

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

**Appeal No. 278 of 2016 & 307 of 2016**

**Dated: 9<sup>th</sup> March, 2018**

**Present: Hon'ble Mr. I.J. Kapoor, Technical Member  
Hon'ble Mr. Justice N K Patil, Judicial Member**

**Appeal No. 278 of 2016 & IA NO. 573 OF 2016**

**In the matter of :-**

1. **JBM Solar Power Pvt. Ltd. (JBMSPPPL)  
Plot No. 9, Institutional Area,  
Sector 44,  
Gurgaon 122003** **... Appellant No.1**

**Versus**

1. **Haryana Electricity Regulatory Commission  
Bays No. 33-26, Sector-4  
Panchkula- 134109** **...Respondent No 1**

2. **Haryana Power Purchase Centre (HPPC)  
Shakti Bhawan,  
Sector-6,  
Panchkula-134108** **...Respondent No 2**

**Counsel for the Appellant(s):** **Mr. Anand K Ganeshan  
Ms. Swapna Seshadri  
Ms. Neha Garg  
Ms. Saloni Sacheti  
Ms. Aditi Mahapatra  
Mr. Sandeep Rajpurohit  
Ms. Parichita Choudhury**

**Counsel for the Respondent(s): Mr. Nishant Ahlawat for R-1**

**Mr. Aditya Singh  
Mr. Gaurav Gupta for R-2**

**Appeal No. 307 of 2016**

**In the matter of :-**

**1. Subhash Infra Engineers Pvt. Ltd. (SIEPL)  
Plot No. 743-P, Sector 38,  
Gurgoan 122001 ... Appellant No.2**

**2. Utrecht Solar Pvt. Ltd. (USPL)  
301-A, Unitech Arcadia South City – II,  
Sector 49,  
Gurgoan 122018 ... Appellant No. 3**

**Versus**

**1. Haryana Electricity Regulatory Commission  
Bays No. 33-26, Sector-4  
Panchkula- 134109 ...Respondent No 1**

**2. Haryana Power Purchase Centre (HPPC)  
Shakti Bhawan,  
Sector-6,  
Panchkula-134108 ...Respondent No 2**

**Counsel for the Appellant(s): Mr. Anand K Ganeshan  
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Ms. Neha Garg  
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Ms. Parichita Choudhury**

**Counsel for the Respondent(s): Mr. Nishant Ahlawat for R-1**

**Mr. Aditya Singh for R-2**

## JUDGMENT

### PER HON'BLE MR. I.J. KAPOOR, TECHNICAL MEMBER

1. The present Appeals are being filed by JBMSolar Power Pvt. Ltd., SubhashInfra Engineers Pvt. Ltd. and Utrecht Solar Pvt. Ltd.(hereinafter referred to as the “**Appellant No. 1**”, “**Appellant No. 2**” and “**Appellant No. 3**”respectively and “**Appellants**” collectively) under Section 111 of the Electricity Act, 2003 challenging the common order dated 12.09.2016/4.10.2016 (hereinafter referred to as the “**Impugned Order**”) passed by Haryana Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. HERC/PRO-6 of 2016 wherein the Chairman of the State Commission in exercise of casting vote held that the competitive bidding process and the Power Purchase Agreements (PPAs) entered into by the Respondent No. 2 with the Appellants are not in line with the competitive bidding guidelines for renewable energy generation under Section 63 of the Electricity Act, 2003, the deviations were not approved by the State Commission and hence the Power Purchases are not valid.
2. The constitution of the State Commission at the relevant time consists of the Chairman and one Member. The Member of the State Commission has given a contrary decision to that of the Chairman. The Member of the State Commission in a separate Order has held that the bidding process undertaken by the

Respondent No. 2 was in accordance with the law and the tariff discovered and finally negotiated should be accepted.

3. The Appellant No.1 is a company incorporated under the provisions of the Companies Act, 1956 having its registered office at Gurgaon. The Appellant No. 1 has been incorporated as a Special Purpose Vehicle (SPV) to establish a 20 MW Solar Power Plant in the State of Haryana, pursuant to M/s Neel Metal Products Limited (NMPL) being selected as the successful bidder in the tender process initiated by the Respondent No. 2 for solar power projects in the State of Haryana.
4. The Appellant No. 2 is a company incorporated under the provisions of the Companies Act, 1956 having its corporate office at Gurgaon. The Appellant No. 2 has established a 1 MW solar generating station in the State of Haryana, pursuant to its being selected as the successful bidder in the tender process initiated by the Respondent No. 2 for solar power projects.
5. The Appellant No. 3 is a company incorporated under the provisions of the Companies Act, 1956 having its corporate office at Gurgaon. The Appellant No. 3 has been incorporated as a Special Purpose Vehicle to establish a 1 MW solar generating station in the State of Haryana, pursuant to M/s Ultimate Sun Systems Private Limited (USSPL) being selected as the successful bidder in the tender process initiated by the Respondent No. 2 for solar power projects.

