

In the Appellate Tribunal for Electricity
New Delhi
(Appellate Jurisdiction)

APPEAL NO. 353 OF 2018 &
IA NO. 1408 OF 2018

Dated: 30th April, 2019

Present: Hon'ble Mr. Justice N.K. Patil, Judicial Member
Hon'ble Mr. Ravindra Kumar Verma, Technical Member

In the matter of:

- 1. Mytrah Vayu (Som) Private Limited
8th Floor, Q-City, Survey No. 109,
Gachibowli, Nanakramguda Village,
Serilingampally Mandal, Hyderabad
Telangana 500 032** **Appellant No. 1**

- Versus**

- 1. Rajasthan Electricity Regulatory
Commission
27, Sahkar Marg, Jyoti Nagar,
Lal Kothi, Jaipur** **Respondent No.1**

- 2. Rajasthan Renewable Energy Corporation
Limited
(Through the Managing Director)
E-166, Yudhishthir Marg, C-Scheme,
Jaipur-302005, Rajasthan** **Respondent No.2**

- 3. Jaipur Vidyut Vitran Nigam Limited
(Through the Chairman/Managing Director)
Vidyut Bhawan, Jyoti Nagar,
Jaipur - 302005** **Respondent No.3**

- 4. Jodhpur Vidyut Vitran Nigam Limited
(Through the Chairman/Managing Director)**

**New Power House, Industrial Area
Jodhpur-342003, Rajasthan**

.... Respondent No.4

- 5. Ajmer Vidyut Vitran Nigam Limited
(Through the Chairman/Managing Director)
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer – 305004, Rajasthan**

.... Respondent No.5

- 6. Rajasthan Urja Vikas Nigam Limited
(Through the Managing Director)
Vidyut Bhawan, Janpath, Jyoti Nagar,
Jaipur- 302005, Rajasthan**

.... Respondent No.6

**Counsel for the Appellant(s) : Mr. Hemant Sahai
Ms. Puja Priyadarshini
Ms. Nived Veerapaneni
Mr. Siva Girish Arepalli (Rep.)
Mr. Dharmendra Gupta (Rep.)**

**Counsel for the Respondent(s) : Mr. Bipin Gupta
Mr. Suneel B.
Mr. Paramhans for R-3 to R-6**

JUDGMENT

PER HON'BLE MR. RAVINDRA KUMAR VERMA, TECHNICAL MEMBER

1. The Appellant has sought the following reliefs:

- a) To set aside the orders dated 19.04.2017 passed by the Rajasthan Electricity Regulatory Commission in Petition No. RERC/1102/17;
- b) To hold and declare that the Project of the Appellant is deemed to be commissioned during the financial year 2015-16 for the entire capacity of 90 MW;
- c) To direct the Respondents to execute a power purchase

agreement with the Appellant for the balance quantum of 27.1 MW capacity out of the total quantum of 90 MW capacity of the Project;

- d) To hold and declare that the Appellant is entitled to preferential tariff in terms of the generic tariff determined by the State Commission in the Tariff Order for the balance quantum of 27.1 MW capacity for which power purchase agreements shall be executed by the Discoms; and
- e) To pass such other or further orders as this Hon'ble Tribunal may deem appropriate, keeping in view the facts and circumstances of the present case.

1.1 The Appellant has raised the following Questions of Law for our consideration:

- I. Whether the State Commission failed to appreciate the fact that the conduct of the Respondents in the instant case in not executing power purchase agreements with the Appellant for the quantum of 27.1 MW for the financial year 2015-16 is arbitrary, erroneous and contrary to the rules and regulations framed by the State Commission?
- II. Whether the State Commission failed to appreciate the rationale behind grant of approval for setting up of a wind power project by SLEC?
- III. Whether the conduct of the Respondents in executing power purchase agreements with generators who were granted SLEC approval subsequent to that of the Appellant bad in law?
- IV. Whether the approach of the State Commission in failing to direct the Discoms within the State of Rajasthan to take

necessary action to meet their envisaged RPO targets violates the law laid down by the Hon'ble Supreme Court and the RPO Regulations prevailing within the State?

- V. Whether the approach of the State Commission is in violation of the intent and purpose behind Section 86(1)(e) of the Act?
- VI. Whether the conduct of the Respondents in the instant case falls foul of the settled principles of promissory estoppel and legitimate expectation?
- VII. Whether the entire delay in grant of extension of time to the Appellant for setting up the Project by the District Collector/ GoR be attributable to the Appellant itself?

2. Brief facts of the case are as follows:

- 2.1 The Appellant is a company incorporated under the Companies Act, 1956 and is a wholly owned subsidiary of MEIPL. The Appellant is engaged in the business of generation of renewable energy. Nidhi Wind Farms Private Limited ("**NWFPL**"), as a developer of a wind power project of 90 MW in the State of Rajasthan.
- 2.2 Rajasthan Electricity Regulatory Commission (hereinafter referred to as the "**Respondent No.1/the State Commission**") within the State of Rajasthan and discharges its functions in terms of the Electricity Act, 2003.
- 2.3 The Rajasthan Renewable Energy Corporation Limited ("**Respondent No. 2/RRECL**") is a company registered under the Companies Act 1956. Respondent No. 2 is working as a State Nodal Agency for promoting & developing non-conventional energy sources in the State and also as a State Designated

Agency (“**SDA**”) for enforcement of provisions of Energy Conservation Act, 2001 in the State.

- 2.4 Jaipur Vidyut Vitran Nigam Limited (“**Respondent No. 3**”), Jodhpur Vidyut Vitran Nigam Limited (“**Respondent No. 4**”) and Ajmer Vidyut Vitran Nigam Limited (“**Respondent No. 5**”) are the three distribution licensees within the State of Rajasthan and are engaged in the business of distribution of electricity within their respective licensed areas (collectively “**Discoms**”).
- 2.5 The Rajasthan Urja Vikas Nigam Limited (“**Respondent No.6**”) is a company incorporated under the Companies Act, 2013 and has been formed to carry out power trading business for the three distribution licensees within the State of Rajasthan.
- 2.6 To promote generation of electricity from wind sources, the Government of Rajasthan (“**GoR**”) notified the “Policy for Promoting Generation of Electricity Through Non-Conventional Energy Sources, 2004” (“**WindPolicy 2004**”). The aforesaid policy was superseded by the “Policy for Promoting Generation of Electricity from Wind, 2012” on 18.07.2012 (“**Wind Policy 2012**”).
- 2.7 Rajasthan Electricity Regulatory Commission also framed Rajasthan Electricity Regulatory Commission (Power Purchase & Procurement Process of Distribution Licensee) Regulations 2004 (“Purchase Regulations of 2004”) as amended from time to time. The Purchase Regulations of 2004, provide for purchase of certain percentage of electricity through renewable energy sources including wind power by the distribution licensees.
- 2.8 The State of Rajasthan framed Rajasthan Land Revenue (Allotment of Land for Setting up of Power Plant Based on Renewable Sources) Rules, 2007 [“**Rules of 2007**”], so as to

provide a mechanism for allotment of land at subsidized amount for the purpose of setting up of renewable energy power plants.

