



POWER PURCHASE AGREEMENT AND ITS AMBIVALENCE BETWEEN SUSTAINABILITY AND SANCTITY OF THE CONTRACT

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1. INTRODUCTION

The privatization of power sector has certainly led to dissemination of energy¹. This gave consumers a choice between state and private organizations. But there is a necessity to see that various participants do not take advantage of such privatization by abusing their dominant position in the market. These interests are seen to be protected by CERC and SERC, when they determine tariff rates as framed in a PPA.² In this regard, it is pertinent to understand what a Power Purchasing Agreement (hereinafter PPA) is. It basically is a technical and industry agreement, dealing with purchase of power from a GENCO by a DISCOM.³ It is in a way so plitudinous to be mentioning that either generation or

distribution of electricity will need adequate financing.⁴ So, as to evade any possible conflicts and conundrums which are bound to arise, PPAs are entered by the companies.⁵ There are certain prolific advantages which can be conferred by the virtue of PPAs. Like, for example, financial guarantee, which is otherwise so uncertain, can be assured. It can be used for facilitating an agreement through which the terms in the agreement can be understood easily.⁶ But it is not always so laidback in regard to such understanding about the scope of PPA and the legal disputes of sanctity or sustenance of a contract.

2. DISPUTE SETTLEMENT MECHANISMS AND JURISDICTIONAL ISSUES

As to the legal disputes, dispute resolution bodies (as per the Act), SERC and CERC are seen to be adequately acting in dealing with the conflicts between various stakeholders. They are conferred with the quasi-judicial powers so that they can be adjudicating upon the disputes which are related to issues of all the three sectors.⁷ SERC will only be relevant if it is about intra-state matters and CERC has a much extended bombshell application.⁸ Their powers not being solely confined to adjudication, but also extend

¹The Electricity Act 1887 regulated the use of electrical energy so as to protect the public. The later Electricity Act of 1903, the local governments were given the power to grant licenses for generation of electricity. As mentioned in Dr. Sai Ram Bhatt & Rohith R Kamnath, "Power Sector Contracts in India", 2 *Energy Law & Policy in India*, 101 (2016)

²Piyush Joshi, *Law Relating to Infrastructure Projects*, 259 (LexisNexis Butterworths India, New Delhi, 2nd edn., 2003).

³As mentioned in Dr. Sai Ram Bhatt & Rohith R Kamnath, "Power Sector Contracts in India", 2 *Energy Law & Policy in India*, 101 (2016), check for Sample PPAs: <http://ppp.worldbank.org/public-private-partnership/sector/energy/energy-power-agreements/power-purchase-agreements>, currently page not found

⁴Mandakini Ghosh & Parinay Deep Shah, "Power Purchase Agreements & Questionable Sanctity", 2 *Energy Law & Policy in India*, 108 (2016)

⁵*Ibid*

⁶Joshi at pg: 335, n. 2

⁷The Electricity Act, 2003 (Act 36 of 2003) §. 86 (1) (b). As per §. 86 (1) (b): "regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State."

⁸See *M/s Pune Power Development Private Ltd. v. KERC*, Appeal No. 200 of 2009 (APTEL); *Lanco Amarkantak Power Pvt. Ltd. v. MPERC*, Appeal No. 7 of 2009 (APTEL).



to referring PPAs to arbitration. In some situations, PPAs by their own virtue can be a relying on a separate clause of “arbitration”. In the case of *Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*,⁹ wherein the SC has mentioned that, the term ‘arbitrability’ has multiple connotations. It is not rather ambiguous when one mentions arbitrability clause- which almost confers all the powers and incidental clauses too, which the adjudicating authorities have while deciding upon a legal issue.¹⁰ So, it can be clearly understood that both adjudicating and arbitrary heads will have to be deciding about multiple altercations in relation to PPAs.

