

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI**

(APPELLATE JURISDICTION)

Appeal No. 235 of 2015

and

Appeal No. 191 of 2015

Dated: 2nd February, 2018

**Present: HON'BLE MR. JUSTICE N.K. PATIL, JUDICIAL MEMBER
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER**

Appeal No. 235 of 2015

IN THE MATTER OF:

M/s DB Power Ltd.
Office Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal-462016

... APPELLANT

VERSUS

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan, Sahakar Marg
Near State Motor Garage,
Jaipur, Rajasthan – 302001
2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
Through its Secretary, Vidyut Bhawan,
Janpath,
Jaipur – 302 005, Rajasthan
3. Jaipur Vidyut Vitaran Nigam Ltd.
Jaipur-Kishangarh Expy, Heerapura,
Ward No. 18,
Jaipur – 302026, Rajasthan

4. Ajmer Vidyut Vitaran Nigam Ltd.
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer – 305004, Rajasthan
5. Jodhpur Vidyut Vitaran Nigam Ltd.
New Power House, Industrial Area
Jodhpur – 342003, Rajasthan
6. Secretary, Government of India
Ministry of Power, Shram Shakti Bhawan
New Delhi - 110001
7. Secretary, Government of Rajasthan
Department of Energy, Secretariat,
Jaipur, Rajasthan - 302005
8. PTC India Ltd.
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi – 110066
9. Maruti Clean Coal & Power Ltd.
Ward No. 42, Building No. 14,
Civil Lines, Near Income Tax Colony,
Raipur,
Chhattisgarh – 492001
10. Lanco Power Ltd.
397, Udyog Vihar,
Phase III,
Gurgaon – 122016
11. SKS Power Generation (Chhattisgarh) Ltd.
501-B, Elegant Business Park,
J.B. Nagar, Andheri East,
Mumbai – 400 059
12. Athena Chhattisgarh Power Ltd.
1024/1/RT, G-1, B-Block
Roxana Towers,
Green Lands,
Begumpet,
Hyderabad-500015

...RESPONDENTS

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Mr. Nishant Kumar
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Ms. Rhea Luthra
Ms. Neha Garg
Ms. Parichita Chowdhury
Mr. Ashwin Ramanathan for R-3 to R-5 & R-7

Mr. Ravi Kishore
Mr. Niraj Singh
Mr. Prashant Mathur
Ms. Prerna Singh for R-8

Mr. Sumit Goel
Mr. Tanuj Aggarwal
Ms. Pratyusha Priyadarshni
Mr. Akash Jindal
Mr. Sameer Parekh for R-9

Mr. Deepak Khurana
Mr. Hemant Singh
Mr. Apurv for R-10

Mr. Atul Shanker Mathur
Ms. Priya Singh
Mr. Prabal Mehrotra for R-11

Mr. Shashi Kumar Jain XE(RA)

In the Matter of:

Lanco Power Ltd.
397, Udyog Vihar
Phase III, Gurgaon 122016

...Appellant

Versus

1. Rajasthan Electricity Regulatory Commission
Vidyut Viniyamak Bhawan, Sahakar Marg
Near State Motor Garage,
Jaipur, Rajasthan – 302001
2. Rajasthan Rajya Vidyut Prasaran Nigam Ltd.
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3. Jaipur Vidyut Vitaran Nigam Ltd.
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Makarwali Road,
Ajmer – 305004, Rajasthan
5. Jodhpur Vidyut Vitaran Nigam Ltd.
New Power Hours, Industrial Area
Jodhpur – 342003, Rajasthan
6. Secretary, Government of India
Ministry of Power, Shram Shakti Bhawan
New Delhi - 110001
7. Secretary, Government of Rajasthan
Department of Energy, Secretariat,
Jaipur, Rajasthan - 302001
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2nd Floor, NBCC Tower,
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New Delhi – 110066

9. Maruti Clean Coal & Power Ltd.
Ward No. 42, Building No. 14,
Civil Lines, Near Income Tax Colony,
Raipur,
Chhattisgarh – 492001
10. DB Power Ltd..
Dwarka Sadan-6, Press Complex, Zone-1
M.P. Nagar, Bhopal-462011
11. SKS Power Generation (Chhattisgarh) Ltd.
501-B, Elegant Business Park,
J.B. Nagar, Andheri East,
Mumbai – 400 059
12. Athena Chhattisgarh Power Ltd.
1024/1/RT, G-1, B-Block
Roxana Towers,
Green Lands,
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Mr. Abhinav Gupta
Mr. O.P. Bansal
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Mr. Ankita Gupta for R-2
- Mr. Ganesan Umapathy
Ms. Swapna Seshadri
Mr. Ashwin Ramanathan
Ms. Rhea Luthra
Ms. Neha Garg

Ms. Parichita Chowdhury for R-3 to R-5 & R-7

Mr. Ravi Kishore

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Ms. Prerna Singh

Mr. Prashant Mathur for R-8

Mr. Sumit Goel

Mr. Tanuj Aggarwal

Ms. Pratyusha Priyadarshni

Mr. Akash Jindal

Mr. Sameer Parekh for R-9

Mr. Hemant Singh

Mr. Nishant Kumar for R-10

Mr. Atul Shankar Mathur

Ms. Priya Singh for R-11

J U D G M E N T

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

Appeal No. 235 of 2015

1. The present appeal has been preferred by M/s DB Power Ltd. (hereinafter referred to as the '**the Appellant**') against the impugned order dated 22.07.2015 passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as '**the Commission**'/'**the Respondent Commission**') in Petition No. 431 of 2013 to the extent it decides issue (iii), as framed by the Respondent Commission in the impugned order dated 22.07.2015, in the affirmative; that is to say to the extent it reduces the quantum of power for adoption of tariff to 500 MW from 1000 MW.
2. The Appellant, D.B. Power Ltd. is a Limited Company incorporated under the provisions of the Companies Act, 1956 and operating as a generating company, having its registered office at Office Block 1A, 5th Floor, Corporate Block, DB

City Park, DB City, Arera Hills, Opposite MP Nagar, Zone-I, Bhopal-462016. The Appellant has set up a 1200 MW (2 x 600 MW) thermal power plant at village Badadarha, in District Janjgir Champa, Chhattisgarh. The present appeal is very limited to the extent that the Appellant is aggrieved by the part of the impugned order dated 22.07.2015 wherein the Respondent Commission in a proceeding under Section 63 of the Electricity Act, 2003 for adoption of tariff has reduced the total quantum of power to 500 MW from 1000 MW resulting in disallowance of 160 MW out of the total 410 MW of power contracted by the Appellant under the Power Purchase Agreement dated 01.11.2013.

Appeal No. 191 of 2015

3. The present appeal has been preferred by M/s Lanco Power Ltd. (hereinafter referred to as the '**the Appellant**') against the impugned order dated 22.07.2015 passed by the Rajasthan Electricity Regulatory Commission (hereinafter referred to as '**the Commission**'/ '**the Respondent Commission**'), whereby the Commission, in a proceeding under Section 63 of the Electricity Act, 2003 (**the Act**), has held that the Procurer (**Respondent No. 2**) is entitled to restrict total procurement of power to 500 MW as against 1000 MW for which bidding had already been conducted culminating into Power Purchase Agreements and filing of tariff adoption Petition under Section 63 of the Electricity Act, 2003.
4. The Appellant, Lanco Power Ltd., is a company incorporated under the Companies Act, 1956, having its office at 397, Udyog Vihar, Phase III, Gurgaon 122 016. The Appellant is filing the present Appeal challenging the legality and validity of the Order dated 22.07.2015 ("**the impugned order**") passed by the Commission in Petition No. RERC 431/13 to the extent it decides issue no. (iii) as framed in Para 25 of the impugned order, in the affirmative.
5. The **Respondent No. 1**, is the Rajasthan Electricity Regulatory Commission, which has passed the impugned Order dated 22.07.2015, in Petition bearing no. RERC-431/13 filed by Respondent No. 2, under Section 63 of the Act.

