

**Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal no. 70 of 2013

Dated: 10th February, 2015

**Present: Hon'ble Mr. Rakesh Nath, Technical Member
Hon'ble Mr. Justice Surendra Kumar, Judicial Member**

In the matter of:

Wardha Power Company Limited

8-2-293/82/A/431/A
Road No.22, Jubilee Hills,
Hyderabad – 500 033

... Appellant(s)

Versus

**1. Maharashtra Electricity Regulatory
Commission,**

World Trade Centre No.1, 13th Floor
Cuffee Parade, Colaba
Mumbai – 400 001

...Respondent(s)

2. Maharashtra State Electricity Distribution Co. Ltd.
Prakashgad, 5th Floor
Bandra (East)
Mumbai – 400 051

3. Indiabulls Realtech Limited (Nashik)
M 62 & 63, First Floor Connaught Place
New Delhi – 122 016

4. Adani Power Maharashtra Limited
Adani House Nr. Mithakhali Circle
Navrangpura
Ahmedabad – 380 009

5. Dr. Ashok Pendse
Consumer Representative
Thane Belapur Industries Association
Rabale Village, Post Ghansoli
Plot P-14, MIDC
Navi Mumbai – 400 701

6. Prayas Energy Group
Consumer Representative
Athwale Corner, Karve Road
Deccan Gymkhana
Pune – 411 004

Counsel for the Appellant: Mr. M.G. Ramachandran
Mr. Anand K. Ganesan
Ms. Swapna Seshadri

Counsel for the Respondent : Mr. Buddy A. Ranganadhan,
Ms. Ramni Taneja,
Ms. Richa Bhardwaj for R-1

Ms. Deepa P. Chavan,
Mr. Neeraj Saha,
Mr. Prashant Mishra,
Mr. Kiran Gandhi,
Mr. Umang Jain for R-2

Mr. H.S. Chandhoke,
Mr. Prashant Mishra,
Mr. Ravjyot Ghumman,
Ms. Sujatha Balachander,
Mr. Deepak Biswas for R-3

Mr. Amit Kapur,
Ms. Poonam Verma,
Mr. Gaurav Dudeja,
Mr. Ankir Saha for R-4

JUDGMENT

RAKESH NATH, TECHNICAL MEMBER

This Appeal has been filed by Wardha Power Company Ltd. against the order dated 27.12.2012 passed by the Maharashtra Electricity Regulatory Commission (“State Commission”) in petition no. 53 of 2012 whereby the State Commission has approved the purchase of power by the Respondent no.2, Maharashtra State Electricity Distribution Company Ltd. (“MSEDCL”), from the Respondent nos.3 and 4.

2. The Appellant is a generating company. The Respondent no.1 is the State Commission. The Respondent no.2 is MSEDCL, the distribution company. Respondent no. 3 and 4 are the generating companies. The Respondent nos. 5 and 6 are the consumer representatives.

3. The brief facts of the case are as under:
- a) In the year 2009-10, MSEDCL, the respondent no.2 herein, initiated a process of tariff based competitive bidding under Section 63 of the Electricity Act, 2003 for procurement of power on long term basis for a period of 25 years. The bidding was conducted for a quantum of 2000 MW, with a deviation of +30%/-20%.
 - b) The bidding process was completed with the State Commission adopting the tariff discovered in the bidding by order dated 28.12.2010. The Appellant was technically qualified in the bidding process. In the above bidding process, a total of 2600 MW of power was approved for procurement by MSEDCL from the lowest bidders, viz. EMCO Energy Ltd. for 200 MW at levellised tariff of Rs. 2.879/kWh, M/s. Indiabulls Power Realtech

Ltd. Amravati project for 1200 MW at Rs. 3.26 per kWh (levellised) and M/s. Adani Power Maharashtra Ltd. for 1200 MW at Rs. 3.28 per kWh (levellised). The Appellant was not selected as the successful bidder as its tariff was higher. Accordingly, MSEDCL entered into Power Purchase Agreements with Emco Energy, Indiabulls Realtech Ltd., Amravati and Adani Power Maharashtra Ltd.

- c) Subsequently, MSEDCL tied up procurement of additional 125 MW of power from Adani Power Maharashtra Ltd., hereinafter referred to as APML, at the same terms and conditions. By order dated 19.05.2011, the State Commission held that since the quantum is very small the approval is given as a special case and this should not become a precedent for the future procurement.

- d) In 2012, MSEDCL proposed to procure another 1090 MW from the Respondent no.3 (650 MW) and Respondent no.4 (440 MW) and filed a petition for approval of additional procurement before the State Commission. The Respondent no.3 was a qualified bidder in the earlier bidding process but was not successful due to higher tariff. The Respondent no.4 was the successful bidder in the earlier bidding process. During the course of proceeding, the State Commission on 27.11.2012 directed MSEDCL to approach other successful bidders in the bidding process conducted earlier in the FY 2009-10.
- e) Upon coming to know of the said direction issued by the State Commission, the Appellant offered to supply 100 MW of electricity to MSEDCL on medium term basis with immediate effect and additional 260 MW from April

2014 at an appropriate tariff similar to the one proposed by MSEDCL.

- f) On 27.12.2012, the State Commission disposed of the Petition no. 53 of 2012 and adopted the tariff for procurement of electricity to the tune of 1090 MW from the Respondent no.3 and 4.
- g) Aggrieved by the above order dt. 27.12.2012, the Appellant has filed the present Appeal.

4. The Appellant has made the following submissions:

- a) The State Commission has erred in passing the impugned order adopting the tariff for procurement of electricity by MSEDCL from the Respondent no. 3 and 4 as the proposal of MSEDCL was not in terms of Section 63 of the Electricity Act. The impugned order is also

contrary to the principles of natural justice, transparency and fairness in action.

- b) The role of the State Commission under Section 63 is very limited and it has to only verify that the competitive bidding guidelines as issued by the Government of India have been followed and the tariff for the quantum of electricity is discovered through a transparent process of competitive bidding process. If the competitive bidding process has not been followed, the petition is required to be rejected. The above position has been settled by the decision of this Tribunal in Essar Power Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission 2012 ELR (APTEL) 182.
- c) The State Commission has failed to appreciate that the proposal for purchase of electricity was also from the Respondent no.3 who was not even a successful bidder in the competitive bidding process conducted earlier by MSEDCL.

- d) The tariff proposed by MSEDCL for procurement of power from the Respondent no.3 was a negotiated tariff and not discovered pursuant to a competitive bidding process under Section 63 of the Electricity Act, 2003.

- e) The State Commission could not have adopted the tariff discovered in the past for a quantum that stands exhausted for future procurement of power and for additional quantum at a tariff which was negotiated by MSEDCL with few pre-selected bidders.