As to the disputes a wide range of aspects like, type of fuel, generating source, quantity of power to be purchased, charges which have to be paid by the seller till delivery is done, dates which the whole agreement commences, penalties which are to be applied etc. are dealt.¹¹ Basically, it is a list of exhaustive obligations which are to be performed by the DISCOMs and GENCOs or the consumers depending on the contract. As per the contract, it can be usually observed that territorial jurisdiction will be conferred on the basis of where a DISCOM is located.¹² It is usually independent on place of GENCO, as mentioned in *Lanco Kondapalli Power Private Limited v. Haryana Electricity Regulatory Commission*.¹³ It is usually the nexus which is looked at by the court of law, when it is dealing

with the issues of jurisdiction. The dependent factors for establishing such nexus are:

1. Which state is consuming power which is supplied by a GENCO?
2. It there is a direct nexus between the supplying contract and PPA (when the trader is involved)?¹⁴

With fundamentals being set about numerous parties, the current lot of decisions have indeed capriciously pushed the parties into a rather tough place in relation to the matters about tariff rates. To articulate the tariff rates, an application has to be made to electricity regulatory commission.¹⁵ Or else it has to be done through a bidding process in a transparent manner. For the total access to energy to be successful, GENCOs were permitted to enter into PPAs with DISCOMs. So, there is an inherent necessity that the terms of such PPAs have to be overviewed by Commission (to condone abuse of dominant position) and commend them.¹⁶ Sometimes there can be PPA in between DISCOMs and consumers, which also has to be overviewed to be reasonable enough.¹⁷

In spite of a constant overview by the regulatory authorities, it can be seen that, there are conundrums in relation to the tariff clause.¹⁸ For the tariff increase, there are various clauses which come into operation. In spite of various clauses, *force majeure* clause, which talks about supervening impossibility, is indeed an operating

⁹*Booz Allen and Hamilton Inc. v. SBI Home Finance Ltd.*, 2011 (5) SCC 532.

¹⁰*Ibid*

¹¹*Supra*, n. 4

¹²*M/s Pune Power Development Private Ltd. v. KERC*, 2011 Indlaw APTEL 21, *Lanco Amarkantak Power Pvt. Ltd. v. MPERC*, 2011 ELR (APTEL) 1714

¹³*Lanco Kondapalli Power Private Limited v. Haryana Electricity Regulatory Commission & Ors.*, 2010 ELR (APTEL) 36.

¹⁴ *M/s. Lanco Budhil Hydro Power Private Ltd. v. Haryana Electricity Regulatory Commission*, Appeal No.188 of 2011 (APTEL).

¹⁵The Electricity Act 2003, (Act 36 of 2003), § 62. However in accordance with Section 63, the Commission may also determine the tariff by means of transparent bidding process- but it will be over-viewing the “reasonability” of such tariffs.

¹⁶*Ibid*

¹⁷*Supra*, n. 15

¹⁸*Supra*, n. 3, pg: 100



clause. Parties can either ask for avoidance of contract or for increase in tariff rate.¹⁹ But, mere increase in the cost and issues of Balance sheet and Twin- balance sheet syndrome in a business will not be adequate enough to be termed as impossibility.²⁰ The court will be examining if there is an unforeseen event which has happened.²¹ Even if there is an alteration in the legislative policy of another nation, which has a considerable impact on the rate of coal import, will not be serving as supervening impossibility and the parties have to be complying with the agreement.²²

3. CAN PPAS BE REOPENED FOR SUSTENANCE?

With the judgment about necessity of “supervening impossibility” as a factor and it being affirmed multiple times, there is an inevitability to gaze the issue in hand which inclines to bring out impediments for both DISCOMs and GENCOs. Typically, PPAs transcend into a considerable amount of time, which make the terms framed in the original PPA mismatched to the needs of ever-changing prices in the industry.²³ The volatility of the prices proves to be a tight rope of operation for parties. The tariff rate decided to be executed is often a socket of dispute.²⁴ Since GENCOs witnessed an exacerbated state about tariffs, they have approached Regulatory Commissions to reopen

the contract, which is indeed a bone of contention to the DISCOMs. This approach mainly strikes at the heart of contract- *Pacta Sunt Servanda*.²⁵ As to settle the matters, considering the feasibility of GENCOs, APTEL has mentioned that, by the virtue of §§. 61, 62 and 86 of the Act, the agreement can be reopened if it is proven to be indispensable enough.²⁶ It indeed can be understood that, an upward revision of tariff is approved only on the account of uncontrollable factors which lead to financial disturbance for the GENCOs. Like for example, when 214 coal blocks which are allotted initially are cancelled because such coal mining is illegal and arbitrary can act as a point of financial unviability which has been considered by the adjudicating authority and has allowed for reopening of PPA.²⁷ But such instances often change into a hellacious probability which usually don't strike chord with the interests of the consumers and the principles of access to energy. Therefore, SERC and CERC usually walk on a tight rope for granting the leverage for increase in the tariff rate. Caution has to be perceived in the cases of GENCOs which initially bid for a really low rate and thereafter tend to increase the tariff rates on the basis of financial viability.²⁸