6. The **Respondent No. 2**, (Rajasthan Rajya Vidyut Prasaran Nigam Ltd.) is the procurer of power in the State of Rajasthan and undertakes bidding process to procure power for the Distribution Companies in the State of Rajasthan.
7. The **Respondent No. 3-5**, are Distribution Companies (Discoms) of State of Rajasthan.
8. The **Respondent Nos. 6 and 7**, are Ministry of Power, Government of India and Department of Energy, Government of Rajasthan, respectively.
9. The **Respondent No. 8-12**, are the companies incorporated under the Companies Act, 1956 and were parties to the proceedings before the Commission (RERC).

10. **FACTS OF THE CASE:**

- a) The Respondent No. 2 has been authorized by the Respondent Nos. 3 to 5 to undertake, on their behalf, the process of selection of sellers for procurement of 1000 \pm 10% base load power under ‘Case 1’ of the “Guidelines for Determination of Tariff by Bidding Process for procurement of Power by Distribution Licensees” dated 19.01.2005 and amended on 30.03.2006, 18.08.2006, 27.09.2007, 27.03.2009 and 21.07.2010 (hereinafter collectively referred to as ‘**the Guidelines**’) issued by the Ministry of Power, Govt. of India, for the purpose of the Respondent Nos. 3 to 5 to meet their load/ power requirements.
- b) The Respondent No. 2 filed a petition on 21.08.2009 being Petition No. 205 of 2009 for *inter alia* procurement of 1000 MW of power under Case-1 for round the year on long term basis for a period of 25 years. The Respondent No. 1 Commission vide its order dated 23.03.2011 allowed the procurement of 1000 MW \pm 10 % under Case-2 or Case-1 as the case maybe. The relevant portion of the order dated 23.03.2011 is set-out hereunder for ready reference:

“93. In the light of the above, the permission, as under for procuring in total 1250(\pm 10%)MW(installed capacity through bidding - which includes the interim permission

granted earlier in respect of Giral unit 3&4 lignite based power is being accorded:

(a) 1000MW ($\pm 10\%$) - under case-2 or case-1 as required.

(b) 250 MW ($\pm 10\%$) - under case -2 from Giral unit 3&4 lignite based power plant (Barmer).

We also withdraw the approval to procure 1000 MW for peak months (Oct. to March) accorded as per order dated 03.11.08.”

- c) Subsequently, in furtherance of the aforementioned order dated 23.03.2011, the Respondent No. 2 issued the Request for Proposal (RFP) inviting sellers to participate in a competitive bidding for procurement of power under Case I route in terms of the aforesaid guidelines. The Appellant participated in the said bidding process through PTC India Ltd. (herein “**Respondent No. 8**”), an inter-State trading licensee. For the purposes of the same, the Appellant and PTC India Ltd. entered into a Power Purchase Agreement dated 12.09.2012. Originally the last date of submission of bids was 13.08.2012. However, by virtue of subsequent revisions, the final date of submission of bids was on 18.09.2012, on which date the Appellant submitted its bid. The PTC India Ltd. had bid for a total of 1041 MW of power of which 311 MW was offered on behalf of the Appellant.
- d) Subsequently, the Respondent No. 2, based on the preliminary evaluation of the non-financial bids by the Bids Evaluation Committee (hereinafter ‘**BEC**’), sought clarifications from all seven participating bidders, including the Appellant. Upon the submission of clarifications, BEC declared seven bidders qualified for opening of the financial bids. Subsequently, since RKM Powergen and M/s NSL Nagapatnam Power & Infratech Limited chose not to extend the bid validity and hence their bids were not opened and the financial bids of only the following 5 bidders

were opened on 04.04.2013:

S. No.	BIDDER NAME	CAPACITY OFFERED (MW)
1.	Jindal Power Limited	300
2.	KSK Mahanadi Power Company Limited	475
3.	SKS Power Generation (Chhattisgarh) Limited	100
4.	Lanco Power Limited	300
	a. Lanco Amarkantak Power Ltd.	100
	b. Lanco Babandh Power Ltd.	100
	c. Lanco Didarbh Thermal Power Ltd.	100
5.	PTC India Ltd. (which had bid from following developers)	1041
	a. Adhunik Power and Natural Resources Limited	135
	b. Maruti Clean Coal and Power Limited	195
	c. MB Power (Madhya Pradesh) Limited	200
	d. DB Power Limited	311
	e. Athena Chhattisgarh Power Limited	200

Out of the above remaining bids, Maruti Clean Coal & Power Ltd. (herein **“Respondent No. 9”**) was the L1 bidder with a quoted levelled tariff of Rs. 4.517 per Unit for the offered quantum of 195 MW. The Appellant was the L2 bidder with a quoted levelled tariff of Rs. 4.811 per Unit for the offered quantum of 311 MW. Lanco Power Ltd. (herein **“Respondent No. 10”**) was the L3 bidder with a quoted levelled tariff of Rs. 4.943 per Unit for the offered quantum of 100 MW. The L1, L2 and L3 bidders were subsequently declared as the Successful Bidders by the Respondent No. 2.

- e) The Board of Directors of the Respondent No. 2 on the issue of whether negotiations should be done with the qualified bidders and what process of negotiations ought to be followed keeping in mind the Guidelines, the capacity offered by the bidders, consumer interest, etc., referred the said issue to the BEC. The BEC after due deliberations on the said issue during

its meeting held on 04.06.2013 decided that negotiations may take place citing the following reasons for the same:

- “1) Capacity offered by various bidders varies from 100 MW to 475 MW and more than one bidder needs to be selected to fulfil the Requisitioned Capacity, i.e. 1000 MW.
 - 2) It is in the interest of consumers of the State if tariff is lowered through negotiations. Looking to the long term impact and quantum of the amounts involved, negotiation with the bidders may result in lowering tariff payable by the Discoms which may benefit the Discoms and the end consumers.
 - 3) The negotiations may be done in a transparent manner, following the ethics of the bidding procedure, resulting in lowering of quoted tariff and would not hamper the financial prudence.
 - 4) BEC noted that despite provision of clause 3.5.9 in the Standard RFP negotiations were done in many cases as mentioned in Tariff Adoption order of respective State Electricity Regulatory Commission such as GERC, MERC, RERC, etc.”
- f) Pursuant to the meeting with the Board of Directors of Respondent No. 2 held on 20.09.2013, 24.09.2013 and 25.09.2013, the Appellant inter-alia agreed to provide additional quantum of power to the tune of 99 MW, to the Respondent No. 2 at the same levelled tariff. However, the Appellant clearly expressed its inability to reduce the tariff. The Board of Directors of the Respondent No. 2, after considering the above factual position and keeping in mind the benefit being accorded to the Respondent Nos. 3 to 5, directed that an LOI for 410 MW (original 311 MW plus additional 99 MW) be issued for procuring the power from the Appellant at the tariff quoted in the Appellant's financial bid.
- g) In furtherance of the above, PTC India Ltd. received an LoI dated 27.09.2013 from the Respondent No. 2. Accordingly PTC India Ltd. issued a back to back LoI dated 30.09.2013 to the Appellant, for supply of 410

MW of power at a levelled tariff of Rs. 4.811 per KWH. Based on the said LoI, PTC India Ltd. entered into a PPA dated 01.11.2013 with the Respondent Nos. 3 to 5 for supply of 410 MW of power. Simultaneously, PTC India Ltd. entered into a PPA dated 01.11.2013 with Appellant on a back to back basis for supply of power to the Respondent Nos. 3 to 5 and for the fulfilment of PTC India Ltd's obligations under the PPA entered into between PTC India Ltd. and the Respondent Nos. 3 to 5.

- h) Subsequently and in compliance with the provisions of Clause 6.2 of the Guidelines, the BEC issued the following certificates:
- a) Certification on conformity of the bid process evaluation according to the provisions of the RFP document by the Bid Evaluation Committee;
 - b) Certification on conformity of the bid process to the Guidelines by the Procurers;
- i) After issuance of the LoI and signing of the PPAs, the Respondent No. 2 filed a petition before the Respondent No. 1 Commission under Clause 5.16 of the Guidelines and under Section 63 of the Electricity Act, 2003 for *inter alia* adoption of tariff for purchase of long term base load power of 1000 MW \pm 10% as quoted by the Successful Bidders (including the Appellant) under the Case I bidding process being Petition No. 431 of 2013. The impugned order ensues out of the said petition.
- j) During the pendency of Petition No. 431 of 2013, some of the unsuccessful bidders, namely M/s SKS Power Generation (Chhattisgarh) Ltd. and M/s Athena Chhattisgarh Power Ltd moved to the Hon'ble High Court of Rajasthan vide Civil Writ Petition Nos. 18699 of 2013 and 19437 of 2013 respectively, challenging the bidding process and the selection of the successful bidders. The Writ Petitions were rejected by the Hon'ble Single Judge of the High Court of Rajasthan vide order dated 07.02.2014 on the ground that the petitioners had an alternate remedy before the Respondent Commission. This order was subsequently challenged by the unsuccessful bidders before a Division Bench of the Hon'ble High Court of Rajasthan

vide DB Special Appeal (Writ) Nos. 604 of 2014 and 538 of 2014. The Hon'ble Division Bench vide its order dated 18.04.2014 rejected the appeals and confirmed the judgment of the learned single judge.