6. The Respondent No. 1, Haryana Electricity Regulatory Commission is the State Commission for the State of Haryana exercising powers and discharging functions under the provisions of the Electricity Act, 2003 ("The Act").
7. The Respondent No. 2, HPPC is the power procurement agency established for procuring electricity from various sources for the purpose of supply to the distribution licensees in the State of Haryana.
8. **Facts of the present Appeal:**
  - a) The State Commission vide order dated 13.8.2014 has fixed the levelized tariff for solar projects at Rs. 7.45/kWh for FY 2014-15. The Respondent No. 2 issued a Notice Inviting Tender (NIT) for procurement of 50 MW  $\pm$  10% of solar power on long term basis from grid connected solar PV power projects through a tariff based competitive bidding process in the month of April, 2014. In terms of the tender documents, the tariff determined by the State Commission for the FY 2014-15 has to be the ceiling tariff.
  - b) M/s Neel Metal Products Ltd (NMPL) participated in the said bidding process and offered to supply 30 MW of capacity. The bids were submitted on 10.10.2014. NMPL offered the tariff of Rs. 6.99/kWh for first 10 MW, Rs. 7.25/kWh for the next 10 MW and the balance 10 MW (two projects of 5 MW each) offered at Rs. 7.35 and Rs. 7.45/ kWh respectively.

- c) The Appellant No. 2 i.e. SIEPL offered to supply a capacity of 1 MW at the tariff of Rs. 6.90/kWh. The Appellant No. 3 i.e. USPL offered to supply 1 MW of capacity at the tariff at Rs. 7.36/kWh.
- d) Total offer of 124 MW was received in response to the bids invited by the Respondent No. 2. The bids were opened on 23.02.2015. The lowest tariff quoted was Rs. 6.50/kWh for 1 MW. During negotiations, the L1 bidder with capacity of 1 MW offered to lower the tariff to Rs. 6.44/kWh. The Respondent No. 2 invited the other bidders also to lower their tariff.
- e) During negotiations the Appellants agreed to lower the tariff to Rs. 6.44/kWh. The Respondent No. 2 could tie up capacity of 23 MW as against the bidding for 50 MW. The Respondent No. 2 issued the Letters of Intents (LOIs) on 27.03.2015 to the selected bidders. The Power Purchase Agreements (PPAs) were signed on 23.6.2015, 26.6.2015 and 19.6.2015 between the Appellant No.1, Appellant No.2 & Appellant No.3 respectively and Respondent No. 2 for the establishment Solar Power Plants and for supply of solar power on long term basis to the Respondent No. 2.
- f) The Respondent No. 2 had sought various compliances and details from the Appellants as per the PPAs. The Respondent No. 2 was also complying with the requirements of the PPAs for construction and commissioning the project in a timely manner.
- g) The construction of the transmission lines for the Solar Power Plants was the responsibility of the distribution licensee at their cost, which was delayed.

- h) Prior to the bidding process, the Respondent No. 2 had approached the State Commission for the approval of the power procurement. The Respondent No. 2 had adopted the standard bidding documents as a reference to draft the bidding documents and intimated the same to the State Commission. Various clarifications were sought by the State Commission which were clarified by the Respondent No. 2.
- i) After the various clarifications furnished by the Respondent No. 2, the State Commission, vide communication dated 08.08.2014 granted the permission to the Respondent No. 2 to proceed with the bidding process and to file with the State Commission the outcome of the bidding process for approval of the PPAs. All the deviations from the Standard Bidding Documents (SBD) which were adopted by the Respondent No. 2 for reference were communicated to the State Commission prior to 08.08.2014 and were incorporated in the bidding documents and the PPAs were signed on the said basis.
- j) The State Commission took up the process for approval of the power procurement by the Respondent No. 2 pursuant to the competitive bidding process.
- k) By the Impugned Order, the Chairman of the State Commission has held that the competitive bidding process was not conducted in terms of Section 63 of the Act following the standard bidding guidelines of the Government of India (GoI). The Chairman held

that there were deviations which were not approved, the price discovered in the bidding process was not aligned to the market prices, the electricity was not required to be procured as there was substantial surplus capacity already tied up by the distribution licensees. The Chairman rejected the power procurement while holding that there would be an option to the generators to supply electricity at the tariff being discovered today for future projects to be established. This tariff works out to Rs. 5.68/kWh.

- l) The Member of the State Commission has passed a dissenting order dated 04.10.2016, stating that the basic fallacy in the approach is to consider the bidding process as being in terms of the bidding guidelines under Section 63 of the Act. There were no guidelines under Section 63 for renewable sources and the question of considering the petition under Section 63 does not arise. The bidding process was transparent, the documents were duly approved and in fact the State Commission vide communication dated 08.08.2014 granted the go-ahead to the bidding process. The State Commission has also repeatedly called upon the Respondent No. 2 to procure renewable energy and in particular solar energy to meet its purchase obligation and it was towards this effort that the bidding process was undertaken. It has further been held that the evaluation was properly done and there is no question of comparing solar power prices with the general electricity prices as the tariff discovered is under competitive bidding with discount over the tariff as determined by the State Commission. The Member has approved the power procurement.



- m) The Chairman has however exercised a casting vote and has held that the order of the Chairman would be the operative order.
- n) Aggrieved by the Impugned Order, the Appellants have preferred the present Appeals before this Tribunal.
- o) This Tribunal vide order dated 13.12.2016 in IA No. 637 of 2016 in Appeal No. 307 of 2016 and vide order dated 29.3.2017 in IA No. 226 of 2017 in Appeal No. 278 of 2016 without expressing any opinion on merits, as an interim arrangement had allowed tariff of Rs. 5.68/kWh (without accelerated depreciation) to the Appellants being tariff fixed by CERC for such solar plants for the year 2016-17.

#### 9. QUESTIONS OF LAW

The Appellants have raised the following questions of law in the present Appeals:

- (a) Whether the State Commission is justified in not approving the PPAs considering the petition under Section 63 of the Electricity Act?
- (b) Whether the State Commission is justified in rejecting the PPAs with the Appellant on the ground that the deviations from the standard bidding documents were not approved?
- (c) Whether the State Commission is justified in comparing the solar prices in the bidding process based on which the projects have been completed to the tariff prevalent as of today for future projects to be established?