3.1. COMPENSATORY TARIFF ISSUES AND THE “ESCALABILITY” CLAUSE

¹⁹ *Ibid*

²⁰ Indian Budget 2017-18, “The Festering Twin Balance Sheet Problem”, available at: <https://www.indiabudget.gov.in/budget2017-2018/es2016-17/echap04.pdf> (last visited on 27-01-2021)

²¹ *Kennedy v. Reece*, 37 Cal. Rptr. 708, 712 (Cal. Dist. Ct. App. 1964)

²² Audited Financial Report of Adani Power Limited-31st March 2015, available at: http://www.adanipower.com/Common/Uploads/FinanceTemplate/2_FFReport_APL_Results.pdf,

(last accessed on 24th June, 2020) currently not available.

²³ *Supra*, n. 4, pg: 109

²⁴ *Ibid*, pg: 112

²⁵ *Ibid*

²⁶ *Ritwik Energy System v. Transmission Corporation of Andhra Pradesh*, Appeal No. 90/2006.

²⁷ *Manohar Lal Sharma v. The Principle Secretary & Ors*, (2014) 9 SCC 516 2014 Indlaw SC 553

²⁸ *Junagadh Power Projects Private Limited vs. Gujarat Electricity Regulatory Commission*, 2013 Indlaw APTEL 1



The story of compensatory tariff tends to get darker shades as the stakes involved in it get higher. As an example, Adani and Tata Power GENCOs were involved in legal disputes for a long time with the DISCOMs.²⁹ PPA was executed after they have given out competitive bids as done by the DISCOMs by the virtue of § 63 of the Act^{30,31}. They have quoted such bid on the basis of “importing coal price” from Indonesia. Thereafter, the government of Indonesia has changed the laws relating to coal.³² Therefore, it culminated into an unforeseeable increase in the rate of coal prices, which was imported by these generating companies. So, these GENCOs have filed petitions before CERC saying that they cannot be supplying power at the rate which is cited originally in the PPA and if done, it would be unviable to them. CERC has agreed to the same and accepted the contention for “compensatory tariffs”.³³ This decision has triggered a substantial uproar amongst various stakeholders. On the other hand, DISCOMs have mentioned that, this kind of dangerous precedent cannot be made conventional as it will be distressing the access to energy and will be counter beneficial to them.³⁴ This decision was appealed to the SC as there is an award for compensatory costs.³⁵ The main issues in SC are:

1. Can frustration of PPA be applied if it becomes financially unviable for the parties?
2. Will change of a foreign law be considered as change in Indian law?

After a series of arguments, which explore the prospect that the bid submitted, was not absolutely premised on the basis that coal will have to be exclusively be procured from Indonesia itself and quoting “non-escalable costs” being done on a voluntary basis by the parties, change in laws of Indonesia cannot be operating as change in law of the nation. As the premise being set, there can be no compensatory tariff which can be awarded to the GENCOs.³⁶ It is also mentioned that, § 56³⁷ doesn’t ineludibly get attracted because “non-escalable cost” was quoted so as to make it more competitive to be paralleled with the other bidders. So, there is no *force majeure* to be made as point of contention in the current case.³⁸ It is also seen to be given that, the frustration of the subject matter (which is coal price- which is often malleable) if taken as a significant proponent, then it will be materializing into an enough ground for modification or rectification of PPA, which further will be persecuting the whole objective of energy access to the society.³⁹

²⁹*Supra*, n. 4, pg: 114

³⁰The Electricity Act, 2003, (Act 36 of 2003), §. 63

³¹*Ibid*

³²The dispute is in respect of thermal power generating plants set-up by Adani Power and Tata Power in Gujarat with a capacity of 4620 MW and 4000 MW respectively and entered into long-term PPAs with Haryana, Gujarat, Punjab, Maharashtra & Rajasthan discoms (Power distribution companies).

³³*Adani Power Limited v. Uttar Haryana Bijli Vidyut Nigam Ltd.*, 2019 Indlaw CERC 167

³⁴*Supra*, n. 29

³⁵*Energy Watchdog v. Central Electricity Regulatory Commission*, (2017) 14 SCC 80

³⁶Civil Appeal No. 5612 of 2012; Also see for discussion, *Transmission Corporation of Andhra*

Pradesh Ltd & Anr v. Sai Renewable Power Private Ltd & Anr (2011) 11 SCC 34.