Against the said final order and judgment of the Hon'ble Division Bench of the High Court of Rajasthan, the unsuccessful bidders preferred an appeal before the Hon'ble Supreme Court vide SLP (C) Nos. 12325 of 2014 and 12548 of 2014, which appeal is pending adjudication. *The Hon'ble Supreme Court vide orders dated 09.05.2014 and 08.10.2014 has refused to grant stay of the orders of the Hon'ble High Court of Rajasthan and has further clarified that the pendency of the list before the Hon'ble Supreme Court shall not come in the way of the Respondent Commission proceeding with the Petition No. 431 of 2013.*

k) The Energy Assessment Committee (hereinafter referred to as “EAC”), as constituted by the Government of Rajasthan pursuant to Regulation 3(3) of the RERC (Power Purchase & procurement process of distribution licensee) Regulations, 2004 in its 4th meeting held on 29.01.2014 decided/recommended that **“there is no requirement for long term procurement of 1000 MW ± 10% power under Case-1 for which PPAs have been executed and tariff adoption petition has been filed before RERC”**. Subsequently, the EAC in its 5th meeting held on 21.05.2014 decided/recommended that as against the quantum of 1000 MW power, for which PPAs had been executed and tariff adoption petition has been filed, a demand of 600 MW ought to be considered, on account of availability of power from various sources and to meet future contingencies. Accordingly, based on the aforementioned decision/ recommendation of the EAC, the Government of Rajasthan vide its letter dated 25.07.2014 issued to the Respondent No. 2, approved the purchase of a quantum of 500 MW power on long term basis as against the quantum of 1000 MW for which PPAs had already been executed.

l) At around the same time, the Respondent No. 2 and an NGO by the name

of Chandelao Vikas Sansthan filed applications for impleadment. The Respondent No. 2 sought the impleadment of the Generating companies who were the successful bidders and the Generating companies who had moved the Hon'ble High Court of Rajasthan vide SB Civil Writ Petition No. 18699/2013 and 19437/2013. The Respondent No. 1 Commission vide its order dated 08.05.2014 disposed of the aforementioned applications by holding as under:

“... ..

... ..

9. In our considered view, Chandelao Vikas Sansthan, Chandelao cannot be allowed to be impleaded as a party to the adoption proceedings, as the application for adoption filed u/s 63 of the Act is still pending and has essentially to be examined by this Commission in the light of conditions specified under Section 63 of the Act and the observations made by the Hon'ble High Court in its order and the contentions raised before the Hon'ble High Court on the validity of LOIs. Further we notice from the records that the applicant has also filed a separate petition No.RERC-436/2014 questioning the legality of award of very LOI on the very grounds raised during the course of hearing in support of the application and the said petition is yet to be heard and decided by this Commission. In our view the applicant can urge the grounds, raised in support of the application, during the hearing of its petition and Commission will certainly examine them. Therefore, we hold that the applicant Chandelao Vikas Sansthan, Chandelao is not necessary to be impleaded as a party to the petition filed by RRVPNL.

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... ..

12. Consequently, we disallow the application of Chandelao Vikas Sansthan, Chandelao.

13. As regards the application filed by the petitioner RRVPNL to implead the parties involved in the case before the Rajasthan High Court, Jaipur bench in the SB Civil Writ Petition 18699/2013, SB Civil Writ Petition No.19437/2013 filed by M/s SKS Power Generation Ltd. and M/s Athena Chhattisgarh Power Ltd. respectively,, we are of the considered opinion that they are necessary parties to the petition, as their rights are directly involved in the petition. Even the Hon'ble High Court

of Rajasthan has held that while considering adoption of tariff u/s.63, this Commission have to hear the petitioners therein and all the affected parties.

14. Accordingly, we allow the application filed by the petitioner RRVPNL for impleading (1) M/s.PTC India Ltd. (2) Maruti Clean Coal & Power Ltd., (3) DB Power Ltd. (4) Lanco Power Ltd. (5) SKS Power Generation (Chhattisgarh) Ltd. (6) Athena Chhattisgarh Power Ltd. Consequently, we direct the petitioner to amend the petition and also the cause title and include proposed parties in the petition as parties and file amended petition within one week from to-day and also serve copies of its petition to all the impleaded parties, to enable them to file their submissions, if any, before the next date of hearing. Post this petition along with petition No.436/14 on 22nd May, 2014 for final hearing.”

- m) On the basis of the decision/ recommendation of the EAC, and the direction issued by the Government of Rajasthan, the Respondent No. 2 filed an application dated 24.11.2014 under Regulation 7 of the RERC (Power Purchase & Procurement Process of Distribution Licensee) Regulations 2004 in Petition No. 431 of 2013 to bring on record the EAC decision/ recommendation and the Government of Rajasthan approval, *inter alia* praying for adoption of tariff and approval of the reduced quantum of 500 MW of power to be purchased as against the original 1000 MW of power for which PPAs had already been executed with the successful bidders.
- n) The Appellant herein along with other successful bidders filed its objections with respect to the maintainability of the application filed by the Respondent No. 2 opposing the unilateral change in the quantum of power being purchased by the Respondent No. 2.
- o) Subsequently, the Respondent No. 1 Commission vide its order dated 09.01.2015 held that the application dated 24.11.2014 filed by the Respondent No. 2 was maintainable and had to be considered along with the Petition No. 431 of 2013. The operative part of the order is set-out hereunder for the ready reference:

“... ..

... ..

17. If the application filed by the petitioner is considered in the light of Section 86(1)(b) of Electricity Act, 2003, and RERC (Power Purchase & Procurement Process of Distribution Licensee) Regulations, 2004 and the assessment of Energy Assessment committee on the requirement of electricity, it cannot be said that the application has to be rejected as not maintainable without going into merits of the same. This Commission also cannot out-rightly ignore the assessment made by EAC without further examining the same as ultimately it is the requirement of the consumers which has to prevail as it will also have a tariff implication.

18. Therefore, we are of the view that the application filed by the petitioner cannot be rejected as not maintainable. Consequently we hold that the application needs to be considered along with the pending petition. At that time the legal issues raised as against the application filed regarding scope of Section 63 proceedings, Commission's power under Section 86 of Electricity Act etc. can also be examined as these require detailed examination with reference to the various Judgments of Hon'ble Supreme Court, High Court and APTEL cited by the respondents and other. The respondents, therefore, are permitted to file their replies on the merits of the application in addition to the filings already made by them in the matter. We also direct the petitioner to file additional material in support of the application now filed and how they desire to obtain 500 MW from which bidder/bidders, after serving a copy of the same on all the respondents. ”

- p) The Respondent Commission after the completion of pleadings and arguments in Petition No. 431 of 2013 vide its impugned order dated 22.07.2015 held as under:

“70 We do not see any conflict between them. Section 63 only deals with the tariff whereas Section 86 deals with general powers of the Commission. Once there is no conflict between them, there is no question of Section 63 prevailing over Section 86. The judgments relied upon by the Counsels in support of the principle that special provision would prevail over general provision has no application in this case as the two provisions operate in different spheres.