- 2.9 RRECL affirmed the technical feasibility of power evacuation system for interconnecting the Project to the proposed 400/220/132/33 kV Ramgarh Grid substation (“**Ramgarh SS**”) to be constructed and operated by Rajasthan Vidyut Prasaran Nigam Limited (“**RVPNL**”). Further, RRECL informed that the Ramgarh SS, which was under construction at that point in time, would be commissioned by May/ June 2013.
- 2.10 In terms of the Rules of 2007 and Allotment Order dated 19.07.2012, the Appellant was required to set-up the power project within a period of two years from the date of allotment. As such, the Project had to be commissioned on or before 18.07.2014.
- 2.11 RRECL apprised the Appellant, vide its letter dated on 15.12.14 that the commissioning of the Ramgarh SS would only be possible latest by the end of the Financial Year 2014-15. However, the said substation was eventually commissioned at the end of the year 2015.
- 2.12 The Appellant on 17.07.2014 requested the RRECL for the requisite extension of time such that the Appellant is left with sufficient time to commission its Project once the Ramgarh SS is ready.
- 2.13 The order for extension of time for completion of the Project by two years was issued on 17.03.2016.
- 2.14 RRECL in terms of Wind Policy 2012 has granted in principle approval to the Project by way of communication dated 07.10.2014 and forwarded the same to the State Level Empowered Committee (“**SLEC**”), subject to fulfilment of certain conditions laid down in the aforesaid approval. One such condition was that the power

purchase agreement would be executed by the Discoms with the Appellant only if the Project is commissioned on or before 31.3.2016.

- 2.15 The Appellant deposited grid connectivity charges with RVPNL amounting to Rs 1,80,00,000 and also deposited Rs. 4,50,00,000/- towards security charges to RRECL on 5.12.2014.
- 2.16 After completing all the requisite formalities, the SLEC in its meeting dated 06.01.2015, granted final approval to the Project of the Appellant for a capacity of 90 MW.
- 2.17 On 29.05.2015, the State Commission issued a generic tariff order for sale of electricity from Wind Power Plants getting commissioned during FY 2015-16 in the State to the Discoms ("**Tariff Order**"). The State Commission by way of the Tariff Order directed that all wind power projects which are commissioned on or before 31.03.2016 shall execute power purchase agreements with the Discoms in the State at the generic tariff determined by the State Commission in the Tariff Order.
- 2.18 The Appellant submitted its request by way of communication dated 21.05.2015 to RRECL to forward the proposal for execution of power purchase agreements amounting to 90 MW by the Appellant with the Discoms to Rajasthan Discoms Power Procurement Centre ("**RDPPC**"). Further, a similar request was made by the Appellant on 28.09.2015.
- 2.19 RRECL on 10.03.2016 forwarded the draft power purchase agreement to the RDPPC for a capacity of 90 MW for which commissioning was scheduled on 31.03.2016.
- 2.20 RDPPC issued an allocation letter dated 22.03.2016 for execution of a power purchase agreement only to the tune of 39.1 MW instead of 90 MW as allotted by SLEC in its meeting held on

06.01.2015 and recommended by RRECL by way of communication dated 10.03.2016.

- 2.21 The Appellant approached the appropriate authorities by way of e-mails dated 25.03.2016 & 28.03.2016, requesting for allocation of the balance quantum of 50.9 MW power to the Discoms, as approved by SLEC in its meeting dated 06.01.2015. However, instead of granting the requisite allocation of 50.9 MW, RDPPC by way of communication dated 28.03.2016 subsequently allocated an additional capacity of only 23.8 MW under a separate power purchase agreement.
- 2.22 The Appellant executed a power purchase agreement with Respondent No. 3 on 28.03.2016 for sale of a quantum of 39.1 MW power ("**PPA 1**"). Further, the Appellant executed a power purchase agreement with Respondent No. 5 on 29.03.2016 for sale of a quantum of 23.8 MW power ("**PPA 2**") (collectively "**PPAs**"). Immediately thereafter, the Appellant commissioned the aforesaid projects of 39.1 MW & 23.8 MW (totaling 62.9 MW) on 31.03.2016. Ever since, the Appellant has been generating and supplying electricity to the Discoms in terms of the PPAs on the preferential tariff as mentioned in the said PPAs.
- 2.23 The Government of Rajasthan issued a notification dated 11.04.2016 introducing certain amendments in the Wind Policy 2012 ("**Notification**"). Pursuant to the amendments brought about by the Notification, Clause 4.1.2 of the Wind Policy 2012 obligated the GoR to promote setting up of wind power projects for direct sale to Discoms for the Financial Year 2016-17 on the preferential tariff determined by the State Commission in the Tariff Order, subject to the condition that such a project has to be finally

approved by the SLEC under Clause 16 of the Wind Policy 2012 on or before 31.03.2016.

- 2.24 On 27.04.2016, RRECL requested Respondent No. 5 to execute a power purchase agreement with the Appellant for the balance capacity of 27.1 MW.
- 2.25 However, the Respondents herein failed to execute power purchase agreements for the remaining quantum of 27.1 MW.
- 2.26 Out of the total commissioned wind power projects in Rajasthan as on 30.09.2016, all the projects approved in SLEC meeting dated 06.01.2015 have signed power purchase agreements with the Discoms for their full approved capacities, except the Project of the Appellant. Further, it is important to note that the project capacities of Suzlon and Vish were approved in the subsequent SLEC meetings dated 10.06.2015 & 09.02.2016 i.e. much later than the date of approval of the project capacity of the Appellant i.e. 06.01.2015. However, despite the aforesaid fact, RDPPC went ahead and executed power purchase agreements with the aforesaid developers to the tune of 252 MW.
- 2.27 Aggrieved by the Impugned Order dated 19.04.2017 passed by the State Commission, the Appellant has filed this present Appeal.

3. The oral and written submissions of the learned counsel appearing for the Appellant are as follows:-

- 3.1. The case of the Appellant is that it has set up the Project after due approval from the state authorities and within the timelines prescribed. However, after completion of the Project, when it came to execution of the PPA, the Appellant was arbitrarily and baselessly discriminated against. While the PPAs for 62.9 MW(Out

of total 90MW approved) have been executed qua the Project, the balance capacity of 27.1 MW has been stranded due to the arbitrary approach adopted by the Discoms.

- 3.2 The 90 MW Project of the Appellant has been set-up under the Policy for Promoting Generation of Electricity from Wind – 2012 (“**Wind Policy 2012**”) to facilitate compliance of Renewable Purchase Obligations (“**RPO**”) by the Discoms.
- 3.3. For the purposes stated above, the Wind Policy envisaged constitution of committees for granting in-principle clearance and final approval of the projects, namely, State Level Screening Committee (“**SLSC**”) and State Level Empowered Committee (“**SLEC**”) with specific participation of the Discoms.
- 3.4. The entire Project (90 MW) has received its in-principle from the SLSC on 07.10.2014 (“**SLSC Approval**”) and final approval from the SLEC on 06.01.2015 (“**SLEC Approval**”) with 31.03.2016 as the Scheduled Date of Commissioning.

The Project for entire 90 MW has been approved under the Wind Policy 2012, by the high-powered committee i.e. SLSC and SLEC with members from government, finance, Discom, RREC, RVPN, etc. Hence, it is evident that the entire 90 MW capacity of the Project of the Appellant was approved with full knowledge of RPO, financial obligations, etc. and after due concurrence of the Discoms.

