IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 37 OF 2018
APPEAL NO. 88 OF 2018 & IA NO. 300 OF 2018 & IA NO. 2268 OF 2023
APPEAL NO. 102 OF 2018
APPEAL NO. 129 OF 2018
APPEAL NO. 302 OF 2018 & IA NO. 1120 OF 2018

Dated: 5th August, 2024

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member (Electricity)

In the matter of:

APPEAL NO. 37 OF 2018

Mr. Rama Shanker Awasthi
301, Surbhi Deluxe Apartments,
6/7 Dalibagh, Lucknow – 226 001 … Appellant(s)

VERSUS

1. **Uttar Pradesh Power Corporation Ltd. (UPPCL)**
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226 001. ... Respondent No.1

2. **UP New & Renewable Energy Development Agency (UPNEDA)**
Through its Managing Director,
Vibhuthi Khand, Gomti Nagar,
Lucknow – 226 010. ... Respondent No.2

3. **Uttar Pradesh Electricity Regulatory Commission**
Through its Secretary,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar
Vibhuti Khand, Lucknow – 226 010 ... Respondent No.3

4. **Essel Infraprojects Ltd.**
Through its Managing Director,
513/A, 5th Floor, Kohinoor City,
Kirol Road, LBL Marg,
Kurla (W), Mumbai – 400 070 ... Respondent No.4

5. Surana Telecom & Power Ltd.
Through its Managing Director,
5th Floor, Surya Tower, SP Road,
Secunderabad – 500 003 … Respondent No. 5

6. Lohia Developers (India) Pvt. Ltd.
Through its Managing Director
S-569, 2nd Floor, Greater Kailash-II,
New Delhi – 110 048. … Respondent No. 6

7. Ferromar Shipping Pvt. Ltd.
Through its Managing Director
Anand Bhavan, Old Station Road,
Margoa, Goa – 403 601 … Respondent No. 7

8. N.P. Agro India Industries Ltd.
Through its Managing Director
581, Kali Bari, Bareilly. … Respondent No. 8

9. Shree Radhey Radhey Ispat Pvt. Ltd.
Through its Managing Director
122.235, Plot No. 17,
Fazalganj, Kanpur – 208 012. … Respondent No. 9

10. Sukhbir Agro Energy Limited
Through its Managing Director
A-16, Narain House, Green Park,
New Delhi – 110016. … Respondent No. 10

Counsel on record for the Appellant	:	Ranjitha Ramachandran Poorva Saigal Anushree Bardhan Shubham Arya Arvind Kumar Dubey
Counsel on record for the Respondent(s)	:	Sunil Kumar Rai Altaf Mansoor for Res.1 C. K. Rai for Res. 3 Ritwika Nanda Petal Chandhok Anal Nair for Res.4 Rupesh Kumar Pravesh Bahuguna Aditya Kumar for Res.5

Shagun Bhargava
Nishant Kumar for Res.6

Rupesh Kumar
Pravesh Bahuguna
Aditya Kumar for Res.7

Sourav Roy for Res.9

Suparna Srivastava for Res.10

APPEAL NO. 88 OF 2018 & IA NO. 300 OF 2018 & IA NO. 2268 OF 2023

M/s. Sukhbir Agro Energy Ltd.
Through its Group Senior Manager
Having its registered office at
Faridkot Road, Guruharsahai,
District Firozpur, Punjab-152023,
and Corporate office at:
A-4, Second Floor, Green Park Main
New Delhi – 110016. … Appellant(s)

VERSUS

1. **Uttar Pradesh Electricity Regulatory Commission**
Through its Secretary,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar,
Vibhuti Khand, Lucknow – 226 010 ... Respondent No.1

2. **Uttar Pradesh Power Corporation Ltd. (UPPCL)**
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226 001. ... Respondent No.2

3. **Uttar Pradesh New & Renewable Energy Development Agency (UPNEDA)**
Through its Director,
Vibhuthi Khand, Gomti Nagar,
Lucknow – 226 010. ... Respondent No.3

4. **Government of Uttar Pradesh**
Department of Energy,
Through its Principal Secretary,
Bapu Bhawan, Vidhan Sabha Marg,
Lucknow, Uttar Pradesh – 226 001. ... Respondent No.4

Counsel on record for the Appellant	:	Suparna Srivastava
Counsel on record for the Respondent(s)	:	C. K. Rai for Res. 1
		Altaf Mansoor Sunil Kumar Rai for Res.2
		Amitav Singh Jagannath Nanda Yash Joshi for Res.3

APPEAL NO. 102 OF 2018

PSPN Synergy Private Limited
(A Project company formed by M/s Shree Radhey Radhey Ispat Pvt. Ltd.)
Registered Office at: 122/235, SA, Plot No. 17,
Fazal Ganj, Kanpur - 208012 … Appellant(s)

VERSUS

1. **Uttar Pradesh Electricity Regulatory Commission**
Through its Chairman,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar,
Vibhuti Khand, Lucknow – 226 010 ... Respondent No.1

2. **Uttar Pradesh Power Corporation Ltd. (UPPCL)**
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226 001. ... Respondent No.2

3. **Uttar Pradesh New & Renewable Energy Development Agency (UPNEDA)**
Through its Director,
Vibhuthi Khand, Gomti Nagar,
Lucknow – 226 010. ... Respondent No.3

4. **Uttar Pradesh Transmission Company Limited,**
Through its Director,
Office at: 7th Floor, Shakti Bhavan,,
14 Ashok Marg, Lucknow - 226001. ... Respondent No.4

Counsel on record for the Appellant	:	Sourav Roy
Counsel on record for the Respondent(s)	:	C. K. Rai for Res. 1
		Altaf Mansoor

Sunil Kumar Rai for Res.2

Amitav Singh
Jagannath Nanda
Yash Joshi for Res.3

APPEAL NO. 129 OF 2018

Salasar Green Energy Private Limited
(A Project company formed by M/s N. P. Agro (India) Industries Limited)
Registered Office at: 253, Madhowari Behind Madhu Ice Factory, Bareilly – 243005, Uttar Pradesh. … Appellant(s)

VERSUS

1. **Uttar Pradesh Electricity Regulatory Commission**
Through its Chairman,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar,
Vibhuti Khand, Lucknow – 226 010 ... Respondent No.1

2. **Uttar Pradesh Power Corporation Ltd. (UPPCL)**
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226 001. ... Respondent No.2

3. **Uttar Pradesh New & Renewable Energy Development Agency (UPNEDA)**
Through its Chairman,
Vibhuthi Khand, Gomti Nagar,
Lucknow – 226 010. ... Respondent No.3

4. **M/s. Essel Infraprojects Ltd.**
Through its Director,
513/A, 5th Floor, Kohinoor City,
Kirol Road, LBL Marg,
Kurla (W), Mumbai – 400 070 ... Respondent No.4

5. **M/s. Surana Telecom & Power Ltd.**
Through its Director,
5th Floor, Surya Tower, SP Road,
Secunderabad – 500 003 … Respondent No. 5

6. **M/s. Sudhakar Infratech Pvt. Ltd.**
Through its Director
Plot No. 3-6-661, Flat-301,
Sai Sandya Apartment, Street No. 9,

Himayat Nagar – 500 029. … Respondent No. 6

7. Lohia Developers (India) Pvt. Ltd.
Through its Director
S-569, 2nd Floor, Greater Kailash-II,
New Delhi – 110 048. … Respondent No. 7

8. M/s. Ferromar Shipping Pvt. Ltd.
Through its Director
Anand Bhavan, Old Station Road,
Margoa, Goa – 403 601 … Respondent No. 8

9. M/s. Technical Associates Limited
Through its Director
8th KM, Faizabad Road, Vijaypur,
Lucknow - 226010 … Respondent No. 9

10. M/s. Sahasradhara Energy Pvt. Ltd.
Through its Director
New No. 25, Old No. 10,
Sir Madhavan Nair Road,
Nungambakkam, Chennai – 600 034. … Respondent No. 10

11. M/s Pinnacle Jackson
Through its Director
T-15, 2nd Floor, Green Park Main,
New Delhi – 110016. … Respondent No. 11

12. M/s Adani Green Energy (Uttar Pradesh) Limited
Through its Director
Achalraj opp. Mayor Bunglaw,
Ahmedabad - 380006 … Respondent No. 12

13. M/s Avadh Rubber Prop Madras Elastomers Ltd.
Through its Director
B-13, Industrial Area,
Opp. Amausi Aerodrome,
Lucknow – 226 008 … Respondent No. 13

14. M/s Shree Radhey Radhey Inspat Pvt. Limited
Through its Director
122/235 Plot No. 17, Fazalgunj,
Kanpur - 208012. … Respondent No. 14

15. Sukhbir Agro Energy Limited (20 MW)
Through its Director

A-16, Narain house, Green Park,
New Delhi. … Respondent No. 15

16. Sukhbir Agro Energy Limited (20 MW)
Through its Director
A-16, Narain house, Green Park,
New Delhi. … Respondent No. 16

17. Sukhbir Agro Energy Limited (20 MW)
Through its Director
A-16, Narain house, Green Park,
New Delhi. … Respondent No. 17

Counsel on record for the Appellant : Sourav Roy

Counsel on record for the Respondent(s) : C. K. Rai for Res. 1

Altaf Mansoor
Sunil Kumar Rai for Res.2

Amitav Singh
Jagannath nanda
Yash Joshi for Res.3

APPEAL NO. 302 OF 2018 & IA NO. 1120 OF 2018

Lohia Developers (India) Pvt. Ltd.
Through its Director
S-569, 2nd Floor, Greater Kailash-II,
New Delhi – 110 048. … Appellant(s)

VERSUS

1. Uttar Pradesh Electricity Regulatory Commission
Through its Chairman,
II Floor, Kisan Mandi Bhawan,
Gomti Nagar,
Vibhuti Khand, Lucknow – 226 010 ... Respondent No.1

2. Uttar Pradesh Power Corporation Ltd. (UPPCL)
Through its Managing Director,
7th Floor, Shakti Bhawan,
14, Ashok Marg, Lucknow – 226 001. ... Respondent No.2

3. Uttar Pradesh New & Renewable Energy Development Agency (UPNEDA)
Through its Director,
Vibhuthi Khand, Gomti Nagar,

Lucknow – 226 010. ... Respondent No.3

4. **Government of Uttar Pradesh**
Department of Energy,
Through its Principal Secretary,
Bapu Bhawan, Vidhan Sabha Marg,
Lucknow, Uttar Pradesh – 226 001. ... Respondent No.4

Counsel on record for the Appellant	:	Himanshu Upadhyaya Shivam Tripathi
Counsel on record for the Respondent(s)	:	C. K. Rai for Res. 1 Altaf Mansoor for Res.2 Amitav Singh Jagannath Nanda Yash Joshi for Res.3

JUDGMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

The Appellants, in this batch of Appeals (except in Appeal No.37 of 2018), are generating companies which have established solar power projects, at different locations in the State of Uttar Pradesh under a competitive bidding process, for solar power procurement carried out in the State in 2015, for procurement of 215 MW power from grid connected solar PV projects. Uttar Pradesh Power Corporation Ltd ("UPPCL" for short) was the designated procurement agency for the DISCOMS of Uttar Pradesh, and the U.P. New and Renewable Energy Development Agency ("UPNEDA" for short) was the nodal agency for procurement of 215 MW power from Grid Connected Solar Power Projects.

By the impugned Order, passed in **M/s. Uttar Pradesh Power Corporation Ltd. & Anr. Vs. Essel Infra Projects Ltd. & Ors,** (Order in Petition No.1110 of 2016 dated 21.11.2017), the Uttar Pradesh Electricity

Regulatory Commission ("UPERC" for short) had: (i) reduced the discovered tariffs for the subject projects to Rs.7.02/kWh (as against the tariff quoted by them, ranging between Rs.8.60 per kwh to 7.95 per kwh); and (ii) directed the Power Purchase Agreements [PPAs], signed by the Appellants with the 2nd Respondent-Uttar Pradesh Power Corporation Ltd. ("UPPCL" for short), to be modified as per the approved/reduced tariff. Aggrieved by such a reduction in tariff, the appellant-generators have invoked the appellate jurisdiction of this Tribunal.

The Appellant, in Appeal No.37/2018, is a consumer of electricity in the State of Uttar Pradesh, and is aggrieved by the tariff approved by the UPERC for purchase of power from these solar power projects. He seeks further reduction in tariff below the tariff of Rs.7.02/kWh approved by the UPERC under the impugned Order.

Under the aforesaid competitive bidding process, the Appellants-generating companies were awarded (and have since then implemented) the following solar power projects:

Table No.1

Capacity	Location	Quoted/ discovered tariff	Date of commissioning and power supply	Dated of execution of PPA	Date of execution of Amended PPA (for 12 years)	Tariff being received
SAEL Ltd. – Appellant in Appeal No.88/2018						
20 MW	Lalitpur	Rs.8.43/kWh	8.2.2019	1.12.2015	7.12.2017	Rs.7.02/kWh
10 MW	Lalitpur	Rs.8.23/kWh	31.3.2017	1.12.2015	7.12.2017	Rs.7.02/kWh
10.MW	Mahoba	Rs.8.60/kWh	5.8.2017	1.12.2015	7.12.2017	Rs.7.02/kWh
PSPN Synergy Private Limited– Appellant in Appeal No. 102/2018						
15MW	Jalaun	Rs.8.60/kWh	31.3.2017	2.12.2015	5.12.2017	Rs.7.02/kWh
Salasar Green Energy Private Limited – Appellant in Appeal No.129/2018						
5MW	Hamirpur	Rs.8.496/kWh	22.5.2017	2.12.2015	5.12.2017	Rs.7.02/kWh
M/s Lohia Developers (India) Pvt. Ltd. - Appellant in Appeal No. 302/2018						
5MW	Hamirpur	Rs.7.95/kWh	29.3.2017	2.12.2015	6.12.2017	Rs.7.02/kWh

According to the appellants, the impugned order passed by the UPERC is in violation of the principles governing the competitive bidding process under Section 63 of the Electricity Act, 2003 ("the Act" for short), and (i) causes them grave financial injury in the form of shortfall in tariff receivables; (ii) has resulted in severe stress on the Appellants in terms of loan repayment; and (iii) has adversely affected reasonable return on the Appellant's investment; and, on account of the illegal reduction in tariff by the impugned Order, the Appellants are suffering financial injury in the form of shortfall in tariff receivables. The above injury continues over the entire period of 12 years of the term of the PPAs (i) SAEL is bound to suffer a shortfall of tariff receivables to the extent of Rs.1.41/kWh, 1.21/kWh and 1.58/kWh respectively for its three projects (aggregating to Rs.143.25 Cr.), which is 16% (approx.) lower than the discovered tariff; (ii) PSPN Synergy is bound to suffer a shortfall of tariff receivables to the extent of Rs. 27.54 Crores (approx.), which is 18.37% (approx.) less than the discovered tariff; and (iii) Salasar Green energy is bound to suffer a shortfall of tariff receivables to the extent of Rs. 15.98 Crores (approx.), which is 17.37% (approx.) less than the discovered tariff.

II. FACTUAL MATRIX:

As part of its endeavour to encourage use of renewable energy, the State of U.P. had issued the Solar Power Policy, 2013, (which was notified in January 2013), providing certain incentives for setting up solar power projects. Generators were entitled thereby to sell their electricity to Discoms who would purchase it through the competitive bidding mode as provided under Section 63 of the Electricity Act, 2003. The 2013 Policy envisaged that approx. 500 MW of solar generation projects should be set up by 2017. Clause 10.1 of the 2013 Policy related to bidding of projects, and provided that the Nodal agency will be responsible for carrying out all the tasks related to the bidding process for solar power projects in the State. Under the Policy,

the State of U.P had constituted an Empowered Committee to be headed by the Chief Secretary to oversee, monitor and resolve issues arising out of the setting up of the solar power projects. On 22.07.2014, the Bid Evaluation Committee (BEC) was constituted vide G.O issued by the Government of UP in accordance with Clause 6.3 of the MNRE Guidelines, 2012. UPNEDA, the 3rd Respondent, was appointed as the Nodal Agency to oversee, facilitate and provide incentives to the project developers under the 2013 Policy. In terms of Clause 4.2 (Sale of Energy) of the Solar Policy, 2013, the project developers, interested in selling energy generated from solar power plants to the distribution utility of UPPCL, were to participate under competitive bidding, and the tariff was to be determined on the basis of the competitive bidding mechanism. It was also provided that, in case the bids received was more than 200 MW, selection of bidders should be done on the basis of the lowest quoted tariff in the ascending order, and PPAs should be signed by UPPCL accordingly. UPNEDA was entrusted with the corresponding duty of ensuring purchase of power from the solar plants so set up under the Policy in co-ordination with UPPCL which, in turn, was to act on behalf of the distribution licensees (Discoms) as procurers of electricity.

UPNEDA issued the Request for Proposal (RFP) for procurement of 215 MW power from the grid connected solar PV power projects through the tariff based competitive bidding process. The said RFP, originally issued on 31.01.2015 and which stood amended on 24.04.2015, stipulated that the total procurement of power, through the present bidding process, would be for a maximum of 215 MW. Under the RFP, the PPA was to be signed between the procurer and the successful bidders, and the bidders were required to quote a single tariff for 12 years. Clause 2.28.1 of the RFP provided that the commissioning/schedule delivery date for the solar PV plant for a capacity upto 25 MW shall be 13 months and, for capacity above 25 MW, it shall be 18 months from the date of signing of the PPA. The appellant-M/s Sael Ltd

submitted its bid for supply of aggregate 50 MW of solar energy for 2 units at Lalitpur of 20MW and 10 MW respectively, and one unit at Mahoba of 20 MW. Similarly, Ms. PSPN submitted its bid for a total capacity of 25 MW but the BEC approved 15 MW for M/s PSPN. M/s Salasar submitted its bid for 5 MW. As per the RFP, the procurement of 215 MW was through the competitive bidding process whereby selection was to be made starting from the lowest bid till the time the bid completes the total procurement of 215 MW ie under the bucket filling system. Apart from the appellant, 28 other bidders, who had registered themselves with UPNEDA, also participated in the competitive bidding process. Considering the fact that the bucket filling method was adopted for a maximum of 215 MW, through the competitive bidding process, 15 solar developers were selected with the lowest tariff of Rs.7.02 per unit and a maximum tariff of Rs.8.60 per unit. Based on the amended RfP, twenty-eight (28) bids for a total quantum of 420 MW were received as against 215 MW aggregate capacity. Twenty-Five (25) bids, for a total quantum of 355 MW capacity, were found to have technically qualified by the bid evaluation committee. The financial bids of the 25 technically qualified bidders were opened in the presence of their representatives on 08.06.2015.