71. *Under Section 86(1)(b), this Commission has a function to regulate electricity purchased through agreements. In other words quantum of power to be procured has to be regulated which in turn has to depend on the requirement. Further, as pointed out earlier the petitioner can increase or decrease the quantum by more than 10% with the approval of the Commission. The consumer cannot be burdened with purchase of power which is not required. Therefore, we are in agreement with the contention of the Petitioner that this Commission has power to approve reduced quantity of power based on the requirement.*
72. *It is contended by the successful bidders that in a petition filed u/s 63 of Electricity Act, 2003, this Commission has to merely adopt tariff obtained through the bidding process and it cannot approve the purchase of the reduced quantity of power.*
73. *The prayers made in the petition do not limit the petition for mere adoption of tariff. It is also prayed in a petition that the Commission may approve additional quantity of power to be procured from L-1, L-2 & L-3. Thus, the petition is not merely for adoption of tariff but is also for purchase of additional quantum of power. Therefore, in the present petition Commission has power to consider decrease/increase in the quantity of power to be purchased.*
74. *We, therefore, hold that the Petitioner is entitled to restrict procurement of power to 500 MW as required by it now as against 1000 MW for which approval was given earlier.”*

11. Aggrieved with these directions under the impugned order of the Commission, the Appellant(s) have filed these petitions before this Tribunal.

12. **The following are the submissions made by the Learned Counsel of Appellant, DB Power Limited in Appeal No. 235 of 2015:**

12.1 The Appellant’s submissions and contentions are, to a great extent, based on the Central Government Guidelines dated 19/1/2005 which have been framed under Section 63 of the Electricity Act 2003 and which Guidelines have in fact been incorporated into Section 63.

The Supreme Court has expressly held in paras **18-19** of the **Energy Watchdog** Judgment (2017 SCC Online 378) that the jurisdiction of the

Commission can be exercised only in accordance with the said Guidelines. The said Guidelines are therefore of critical importance to the present case.

12.2 The said Central Government Guidelines dated 19.01.2005 expressly state that they have been issued under Section 63 of the Act – it is of crucial importance to clearly understand the provisions of the Guidelines in Para 3.1 (iii) of the Guidelines specifically provides as under:-

“(iii) Approval of the Appropriate Commission shall be sought prior to initiating the bidding process in respect of the following aspects:-

(a) For the quantum of capacity/energy to be procured.....

Para 3.1 (iii) has to be read with para 3.2 which speaks of “the irrevocable intention of the procurer”.

The reasons for these provisions of the Guidelines are crystal clear. The bidding process, especially an international competitive bidding process, can be started only if there is total clarity and certainty about the quantum of energy to be procured. The bid made by any bidder will necessarily depend on the quantum of energy to be supplied, and, therefore, the Guidelines provide that the Commission has to approve the quantum of energy to be procured before the bidding process begins. It has been laid down by the Supreme Court in the **Energy Watchdog** case and by this Tribunal in the case of **Essar Power Ltd vs UPERC & Anr.** and in the case of **Wardha Power Company Limited Vs. MERC & Ors.** that, after the bidding process is over, if the Commission finds that the process is transparent and in compliance with the Guidelines, then the Commission has no choice except to adopt the tariff which has been bid. It would be unjustifiable if the Commission, while adopting the tariff were to lay down that though the bid made was for a supply of 1000 MW, the tariff which was bid is being adopted by the Commission for a supply of only 500 MW. Such an approach would not only make the entire bidding process irrational but it would also be directly contrary to para 3(1)(iii) read with para 3(2) of the Guidelines which

are mandatory and binding not only on the parties but also on the Commission. By virtue of these provisions of the Guidelines, the Commission's power to approve the quantum of power to be procured can be exercised only before the commencement of the bidding process and once that power has been exercised (as in the present case) to start the competitive bidding process for a specified quantum of power, the Commission has no power or jurisdiction to change the quantum of power supply after the completion of the competitive bidding process. Any other view will not only be directly contrary to the mandatory Guidelines but will also result in a complete breakdown of the entire competitive bidding process which will be totally destructive of public interest.

- 12.3 In this connection, it is important to see the earlier order dated 23.03.2011 passed by the Commission –this order is specifically titled as under:-

“In the matter of approval of quantum of capacity to be procured by RVPN as per “Guidelines for determination of tariff by bidding process for procurement of power by distribution licensees”.

The said order dated 23.03.2011, granted permission to RRVPN Ltd. (Respondent No. 2) to procure 1000 MW \pm 10 % by the competitive bidding process. This approval order was therefore passed in terms of para 3(1)(iii) read with para 3(2) of the Guidelines, and was the basis of the entire competitive bidding process. The said quantum of 1000 MW which was so approved by the Commission could not therefore, be reduced by the Commission itself after the conclusion of the bidding process and signing of PPAs, as has been done by the impugned order dated 22.07.2015.

- 12.4 The said Guidelines also contain clear provisions (in para 6) as to what is mandatorily required to be done after the conclusion of the bidding process. The Evaluation Committee is required (by para 6.2) to certify that the bidding process is in conformity with the Guidelines and the RFP. Para 5.15 read with para 6.1 require that the contract for supply shall be awarded to the lowest bidder and mandate that the PPA shall be signed with him.

Thereafter, under para 6.4 of the Guidelines the signed PPA along with the certificates issued by the Evaluation Committee are required to be forwarded to the Commission only “for adoption of tariffs in terms of Section 63 of the Act”.

- 12.5 As laid down by the Supreme Court in the **Energy Watchdog** case and by this Tribunal in the **Essar Power** case, if the Commission finds that the bidding process has been transparent and in conformity with the Guidelines, then the Commission has no choice except to adopt the tariff. Under Section 63, as clearly laid down by the Supreme Court, the Commission does not determine the tariff but only adopts the tariff which is determined by the competitive bidding process.

In the present case, the Commission has, in its said order dated 22.07.2015 expressly held (in its findings on Issues (i) and (ii) that the bidding process was transparent, honest and in conformity with the Guidelines. The Respondents do not question or dispute any of these findings. In these circumstances, under the Guidelines read with Section 63, the Commission could only adopt the tariff discovered by the bidding process, and the Commission had no jurisdiction or authority of law whatsoever to reduce the quantum of energy of 1000 MW fixed by the earlier order dated 23.03.2011, on the basis of which the entire competitive bidding process was started in terms of para 3.1 (iii) read with para 3.2 of the Guidelines. The order of the Commission on Issue (iii) is, therefore directly contrary to and wholly inconsistent with the mandatory Guidelines and is, therefore, completely without jurisdiction and without the authority of law.

- 12.6 This Tribunal has repeatedly pointed out the stark contrast between the process under Section 62 and 63. Where there is competitive bidding governed by the Guidelines, the advance approval of the Commission has to be obtained in respect of the quantum of power to be procured, and the lowest

bidder is entitled to have the Letter of Intent issued to him, and the PPA executed with him. The Tribunal has consistently held that, in a case governed by Section 63, enforceable contractual rights and obligations arise in favour of and also against the bidder on the completion of the bidding process and issuance of the LOI and even before the execution of the PPA for ready reference:

(a) **LancoKondapalli Power (P) Ltd vs Haryana Regulatory Commission** Appeal No. 156 of 2009 (Held: that contract came into existence when LOI was issued i.e even before PPA was drawn up and executed).

(b) **Essar Power Ltd vs UPERC &Anr.** Appeal No. 82 of 2011– LOI should be issued to successful bidder and PPA should be signed with him.

Noida Power (procurer was bound to procure power from the successful bidder (Essar Power) and not could not do so from anybody else, even if that other person was offering power at a lower tariff than the successful bidder.

12.7 Regulation 7 of the RERC Regulations will have to be construed harmoniously with the mandatory and binding Guidelines. Regulation 7 (a) of the RERC Regulations cannot therefore apply in a situation, where, in conformity with the mandatory guidelines, the prior approval of the Commission has already been obtained, in respect of the quantum of power to be procured by the Competitive Bidding Process under Section 63 of the Electricity Act, 2003, as in the present case. In such a situation, the competitive bidding process has been completed in accordance with the said approval of the Commission, it will not be lawful and open to the commission to nullify its earlier approval given in terms of the guidelines by resorting to Regulation 7 (a) of the RERC Regulation. This specific issue is also squarely covered by para 19 of the Energy Watchdog Judgment, which stated as under:

“It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation,

the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

13. **Per Contra, The following are the submission made by Learned Counsel of the Respondent No 2 (RRVPL)**

13.1 Even in the present case, when the issue of award of additional quantity was challenged by M/s Athena Chattisgarh Power Ltd and M/s SKS Power Generation (Chhattisgarh) Ltd, before the Hon'ble High Court, the Learned Single Judge while considering the scheme of the Electricity Act, 2003 as well as the Guidelines (in a proceedings where the present appellant was a party) has held and observed as follows:-

“...The process gets completed when it is approved by the Commission followed by execution of agreement which has not yet taken place. The issuance of the letters of intent is not final word for the aforesaid purpose.