³⁷Indian Contract Act, 1872, (Act 9 of 1872), §. 56

³⁸Clause 12.4 of the PPA states that if the price of raw material rises, then also the agreement does not get frustrated on the ground that it has become commercially onerous to one party.

³⁹The decision of the Supreme Court would adversely impact new power plants as the investors will not be ready to lend huge sums to the generators seeing the weak policies on which the PPAs run. The price of exported coal in India was fixed from the last 40 years and so the companies entered into a bid and quoted a non-escalable tariff. It was not expected that the laws will change and the price will increase. Further, the PPAs are entered into for a long period of approximately 20 to 25 years and so it is not possible



The above arguments can be augmented to be on a fairer shade when one thinks have implications on “energy access to poor”. With the contrasting side considerations ranging from Fuel Supply Agreement (FSA) to importation of coal from Indonesia will function as the central basis for the PPA.⁴⁰ The adjudicating authority has already made itself clear that, if there is a case of § 56 of the Indian Contract Act, then PPA can be allowed to be reconsidered and amended to suit their needs.⁴¹ But same is not the circumstance with concerns of commercial unfeasibility as it is not supervening in its own nature.

It can be objectively observed that, GENCOs have quoted under “non-escalable head” and asked for only 55% of the energy charges, so as to obtain bid in their favour.⁴² Therefore, any benefits of “escalation index” will not be available for the GENCOs. In relevance to aggressive bidding and business tactics adapted to secure the bid, the prices were low-slung, which has facilitated them to be efficacious till the bidding and gain the PPA. However, in the due course, this low bidding has utterly and completely backfired, which transforms into one of the main reasons for quoting the tariff to be an unviable one.⁴³ It has also to be well-thought-out

that such change in the agreement will be manifesting into injustice to the other bidders who have partaken in the bidding process. At the end of the day, if such compensatory tariff is recurrently and habitually allowed, it will be the consumers of that area who will have to undertake such humongous burden, which proves to be hellacious in futuristic view in a macro level.⁴⁴ The victory of gaining PPA can seem to be momentous initially, but at a later stage the implications appear to garner grey shades. It can also be analysed that, the whole narration of compensatory tariffs seem futile to energy access as a concept. With DISCOMs on the verge of loss making state (AT & C losses etc), numerous alterations in PPAs have to be weighed rather cautiously by the decision making authorities.⁴⁵ On the flip side, the antagonistic and aggressive bidding by the GENCOs to gain the contract at preliminary junctures and later disputing for re-determination of tariff has to be borne in mind while passing a decision.⁴⁶

The concepts of energy access and other beneficial schemes which aim to strengthen the prospects of Indian infrastructure to the next level turn rather futile and seem to fade into

for the companies to foresee the future economy of the concerned sector. This has lead to CUTS Debate.

⁴⁰The Electricity Act, 2003, (Act 36 of 2003), §. 63 starts with the words, “Notwithstanding anything contained in Section 62” and not with “Notwithstanding anything contained in the Act,” so all the sections of the Electricity Act need to be construed harmoniously. So, Sections 61 and 79 of the Electricity Act would not cease to apply, when Section 63 applies. Section 79 of the Electricity Act has residuary powers of the Central Commission and therefore it also has the authority to fix or modify tariffs under Section 63 of the Electricity Act.

⁴¹The PPA reflected that the fuel supply agreement and imported coal constitutes the main element of the agreement and in case there is an unavailability of coal then the PPA has to be revised. It was further submitted that in case of a change in law or force

majeure then the non-escalable tariff would also be revised so as to be in conformity with the provisions.

⁴²*Supra*, n. 33

⁴³The dispute is in respect of thermal power generating plants set-up by Adani Power and Tata Power in Gujarat with a capacity of 4620 MW and 4000 MW respectively and entered into long-term PPAs with Haryana, Gujarat, Punjab, Maharashtra & Rajasthan discoms (Power distribution companies). The comment was made as a general one- in relation to various other cases.

⁴⁴*Supra*, n. 4, pg: 116

⁴⁵See the models of Delhi and Orissa privatization, which clearly mention that Discoms are highly loss making and to recover from the losses was the main aim.