Of the twenty-five (25) financial bids opened, the Bid Evaluation Committee, in its meeting held on 12.06.2015, recommended approval of the fixed tariff quoted by fifteen bidding companies for 12 years which was subsequently approved by the Empowered Committee on 04.07.2015, and finally by the U.P Government cabinet on 07.09.2015. The appellants, who had also participated in the bid, were selected through the bidding process with a quoted tariff of Rs.8.43/kWh, 8.60kWh and 8.23kWh respectively for an aggregate capacity of 50MW (for 2 units at Lalitpur 20MW & 10 MW and one unit at Mahoba – 20MW) for M/s Sael Ltd; Rs. 8.60/kWh for appellant-Ms PSPN Synergy Pvt. Ltd. and Rs. 8.496/kWh for appellant-Ms. Salasar Green Energy Pvt. Ltd.

All the PPA were signed in December, 2015 on different dates, and the successful bidders had to achieve the commercial operation date, within 13 months from the date of signing of the PPA, by January, 2017. The appellant, M/s Sael Ltd, signed the PPAs for all its 3 units on 01.12.2015, and the remaining two appellants namely M/s PSPN and M/s Salasar signed their respective PPAs on 02.12.2015. Accordingly, they had to achieve scheduled commercial operation date by 01/02, January 2017.

On selection of 15 developers of solar power projects, for supply of electricity under the bucket filling system, UPNEDA and UPPCL were required to move an appropriate petition before the UPERC for adoption of the discovered tariff under Section 63 of the Electricity Act, 2003. UPNEDA and UPPCL, accordingly, filed the petition under Section 86(1)(b) of the Electricity Act, 2003 before the UPERC on 04.05.2016 (being Petition No. 1110 of 2016) for adoption of the discovered tariff arrived at, pursuant to the competitive bidding process, for 215 MW of solar power with respect to the RFP issued by UPNEDA. In the said petition, the petitioners had also referred to the discussions that took place on 18.05.2015, 30.05.2015, 08.06.2015, 12.06.2015 and 04.07.2015, prior to the filing of Petition No. 1110 of 2016, before the bid evaluation committee which had looked into the viability as well as the alignment of tariff vis-à-vis the market price.

In the petition for adoption of tariff it was mentioned that various developers had participated under the RFP and, in view of the competitive bidding process adopted, 15 developers were selected on the basis of the lowest quoted tariff in the ascending order so as to reach the desired quantum of 215 MW as mentioned in the RFP. By its Order dated 22.02.2017, the UPERC directed the petitioners to take an appropriate decision in the background of the then prevailing and also the present market rate for solar energy, making it clear that they had not expressed any finding approving or

disapproving the rates, and the next hearing in the matter would be held subsequent to the action taken on the basis of the afore-said directions.

By its final order dated 21.11.2017, which order is impugned in these appeals, the UPERC adopted the tariff of Rs. 7.02/Unit for a period of 12 years, directed that, for the next period of 13 years, the bidders shall be bound to supply power to UPPCL at APPC as agreed in the PPA, subject to a ceiling of Rs. 7.02 /Unit, approved the PPA of the nine bidders, and directed that necessary modifications be made in the signed PPA, according to its order. Aggrieved thereby the present appeals.

During the hearing of these appeals, and pursuant to the direction of this Tribunal, UPNEDA produced the minutes of the meetings of the bid evaluation committee. The report submitted by M/s Medhaj Techno Concept Pvt. Ltd, regarding the above mentioned procurement of 215 MW of power, on which reliance was placed by UPNEDA, was also placed before this Tribunal for its perusal.

III. ORDER OF UPERC DATED 22.02.2017:

Petition No. 1110 of 2016 was filed, before the UPERC jointly by UPPCL and UPNEDA, for adoption of tariff, under Section 63 of the Electricity Act, 2003, discovered through the competitive bidding process as per the standard guidelines issued by the Central Government for procurement of solar power from grid connected solar PV projects. UPNEDA was made the designated nodal agency by the Government of UP, vide order dated 20th June, 2013 in accordance with Clause 10.1 of its Solar Power Policy, 2013, for carrying out the bidding process for procurement of solar power from grid connected solar power projects. UPNEDA carried out the tariff based competitive bidding process in accordance with the MNRE guidelines for procurement of 215 MW capacity Solar Power at a fixed tariff for a period of 12 years from the grid

connected Solar PV projects. On 31.01.2015, the NIT in this regard was published in newspapers as well as on the website of UPNEDA with 22.04.2015 as the last date of submission of bids.

A pre-bid meeting was held on 21.02.2015 and, based on various inputs received from interested firms, a modified RfP was published on the website of UPNEDA on 24.04.2015 as well as in the newspapers, with the last date of bid submission extended till 18.05.2015. Based on the amended RfP dated 21.04.2015, twenty eight (28) bids for a total quantum of 420 MW were received as against 215 MW aggregate capacity. In compliance with clause 6.3 of the MNRE guidelines, a Bid Evaluation Committee (BEC) was constituted vide Government of UP order dated 27.02.2015. Non-financial bids were opened by the said committee on 18.05.2015 in the presence of representatives of various bidders, and the bids of three bidders were not found technically responsive. The remaining twenty five (25) bids of a total quantum of 355 MW capacity were technically qualified by the bid evaluation committee. The financial bids of these 25 technically qualified bidders were opened on 08.06.2015. Out of the twenty-five (25) financial bids opened, the Bid Evaluation Committee, in its meeting held on 12.06.2015, recommended approval of the fixed tariff quoted by fifteen bidding companies for 12 years which was subsequently approved by the empowered committee on 04.07.2015, and finally by the U.P Government cabinet on 07.09.2015.

A Letter of Intent was awarded by UPNEDA to the fifteen bidding companies on 09.09.2015 (after approval from the U.P. Govt cabinet), and the firms were directed to deposit the Contract Performance Guarantee (CPG) of the required amounts, and subsequently enter into a PPA with UPPCL (Procurer). After submission of CPG by these firms to UPNEDA, PPAs were signed by UPPCL. In terms of Clause 7.3 of the guidelines, after conclusion of the bid process, the bid evaluation committee provided a certificate on conformity of the bid process evaluation according to the

provisions of the RFP document. The procurer also provided a certificate on conformity of the bid process as per the guidelines. For making bids public, a notice was published in the newspapers. On 04.05.2016, the petition was filed in UPERC jointly by UPNEDA and UPPCL for adoption of the above discovered tariff obtained by the bidding process. On 20.10.2016, public notices were issued by the UPERC (with a copy to UPNEDA & UPPCL) to stakeholders and interested parties to submit in writing comments/objection/suggestions to the Petition by 15.11.2016, and that a public hearing was scheduled in the matter on 29.11.2016. However, the public hearing was rescheduled and took place on 29.11.2016.

In the public hearing held on 29.11.2016, the UPERC enquired from the petitioners about the reasonability of the tariff vis-a-vis the tariff discovered in the country during this time period. The petitioner submitted that their case was different as compared to others, since it had a 12 year tenure whereas, in other cases, the tenure was 25 years, and the bid was conducted almost a year and half back when the prevailing prices were quite high.

After taking note of the submissions of Shri Rama Shankar Awasthi as a public representative, Shri A.K. Verma, Chairman, UPRVUP, and UPPCL, UPERC, in its order dated 22.02.2017, considered whether they could look into reasonability of the discovered tariff in a bidding process under Section 63 of the Electricity Act; and whether it had the power to look into the fairness and reasonability of the tariff discovered through a competitive bidding process under Section 63 in the light of the provisions of Section 61 and 62, and the Regulations and the guidelines of the Central Government. After taking note of Sections 61 to 63 of the Electricity Act, 2003, the UPERC observed that the powers of the State Commission under Section 63 was clarified by APTEL in its order in **Essar Power Ltd. vs UPERC and NPCL** (Order in Appeal No. 82 of 2011 dated 16.12.2011); even while recognizing the limited powers of the Commission in a bidding process, Aptel had

underlined consumer interest and the need to discover a tariff consistent with market condition; in **MPPTCL Vs. MPERC** (order in Appeal No. 44 of 2010 dated 06.05.2010), APTEL, while emphasizing on the limited powers of the Commission in a bid process, had made observations in respect of supremacy of consumer interest; in this order, APTEL had held that the bidding process must discover competitive tariff in accordance with the larger public interest and the market conditions; and this establishes that the discovered tariff must be in consonance with the prevailing market rates.

The UPERC then noted the observations and directions issued by the Division Bench of the Rajasthan High Court, in **M/s S.K.S Power Gen. Ltd. and Athena Power Ltd. Vs. State of Rajasthan & Others** (Special Appeal (Writ) No.604/2014 & Special Appeal (Writ) No.538/2014 dated 18.04.2014), and held that, in the aforesaid judgement, the Rajasthan High Court had maintained that, under Section 63 of the Electricity Act also, the Commission is vested with the power to ascertain whether the overall cost of procurement could be reduced, and also whether consumer interest is safeguarded; the petitioners, ie UPPCL and UPNEDA, had failed to come up with any tenable argument to vindicate the reasonability of the discovered tariff, and the reason for such a huge variation in tariff within the same bidding process, thus making it even more incumbent on the Commission to closely scrutinize the reasonability of the tariff before passing it on to the consumer to protect consumer interest; in **MPPTCL Vs. MPERC** (order in Appeal No. 44 of 2010 dated 06.05.2010), APTEL had endorsed the applicability of Section 61 in respect of the reasonability of tariff and safeguarding the interest of the consumer, in regard to competitive tariff under Section 63; the provisions of the Electricity Act clearly indicated that efforts should be made, as far as possible, to reduce the impact of tariff on the consumers; and Section 63 cannot be read in isolation i.e. without considering the provisions of Section 61 and the underlying objective of the Electricity Act; under the guiding

principles of the Electricity Act, 2003 and the provisions of Section 61, in larger public interest, the Commission can, and should, look into the reasonability of the tariff discovered through the bidding route under Section 63 or otherwise; and the instant petition had been filed for adoption of tariff which had been discovered through the bidding process carried out in FY 2015-16 for supply for a period of 12 years which was not aligned with the prevailing CERC and UPERC Regulations providing for 25 years period, and the tariff did not seem to be in sync with the tariff available in the market.

The UPERC then extracted the table given in the document available at link **http://mnre.gov.in/file-manager/UserFiles/GW-Solar-Plan.pdf**, and observed that the said table made it abundantly clear that, over the years, solar tariff had been decreasing consistently; with the increase in volume and learning of the industry over the years, it was assumed that the solar tariff shall continue to decline further in future also; the same was also corroborated considering the fact that for FY 2015-16 the CERC levellized solar tariff was Rs. 7.04/ unit with capital cost being Rs. 605.85 Lacs/MW whereas in FY 2016-17 the CERC levellized tariff stood at Rs. 5.68/unit with capital cost as Rs. 530.02 lac/MW; the decline in capital cost was occurring mainly due to decline in the prices of Solar PV cells which was the major component of a solar PV power plant; since the tariff, in the instant petition, was discovered in FY 2015-16, the tariff discovered in the country, during this time period, was relevant to understand the reasonability of the discovered tariff; a perusal of the table made it clear that the tariff discovered in UP was nowhere close to the tariff discovered across the country during the corresponding period, which was in the range of Rs. 4.34 to Rs. 5.99 per unit whereas, in the case of the instant petition (also given in table), the tariff lay in the range of Rs. 7.02 to Rs. 8.60 per unit; even the lowest tariff, discovered in the instant case, was far above the highest tariff discovered elsewhere even though, in so far as solar insolation and other environmental conditions were concerned, UP was

said to be on par with other States in terms of solar generation/ CUF in other States; only tariffs which are in sync with the prevailing market tariffs in FY 2015-16 (since bid was conducted in FY 2015-16), and the then prevailing Regulations, should have been considered by the petitioners before seeking approval; and, while the prevailing tariffs in the market were varied considering their different laid down conditions in respective RfP, since even the tariffs discovered through this particular bidding were also quite wide-ranging, the petitioners should have paid attention to this fact.

The UPERC further observed that it had, on its own, tried to check the reasonability of tariff on the basis of the CERC benchmark tariff for FY 2015-16 of Rs. 7.06/unit; the CERC benchmark was a well accepted benchmark across the country which, by and large, reflected the market conditions; in an earlier order in Petition No. 1050 of 2015 dated 06.04.2016 (for the bidding done in FY 2014-15), the Commission had decided that, after the first 12 years of the project, the tariff for the subsequent 13 year life of the project shall be decided by the Commission under the provisions of the then prevailing Regulations in this regard; under this stipulation, the overall rates calculated for the entire period were coming down and were becoming comparable to the market rates; and the Commission, therefore, had found the rates acceptable from the consumer point of view.

The UPERC also observed that, when benchmarking the tariff discovered in the present bidding process against the CERC tariff for FY 2015-16 and keeping in view similar conditions as adopted by the Commission in its previous order dated 06.04.2016 in Petition No. 1050 i.e. to have total 25 years tariff term with the first 12 years being exactly the same as discovered tariff and for remaining 13 years considering ROE, IWC and O&M cost as per the CERC Regulations, it found that overwhelming number of bids fell short of being qualified on the above criteria as the resultant tariff

became much higher than the CERC levellised tariff for 25 years', thus undermining the very objective of the bidding i.e. to discover market tariff.

The UPERC then referred to the directions issued by this Tribunal in **MPPTCL Vs. MPERC** (Appeal No. 44 of 2010) which was also a bidding under Section 63, which were as follows: *(1) the Appellant is directed to finalize the price through negotiation and to place it before the Evaluation Committee, which in turn will consider the same and find out whether it is aligned with the market prices or reasonable or acceptable price and give suitable recommendations through the certificate; (2) Thereupon, the Appellant shall approach the State Commission to grant approval on the basis of the recommendations of the Evaluation Committee;* and *(3) on this basis, the State Commission is directed to pass an order on the application filed by the Appellant in the light of the Evaluation Committee's recommendations and ……..."*

On the question whether, in matter of the instant bid, negotiations could take place in the absence of any specific provision in the RfP, UPERC quoted the following provision of the RfP: " ***Right to withdraw the RfP and to reject any Bid:*** *This RfP may be withdrawn or cancelled by UPNEDA at any time without assigning any reasons thereof. UPNEDA further reserves the right, at its complete discretion, to reject any one or all of the Bids without assigning any reasons whatsoever and without incurring any liability on any account";* in **MPPTCL Vs. MPERC,** (ie in Appeal No. 44 of 2010) also, bids were called under case-1 route and there was no explicit provision for negotiation in the RfP either and, in that matter, APTEL had maintained that negotiations could be carried out even when there was no explicit provision in the RfP since the procurer had the right to reject in case the discovered rates were not aligned with the market rates; in the instant case, the RfP had the provision to reject the bid without assigning any reason, unlike other cases where the condition of non-alignment with market rate could be the reason for rejection of a bid;

thus, in the instant case, the procurer had firmer ground to negotiate with the bidders in the interest of the consumer and public; and the above noted directions, given in the aforesaid judgments of the Supreme Court and APTEL, left it open to the petitioners to reconsider the rates on the basis of the observations and decisions made in the above quoted judgments.

Considering the entire circumstances of the case, the legislative intent of the statute, the law laid down by the Supreme Court and APTEL, the UPERC was of the considered opinion that the matter should be reconsidered and the petitioner should take appropriate decision in the background of the law laid down by the authorities, the then prevailing and also the present market rate for solar energy; however, at present, they did not express any finding approving or disapproving the rates; and the next hearing in the matter shall be held subsequent to the actions taken on the basis of above mentioned directions.

IV. FINAL ORDER OF UPERC DATED 21.11.2017:

In its order in Petition No.1110 of 2016 dated 21.11.2017, the UPERC observed that UPPCL and UPNEDA had filed Petition No.1110/2016 for adoption of tariff under Section 63 of the Electricity Act, discovered through competitive bidding process for setting up of grid connected solar power plants of 215 MW capacity; this matter was heard on 29.11.2016 and a detailed order was passed on 22.02.2017; it had examined the scope of the Commission's purview while adopting the tariff under Section 63; since the rates, obtained through the competitive bidding process, appeared to be on the higher side, it had, taking a cue from various orders of the Supreme Court and APTEL, directed that the matter should be reconsidered and the petitioner should take appropriate decision in the background of the law laid down by the authorities, the then prevailing and also the present market rate for solar energy, however, at present, they were not expressing any finding approving or disapproving the rates; after

the above order, the Director, UPNEDA and the Chief Engineer (PPA) UPPCL

had submitted reply/additional information before the Commission on 3.10.2017 wherein they stated that, as per the directions of UPERC, the matter of tariff adoption was put up to the Empowered Committee constituted under the State Solar Policy 2013 headed by the Chief Secretary, Govt. of UP; in their meeting held on 26.5.2017, the Empowered Committee had noted that the lowest tariff of Rs.7.02 per unit obtained in the bid was below the prevailing CERC bench mark tariff of Rs. 7.06/unit for the year 2015-16; the Empowered Committee had, while directing negotiations with the bidding companies to match the lowest tariff of Rs.7.02/unit, also constituted a negotiation committee under the Chairmanship of the Principal Secretary (Energy)/ Renewable Energy, Principle Secretary (Finance) and Director UPNEDA as members of the Committee; pursuant to the meeting held on 6.7.2017, the negotiation committee had recommended adoption of tariff at Rs. 7.02/unit for all the nine bidders whose projects had been commissioned; regarding the six projects which were not commissioned, the committee had expressed its view that they were not even entitled for L-1 tariff of Rs. 7.02/Unit, and the decision for adoption of tariff for these projects may be deferred in the light of the preliminary procurer's notice of default; and the recommendations of the negotiation committee had been endorsed by the Empowered Committee.

The UPERC observed that, out of the nine projects which had been Commissioned, the following bidders had not agreed to accept the tariff of Rs.7.02/unit: (1) M/s Lohia Developers India Pvt. Ltd., New Delhi (5 MW); (2) M/s Sukhbir Agro Energy Ltd, New Delhi (20MW); (3) M/s Sukhbir Agro Energy Ltd, New Delhi (20MW); (4) M/s Sukhbir Agro Energy Ltd, New Delhi (10MW); (5) M/s NP Agro India Industries Ltd., Bareilly; and (6) M/s Shree Radhy Radhey Ispat Pvt. Ltd., Kanpur; and to decide the issue, in the light of new recommendations, the Commission held another public hearing in the matter on 25.10.2017 in which

two public representatives namely Sri Avdhesh Kumar Verma, Chairman, Rajya Vidyut Upbhokta Parishad and Sri R.S. Awasthi had participated.