- f) The State Commission has either to determine tariff under Section 62 or adopt the tariff discovered by competitive bidding process under Section 63 of the Electricity Act. In the present case, the State Commission has approved the procurement under Section 63 of the Act.

- g) The State Commission should have at least followed a transparent methodology akin to competitive bidding process, namely, the Swiss Challenge Method or similar methodology. The State Commission could have arrived at a single levelled tariff for inviting bids using Swiss Challenge Method.
- h) The Appellant had offered power on medium term basis without being aware that the process was for long term procurement. There was no occasion for the Appellant to participate in the proceedings or attend to any hearing before the State Commission. No opportunity was given to the Appellant to participate in the procurement process for additional power.
- i) In any event if the opportunity was to be given to others, the same ought to have been given to at least those bidders who were technically qualified in the previous

bidding process. The generating station of the Appellant is also in the State of Maharashtra and in the circumstances even qualified for the criteria considered by the State Commission. Thus, the order passed by the State Commission is arbitrary and unjust.

- j) The Appellant offered power on medium term basis only upon coming to know of the direction of the State Commission in its order dated 27.11.2012 directing MSEDCL to seek offer of supply from M/s EMCO Energy Ltd. and M/s. APML Power. There was no offer to others, and the Appellant on its own approached for supply of electricity. The Appellant was not a party to the petition filed by MSEDCL to be aware that the MSEDCL was only proposing procurement on long term basis and not on medium term basis. The Appellant was neither informed about the power only being required on long term basis and not on medium term basis or given an opportunity to revise the offer to long term basis. The

State Commission ought to have ensured that all generators were given a level playing field and equal opportunity to offer supply of electricity at the most competitive price.

5. In reply, the Respondent nos. 2, 3 and 4 have submitted the following:

- a) Having participated in the power procurement process, the Appellant is estopped from challenging the same.
- b) The Appellant is not a “person aggrieved” under Section 111 of the Electricity Act, 2003. The Appellant has not suffered a legal grievance because of the impugned order. A “person aggrieved” does not mean a person who is merely disappointed of a benefit which he may have received if some other order had been passed.

- c) The State Commission has plenary power under Section 86(1)(b) to regulate procurement of power and approve PPA between the Respondent no. 2 and Respondent nos. 3 and 4.

- d) The entire proceedings before the State Commission are reflective of the extent to which the Commission has gone to ensure that the additional procurement is in public interest.

- e) Intelligible reasons were given by MSEDCL for procuring additional power and the same was given appropriate consideration by the State Commission. The State Commission has also carried out detailed analysis wherein various tariffs discovered in recent bids as well as recent developments in power sector impacting the tariff were considered.

6. The State Commission has also made submissions in support of the impugned order.

7. The Respondents have raised the issue that the Appellant having participated in the proceedings for approval of power procurement before the State Commission and being disappointed of a benefit which he may be received if some other order was passed cannot challenge the power procurement process and is not a “person aggrieved” as contemplated by Section 111(1) of the Electricity At, 2003. Let us take up the issue of maintainability of the Appeal first before taking up the issues on merits.

8. Ms. Deepa Chavan, Learned Counsel for the Respondent no. 2 argued that the Appellant had notice of the proceedings for procurement of additional quantum of power. The Appellant participated in the

proceedings for additional power procurement by addressing a letter to the State Commission and did not object to the State Commission undertaking the exercise of procurement of additional quantum to be approved by adopting competitively bid tariff under Case-1 Stage-2. The Appellant also submitted its own offer of 100 MW in additional power procurement process on medium term basis. The State Commission has considered the offer of the Appellant before passing the impugned order. She referred to *Duncans Industries Ltd. Vs. Union of India* -2004 (165) E.L.T. 484 (SC), to press her point that the Appellant had notice of the proceedings for additional power and, therefore, the principles of natural justice was followed. She also referred to *Babulal Badriprasad Verma Vs. Surat Municipal Corporation & Ors.* - 2008(12) SCC 401, to press that the Appellant has disentitled itself to relief having waived its right to objection.

9. She further stated that the Appellant was aware of the case relating to increasing the quantum for adoption of tariff determined under competitive bidding guidelines, the Appellant participated in the said proceedings process fully knowing that this was on additional procurement and only after the Appellant's offer dated 10.12.2012 was rejected did the Appellant move to the Appellate Tribunal. This is not permissible. She relied upon Sharad Keshao Ghandi Vs. State of Maharashtra & Ors 2006(2) Mh L.J. 356 to press her point. Appeal before this Tribunal is a Statutory Appeal and the person appealing has to be an aggrieved party as decided in *Adi Pherozshah Gandhi Vs. H.M. Seevai* AIR 1971 SC 385. Further, a person aggrieved must be a man who has suffered a legal grievance, a man against whom a decision has been pronounced which has wrongfully deprived him something or wrongfully refused him

something or wrongfully refused his title to something as held in Thammanna Vs. K. Veera Reddy & Ors., 1980(4) SCC 62 and Gujarat Electricity Regulatory Commission Vs. Century Rayon Ltd. 2013 ELR (APTEL) 0768. She also referred to the State of Bihar Vs. Raj Bahadur Hemdutt Roy Moti Lall Jute Mills & Anr, 1960(2) SCR 331 to state that the Appellant Tribunal will not undertake an academic exercise at the behest of a person not aggrieved by the order. She also referred to Raunaq International Ltd. Vs. IVR Construction Ltd. & Ors. 1999 (1) SCC 492 and Ramana-Dayaram Shetty Vs. International Airport Authority of India & Ors. 1979 (3) SCC 489 regarding authority on tender jurisprudence.

10. The Learned Counsel for the other Respondents also referred to loads to authorities regarding the right of the Appellant to file this Appeal having been disappointed

that he was not successful in getting the benefit having participated in the proceedings for additional procurement of power.

11. Let us examine the facts of the case to see if the Appellant is the party aggrieved by the impugned order.

11.1 In the FY 2009-10, MSEDCL carried out competitive bidding for procurement of 2000 MW $\pm 30\%$ /-20% power on long term basis (25 years). In the bidding, the qualified bidders with quantum of power and price offered in the ascending order of the quoted tariffs were as under:

S.No.	Name of bidder	Levelised tariff 'Rs. per kWh'	Position in bid process	Quantum offered 'MW'
1.	Emco Energy Ltd.	2.879	L1	200
2.	IBRL-Amravati	3.260	L2	1200 (450+750)
3.	APML	3.280	L3	1200
4.	IBRL-Nashik	3.450	L4	950
5.	Wardha Power Company Ltd.	3.620	L5	675

11.2 The quantum of power to be procured by the Respondent no.2 (2600 MW) was met by the quantum offered by the first three bidders viz., M/s. Emco Energy Ltd., IBRL–Amravati and APML. Accordingly, the Respondent no.2 initialed PPAs with the first three lowest bidders viz., M/s. Emco Energy Ltd., IBRL-Amravati and APML for 200 MW, 1200 MW and 1200 MW respectively at their respective tariffs. The State Commission accorded in-principle approval for adoption of tariff for procurement of 2600 MW power vide its order dated 28.12.2010. IBRL-Nashik (Respondent no. 3 herein) and Wardha Power Company Ltd. (Appellant) were qualified bidders but were not successful due to higher tariff-offered by them.