- 3.5. SLSC Approval and SLEC approval of the Project specify the SCOD of the Project as 31.03.2016 and the Project was ready for commissioning by 17.03.2016.
- 3.6 The case of the Discoms is that they have refused to execute the PPA for the balance capacity (27.1 MW) with the Appellant on the ground that they have already fulfilled their RPO targets for the year 2015-16 by contracting sufficient capacity of wind power by way of execution of PPAs in this regard. The said stance of the Discoms has no basis on facts or in law since RPO is a percentage of the total energy consumption by the obligated entity and contracted capacity (by way of signing PPAs) is irrelevant for the purposes of measuring the compliance thereto.
- 3.7 The RPO of the Discoms had not been fulfilled. In this regard, it is pertinent to refer to Order dated 14.11.2017 passed by RERC in Petition No. RERC-867/16 (i.e. an order issued by the RERC shortly after issuance of the Impugned Order). The relevant extracts of the said Order dated 14.11.2017 are reproduced herein below for ready reference:

“In the matter of petition filed by Rajasthan Renewable Energy Corporation Ltd. under Section 86 (1) (e) and Section 142 of the Electricity Act, 2003 read with Regulation 5 of RERC (Renewable Purchase Obligation) Regulations, 2007 and Regulation 7 & 9 of RERC (Renewable Energy Certificate and Renewable Purchase Obligation Compliance Framework) Regulations, 2010 seeking directions against Discoms for non-compliance of Renewable Energy Purchase Obligation.

...

11. Discoms in support of the above submissions have placed year wise statement of the number of PPA's signed,

contracted capacity under the said PPAs, the CUF supposed to be achieved by the project developers, CUF actually achieved, the Million Units of energy generated, the MUs of electricity that would have been generated had the CUF at normative level been achieved, the percentage of actual compliance of RPO, the percentage of compliance if the solar, wind and bio-mass projects had achieved the normative CUF provided in the PPA. The data submitted by Discoms is as under:

(i) Wind RPO

<i>FY</i>	<i>Commiss ioned capacity during the FY (MW)</i>	<i>CUF (in terms of the PPA) (%)</i>	<i>The CUF actually achieved</i>	<i>Energy capable of being generated at the CUF (in terms of the PPA)(M U)</i>	<i>Energy actually generated(MU)</i>	<i>RP O Compliance for the FY, as per Commission (%)</i>	<i>RPO complia nce if the CUF in terms of the PPA, had been achieve d (%)</i>	<i>Actual complia nce of RPO obligatio n (%)</i>
2007-08	42.71	20%	15.59	804.54	626.98	4.00	2.19	1.70
2008-09	195.35	20%	13.38	1144.60	765.58	5.00	2.94	1.97
2009-10	350.70	20%	12.63	1759.03	1110.89	6.00	3.91	2.47
2010-11	404.80	20%	11.74	2468.24	1449.35	6.75	5.30	3.11
2011-12	499.15	20%	13.88	3351.90	2325.53	4.50	6.69	4.64
2012-13	593.55	20%	14.26	4382.65	3124.19	5.10	7.92	5.65
2013-14	51.20	20%	16.30	4472.35	3643.95	5.70	7.57	6.17
2014-15	538.85	20%	14.55	5416.41	3941.46	6.80	8.03	5.85
2015-16	659.50	20%	13.50	6589.86	4446.71	7.30	9.55	6.44
2016-17	0.00	20%	15.99	6571.86	5252.64	7.80	9.44	7.54

...

12.It is submitted by Discoms that as an ‘obligated entity’ it have done all that is within their power and control to fulfil the RPO and had taken due and adequate steps to undertake the same, but could not do for reasons beyond the control of the Discoms.

13.Commission has considered the submissions of Discoms and looked into the material placed by Discoms. From

material produced, Commission observe that Discoms have signed PPAs with an intention to comply with RPO but generation of electricity by the generators was not adequate to fulfill the RPO. If generation was to the level expected in the PPAs, RPO obligation would have been fulfilled by Discoms without any difficulty. On account of under generation by the generators, RPO in terms of energy has not been purchased to the extent required,”

16. Commission has observed that even though adequate quantum of PPAs were signed by Discoms in the past, the generation in terms of energy was not to the expected level and consequently there is shortage in RPO in terms of energy. Therefore, Commission advise the Respondent Discoms to assess the energy requirement for compliance of RPO more realistically in advance and sign the PPA accordingly in future and comply with RPO Regulations without fail...”

The Appellant submitted that the Discoms have failed to meet their RPO for the FY 2015-16. In March 2016, Discoms had a history of more than 2 years of under generation (below the projected generation) in terms of MUs which resulted in lower procurement of wind power in MUs terms (i.e. procurement prescribed by the RERC) below the RPO.

- 3.8. In March 2016, the Discoms had wrongly concluded that they had fulfilled RPO. This error occurred because the Discoms calculated the status of compliance on the basis of installed capacity under the PPAs rather than actual MUs generated with actual Capacity Utilisation Factor (“**CUF**”). As set out in detail at paragraphs 9 to 13 above, the RPO is expressed as a percentage of the MUs procured and not the MW capacity tied up. Therefore, the calculation adopted by the Discoms is not only contrary to law but also defies logic as there is no capacity/ fixed charge payable for a

renewable energy project and every parameter is calculated basis the actual generation and consumption.

3.9. The Maharashtra Electricity Regulatory Commission (“**MERC**”), which has framed similar RPO regulations (i.e. obligation expressed as a percentage of the consumption in MUs), was faced with a similar situation of RPO non-compliance. It is pertinent to note that MERC in Case No. 190 of 2014 held that:

“1. The Commission has notified the Maharashtra Electricity Regulatory Commission (Renewable Purchase Obligation, its Compliance and Implementation of Renewable Energy Certificate Framework) Regulations, 2010 (‘RPO-REC Regulations’) on 7 June, 2010. These Regulations specify the Renewable Purchase Obligation (RPO) targets for Obligated Entities, including the Maharashtra State Electricity Distribution Co. Ltd., a Distribution Licensee, for FY 2010-11 to FY 2015-16. The specified RPO targets are as below:

Year	Minimum quantum of purchase (in %) from Renewable Energy sources (in terms of energy equivalent in kWh)		
	Solar	Non-Solar (other RE)	Total
2010-11	0.25%	5.75%	6.0%
2011-12	0.25%	6.75%	7.0%
2012-13	0.25%	7.75%	8.0%
2013-14	0.50%	8.50%	9.0%
2014-15	0.50%	8.50%	9.0%
2015-16	0.50%	8.50%	9.0%

The Regulations also stipulate that,

“Further, the Distribution Licensee (s) are also mandated to procure 0.1% per year of their Non-Solar (other RE) RPO obligation for the period from FY 2010-11 to FY 2012-13 and up to 0.2% of their Non-Solar (other RE) RPO obligation for the period from FY 2013-14 to FY 2015-16 by way of purchase from Mini Hydro or Micro Hydro power project.

...

48. MSEDCL has stated that it has contracted adequately with RE (mainly Wind) Generators to fulfil its Non-Solar RPO targets upto FY 2015-16 on capacity basis; and that, considering normative CUF, sufficient generation could have been expected from them to enable MSEDCL to do so. However, the actual RE generation injected in energy terms (MUs) has been less than the expected generation considering the normative CUF. MSEDCL has contended that, since RE generators have not delivered as per the normative CUF, either the CUF projections should be revised, or the Generators must improve their efficiency. Alternatively, the RPO target compliance may be assessed on the basis of RE capacity contracted and not on the basis of the Units actually injected.

49. The Commission is of the view that, although MSEDCL has contracted adequately with RE Generators on capacity basis considering generation estimated at normative CUF, the inherent characteristics of RE sources have to be kept in view. Renewable sources dependent on natural phenomena like wind are intermittent by nature. The predictability of generation from these RE sources has certain limitations. Considering these limitations and other factors, the Commission has specified the REC mechanism as an alternative for fulfilling RPO targets. The Regulations provide for resort to the REC mechanism when MSEDCL finds that RPO targets are unlikely to be fulfilled because actual energy injection is less than had been estimated. The compliance of RPO targets cannot be based merely on contracted RE capacity, as suggested by MSEDCL.