After taking note of the objections of both the public representatives, the submissions of Sri DD Chopra appearing on behalf of some bidders, and the reply given thereto by Smt. Namrata Kalra, Sr. Project Manager, UPNEDA, the UPERC observed that the revised tariff recommended by UPNEDA and UPPCL was somewhat near the benchmark tariff indicated by CERC on the basis of the cost structure of FY 2015-16 in which the bidding was carried out; and in order to enable the aforesaid nine bidders to recover their cost of generation with adequate return on their equity, and also safeguarding the interest of consumers in the public interest, it would be fair to adopt the tariff of Rs. 7.02/unit for the aforesaid nine bidders whose projects had been commissioned.

The UPERC adopted the tariff of Rs. 7.02/Unit for the nine bidders for a period of 12 years, and observed that, for the next period of 13 years, the bidders shall be bound to supply power to UPPCL at APPC as agreed in the PPA, subject to a ceiling of Rs. 7.02 /Unit. The UPERC also approved the PPA of these nine bidders with the directions that necessary modifications be made in the signed PPA, according to these orders. Regarding the remaining 6 bidders, whose projects had not been commissioned, the UPERC noted that UPPCL had intimated that they wanted to terminate these PPAs; but the petitions of these 6 bidders against the pre-termination notice was under consideration; and, therefore, the Commission would pass necessary orders separately on the respective petitions.

V. RIVAL SUBMISSIONS:

Elaborate submissions, both oral and written, have been put forth on behalf of the appellant generators, the appellant-Sri. R.S. Awasthi, UPERC, UPPCL and UPNEDA, and the intervenors. It is convenient to examine the

rival contentions under different heads. Before doing so, it is useful to note, in brief, the relevant portions of (i) the Government of India guidelines issued in December, 2012; (ii) Solar Power Policy, 2013 of the Government of Uttar Pradesh; and (iii) Request for Proposal (rfp) dated 31.2.2015.

VI. THE GOVERNMENT OF INDIA GUIDELINES ISSUED IN DECEMBER, 2012:

In December, 2012, the Government of India, Ministry of New and Renewable Energy [MNRE] issued Guidelines for tariff-based competitive bidding process for grid connected power projects based on renewable energy [RE] sources. Clause 1.2 of the said guidelines detailed the objectives of the guidelines, and provided that promotion of competition in the electricity industry in India is one of the key objectives of the Electricity Act, 2003; power purchase cost constitutes the largest cost element for distribution licensees; competitive procurement of electricity by the distribution licensees is expected to reduce the overall cost of procurement of power, and to facilitate development of power markets; internationally, competition in wholesale electricity markets has led to reduction in prices of electricity and in significant benefits for the consumers; these guidelines have been framed to cover grid connected renewable energy sources (excluding wind power) under the provisions of Section 63 of the Act. The specific objectives of these guidelines are as follows: (1) Promote competitive procurement of electricity from Renewable Energy Sources by distribution licensees; (2) Facilitate transparency and fairness in procurement processes; (3). Facilitate reduction of information asymmetries for various Bidders; (4) *Protect consumer interests. by facilitating competitive conditions in procurement of electricity;* (5) Enhance standardization and reduce ambiguity and hence time for materialization of projects; and (6) Provide flexibility to sellers on internal operations while ensuring certainty on availability of power and1 tariffs for buyers.

Clause 6 of the 2012 bidding guidelines related to Bid Submission and Evaluation. Clause 6.3 provided that the Procurer shall constitute a committee for evaluation of the bids (Evaluation Committee) with at least one member external to the Procurer's organization and affiliates; the external member shall have expertise in financial matters / bid evaluation; and the Procurer shall reveal past associations with the external member - directly or through its affiliates - that could create potential conflict of interest. Clause 6.8 provided that the Bidder, who had quoted the lowest levelised tariff as per the evaluation procedure, shall be considered for the award, and the Evaluation Committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices. Clause 6.9 related to deviation from the process defined in the Guidelines, and stipulated that, in case there was any deviation from these guidelines, the same shall only be with the prior approval of the Appropriate Commission, and the Appropriate Commission shall decide on the modifications to the bid documents within a reasonable time not exceeding 90 days.

The said 2012 Guidelines required the procurer *(*clause 3) to undertake the bidding process by preparing documents for inviting bids in accordance with these Guidelines, and the Standard Bid Documents issued by the Central Government. The preparatory work, regarding conduct of the bidding process (including fixation of ceiling tariff), was the sole responsibility of the procurer, and the prospective bidders participating in the bidding process had no role to play. Under the above Guidelines (i) the stated objective, inter-alia, included protection of consumer interest by facilitating competitive conditions in procurement of electricity (clause 1.2); (ii) the bidding could also be carried out based on the discounts offered on the tariff approved/notified by the Commission i.e. through a reverse bidding process (clause 4.7(i)), and the tariff arrived after discount was to be fixed for the term of the PPA *(*clause 5.4 (iii)); (iii) the bidding process was to be carried out through issuance of a

Request for Proposal (RfP) to be published in two national newspapers and online *(*clauses 5.1 & 5.2); (iv) the procurer was required to constitute an 'Evaluation Committee' for evaluation of bids (clause 6.3); (v) the bidder who quoted the lowest levelized tariff as per the evaluation procedure was to be considered for the award, and the PPA was to be signed with the selected bidder as per the prescribed terms under the bid documents *(*clause 6.8)*;* and (vi) the Evaluation Committee had the power to reject all price bids if the rates quoted were not aligned to the prevailing market prices *(*clause 6.8).

The afore-said Guidelines contemplated a transparent process of bidding through its placement in the public domain *(*clauses 7.3 to 7.6). The onus was cast on the procurer (who was the initiator of the bidding process) and the Bid Evaluation Committee (BEC) to certify that the bidding process had been conducted in a transparent manner and in conformity with the Guidelines and the bid document, including alignment of discovered bids with the market prices. With the provision for 'alignment of bids to the prevailing market prices' (under clause 6.8), the Guidelines ensured protection of consumer interest.

The subject bidding process had been duly certified by the Evaluation Committee as also by the procurer and the Nodal Agency.

VII. GOVERNMENT OF UTTAR PRADESH SOLAR POWER POLICY, 2013:

In 2013, Respondent No.3-UPNEDA notified the Solar Power Policy, 2013 in terms of which (i) the project developers, who were interested in selling energy generated from their solar power projects to the distribution utility(s) in the State, were to compulsorily participate in competitive bidding for the total megawatt capacity they wished to offer at the tariff discovered through bidding, subject to approval by the UPERC (clause 4.2); (ii) Respondent No.2-UPPCL was to sign PPAs with the successful bidders

(clause 4.2); (iii) solar PV projects were to be commissioned within 13 months from the date of signing of the PPAs (clause 4.5); (iv) the designated Nodal Agency i.e. Respondent No.3-UPNEDA was responsible for carrying out all tasks related to the bidding process *(*clause 10.1); and (v) to oversee, monitor and resolve various issues arising out of the Policy, an Empowered Committee under the Chairmanship of the Chief Secretary of the State was to be constituted (clause 11). There was no specific provision in the 2013 Solar Policy, conferring power on the Empowered Committee to direct/refer parties to negotiate through a 'Negotiation Committee'.

VIII. REQUEST FOR PROPOSAL (RFP) DATED 31.2.2015:

Under the RfP dated 31.2.2015 issued by Respondent No.3-UPNEDA, (i) a PPA was required to be signed between UPPCL and the successful bidder, whereunder UPPCL was to pay to the seller(s) the discovered tariff which had been arrived from the single tariff quoted by the successful bidder in the price bid (clause 1.1.4); (ii) the bidder was required to quote a tariff below the ceiling tariff of ₹9.33/kWh approved by UPNEDA. The competitive bidding process under the RfP was to be as per Section 63 of the 2003 Act as amended from time to time (clause 2.3.2). After completion of the evaluation process, a Letter of Intent (LoI) was to be issued to the successful bidder for a project, who was required to sign a PPA with UPPCL for a duration of 12 years (clause 2.5.1). Thereafter, 180 days prior to the expiry of the 12 year term of the PPA, UPPCL was to extend the PPA for a further period of 13 years at the price of the 11th year Average Pooled Purchase Cost (APPC) on the willingness of the project developer *(*clause 2.5.1). The procurer was liable to pay to the project developer the tariff as signed in the PPA (clause 2.6.2). The bidders were required to submit bank guarantees of Rs.20 lakh/MW and Rs.30 lakh/MW in the prescribed format to UPNEDA (clause 2.20). The financial bids were to be submitted based on a "single Quoted Tariff at the inter-connection point", the tariff being "below the

UPNEDA approved ceiling tariff of ₹9.33/kWh" (clause 2.22.2 and Format 4.7). The solar PV power projects were to be commissioned within 13/18 months from the date of signing of the PPA (clause 2.28) failing which the consequences included gradual encashment of the bank guarantee and cancellation of LoI/PPA (clause 2.29).There was a comprehensive 'Bid Evaluation Criteria' (clause 3.1) to be followed by the Evaluation Committee for evaluation of bids received, and the bidder offering maximum discount on the ceiling tariff of ₹9.33/kWh was to be declared as the successful bidder to whom the LoI was to be issued (clause 3.1.4 VII). UPNEDA, in its own discretion, had the right to reject any one or all bids if the quoted tariff was not aligned to market prices (clause 3.1.4 X), and once the above process culminated in issuance of LoIs to the successful bidders, UPPCL, being the procurer, was required to file a Petition before the UPERC together with the certification of conformity of the provisions of the Guidelines and RfP under Section 63 read with Section 86(1)(b) for approval of the PPAs, and for adoption of the discovered tariffs.

IX. LOCUS STANDI:

A. SUBMISSION OF APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellants-generators, that, acting contrary to the mandate of Section 63, the UPERC issued a public notice on 20.10.2016 inviting comments/objections to the Petition, and held a public hearing; during the above hearing, a representative of the consumers, one Mr. Rama Shankar Awasthi (Appellant in Appeal No.37/2018), also placed his objections on record, inter-alia, stating that, in comparison to the tariff rates discovered elsewhere in the country and the CERC benchmark tariff, the tariffs discovered in the bidding process did not seem to be in line with the prevailing market prices; he also requested for rejection of the Petition as also the bidding process; on the query of UPERC, on the reasonability of the discovered tariff, UPPCL submitted that (i) the bid process had been

conducted almost a year and half back when prevailing prices were high; and (ii) the rates discovered though the competitive bidding process, though carried out as per the Guidelines, *"may not be in line with"* the prevailing market prices; despite having already certified on affidavit as to the conformity of the bidding process to the Government of India Guidelines together with market alignment of the successful bids, and being well aware that any delay in tariff adoption had not been for reasons attributable to the Appellants, UPPCL shifted its stand for reasons best known to it and chose to cast a doubt on the alignment of discovered tariffs with the prevailing market prices; vide interim Order dated 22.2.2017, the. UPERC (i) took note of the transparent process in which the competitive bidding was conducted and the evaluation process of the BEC; (ii) recorded the submissions of UPPCL, UPNEDA and the consumers who appeared during the public hearing dated 29.11.2016; (iii) observed that, in view of the guiding principles of the 2003 Act and the provisions of Section 61 therein, in larger public interest, it could and should look into the reasonability of the tariffs discovered under the bidding process so as to make the tariffs *"in sync with the prevailing market tariffs in FY 2015-16"*, and directed UPPCL and UPNEDA to take an appropriate decision in the background of the present market rates for solar energy; (iv) having failed to take into account the detailed examination conducted by the BEC, the UPERC took into consideration a table from the website of MNRE depicting tariff rates discovered elsewhere in the country and observed that the tariffs discovered in the subject bidding process had huge variation from the rates in the table; and (v) on a completely misplaced and selective reading of the decisions of this Tribunal, and that of the High Court of Rajasthan, observed that, when bids were found not to be aligned with the prevailing market prices, negotiations could be held with bidders to arrive at a reduced tariff; and Section 63 does not envisage any consumer participation and, as such, does not incorporate a provision for inviting any suggestions/objections from consumers at large.

B. SUBMISSION OF APPELLANT-SRI R.S. AWASTHI:

It is submitted, on behalf of Mr. R.S. Awasthi, that the issue of his locus, to participate in the proceedings, was not raised before the UPERC; despite his having participated in the proceedings before the State Commission, neither Respondent No. 10-Sukhbir Agro (now SAEL Limited) nor the other developers, who have filed Appeals challenging the Impugned Order, had challenged his locus standi to participate in the proceedings before the Commission; Section 94(3) of the Electricity Act, 2003 read with the Uttar Pradesh Electricity Regulatory Commission (UPERC) Conduct of Business Regulations, 2004, notified by the State Commission, provides for consumer participation in all such proceedings; neither Section 94(3) nor the Conduct of Business Regulations, 2004 is circumscribed by the fact that consumer participation cannot be allowed in proceedings, under Section 63, dealing with the bidding process; there is no such restriction in the Electricity Act, 2003 and/or the Conduct of Business Regulations, 2004 notified by the State Commission; consumer participation being allowed is necessary to safeguard the interest of the consumers; and, in regard to the above, the following are relevant: (a) **West Bengal Electricity Regulatory Commission v. CESC Ltd., (2002) 8 SCC 715**, (b) **Rama Shanker Awasthi v. Lanco Anpara Power Limited** (Order of APTEL in Appeal No. 173 of 2016 dated 30.11.2016)**,** (c) **Mr. Ramashankar Awasthi v. R.K.M. Powergen Pvt. Ltd. and Others** (Order of APTEL in Appeal (DFR) No. 2361 of 2017 dated 30.11.2017), the above Order has been upheld by the Supreme Court *vide* Order dated 09.03.2018 passed in Civil Appeal (Diary) No. 6181 of 2018 in the matter of R.K.M. Powergen Pvt. Ltd. v. Ramashankar Awasthi & Ors, (d) Essar Steel India Limited v. Gujarat Urja Vikas Nigam Limited: Order dated 03.05.2016 in Petition No. 1420 of 2014 passed by the Gujarat Electricity Regulatory Commission (GERC), and (f) the Conduct of Business Regulations, 2004; the intention of the Appellant, in filing this Appeal, is to

plead and place before this Tribunal the material which are relevant for consideration; and, in view of the above and the fact that the Appellant had participated before the State Commission pursuant to the public notices/public hearing by the State Commission on 20.10.2016 and 25.10.2017, and more particularly, that the Respondents have not placed anything to show a conflict of interest of the Appellant or that the Appellant had pursued the matter with any ulterior motive, the Respondent-Generators cannot raise vague allegations and make unsubstantiated insinuations on the conduct or locus of the Appellant.

It is further submitted that the Appellant is a 'person aggrieved' within the meaning of Section 111 of the Electricity Act, 2003; the contention that Section 63 begins with a non-obstante clause stating *"Notwithstanding anything contained in section 62"* and therefore consumer participation cannot be allowed under Section 63 is erroneous; the non-obstante clause is only applicable to Section 62 read with Section 64 of the Act, and cannot be read to exclude Section 94(3) which provides for consumer participation; the judgment of the Supreme Court in **V.C. Shukla v. State Through CBI, (1980) Supp SCC (1) 92,** in fact supports the case of the Appellant; in the above case, the Court was considering Section 11(1) of the Special Courts Act, 1979 which provided for 'Notwithstanding anything in the Code', and not exclusion of a particular Section; the contention that consumers, such as the Appellant, have a right to question the bidding process only at a stage prior to the adoption proceedings when the LoI has been issued and the bidding is completed, is erroneous; the cause of action, for raising objections to the adoption of tariff and approval of PPA, arises when the Petition is filed before the State Commission and not before; prior to issuing the LoI and/or filing of the Petition, in terms of Clause 2.34 of the Request for Proposal, UPNEDA/UPPCL has the right to reject any one or all of the bids without assigning any reasons; the Appellant cannot file any proceedings to challenge

the tariff adoption at the above prior stage; there is no occasion for consumers to participate or object to the bids being accepted prior to the adoption proceedings; and consumer/consumer organisation participation at the stage of adoption or thereafter has been recognised by the Commissions, this Tribunal and the Supreme Court in cases involving Prayas Energy Group and Energy Watchdog.

C. JUDGEMENTS RELIED UPON:

(i) West Bengal Electricity Regulatory Commission v. CESC Ltd., (2002) 8 SCC 715:

In **West Bengal Electricity Regulatory Commission v. CESC Ltd., (2002) 8 SCC 715,** the question which arose for consideration was the locus standi of the consumers before the Commission in its proceedings, as also before the High Court in an appeal under Section 27 of the 1998 Act. The Commission in the proceedings before it, issued a newspaper publication calling upon the persons to appear and file objections in case they were interested in the proceedings before it. Pursuant to the said publication, a number of organisations including some of the appellants, representing sections of the consumers, appeared and filed their objections and submitted their arguments which were taken note of by the Commission in the proceedings before it. This was not objected to by the respondent Company which, being aggrieved by the final order of fixation of tariff by the Commission, preferred the statutory appeal before the High Court. To the said appeal, the respondent Company impleaded only the Commission as a party-respondent, but the High Court in the initial stage thought it appropriate to issue a public notification of the filing of the appeal, and called upon the interested parties to represent themselves before it. Pursuant to the said publication, some of the organisations representing consumers sought impleadment before the High Court. However, when the matter came up for final hearing the applications of these consumer organisations were rejected

by the High Court holding that the Commission does not have the power to issue indiscriminate notice to the consumers or for hearing them. It also held that the advertisements published in this regard as per the Commission's Regulations as also the advertisements issued by the High Court in the appeal were all on an erroneous view that the 1998 Act envisages such procedures.