(d) Whether the State Commission has proceeded on assumptions and conjectures?

(e) Whether the State Commission is justified in going into the issue of requirement of electricity on overall basis while procuring solar energy where the State is in substantial deficit of the solar RPO?

(f) Whether the State Commission is justified in proceeding comparing solar prices on the basis of assumptions?

10. The learned counsel for the Appellants has made following arguments/submissions for our consideration:

a) The Chairman of the State Commission has erred in passing the Impugned Order alone without even waiting for the order of the Member who heard the matter. The Chairman has failed to appreciate that orders are to be passed based on judicial principles & judicial propriety and cannot be passed individually without the entire order being passed on the same date.

b) The approach of the State Commission to proceed on the basis that the competitive bidding process was to be in terms of the Gol guidelines notified under Section 63 of the Act is fallacious. There are no guidelines issued by the Gol for renewable energy projects and the question of mandatory compliance with such guidelines does not arise. The State Commission has grossly erred in considering the petition of the Respondent No. 2 as being for adoption of tariff under Section 63 of the Act. The petition was in fact for approval of the power purchases.

- c) The State Commission has also erred in holding that the prior approval of the State Commission was not taken for the bidding process. The State Commission has ignored its communication dated 8.8.2014 wherein the State Commission directed the Respondent No. 2 to proceed with the bidding process. The approval of the PPAs with the successful bidders was not a stage to consider whether the bidding documents were in order, which was already filed before the State Commission and go-ahead was granted by the State Commission. Accordingly, the PPAs were entered into, the plant has been established by the Appellants at a substantial cost and the viability of the projects is based on the tariff of Rs. 6.44/kWh. The State Commission at this stage holds that even though the go ahead was granted on 8.8.2014 prior to the submissions of the bids, the process is to be rejected now as the documents filed prior to 8.8.2014 were not approved by the State Commission.
- d) The State Commission has also erred in holding that the Evaluation Committee was not in terms of the Guidelines under Section 63 of the Act. This again is on the erroneous assumption that guidelines under Section 63 are notified. The bids were evaluated by the High Level committee, in a transparent manner and was perfectly justified. The power procurement and the tender process was initiated to comply with the repeated directions of the State Commission to fulfil the Renewable Purchase Obligations (RPO). This was also reiterated in the communication dated 8.8.2014 of the State Commission wherein it has given go-ahead for the bidding process. The State Commission has erred in

rejecting the same on hyper-technicalities based on erroneous presumptions.

- e) The State Commission has also erred in holding that the price for solar projects need to be aligned to the market prices. There are no available market prices for solar projects except as determined by the State Commission at Rs. 7.45/kWh. This tariff was determined by the State Commission based on reasonable costs and expenditure for the solar projects in the State, considering various costs and expenses for the development including the land cost in the State. The bidding process was in fact on competitive tariff based bidding, at a discount to the tariff as determined by the State Commission. Accordingly, there can be no question of the tariff not being aligned to market prices. The tariff of Rs. 6.44/kWh discovered in the bidding process is much less than the tariff determined by the State Commission.
- f) The tariff of Rs. 6.44/kWh discovered in the bidding process has been adopted by the State Commission and applied to another project of M/s Siwana Solar Power Projects, vide order dated 20.1.2016. The said project was allowed the tariff of Rs. 6.44/kWh as discovered in the bidding process as it was the prevalent tariff discovered in the bidding process.
- g) The State Commission has failed to appreciate that as against the quantum of 50 MW sought for and a total of 124 MW bid for, the Respondent No. 2 could tie up only 23 MW at the tariff of Rs. 6.44/kWh. This is primarily of the fact that the said tariff of Rs.

6.44/kWh was highly competitive and not many project developers could match the said tariff.

- h) The State commission has erred in observing that the eligibility conditions were changed from the standard bidding documents. Even assuming that such conditions are to be applicable as per the SBD, the conditions were only relaxed to ensure wider participation, which is in the interest of the State and public in general.
- i) The State Commission has also erred in observing that the rates discovered in the bidding process at Rs. 6.44/kWh was to be compared with the price of Rs. 4.34 to Rs. 4.63/kWh which was published in newspapers. The State Commission has erred in proceeding on assumptions and conjectures. Further, the time period when the rates were discovered, the location and capacity that is being established etc. are to be seen and the prices cannot be compared otherwise. The State Commission has erred in comparing the tariff of Rs. 5.50/kWh procured from SECI with that discovered in the bidding process. The tariff for procurement from SECI includes the viability gap funding under the Jawaharlal Nehru Solar Mission of GoI and also without considering the transmission charges etc. Including all such costs and also the funding, even such tariff works out much more than Rs. 6/kWh.
- j) The State Commission has erred in holding that Renewable Energy Certificates (RECs) could be procured and the plants which have been already set up pursuant to being selected through a competitive bidding process should be rejected. The State

Commission had itself while passing the tariff order dated 13.8.2014 directed that the Respondent No. 2 should procure renewable electricity and in fact held that RECs should not be preferred. There was also a direction that competitive bidding should be preferred with the ceiling tariff of Rs. 7.45/kWh as determined by the State Commission.