11.3 Subsequently, the Respondent no.2 filed a petition with the State Commission for approval of power purchase of

an additional 125 MW from M/s. APML at the same tariff that was offered in the competitive bidding i.e. Rs. 3.28 per kWh. The State Commission vide its order dated 19.5.2011 approved the proposed power purchase as a special case at the same tariff and terms and conditions as stipulated in the earlier PPA, as quantum of procurement of power was less and it was not advisable to start a fresh process of procurement of power through competitive bidding process. The Commission also stated that this process should not create precedence in the future power procurement.

11.4 On 15.05.2012, the Respondent no.2 moved for additional power procurement of 1090 MW in petition no. 53 of 2012 filed before the State Commission from IBRL-Nashik (650 MW at a tariff of Rs. 3.42 per kWh – levellised) and APML (440 MW at a `tariff of Rs. 3.28 per kWh – levellised). The Commission after hearing the

MSEDCL observed that MSEDCL needed to go through a fresh bid process as per the competitive bidding guidelines to procure additional power. Accordingly by daily order dated 09.07.2012, the State Commission gave liberty to MSEDCL (Respondent no.2) to withdraw the Petition in case no. 53 of 2012 and granted a weeks time to file an application for the same. On 17.07.2012, the Respondent no.2 informed the Commission that it did not desire to withdraw the Petition and would made additional submission in the matter.

11.5 On 20.07.2012, the Respondent no.2 filed its additional submissions with Affidavit pointing out the necessity for the additional procurement of power adopting the tariff under the earlier competitive bidding process and requested the State Commission to reconsider the facts. Presentations were also made by MSEDCL in the matter.

11.6 Pursuant to hearing on 17.10.2012, a Committee was constituted by the State Commission comprising the officers of the Commission, the consumer representatives and the consultants to study the submissions in the case in details regarding additional procurement of power by MSEDCL. The Committee scrutinized all the submissions made by MSEDCL and the Respondents 3 and 4. On 15.12.2012, the Committee submitted its report.

11.7 The State Commission, after considering the recommendations of the Committee, by impugned order dated 27.12.2012 approved procurement of additional power 440 MW from M/s. APML, the Respondent no.4, herein, at the same tariff which was offered in the competitive bidding conducted in the year 2009-10 i.e. Rs. 3.28 per kWh (levellised) and at which it had entered into PPA with the Respondent no. 2 earlier and

IBRL-Nashik, the Respondent no.3, herein, for 650 MW at a levellised tariff of Rs. 3.42 per kWh, 3 paise per kWh lower than that offered in the competitive bidding conducted in the year 2009-10, which was as a result of negotiations by the State Government with IBRL-Nashik. It is pertinent to point out that IBRL-Nashik, though a qualified bidder in the earlier bidding process, had not been successful as its quoted tariff was higher and was ranked at L4 position in the ascending order of tariff.

12. We notice from the impugned order that the Commission has observed that about three years have lapsed since the bidding process was completed and hence there was a need to review the competitiveness of the tariffs under the current market scenario. The State Commission also directed that to provide equal opportunity to the earlier qualified/selected bidders, the Respondent no.2 should check with other successful

bidders to supply additional power at the respective quoted tariffs.

13. We find that only M/s. Emco Energy, IBRL-Amravati, APML and IBRL-Nashik were approached by the Respondent no.2 in the ascending order of tariff quoted in the earlier bidding. The Appellant, even though it was a qualified bidder in the earlier competitive bidding process, was not approached by the Respondent no.2.

14. We find that during the proceedings in the case 53 of 2012, the State Commission on 27.11.2012 directed as under.

“MSEDCL is directed to approach GMR erstwhile Emco Energy Ltd. and enquire whether any quantum is left for Power Purchase Agreement under long term and whether they are willing to supply additional quantum available from their Warora units. Further, MSEDCL is directed to approach India Bulls Power Ltd. and enquire whether any quantum is left for Power Purchase Agreement under long term from its Amravati Units and

whether they are willing to supply additional quantum available from their Amravati units.

Indiabulls Power Ltd. is directed to submit the details of PPA entered for Nashik Plant including the PPA's under arbitration, if any.

GoM is once again requested to submit a copy of all the relevant papers placed before the GoM for approval of quantum and price for additional long term power procurement from Indiabulls Nashik and Adani Power Maharashtra Ltd., Tiroda to the Commission within a week.

All the parties are requested to serve their copy of replies/submissions in this matter to the Authorised Consumer Representatives and the GoM.

15. Shri Anand Ganeshan, Learned Counsel for the Appellant has submitted that the Appellant came to know of the above directions dated 27.11.2012 and offered to supply power on medium term basis by letter dated 10.12.2012.

16. Let us examine the letter dated 10.12.2012, sent by the Appellant to the Secretary of the State Commission. The

relevant extracts of the letter dated 10.12.2012 are as under:

“We note, from the daily proceedings of MERC in Case no;53 of 2012 dated 27th Nov 12, the Hon’ble Commission has directed MSEDCL to approach GMR erstwhile EMCO Energy Ltd to find out whether they are willing to supply additional power from their Warora unit and India Bulls Power Ltd to find out whether any quantum is left for PPA under long term and whether they are willing to supply power.

In this context, WPCL has surplus capacity of around 100 MW and being a generating facility located within the State of Maharashtra, is willing to offer the same to MSEDCL medium term basis, supplies of which can commence immediately at the tariff proposed by MSEDCL for purchase from Adani, which is now pending approval before this Hon’ble Commission.

WPCL would also be in a position to further supply an additional 260 MW from April 2014, when the term of the present contract with Reliance infra expires. WPCL can offer this power on Medium Term basis.

We request you to kindly take the above on record and may consider directing MSEDCL to explore the possibility of power supplies from WPCL as well, being a plant situated in the state of Maharashtra along with GMR and India Bulls Power Limited. The Commission may consider the above proposal for supply of 100 MWs to MSEDCL from WPCL at an approved tariff similar to the one proposed by MSEDCL.”