On the question whether the consumers had a legal right or not to be heard in the proceedings before the Commission under Section 29(2) of the 1998 Act, as also in an appeal under Section 27 of the said Act, the Supreme Court held that though, generally, it is true that price fixation is in the nature of a legislative action and no rule of natural justice is applicable, the said principle cannot be applied where the statute itself has provided a right of representation to the party concerned; the 1998 Act not only took away the right of the licensee or a utility to determine the tariff, but also conferred the said power on the Commission; this was done because one of the primary objects of the 1998 Act was to create an independent regulatory authority with the power of determining the tariff, bearing in mind the interests of the consumers whose rights were till then totally neglected; the fact that the Commission was obligated to bear in mind the interests of the consumers is also indicative of the fact that the Commission had to hear the consumers in regard to fixation of tariff; this right of the consumers is further supported by the language of Section 26 of the Act, which specifically mandates the Commission to authorise any person as it deems fit to represent the interest of the consumers in all proceedings before it; if the above provision of the Act is read in conjunction with Sections 22 and 29 read with Section 58(2)(*d*) of the 1998 Act, it is clear that the Commission, while framing Regulations, must keep in mind the interests of the consumers for the purpose of determining the tariff; the mandate of Parliament in Section 37 of the 1998 Act is that the Commission should ensure transparency while exercising its powers and

discharging its functions which also indicates that the proceedings of the Commission should be public which, in itself, shows participation by interested persons; that apart, the State of West Bengal in exercise of its power under Section 57 of the Act has enacted the West Bengal Electricity Regulatory Commission (Appointment of Chairperson and Members Functions, Budget and Annual Report) Rules, 1999; under Rule 4(1)(*c*) the State Government has provided that the Commission before taking any decision on the rates of tariff must notify its intention in this behalf, in leading newspapers of West Bengal *and* hold public hearing for the said purpose; even the Commission under the power conferred on it in Section 58 of the Act, has framed the West Bengal Electricity Regulatory Commission (Conduct of Business) Regulations, 2000 as amended by the Regulations dated 3-2-2000, wherein, under Regulation 18, the Commission can permit an association or other body corporate or any group of consumers to participate in any proceedings before the Commission, on such terms and conditions, including, in regard to the nature and extent of participation as the Commission may consider appropriate; the Commission under Regulation 19 is also empowered to notify a procedure to associations, groups, forums or body corporates or registered consumer associations, for the purpose of representation before the Commission; a combined reading of these provisions of the Act, Rules and Regulations, clearly shows that the statute has unequivocally provided a right of hearing/representation to the consumers, though the manner of exercise of such right is to be regulated by the Commission; when a statute confers a right which is in conformity with the principles of natural justice, the same cannot be negatived by a court on an imaginary ground that there is a likelihood of an unmanageable hearing before the forum concerned; in cases where such right is conferred under a statute, it becomes a vested right, compliance of which becomes mandatory; such a right when given under the statute cannot be taken away by courts on the ground of practical inconvenience, even if such inconvenience does in

fact exist; the statute, having conferred a right on the consumer to be heard in the matter pertaining to determination of the tariff, the High Court was in error in denying that right to the consumers; consequently, the right of the consumers to prefer an appeal under Section 27 of the 1998 Act to the High Court is similar, if they are in any manner aggrieved by any order made by the Commission; and, if the Company is an aggrieved party and if it prefers an appeal, then it has to make such of those consumers who have been heard by the Commission, as party-respondent, and such consumers will have the right of audience before the appellate court.

(ii) Rama Shanker Awasthi v. Lanco Anpara Power Limited (Order in Appeal No. 173 of 2016 dated 30.11.2016):

In **Rama Shanker Awasthi v. Lanco Anpara Power Limited (Order in Appeal No. 173 of 2016 dated 30.11.2016),** this Tribunal held that the Preamble of the Electricity Act states that the said Act is enacted *inter alia* to protect interest of consumers; that the consumer is a major stakeholder in the power sector can hardly be disputed; Section 94(3) of the said Act reads as under: *"The Appropriate Commission may authorize any person, as it deems fit, to represent the interest of the consumers in the proceedings before it.";* this provision will apply to Section 86(1)(f) of the said Act as well; when Section 94(3) or any other provision of the said Act does not exclude proceedings under Section 86(1)(f) from the purview of Section 94(3). such exclusion cannot be inferred; it is not unlikely that a dispute which may ostensibly be described as contractual dispute may have wide ramifications and decision of the State Commission may have an adverse impact on the consumer interest; and it is precisely for this reason that the legislature has made a provision for consumer participation in Section 94(3).

This Tribunal further observed that Regulations 17 and 18 of the "Uttar Pradesh Electricity Regulatory Commission (Conduct of Business)

Regulations 2004 are in tune with the purport, intent and provisions of the said Act, and Section 86(1)(f) cannot be excluded from the purview of these regulations; even a decision in a contractual matter can have repercussions on the tariff; it can have adverse impact on consumer interest; it is precisely for this reason that the said Act makes unequivocal provision for consumer participation in proceedings before the Appropriate Commission; if the legislature wanted to deny the consumer the right to participate in proceedings under Section 86(1)(f) of the said Act, it would have said so; and this Tribunal cannot add anything to the provisions of the said Act so as to deny the consumer his right to participate in the proceedings before the State Commission; the Appellant is a consumer in the State of Uttar Pradesh; he is a member of the State Advisory Committee constituted by the State Commission; he had participated in the proceedings before the State Commission; he had filed objections to the claim of Lanco; his presence is noted in the impugned order; it is his case that the relief of compensatory tariff granted to Lanco will ultimately put additional burden on the consumers; he is, therefore, a 'person aggrieved' within the meaning of Section 111 of the said Act; it is not possible to hold that the Appellant has no locus; and the alleged privity of contract between Lanco and Respondent No.2 cannot disentitle the Appellant-consumer from filing the appeal.

(iii) Mr. Rama Shanker Awasthi Vs R.K.M. Powergen Private Ltd. & Ors. (Order in IA No. 665 of 2017 in DFR No. 2361 of 2017 dated 30.11.2017):

In **Mr. Rama Shanker Awasthi Vs R.K.M. Powergen Private Ltd. & Ors.** (Order in IA No. 665 of 2017 in DFR No. 2361 of 2017 dated 30.11.2017), this Tribunal, after taking note of the submissions urged on behalf of the Appellant therein, observed that the Letter of Intent and tariff adoption were sequential orders and related to procurement of power by UPPCL; interest of the consumer was involved; and the Appellant, who was a consumer residing

in Uttar Pradesh, could not be held not to be an aggrieved person. This Tribunal further held that the issue stood concluded in the decision of this Tribunal in **Rama Shankar vs. Lanco Anpara Power Limited** (judgment in Appeal No. 173 of 2016 dated 30.11.2016); and therefore, leave to file appeal was granted to the Appellant as a consumer.

D. ANALYSIS:

The procedure for passing a tariff order, in terms of Section 62 of the Electricity Act, is stipulated in Section 64 of the said Act. While Section 64 (1) requires a generating company or licensee to submit an application for determination of tariff under Section 62, and to publish the application in such abridged form and manner as stipulated under Section 64(2), the obligation cast on the Appropriate Commission, under Section 64(3), is to issue a tariff order or to reject the application within 120 days from the date of its receipt under Section 64(1), after considering all suggestions and objections received from the public. Section 64(4) requires the Appropriate Commission, within seven days of making the order, to send a copy thereof, among others, to the person concerned, which would undoubtedly include a consumer who has submitted his objections/suggestions. The requirement of publication of the application as stipulated under Section 64(2), and receipt of objections from the public as stipulated under Section 64(3), makes it amply clear that any member of the public, whose interest may be adversely affected by the determination of tariff under Section 62, can put-forth his objections to the application submitted by a generating company or a licensee under Section 64(1) for determination of tariff under Section 62. Section 64 is applicable only for determination of tariff under Section 62, and not for adoption of tariff under Section 63. Unlike Section 62 read with Section 64, Section 63 of the Electricity Act neither specifically provides for a public hearing nor does it confer any explicit right on the general public to put-forth their objections to the tariff adopted by way of the bidding process under Section 63.

In **Aayan Anthapuramu Solar Private Ltd. V. Andhra Pradesh Electricity Regulatory Commission & Ors. (Judgment of APTELin Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020)**, this Tribunal held that, where guidelines have been prescribed by the Central Govt, stipulating a specific procedure to be followed in procurement of power, there is no scope for the State Commission to hold a public hearing calling for objections/suggestions from the public; therefore, conducting a public hearing and entertaining suggestions, for amendments to the PPAs and PSAs between the parties, from the public is outside the scope of exercise of the regulatory powers, since the State Commission was considering approval, for procurement of power and adoption of tariff, undertaken in accordance with the Central Govt guidelines; and the procedure prescribed under Section 63 does not contemplate either a public hearing or calling for objections.

Reliance is however placed, on behalf of the Appellant Shri R. S. Awasthi, on Section 94(3) of the Electricity Act, which enables the Appropriate Commission to authorise any person, as it deems fit, to represent the interests of the consumers in the proceedings before it. Unlike Section 64 read with Section 62 which specifically confers a right, to raise objections, on any member of the public likely to be adversely affected by the tariff determined under Section 62, Section 94(3), by the use of the word “may”, is an enabling provision and confers discretion on the Appropriate Commission to authorise any person, as it considers fit, to represent the interests of the consumers in the proceedings before it.

We shall, for the purpose of considering the contentions raised in the present batch of Appeals, proceed on the premise that Section 94(3) would apply even to proceedings under Section 63 of the Electricity Act. Even then, the right of participation of a member of the public is not automatic. Section 94(3) does not obligate the Appropriate Commission to authorise any person to represent the interests of consumers in proceedings under Section 63. It

only confers a discretion on the Commission to do so. Even if the Appropriate Commission is of the view that it should authorise a person to represent the interests of consumers in the Section 63 proceedings, as to who should be the person, to be so authorised, is again a matter for the Commission in its discretion to decide *"as it deems fit"*. Section 94(3) does not permit consumers, such as the Appellant Shri R. S. Awasthi, to participate, as of right, in Section 63 proceedings.

Regulation 17 and 18 of the Uttar Pradesh Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 read as under:

> ***"Consumers Association:***
>
> ***17.*** *It shall be open to the Commission to permit any association or other bodies corporate or any group of consumers to participate in any proceedings before the Commission on such terms and conditions including in regard to the nature and extent of participation as the Commission may consider appropriate.*
>
> ***18.*** *The Commission may, as and when considered appropriate, notify a procedure for recognition of association, groups, forums or bodies corporate as registered consumer association for the purpose of representation before the Commission"*

Regulation 17, as afore-extracted, enables the UPERC to permit any association or other bodies corporate or any group of consumers to participate in any proceedings before it. The words "any proceedings" may well include Section 63 proceedings also. Even then, no consumer can claim participation as of right, since Regulation 17, by use of the words *"it shall be open to the Commission to permit",* leaves it to the discretion of the Commission to either grant or refuse permission. Use of the word "permit" would mean that, on the request of any association/ Bodies corporate/ group

of consumers seeking participation in Section 63 proceedings, it is for the Commission to decide whether or not permission should be granted for their participation. It does appear that Shri R.S.Awasthi is an individual consumer, and is neither an Association nor a body corporate. It is not even known whether he represents any group of consumers.

Even if the UPERC were to be satisfied that permission should be accorded, Regulation 17 confers on it the power to stipulate the terms and conditions regarding the nature and extent of participation, by such association/ Bodies corporate/ group of consumers, as it considers appropriate. Regulation 17 makes it amply clear that not only does the Commission have the power to refuse to grant permission to any association/ Bodies corporate/ group of consumers to participate in proceedings under Section 63 of the Electricity Act, it can also, even if it chooses to accord permission, impose terms and conditions regarding the nature and extent of participation by such bodies.

Regulation 18 enables the UPERC, as and when it considers appropriate to notify the procedure for recognition of Associations, Groups, Forums or Bodies corporate, as registered Consumer Associations, for the purpose of representation before the Commission. It is not known whether any such procedure has been prescribed by the UPERC, under Regulation 18, till date. The fact, however, remains that, on any such procedure being prescribed, the opportunity to participate in Section 63 proceedings, in terms of Regulation 17, would be available only to such registered consumers association which fulfil the procedural requirements notified under Regulation 18 of the 2004 Regulations.

In **West Bengal Electricity Regulatory Commission vs. CESC Limited (2002 8 SCC)**, on which reliance is placed on behalf of the appellant-consumer, the Supreme Court examined the scope of Sections 27 and 29 of

the Electricity Regulatory Commissions Act 1998, which are similar to Sections 62 and 61 of the Electricity Act, 2003. Section 62 read with Section 64 of the Electricity Act, 2003 specifically provides for any member of the public, likely to be adversely affected by the determination of tariff under Section 62, to participate in the public hearing and their objections, to the applications filed for determination of tariff, to be considered. Since a provision similar to Section 63 of the Electricity Act did not arise for consideration in the afore-said Judgment, reliance placed thereon is of no avail.

In **Rama Shankar Awasthi vs. Lanco Anpara Power Limited (Appeal No. 173 of 2016 and IA Nos. 373 and 569 of 2016 dated 30.11.2016),** pursuant to a Competitive Bid Process initiated by UPPCL under Section 63 of the Electricity Act, Lanco had entered into a PPA with UPPCL for generation and supply of power, and had thereafter filed a petition before the Commission, under Section 86(1)(f), to direct the Respondents to clear all outstanding dues under the PPA till date; to pass an order determining new tariff for supply of power from the Anpara plant to the Respondents till successful completion of the buy-out of the plant; and, in the alternative, to pass an order determining new tariff for the supply of power from the Anpara plant to the Respondents, instead of a buy-out of the plant, keeping in view the viability and sustainability of the plant after taking into account the accumulated losses of the plant till date. On Lanco issuing a termination notice to UPPCL, UPPCL filed a petition before the Commission under Section 86(1)(f) challenging the termination notice and the buy-out notice issued by Lanco.

The contention urged before this Tribunal, on behalf of Lanco, was that, since the State Commission adjudicates contractual disputes between a distribution licensee and a generating company under Section 86(1)(f) of the said Act, a consumer cannot be allowed to participate. The Appellant, as a

consumer in the State of Uttar Pradesh, had participated in the public hearing held by the State Commission, and had put-forth his submissions as an objector. It is in this context that this Tribunal observed that Section 94(3) would apply to proceedings under Section 86(1)(f) also; a contractual dispute may also have wide ramifications and have an adverse impact on consumer interest; it is for this reason that a provision for consumer participation has been made under Section 94(3); Regulations 17 and 18 of the 2004 UPERC Regulations are impugned with the purport, intent and provisions of the Electricity Act; and Section 86(1)(f) could not be excluded from the purview of these Regulations.

While it is no doubt true that both Section 94(3) of the Electricity Act and Regulations 17 and 18 of the 2004 Regulations were noted in the afore-said judgment, this Tribunal was not called upon to examine their scope and ambit and analyse these provisions or take note of the restrictions imposed therein for consumer participation. Unlike Section 64 which statutorily provides for public participation in Section 62 proceedings, Section 63 does not. Since Section 94(3) enables the Commission to authorise a person, as it deems fit, to represent the interests of consumers in the proceedings before it, a consumer cannot claim, as a matter of right, to be entitled to participate in Section 63 proceedings before the Commission. Further the Supreme Court, in **WBERC vs. CESC Limited (2002 8 SCC 715),** has held, while considering the scope of Regulation 18 of the WBERC (Conduct of Business) Regulation 2000 (which is similar to Regulation 17 of the UPERC 2004 Regulations), that, while a right of hearing/representation has been provided to consumers, the matter of exercise of such right is to be regulated by the Commission. If this be the case even in proceedings similar to Section 62 of the Electricity Act, it does not stand to reason that a consumer can claim, as of right, to be entitled to unregulated and unrestricted participation in Section 63 proceedings.

While a member of the public, who is likely to be adversely affected by the tariff determination exercise, is entitled, as of right, to participate in proceedings under Section 62 of the Electricity Act, the Commission can, in addition and in the exercise of its powers under Section 94(3) read with Regulation 17, authorise any association/body corporate/group of consumers to represent the interests of consumers in the Section 62 proceedings. As Section 63, unlike Section 62, does not provide for public participation, no member of the public can claim to be entitled to participate in such proceedings as a matter of right. It is, however, open to the Commission, if it so deems it fit, to authorise any association/body corporate/consumer association to represent the interests of consumers in the Section 63 proceedings also.

While Regulation 17 makes it clear that no individual consumer is entitled to participate in Section 63 proceedings, it is the UPERC which has permitted Shri R. S. Awasthi to participate in the proceedings before it as is evident from the orders passed by the UPERC both on 22.02.2017 and 21.11.2017. As no objection appears to have been taken to his participation, in the Section 63 proceedings before the UPERC, by any of the parties to such proceedings, we deem it inappropriate, at the appellate stage, to consider the issue whether Sri R.S. Awasthi could have participated in the Section 63 proceedings before the UPERC which culminated in the impugned order being passed.

Suffice it therefore, to hold, as a matter of law, that, on a conjoint reading of Section 94(3) of the Electricity Act with Regulations 17 and 18 of the UPERC (Conduct of Business) Regulation 2004, individual consumer participation in Section 63 proceedings before the UPERC is impermissible and it is for the UPERC to decide whether or not an Association/ Bodies corporate/ group of consumers should be permitted to participate in Section

63 proceedings and, if so permitted, to stipulate the terms and conditions regarding the nature and extent of their participation.

Section 111(1) of the Electricity Act enables *"any person aggrieved"*, by an order made the by the Appropriate Commission under the Electricity Act, to prefer an Appeal to this Tribunal. To satisfy the test of a "person aggrieved", one is required to establish that one has been denied or deprived of something to which one is legally entitled. A person can be aggrieved if a legal burden is imposed on him. The scope and meaning of the words "aggrieved person" depends on diverse, variable factors such as the content and intent of the statute of which contravention is alleged, the specific circumstances of the case, the nature and extent of the petitioner's interest, and the nature and extent of the prejudice or injury suffered by him. As the expression "person aggrieved" has not been defined in the Electricity Act, it should be given its natural meaning, which would include a person whose interest is, in any manner, affected by the order, and these words are of the widest amplitude. **(Emmar MGF Construction Pvt. Ltd. v. Delhi Electricity Regulatory Commission : (Order of APTEL in APL No. 123 of 2008 dated 08.09.2009); Tata Power Delhi Distribution Ltd. v. Delhi ERC, 2023 SCC OnLine APTEL 14; Bar Council of Maharashtra v. Dabholkar (1975) 2 SCC 702, and J.M. Desai v. Roshan Kumar (1976) 1 SCC 671; Reliance Industries Ltd. v. PNGRB, 2014 SCC OnLine APTEL 5; and Rain CII Carbon (Vizag) Ltd. v. A.P. ERC, 2023 SCC OnLine APTEL 40).**

As the words *"any person aggrieved"* are of the widest amplitude and, since Shri R. S. Awasthi was permitted by the UPERC to participate in the Section 63 proceedings before it and to put-forth his submissions on the question whether the tariff quoted by the Appellants-generators was market aligned or not, we see no reason to non-suit the Appellant Shri R. S. Awasthi on this score. We are, therefore, considering his submission, along with the

submissions put-forth by the Appellants-generators, the intervenors, the UPERC, the UPPCL and UPNEDA, on its merits.