- k) The State Commission has failed to appreciate its own order dated 20.11.2013, wherein it has held that the tariff determined by the State Commission is the ceiling tariff and the distribution licensees to procure electricity available, even though it may not be less than the tariff determined. The above order was passed in the petition of the distribution licensees seeking relaxation/carry forward of RPO. In the present case, when the tariff is much lower than the tariff determined by the State Commission, the State Commission has erroneously proceeded to reject the power procurement.
11. The learned counsel for the State Commission defended the findings of the State Commission in the Impugned Order.
12. After having a careful examination of all the aspects brought before us on the issues raised in the Appeals and submissions made by the Respondents and the Appellants for our consideration, our observations are as follows: -
- a) The present cases pertains to the decision of the State Commission vide Impugned Order rejecting the PPAs entered into between the Appellants and the Respondent No. 2 pursuant to

competitive bidding process initiated by the Respondent No. 2 for procurement of solar power.

- b) This is a case where the Impugned Order of the State Commission has been based on the casting vote of its Chairman and Member has given its dissenting order by disagreeing with the decision of the Chairman of the State Commission. The Chairman of the State Commission had also pronounced its Order even before the Order of the Member of the State Commission was ready indicating that there was lack of proper consultations between the two.
- c) The issue regarding acceptance/ rejection of the PPAs is with respect to the competitive bidding guidelines for procurement of power from renewable energy sources ought to be issued by Gol and adoption of the discovered tariff by the Appropriate Commission under Section 63 of the Act.

After perusal of the orders of the Chairman & Member of the State Commission and submissions made by the Appellants and the Respondents, one thing is clear that there are no such competitive bidding guidelines/ SBD for procurement of power from renewable energy sources notified guidelines by Gol at the time of bidding process initiated/completed by the Respondent No. 2.

- d) The Appellants have raised certain questions of law, which are reproduced at S. No. 9 above. In facts and circumstances of the present cases two main questions arise which need answers. They are whether the State Commission has rightly rejected the power purchase and hence the PPAs and if power purchases/PPAs are

held valid then what should be the tariff of solar power projects of the Appellants in question. Now we proceed to address these questions in subsequent paragraphs.

- e) As both the questions are interlinked we consider them together i.e. whether the State Commission has rightly rejected the power purchase and hence the PPAs and if power purchases/PPAs are held valid then what should be the tariff of solar power projects of the Appellants in question?, we decide as follows:
- (i) To decide on these issues, let us first analyse the findings of the State Commission in the Impugned Order. The relevant portion of the Impugned Order is reproduced below:

*“23 On examination of the correspondence that has been reproduced at para 1 to para 6 of the order, it is observed that the Commission has, at no place, approved the deviations as has been claimed by the petitioner in its reply dated 28.04.2016. The last communication of the Commission to the petitioner is vide memo no. 1725/HERC/Tariff/NIT/2014 dated 08.08.2014, wherein the Commission had allowed HPPC to go ahead with the process as it was already underway. The Commission did not grant approval to the deviations and also directed that once the bids are opened, the HPPC shall analyze the same and submit the details to the Commission for its orders and approval of the PPA with the successful bidders. The Commission observes that this communication*



**can in no way be interpreted as approval to the deviations to the SBD submitted by the petitioner.**

24 Even if for argument sake, the contention of the petitioner that the Memo no. 1725/HERC/Tariff/NIT/2014 dated 08.08.2014, conveyed HERC go ahead to the process, it is imperative to note that before this communication was issued, the petitioner, vide memo no. C50/HPPC/SE/C&R- 1/PSA/ SECI dated 05.08.2014 informed the Commission that “in this regard it is submitted that major deviation in NIT from SBD in respect of Bid Bond and Contract performance Guarantee is that of the amount per MW to be paid. All the minor deviations will be rectified to have the NIT exactly the same as that of SBD. All these deviations have been color coded in the comparison done in the tabular form. Also the Standard Bid Document does not contain any PPA”. A perusal of this communication conveys the commitment by the petitioner to have the NIT exactly the same as that of SBD except for the amount per MW to be paid for Bid Bond and Contract performance Guarantee. **Therefore, by no stretch of imagination can it be inferred that the Commission had granted its approval to any deviation except that related to the amount per MW to be paid for Bid Bond and Contract performance Guarantee.**

**25** *The Commission had, vide memo no. 1725/HERC/Tariff/NIT/2014 dated 08.08.2014, had expressly directed the petitioner that “once the bids are opened, the HPPC shall analyze the same and submit the details to the Commission for its orders and approval of the PPA with the successful bidders”. **Whether the petitioner complied with the orders of the Commission conveyed to it? The answer to it is that it definitely did not.***

**26** *The Commission had pointed out certain deviations in the bid documents and asked the petitioner for its comments. The Petitioner assured the Commission that all deviations except those related to Bid money and the Contract Performance Guarantee money would be removed to make the bid documents same as SBD. When the same commitment has, admittedly not been adhered to, it renders the so called go ahead of the Commission conveyed vide memo no. 1725/HERC/Tariff/NIT/2014 dated 08.08.2014 null and void. Therefore it is held that the deviations to the SBD do not have the prior approval of the Commission.*

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**28** *When it is mandated that deviations to the Standard Bid Documents and Standard guidelines, if any, are to have prior approval of the Commission, it is not open to the Commission to grant ex-post facto approval.*

29 It is also observed that, apart from the fact that the deviation(s) to the Standard Bid Documents, the process by which the tariff of Rs. 6.44 per unit has been discovered, suffers from certain other infirmities also.