50. In this background, the Commission notes that the closing balance of Non-Solar RECs by the end of March,

2014 was 55, 15,639, i.e. equivalent to 5515.639 MUs. However, even though sufficient Non-Solar RECs were available, MSEDCL has not purchased any RECs to fulfill its RPO target for FY 2013-14 and earlier years. The Commission cannot, therefore, condone this default by MSEDCL.”

3.10. RERC, in the Order dated 14.11.2017 in Petition No. RERC-867/16, has held that

“11. Discoms in support of the above submissions have placed year wise statement of the number of PPA’s signed, contracted capacity under the said PPAs, the CUF supposed to be achieved by the project developers, CUF actually achieved, the Million Units of energy generated, the MUs of electricity that would have been generated had the CUF at normative level been achieved, the percentage of actual compliance of RPO, the percentage of compliance if the solar, wind and bio-mass projects had achieved the normative CUF provided in the PPA. The data submitted by Discoms is as under:

(i) Wind RPO

FY	Commissioned capacity during the FY (MW)	CUF (in terms of the PPA) (%)	The CUF actually achieved	Energy capable of being generated at the CUF (in terms of the PPA)(MU)	Energy actually generated(MU)	RPO Compliance for the FY, as per Commission (%)	RPO compliance if the CUF in terms of the PPA, had been achieved (%)	Actual compliance of RPO obligation (%)
2007-08	42.71	20%	15.59	804.54	626.98	4.00	2.19	1.70
2008-09	195.35	20%	13.38	1144.60	765.58	5.00	2.94	1.97
2009-10	350.70	20%	12.63	1759.03	1110.89	6.00	3.91	2.47
2010-11	404.80	20%	11.74	2468.24	1449.35	6.75	5.30	3.11
2011-12	499.15	20%	13.88	3351.90	2325.53	4.50	6.69	4.64
2012-13	593.55	20%	14.26	4382.65	3124.19	5.10	7.92	5.65
2013-14	51.20	20%	16.30	4472.35	3643.95	5.70	7.57	6.17
2014-15	538.85	20%	14.55	5416.41	3941.46	6.80	8.03	5.85
2015-16	659.50	20%	13.50	6589.86	4446.71	7.30	9.55	6.44
2016-17	0.00	20%	15.99	6571.86	5252.64	7.80	9.44	7.54

12.It is submitted by Discoms that as an ‘obligated entity’ it have done all that is within their power and control to fulfil the RPO and had taken due and adequate steps to undertake the same, but could not do for reasons beyond the control of the Discoms.

13.Commission has considered the submissions of Discoms and looked into the material placed by Discoms. From material produced, Commission observe that Discoms have signed PPAs with an intention to comply with RPO but generation of electricity by the generators was not adequate to fulfill the RPO. If generation was to the level expected in the PPAs, RPO obligation would have been fulfilled by Discoms without any difficulty. On account of under generation by the generators, RPO in terms of energy has not been purchased to the extent required,”

16.Commission has observed that even though adequate quantum of PPAs were signed by Discoms in the past, the generation in terms of energy was not to the expected level and consequently there is shortage in RPO in terms of energy. Therefore, Commission advise the Respondent Discoms to assess the energy requirement for compliance of RPO more realistically in advance and sign the PPA accordingly in future and comply with RPO Regulations without fail...”

The Appellant submitted that a collective reading of the above-mentioned orders in tandem reveals that, during March 2016, the Discoms had a 2 year history of under achievement of RPO in terms of the MUs. Yet, RERC had accepted their erroneous submissions that their RPO had been fulfilled in clear contradiction of its own regulations as well as the law of the land.

3.11. The Hon’ble Supreme Court in the case of *Hindustan Zinc Ltd. v. Rajasthan Electricity Regulatory Commission*, (2015) 12 SCC 611, while interpreting the same RERC RPO Regulations 2010 (as also applicable in the instant matter), has also held that:

*“51. In view of the above provision, the obligated entity in case of genuine difficulty may seek to carry forward of RE obligation or also may seek waiver. Therefore, in view of the aforesaid reasons, the contentions urged on behalf of the appellants in this regard must fail. It is pertinent to note the submission made on behalf of RERC that 21 States in the country have framed similar regulations imposing such renewable purchase obligation on both distribution licensees as well as captive gencos entities such as the appellants herein. The impugned Regulations have been enacted in order to effectuate the object of promotion of generation of electricity from renewable sources of energy as against the polluting sources of energy which principle is enshrined in the Act, the National Electricity Policy of 2005 and the Tariff Policy of 2006. **The provisions requiring purchase of minimum percentage of energy from renewable sources of energy have been framed with an object of fulfilling the constitutional mandate with a view to protect environment and prevent pollution in the area by utilising renewable energy sources as much as possible in larger public interest.** The High Court has considered the submissions of the appellants and has rightly rejected the same on the ground that the RE obligation imposed on the captive gencos under the impugned Regulations is neither ultra vires nor violative of the provisions of the 2003 Act and cannot in any manner be regarded as a restriction on the fundamental rights guaranteed to the appellants under the Constitution.”*

[Emphasis Supplied]

The Appellant submitted that the RPO prescribed by the RERC as a percentage of the minimum consumption is merely a minimum requirement and there is no maximum limit which has been set.

3.12. An amendment dated 11.04.2016 was made to the Wind Policy 2012 wherein Clause 4.1.2 was amended to state that:

“4.1.2 Wind Power Plants for direct sale of power to Discom(s) of Rajasthan for the years 2013-14 onwards (clause 4.1.2):

...

- b) *The State will promote setting up of wind power plants for direct sale to Discoms of Rajasthan for the year 2016-17 on the preferential tariff determined by the RERC, provided that the project has been finally approved by the State Level Empowered Committee under clause 16 before 31.03.2016”*

The Appellant submitted that the project of the Appellant was squarely covered under this amendment. However, the Rajasthan Government’s suspension of this amendment by way of notification dated 24.03.2017 i.e. during the course of hearings before the RERC, was completely arbitrary and the only person/project affected by this arbitrary action was the 90 MW Nidhi Project of the Appellant herein.

3.13. The Hon’ble Supreme Court in the case of *Sachidan and Pandey v. State of W.B.*, (1987) 2 SCC 295 held that:

“4....The question raised in the present case is whether the Government of West Bengal has shown such lack of awareness of the problem of environment in making an allotment of land for the construction of a five star hotel at the expense of the zoological garden that it warrants interference by this Court? Obviously, if the government is alive to the various considerations requiring thought and deliberation and has arrived at a conscious decision after taking them into account, it may not be for this Court to interfere in the absence of mala fides. On the other hand, if relevant considerations are not borne in mind and irrelevant considerations influence the decision, the court may interfere in order to prevent a likelihood of prejudice to the public. Whenever a problem of ecology is brought before the court, the court is bound to bear in mind Article 48-A of the Constitution, the Directive Principle which enjoins that

“the State shall endeavour to protect and improve the environment and to safeguard the forests and wild life of the country”, and Article 51-A(g) which proclaims it to be the fundamental duty of every citizen of India “to protect and improve the natural environment including forests, lakes, rivers and wild life, and to have compassion for living creatures”. When the court is called upon to give effect to the Directive Principle and the fundamental duty, the court is not to shrug its shoulders and say that priorities are a matter of policy and so it is a matter for the policy-making authority. The least that the court may do is to examine whether appropriate considerations are borne in mind and irrelevancies excluded. In appropriate cases, the court may go further, but how much further must depend on the circumstances of the case. The court may always give necessary directions. However the court will not attempt to nicely balance relevant considerations. When the question involves the nice balancing of relevant considerations, the court may feel justified in resigning itself to acceptance of the decision of the concerned authority. We may now proceed to examine the facts of the present case.