17. Thus, the Appellant had offered 100 MW immediately and 260 MW from April 2014 on medium term basis. The Appellant had offered 100 MW on medium term basis to commence immediately at the tariff proposed by MSEDCL for purchase from M/s. APML.
18. We find that the Appellant was also not given an opportunity by the State Commission of hearing while other qualified bidders namely M/s. IBRL-Nashik and AMPL were heard by the State Commission. M/s. IBRL-Nashik and APML were also heard by the Committee appointed by the State Commission to study the submissions in details regarding additional procurement of power. The Appellant was neither given an opportunity to appear before the State Commission nor before the Committee appointed by the State Commission, even though it was a qualified bidder in the bidding carried out in 2009-10 for procurement of power

on long term basis. We also find that Committee appointed by the State Commission had given recommendation that a fair and equal opportunity should be provided to the other bidders who qualified in the bidding process. Despite the recommendations of the Committee, the State Commission did not direct MSEDCL to approach the Appellant to give their offer for supply of power on long term basis, even though the tariff proposed by MSEDCL from the other qualified bidder namely IBRL-Nashik was a negotiated tariff with by the State Government/MSEDCL. M/s. IBRL-Nashik as a result of negotiations with MSEDCL/State Government had agreed a discount of 3 paise per kWh (levellised) on the tariff quoted in the earlier competitive bidding. The same negotiated tariff of Rs. 3.42 per kWh was proposed by MSEDCL in their petition before the State Commission. The State Commission also did not record any reason for not accepting the

recommendations of the Committee appointed by it regarding providing equal opportunity to other qualified bidders.

19. From the letter dated 10.12.2012 it appears that the Appellant was not even aware the date from which additional power was required to be procured by the MSEDCL as the Appellant had offered 100 MW with immediate effect and 260 MW from April, 2014, whereas the additional power of 1090 MW was proposed to be procured from FY 2017-18 onwards on long term basis. We also find that the State Government/MSEDCL had negotiated the tariff with M/s. IBRL – Nashik. While IBRL-Nashik had offered levelled tariff of Rs.3.450 per kWh in the bid in FY 2009-10, after negotiation by the State Government/MSEDCL, they agreed to a tariff of Rs. 3.42 per kWh which was also approved by the State Commission. No opportunity was given to the Appellant to match the lowest price and to seek clarification

whether they would be able to supply power on long term basis from 2017-18 from which 1090 MW had been proposed to be procured by MSEDCL. It is pertinent to point out, that the Appellant in the earlier competitive bidding process had bid for 675 MW power on long term basis. As rightly, argued by the Learned Counsel for the Appellant, there was no occasion for the Appellant to be aware that offer on medium term was not acceptable to MSEDCL and that power on long term basis was required from FY 2017-18. MSEDCL also did not approach the Appellant to provide its offer on long term basis from 2017-18 instead of their offer of medium term supply with immediate effect and to match the price at which MSEDCL was proposing additional power procurement from the Respondent no. 3 and 4.

20. The State Commission wrongly presumed from the letter dated 10.12.2012 from the Appellant offering power from immediate effect on medium term basis that in

Appellant was unable to offer power on long term basis from FY 2017-18.

21. It is argued by the Respondents that MSEDCL approached each of the qualified bidders in the order of ranking viz. M/s. EMCO, IBRL-Amravati, APML and then IBRL Nashik. As the additional quantum was fulfilled from these qualified bidders itself, there was no need to go to the bidder which had quoted the highest levelled tariff, namely the Appellant. We do not agree with the contention of the Respondents. MSEDCL had negotiated tariff with IBRL-Nashik and IBRL-Nashik had reduced the levelled tariff by 3 paise per kWh from the tariff quoted in the competitive bidding. Therefore, similar opportunity should have been given to the Appellant too to match their price with the lowest bid for additional procurement of power.

22. The rulings referred to by the Respondents will not be applicable to the present case where the Appellant was not given opportunity by the Respondent no. 2 and the State Commission to participate in the process of procurement of additional power even though it was a qualified bidder in the competitive bidding conducted in FY 2009-10 based on which additional procurement of power was proposed.
23. In view of above, we hold that the Appellant is an aggrieved party and the present Appeal filed by the Appellant is maintainable.
24. We have also heard the Learned Counsel for the parties on merits of procurement of additional quantum of power based on the earlier competitive bidding process. The main contention of the Appellant is that they had not been given opportunity to participate in the bidding process, being a qualified bidder in the earlier bidding,

for power supply on long term basis, even though such opportunity was given to another qualified bidder.

25. Keeping in view the rival contentions of the parties, the following questions would arise for our consideration:

- i) Whether the State Commission is justified in allowing additional procurement of power of 1090 MW from Respondent nos. 3 and 4 under Section 63 read with Section 86(1)(b) on the basis of competitive bidding process conducted by the Respondent no.2 in the year 2009-10 in the order of ranking and that too without approaching the Appellant who was a qualified bidder in the earlier bidding process, to match the lowest tariff?**
- ii) Whether the State Commission has ensured a transparent and fair procedure for procurement of additional quantum of power?**

- iii) Whether the State Commission was correct to permit additional procurement of power on the basis of earlier competitive bidding process at a tariff higher than that the tariff adopted by its order dated 28.12.2010 under Section 63 of the Electricity Act?**
- iv) Whether the State Commission was correct in approving procurement of power at a negotiated tariff from the Respondent no. 3 who had not succeeded in the earlier procurement process without approaching the Appellant who was also a qualified bidder in the earlier bidding process to match the lowest price?**

26. As all the above issues are interconnected these are being dealt with together.

27. Shri Buddy A. Ranganadhan, Learned Counsel for the State Commission has made the following submissions:-

- a). The State Commission had adopted the tariff which was discovered in the competitive bidding undertaken by the Respondent no.2 under Section 63 of the Act. The only thing that the Commission has done further is to permit an additional quantum of power to be procured by the Respondent no.2 at the same tariff as discovered in the competitive bidding.

- b). Neither Section 63 of the Act nor Section 62 in any case supersede or overshadow Section 86(1)(b) of the Electricity Act. The jurisdiction exercised under Section 86(1)(b) of the Act is not subsumed by Section 63 and 62 of the Act.

- c). Whether the tariff of power generated is determined by the Commission under Section 62 or discovered and adopted under Section 63, the PPA to be entered into

between generator and the distribution company has necessarily to be approved under Section 86(1)(b) of the Act.

- d). The scope of approval under Section 86(1)(b) of the Act includes the power to reject, modify, alter or vary the terms of the agreement for purchase of power and to further direct the distribution licensee to rewrite the terms found reasonable by the State Commission.

- e). The quantity of power in the PPA is one of the criteria for the State Commission to satisfy itself as to its reasonableness and in the public interest. Further, under Section 86(1)(b), the power to check and satisfy itself as to the reasonableness of quantum of power is part of the statutory function to regulate power procurement process of the distribution licensee. It has been held in a catena of judgments that the power to

“regulate” is a very wide import and would encompass every aspect of the thing sought to be regulated.