X. DELAY AND LACHES:

A. SUBMISSIONS OF APPELLANT-SRI R.S. AWASTHI:

With respect to the contention of Respondent No. 10, that the Appellant had made belated objections in the month of October/November 2017 before the State Commission, and it is therefore hit by delay and latches, it is submitted, on behalf of Mr. R.S. Awasthi, that the above statement is factually incorrect and misleading; reference made by Respondent No. 10 is in regard to the submissions made by the Appellant after negotiations were held between UPPCL/UPNEDA and the Generators and the matter was again listed before the State Commission; a perusal of Paras 22-24 of the order dated 22.02.2017 clearly shows that the Appellant had participated even pursuant to the Public Notice dated 20.10.2016 issued by the State Commission, and had made submissions.

JUDGEMENTS RELIED UPON:

In **State of M.P. v. Nandlal Jaiswal, (1986) 4 SCC 566,** the Supreme Court observed that the petitioners were guilty of gross delay in filing the writ petitions with the result that, by the time the writ petitions came to be filed, Respondents 5 to 11 had, pursuant to the policy decision dated December 30, 1984, altered their position by incurring huge expenditure towards setting up the distilleries; the power of the High Court to issue an appropriate writ, under Article 226 of the Constitution, is discretionary and the High Court, in the exercise of its discretion, does not ordinarily assist the tardy and the indolent or the acquiescent and the lethargic; if there is inordinate delay on the part of the petitioner in filing a writ petition and such delay is not satisfactorily explained, the High Court may decline to intervene and grant

relief in the exercise of its writ jurisdiction; the evolution of this rule of laches or delay is premised upon a number of factors; the High Court does not, ordinarily, permit a belated resort to the extraordinary remedy under the writ jurisdiction because it is likely to cause confusion and public inconvenience and bring in its train new injustices; the rights of third parties may intervene and if the writ jurisdiction is exercised on a writ petition filed after unreasonable delay, it may have the effect of inflicting not only hardship and inconvenience but also injustice on third parties; when the writ jurisdiction of the High Court is invoked, unexplained delay coupled with the creation of third party rights in the meanwhile is an important factor which always weighs with the High Court in deciding whether or not to exercise such jurisdiction; this rule of laches or delay is not a rigid rule which can be cast in a strait jacket formula, for there may be cases where despite delay and creation of third party rights the High Court may still, in the exercise of its discretion, interfere and grant relief to the petitioner; but, such cases where the demand of justice is so compelling that the High Court would be inclined to interfere in spite of delay or creation of third party rights would by their very nature be few and far between; ultimately it would be a matter within the discretion of the court; and, ex hypothesi, every discretion must be exercised fairly and justly so as to promote justice and not to defeat it.

In **U.P. Jal Nigam v. Jaswant Singh, (2006) 11 SCC 464,** the question which arose for consideration was whether, in the case of a person who is not vigilant of his rights and acquiesces with the situation, his writ petition can be heard after a couple of years on the ground that the same relief should be granted to him as was granted to person similarly situated who was vigilant about his rights.

The Supreme Court held that the statement of law had been summarised in *Halsbury's Laws of England*, para 911, p. 395 as follows: “In determining whether there has been such delay as to amount to laches, the

chief points to be considered are: (*i*) acquiescence on the claimant's part; and (*ii*) any change of position that has occurred on the defendant's part; acquiescence in this sense did not mean standing by while the violation of a right is in progress, but assent after the violation has been completed and the claimant has become aware of it; it is unjust to give the claimant a remedy where, by his conduct, he has done that which might fairly be regarded as equivalent to a waiver of it; or where by his conduct and neglect, though not waiving the remedy, he has put the other party in a position in which it would not be reasonable to place him if the remedy were afterwards to be asserted; in such cases lapse of time and delay are most material; and upon these considerations rests the doctrine of laches"; the respondents were guilty since they had acquiesced in accepting the retirement and did not challenge the same in time; if they had been vigilant, they could have filed writ petitions as others did in the matter; therefore, whenever it appears that the claimants lost time or whiled it away and did not rise to the occasion in time for filing the writ petitions, then in such cases, the court should be very slow in granting the relief to the incumbent; secondly, the question of acquiescence or waiver on the part of the incumbent should also be taken into consideration, whether other parties are going to be prejudiced if the relief is granted; in the present case, if the respondents had challenged their retirement being violative of the provisions of the Act, perhaps the Nigam could have taken appropriate steps to raise funds so as to meet the liability; but by not asserting their rights the respondents have allowed time to pass and after a lapse of couple of years, they have filed writ petitions claiming the benefit for two years; that would require the Nigam to raise funds which would have serious financial repercussions on the financial management of the Nigam; and the court should not come to the rescue of such persons when they themselves are guilty of waiver and acquiescence.

ANALYSIS:

This contention urged on behalf of the Appellant generators does-not merit acceptance, as not only did the appellant-consumer put forth his objections pursuant to the public notice issued by the UPERC on 20.10.2016, but had also participated during the course of hearing which culminated in the order passed by the UPERC on 22.02.2017. He also raised specific objections during the hearing of the Petition which culminated in the order dated 21.11.2017 being passed. Delay and Laches are factors which arise for consideration where the jurisdiction of courts and tribunals is belatedly invoked, and unexplained delay coupled with creation of third party rights may justify refusal to entertain a Writ Petition. In the present case, the appellant-consumer has not invoked the jurisdiction of the UPERC, much less have they filed a belated petition before the Commission or a belated appeal before this Tribunal. It is not even the case of the appellants-generators that, as a result of the alleged delay, third party rights have been created in the interregnum.

As shall be detailed hereinafter, the order passed by the UPERC on 22.02.2017 is merely an interlocutory order. and it is the order dated 21.11.2017 which is the final order. Even if we were to proceed on the premise that the appellant-consumer had failed to put forth his submissions at the interlocutory stage of the proceedings, that did not disable him from putting forth his contentions during the final hearing of the Petition before the UPERC. As the Appellant-Consumer had put forth his submissions during the final hearing of the petition, undue delay and latches on his part, in the context of his failure to put forth objections at the interlocutory stage of the proceedings, is of no consequence.

XI. IS A CHALLENGE TO THE SUBSEQUENT ORDER DATED 21.11.2017 BARRED BY THE PRINCIPLES OF RES JUDICATA BECAUSE OF FAILURE OF THE APPELLANTS TO CHALLENGE THE ORDER OF THE UPERC DATED 22.02.2017?

A. SUBMISSION OF APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellant-generators, that, as the UPERC had refrained from expressing any opinion on the merits of the Petition and adoption of the discovered tariffs, there was no cause of action in favour of the Appellants that could have been said to have arisen, and as such the said Order dated 22.02.2017 could not be the subject matter of challenge before this Tribunal; even otherwise, any direction passed by the Commission, in excess of the powers conferred under Section 63, was an Order passed without jurisdiction, and would not be hit by the principles of *'res judicata'* as has been wrongly contended by the Respondents **(Sushil Kumar Mehta V. Gobind Ram Bohra (1990) 1 SCC 193)**; in any case, the Respondent UPPCL, in its Reply filed before this Tribunal, has not raised the plea of *'res judicata',* and therefore the said plea is inadmissible **(Alka Gupta V. Narendra Kumar Gupta (2010) 10 SCC 141);** and this Tribunal, in **Adani Green Energy (Uttar Pradesh) Ltd. V. Uttar Pradesh Electricity Regulatory Commission & Ors** (Judgement in Appeal Nos. 307/2018 and 275/2019 dated 28.11.2022 passed in a dispute arising out of the very same bidding process) has categorically rejected the plea of *'res judicata'* identically raised by the Respondents herein**.**

B. SUBMISSIONS OF UPERC:

It is submitted, on behalf of the UPERC, that the Order dated 22.02.2017 (1st Order), wherein the State Commission had decided to examine the reasonability of the discovered tariff and had compared it with the tariff of CERC specifically with respect to the 12 year tenure to check the market alignment, has not been challenged by the Appellants; the findings of the State Commission, in the order dated 22.02.2017, has attained finality; and they cannot be re-opened in the garb of the present Appeals which have been filed only against the subsequent order dated 21.11.2017.

C. SUBMISSION OF UPPCL:

It is submitted, on behalf of UPPCL, that the Appellants-generators never challenged the order of the UPERC dated 22.02.2017, and in fact participated in the subsequent proceedings pursuant to the order dated 22.02.2017; the appellants only raised a feeble objection to the tariff @ Rs. 7.02/unit before the Empowered Committee; the fact, however, remains that the findings given in the order dated 22.02.2017 have attained finality; the issues, raised by the appellants in the present appeals, arise from the earlier order dated 22.02.2017 passed by the UPERC, and not from the subsequent order dated 21.11.2017 (impugned in the present appeals); the impugned order dated 21.11.2017 is a consequential order to the order dated 22.02.2017 where the reasons for reduction in tariff rates has been detailed; since the order dated 21.11.2017 is only a consequential order, the earlier order dated 22.02.2017 ought also to have been challenged by the appellants; as they failed to do so, the said order dated 22.02.2017 has attained finality; not only has the appellant failed to challenge the order dated 22.02.2017, but they have participated in the subsequent negotiations and have further signed the Amended PPA dated 07.12.2017; and, in **Amarjeet Singh & ors. Vs. Devi Ratan & ors. (2010) 1 SCC 417,** the Supreme Court has held that challenging the consequential order without challenging the basic order is not permissible.

It is further submitted, on behalf of UPPCL, that the contention of the Appellants-generators, that the order dated 22.02.2017 is interlocutory in nature and has merged with the final order which is under challenge before this Tribunal, is not sustainable in law; the Order dated 22.02.2017 is not an interlocutory order as the issue, with regards to whether the Commission could, under the Section 63 process, look into the reasonability of tariff vis-à-vis prevailing market rates, was finally decided therein; any Order, which finally settles an issue, is not an interlocutory Order and does not merge with the final Order; the Order dated 22.02.2017 is neither interlocutory nor final

as has been held in **Madhu Limaye V. State Of Maharashtra, (1977) 4 SCC 551;** further, under Section 111 of the Electricity Act, any order of the Commission can be assailed/challenged before this Tribunal; the appellant willingly chose not to challenge the order dated 22.02.2017, and as such is bound by the findings arrived at in the said order; the issues being agitated in the instant appeal were decided by the UPERC in the order dated 22.02.2017; and the appellant, at this stage, cannot challenge the order dated 22.02.2017 as the same has achieved finality. Reliance is also placed, on behalf of UPPCL, on **Ishwar Dutt Vs. Land Acquisition Collector (2005) 7 SCC 190; Pannalal Binjraj v. Union of India, 1957 SCR 233 : AIR 1957 SC 397 : (1957) 31 ITR 565;** and **State of Punjab v. Krishan Niwas, (1997) 9 SCC 31.**

D. SUBMISSIONS OF SRI R.S. AWASTHI:

It is submitted, on behalf of Sri R.S. Awasthi, that the findings of the State Commission, in Para 42 that *"so far as solar insulation and other environmental conditions are concerned UP is said to be on par with other states in terms of solar generation/CUF"*, and in Para 45 that *"over-whelming number of bids fall short of being qualified on above criteria as the resultant tariff becomes much higher than CERC levellised tariff for 25 years', thus undermining the very objective of the bidding i.e. to discover market tariff."* have become final as the same have not been challenged by the Respondent Generators in their Appeal, irrespective of the fact whether the Order dated 22.02.2017 is an Interim Order or a Final Order; in view of the above, assuming that the Impugned Order is set aside, the above findings are left unchallenged which would lead to the conclusion that the tariff ought not to be adopted; the above findings in fact contradict the findings of the bid-evaluation Committee, in its Report dated 08.06.2015 which had stated that the marginal difference between the prices quoted by bidders in other States

and the prices quoted in the present financial bid may be attributed to the short duration of PPA and other difficulties cited by the bidders.

E. JUDGEMENTS RELIED ON:

The facts giving rise to the appeals, in **Amarjeet Singh v. Devi Ratan, (2010) 1 SCC 417,** were that the appellants and the respondents were appointed as Excise Inspectors under the provisions of the U.P. Excise Service (Class II) Rules, 1970; they became eligible for consideration for promotion to the post of Superintendent of Excise under the said 1970 Rules; the criteria of promotion to the post of Superintendent of Excise, and for the higher post of Assistant Excise Commissioner, was "*merit*" under the provisions of the U.P. Assistant Excise Commissioners Service Rules, 1992 which stood amended w.e.f. 10-10-1994 and the criteria for promotion was changed from "*merit*" to "*seniority subject to rejection of unfit*". The appellant, along with some other Excise Inspectors, filed Writ Petition No. 1113 (SB) of 1994 before the Allahabad High Court challenging the selection process for promotion under the 1992 Rules. The High Court, vide judgment and order dated 1-2-1995, held that the vacancies which had come into existence prior to 10-10-1994 i.e. the date of amendment, be filled up as per the unamended Rules i.e. on the basis of "*merit*" and not on the basis of "*seniority subject to rejection of unfit*". Being aggrieved, the State of U.P. preferred a special leave petition before the Supreme Court and an interim order dated 30-10-1995 was passed permitting the State authorities to make promotions as per the 1994 Amendment Rules subject to the result of the SLP. Sixty-one Excise Inspectors stood promoted, subject to the final outcome of the special leave petition. The Supreme Court dismissed the said special leave petition vide order dated 19-8-1998 in limini. However, the State authorities did not revert the promoted officers and they continued to hold the higher posts. The Departmental Promotional Committee, meant for filling up forty-two vacancies which came into existence prior to 10-10-1994, met on 19-12-1998, and came

to the conclusion that only thirty candidates were suitable for promotion to the posts of AEC and they were to be promoted as per the availability of year-wise vacancies. The respondents were found unsuitable for promotion in the said selection process. After completing the aforesaid exercise, twelve vacancies for the post of AEC remained unfilled. Therefore, the twelve vacancies were carried forward to enable the State authorities to fill up the same under the amended Rules on a different criterion i.e. "*seniority subject to rejection of unfit*". Thus twelve officers/respondents were promoted under the amended Rules by another DPC held on 22-1-1999.

The State Government issued Order dated 15-5-1999 reverting all Excise Inspectors promoted on 6-12-1995 under the interim order of the Supreme Court, and gave notional promotions with retrospective effect to the appellants as well as to all the reverted officers/respondents. As a consequence, a seniority list dated 12-7-2000 was issued, wherein the appellants were placed over and above the respondents. Being aggrieved, the respondents approached the High Court challenging the said seniority list dated 12-7-2000. The High Court, vide impugned judgment and order dated 11-4-2002, held that, as the postings to both sets of officers i.e. those who had been promoted by DPC dated 19-12-1998 and another DPC dated 22-1-1999 had been made on the same day and had been given notional promotion *from one and the same date*, their inter se seniority was to be fixed as it existed in the feeding cadre of Excise Inspectors. The seniority list dated 12-7-2000 was quashed directing the State to prepare a fresh seniority list placing the appellants below the respondents. Hence the appeals before the Supreme Court.

It is in this context that the Supreme Court observed that, in the instant case, promotions had been made by two different DPCs held on 19-12-1998 and 22-1-1999; both DPCs had made promotions under different Rules on different criterion and their promotions had been made with retrospective

effect with different dates notionally; in the writ petition before the High Court, the promotion of the appellants had not been under challenge; the seniority which is consequential to the promotions could not be challenged without challenging the promotions; challenging the consequential order without challenging the basic order is not permissible in the light of the judgement in **P. Chitharanja Menon v. A. Balakrishnan: (1977) 3 SCC 255;** in **Roshan Lal v. International Airport Authority of India : 1980 Supp SCC 449,** the petitions were primarily confined to the seniority list and the Supreme Court held that challenge to appointment orders could not be entertained because of inordinate delay and, in absence of the same, validity of the consequential seniority could not be examined, and in such a case, a party was under a legal obligation to challenge the basic order and if and only if the same was found to be wrong, consequential orders may be examined; in **H.V. Pardasani v. Union of India : (1985) 2 SCC 468,** the Supreme Court held that, if the petitioners were not able to establish that the determination of their seniority was wrong and they have been prejudiced by such adverse determination, their ultimate claim to promotion would, indeed, not succeed; a similar view had been reiterated by the Supreme Court in **Govt. of Maharashtra v. Deokar's Distillery: (2003) 5 SCC 669;** these appeals were squarely covered by the aforesaid judgments; and, in the absence of a challenge to the promotion of the appellants, relief of quashing the consequential seniority list could not have been granted.

In **Ishwar Dutt v. Collector (LA), (2005) 7 SCC 190,** after reorganisation of the States on 1-11-1966 the PWD Department of Himachal Pradesh took over construction of the road which was finally commissioned in the year 1968; possession of the land owned by the appellant, along with lands of a large number of villagers that came under the said road construction plan was taken over in the year 1968; no steps were however taken to formally acquire the lands by issuing notifications under Section 4 of

the Land Acquisition Act, 1894; having failed to get compensation for nearly 17 years, a public interest writ petition titled *Chander Kant Sharma* v. *State of H.P.* [CWP No. 510 of 1985 dated 9-9-1985] was filed, and the High Court, vide its judgment and order dated 9-9-1985, directed the respondents to complete acquisition proceedings within a time-frame and to pay the writ petitioners interest @ 12% per annum from the date of taking over of possession till the date of payment of interim compensation and of final compensation, if there was enhancement. It was held that the aforesaid interest payable was in the nature of equitable compensation, and such interest shall be in addition to the compensation, solatium and interest at the statutory rate which would be paid to the writ petitioners under the law whether awarded by the Collector or enhanced by the Court and such interest shall not be taken into consideration in any proceeding under the Act while awarding the statutory compensation; as the writ petition had been filed in public interest, it was ordered by the Court that all landowners whose lands had been taken possession of in either of the awards would be entitled to a similar relief; some other petitioners filed CWP No. 125 of 1986 and CWP No. 147 of 1988 which were also disposed of with similar directions. As a result of the directions issued by the High Court, the respondents issued the notification under Section 4 of the Act, and ultimately by its Award No. 27 of 1990 dated 31-1-1991 the LA Collector fixed the market value of the land at Rs 9727 per bigha. Apart from the statutory benefits of solatium, etc. the landowners were also awarded interest @ 12% p.a. from the date of taking over of possession till the date of payment as directed by the Division Bench in its order dated 9-9-1985 on equitable grounds.