40. *On a consideration of the relevant cases cited at the Bar the following propositions may be taken as well established: State-owned or public-owned property is not to be dealt with at the absolute discretion of the executive. Certain precepts and principles have to be observed. Public interest is the paramount consideration. One of the methods of securing the public interest, when it is considered necessary to dispose of a property, is to sell the property by public auction or by inviting tenders. Though that is the ordinary rule, it is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule but then the reasons for the departure must be rational and should not be suggestive of discrimination. Appearance of public justice is as important as doing justice. Nothing should be done which gives an appearance of bias, jobbery or nepotism.”*

3.14. Further, the Hon'ble Supreme Court in the case of *Krishnan Kakkanth v. Govt. of Kerala*, (1997) 9 SCC 495 held that:

“36. To ascertain unreasonableness and arbitrariness in the context of Article 14 of the Constitution, it is not necessary to enter upon any exercise for finding out the wisdom in the policy decision of the State Government. It is immaterial whether a better or more comprehensive policy decision could have been taken. It is equally immaterial if it can be demonstrated that the policy decision is unwise and is likely to defeat the purpose for which such decision has been taken. Unless the policy decision is demonstrably capricious or arbitrary and not informed by any reason whatsoever or it suffers from the vice of discrimination or infringes any statute or provisions of the Constitution, the policy decision cannot be struck down. It should be borne in mind that except for the limited purpose of testing a public policy in the context of illegality and unconstitutionality, courts should avoid “embarking on uncharted ocean of public policy”.

37. The contention that the impugned circular suffers from hostile discrimination meted out to the farmers in the northern region of the State covered by the financial assistance under the governmental schemes, by fastening such assistance with an obligation to purchase pumpsets only from the two approved dealers, cannot be accepted in the facts of the case. The reasons for fastening the farmers of northern region with the obligation to purchase pumpsets from the said two dealers have been indicated by Mr Bhat and Mr Gupta and, in our view, it cannot be held that such reasoning suffers from lack of objectivity. The law is well settled that even in the matter of grant of largesse, award of job contracts etc. the Government is permitted to depart from the general norms set down by it, in favour of a particular group of persons by subjecting such persons with different standard or norm, if such departure is not arbitrary but based on some valid principle which in itself is not irrational, unreasonable or discriminatory (Dayaram Shetty case [(1979) 3 SCC 489 : AIR 1979 SC 1628]).”

3.15 The Appellant submitted that a bare perusal of the above reveals that:

- a) The Discoms were well aware that the RPO is measured in MUs and not merely capacity contracted.

- b) The Discoms were clear that they were not meeting RPO in MU terms.
- c) Therefore, it was in that context of RPO shortfall for FY 2015-16, that the proposals of Suzlon and Vish Wind for a total additional capacity of 252 MW was approved by SLEC in its meetings dated 10.06.2015 and 01.02.2016.
- d) This is a clear case of discrimination and arbitrariness where the Appellant's balance capacity (27.1 MW) was sacrificed to benefit Suzlon and Vish Wind, even though their capacities were approved later. It is pertinent to note that while the Appellant's Project was approved in January 2015, the Project's of Vish Wind and Suzlon were approved in June 2015 and February 2016. However, while executing the PPAs, preference was given to the projects of Vish Wind and Suzlon without any basis.
- e) The Discoms have attempted to mislead this Hon'ble Tribunal as they have contended that only 503 MW was required. To the contrary, the evidence on record exhibits that approvals were accorded for a total of 626.4 MW by the SLEC and that too, at the behest of the Discoms.

3.16 The Appellant submitted that despite repeated follow-ups the Discoms refused to sign the PPA for the balance capacity of 27.1 MW (out of total approved 90 MW capacity) on the grounds that the RPO has been fulfilled (i.e. basis an erroneous assumption that it was obligated to sign PPAs only to the extent of 503 MW) and that there is no capacity left to be allocated. It is humbly submitted that such reasoning adduced by the Discoms is erroneous as, the entire capacity approved by the SLEC for fulfilment of RPO for FY 2015-16 was 626.4 MW. Further, such

additional capacity was approved at the behest and presence of the Discoms. Hence, it cannot be allowed to now take a contradictory stance at this belated stage with regards to the approved and obligated capacity. It is also noteworthy that at this stage the Discoms were well aware that, the RPO compliance is calculated basis the actual energy consumption in MUs. Hence, additional capacity to other developers was approved. Assuming for the sake of argument but not admitting that, the contracted capacity itself was enough to meet RPO, it is pertinent to note that even then the Discoms have defaulted by contracting a capacity of merely 501.5 MW (admitted fact based on submissions made by the Discoms before this Hon'ble Tribunal) as against total approved capacity of 626.4 MW by the SLEC.

3.17 Therefore, he submitted that the order impugned passed by the Respondent No.1/the State Commission may be set aside and the prayer sought in the Appeal by the Appellant may be granted as prayed for in the interest of justice and equity.

4. The oral and written submissions of the learned counsel appearing for the Respondent Nos. 3 to 6 are as follows:-

4.1 The appellant had filed the petition before the State Commission with frivolous statements alleging malafide and alleging giving benefit to certain other generators over and above appellant. The said allegation is totally baseless. For the financial year 2015-16, the Rajasthan Renewal energy Corporation Limited (RRECL) was informed by the respondents vide their letter dated 13th May, 2015 that for the financial year 2015-16 addition of New Wind Power

Project upto the extent of 503 MW new wind power plants would be required and the PPA would be executed for the said capacity on preferential tariff

4.2 During the financial year 2015-16, as and when the PPAs were sent by RRECL, the same were executed in the preference of being sent by RRECL. By the time when the PPAs of the appellant Generator were forwarded, no quantity was left to be added and therefore, upto the extent of requirement the PPA was executed with the appellant. Respondent Discoms are not obliged to execute PPA on preferential tariff beyond their requirement. PPAs were executed strictly in priority according to the PPAs forwarded by RRECL upto the extent of requirement. The capacity addition of 503 MW of wind power plant in financial year 2015-16 was as per the decision of RERC target of 7.3%.

4.3 So far as the claim of the petitioner seeking direction to execute the PPA on the basis of notification dated 11.4.2016 issued by the Government of Rajasthan Energy Department is concerned, it is submitted that as per the RPO Targets of the answering respondent is concerned for the year 2016-17 upto May 2016 against the Target of 7.8% achievement was of 9.5% and further upto December 2016 against the target of 7.8% the achievement was 8.11%. The copies of achievements of target were placed before the commission. Thus the Discoms had no requirement to make a capacity addition as per the notification dated 11.4.2016. The notification itself provides that the preferential tariff PPA has to be executed only upto the extent of renewal purchase obligation. Even otherwise no generator can force the Discom to purchase

non conventional; energy⁶ which is more costlier except upto the extent of RPO Target as ultimate object is to watch the interest of consumer who is the purchaser of the electricity. Therefore the petitioner has got no case to claim and seek direction asking to enter into power purchase agreement of capacity of 27.1 MW. Further mere approval by SLEC does not ipso-facto mandates the execution of PPA. Approval issued itself provides as under:-

"6" It is also made clear that SLEC approval is only for setting up of a project and is not for purchase of power by Discom under preferential tariff. The Discom will execute PPAs for preferential tariff only upto the RPO determined by RERC till 2015-16 as per the wind policy 2012".