- f). Some of the main contentions raised by the Respondent no.2 in regard to high demand supply gap envisaged in FY 2017-18 are reduction in availability from UMPPs as only two of the twelve UMPPs envisaged are in construction stage, some of the PPAs signed between the Respondent no.2 and NTPC are sub judice before the Central Commission, reduced availability of power from Uran gas project and RGPPL project due to shortage of gas supply and uncertainty about availability of supply from some of its contracted sources as the matters are sub judice. Based on the projections of MSEDCL, there was a shortage of 1447 MW in 2017-18 and 6434 MW in FY 2019-20. The Respondent no.2 further stated that the tariff discovered in the competitive bidding held recently in other states have been showing

increasing trend and were higher than being offered by the Respondent no.3 and 4.

- g). Commission has considered various aspects while approving the power purchase of 1090 MW from the Respondent no. 3 and 4. The State Commission has carried out a detailed analysis of the fact that whether the tariffs offered by the Respondent no.3 and 4 are competitive in the current scenario or not. The factors considered by the Commission are not “assumption and presumption” but ground realities and the actual state of affairs in the power sector as prevalent.
- h) The Commission has in the impugned order also taken into account the public interest in considering the reasonability of the quantum of power.

- i) After a detailed analysis, the State Commission has concluded that while it is difficult to establish whether one would receive more competitive tariffs as compared to the proposed procurement if the bidding process is carried out at the time of order, there has been an increasing trend in the tariff discovered in case 1 bidding process and the recent developments, as discussed in the order, are likely to impact it further.

28. Ms. Deepa Chavan, Mr. M.S. Chandoke, Mr. Amit Kapur, Learned Counsel for the Respondent nos. 2, 3 and 4 respectively have made the following submissions:-

- a) The entire proceeding before the State Commission are reflective of the extent to which the State Commission has gone to ensure that the additional power procurement is in public interest.

- b) It was within the powers of the State Commission to approve procurement of additional quantum of power at tariff discovered in competitive bidding conducted in 2009-10 under Section 63 of the Act.

- c) Under the bidding guidelines deviations are permissible as long these have the approval of the Appropriate Commission. This power can be exercised under Section 86(1)(b) read with Section 63 of the Act. Clause 3.5.7 of RFP captures the intent of the Respondent no.2 in seeking the approval of the Appropriate Commission should the quantum of procurement vary from the - 20%/+30% mark. This is what was done in the present case.

- d) It has been held in the case of Tata Cellular Vs. Union of India (1994) 6 SCC 651 that the Government must

have freedom of contract. In other words a fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere or quasi-administrative sphere. However, the decision must not only be tested by the application of Wednesbury principle of reasonableness but must be free from arbitrariness not affected by bias or actuated by malafides.

- e) In the present case MSEDCL's actions are not actuated by malafides or bias nor are the violative of Wednesbury principles, or smack of arbitrariness.

29. Let us examine the findings of the State Commission in the impugned order. The relevant findings are as under:

- a). Based on the demand and supply analysis carried out by the MSEDCL, it has projected a shortfall of 1447 MW in FY 2017-18 and the projected shortfall is expected to

increase to 6434 MW by 2019-20. The State Commission after considering the following major issues impacting the availability of power from contracted sources approved procurement of a quantum of 1090 MW as proposed by the Respondent no.2.

- i) Uncertainties about availability of supply from some of its contracted sources as the matters are sub judice;
- ii) Reduced availability of power from Uran gas project and RGPPL project due to shortage of gas supply;
- iii) Reduction in availability from UMPPs as only two of the twelve UMPPs envisaged are in construction stage; and

- iv) Some of the PPAs signed between MSEDCL and NTPC are sub judice before the Central Commission.

- b) The proposed procurement relies on the tariff discovered in the competitive bidding process carried out in 2009-10. About 3 years have elapsed since the bidding process was completed and hence there was a need to review the competitiveness of the tariffs under the current market scenario.

- c) Wardha Power Company Ltd., one of the bidders who was technically qualified has offered to supply 100 MW immediately and another 260 MW from April 2014 onwards under medium term contract to the Respondent no.2. The present petition is for long term power procurement. Further, the tariff quoted by the Wardha Power in the competitive bidding process was higher

than those proposed under the petition. Hence Wardha Power's offer to supply power, to MSEDCL under medium term cannot be considered.

- d) On an examination of the letters written by the successful bidders clearly stating their inability to supply additional power, the Commission is satisfied that a transparent process has been followed. The successful bidders have been given an equal opportunity to supply the additional quantum offered by IBRL-Nashik and APML. These letters and correspondences extracted above giving chance and opportunity to other bidders is akin to a competitive bidding process.

- e) The Commission has carried out an analysis considering various tariffs discovered in the recent bids as well as the recent developments in power sector

impacting the tariffs. The State Commission noted that in tariffs discovered in recent case of bidding process conducted by UPPCL are in the range of Rs. 4.48 to 7.10 per kWh.

- f) The Commission revisited the developments in power sector which have an impact on the cost structure of power projects and hence tariffs. The following factors have an impact to increase the tariffs for future procurements of power.
- Lack of clarity on allocation of coal blocks as well as fresh coal linkage;
 - Emerging scenario on account of cancellation of coal blocks and linkages;
 - Resources taxes levied by different countries for export of coal; Proposed pooled pricing of coal;

- Withdrawal of Mega Power Policy since July, 2012; and
 - Impact of exchange rate and interest rate movements.
- g) Above analysis leads to the conclusion that while it is difficult to establish whether one would receive more competitive tariffs as compared to the proposed procurement if the bidding process is carried out today, there has been an increasing trend in tariffs discovered in the Case1 bidding process; and the recent developments mentioned above are likely to impact it further.
- h) Further, the revised model documents for power purchase by distribution licensees are in a draft stage; and it may take three to six months of time to be finalised. This uncertainty may affect the competition, in case a new bidding process is conducted now.

- i) M/s. AMPL and IBRL-Nashik Projects are based on linkage of domestic coal . Considering the fact that a) increase in imported coal prices in general; b) unavailability of new coal blocks; and c) unavailability of gas, it appears that domestic linkage coal based generation is competitive as compared to other sources. It may be noted that as per the NCDP and further clarification issued by PMO, in absence of a PPA with distribution utility, both the projects from which power procurement has been proposed by MSEDCL, may lose an opportunity to avail linkage coal.
- j) The coal linkage awarded to the projects under consideration is not transferrable. Recently, no new coal linkages have been awarded by Ministry of Coal. Hence, in the near future, procurement of power from projects based on domestic coal, which are based in Maharashtra, will be more difficult as compared to the past.