Being aggrieved by the market value fixed by the Land Acquisition Collector, the appellant filed an application seeking reference under Section 18 of the Act to the District Judge who, vide award dated 1-9-1992, enhanced the compensation to Rs 45,000 per bigha. The respondents being aggrieved

by the said award preferred a first appeal under Section 54 before the High Court. By reason of the impugned judgment, a Division Bench of the High Court, while upholding the amount of compensation payable to the appellant herein for acquisition of the land, set aside that part of the award, relying on the decision of the Supreme Court in *State of H.P.* v. *Dharam Das*: (1995) 5 SCC 683, complying with the payment of interest only with effect from 7-5-1989 or with effect from the date of publication of the notification under Section 4(1) of the Act and not from 18-12-1968. In *Dharam Das*: (1995) 5 SCC 683, the State of Himachal Pradesh had filed an appeal against the judgment in *State of H.P.* v. *Dharam Das* [CWP No. 125 of 1986] in which a direction similar to the one which had been given by the High Court in *Chander Kant Sharma* v. *State of H.P.* [CWP No. 510 of 1985 dated 9-9-1985] was given; the Supreme Court did not approve of the view taken by the High Court and a contra view was taken holding that the amount other than the one envisaged either under Section 23(1-A) of the Act or under any of the provisions of the Act could not be granted on equitable grounds.

It is in this context that the Supreme Court, in **Ishwar Dutt v. Collector (LA), (2005) 7 SCC 190,** observed that the High Court had issued a writ of mandamus, and the direction of the High Court was acted upon; principles of res judicata would apply in different proceedings arising out of the same cause of action, but would also apply in different stages of the same proceedings; as the judgment and order passed in CWP No. 510 of 1985 dated 9-9-1985 had attained finality, the respondents could not have raised any contention contrary thereto or inconsistent therewith in any subsequent proceedings; and, in fact the Land Acquisition Officer, while passing the award on 31-1-1991, took into consideration the said direction and awarded 12% additional compensation at the market value; and the said order of the Land Acquisition Officer never came to be questioned and, thus, attained finality.

F. ANALYSIS:

With reference to the very same bidding process, this Tribunal, in **Adani Green Energy (Uttar Pradesh) Ltd. V. Uttar Pradesh Electricity Regulatory Commission & Ors. (Judgement in Appeal Nos. 307/2018 and 275/2019 dated 28.11.2022)** found no merit in the objection based on rule of res judicata, and observed that the earlier orders of the UPERC dated 22.02.2017, 21.11.2017 and 23.01.2018 were interlocutory orders passed in the proceedings arising out of the adoption petition (Petition No.1110 of 2016) filed by UPPCL and UPNEDA; though some issues were decided and may appear to be conclusive in nature, it cannot be said that the same, not having been challenged by way of appeal, is binding and beyond reproach after culmination of proceedings eventually by order dated 12.02.2018, in which such previous interlocutory orders in the same proceedings had merged; the State Commission, by its order dated 22.02.2017, had itself observed (in para 51) that it was only asking the parties to reconsider (the issue of tariff), no finding being returned at that stage approving or disapproving the rates that had been quoted, and the issue of applicable tariff not having been determined; and it could not therefore be said that it was an order that was conclusive or had attained finality, if not challenged, an appeal against such an inchoate dispensation not even being available.

In the light of the afore-said judgement of this Tribunal, in **Adani Green Energy (Uttar Pradesh) Ltd. V. Uttar Pradesh Electricity Regulatory Commission & Ors. (Judgement in Appeal Nos. 307/2018 and 275/2019 dated 28.11.2022)**, we would, ordinarily, have negatived the contention urged on behalf of UPERC, UPPCL and Sri R. S. Awasthi regarding a challenge to the order dated 21.11.2017 being barred by the principles of res judicata, as the appellants-generators did not challenge the earlier order of the UPERC dated 22.02.2017. Our attention has, however, been drawn to the appeal

preferred by UPPCL to the Supreme Court against the afore-said judgement of this Tribunal, and to the interim orders passed therein.

In Civil Appeal No.974/2023, preferred by UPPCL against the afore-said order of this Tribunal, the Supreme Court, by its interim order dated 27.02.2023, observed that, pursuant to the letter dated 17th February 2023, addressed by the Chief Engineer (PPA) of the appellant to the respondent, payment of Rs 21 crores, representing the first instalment, has been made to the respondent on 17th February 2023; in view of the commitment which was made on 17th February 2023, there shall be no stay in respect of the balance which is payable in three equal monthly instalments in the months of March, April and May 2023; however, in respect of future payments against the invoices which may be raised by the respondent, the appellant shall presently pay at the old rate of 5.07/Kwh; the appellant shall make a provision in its own accounts representing the differential between the rate of Rs 7.02/kwh which has been accepted by the Appellate Tribunal for Electricity in its impugned order and the rate of 5.07/Kwh which was fixed by the Uttar Pradesh Electricity Regulatory Commission; payment of the differential shall stand stayed; and the above arrangement shall abide by the final result of the appeal.

Thereafter, by its interim order in Civil Appeal No(s).974/2023 dated 24-07-2023, the Supreme Court observed that, in respect of the past dues payable to the first respondent, it was common ground that payment had been made by the appellant at the old rate of Rs 5.07/KWH. The Supreme Court issued the following interim directions: (i) In respect of future payments against the invoices which may be raised by the first respondent, the appellant shall presently pay at the old rate of Rs 5.07/KWH. The appellant shall make a provision in its own account representing the differential between the rate of Rs 7.02/KWH which has been accepted by the Appellate Tribunal for Electricity in its impugned order and the rate of Rs 5.07/KWH, which was fixed

by the Uttar Pradesh Electricity Regulatory Commission. Payment of the differential shall stand stayed for the future, at this stage; and (ii) There shall be no stay on the payment of the differential in respect of the past period. However, any such payment which shall be made in respect of the past period shall abide by the result of the present appeal and will be subject to such further directions as may be passed in the final order.

As the appeal, against the judgement of this Tribunal in **Adani Green Energy (Uttar Pradesh) Ltd. V. Uttar Pradesh Electricity Regulatory Commission & Ors. (Judgement in Appeal Nos. 307/2018 and 275/2019 dated 28.11.2022),** is pending before the Supreme Court, and interim orders have been passed therein, we shall, independent of the judgement in **Adani Green Energy (Uttar Pradesh) Ltd**, examine the respondents' contention regarding application of the principles of res-judicata.

As noted hereinabove, Petition No. 1110 of 2016 was filed, before the UPERC jointly by UPPCL and UPNEDA, for adoption of tariff, under Section 63 of the Electricity Act, 2003, discovered through the competitive bidding process as per the standard guidelines issued by the Central Government for procurement of solar power from grid connected solar PV projects.

By its order dated 22.02.2017, the UPERC held that APTEL had maintained, in **MPPTCL Vs. MPERC (Appeal No. 44 of 2010),** that negotiations could be carried out even when there was no explicit provision in the RfP, since the procurer had the right to reject in case the discovered rates were not aligned with the market rates; in the instant case, the RfP provided for rejection of the bid without assigning any reason, unlike in other cases where the condition of non- alignment with market rate could be the reason for rejection of a bid; thus, in the instant case, the procurer had firmer ground to negotiate with the bidders in the interest of the consumer and the public; it was open to the petitioners (ie UPPCL and UPNEDA) to reconsider

the rates on the basis of the judgments quoted in the said order; the matter should be reconsidered and the petitioner should take an appropriate decision in the background of the then prevailing and also the present market rate for solar energy; however, at present, they did not express any finding approving or disapproving the rates; and the next hearing in the matter shall be held subsequent to the action taken on the basis of above mentioned directions.

After the order of the UPERC dated 22.02.2017, UPNEDA and UPPCL informed the Commission on 3.10.2017 that, as per the directions of UPERC, the matter of tariff adoption was put up to the Empowered Committee which, in its meeting held on 26.5.2017, noted that the lowest tariff of Rs.7.02 per unit obtained in the bid was below the prevailing CERC bench mark tariff of Rs. 7.06/unit for the year 2015-16; the Empowered Committee had, while directing negotiations with the bidding companies to match the lowest tariff of Rs.7.02/unit, also constituted a negotiation committee; and, pursuant to the meeting held on 6.7.2017, the negotiation committee had recommended adoption of tariff at Rs. 7.02/unit for all the nine bidders whose projects had been commissioned

In its order in Petition No.1110 of 2016 dated 21.11.2017, the UPERC observed that the revised tariff recommended by UPNEDA and UPPCL was somewhat near the benchmark tariff indicated by CERC on the basis of the cost structure of FY 2015-16 in which the bidding was carried out; and, in order to enable the aforesaid nine bidders to recover their cost of generation with adequate return on their equity, and also safeguarding the interest of consumers in the public interest, it would be fair to adopt the tariff of Rs. 7.02/unit for the aforesaid nine bidders whose projects had been commissioned. While adopting the tariff of Rs. 7.02/Unit for the nine bidders for a period of 12 years, UPERC observed that, for the next period of 13 years, the bidders shall be bound to supply power to UPPCL at APPC as agreed in the PPA, subject to a ceiling of Rs. 7.02 /Unit. The UPERC also approved the PPA of these nine bidders with the directions

that necessary modifications be made in the signed PPA, according to these orders.

Before examining whether failure of the appellants-generators to challenge the validity of the order of the UPERC dated 22.02.2017 is fatal, and consequently whether a challenge to the subsequent order dated 21.11.2017 is barred by the principles of res judicata, it is necessary to understand the scope and purport of this principle.

1. PRINCIPLES OF RES JUDICATA: ITS SCOPE:

The literal meaning of "res" is "everything that may form an object of rights and includes an object, subject-matter or status" and "res judicata" literally means "a matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgments". *Res judicata pro veritate accipitur* is the full maxim which has, over the years, shrunk to mere "res judicata", which means that res judicata is accepted for truth. The doctrine contains the rule of conclusiveness of the judgment which is based partly on the maxim of Roman jurisprudence *interest reipublicae ut sit finis litium* (it concerns the State that there be an end to law suits) and partly on the maxim *nemo debet bis vexari pro una et eadem causa* (no man should be vexed twice over for the same cause). **(Subramanian Swamy v. State of T.N., (2014) 5 SCC 75).** Res judicata means "a thing adjudicated", that is, an issue that is finally settled by judicial decision. **(Alka Gupta v. Narender Kumar Gupta, (2010) 10 SCC 141)**

The principle of res judicata is based on the need of giving a finality to judicial decisions. What it says is that once a res is judicata, it shall not be adjudged again. Primarily it applies as between past litigation and future litigation. When a matter—whether on a question of fact or a question of law—has been decided between two parties in one suit or proceeding and the decision is final, either because no appeal was taken to a higher court or

because the appeal was dismissed, or no appeal lies, neither party will be allowed in a future suit or proceeding between the same parties to canvas the matter again. The result of this is that the original court as well as any higher court must in any future litigation proceed on the basis that the previous decision was correct. **(Satyadhyan Ghosal v. Deorajin Debi :AIR 1960 SC 941; Subramanian Swamy v. State of T.N., (2014) 5 SCC 75; Daryao v. State of U.P: AIR 1961 SC 1457; Greater Cochin Development Authority v. Leelamma Valson: (2002) 2 SCC 573; and Bhanu Kumar Jain v. Archana Kumar: (2005) 1 SCC 787).**

The plea of res judicata is a restraint on the right of a plaintiff to have an adjudication of his claim. The plea must be clearly established. The plaintiff, who is sought to be prevented by the bar of res judicata, should have notice about the plea and have an opportunity to put forth his contentions against the same. **(Alka Gupta v. Narender Kumar Gupta, (2010) 10 SCC 141).** It is contended, on behalf of the appellants-generators, that this plea has been raised by UPPCL for the first time during the hearing of the appeal, and no such plea has been taken by them in the reply filed to the Appeals. As we are satisfied, for reasons detailed hereinbelow, that the bar of res judicata has no application to the facts of the present case, we see no reason to delve further on the absence of such a plea and its consequences.

The doctrine of res judicata is attracted between the parties to the lis, even if the decision on a question of law is erroneous. The correctness or otherwise of a judicial decision has no bearing upon the question whether or not it operates as res judicata. (**Sha Shivraj Gopalji v. Edappakath Ayissa Bi: AIR 1949 PC 302; Subramanian Swamy v. State of T.N., (2014) 5 SCC 75;** and **Mohanlal Goenka v. Benoy Kishna Mukherjee: AIR 1953 SC 65).** A decision of a competent court on a matter in issue may be res judicata in other proceedings between the same parties. The matter in issue may be an issue of fact. The fact decided by a competent court is final determination

between the parties and cannot be reopened between them in another proceeding. The previous decision on a matter in issue alone is res judicata. The reasons for the decision are not res judicata. A matter in issue between the parties is the right claimed by one party and denied by the other. The claim of right from its very nature depends upon proof of facts and application of the relevant law thereto. A pure question of law unrelated to facts which give rise to a right, cannot be deemed to be a matter in issue. When it is said that a previous decision is res judicata, it is meant that the right claimed has been adjudicated upon and cannot again be placed in contest between the same parties. A previous decision of a competent court on facts which are the foundation of the right, and the relevant law applicable to the determination of the transactions which is the source of the right, is res judicata. A previous decision on a matter in issue is a composite decision; the decision of law cannot be dissociated from the decision on facts on which the right is founded. A decision on an issue of law will be res judicata in a subsequent proceeding if it be the same as in the previous proceeding, but not when the cause of action is different, nor when the law has since the earlier decision been altered by a competent authority, *nor when the decision relates to the jurisdiction of the court to try the earlier suit nor when the earlier decision declares valid a transaction which is prohibited by law*. **(Mathura Prasad Bajoo Jaiswal v. Dossibai N.B. Jeejeebhoy: (1970) 1 SCC 613; Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193)**

A question of jurisdiction of the court, or of procedure, or a pure question of law unrelated to the right of the parties to a previous suit, is not res judicata in the subsequent suit. The object of the doctrine of res judicata is not to fasten upon parties special principles of law as applicable to them inter se, but to ascertain their rights and the facts upon which these rights directly and substantially depend; and to prevent this ascertainment from becoming nugatory or precluding the parties from reopening or recontesting that which

has been finally decided. **(Tarini Charan Bhattacharjee v. Kedar Nath Haldar : AIR 1928 Cal 777; Sushil Kumar Mehta v. Gobind Ram Bohra, (1990) 1 SCC 193).**

2. AN ORDER WHOLLY WITHOUT JURISDICTION DOES NOT CONSTITUTE RES JUDICATA:

Reliance is placed by the appellants-generators, on **Sushil Kumar Mehta v. Gobind Ram Bohra: (1990) 1 SCC 193,** in support of their submission that the Commission lacks jurisdiction, in Section 63 proceedings, to direct parties to enter into negotiations.

In **Sushil Kumar Mehta v. Gobind Ram Bohra: (1990) 1 SCC 193,** the Supreme Court held that a decree passed by a court without jurisdiction over the subject matter or on other grounds which goes to the root of its exercise or jurisdiction, lacks inherent jurisdiction; it is *coram non judice*; a decree passed by such a court is a nullity and is non est; its invalidity can be set up whenever it is sought to be enforced or is acted upon as a foundation for a right, even at the stage of execution or in collateral proceedings; and the defect of jurisdiction strikes at the authority of the court to pass a decree which cannot be cured by consent or waiver of the party.

It is true, as contended on behalf of the Appellant generators, that an order wholly without jurisdiction can be subjected to challenge even in collateral proceedings and, consequently, the principles of res judicata will not apply in such cases. In order to agree with this submission, it would be necessary for us to hold that no negotiations are permissible in Section 63 proceedings even if it be with the consent of the parties and even if, pursuant to such voluntary negotiations, they have chosen to enter into a PPA at the reduced tariff. Taking such a view would also fall foul of the judgment of this Tribunal, in **MPPTCL vs. MPERC** (Judgement in Appeal No. 44 of 2010), where the generators had voluntarily and on their own accord negotiated with

the procurers; and the action of the Procurers in entering into negotiations with the generators, for reduction in tariff, was upheld by this Tribunal.

It is unnecessary for us, in the present batch of Appeals to examine the afore-said issue, since we are satisfied, for reasons to be detailed later in this order, that the regulatory Commission lacks jurisdiction, in Section 63 proceedings, to direct an unwilling party to negotiate and to unilaterally direct them to enter into an amended PPA at the reduced tariff fixed by the Commission on the recommendations of the procurer/negotiation committee. We see no reason, therefore, to examine the larger question as to whether every form of negotiations, even one to which the parties had consented to, is impermissible in Section 63 proceedings, and deem it appropriate to leave such a question open for examination in appropriate proceedings.

Both the orders dated 22.02.2017 and 21.11.2017 were passed by the UPERC in Petition No. 1110 of 2016 filed jointly by UPPCL and UPNEDA for adoption of tariff under Section 63 of the Electricity Act. As the submission, urged on behalf of the Appellant generators, is that the order of the UPERC dated 22.02.2017 is merely an interlocutory order, the observations made therein have no finality attached to it, and the principles of res judicata are not applicable to such interim orders, it is necessary for us to understand what the words *"interlocutory order"* means.