4.4 SLEC approval does not create a right in favour of a generator to claim execution of a PPA and therefore also the prayer prayed for by the appellant is baseless. It is also relevant to mention here that after the receipt of the PPA forwarded by RRECL of the appellant generator and having executed the PPA with appellant generator upto the extent of required capacity, not even a single PPA has been executed by the answering respondent with any other generator and thus, leveling of allegation of malafide, arbitrary and discriminatory are baseless. It is further submitted that the Government of Rajasthan vide notification dated 24/3/2017 has kept the notification dated 11/4/2016 in abeyance.

4.5 Discom has not entered into any PPA after achieving the Target . The argument of the appellant that the RPO is in term of energy and not contracted capacity is baseless. The RPO is in percentage

of total consumption and therefore on the basis of total consumption the need is calculated and in term of contracted capacity based on the existing CUF, the PPA are entered into. The Discom cannot enter into PPA on the basis of the fact that either some plants do not generate or some plants do not achieve the CUF. The PPA are entered on the basis of requirement to fulfill RPO based on the CUF of the Plant in terms of capacity of the Plant and therefore argument of the petitioner that the PPA cannot be entered on the basis of the capacity is baseless and impractical.

4.6 Bare reading of the all the minutes of meeting on which the petitioner has placed on reliance Clearly speaks of Discom requirement of 503 MW of Capacity for the FY 2015-16 and on that basis only the Approval were granted subject to entering in PPA upto the extent of RPO obligation and therefore beyond that, Discom was not under obligation to enter in to PPA and this was clearly mentioned in approval of the Appellant.

4.7 In subsequent meeting the decision to approval were given for the reason that sometime all the approved projects do not commission and therefore subsequently approval were granted but they were subject to the need of 503 MW as is evident from the minutes of meeting and therefore the petitioner cannot claim and cannot force the Discom to enter in to PPA beyond there need. Further tying the costlier power for long term without need would also be against the interest of consumers and therefore also beyond RPO , the PPA cannot be executed.

- 4.8 The Computation of requirement of capacity addition for fulfillment of RPO is based on certain assumptions, such as projected energy demand of Discoms and average CUF of preceding Year. The shortfall is worked out in MW capacity which will be required to be added for RPO fulfillment which is 503 MW for FY 2015-16. There may be shortfall in RPO fulfillment due to any reasons whatsoever which may be compensated by RE certificate instead of creating a long term Liability by entering into PPA with wind generators in the commercial interest of consumers. Further the commission cannot direct the Discom to enter into PPA.
- 4.9 The learned counsel appearing for the Respondent Nos.3 to 6 interalia contended and submitted that the Impugned Order passed by the Respondent No.1/the State Commission is in accordance with law. The counsel for the Appellant has failed to make out any case on merits. There is neither any error nor legal infirmity in the Impugned Order. The Impugned Order passed by the Respondent No.1/the State Commission is well found and well reasoned. Interference by this Tribunal does not call for.
5. We have heard the learned counsel for the Appellant and the learned counsel for the Respondent No.2 at considerable length of time and after careful perusal of the Impugned Order passed by the State Commission and after going through the written submission and rejoinder filed by the counsel appearing for both the parties and after critical evaluation of entire relevant material available on records and the pleadings available on the file, the following issues in the instant Appeal arise for our consideration:-

1. Whether approval of projects by State Level Empowered Committee (“SLEC”) create a right in favour of projects for signing of PPA with DISCOMs on preferential tariff?
2. Whether the DISCOMs erred in calculation of required capacity for meeting RPO target with adoption of higher normative CUF.
3. Whether the DISCOMs erred in signing of PPA with the projects approved later as a part of supplementary list of 124 MW and denying to sign PPA with the Appellant?

6. Our Considerations and Analysis:

Issue No.1 : Whether approval of projects by State Level Empowered Committee (“SLEC”) create a right in favour of projects for signing of PPA with DISCOMs on preferential tariff?

The Appellant have submitted as under:-

- i) In 2004, the Government of Rajasthan notified a policy for promoting generation of electricity through non-conventional energy sources (“**Wind Policy, 2004**”).
- ii) The Rajasthan Electricity Regulatory Commission (“**RERC**”) notified (Power Purchase & Procurement Process of Distribution Licensee) Regulations 2004 (“**Purchase Regulations of 2004**”).

These Regulations provide for purchase of certain percentage of electricity through renewable energy sources including wind power by the Distribution Licensees.

- iii) In 2007, the Government of Rajasthan framed Rajasthan Land Revenue (Allotment of Land for Setting up of Power Plant Based on Renewable Sources) Rules, 2007 (**“Rules of 2007”**), so as to provide a mechanism for allotment of land at subsidized amount for the purpose of setting up of renewable energy power plants.
- iv) In 2012 the Government of Rajasthan notified Policy for Wind 2012 (**“Wind Policy, 2012”**) for Promoting Generation of Electricity superseding Wind Policy 2004,
- v) In 2012, the Appellant received the approval for allotment of land for setting up of the wind project. In terms of the allotment letter dated 19.07.2011, the Appellant was required to set up the power project within a period of two years with schedule of commissioning as on 18.07.2014.
- vi) RRECL in terms of Wind Policy 2012 granted in principle approval to the Project by way of communication dated 07.10.2014 and forwarded the same to the State Level Empowered Committee (**“SLEC”**), subject to fulfilment of certain conditions laid down in the aforesaid approval. One such condition was that the power purchase agreement would be executed by the Discoms with the Appellant only if the Project is commissioned on or before 31.3.2016.

- vii) The Appellant deposited grids connectivity charges with RVPNL amounting to Rs. 1.8 Crores and also deposited Rs. 4.5 Crores towards security charges of RRECL on 05.12.2014.
- viii) After completing all the requisite formalities, the SLEC in its meeting dated 06.01.2015, granted final approval to the Project of the Appellant for a capacity of 90 MW.
- ix) The SLEC out of total 503 MW in the first phase approved a capacity of 374.4 MW of new Wind Power Projects which included 90 MW power project of M/s. Nidhi Wind Farms Private Limited (**“Appellant”**).
- x) RDPPC vide letters dated 13.05.2015 and 19.05.2015 intimated that capacity addition of 503 MW New Wind Power Project would be required by the Discoms to meet the RPO target during the FY 2015-16.
- xi) Subsequently the SLEC approved another capacity to 128 MW of new Wind Power Projects making a cumulative approval of 502.4 MW, (i.e. 374.4 MW + 128 MW = 502.4 MW). It was further mentioned that the preferential tariff to 128 MW capacity would be available only if the projects were commissioned by 31.03.2016.

The Appellant have submitted that the decision to set up the project of 90 MW was taken after due approval from the state authorities and the project was commissioned within the timelines prescribed.

It is the case of the Appellant that the project was set up under the Wind Policy 2012 promulgated by the State Government of Rajasthan with the main aim to encourage wind power generation in the state and to meet the RPO targets by the DISCOMs.

To achieve this objective, the Government of Rajasthan set up Standing Level Screening Committee ("SLSC") and Standing Level Empowered Committee ("SLEC") with the specific participation of the DISCOMs.

The project got in-principle approval on 7th October, 2014 ("SLSC" approval) and final approval on 6th January, 2015 ("SLEC" approval). As such the project was approved for the entire 90 MW capacity by the Government of Rajasthan for meeting the RPO obligation with a condition to ensure commissioning of the project by 31st March, 2016.

- xii) However, out of a total capacity of 90 MW of the Appellant the DISCOMs signed PPA with the Appellant for a part capacity of 62.9 MW only and left 27.1 MW.
- xiii) **Per contra**, the learned counsel representing the Respondent Nos. 3 to 6 submitted that though it is not disputed that the project is covered under Wind Policy 2012 notified by the Government of Rajasthan and the project received in-principle approval from SLSC as well as final approval from SLEC, however, SLEC approval does not create a right in favour of a generator to claim execution of the PPA and therefore also the prayer prayed by the Appellant is baseless.