13.2 The Adoption of Tariff by the Commission includes approval of the PPA entered into with the appellants which would take into consideration both i.e. the Quantity offered at the Tariff quoted. Once the PPA's are approved, it concludes the process of “Determination of Tariff” under section 63 read with the Guidelines.

2.15 Right to withdraw the RFP and to reject any Bid

This RFP may be withdrawn or cancelled by the Procurer/Authorized Representative at any time without assigning any reasons thereof. The Procurer/Authorized Representative further reserves the right, at its complete discretion, to reject any or all of the Bids without assigning any reasons whatsoever and without incurring any liability on any account.

2.5.7. At any step during the selection of Successful Bidder(s) in accordance with Clauses 3.5.2 to 3.5.6, the Procurer/Authorized Representative Reserves the right to increase/decrease the Requisitioned Capacity by upto ten percent (10%) of the quantum indicated in Clause 1.3.1 to achieve the balance Requisitioned Capacity and select the Successful Bidder with the

lowest Levelised Tariff amongst the remaining Bids. **Any increase/decrease in the Requisitioned Capacity exceeding ten percent (10%) of the quantum in Clause 1.3.1, can be made only with the approval of the Appropriate Commission.**

Under the RFP approved by the Commission controls the discourse of the present tender, where under the procurer not only has a right to withdraw the RFP or reject any bid under clause 2.15 but in addition has a right to increase or decrease the requisitioned capacity by $\pm 10\%$. Requisitioned capacity has been defined in clause 1.3.1 as 1000 MW Base Load power supply. Thus, the procurer on its own can reduce it by 100 MW i.e. upto 900 MW. Since the present case the Respondent procurer was seeking to reduce the requisitioned capacity beyond 10% (i.e. by 500 MW or 50%), approval of the Commission was required under Clause 3.5.7, hence the subject application dated 24.11.2014 was moved before the Commission for approval of reduction in requisitioned capacity beyond 10%. The said permission has been granted by the Commission in the impugned judgment.

- 13.3 The application has been filed under Regulation 7 of the *RERC (Power Purchase & Procurement Process of Distribution Licensee) Regulations, 2004*, which regulates the power of RERC to Regulate the purchase and procurement process under Section 86(b) read with Section 61, 62 and 63 of the Electricity Act. The said regulations control the process of purchase and procurement i.e. upto the time of approval of the PPA's by the Commission. It is submitted that once the PPA's are approved and become enforceable in law, the said regulations cannot be used to modify the same unilaterally however any bilateral act of modification of an approved PPA is also subject to approval by RERC. Thus, new PPA's, after execution (but before approval by the commission) or **"amendment"** to existing PPA's, the subject to scrutiny by the Commission under Regulation 7 on the parameters provided therein. The parameters *inter-alia* include **"necessity"** as well as **"Conformity with policy directives of the State Government"**. Regulation 7 of the said regulation provides as under:-

7. Power purchase arrangements or agreements – Any new power purchase arrangement or agreement and amendments to existing Power Purchase Agreement (PPA) entered into by distribution licensee(s), shall be subject to the Commission scrutiny (after execution) under Section 86 of the Act, in respect of:

- (a) **Necessity.**
- (b) Reasonability of cost.
- (c) Promoting efficiency, economy & equitability & competition.
- (d) Conformity with regulations for investment approval.
- (e) Conformity with requirements of quality, continuity and reliability of supply.
- (f) Conformity with safety and environmental standards.
- (g) Conformity with criterion of power purchase as laid down by the Commission.
- (h) **Conformity with policy directives of the State Government and National Power policies.**

13.4 The decision to reduce the requisitioned capacity has been taken in view of the reassessment made of the demand and supply of the electricity projections after 2017-18 by the EAC in its 5th meeting held on 21.05.2014. It is stated that the EAC observed that there is a need to review the decision taken in 4th EAC meeting held on 29.01.2014 and based on a re-assessment, the EAC decided to consider that there would be a projected estimated demand of 600 MW on long term procurement of power under Case-I and therefore considering EAC's recommendation and power requirement of the state in future, the Government of Rajasthan vide its letter dated 25.07.2014 approved purchase of only 500 MW power as against 1000 MW for which bidding process was conducted. It is submitted that in the meeting dated 21.05.2014 it was observed that in the 4th meeting of the EAC dated 29.01.2014 it was recommended that there would be no shortages against the demand at the end of the 12th and 13th Plan period and hence there was no need for procurement through the Case-I route. The said position was reassessed by EAC on 21.05.2014 since it was inter-alia found that:-

- i) It would not be possible to upsize the Kalisindh TPS Unit 3&4 since availability of water supply would not be sufficient for 2x800 MW units and therefore the same will have to be restricted to 2x660 MW units.

- ii) In respect of the Giral Lignite TPS Unit 1 & 2 it was found that due to the high sulphur content in fuel the units were operating at only 25-30% PLF as against a projected capacity utilization of 75% and similarly there was uncertainty for installation of Giral Unit 3 & 4 for the same reason.
- iii) The Andhra Pradesh UMPP from which Rajasthan was to get an allocation of 55 MW was closed down by Ministry of Power, GOI.

For all the aforesaid reasons as detailed in the minutes of the meeting dated 21.05.2014 it was decided that the requisitioned capacity under Case-I ought to be around 600 MW. The Government of Rajasthan thereafter approved a Long Term Requisitioned Capacity of only 500 MW to be procured under the present case.

14. The following are the submission made by Learned Counsel of the Respondent Nos. 3, 4 and 5 (JVVNL, AVVNL & JVVNL)

- 14.1 The sole issue raised by the Appellant in the present appeal is with regard to the power of the State Commission to reduce the quantum of electricity to be purchased under the competitive bidding process under Section 63 of the Electricity Act, from 1000 MW initially envisaged to 500 MW for which the tariff has been adopted and the power procurement has been approved by the State Commission by the impugned order.
- 14.2 The Respondents No. 3 to 5, through the Respondent No. 2 had in the year 2012 floated a competitive bidding process under Section 63 of the Electricity Act for procurement of electricity, which power requirements was for base load power. The procurement was envisaged to be under Case 1 of the Competitive Bidding Guidelines and the competitive bidding documents of the Government of India framed and notified under Section 63 of the Electricity Act.
- 14.3 Prior to the above bidding process, the State Commission had by order dated 23/03/2011 estimated the requirement of electricity by the distribution licensees in the state of Rajasthan and upon analysis of the data then available, permitted the distribution licensees to procure 1250 MW of electricity through a competitive bidding process. The above was at that stage approved at 1250 MW

as against the proposal to procure 2250 MW of electricity through the competitive bidding process.

- 14.4 In the above order dated 23/03/2011, the State Commission had taken into account the consideration and recommendation of the Energy Assessment Committee which was constituted by the Government of Rajasthan in accordance with Regulation 3(3) of the Rajasthan Electricity Regulatory Commission (Power Purchase & Procurement Process of Distribution Licensees) Regulations, 2004 (hereinafter called the **Power Procurement Regulations**). In the said order, the State Commission had analysed the projection for availability and demand in the state from 2011-12 to 2017-18 and based on the projections as then available, concluded that there was requirement for procurement of additional 1250 MW.
- 14.5 Pursuant to the above, at that stage and pending the approval by the State Commission and adoption of tariff, the Letters of Intent were issued to PTC India Limited for the supply of electricity by M/s Maruti Clean Coal and Power Limited for a capacity of 250 MW, to the Appellant M/s DB Power Limited for the capacity of 410 MW and M/s Lanco Power Limited for a capacity of 350 MW capacity. The PPA was signed with the above bidders on 01/11/2013, subject to the approval by the State Commission and adoption of tariff.
- 14.6 Pending the approval of the PPA and adoption of tariff, the Energy Assessment Committee constituted under the Regulations of the State Commission having reassessed the requirement of electricity in the State of Rajasthan an application was filed by the Respondent No. 2 before the State Commission on 27/11/2014 seeking the approval of the power procurement only to the extent of 500 MW as against the originally envisaged quantum of 1000 MW.
- 14.7 The above application was pursuant to the reassessment of energy requirement in the State of Rajasthan. The Energy Assessment Committee in the meeting held on 29/01/2014 considered the additional generating capacity which was expected to be commissioned and after considering various other factors

including the power requirements, load growth trajectory, capacity addition etc. came to the conclusion that there was no requirement for the long-term procurement of 1000 MW electricity under the competitive bidding process. Further, the existing petition of 500 MW peak power load approval filed before the State Commission was not necessary to be pressed and further that the 1120 MW generating project proposed by M/s Gamma Energy Limited was not required.