As per clause 6.3 of the MNRE Guidelines it is mandated that the procurer shall constitute a committee for evaluation of the bids (Evaluation Committee), Clause 7.3 provides for the said Committee to provide a certificate on conformity of the bid process and evaluation as per the guidelines. Admittedly, the Bid Evaluation Committee was not constituted by the procurer in the present case as per the guidelines. The bid evaluation committee did not comprise of an external expert, nor was any effort made to ensure that the rate discovered is in accordance with the market conditions. The deficiencies in the bid process has also been in the notice of the Commission and consequently, the Commission, at NP-26 of the file, on 20.1.2016, observed that the whole process followed by the HPPC appears to be in violation of the Electricity Act, Rules and the guidelines issued by the Central Government as well as the directions of the Commission and therefore, the Commission decided that it would not be appropriate to approve the PPA.

30 The tariff discovered by the process by the petitioner is Rs. 6.44 per unit and the petitioner has

sought to justify that the said tariff was in line with the prevailing market conditions. However, the petitioners have not submitted any document to the Commission that can demonstrate the fact that an attempt was made by the petitioner to examine whether the rate quoted by the bidders was in line with the prevailing market conditions or not before the LOI was issued and the PPA's were signed. The petitioner was required to undertake this exercise as part of the Standard Bidding Guidelines. As held by the Hon'ble Appellate Tribunal "The 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 as well as the Government of India guidelines which strike a balance between the transparency, fairness, consumer interest and viability". Whether the rate was lower than the benchmark rate is not relevant to the comparison of the rate with market conditions which is an activity mandated to be carried out before grant of LOI. It is also observed that the documents submitted to the Commission carried a benchmark rate of Rs. 5.70 and not Rs. 7.54 per unit.

32 The petitioner has also sought to introduce another dimension to the instant petition by claiming that MNRE issued draft guidelines and SBD for purchase of renewable power through competitive bidding in Dec 2012 which were not notified as such. The Commission

observes that the petitioner, from the very first stage of the case has considered the draft guidelines as a template and has sought the approval of the Commission on the deviations from the said draft guidelines. Therefore, The Commission holds, at this stage, it is not open to the petitioner to question the validity of the guidelines.

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The Commission, after hearing the parties and perusing the statutes occupying the field is of the considered view that the powers of the Commission while dealing petition(s) under section 63 is in a very narrow confine i.e. the Commission can either adopt the tariff if the same was discovered by a transparent process of bidding conducted as per the Government of India Guidelines or reject the petition if the bidding was not found to be as per the statutory framework/Guidelines.

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Given the position discussed above and the fact that this Commission, on many occasions, has emphasized the need for procurement of RE Power by the Discoms as well as taken serious note of shortfall in both Solar as well as Non-Solar RPO. Hence, to balance the equity on both sides the Commission Orders as under:-

i) *In order to restore HPPC and the successful bidders to their initial status, HPPC shall restore the bank guarantee, if not already done, as well as CPG amount without any other cost i.e. interest etc.*

ii) *However, in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPA executed by HPPC, and are willing, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 in accordance with the 6.4 (3) of the National Tariff Policy, 2016 and HERC RE Regulations in vogue as the projects are likely to be commissioned during FY 2016-17 only. In such an event HPPC, shall submit the outcome arrived at for the consideration and Order of the Commission, before 30th September, 2016.*

iii) *In case of successful bidder(s), other than those covered in point no. ii above, the PPAs are not approved. HPPC, if required, may invite fresh bids after following the due process prescribed for the purpose and these bidders may be given preference in the next round of fresh bids to be called by the Power Utilities in the State. The developer shall be allowed to supply the quantity of power for which the PPA has already been*

*signed and at the rate allowed to the successful bidder in that round of procurement of Solar power.”*

While deciding the fate of power purchase/PPAs in the Impugned Order the State Commission has held that in terms of the Section 63 of the Act, the tariff-based bidding guidelines have not been followed by the Respondent No. 2 and also the deviations with respect to SBD have not been duly approved by the State Commission. There was no Evaluation Committee in terms of the guidelines to evaluate whether the tariff is aligned to the market prices or not. Further, the State Commission has held that the tariff so determined is not aligned to the market rates.

However, the State Commission while emphasising the need to procure solar power and to be equitable to the parties has held that in the case of the successful bidders who have already commissioned their plants or are nearing completion (more than 80% complete) under the PPAs executed by the Respondent No. 2, may explore the possibilities for arriving at an equitable and reasonable solution to arrive at a tariff aligned to the prevailing market conditions subject to the ceiling of the project cost determined by CERC for the FY 2016-17 as the projects are likely to be commissioned during FY 2016-17.

- (ii) Let us now analyse the findings of the Member of the State Commission in its dissenting order. The relevant portion of the same is reproduced below:

### 3. Analysis & My Order

3.1. In paragraph 17 (1) of the Order, it is observed that the Petitioner, HPPC, has sought the following relief:-

1. Adoption of Tariff discovered through transparent bidding process u/s 63 of the Electricity Act, 2003.

2. Approval of PPAs with solar power developers selected by it under the NIT No. 51 at the said tariff.

I have perused the Petition / Application filed by HPPC in the present case, the following is observed:-

i) The first letter dated 16.06.2014 (Ch-43/HPPC/SE/C&R-I/PPA-136) received from the Petitioner carried a simple request i.e. "It is requested that HERC may furnish its valuable comments, if any, on the NIT latest by 25.06.2014 so that HPPC may proceed further with the tender process". Hence, at that stage, no approval of the Commission for adoption of tariff or approval of PPAs under the Electricity Act, 2003, was sought.

ii) Subsequently, vide Memo No. Ch-46/HPPC/SE/C&R-I/PPA-67 dated 1.07.2014 the Petitioner prayed that, "It is humbly requested that approval may please be granted to the NITs for purchase of 50 MW solar and 100 MW non-solar power".