- k) The Commission observes that if the projects from which power procurement has been proposed by MSEDCL are not able to tie up power under long-term PPA, these projects may lose the linkage coal. If the coal linkage is lost, the projects will have to depend on imported coal for power generation.
- l) In such a scenario, there is a possibility that these projects, which have been set-up under the Government of Maharashtra's policy for promoting investment in power generation, may not be able to contract power in long-term at all or may sign long-term PPAs with States other than Maharashtra. The Commission notes that in such a scenario, the benefits of these projects set up under the GoM policy, which have utilised the natural resources of Maharashtra, may accrue to other States. The Commission also notes that

- this may impact future private investment in power generation sector in the State.
- m) The proposed power purchase has been approved by the Government of Maharashtra vide letter dated 01.12.2011 after the approval of the Cabinet Sub-Committee on Energy on 01.11.2011.
- n) Having established that demand-supply gap proposed by MSEDCL requires the proposed procurement of 1090 MW from FY 2017-18 onwards, the Commission derived a conclusion that even though it is difficult to establish in absolute terms whether one would receive more competitive offers if the procurement is carried out today, it is certain that there has been an upward trend in levellised Tariffs for subsequent bidding processes and the analysis shows that the trend is likely to continue.

- o) With the above analysis, it is a fact that the proposed Tariffs are competitive in current scenario. Further, the project specific factors strengthen the fact that domestic linkage coal based power is likely to be competitive and the projects have received benefits under the investment promotion scheme of Maharashtra. The future projects are likely to see an increasing trend of Tariff on account of the issues analysed by the Commission.

- p) The Commission also considered Swiss Challenge Method but concluded that there are many obstacles and there is a likelihood of the exercise becoming futile. Since the procurement has to commence from 2017-18, there is not enough time to experiment with a new process which is not established in power sector.

q) The Commission is satisfied that a transparent process has been followed and the successful bidders have been given an equal opportunity to supply the additional quantum at respective quoted tariffs.

r) Accordingly the State Commission approved procurement of 650 MW from IBRL-Nashik at Rs. 3.42 per kWh and 440 MW from APML at Rs. 3.28 per kWh.

30. Thus, the State Commission has given detailed reasons for allowing additional procurement of 1090 MW against the bids received in the earlier bidding process, by giving opportunity to the successful/qualified bidders in the ascending order of the tariff quoted by them and approving procurement of 440 MW from APML at a levelled tariff of Rs.3.28 per kWh and 650 MW from IBRL-Nashik at a levelled tariff of Rs.3.42 per kWh.

31. We find that in the earlier bidding process the following procurement was approved by the State Commission:

Sl.	Name of Bidding Company	Successful Bidders	Capacity Offered (MW)	Levelised Tariff Rs./kWh)
1.	Emco Energy Ltd.	L1	200	2.879
2.	Indiabulls Power Ltd. (Amravati)	L2	450	3.260
3.	Indiabulls Power Ltd. (Amravati)	L2	750	3.260
4.	Adani Power Maharashtra Ltd.	L3	1200	3.280

32. Section 63 of the Electricity Act provides that notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

33. Thus, under Section 63, the State Commission has to adopt the tariff discovered through transparent process of bidding carried out in accordance with the competitive bidding guidelines issued by the Central Government. In the present case the State Commission had adopted the

tariff for procurement of 2600 MW of power by order dated 28.12.2010 (200 MW from EMCO Energy Ltd. at levelled tariff of Rs. 2.879 per kWh, 1200 MW from Indiabulls Power Realtech Ltd. – Amravati at a levelled tariff of Rs. 3.26 per kWh and 1200 MW from APML at a levelled tariff of Rs. 3.28 per kWh. With this the entire procurement of 2000 + 30% planned under the competitive bidding process was completed. However, by order dated 19.05.2011, the State Commission approved additional procurement of 125 MW from M/s. Adani Power Maharashtra Ltd. at Rs. 3.28 per kWh (levelled), i.e. same tariff as discovered through the competitive bidding process, as a special case, since the quantum was very small.

34. The guidelines for determination of tariff by bidding process for procurement of power by the distribution

licensee has been formed by the Central Government with the following objections:

- i) Promote competitive procurement of electricity by distribution licensee;
- ii) Facilitate transparency and fairness in procurement process;
- iii) Facilitate reduction of information asymmetries for various bidders;
- iv) Protect consumer interest by facilitating competitive conditions in procurement of electricity;
- v) Enhance standardization and reduce ambiguity and hence time for materialization of projects;
- vi) Provide flexibility to suppliers on internal operations while ensuring certainty of availability of power and tariffs for buyers.

35. Admittedly, the competitive bidding process was carried out by MSEDCL for procurement of 2600 MW power as

per the competitive bidding guidelines of the Central Government. There is no dispute that the price discovered in the competitive bidding process was 200 MW at Rs. 2.879 per kWh (levellised) for Emco Energy, 1200 MW at Rs. 3.26 per kWh (levellised) for M/s. IBRL-Amravati and 1200 MW at Rs. 3.280 (levellised) for M/s. APML which stands approved by the State Commission by order dated 28.12.2010. Even though the State Commission has powers to approve deviation in competitive bidding process as stipulated in the competitive bidding guidelines, what is to be examined if the State Commission was justified in approving procurement of additional quantum of power (1090 MW) after the procurement of 2600 MW through competitive bidding was completed, against the same competitive bidding from the qualified bidders at a tariff higher than that adopted by order dated 28.12.2010 and whether

the procedure for taking offers from the qualified bidders in the order of ranking was correct?

36. As rightly pointed out by Learned Counsel for the Appellant, two alternative routes are available to the distribution licensee for procurement of power viz. through bilateral/negotiated PPAs in which case the tariff is determined by the Appropriate Commission under Section 62 of the Electricity Act and by tariff based competitive bidding process under Section 63 of the Act under which the Appropriate Commission adopts the tariff discovered under the competitive bidding process. The present case involves procurement of power under Section 63 of the Act.

37. We find that the Clause 3.5.7 of the Request for Proposal for long term power procurement by MSEDCL provided that any decrease/increase in requisitioned

capacity exceeding 20% or 30% as the case may be, has to be done with the approval of the Appropriate Commission. However, in this case the enhancement in procurement of power by 1090 MW has been allowed by the State Commission after a lapse of about 2 years after the order dated 28.12.2010 of approving procurement of 2600 MW power under Section 63 of the Act.

38. The State Commission has given detailed reasons for approving against additional procurement of 1090 MW against the competitive process which was carried out in FY 2009-10. According to Learned Counsel for the State Commission, the State Commission has exercised its regulatory jurisdiction under Section 86(1)(b) of the Act to approve the procurement of additional power of 1090 MW at a tariff which was discovered during a competitive bidding process under Section 63 of the Act.

39. The State Commission has considered the high demand supply gap in FY 2017-18 due to reduction in availability from Ultra Mega Power Projects as only two out of twelve UMPPs are in construction stage, some PPAs signed between NTPC and MSEDCL are sub judice before the Central Commission, reduced availability of power from Uran gas project and RGPPL project due to shortage of gas supply and uncertainty about availability of supply from some of its contracted sources as the matters are subjudice, etc. The shortfall projected in FY 2017-18 is 1447 MW which is expected to increase to 6434 MW in FY 2019-20.