14.8 Subsequently, in the meeting of the Energy Assessment Committee held on 21/05/2014, considering the shortfall from some generating capacity which was not coming up, it was concluded that long-term capacity tie up was required for around 600 MW. On 25/07/2014, the above recommendation of the Energy Assessment Committee was considered and it was recommended by the Government of Rajasthan to the Respondent No. 2 for consideration of the power requirement of 500 MW as against the earlier approval sought for 1000 MW.

14.9 Pursuant to the above, the application was filed seeking the approval for 500 MW as against the originally envisaged quantum of 1000 MW. It is relevant to mention that the demand supply position in the state had substantially changed as against the envisaged position in the year 2011. As has been experienced by many states in the country, while the generation capacity had increased substantially over the years, the demand and load growth had not increased correspondingly, and large surplus generation capacity is available. In the circumstances, though the State of Rajasthan required some additional capacity to meet the demand of the consumers in the State, it was much less than the originally envisaged capacity of 1000 MW.

14.10 It was open to the distribution licensees to restrict their requirement of electricity and the approval sought from the State Commission to the extent of 500 MW as against 1000 MW which was originally envisaged and approved by the order dated 23/03/2011 prior to the competitive bidding process. This was considering

the fact that in terms of the recommendations of the Energy Assessment Committee constituted under the Regulations of the State Commission and whose recommendations have been accepted by the State Government and the answering Respondents, the load growth in the state and requirement of additional power had reduced and procurement of 1000 MW would only burden the consumers at large in the State by adding to the power purchase cost without the corresponding requirement of the additional electricity;

- 14.11 The approval of the PPA and the quantum of electricity required to be approved by the State Commission is within the jurisdiction of the State Commission under Section 86(1)(b), Regulation 7 of the Power Procurement Regulations and also Clause 3.5.7 of the Competitive Bidding Documents notified under Section 63 of the Electricity Act.
- 14.12 The power under Section 86(1)(b) particularly in regard to approval of quantum for procurement is applicable both for Section 62 and Section 63. Sections 62 and 63 are only means of determination of tariff and not the approval of the PPAs. Even where the State Commission does not determine the tariff, the decision to purchase or not is within the jurisdiction of the State Commission.
- 14.13 The PPAs become valid, binding and enforceable only upon the approval of the State Commission. Without such approval, the PPAs are null and void and do not come into force.
- 14.14 The Competitive Bidding Guidelines do not in any manner restrict the power of the State Commission to approve the PPAs and the quantum to be procured by the distribution licensees. In fact, the Competitive Bidding Guidelines also, independent of Section 86(1)(b) and Regulation 7 also enable the State Commission to decide on the quantum of electricity to be procured.
- 14.15 The Order dated 23/03/2011 does not in any manner restrict the power of the State Commission to restrict the purchase of quantum to 500 MW under the competitive bidding process. The State Commission is required to act in public

interest and the interest of the consumers at large. The State Commission does not act in an adversarial manner, but takes a decision in public interest and interest of the State as a whole.

15. We have heard at length the learned counsel for the rival parties and considered carefully their written submissions, arguments put forth during the hearings, etc. The following issues arise in the present appeal(s):

- (i) Whether the Respondent Commission exceeded its jurisdiction in terms of section 63 of the Electricity Act, 2003 while passing the impugned order and failed to appreciate that in a proceeding under section 63 of the Electricity Act, 2003, it could only limit itself to the adoption or rejection of tariff without deviating the quantum of power once approved by it and PPAs executed accordingly?
- (ii) Whether the Respondent Commission failed to consider that once the Bid Evaluation Committee has certified that the tariff was market aligned and the bidding process was fair & transparent and in accordance with the guidelines, its jurisdiction gets limited to adoption of tariff only with no other discretion to reduce the quantum of power?
- (iii) Whether the Respondent Commission failed to appreciate that when the bidding process got completed strictly as per its order dated 23.03.2011 and PPAs signed accordingly within the approved quantum of power (1000 MW), the review by EAC or by RERC Regulations, 2004 (No. 7) or under Section 86(1) (b) cannot be justified?
- (iv) Whether the State Commission failed to adopt judicious approach as required under the Act in conduct of its business while diluting the legality of signed Agreement(s) between the parties under Section 63?

The issues raised by the Appellant in both the Appeals are common. Hence, we will decide on the present appeals by this common judgment.

16. Our Findings and Analysis on the various issues involved in the case are dealt as under:

- 16.1 While considering the merits of the submissions made by the Appellant(s), it would be appropriate to deal with the scope of Competitive Bidding under Section 63 of the Electricity Act 2003.

The present case involves interpretation of a “**Statutory Framework**” governing procurement of power by transparent competitive bidding process under the Act, comprising:-

- (a) Section 63 of the Act;
- (b) Government of India’s Guidelines notified on 19.01.2005 under Section 63 for Determination of Tariff by Bidding Process for procurement of power by Distribution Licensees;
- (c) The Standard documents for Request for Proposal the PPA notified by the Central Government and adopted by the Respondents without any modification.

16.2 With respect to fixation of tariff, the applicable framework is provided in Section 61 to Section 66 of the Act:

- (i) The principles set out in Section 61 require all the Regulatory Commissions to adopt a balanced approach for fixation of tariff. These principles are:
 - (a) The generation, transmission, distribution and supply of electricity are conducted on commercial principles;
 - (b) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
 - (c) safeguarding of consumers’ interest and at the same time, recovery of the cost of electricity in a reasonable manner
- (ii) Two alternative routes are available to distribution licensee for procurement of power. The licensee has to elect any one of these two routes. They are as follows:
 - (a) Through bilateral/negotiated PPAs, where the agreement is subject to prudence check and regulatory approval of tariff under Section 62 and procurement under Section 86 (1) (b); This is MoU Route.
 - (b) Through transparent process of competitive bidding conducted in accordance with Central Government’s Bidding Guidelines, where the Appropriate commission is obliged to adopt the tariff discovered under Section 63. This is Bidding Route.

16.3 Section 63 starts with non-obstante clause and excludes the tariff

determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with Central Government's guidelines, standard document of Request for Proposal and the model PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63.

16.4 The competitive bidding process under Section 63 is regulated in various aspects by the Statutory Framework. To promote competitive procurement of electricity by distribution licensees with transparency, fairness and level playing field, the Central Government has framed the Bidding Guidelines to achieve the following objectives:

- (a) To promote competitive procurement of electricity by the distribution licensees;
- (b) To facilitate transparency and fairness in procurement processes;
- (c) To facilitate reduction of information asymmetries for various bidders:
- (d) To protect consumer interests by facilitating competitive conditions in procurement of electricity;
- (e) To enhance standardization and reduce ambiguity and for materialization of projects;
- (f) To provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers”.