⁴⁶*Ibid*



darkness. While on the contrasting prospect, without GENCOs playing their part of generation of electricity, there isn't any other way around which continues the whole chain of electricity.⁴⁷ With issues of financial sustainability and viability pushing GENCOs into mediocrity, whilst a whole lot of NPAs burdening them already, tariff rates tend to play a humongous impact on GENCOs.⁴⁸ It will be saving UMPP (Ultra Mega Power Projects) from being regarded as stranded assets. But a clear caution has to be weighed, rather striven to be achieved, as the angst and fear cannot be overweighed onto any of the stakeholders. This observation was considered by Supreme Court in the case of *Bangalore Electricity Supply Corporation v. Konark Power Projects Limited & Anr.*,⁴⁹ in which it has been mentioned that, there has to be definite and clear-cut embedded precinct which has to be kept in mind while an application is made for reopening a PPA. There is no room for SERC or CERC to be varying the agreed tariffs until there is an appropriate reason.⁵⁰ With the power sector still being in the nascent stage and privatization rolling in its full bloom, with the main aim to afford access to energy to all the segments of the society, the adjudicating authorities really struggle with the problem of regulatory powers of inherent capacity to be re-determining the tariff rates in a long term contract like a PPA.⁵¹

Certain situations which prove to be rather compelling of gaining perspective and

inclination on to the other side cannot be entirely abandoned. There is indeed certain amount of judicial consensus that, a PPA which has been already executed or partly executed can be reopened because of its long term nature. There can be certain happenings, which the parties could never have anticipated under reasonable circumstances.⁵² This situation can be understood when the maxim of *Pacta Sunt Servanda* is looked at. The maxim has an exception of *Clausula rebus sic stantibus*,⁵³ which means, if there is a fundamental change in the circumstances, then such clauses in the contract can be made inapplicable. In terms of understanding the basis of judicial interpretation, references can also be placed on the "doctrine of hardship" as mentioned in UNIDROIT – The principles of International Commercial Contracts, 2004.⁵⁴ The focussed approach is to be establishing equilibrium in a case, which might prove to be disadvantageous in the current instance.⁵⁵ With volatile markets in issue, long term PPAs and their problems are pertinent to arise. But for interpreting a PPA some sort of balanced approach is an essential criterion, if not, abysmal repercussions are bound to arise.

3.2. ARE THESE TARIFF POLICIES BINDING AT ALL?

As the matter of law, tariff policies typically are not binding in the same manner as of a normal statute. It has been noted by the Appellate

⁴⁷Bushra Quasmi, "Access To Clean Energy : Challenges Faced By India.", 2 *Energy Law & Policy in India*, 27 (2016)

⁴⁸*Supra*, n. 20. Also reference can be placed on *Swiss Ribbons Private Limited v. Union of India*, 2019 SCC OnLine SC 73

⁴⁹*Bangalore Electricity Supply Corporation v. Konark Power Projects Limited & Anr*, 2015 SCC On line SC 1089; Also see for discussion, *Transmission corporation of Andhra Pradesh Ltd & Anr v. Sai*

Renewable Power Private Ltd & Anr (2011) 11 SCC 34.

⁵⁰*Ibid*

⁵¹*Supra*, n. 44

⁵²*GUVNL v. Green Infra Corporate Wind Power Ltd & Ors*, Appeal No.198/2014 and batch of Appeals

⁵³Latin for "things thus standing".

⁵⁴Article 6.2.2 of UNIDROIT Principles of International Commercial Contracts 2004.

⁵⁵Article 6.2.3 of UNIDROIT Principles of International Commercial Contracts 2004.



Tribunal in the case of *RVK Energy Ltd v. Andhra Pradesh Commission*,⁵⁶ where in it has been said that, SERCs cannot be deviating and diverting from the tariff policy which has been proposed. But, there are divergent decisions regarding the applicability and finality of the tariff policies. In the case of *Maruti Suzuki India Ltd v. Haryana Commission*⁵⁷, it has been held that, SERCs should essentially be guided by the tariff policies. But these tariff policies cannot be intrusive and turn out to be meddlesome with the scope of statutory functions of SERCs. It has also been cited that, there are positive deliberations and reflections which are to be borne in mind while these policies are proposed. They are:

1. One singular tariff rate cannot be applied for different categories of customers for a lucrative working of the DISCOMs. Also the DISCOMs in different plateaus seem to be in an advantageous proposition to start off with. Multifarious factors like load and energy consumed in such region act as substantial causes for such determination.

2. Different rates and slabs must be placed into operation for perceptible enhancement. The prominence of progressive slab cannot be undermined for a conducive culmination of progressed electricity sector.

3. With gigantic socio-economic divide of the population, the concerns of subsidies are bound to crop up. The customers in the lower brackets of economic slab will have to be subsidized with that of the customers in higher range as a measure of cross subsidy.