3. 'INTERLOCUTORY ORDER': ITS MEANING:

Ordinarily and generally the expression *"interlocutory order"* has been understood and taken to mean as a converse of the term *"final order".* The term "interlocutory" has to be construed in contra-distinction to or in contrast with a final order. In other words, the words "not a final order" must necessarily mean an interlocutory order or an intermediate order. (**Madhu Limaye v. State of Maharashtra: (1977) 4 SCC 551**; **V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

In *WEBSTER'S THIRD INTERNATIONAL DICTIONARY* (Vol. II, p. 1179) the expression "interlocutory order" has been defined thus: "Not final or definitive: made or done during the progress of an action: INTERMEDIATE, PROVISIONAL." According to Stroud, interlocutory order means an order other than a final judgment. *HALSBURY'S LAWS OF ENGLAND* (3rd Edn., Vol. 22, pp. 743-44) describes an interlocutory or final order thus: "*Interlocutory judgment or order.*—An order which does not deal with the final rights of the parties, but either (*1*) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (*2*) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'. An interlocutory order though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals. In general a judgment or order which determines the principal matter in question is termed 'final'." At p. 743 of the same volume, Blackstone says thus: Final judgments are such as at once put an end to the action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.... Four different tests for ascertaining the finality of a judgment or order have been suggested: (1) Was the order made upon an application such that a decision in favour of either party would determine the main dispute? (2) Was it made upon an application upon which the main dispute could have been decided? (3) Does the order, as made, determine the dispute? (4) If the order in question is reversed, would the action have to go on ? CORPUS JURIS SECUNDUM (Vol. 49, p. 35) defines interlocutory order thus: A final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it, while an interlocutory judgment is one which reserves or leaves some further question or direction for future determination.... *Generally, however, a final judgment is one which disposes of the cause both as to the subject-matter and the parties as far as the court has power to dispose of it,* while an interlocutory judgment is one which does

not so dispose of the cause, but reserves or leaves some further question or direction for future determination.... The term 'interlocutory judgment' is, however, a convenient one to indicate the determination of steps or proceedings in a cause preliminary to final judgment. **(V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

If the decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute but, if given in the other, will allow the action to go on, then it is not final, but interlocutory." **(S. Kuppuswami Rao v. King: AIR 1949 FC 1; Salaman v. Warner [(1891) 1 QB 734; Madhu Limaye v. State of Maharashtra, (1977) 4 SCC 551).** The essential attribute of an interlocutory order is that it merely decides some point or matter essential to the progress of the suit or collateral to the issues sought but not a final decision or judgment on the matter in issue. An intermediate order is one which is made between the commencement of an action and the entry of the judgment. An order which does not terminate the proceedings or finally decides the rights of the parties is only an interlocutory order. In other words, an interlocutory order is one which only decides a particular aspect or a particular issue or a particular matter in a proceeding, suit or trial but which does not however conclude the trial at all. **(V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

The question must depend on what would be the result of the decision, assuming it to be given in favour of either of the parties. If their decision, whichever way it is given, will, if it stands, finally dispose of the matter in dispute, it is final. On the other hand, if their decision, if given in one way, will finally dispose of the matter in dispute, but, if given in the other, will allow the action to go on, then it is not final, but interlocutory. (**Salaman v. Warner : (1891) 1 QB 734**; **V.C. Shukla v. State through CBI, 1980 Supp SCC 92).** Another test to determine whether or not an order is an interlocutory order is

whether the judgment or order, as made, finally disposes of the rights of the parties? If it does, it ought to be treated as a final order; but if it does not it is then an interlocutory order. (**Bozson v. Altrincham Urban Distt. Council [(1903) 1 KB 547; V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

The expression 'final order' has been used in contra-distinction to what is known as 'interlocutory order' and the essential test to distinguish the one from the other is whether the judgment or order finally disposed of the rights of the parties.(**Mohd. Amin Bros. v. Dominion of India : AIR 1950 FC 77; S. *Kuppuswami Rao* v. *King* : AIR 1949 FC 1; V.C. Shukla v. State through CBI, 1980 Supp SCC 92).** The meaning of the two words 'final' and 'interlocutory' has to be considered separately in relation to the particular purpose for which it is required. However, generally speaking, a judgment or order which determine the principal matter in question is termed final. An interlocutory order, though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals. If the decision on an issue puts an end to the suit, the order is undoubtedly a final one but if the suit is still left alive and has yet to be tried in the ordinary way, no finality could attach to the order. **(Mohan Lal Magan Lal Thacker v. State of Gujarat: AIR 1968 SC 733; V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

On a consideration of the authorities, mentioned above, the following propositions emerge: (*1*) that an order which does not determine the right of the parties but only one aspect of the suit or the trial is an interlocutory order; (*2*) that the concept of interlocutory order has to be explained in contradistinction to a final order. In other words, if an order is not a final order, it would be an interlocutory order; (*3*) that one of the tests generally accepted is to see if the order is decided in one way, it may terminate the proceedings but if decided in another way, then the proceedings would continue. (**V.C. Shukla v. State through CBI, 1980 Supp SCC 92).**

It is thus evident that an order which is made before the final judgment in the lis, and gives no final decision on the matters in dispute, is an interlocutory order. On the other hand, a final judgment is one which puts an end to the action by declaring that the Petitioner is either entitled or is not entitled to the relief sought for. An order which decides the main dispute in favour of either party is a final order. Unlike the final judgment which disposes of the cause, both as to the subject matter and to the parties is concerned, an interlocutory order does not dispose of the cause but reserves or leaves some further questions or directions for further determination.

In the present case, the order of the UPERC dated 22.02.2017 has, no doubt, examined the question whether or not the tariffs quoted by the Appellant generators are market aligned. It, however, only directed UPPCL and UPNEDA to reconsider the matter and take an appropriate decision, among others, in the backdrop of the then prevailing and the present market rates of solar energy, making it clear that it was not expressing any findings either approving or disapproving the rates quoted by the Appellant generators. The UPERC also directed that hearing of the Petition be deferred subsequent to the action taken by the Petitioners on the basis of the afore-said directions. While the UPERC has, no doubt, made certain observations on the procurers' entitlement to enter into negotiations, the eventual directions issued to UPPCL and UPNEDA, in the order dated 22.02.2017, is only for them to reconsider the matter and take an appropriate decision in the background of the then prevailing and the present market rates for solar energy. The very fact that the UPERC also made it clear that they were not expressing any findings, approving or disapproving the rates quoted by the Appellant generators, would also go to show that no directions, either interlocutory or final, were issued in its order dated 22.02.2017.

Unlike the order of the UPERC dated 22.02.2017 which is in the nature of an interlocutory order, the subsequent order dated 21.11.2017 is the final

judgment in as much as the UPERC, based on the revised tariff recommended by UPNEDA and UPPCL, adopted the tariff for nine bidders at Rs.7.02 per unit for the first 12 years, and directed that necessary modifications be made in the signed PPA in terms of the said order. By its order dated 21.11.2017, the UPERC disposed of the Petitions in so far as the nine bidders (which included the Appellants generators) were concerned, and the cause was finally disposed of.

4. INTERIM ORDERS HAVE NO FINALITY AND MERGE WITH THE FINAL ORDER:

Unlike the final judgment dated 21.11.2017 which, if it had been left unchallenged, would have constituted res judicata in subsequent proceedings, the question which necessitates examination is whether the interlocutory order dated 22.02.2017 would constitute res judicata disabling the Appellant generators from mounting a challenge to the subsequent final judgment dated 21.11.2017. In this context, it is relevant to note that an interlocutory order has no finality attached to it, and interim orders passed by Courts on certain conditions are not precedents. (**Empire Industries Limited v. Union of India : (1985) 3 SCC 314; M. Vijaya Kumar v. General Manager, Milk Products Factory, Andhra Pradesh Dairy Development Cooperative Federation Ltd. : (1990) 3 ALT 382; North Karanpura Transmission Co. Ltd. v. CERC, 2023 SCC OnLine APTEL 7).**

The law is well settled that when the main lis comes to an end, all interim orders merge into that final order. Once, those interim orders merge into the final order, the interim orders do not survive. **(*Gwaldas Shivkisanji Lakhotia v. Bapurao Arjunji Bandabuche*, 2007 SCC OnLine Bom 229).** Once the proceedings, wherein a stay was granted, are disposed of, any interim order granted earlier merges with the final order, (***State of U.P. thr. Secretary* v. *Prem Chopra*, 2022 SCC OnLine SC 1770; *South Eastern Coalfields Ltd.* v. *State of M.P.*, (2003) 8 SCC 648; Teesta Urja**

Ltd. v. CERC, 2023 SCC OnLine APTEL 26), and an order of stay, which is granted during the pendency of proceedings, comes to an end with the disposal of the substantive proceedings. (***State of U.P. thr. Secretary* **v.** ***Prem Chopra*****, 2022 SCC OnLine SC 1770;** ***Kanoria Chemicals and Industries Ltd.* v. *U.P. State Electricity Board*****, (1997) 5 SCC 772; Teesta Urja Ltd. v. CERC, 2023 SCC OnLine APTEL 26).** On a final order being passed, all the earlier interim orders merge into the final order, and the interim orders cease to exist. Consequently, any direction given in the interim order also ceases to exist. ***(Prem Chandra Agarwal v. U.P. Financial Corpn.*****, (2009) 11 SCC 479).**

5. PRINCIPLES OF RES JUDICATA DO NOT APPLY TO INTERLOCUTORY ORDERS:

Relying on **Satyadhyan Ghosal v. Smt Deorajin Debi: (1960) 3 SCR 590,** the Supreme Court, in **United Provinces Electric Supply Co. Ltd. v. Workmen, (1972) 2 SCC 54,** held that a party is not bound to appeal against an interlocutory order which is a step in the procedure that leads up to a final decision in the dispute between parties by way of a decree or a final order; and the rule of res judicata cannot be invoked in such a case. The judgement of the Supreme Court, in **United Provinces Electric Supply Co. Ltd. v. T.N. Chatterjee, AIR 1972 SC 1201,** was followed by the Orissa High Court in **Anirudha Adhikari v. Amarendra Adhikari: AIR 1988 Ori 42.**

In **Mahadeo Mahto and Ors. V. Hiralal Verma and Ors. (1991) SCC OnLine Pat 78**, the Patna High Court, relying on **United Provinces Electric Supply Co. Ltd. v. T. N. Chatterjee, AIR 1972 SC 1201,** and **Anirudha Adhikari v. Amarendra Adhikari, AIR 1988 Orissa 42,** held that, while the principles of res judicata apply at different stages of the suit, it is also well known that interlocutory orders do not operate as res judicata; in a given case, the Court may not entertain a subsequent application for passing interlocutory

orders filed by a party, if such a prayer has earlier been rejected but the same is not done by invoking the principles of res judicata.

On the question whether, because at an earlier stage of the litigation a court had decided an interlocutory matter in one way and no appeal had been taken therefrom, the court could not, at a later stage of the same litigation consider the matter again, the Madras High Court, in **Uma Shankar v. Oriental Bank of Commerce & Anr. (judgment in CRP No. 1856 of 2019 & CMP No. 12263 of 2019 dated 06.02.2023)**, held that the principles of res judicata do not apply to interlocutory applications.

As no finality is attached to an interlocutory order, and as the said order ceases to exist on a final judgment being passed, we are of the view that failure to challenge the interim order dated 22.02.2017 does not bar the Appellant generators, on the principles of res judicata, from challenging the final judgment of the UPERC dated 21.11.2017. Reliance placed, on behalf of UPPCL, on stray observations in the judgments of the Supreme Court in **Amrjeet Singh and Others vs. Devi Ratan and Others (2010 1 SCC 417)** and **Ishwar Dutt vs. Land Acquisition Collector and Anr (2005 7 SCC 190)** is misplaced for, in both the afore-said cases, the earlier order was a final judgement, and not an interlocutory order.

While it is true that an Appeal under Section 111(1) of the Electricity Act lies with this Tribunal against any order passed by the Commission, in the present case, the Appellant generator could not have subjected the order of the UPERC dated 22.02.2017 to challenge in appellate proceedings, since no directions were issued by the UPERC in the said order by which the Appellant generators can be said to be aggrieved by. All that the UPERC had directed, in the said order dated 22.02.2017, is for UPPCL and UPNEDA to reconsider and take an appropriate decision in the background of the then prevailing and the present market rates of solar energy making it clear that they were not

expressing any findings approving or disapproving the rates quoted by the Appellant generators. A mere direction to the UPERC and UPNEDA to reconsider and take an appropriate decision, without expressing any findings on whether or not the rates quoted by the Appellant generators should be adopted, does not give rise to a cause of action by which the Appellant generators can be said to be aggrieved by, justifying their invoking the appellate jurisdiction of this Tribunal under Section 111(1) of the Electricity Act.

We must express our inability to agree with the submission, urged on behalf of UPPCL, that the order passed by UPERC on 21.11.2017 is a consequential order to the order dated 22.02.2017. As the earlier order dated 22.02.2017 is an interlocutory order, it merges with the final judgment passed by the UPERC, in so far as the Appellant generators are concerned, on 21.11.2017. While it is true, as contended on behalf of the Appellant-Consumer, that certain observations were made by the UPERC in its order dated 22.02.2017, the fact remains that the UPERC has itself left the question, as to whether the rates quoted by the Appellant generators should be accepted or not, open to be considered by it later. This goes to show that no conclusive findings have been recorded by the UPERC in its order dated 22.02.2017. We are satisfied, therefore, that the principles of res judicata have no application, and failure of the Appellants-generators to challenge the earlier order of the UPERC dated 22.02.2017 does not bar them, on application of the principles of res judicata, from challenging the validity of the final judgment dated 21.11.2017.

XII. SECTION 63: SCOPE OF ENQUIRY BY THE REGULATORY COMMISSION:

A. SUBMISSIONS OF APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellant-generators, that electricity purchase and procurement process for distribution licensees in a State, including the price at which electricity is to be procured from generating companies or licensees through agreements for the purchase of power, is regulated under the 2003 Act and is a function assigned to the State Commissions under Section 86(1); power procurement may take place either at a price "determined" by the State Commission under a cost-plus regime (Section 62) or at a price "adopted" by the Commission under a competitive bidding route (*Section 63);* in the present case, power procurement by UPPCL has taken place through the competitive bidding route; when a project is being set up through a tariff-based competitive bidding process under Section 63, then, as per the said Section, the conditions that are required to be fulfilled are two-fold: (i) the tariff must be determined through a transparent process of bidding; and (ii) the bidding process must be undertaken in accordance with the Guidelines issued by the Central Government (the Guidelines provide that the discovered tariffs must be aligned with the prevailing market prices in consumer interest); if the aforesaid two conditions (the "twin test") are satisfied, then the mandate under Section 63 (with the use of the word "shall") is that the Appropriate Commission must adopt the tariff which has been discovered through the competitive bidding process. (**Essar Power Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission & Anr (Judgment in Appeal No.82/2011 dated 16.12.2011);** and **Aayan Anthapuramu Solar Private Ltd. V. Andhra Pradesh Electricity Regulatory Commission & Ors. and batch: (Judgment in Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020);** while adopting the discovered tariff under Section 63 and applying the above twin tests, the Appropriate Commission has been held to not be a mere post office and as such is also enjoined, in the discharge of its regulatory functions, to examine whether the said discovered tariffs are aligned to the prevailing market prices; in doing so, the Appropriate Commission is also empowered

to reject any bid(s) which, in the process of adoption, are not found aligned to the market prices. (**Energy Watchdog V. Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80; Jaipur Vidyut Vitran Nigam Limited vs MB Power (Madhya Pradesh) Limited, 2024 INSC 23; and Tata Power Company Limited v MERC, 2022 SCC OnLine SC 161);** and Section 63 does not envisage any determination of tariff by the Appropriate Commission, if the discovered tariffs are not found to be in compliance with the twin tests or are not aligned to market prices.

It is further submitted, on behalf of the appellant-generators, that the scope of power to be exercised and the procedure to be followed by the State Commissions under Section 63, while dealing with Petitions for adoption of tariffs, has been examined in the following decision by the Supreme Court and this Tribunal: (i) **Essar Power Ltd. Vs. Uttar Pradesh Electricity Regulatory Commission & Anr.** [Judgment of this Tribunal in Appeal No.82/2011 dated 16.12.2011]; (ii) **Aayan Anthapuramu Solar Private Ltd. V. APERC & Ors.** [Judgment of this Tribunal in Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020]; (iii) **Energy Watchdog V. Central Electricity Regulatory Commission & Ors.** [2017 (14) SCC 80]; (iv) **Tata Power Company Limited (Transmission) V. Maharashtra Electricity Regulatory Commission** [(2022) SCC online SC 1615]; and (v) **Jaipur Vidyut Vitran Nigam Ltd. & Ors. V.MB Power (MP) Limited** (Judgment of the Supreme Court in C.A No. 6503/2022 dated 8.1.2024); the clear legal position that emerges from the above decisions is that (i) there is a statutory sanctity attached to a bidding process that is conducted strictly in accordance with the provisions of the Electricity Act and the Central Government Guidelines which cannot be disturbed; (ii) Section 63 process must discover competitive tariffs in accordance with market conditions and, if the tariffs quoted in the submitted bids are not aligned with prevailing market prices, then the procurer is within its rights to reject the bids; however, once the

bidding process is over and the successful bidders have been selected (and projects awarded to them), then the right to reject bids cannot be exercised by the procurer; (iii) tariff negotiation, after submission of a Petition for tariff adoption, amounts to re-opening of concluded bids which cannot be permitted; (iv) once the bidding process has been conducted as per MNRE Guidelines and the provisions of the RfP (which includes the requirement of bids being below prescribed ceiling tariff), the ground of consumer interest cannot be resorted to for re-opening a validly concluded bidding process, and that too after the awarded projects have been commissioned and power supply therefrom has commenced under the executed PPAs; (v) the Appropriate Commission, while adopting tariff under Section 63 of the Act, is bound by the Government of India Guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those Guidelines; 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 be used; (vi) the Commission is mandated under Section 63 to adopt the tariff determined through a TBCB process if the same conforms with the twin tests provided under Section 63 and, if the process fails to satisfy the said tests, the Commission ought to reject adoption of the same and only thereafter may determine the tariff under Section 62; and (vii) the Appropriate Commission has power to go into the question as to whether the prices quoted by the bidders under a process under Section 63 are market aligned or not, and take into consideration the aspect of consumer interest; the Commission, which is vested with ample powers to regulate power purchase under Section 86 (1)(b), is not bound to adopt such bids but can reject any one or all of such bids which are not found to be market aligned; however, in none of the above decisions, either this Tribunal or the Supreme Court has held that, in case discovered tariffs are found not to be market aligned, the Appropriate Commission may proceed in the manner the UPERC has proceeded in the

present case where, without any examination whatsoever of the material placed before it demonstrating as to how the bids have been found to be market aligned, it has directed parties to negotiate tariff (that too not through the BEC) and, thereafter, approve a tariff unilaterally arrived at by a 'Negotiation Committee' of the procurer; the UPERC has, therefore, acted contrary to and in violation of the above settled legal position and has passed the impugned Order by wrongly relying on the selective findings in **Madhya Pradesh Power Trading Co. Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission & Ors:** (Judgment of this Tribunal in Appeal No.44/2010 dated 6.5.2010) where tariff negotiations had taken place prior to the issuance of an LoI, and the negotiated tariff had not been accepted by the Commission; the impugned Order, or the interim Order dated 22.2.2017, have nowhere found the subject bidding process to be non-transparent or in violation of the Guidelines; in fact, vide its interim Order dated 22.2.2.2017, the UPERC has taken note of compliance of the process of tariff adoption, the meetings of the BEC and the consequent certifications by UPPCL and UPNEDA; had the UPERC examined the contents of the meetings of the BEC, it would have become evident that the subject bidding process had, in fact, ensured market alignment of the discovered tariffs and, therefore, had fully satisfied the twin tests specified under Section 63; having failed to do so, the UPERC has wrongly declined to adopt the tariff discovered for the Appellants' projects, and has reduced the same by applying impermissible benchmarks; and the impugned Order is liable to be set aside, and the Appellants are liable to receive the discovered tariffs for their solar power plants commissioned by them under the competitive bidding process.