16.5 It is important to note that one of the important objectives of Central Government's Guidelines mentioned above is to facilitate reduction of

information asymmetries for various bidders. Accordingly, the Central Government had also notified Standard Bidding Document in the form of Request for Proposal and also model PPA. Any deviation from these standard documents is required to be approved by the State Commission. **Admittedly, in the present case, the RRVPN (R-2) had adopted these documents verbatim and the State Commission had also approved the same.**

16.6 Besides these objectives outlined above, the stage wise process of election to be exercised by the procurer under the above statutory scheme crystallizing its commitments and rights of the parties concerned is also to be noted in this context. Let us now see various stages which crystallize the commitments and rights of the parties concerned:

- (a) The Procurer has the choice of process for procurement of power either through bilateral PPA with tariff determined by the Appropriate Commission under Section 62 of the Act or tariff discovered through a transparent process of competitive bidding in accordance with the Central Government's Guidelines under Section 63 of the Act ;
- (b) After electing 2nd route i.e. procurement of power through competitive bidding process, the procurer has to finalize the complete bidding process including finalization of RFP and other related documents with the approval of the State Commission at least 45 days before the bid submission date. In this case, admittedly, the procurer i.e. RRVPN electing the 2nd route had adopted standard bidding documents (RFP and PPA) notified by the Central Government and the State Commission had approved the same.
- (c) Short listing of qualified bidders on the basis of evaluation of non-financial bids;
- (d) Evaluation of financial component of the bids to determine the levelised tariff and evaluate whether such levelised tariff is aligned to the prevailing market prices;
- (e) The bidder who has quoted lowest levelised tariff to be declared as successful bidder. Acceptance of the outcome of the bid evaluation resulting issuance of Letter of Intent (LoI) in favour of successful

bidder and signing of PPA.

- (f) Followed by filing of the Petition for adoption of the tariff of the successful bidder by the Appropriate Commission under Section 63;
- (g) **The adoption of such tariff discovered by the competitive bidding governed by Section 63 is the statutory duty of the Appropriate Commission with no discretion in the matter;**

16.7 According to the Appellant(s), once RRVPN (R-2) elected to procure 1000 MW power through competitive bidding route under the Statutory Framework, the choices available to the procurer are limited to:

- (a) Rejecting all the bids upon finding that bids were not aligned to prevailing market conditions.
- Or**
- (b) Accepting the lowest bid and declaring the lowest bidder as successful bidder.

16.8 **The Government of India has framed guidelines under Section 63 of the Act to comply with the principles specified in Section 61 of the Act. The Government of India guidelines contain the mandate to safeguard consumer interest as well as to encourage competition, efficiency, economical use of the resources. The stated objectives of the Government of India guidelines are to strike a balance between transparency, fairness, consumer interest and viability.**

16.9 The competitive bidding process adopted under the Act must, therefore, meet the following statutory requirements:

- (a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission.
- (b) This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act.
- (c) If the deviations are permitted by failing to safeguard the consumer

interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines.

16.10 In the present case, the bid documents under Government of India guidelines adopted in the Request for Proposal (RFP) and Model PPA documents were filed before the State Commission and on the basis of those documents, the State Commission approved the bidding process. There were some stages creating/exhausting certain rights of both the procurer and bidders which have been established in this case. These stages in this case are as follows:

- (a) Electing the route of the competitive bidding process for procurement of power under Section 63 of the Act, the RRVPN filed RFP document and the draft PPA and obtained the approval of the State Commission.
- (b) Technically qualified bidders were shortlisted for the bid process.
- (c) The materials have been placed before the Evaluation Committee for its report. After evaluation the Committee forwarded its Report, recommending the tariff quoted by the Appellant(s).
- (d) After accepting the Report of Evaluation Committee, the RRVPN (R-2) filed the petition before the State Commission for adoption of the tariff quoted by the Appellant(s) being the successful bidder(s).
- (e) The last stage is that such tariff discovered by competitive bid process under Section 63 must be adopted by the State Commission except when there is a sole bidder or when the evaluation of financial bid was not as per the prevailing market prices.

16.11 The important stage of the process is the selection of successful bidder from among the seven qualified bidders. Clause 3.5.3 and 3.5.8 of the Request for Proposal (RFP) provide that the bidder quoting the lowest levelised tariff must be declared as successful bidder and the letter of intent has to be issued to the said bidder. The only exception to this mandate is that the procurer can reject all the bids, if the quoted tariff is not aligned to prevailing market prices.

It would reveal that the RRVPN has attempted by seeking for the

directions for approval of **deviation** regarding reduction in procurement of 1000 MW power through Case-I bidding in the matter of petition filed by it for adoption of tariff (No.431/13) from the State Commission to subvert the entire competitive bidding process under Section 63 ignoring the various procedures contemplated in the Government of India's guidelines and Request for Proposal (RFP). In fact, the Commission ought to have not allowed/entertained such deviation contained in the petition.

16.12 When RRVPN chose to file its petition No.431/13 seeking for the adoption of the tariff quoted by the Appellant(s), after accepting the Evaluation Committee's report certifying the Appellant(s) as successful bidder under clause 3.5.3 of the Request for Proposal (RFP), the RRVPN cannot be permitted to act in any manner other than just to honour the LOI & PPA. As mentioned earlier, the only exception available to the RRVPN (R-2) under clause 3.5.12 of RFP was that it could have rejected the bids of the quoted tariff if it was found to be not aligned with the market conditions. In the present case, the same had not been done in view of the fact that the Evaluation Committee declared that the rate quoted by the Appellant(s) was aligned with the market rates. **Moreover, the rates/tariff were quoted for supply of 1000 MW power as stipulated by procurer in bidding documents and cannot be assumed for lesser quantity at same terms & conditions.**

16.13 The whole case of RRVPN (R-2) is relied upon the phrase "**consumer's interest**" stating that after conclusion of the bidding process, the EAC recommended to procure only 600 MW instead of 1000 MW and procurement of excess power would be burden on consumers. This contention is totally misconceived because the consumer's interest alone cannot be the sole criteria for competitive bidding under Section 63 of the Act. If that was so, there was no need for Government of India guidelines. In fact, these guidelines framed by the Central Government are so detailed

and elaborate so as to take care and interest of all the stake holders of the Sectors including consumers' interest. In other words, if the consumer's interest alone is taken as the criteria, then the guidelines framed by the Central Government would become entirely redundant. It is also evident that the bidding process was initiated / concluded upto issue of LOI/signing of PPA based on recommendations of EAC for procuring 1000MW power and also, approved by RERC on 23.3.11. **Once, the statutory power is exercised by the Commission under the Act cannot be scrapped or revisited resulting into sole disadvantage to generators/suppliers in the utter violation of justice and equity.**

- 16.14 As indicated above, the bid process under Section 63 of the Act is entirely different from normal procurement of goods through competitive bidding process which is not governed by specific statutory scheme and guidelines. The bidding process under Section 63 is wholly based upon the objective of section 61 of the Act as well as the objectives of the Government of India guidelines. The Government of India guidelines have been framed to comply with the principles specified under Section 61 of the Act. The Government of India guidelines contained the mandate to safeguard the consumer's interest as well as to encourage competition, efficiency and economical use of the resources. Let us quote Section 63 of the Act for better understanding.

“Determination of tariff by bidding process.- Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

- 16.15 At the risk of repetition, it has to be stated that if these requirements have not been followed and if the process has failed to safeguard the consumer interest as well as to promote competition and efficiency by permitting the deviations, it would not only destroy the basic structure of the guidelines but also would frustrate the objectives of the statutory guidelines. In view

of the fact that the bid documents and the Request for Proposal documents on the basis of the Government guidelines as well as the bid process had already been approved by the State Commission before inviting the bids and since Evaluation Committee had already concluded the bid process by declaring the Applicant(s) as a successful bidder and in view of the fact that on that basis, the RRVPN filed a Petition before the State Commission for adoption of said tariff, the above process has established certain rights of the parties.

16.16 According to the Respondents No. 2 to 5, the signed PPA may be valid and enforceable only when it is approved by the Commission. It is noted that the draft PPA was duly approved by the State Commission by its Order as early as on 23.03.2011 and therefore, there does not appear any further necessity for a separate approval required for the approval of the PPA. In the present case, it is not disputed that the draft PPA had already been approved by the State Commission and only after the approval of the said draft PPA, bidding process has to begin and in that process, the tariff has to be determined through the competitive bidding process. The fact that the tariff was discovered in a transparent manner by following the guidelines issued by the Central Government is evident from the report of the Evaluation Committee. Only on the basis of this report, RRVPN (R-2) filed petition before the State Commission for adoption of the tariff quoted by the Appellant(s). Para 2.3 of the guidelines provides that unless explicitly specified, the provisions of these guidelines shall be binding on the procurer. Therefore, the mandatory nature of the guidelines cannot be questioned by the parties. Any deviation to the bidding documents or the guidelines can be permitted by the State Commission that too, before the bidding process was initiated/completed. In the present case, the bidding process was over and after it was over, the RRVPN decided to accept the offer as recommended by the Evaluation Committee and accordingly, filed a petition for approval of the said tariff under Section 63 of the Act. Thus,

once the RRVPN filed the petition to the Commission for the adoption of tariff, the bid process got concluded. Thereafter, jurisdiction of the State Commission under Section 63 is limited to find out only two aspects:

- (a) To verify as to whether the tariff has been adopted through transparent bidding process;
- (b) Whether the bidding process has been in accordance with the guidelines issued by the Central Government.