He further submitted that SLEC does not ipso-facto mandates the execution of PPA. Approval issue itself provides as under:-

“6. It is also made clear that SLEC approval is only for setting up of a project and is not for purchase of power by Discom under preferential tariff. The Discom will execute PPAs for preferential tariff only upto the RPO determined by RERC till 2015-16 as per the wind policy 2012”.

Commission’s view:

- xiv) The State Commission in its Impugned Order dated 19.04.2017 observed that the Appellant had set up a power plant by spending considerable amount and the same was ready for generation. It observed that approval for setting up of the plant was given by SLEC on 06.01.2015 under the policy for Promoting of Electricity from Wind 2012 and the State/Discoms as well as this State Commission under the provisions of the Electricity Act, 2003 have to promote RE power.
- xv) The State Commission has further observed that instead of leaving the Appellant to fend for itself, in the peculiar facts and circumstances of this case, Respondents may consider to sign the PPA for the remaining capacity also and count the same for RPO for FY 2017-18 so that the investment made by the Appellant will be put to use and state will get RE to fulfil its obligation.
- xvi) It is clear from the observation made by the State Commission that even the State Commission in their Impugned Order have given

favourable recommendations and have said so that “Respondents may consider to sign the PPA for the remaining capacity also and count the same for RPO for FY 2017-18 so that the investment made by the Appellant will be put to use and state will get RE to fulfil its obligation.”

In light of the Impugned Order dated 19.04.2017 passed by the Respondent No.1/the State Commission during the course of the submissions on 28.03.2019 we have directed both the parties to negotiate and report the same in the interest of justice. The order dated 28.03.2019 reads as under:-

“The Principal Secretary (Energy), Government of Rajasthan is hereby directed to call a meeting of the Chairman of the DISCOMs/Respondent Nos. 3, 4 & 5 and also call the Director of the Appellant and negotiate the matter for an amicable settlement in the light of the Order dated 19.04.2017 passed in Petition No. RERC/1102/17 at para 27 of the order and report the settlement arrived between the Appellant and the Chairman of the DISCOMs/Respondent Nos. 3, 4 & 5, as expeditiously as possible, at any rate, within a period of two weeks from today i.e. on or before 10.04.2019.”

Accordingly, Principal Secretary, Energy, GOR convened a meeting on 08.04.2019 and an offer was given to the appellants for signing of PPA at the lowest tariff which will be discovered through competitive bidding to be conducted for procurement of wind power in Rajasthan in this financial year. The appellant M/s.

Mytrah Vayu (SOM) Pvt. Ltd did not agree to the Proposal and hence no amicable settlement was arrived at.

Our Findings:

xvii) It is established fact that the Appellant set up its project of 90 MW for producing electricity under the Wind Policy, 2012 notified by the Government of Rajasthan for promoting generation of electricity through wind. The Appellant was allotted land at subsidised rates. The Government of Rajasthan made extensive efforts for promotion of generation of electricity from renewable energy sources including wind and created High Level Screening Committee and Standing Level Empowered Committee. All this was done for promotion of electricity from renewable energy sources. Detailed discussions were held to finalise the required capacity for meeting RPO targets and accordingly a list of projects were identified and approved with condition to ensure for preferential tariff.

The submission made by the Respondents that the “State Level Empowered Committee (“**SLEC**”) approval is only for setting up of a project and is not for purchasing of power by the DISCOMs under preferential tariff” has no merit. The Appellant had set up the project after obtaining due approval from the Government of Rajasthan for generation of electricity and for selling the same to DISCOMs to meet the RPO target at preferential tariff under the Wind Policy 2012. If the Appellant has commissioned the project as per agreed schedule, not signing of PPA by DISCOMs for the power generated by the project of the Appellant on the ground that SLEC approval is only for setting up of the project and not for purchasing of power by the DISCOMs is illogical and absurd. One may ask what is the

purpose of the approval if the PPA is not signed? What will happen to the investment made by the Appellant for setting up of the project on the approval of none other than the Government of Rajasthan and after a detailed exercise by high profile committees such as State Level Empowered Committee (“**SLEC**”) and State Level Screening Committee (“**SLSC**”)? In view of this the submission made by the Respondents that SLEC’s approval is only for setting up of the project and is not for purchase of power by DISCOMs under preferential tariff needs to be rejected forthwith.

It is obvious from the foregoing paras that only after getting the approval from the Government of Rajasthan, the Appellant took a decision to set up the project and invest its funds in the project. As such we are of the opinion that in view of the fact that the project has been approved by none other than the Government of Rajasthan, under the Wind Policy 2012 to meet the RPO target, after a detailed exercise by two high profile Committees i.e. Standing Level Screening Committee and Standing Level Empowered Committee, denying signing of PPA by DISCOMs, for the full capacity when the project has been completed, as agreed by the scheduled date of commissioning i.e. before 31.03.2016, is wrong. In fact, once the project has been approved by State Government after a detailed exercise then it creates a right in favour of the Appellant to sign PPA with the DISCOMS for full 90 MW capacity.

Issue No.2: Whether the DISCOMs erred in calculation of required capacity for meeting RPO target with adoption of higher normative CUF.

The Appellant have submitted as under:-

xviii) RERC, in the Order dated 14.11.2017 in Petition No. RERC-867/16, has held that

“11. Discoms in support of the above submissions have placed year wise statement of the number of PPA’s signed, contracted capacity under the said PPAs, the CUF supposed to be achieved by the project developers, CUF actually achieved, the Million Units of energy generated, the MUs of electricity that would have been generated had the CUF at normative level been achieved, the percentage of actual compliance of RPO, the percentage of compliance if the solar, wind and bio-mass projects had achieved the normative CUF provided in the PPA. The data submitted by Discoms is as under:

(i) Wind RPO

<i>FY</i>	<i>Commissioned capacity during the FY (MW)</i>	<i>CUF (in terms of the PPA) (%)</i>	<i>The CUF actually achieved</i>	<i>Energy capable of being generated at the CUF (in terms of the PPA)(MU)</i>	<i>Energy actually generated(MU)</i>	<i>RPO Compliance for the FY, as per Commission (%)</i>	<i>RPO compliance if the CUF in terms of the PPA, had been achieved (%)</i>	<i>Actual compliance of RPO obligation (%)</i>
2007-08	42.71	20%	15.59	804.54	626.98	4.00	2.19	1.70
2008-09	195.35	20%	13.38	1144.60	765.58	5.00	2.94	1.97
2009-10	350.70	20%	12.63	1759.03	1110.89	6.00	3.91	2.47
2010-11	404.80	20%	11.74	2468.24	1449.35	6.75	5.30	3.11
2011-12	499.15	20%	13.88	3351.90	2325.53	4.50	6.69	4.64
2012-13	593.55	20%	14.26	4382.65	3124.19	5.10	7.92	5.65
2013-14	51.20	20%	16.30	4472.35	3643.95	5.70	7.57	6.17
2014-15	538.85	20%	14.55	5416.41	3941.46	6.80	8.03	5.85
2015-16	659.50	20%	13.50	6589.86	4446.71	7.30	9.55	6.44
2016-17	0.00	20%	15.99	6571.86	5252.64	7.80	9.44	7.54

12.It is submitted by Discoms that as an ‘obligated entity’ it have done all that is within their power and control to fulfil the RPO and had taken due and adequate steps to undertake the same, but could not do for reasons beyond the control of the Discoms.