40. The State Commission has also revisited the developments in power sector which have an impact on the cost structure of power projects and hence tariffs for future procurement of power.

- Lack of clarity on allocation of cancellation of coal blocks and linkages.
- Emerging scenario on account of cancellation of coal blocks and linkages.
- Taxes levied by different countries for export of coal
- Proposed pooled pricing of coal
- Withdrawal of Mega power Policy since July 2012 and
- Exchange rate and interest rate movements.

41. The State Commission has also taken into account the public interest in considering the reasonability of the quantum of power procured. Regarding the competitiveness of the tariffs, the Commission observed in the impugned order that there was an increasing trend in tariff as displayed in the competitive bidding

process carried out for procurement of power by other distribution companies.

42. This Tribunal in the case of Essar Power Ltd. V Uttar Pradesh Electricity Regulatory Commission, 2012 ELR (APTEL) 182 held as under:

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

(a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission.

(b) This process must discover competitive tariff in accordance with market conditions from the successful bid-consistent with the guiding principles under section 61 of the Act.

(c) If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines.”

.....

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

“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 guidelines issued by the Central Government.”

78. Thus the competitive bidding process as contemplated under Section 63 of the Act must meet the following mandatory statutory requirements:

- (a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines and Request for Proposal (RFP) including the finalized PPA approved by the State Commission
- (b) 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.

79. At the risk of repetition, it has to be stated that if these requirements have not been followed and if the process has failed to safeguard the consumer interest as well as to promote competition and efficiency by permitting the deviations, it would not only destroy the basic structure of the guidelines but also would frustrate the objectives of the Government guidelines. In view of the fact that the bid documents and the Request for Proposal documents on the basis of the Government guidelines as well as the bid process had already been approved by the State Commission before inviting the bids and since Evaluation Committee had already concluded the bid process by declaring the Essar Power as a successful bidder and in view of the fact that on that basis, the Noida Power filed a Petition before the State Commission for adoption of said tariff, the above process has established certain rights of the parties. Those rights are these:

- (a) The procurer has a right to claim for adoption of the tariff discovered through the competitive bidding process under Section 63 of the Act by the State Commission.*
- (b) Once qualified bidders were short listed on the basis of non-financial component of the bids by the bidders, no new participants could be introduced.*
- (c) The process should have been culminated into the signing of the PPA when the evaluation of the financial bid by the Evaluation Committee had shown*

that bid of lowest bidder was as per the prevailing market prices.

- (d) Unless the said bidding process is scrapped, the Noida Power (R-2) cannot go for bilateral PPA.*

118. The State Commission is required to act consistent with the scheme and objective of the Section 63 as well as other provisions of the Act, 2003. It is settled law that when a statute vests power in the authority to be exercised in a particular manner, then the said authority has to exercise it only in that manner provided in the Statue and not otherwise. The State Commission has thus acted beyond its jurisdiction in issuing the directions in the Order dated 30.05.2011.

119. Under Section 63 there are only two options for the State Commission:

- (a) Either to reject the petition if it finds that the bidding was not as per the statutory frame work;*

Or

- (b) To adopt the tariff if it is discovered through transparent process conducted as per the bidding guidelines.*

120. This Tribunal has already held in the decisions referred to above that while invoking the Section 63, the State Commission has only following two courses to follow:

- (a) The State Commission is only to verify, under Section 63 of the Act, as to whether the bidding*

process has been held in a transparent manner and in accordance with the Government of India guidelines or not. If this is not found to be complied with, then State Commission shall reject the petition for the approval of the tariff.

- (b) *Once the process of the bidding is completed strictly in accordance with the bidding guidelines issued by the Central Government in a transparent manner, then the State Commission shall adopt the said tariff since it is binding on the Commission.*

.....

128. *Let us now deal with the powers of the State Commission which are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 could pass any of the following Orders as indicated earlier:*

- (a) *Either reject the petition if it finds that the bidding was not as per the statutory framework;*

Or

- (b) *Adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines.”*

43. In Essar Power case the distribution company after having carried out the tariff based competitive bidding and having selected the qualified bidders proposed to enter into a PPA with a generating company who had

not participated in the competitive bidding at a negotiated price lower than the lowest qualified bidder. The State Commission permitted the same. The Tribunal set aside the order of the State Commission on the basis that such procurement from a party who had not participated in the competitive bidding is not as per the Government of India guidelines. Admittedly in the present case the competitive bidding process for 2600 MW was carried out as per the Government of India guidelines and the competitive tariffs discovered in the bidding process was duly adopted by the State Commission as per law. However, in the present case the procurement of additional power has been proposed from the qualified bidders in the competitive bidding process for 2000 MW ± 30 /-20% bidding process conducted in FY 2009-10 and completed in December 2010.

44. The standard bidding guidelines of Government of India provided for deviation for the guidelines with the approval of the State Commission. The RFP issued under the competitive bidding process permits additional procurement beyond the specified quantum with the approval of the State Commission. This deviation in quantum of power could have been exercised at the time of procurement of power in the year 2010. However, due to certain developments as described in the impugned order a shortfall in availability of power is anticipated in the FY 2017-18 to the extent to 1447 MW which is likely to increase to 6434 MW in FY 2019-20. Thus, approval for procurement of additional quantum of 1090 MW power by the State Commission is in order. The question arises whether procurement of additional power of 1090 MW, about 42% of 2600 MW power procurement approved under the bidding process, can

be allowed by the State Commission against the earlier bidding process.

45. In *Jiyajeerao Cotton Mills Ltd. Vs. MP Electricity Board* 1989 SCC Supl.(2) 52 it was held:

“The word ‘regulate’ has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied.”

46. *Shri D.K. Trivedi & Sons Vs. State of Gujarat* 1986 SCC Suppl 20, the Hon’ble Supreme Court held:

‘The word ‘regulate’ means ‘to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings.’”

47. In *V.S. Rice and Oil Mills & Others Vs. State of A.P.* AIR 1964 SC 1781 it was held: “The word ‘regulate’ is which enough to confer power on the State to regulate

either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of essential activities in question and to arrange for its equitable distribution and its availability at fair prices.”

48. In *K. Ramanathan Vs. State of Tamil Nadu & Anr.* (1985) SCC(2) 116 the Hon'ble Supreme Court held:

“The word ‘regulate is variously defined as meaning to adjust; to order or govern by rule, method or established mode. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and the power must be regarded as plenary. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed”.