16.17 If the State Commission is satisfied on the above aspects, it has to mandatorily adopt the tariff determined through the competitive bidding accepted by the procurer. **In the process of adoption of tariff under Section 63, the Commission cannot entertain any fresh deviation to the bidding documents viz. reduction in capacity, etc. which stand approved by it before the beginning of the bid process.**

16.18 In fact, the following observations made by this Tribunal in Appeal No.44 of 2010 are relevant in this context:

“69. As indicated above, the State Commission has to verify merely whether the bid process has been done in a transparent manner and in accordance with the guidelines framed by the Central Government and if that is complied with, the State Commission shall give approval and adopt the tariff recommended by the Evaluation Committee.

70. As indicated above, the wordings contained in section 63 of the Electricity Act, 2003 would make it clear that the power of scrutiny by the State Commission is so limited. When it is found that the bid process was done in a transparent manner as per the guidelines and when the certificate is issued by Evaluation Committee recommending the reduced prices through negotiations, it is the duty of the State Commission to give approval without raising any hyper technical objection. To put it shortly, the Commission as per section 63 of the Electricity Act, 2003 having only limited jurisdiction has to satisfy with reference to the compliance of the requirement of Section 63 and cannot indulge itself to conduct a roving enquiry. In other words, the State Commission should act within the ambit of Section 63 of the Act and should not go beyond that as it is neither an Enquiry Commission nor a Vigilance Commission”

16.19 It has been claimed by the Respondents that the application for reduction in quantum of power to be procured has been filed before the State Commission under Regulation 7 of the RERC (Power Purchase & Procurement process of distribution licensee) Regulations, 2004. It is noted that the said regulation only applies to Power Purchase Agreements and amendments thereto “after execution”. In other words, it is only once the contracting parties have entered into a contract or an amendment thereto, that contract or amendment is to be placed before the Commission for its scrutiny under Regulation 7. These regulations cannot be adopted and invoked by the Commission overriding on the statutory provisions under Section 63 of the Act.

16.20 Based on the observation of the Commission that as the EAC finalizes the maximum demand and requirement for next 1-5 years and therefore based on the recommendation of the EAC, the quantum of power, for which approval has already been granted by the Commission, can be reduced, is directly contrary to the long term procurement of power under the Competitive Bidding Guidelines. This view taken by the Commission on the role and powers of EAC, runs contrary to the Competitive Bidding Guidelines and in fact, sets the objective of long term procurement of power a mere imagination & non-existent.

If the above reasoning of the Commission is accepted, then the approval of Commission prior to initiating the process of procurement will be rendered meaningless in as much as it would be completely open to the procurer to seek reduction at any stage after taking the approval of the Commission even after execution of the PPA. This would not only be in violation of Section 63 of the Act but would also lead to grave repercussions as has happened in the present case. **It is noted that the Commission has ignored Para 65 of its own order dated 23.03.2011 which reads as under:**

65. It would be pertinent to clarify here that projections of surplus energy need not be concluded as there being no gap between demand and supply. This is because State's load reduces substantially during monsoon, which typically leads to surplus energy during some period of the year whereas during the peak Rabi season, there would still be shortage and power cuts. *Therefore, even if annual energy account shows some surplus, one need not come to the conclusion that State has reached a situation of unrestricted power supply to consumers. Any planning for bridging the gap between demand and supply has to aim at doing away with power cuts/restricted supply. This observation is being made keeping in view the point raised by stakeholders in respect of the so-called surplus energy scenario.*

17. Summary of our Findings

17.1 The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act.

The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance Central government's guidelines, standard document of Request for Proposal and the model PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. Competitive bidding

process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act. If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines. In this case the above procedure has not been followed. The contention of the Respondents as well as State Commission that even after the bidding process is completed and PPA signed, the stipulated power capacity of 1000 MW for procurement can be reduced is contrary to the provisions of the Act as well as bidding guidelines. **Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Respondents (Procurer) and the State Commission to reduce procurement of power stipulated in the bidding documents and PPA(s) already executed between the parties.**

- 17.2 Regulation 7 of the RERC Regulations will have to be construed harmoniously with the mandatory and binding Guidelines. Regulation 7 (a) of the RERC Regulations cannot therefore apply in a situation, where, in conformity with the mandatory guidelines, the prior approval of the Commission has already been obtained, in respect of the quantum of power to be procured by the Competitive Bidding Process under Section 63 of the Electricity Act, 2003, as in the present case. In such a situation, the competitive bidding process has been completed in accordance with the said approval of the Commission, it will not be lawful and open to the Commission to nullify its earlier approval given in terms of the guidelines by resorting to Regulation 7 (a) of the RERC Regulation. Further, the

Regulations, 2004 of RERC, cannot override the Central Government Guidelines notified on 19.01.2005 (as amended from time to time) brought out under the provisions of Section 63 of the Act.

17.3 The Respondents have primarily relied upon the phrase “**consumer’s interest**” and have stated that after conclusion of the bidding process, the EAC recommended to procure only 600 MW instead of 1000 MW and procurement of excess power would be burden on consumers. This contention of the Respondents lacks logic & rationale and hence, not tenable. The consumers’ interest is a broad term and among others, involves reliable, quality and un-interrupted power on long term basis besides being competitive. The State Commission has rightly noted in its order dated 23.03.2011 while approving the process of initiation of competitive bidding while approving RFP, draft PPA, documents and quantum of power to be procured on long term basis. The said order of the State Commission categorically noted the consumers’ interest and the guidelines of the Central Government under Section 63 of the Electricity Act, 2003 envisage the interest of all stake holders including consumer interest. Hence, no other section or regulation is having any overriding power on the Section 63 which is self-contained and amply elaborated for the procurement of power by the discom through transparent competitive bidding which, in turn, safeguards the interest of all stake holders including consumers’ interest.

17.4 The State Commission is mandated to ensure transparency while exercising its power and discharging its functions under Section 86 (3) of the Act. The concept of transparency and principle of natural justice mandates that the State Commission should grant opportunity to other party and take into account their logical concerns before passing any order detrimental to the said party. In this case the State Commission, not only,

wrongly entertained the untenable deviation of reduction in power quantum to be procured but also passed orders giving unilateral directions in violation of its own 'Conduct of Business Regulations' and the principle of natural justice.

- 17.5 In view of the summary of our findings referred to above, we are to conclude that the State Commission has passed the impugned Order dated 22.07.2015 without adopting the judicial approach and has gone beyond its jurisdiction under Section 63 of the Act. The impugned order has been passed in without any clarity and without dealing with the main issue of maintaining a balanced & judicious approach as required under Section 61 of the Act and also, well elucidated in the Central Govt. Guidelines under Section 63 of the Act.

Hence, the impugned Order dated 22.07.2015 is liable to set aside. The State Commission shall be required to pass appropriate/revised order enabling the Appellants namely DB power Ltd. and Lanco Power Ltd. to supply the contracted power under the respective PPA (dated 01.11.2013) viz. 410 MW & 350 MW, respectively expeditiously in the interest of justice and equity.

ORDER

Hence, the Appeal Nos. 235 of 2015 and 191 of 2015 are allowed and the State Commission's order dated 22.07.2015 is set aside. The State Commission is directed to pass consequential order in accordance with the law keeping in view our observations made above as well as the judgments of this Tribunal rendered earlier on the aspects of the scope of Section 63 of

the Act as expeditiously as possible, preferably, within 2 months from today. No order as to costs.

Pronounced in the open Court on this 2nd day of February, 2018.

(S.D. Dubey)
Technical Member

(Justice N.K. Patil)
Judicial Member

REPORTABLE / ~~NON-REPORTABLE~~