Admittedly, even at this stage no approval of the Commission for adoption of tariff or approval of PPAs under the Electricity Act, 2003, was sought by the Petitioner.

iii) Thereafter, the Petitioner vide Memo No. Ch-2/HPPC/SE/C&R-I/PPA-196 dated 16.07.2015 intimated as under:-

*“HPPC had floated tender to purchase 50 MW solar power. The Technical bid was opened on 22.10.2014 & financial bid on 22.12.2014. Ten nos. bidders submitted the tenders. Out of them, only eight Nos. Bidders were found eligible for financial evaluation. The negotiations were done with the eligible bidders. As a result, Rs.6.44/kWh was discovered as the lowest price for which LOI has been issued to the following Five Nos. bidders for a capacity of 25 MW solar power..... HPPC has signed PPA with the above bidders except M/s Sudhakar Infratech Ltd. Accordingly, HPPC seeks approval of PPA from the Hon’ble Commission” emphasis added.*

It is evident from the above that the Petitioner, at this stage, sought approval of the PPAs and also submitted the requisite fee as required under HERC (Fee) Regulations, 2005 (1st Amendment, 2013) for approval of four PPAs for procurement of 23 MW power. Hence, even at this stage no prayer was made or “relief

sought” u/s section 63 of the Electricity Act, 2003 as observed in the order.

For the sake of brevity Section 63 of the Act reproduced as under:-

“63. 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 guideline issued by the Central Government”.

Admittedly, as also recorded at para 32 of the Order the draft guidelines shall be considered as template, there is no guidelines notified by the Central Government / MNRE. Hence, the validity of the tendering process cannot be questioned on the basis of deviations from a non-existing guidelines and SBD and Commission’s approval thereto. In this context the judgment dated 16th March, 1999 in BabuVerghese&Ors. Vs. Bar Council of Kerala &Ors has been relied upon in the order i.e. the basic principle of law long settled that if the manner of doing a particular act is prescribed under any Statute, the act must be done in that manner or not at all (emphasis supplied) cited by the Hon’ble Chairman at para 27 of the Order strongly supports my considered view that absence of ‘Guidelines’ as provided in Section 63 of

*the Act shall negate any proceedings under the said section of the Act. Therefore, even if this Commission is required to proceed u/s 63 of the Act the same, in the absence of 'Guidelines' shall be ultra-virus. This is probably the reason that a few other States either invited reverse bids considering the tariff determined by the SERC u/s 62 of the Act or opted for Feed in Tariff (FIT). Similarly, the Petitioner also followed reverse bidding process as per the directions of the Commission in its Order dated 20.11.2013.*

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*3.3 The Order (para 31, page 47) also points out that the bid evaluation committee was not constituted by the procurer as per the 'Guidelines'. Regarding this, as per the details submitted by the Petitioner, technical and commercial bids (excluding financial bids) were evaluated by a Committee comprising of Chief Engineer (HPPC), Financial Advisor and Superintending Engineer (HPPC). Additionally, the Steering Committee for Power Planning (SCPP) constituted for evaluating the purchase of power, consisting of Additional Chief Secretary (Power), and the Managing Directors of the Haryana Power Utilities i.e. UHBVN, DHBVN (Discoms), HPGCL (Generation Company), HVPNL (Transmission Company) and the Chief Engineer (HPPC) considered the prices bids and decided on the course of action to be taken in*

accordance to the tender terms and conditions. As such, in my considered view the procedure adopted by the Petitioner for technical and financial evaluation was adequate.

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4.5. As the SBD was not in existence, hence, the question of other deviations (which has not been mentioned in the order) from the SBD does not arise. Further, the order also refers to the newspaper report dated 20.01.2016 that the Solar tariff hits new low in Rajasthan i.e. Rs. 4.34 to Rs.4.63/kWh and Rs.5.0/kWh in Haryana in a subsequent bidding process. I have considered the figures relied upon in the Order and I am of the view that the Solar tariff obtained in Rajasthan could be very different because of much better CUF and cheaper land available in Rajasthan more so if the Solar Power Projects are located in the Solar Park promoted by the Rajasthan Government. Additionally, the projects envisaged / bids called at different points of time as in the case of subsequent bids for 165 MW Solar Power invited in Haryana or the tariff reported sometimes in January, 2016 in Rajasthan as against the present bids received by HPPC sometimes in October, 2014 are strictly not comparable as with the passage of time the project cost has witnessed a sustained decline. Hence, any decision based on such comparison is futile. As a corollary if we wait for some more time the tariff

*discovered / offered may turn out to be lower or higher depending on the market conditions.*

*In view of the above discussions, I approve the draft PPAs submitted by the Petitioner with four Solar Power Developers selected through competitive bidding.”*

The Member of the State Commission in the dissenting order has held that there were no guidelines/ SBD notified by Gol for procurement of power by discoms from renewable energy sources. Hence there is no question of adoption of tariff under Section 63 of the Act by the State Commission. The documents available were only draft in nature based on which the Respondent formulated the bidding process. The State Commission vide order dated 8.8.2014 has also allowed the Respondent No. 2 to go ahead with the bidding process. The Member while comparing the tariff set by CERC and other Regulators has also held that the rates are aligned to the market prices and approved the PPA. The Member has also held that the tariff compared by the Chairman of the State Commission were based on various factors and cannot be compared to the present case and justified the tariff of Rs. 6.44/kWh.