49. The State Commission under Section 86(1)(b) of the Act has powers to regulate the procurement of power by the distribution licensee. The approval for procurement of additional quantum of power of 1090 MW for meeting the anticipated shortfall in supply due to some exigencies as indicated in the impugned order by the State Commission is, therefore, in order. The Appellant here is mainly aggrieved by the process in selecting the bidders for additional power without providing him an opportunity even though it was a qualified bidder in the earlier bidding process. Therefore, in the present context we are only concerned about the process followed by the State Commission in selecting the successful bidders for supply of additional power of 1090 MW. In the circumstances of the present case, we do not want to interfere with the decision of the State Commission for procurement of additional 1090 MW against the competitive bidding process for 2600 MW

power conducted in FY 2009-10 and approved by the order dated 28.12.2010, to meet the projected shortfall in power supply in the State in the interest of consumers. However, we have to examine the procedure adopted in selecting the bidders for supply of additional power and the tariff approved for the same. We also want to make it clear that the findings in the present Appeal is specific to the circumstances of the present case and should not be treated as a precedent.

50. Let us examine the procedure adopted by the MSEDCL in deciding the quantum and price of power for procurement of additional power from the qualified bidders. MSEDCL approached the bidders in the ascending order of their quoted tariff in the bids. M/s. GMR, erstwhile M/s. EMCO Energy Ltd., the lowest bidder (L1) and Indiabulls Power Ltd. (Amravati), the second lowest bidder (L2) expressed inability to offer any additional quantum of power. M/s. AMPL, the third

lowest bidder (L3) offered 440 MW power at Rs. 3.28 per kWh i.e. the same tariff at which the State Commission had approved procurement of 1200 MW vide its order dated 28.12.2010. M/s. IBRL-Nashik, the fourth lowest bidder (L4) offered balance 650 MW of power. It is seen that the State Government/MSEDCL negotiated the price of electricity with M/s. IBRL-Nashik, the Respondent no.3, and they agreed to reduce the levelled tariff to Rs. 3.42 per kWh from the earlier bid price of Rs. 3.450 per kWh which was approved by the State Commission by the impugned order. It is seen that the Appellant was not approached by MSEDCL to offer power on long term basis even though the Appellant was a qualified bidder (L5).

51. We find that the State Commission by order 28.12.2010 had approved the adoption of tariff for procurement of 2600 MW power as under:

Sl.	Name of Bidding Company	Successful Bidders	Capacity Offered (MW)	Levelised Tariff Rs./kWh)
1.	Emco Energy Ltd.	L1	200	2.879
2.	Indiabulls Power Ltd. (Amravati)	L2	450	3.260
3.	Indiabulls Power Ltd. (Amravati)	L2	750	3.260
4.	Adani Power Maharashtra Ltd.	L3	1200	3.280

The State Commission in its order dated 28.12.2010 has also analysed the levelled tariff rates discovered through the competitive bidding and compared these rates with the levelled tariffs calculated through MoU route with same assumptions and after analysis of the data it observed that tariffs discovered through both the routes were comparable. With the adoption of the above tariffs, the highest being Rs. 3.280 per kWh, the competitive bidding process was completed.

52. Thus, the highest tariff which was adopted by the State Commission by its order dated 28.12.2010 was Rs. 3.280 per kWh. The other two lower bidders whose tariff was adopted by the State Commission had declined to

offer additional power. We find that the additional procurement of 440 MW approved by the State Commission from M/s. AMPL is also at Rs. 3.280 per kWh i.e. the same rate at which the approval was granted by the State Commission by order dated 28.12.2010. We feel that the State Commission should have directed MSEDCL to give opportunity to all other qualified bidders viz. M/s. IBRL-Nashik and the Appellant to match the price of Rs. 3.280 per kWh at which procurement of power was approved by the State Commission in its earlier approval dated 28.12.2010. Allowing procurement of power at any rate higher than the rate of Rs. 3.280 (levellised) which was adopted and approved by order dated 28.12.2010 after following the competitive bidding process under Section 63 would not be permissible. It was not open to the State Commission to accept the negotiated tariff with IBRL-Nashik at a tariff which was higher than the tariff approved after

completion of the competitive bidding under Section 63 of the Act. The competitive bidding process conducted in the year 2009-10 was completed with the approval of procurement of 2600 MW at the price discovered in the bidding process. If some additional procurement has to be made after approval of the State Commission it has to be at the price which was earlier discovered in the competitive bidding and approved by the State Commission by order dated 28.12.2010. Admittedly M/s. Emco Energy Ltd. (L1) and M/s. IBPL-Amravati (L2) had expressed inability to supply additional power. M/s. APML (L3) have offered to supply 440 MW at Rs. 3.280 per kWh (levellised) i.e. the same tariff which was approved by the State Commission by the order dated 28.12.2010. Therefore, IBRL-Nashik and the Appellant, the other successful bidders (L4 and L5 respectively) should have been given an opportunity to match the price of Rs. 3.280 per kWh (levellised) offered by APML

which was earlier approved by the State Commission by its order dated 28.12.2010. It was not correct for the State Commission to have adopted a tariff of Rs. 3.420 per kWh for procurement from the Respondent no.3 which was agreed after negotiations without giving an opportunity to the Appellant to match the tariff with the lowest offer.

53. Accordingly, we direct MSEDCL to approach IBRL-Nashik and the Appellant who were the qualified bidders to give their offers for long term supply matching the levelled tariff of Rs. 3.280 per kWh. In case both IBRL-Nashik and the Appellant are able to offer matching the tariff of Rs. 3.280 (levelled), additional procurement of power (1090 MW) shall be approved by the State Commission amongst M/s. APML, IBRL-Nashik and the Appellant on pro-rata basis on the quantum offered by them i.e. in the ratio of 440 MW, 650 MW and the quantum offered by the Appellant on long term basis

respectively. If the Appellant is not prepared to offer any power at Rs. 3.280 per kWh and IBRL-Nashik is prepared to offer power at Rs. 3.280 per kWh levelled than the power procurement shall be approved from APML and IBRL-Nashik for 440 MW and 650 MW respectively. If IBRL-Nashik offers less than 650 MW at the tariff of Rs.3.28 per kWh (levelled) then the power will be allocated amongst APML, IBRL-Nashik and the Appellant in the ratio of 440 MW and the quantum in MW offered by IBRL-Nashik and the Appellant respectively and for balance power, if any, fresh procurement process shall be initiated by MSEDCL. In case IBRL-Nashik and the Appellant do not agree to offer power on long term basis at levelled tariff of Rs. 3.280 per kWh, MSEDCL would take action for procurement of balance 650 MW (over and above 440 MW already approved in the impugned order for

procurement from M/s. APML at Rs. 3.28 per kWh –
levellised) through a fresh competitive bidding process.

54. In view of above, the Appeal is allowed and the State
Commission's order is set aside to the extent indicated
above. The State Commission is directed to pass
consequential order as per the above directions. No
order as to costs.

55. Pronounced in the open court on this 10th day of
February, 2015.

(Justice Surendra Kumar)
Judicial Member

(Rakesh Nath)
Technical Member

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