13. Commission has considered the submissions of Discoms and looked into the material placed by Discoms. From material produced, Commission observe that Discoms have signed PPAs with an intention to comply with RPO but generation of electricity by the generators was not adequate to fulfill the RPO. If generation was to the level expected in the PPAs, RPO obligation would have been fulfilled by Discoms without any difficulty. On account of under generation by the generators, RPO in terms of energy has not been purchased to the extent required,”

16. Commission has observed that even though adequate quantum of PPAs were signed by Discoms in the past, the generation in terms of energy was not to the expected level and consequently there is shortage in RPO in terms of energy. Therefore, Commission advise the Respondent Discoms to assess the energy requirement for compliance of RPO more realistically in advance and sign the PPA accordingly in future and comply with RPO Regulations without fail...”

- xix) The Appellant further submitted that the DISCOMs have taken a high normative Capacity Utilisation Factor (“CUF”) in their calculation for the capacity required for meeting the RPO target. From the historical data of CUF for the last ten years it is observed that CUF has varied between 11.74% and 16.30% during the last ten years i.e. 2007-2017. The Appellant has further stated that the State Commission has also made similar observations in their order dated 14.11.2017 wherein the Commission has advised to DISCOMs to assess the energy requirement of RPO more realistically in advance and sign the PPA accordingly and comply with RPO regulation without fail.
- xx) **Per contra**, the learned counsel representing the Respondent Nos. 3 to 6 submitted that the RPO is in percentage of total

consumption and therefore on the basis of total consumption the need is calculated and in terms of contracted capacity based on the CUF, the PPAs are entered into. The DISCOMs cannot enter into PPA on the basis of the fact the either some do not generate or some plants achieved a CUF. The PPAs are entered on the basis of requirement to fulfil RPO based on the CUF of the plant in terms of capacity of the plant and therefore argument of the Appellant that PPA cannot be entered on the basis of the capacity is baseless and impractical. The computation of requirement of capacity addition for fulfilment of RPO is based on certain assumptions, such as projected energy demand of DISCOMs and average CUF of preceding years.

Our Findings:

- xxi) The DISCOMs calculated the required capacity of 503 MW to meet the RPO target for 2015-16 on the basis of CUF of 20%. From the historical data of CUF for the past 10 years it is clear that CUF has varied in the last ten years in the range of 11.74% to 16.38%. This is an important observation and DISCOMs should have taken judicial note of this important aspect while working out the required capacity to meet the RPO target. As such the action of DISCOMs in calculating the required capacity of 503 MW on the basis of normative CUF of 20% was wrong. The DISCOMs should have been more cautious and applied their due diligence in adopting a more realistic value of CUF for better estimation of required capacity. The State Commission has not considered this aspect also in their Impugned Order. Therefore, the Impugned Order passed by the first Respondent/the State Commission is liable to be set aside.

Issue No.3: Whether the DISCOMs erred in signing of PPA with the projects approved later as a part of supplementary list of 124 MW and denying to sign PPA with the Appellant?

The Appellant submitted as under:-

- xxii) RRECL in terms of Wind Policy 2012 granted in principle approval to the Project by way of communication dated 07.10.2014 and forwarded the same to the State Level Empowered Committee (“SLEC”), subject to fulfilment of certain conditions laid down in the aforesaid approval. One such condition was that the power purchase agreement would be executed by the Discoms with the Appellant only if the Project is commissioned on or before 31.3.2016.
- xxiii) After completing all the requisite formalities, the SLEC in its meeting dated 06.01.2015, granted final approval to the Project of the Appellant for a capacity of 90 MW.
- xxiv) Subsequently the SLEC approved another capacity to 128 MW of new Wind Power Projects making a cumulative approval of 502.4 MW, (i.e. 374.4 MW + 128 MW = 502.4 MW). It was further mentioned that the preferential tariff to 128 MW capacity would be available only if the projects were commissioned by 31.03.2016.
- xxv) The SLEC in its meetings held on 10.06.2015 also approved another 124 MW of new Wind Power Project in addition to 503 MW, earlier to take care of contingency arising out of delay in connectivity of Wind Power Projects. As per minutes of the meeting

the developers could set up their project for an additional capacity of 124 MW under captive /sale to third party/open access mode. Subsequently, the SLEC in its meeting held on 1st February, 2016 approved this 124 MW capacity under the preferential tariff for sale to DISCOM for the FY 2015-16.

- xxvi) From the perusal of the minutes of the State Level Empowered Committee (“**SLEC**”) held on 10.06.2015, it is clear that wind capacity of 374.4 MW had already been approved by SLEC in the past and 128 MW capacity was granted final approval in proportionate manner under preferential tariff mode for meeting the RPO target of the FY 2015-16.
- xxvii) The project of the Appellant of 90 MW is a part of the capacity of 374.4 MW approved in the past in the first phase out of a total part of 503 MW installed capacity required to meet the RPO target whereas 128 MW was approved in the second stage and 124 MW was a supplementary list of the project approved at the end over and above 503 MW capacity.
- xxviii) **Per contra**, the learned counsel representing the Respondent Nos. 3 to 6 submitted that for the FY 2015-16, the Rajasthan Renewal energy Corporation Limited (RRECL) was informed by the respondents vide their letter dated 13th May, 2015 that for the financial year 2015-16 addition of New Wind Power Project upto the extent of 503 MW new wind power plants would be required and the PPA would be executed for the said capacity on preferential tariff

xxix) During the financial year 2015-16, as and when the PPAs were sent by RRECL, the same were executed in the preference of being sent by RRECL. By the time when the PPAs of the appellant Generator were forwarded, no quantity was left to be added and therefore, upto the extent of requirement the PPA was executed with the appellant. Respondent Discoms are not obliged to execute PPA on preferential tariff beyond their requirement. PPAs were executed strictly in priority according to the PPAs forwarded by RRECL upto the extent of requirement. The capacity addition of 503 MW of wind power plant in financial year 2015-16 was as per the decision of RERC target of 7.3%.

Our Findings:

xxx) The reason given by the DISCOM for not signing the PPA for the balance capacity of 27.1 MW was that the capacity required of 503 MW for meeting the target of RPO for 2015-16 had been fulfilled. This happened because PPA of the projects which were approved as a part of supplementary list of 124 MW approved in the end, were signed by the DISCOMs prior to the Appellant.

In a way DISCOMs allowed the project which were approved at the end to jump before the projects which were approved earlier in the first phase and signed PPA with them and did not sign PPA with the Appellant.

Such an action by DISCOM is wrong and against principal of natural justice and equity and as such DISCOM committed a mistake. The State Commission in their Impugned Order have not considered this fact.

ORDER

For the foregoing reasons as stated above, the instant Appeal being Appeal No. 353 of 2018 filed by the Appellant is allowed.

The Impugned Order dated 19.04.2017 passed in Petition No. RERC/1102/17 by the Rajasthan Electricity Regulatory Commission is hereby set aside.

The matter stands remitted back to the Respondent No.1/the State Commission to pass the order in the light of the observations made in the preceding paragraphs as expeditiously as possible at any rate within a period of three months from the date of receipt of copy of this order.

The Appellant and the Respondents herein are directed to appear before the first Respondent, Rajasthan Electricity Regulatory Commission personally or through their counsel without notice on 27.05.2019 to collect necessary date of hearing.

In view of the judgment/order passed in the Appeal No. 353 of 2018, the relief sought in IA No. 1408 of 2018 does not survive for consideration and stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **30th day of April, 2019.**

(Ravindra Kumar Verma)
Technical Member

√

REPORTABLE/NON-REPORTABLE

mk

(Justice N. K. Patil)
Judicial Member