- (iii) We observe that the whole issue of power purchase/PPAs is hovering around the application of Section 63 of the Act which says that the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guideline issued by the Central Government. In the present case, actually no guidelines/ SBD

have been issued/notified by Gol at that point of bidding and till completion of the bid process and even up to the Impugned Order date. The Respondent No. 2 initiated the bidding process on draft guidelines only and informing the State Commission the same at a later stage when the bidding process was completed and approached the State Commission for the approval of the PPAs it entered into with the selected bidders. The State Commission has also not gone into the details by checking whether such guidelines /SBD has been notified by Gol. The State Commission vide letter dated 8.8.2014 has also given go ahead for the bidding process to the Respondent No. 2. The relevant extract of the letter is reproduced below:

*“Subject: NIT for Purchase of 50 MW solar & 100 MW non-solar power to meet RPO – approval thereof.*

*kindly refer to your memo no Ch-43/HPPC/SE/C&R –I/PPA – 136 dated 16.06.2014 and Ch-46/HPPC/SE/C&E-I/PPA-67 dated 1.07.2014 vide which approval of the Commission was sought to be deviations in the bid documents vis-a-vis the Case – 1 RE Bidding Procedure of the Government of India. The Commission has considered your application/petition and observes that the NIT No. 51 & 52 for inviting competitive bids purchase of 50 MW for Solar Power and 100 MW of Non- Solar (renewable energy) were issued on 16.04.2014 and the approval of the Commission to the deviations were sought on 1.07.2014 i.e. ex post facto.*

*The Commission observes that the Discoms have not fulfilled their RPO including by way of purchase of REC. Consequently, the accumulated shortfall allowed to be carried forward from FY 2011-12 up to FY 2013-14 (up to*

December 2013) is about 720.83 Mus and the total RPO target set for FRY 2014-15 is 1463.41 Mus. On several occasions the Commission has observed that HPPC/HAREDA may invite bids/ reverse bids for purchase of renewable energy in order to meet with the RPO targets and the fact that the bidding process is already under way, HPPC may proceed with the same. Once the bids are opened HPPC shall analyze the same and submit the details to the Commission for its order and approval of the PPA with the successful bidders.”

The State Commission while observing the shortfall in meeting RPO obligation by the Respondent No. 2 has given go ahead with the bidding process. The letter also says that at many occasions the State Commission has observed that HPPC/HAREDA may invite bids/ reverse bids for purchase of renewable energy in order to meet with the RPO targets. The State Commission further directed that after the bids are opened the Respondent No. 2 should analyze the same and submit the details to the Commission for its order and approval of the PPA with the successful bidders. However, it is not clear from the order that whether the signed PPAs are to be submitted before the State Commission or only draft PPA was to be submitted for the approval.

- (iv) After going through the various aspects of the case we find that both the State Commission and the Respondent No. 2 had made mistake. The Respondent No. 2 making its bid process on non-existent guidelines/SBD and the State Commission passing

the Impugned Order on premise of Section 63 as if guidelines/ SBD existed. The issue is between the State Commission and the Respondent No. 2. The sufferers are the Appellants who have already installed the solar power plants based on Lol issued and PPAs signed with them for no fault of them.

- (v) This Tribunal vide order dated 13.12.2016 in IA No. 637 of 2016 in Appeal No. 307 of 2016 and vide order dated 29.3.2017 in IA No. 226 of 2017 in Appeal No. 278 of 2016 has made some observations. The relevant extract from order dated 13.12.2016 is reproduced below:

*“8. The primary objective for any power plant is to ensure the plant continuously and reliably operates, thereby generating the maximum economic and energy performance returns. Solar Photovoltaic (PV) power plants are no exception.*

*9. Solar PV stations are conceived with the premise that they need to operate and generate electricity whenever some minimum sunlight is available. In Renewable Energy Regulations (RER), they are envisaged as “must run” stations. Tariff for such Solar PV plants is designed, formulated and arrived upon considering their “must run” status.*

*10. Compared to many other power generating stations, PV plants have minimal maintenance and service requirements. The operation and maintenance (O&M) of Solar PV plants is based on integrated management system that is*



*implemented throughout the lifecycle. An integrated approach to planning, execution and monitoring of the activities leads to an optimal performance of the plant.*

*11. A prolonged outage may disrupt the normal operation & maintenance of Solar PV plant as generation is reduced to zero due to no schedule and as such, all auxiliaries and systems of solar PV stations are switched off. As a result, large number of technical challenges crop in such as:*

- (i) Moisture ingress in transformers may cause failure of transformer. Moreover, such failure may further increase down time if such faults are detected at the time of revival from long shut down.*
- (ii) Failure of UPS batteries due to lack of charging hence loss of control, protection and communication system.*
- (iii) Theft of un-energized solar panels may additionally leads to down time from theft etc.*

*12. In the Impugned Order, the State Commission has held that while the generators are not entitled to the tariff of Rs.6.44 per Kwh being the tariff discovered in the competitive bidding process, the generators should be entitled to supply electricity at a tariff which would not exceed the tariff determined by the Central Commission for the year 2016-2017 which works out to Rs.5.68 per Kwh. During the*

course of arguments, the Appellants undertook to abide by this tariff, subject to the outcome of the Appeal.

13. *It is fact that the solar panels cannot be allowed to be left idle, as it would result in technical degradation which would result in irreparable loss to the generators who have invested in the project.*

14. Under the circumstances as discussed above, we direct that as an interim measure, the Appellants' generators shall supply electricity to the Respondent No.2 at the tariff of Rs.5.68 per Kwh, being the tariff determined by the Central Commission for the year 2016-2017. This interim arrangement shall be without prejudice to the rights and obligations of the parties and subject to the outcome of this Appeal. We make it clear that we have not expressed any opinion on the merits of the case."