4. Prominence of bulk customers is to be valued and appreciated by the virtue of appropriate rebates.⁵⁸

4. CONCLUSION- "SUSTAINABILITY OF A BUSINESS OR SANCTITY OF CONTRACT?"

As the name suggests, there is duality on perspectives on the preferences, as the end goals seemingly merge into development of the national infrastructure.⁵⁹ It is not rather allusive to be mentioning that, for sustainability of business for GENCOs, raw materials (coal in this case) play humongous role. Any sort of prospective annihilations for imports or mining of coals will prove to be handicapping the whole industry.⁶⁰ After the power sector taking steps to be privatized, security of such private players who invest in GENCOs also play a major futuristic role in considerations for interpreting the clauses of PPAs.⁶¹ In this regard, it has also to be seen that private companies which work for profit, revenue and income motives should not be equated with that of the public sector companies in the arena.⁶²

On the flip side, considering the scope of sanctity of a contract, the knowledge about clauses is mutual in nature. The voluntary nature in price fixation in clauses of price-variation or price-escalation can turn out to be imprudent firstly and thereafter, geriatrically trigger into ignominious past if not careful.⁶³ If PPA and its amendments are allowed frequently, then undue advantage is conferred to them. Bearing in mind that the malleable stakeholders are the end

⁵⁶*RVK Energy Limited v. Andhra Pradesh Commission*, (2008) 17 SCC 769 2008 Indlaw SC 953

⁵⁷*Maruti Suzuki India Ltd v. Haryana Commission*, Appeal No. 200 of 2011

⁵⁸Energy Sector, India's Power Sector: Legal & Regulatory Developments, Economic Laws Practice, 2018, pg: 23

⁵⁹*Supra*, n. 3, pg: 107

⁶⁰*Supra*, n. 58, pg: 30

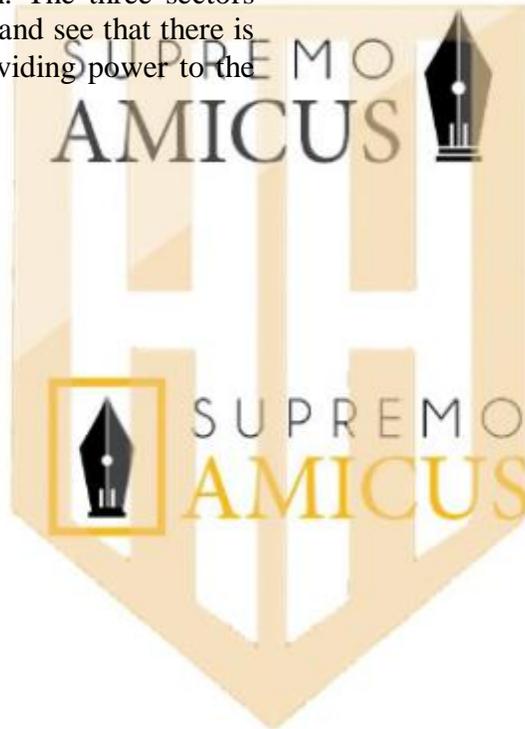
⁶¹*Supra*, n. 59

⁶²*Supra*, n. 60

⁶³CUTS Debate as mentioned above, arguing on the flip side of why the contract has to be given preference



consumers and it is for the ultimate benefit of them, such appeals of compensatory tariff need to materialize. With UDAY Scheme as the basis for framing of initial tariff rates, the motive of such scheme and backdrop of holistic development of Indian infrastructure is to be borne in mind.⁶⁴ With accessibility of electricity as the core ideology, efficiency of various sectors, environmental issues and ease of doing business also are deemed as major parameters for the scheme.⁶⁵ The accessibility of 24x7 power being an operative ideology the regulating commissions need to devise a supply trajectory so as to achieve this vision. The three sectors must abide to this principle and see that there is maximum efficiency in providing power to the consumers.⁶⁶



⁶⁴Ministry of Power, Government of India, “UDAY (Ujwal Discom Assurance Yojana) Scheme for Operational and Financial Turnaround for Power Distribution Companies (DISCOMs)”, (Nov. 2015), https://powermin.nic.in/pdf/Uday_Ujjawal_Scheme_f

or_Operational_and_financial_Turnaround_of_power_distribution_companies.pdf (last visited on 27-01-2021)

⁶⁵*Supra*, n. 47

⁶⁶*Ibid*