This Tribunal based on the technicalities involved due to idling of the solar power projects and based on the decision of the State Commission that the generators would be entitled to supply electricity at a tariff determined by CERC for the year FY 2016-17 which works out to Rs.5.68 per kWh (without accelerated depreciation) allowed the Appellants to supply power to the Respondent No. 2 as an interim measure.

(vi) In view of the foregoing discussions, we observe that the whole exercise of the bidding was premised and based on the wrong notion that competitive bidding guidelines/ SBD do exist which

was not true. Solar Power purchase was initiated by the Respondent No. 2 based on repeated directions from/observations of the State Commission in various ARR orders as well as in the letter dated 8.8.2014. It is also observed that the Respondent No. 2 has followed the bidding documents which it had submitted to the State Commission and the State Commission too has given go ahead with the bidding process. Negotiations too were carried out by the Respondent No. 2 in accordance with the bidding documents. PPAs too were signed after completion of the bidding process and the Appellants have already set up the solar power plants. The State Commission in the Impugned Order has also allowed the Respondent No. 2 to procure power from these plants based on the tariff determined by CERC for FY 2016-17, the year in which these plants were commissioned. This Tribunal as an interim allowed the said CERC tariff of FY 2016-17 to the Appellants.

- (vii) The basic issue which merits consideration is that there was a competitive bid process initiated by the Respondent No. 2 for selection of solar power developers to supply solar power to the Respondent No. 2. Irrespective of whether such competitive bid process was undertaken under Section 63 of the Act based on the guidelines issued by GoI or not, the fact that such a competitive bid process was initiated, solar power developers were invited to participate and give their bids and the PPA was finalised between the Respondent No. 2 and the selected bidders cannot be denied. Further, the State Commission was also informed of the bidding process being undertaken by the Respondent No. 2 and the State Commission did not stop the

process at the relevant time by stating that Respondent No. 2 should wait until the guidelines are issued under Section 63 of the Act or on the ground that there exists guidelines of Gol which need to be followed. The entire process was allowed to be implemented without the State Commission exercising its regulatory powers to either stop or otherwise provide the course of action to be adopted for Respondent No. 2 to complete the bidding process. It is not for the State Commission to have raised all these issues at a later stage when the approval of PPAs with tariff discovered and negotiated downwards was placed. The Appellants have referred to the procurement of power in another case (M/s Siwana Solar Power Projects) wherein the State Commission has approved the PPA with a tariff of Rs. 6.44/kWh. However, there is no allegation in regard to the issue of guidelines being followed or not in the said decision.

- (viii) Further, the PPA executed by the Respondent No. 2 with M/s Siwana Solar Power Projects on 21.2.2014 was prior in point of time as compared to the PPAs with the Appellants and the approval was granted vide order dated 20.1.2016. The PPAs in the present case were executed on a subsequent date during June 2015 and the approval to the PPAs was sought from the State Commission on 16.7.2015. The price of the solar panels are falling progressively as indicated by various bidding process cannot be ignored. At the same time the absence of finalised guidelines by Gol cannot be considered as a ground for not approving the PPAs, particularly in the context of Section 63 of the Act which states that the bidding has to be “in accordance

with the guidelines” in case of Energy Watchdog v. CERC decided by the Hon’ble Supreme Court on 11.4.2017 in Civil Appeal Nos. 5399-5400 of 2016. The relevant extract from the said judgement is reproduced below:

*“19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government’s guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission’s power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff,*

*which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. 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.”*

From the above it is clear that in case where there are no guidelines, regulatory powers under Section 79 (1) (b) and under Section 86 (1) (b) of the Act empowers the CERC and the State Commission respectively to provide for necessary approval for bidding process and approve the PPA including the price at which the electricity should be procured by or on behalf of the distribution licensees.

- (ix) Considering the circumstances of the case equitably and the fact that the Solar Power Projects have been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy need to be promoted, it would be appropriate to approve the PPAs between the Appellants and the Respondent No. 2 for procurement of solar power at the tariff of Rs. 5.68/kWh (without accelerated depreciation) as allowed in the interim Orders dated 13.12.2016 and 29.3.2017 of this Tribunal.

(x) In view of the facts and circumstances of the case, we are of the considered opinion that the PPAs signed between the Appellants and Respondent No. 2 be allowed by the State Commission at the tariff of Rs. 5.68/kWh (without accelerate depreciation) determined by CERC for FY 2016-17.

(xi) Hence the issues are decided accordingly.

### **ORDER**

Having regard to the factual and legal aspects of the matter as stated supra, we are of the considered opinion that the issues raised in the present appeal have merit as stated above.

The instant appeal is hereby allowed.

The Impugned Order (Common Order dated 12.09.2016/ 4.10.2016) on the file of the Haryana Electricity Regulatory Commission is hereby set aside to the extent stated above and is remanded to allow the PPAs signed between the Appellants and the Respondent No. 2 as held at preceding paragraph 12. e) x) above in the interest of justice and equity. The IA No. 573 of 2016 is disposed of as such.

No order as to costs.

Pronounced in the Open Court on this **9<sup>th</sup> day of March, 2018.**

**(Justice N. K. Patil)**  
**Judicial Member**

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**REPORTABLE/NON-REPORTABLE**

mk

**(I.J. Kapoor)**  
**Technical Member**