It is also submitted, on behalf of the appellant-generators, that, under the said Order, the UPERC took note of the following decisions while observing that it could look to the reasonability of the tariffs discovered under the bidding process: (i) **Essar Power Ltd. Vs. Uttar Pradesh Electricity**

Regulatory Commission & Anr. (Judgment of this Tribunal in Appeal No.82/2011 dated 16.12.2011), (ii) **Madhya Pradesh Power Trading Co. Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission & Ors** (Judgment of this Hon'ble Tribunal in Appeal No.44/2010 dated 6.5.2010), and (iii) **SKS Power Generation Ltd. V. State of Rajasthan** (Judgment of the Rajasthan High Court in Special Appeal (Writ) No.604/2014 dated 18.4.2014); in each of the aforesaid decisions, no negotiations were permitted under a Section 63 process after issuance of LoIs or issuance of certification of conformity of the twin tests; as such, reliance on the said decisions for examining the subject bidding process where LoIs and Certificate of conformity had been issued, was clearly misplaced; in the meantime, the Appellants' projects were commissioned and synchronized with the grid as per the timelines provided under the PPAs on the respective stated dates; commissioning of the projects, within the timelines prescribed under the RfP and PPA, was necessary for the Appellants, pending adoption of the tariff under the above Petition, in order to avoid levy of liquidated damages in the form of encashment of bank guarantee due to delay in commissioning; as such, with their projects being commissioned, the Appellants began supplying power to UPPCL and raising power supply bills as per the discovered tariffs as incorporated in the initialed PPAs; on 26.5.2017, the matter of tariff adoption was put to the Empowered Committee which, in turn, constituted a 'Negotiation Committee' for negotiation with the selected bidders to match the lowest tariff of Rs.7.02/unit, being the lowest tariff obtained in the bids which was also below the CERC benchmark tariff of Rs.7.06/unit; the Empowered Committee, constituted under the Solar Power Policy, did not have the power to constitute any such 'Negotiation Committee' which, in any case, was wholly alien to the entire process of tariff adoption under Section 63; and, in a Meeting of the said 'Negotiation Committee' held on 6.7.2017, a tariff of Rs.7.02/unit, for all the nine bidders whose projects had been commissioned (within PPA timelines), was recommended.

It is contended, on behalf of the appellant-generators, that, out of the said nine bidders, six bidders (including the present Appellants) did not agree to accept the 'negotiated' tariff of Rs.7.02/unit and wrote letters of protest to the chairman of the 'Negotiation Committee' as under: (i) SAEL wrote a letter dated 8.7.2018 stating that its financial arrangements including loan sanctions from banks were based on the discovered tariff, and any change in tariff would make the projects unviable and restrict the Appellant's capacity for servicing of loans; the Negotiation Committee was informed that it was not possible for it to enter into any negotiations; (ii) PSPN Synergy wrote a letter dated 15.07.2017 to the Government of Uttar Pradesh objecting to the re-negotiation of the discovered tariff with UPPCL & UPNEDA; further, the Impugned Order, in paragraph 8, specifically notes that PSPN Synergy (Shree Radhey Radhey Ispat Private Limited) objected to the reduced tariff of Rs. 7.02/kWh; the aforementioned fact is not disputed by UPPCL & UPNEDA; and PSPN Synergy did not agree to the negotiated rate and insisted on payment of the discovered tariff. (iii) Salasar Green Energy also objected to the re-negotiation of discovered tariff. The Impugned Order, in paragraph 8, specifically notes that Salasar Green Energy (NP Agro India Industries Limited) objected to the reduced tariff of Rs. 7.02/kWh. The aforementioned fact is not disputed by UPPCL & UPNEDA. Salasar Green Energy did not agree to the negotiated rate and insisted on payment of discovered tariff. (iv) Lohia Developers wrote a letter dated 6.7.2017 to the Government of Uttar Pradesh stating that tariff of RS.7.02/kWh was not viable and objected to the reduction in tariff; all this while, the Appellants continued to supply power from their respective projects to UPPCL under the initialed PPA and kept on raising tariff bills at the discovered tariff; however, vide its letter dated 15.7.2017, UPPCL informed SAEL that, since the PPAs signed for its projects were yet to be approved by UPERC, the bills raised by it for the months from February, 2017 to May, 2017 were being returned, even though it was receiving continuous supply from the projects; on 3.10.2017, UPPCL and

UPNEDA submitted an additional reply before the UPERC and, inter-alia, stated that the Negotiation Committee, in its meeting held on 6.7.2017, had recommended adoption of tariff at ₹7.02/unit for all the nine bidders whose projects had been commissioned, which had been endorsed by the empowered committee; in this manner, after having invited solar power generators to set up their projects based on the tariffs discovered through a competitive bidding process under the Government of India guidelines, the said power generators were now required to supply power from their already commissioned projects at "negotiated tariff", thereby making a complete farce and sham of the competitive bidding process, and causing adverse financial repercussions on the generators.

B. SUBMISSIONS ON BEHALF OF THE INTERVENOR:

It is submitted, on behalf of the intervenor-AGEUPL, that clause 3.1.4 (VII) of the amended Request for Proposal (**RfP**) dated 24.04.2015 issued by UPNEDA places restrictions on post-bid negotiations of the tariff:- "*There shall be no negotiation on the Single Quoted Tariff between UPNEDA/ Procurer and the Bidder (s) during the process of evaluation*"; the bid discovered tariff was found valid and competitive, and was approved and recommended for adoption as having found to be in due compliance with the MNRE Bidding Guidelines, 2012 mandated in terms of Section 63 of the Electricity Act by:- (i) Bid Evaluation Committee on 12.06.2015; (ii)Empowered Committee on 04.07.2015; and (iii) Government of UP ('**GoUP**') on 07.09.2015; the UPERC, while exercising powers under Section 63 of the Electricity Act, cannot issue directions which negate the competitive bidding process and are in violation of the statute; in this regard, reliance is placed on the following judgments: (i) ***Essar Power Limited v. UPERC & Anr*., 2011 SCC OnLine APTEL 185** (Judgment in Appeal No. 82 of 2011 dated 16.12.2011); (ii) ***Energy Watchdog v. CERC & Ors.,* (2017) 14 SCC 80;** (iii) ***Tata Power Company Ltd. Transmission v. Maharashtra Electricity Regulatory Commission &***

***Ors.,* 2022 SCC OnLine SC 1615;** (iv) ***Jaipur Vidyut Vitran Nigam Ltd. & Ors. v. MB Power (Madhya Pradesh) Limited & Ors.,* 2024 SCC OnLine SC 26** upholding the principles enunciated in the **Energy Watchdog** Judgment and **Tata Power** Judgment that, in a situation where the guidelines issued by the Central Government under Section 63 of the Electricity Act cover the situation, then the State Electricity Regulatory Commission is bound by those guidelines and must exercise its regulatory functions, and 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 can be used.

It is further submitted, on behalf of the intervenors, that, in the **JVVNL Judgment**: (a) in terms of Clause 5.15 of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees, 2005 notified by Ministry of Power, Government of India ('**MOP Bidding Guidelines 2005**'), the bid evaluation committee had observed and recommended that the bid discovered tariff of SKS Power Generation (Chhattisgarh) Ltd., one of the bidders, was not aligned with market prices; accordingly, the State Electricity Regulatory Commission had considered the recommendations of the bid evaluation committee in the tariff adoption process; and (b) considering the above aspect, the Supreme Court had observed that the decision of the State Electricity Regulatory Commission, during the tariff adoption process under Section 63 of the Electricity Act, that the bid discovered tariff of SKS Power Generation (Chhattisgarh) Ltd was not aligned with the market prices was correct since the decision of the State Electricity Regulatory Commission was premised on the decision of the bid evaluation committee in accordance with Clause 5.15 of the MOP Bidding Guidelines.

It is also submitted, on behalf of the intervenor-AGEUPL, that, in view of the judgments cited above and the settled position of the law regarding the

powers of the State Electricity Regulatory Commission under Section 63 of the Electricity Act, (i) as per the scheme of the Electricity Act and the settled position of law, the State Electricity Regulatory Commission has limited power under Section 63 during the tariff adoption process; the Commission can only approve or reject the tariff, and it has no powers to re-determine the tariff if the tariff is discovered in terms of the bidding guidelines; in terms of Section 63 of the Electricity Act, the Commission has the discretion not to adopt the tariff determined through the bidding process only if the twin conditions as enumerated in Section 63 of the Electricity Act are not fulfilled; the twin conditions are: (a) the bidding process must be transparent; (b) the bidding process must comply with the guidelines issued by the Central Government; admittedly, the Commission cannot re-determine the tariff when the tariff is discovered in compliance with the bidding guidelines; in the present case, the UPERC had directed the parties to renegotiate the tariff even after the Bid Evaluation Committee had approved the bid discovered tariff, and had provided the appropriate certificate on conformity of the bidding process evaluation in terms of Clause 7.3 and 7.6 of the MNRE Bidding Guidelines 2012; and the extracts of Clause 7.3 and 7.6 of the Bidding Guidelines 2012 are set forth below:

> "*7.3 After the conclusion of bidding process,* ***the Evaluation Committee constituted for evaluation of RFP bids shall provide appropriate certification on conformity of the bidding process evaluation according to the provisions of the RFP document.*** *The Procurer /Authorized Representative shall provide a certificate on the conformity of the bidding process to these guidelines.*
>
> *7.6 The signed PPA* ***along with the certification certificates provided by the evaluation committee and by the Procurer as provided in clause 7.2 shall be forwarded to the***

Appropriate Commission for adoption of tariff *in terms of Section 63 of the Act.";*

It is further contended, on behalf of the intervenor-AGEUPL, that, from the observations of the Supreme Court, in the **Energy Watchdog** Judgment, it is evident that, if a situation is covered by the bidding guidelines, then the regulatory commission is bound by such bidding guidelines and it must exercise its power in accordance with those bidding guidelines; the UPERC has also recorded in Para 14 & 17 of the Order dated 22.02.2017, in Petition No. 1110 of 2016, that, after conclusion of the bidding process, the Bid Evaluation Committee has provided the certificate on conformity of bidding process and approved the bid discovered tariff; the UPERC has acted contrary to the recommendations of the Bid Evaluation Committee, and has violated Clause 7.3 and 7.6 of the MNRE Bidding Guidelines, 2012; further, in terms of the law settled by the Supreme Court in the **Energy Watchdog** Judgment, **Tata Power** Judgment and **JVVNL** Judgment, the UPERC ought to have adopted the bid discovered tariff since the Bid Evaluation Committee, which consists of experts, has already approved the bid discovered tariff; and, in terms of Clause 7.3 of the MNRE Bidding Guidelines, 2012, the Procurer/UPPCL has also provided the certificate on the conformity of the bidding process as per the MNRE Bidding Guidelines, 2012, which was recorded by the UPERC in Para 18 of the Order dated 22.02.2017 in Petition No. 1110 of 2016.

It is also contended, on behalf of the Intervenor- AGEUPL, that the UPERC has acted contrary to the observations of the Supreme Court in the **Energy Watchdog** Judgment since the Commission can exercise its general regulatory power if the guidelines issued under Section 63 of the Electricity Act is silent in any particular aspect; in this context, it is pertinent to note that Clause 3.1.4 (VII) of RFP specifically prohibits negotiation of tariff during the bid evaluation stage; and Clause 3.1.4(VII) of the RFP reads thus: "*There*

shall be no negotiation on the Single Quoted Tariff between UPNEDA/ Procurer and the Bidder (s) during the process of evaluation"; thus the UPERC's direction to UPNEDA and UPPCL, in its Order dated 22.02.2017 in Petition No. 1110 of 2016 for reconsideration of the bid discovered tariff, is *non-est* in law; in the present case, the bidding conducted by UPNEDA was transparent, and the bidding process was in accordance with the MNRE Bidding Guidelines 2012; as such, the UPERC was obliged to adopt the tariff determined through a competitive bidding process which was found to be consistent with the prevalent market prices by the Bid Evaluation Committee, and the bid being consistent with the MNRE Bidding Guidelines 2012 issued by the Central Government under Section 63 of the Electricity Act; and, consequently, the bid discovered tariff should be reinstated since the inception.

C. SUBMISSIONS OF UPERC:

It is submitted, on behalf of UPERC, that the objective of the guidelines, for Tariff Based Competitive Bidding Process for Grid Connected Power Projects based on Renewable Energy Sources, issued in December 2012 as applicable in the present case, and that of the bidding guidelines notified by the Union of India vide Resolution dated 19.01.2005 as considered by the Supreme Court, in **Jaipur Vidyut Vitran Nigam Ltd. & Ors. Vs. M.B. Power (Madhya Pradesh) Limited & Ors**: **2024 SCC ONLINE SC 26**, stand in pari-materia; the Supreme Court, in **Jaipur Vidyut Vitran Nigam Ltd,** has held the following:- (i) finding of this Tribunal in its Judgment in Appeal No. 224 of 2019 dated 03.02.2020 wherein it held that the State Commission has no power to go into the question as to whether the prices quoted are market aligned or not, and to also not take into consideration the aspect of consumers interest, is erroneous; (ii) Section 86(1)(b) of the Electricity Act gives ample power to the State Commission to regulate electricity purchase and procurement process of distribution licensees; (iii) one of the objectives of the

bidding guidelines is the protection of consumer interest by facilitating competitive conditions in procurement of electricity; (iv) the State Commission is justified in rejecting the price bids, if the rates quoted are not aligned to the prevailing market prices; and (v) the procurer is not bound to accept all the bids only on the ground that the bidding process was found to be transparent and in compliance with bidding guidelines.

It is further submitted, on behalf of the UPERC, that it had dealt with the issue of negotiation @ para **47 to 51** of the 1st order dated 22.02.2017; and on this issue, it relies upon the Judgment of this Tribunal, in ***Madhya Pradesh Power Trading Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission& Ors***. ***2010 SCC Online Aptel 45*** (Appeal No. 44 of 2010), and on the judgment of the Supreme Court in ***Food Corporation of India Vs. M/s Kamdhenu Cattle Feed Industries (1993)1 SCC 71.***

It is also submitted, on behalf of the UPERC, that the UPERC, in its order dated 22.02.2017 (the "1st Order"**),** along with the overall market rates, has also examined the applicability of the 12 year term, and still found that the tariff discovered were very high, and not according to the market rates; the finding of the UPERC, in its Order dated 22.02.2017 with respect to market alignment of the discovered tariff discussed in Para 40-45, are summarised thus:- (i) the Commission considered the data (Table) taken from the Ministry of New and Renewable Energy (MNRE) website to compare the rates discovered in other States during the same period, and found that the tariff discovered in U.P were nowhere close to the tariff discovered across the country during the corresponding period of 2015-16 which were in the range of Rs. 4.34 to 5.99 per unit whereas, in the instant case, the tariff lay in the range of Rs. 7.02 to 8.60/Unit; (ii) over the years, solar tariff has been decreasing consistently due to decline in prices of solar PV cells; (iii) the CERC levelised solar tariff of Rs. 7.04 for FY 2015-16 got reduced to 5.68 per unit for FY 2016-17; (iv) Uttar Pradesh is said to be on par with other States

in terms of solar generation/CUF and other environmental conditions are concerned; (v) CERC benchmark tariff for FY 2015-16 was Rs.7.06/unit; (vi) CERC tariff is accepted across the country to, by and large, reflect the market conditions; (vii) the Commission compared the tariff discovered in FY 2014-15 with that of the solar bid in 2014-15 for 300 MW which was also for the period of 12 years, and the tariff for the subsequent 13 years was decided based on the prevailing Regulations; (viii) the Commission found that, if similar conditions as adopted in the previous order dated 6.4.2016 i.e to have total 25 years tariff term with first 12 years being exactly the same as discovered tariff and for the remaining 13 years considering Return on Equity, Interest on working capital and O&M Cost as per CERC Regulations, then over whelming number of bids fall short of being qualified on the above criteria as tariff becomes much higher than the CERC levelised tariff for 25 years; and (ix) the discovered tariffs were found to be defeating the very objective of the bidding i.e, to discover the market aligned tariff.

D. SUBMISSIONS OF UPPCL:

It is submitted, on behalf of UPPCL and UPNEDA, that, under Section 86 of the Electricity Act, 2003, the UPERC, apart from exercising its adjudicatory power of deciding the dispute, also has the responsibility of regulating generation, sale and purchase of electricity under the provisions of the Electricity Act, 2003 and the regulations made thereunder; it has also been given the responsibility of ensuring competition, efficiency and economy in activities of the electricity industry as well as to promote co-generation and generation of electricity from renewable sources of energy; the UPERC also has the responsibility to advise the State Government and its authorities to establish ways and means to ensure that procurement of energy, through the competitive process, is at economical rates in order to protect the interest of the consumers who finally make the payment and are saddled with the responsibility of making payment of tariff decided or finalized by the UPERC;

consequently, the UPERC cannot be a mute spectator to any tariff arrived at through the bidding process; the very purpose of adoption of tariff under Section 63 is to ensure that the UPERC, as a regulator, analyzes and checks whether the tariff arrived at was through a competitive, fair and transparent bidding process, and that the tariff, discovered through the competitive bidding process is in tune with the market rates; the UPERC cannot be expected to blindly accept any tariff arrived at, as it is not a mere post office; the very fact that the discovered tariff has to receive the final approval of the UPERC clearly establishes that, even under Section 63, the UPERC can always decline to give approval under its regulatory powers to ensure that the interest of consumers is protected, or can issue necessary directions that the tariff discovered through competitive bidding process is not in tune with the existing market scenario.

It is further submitted on behalf of UPPCL that, while hearing the aforesaid petition for adoption of tariff under Section 63, discovered through the competitive bidding process as per the guidelines of the Central Government, the UPERC, after analyzing the different tariff offered by the solar developers, found that the tariff so offered was much higher than the prevailing market rates; the UPERC did not doubt the process of RFP or the manner of selection of the selected bidders; it only had concern with respect to the tariff arrived at which was comparatively higher than the existing market rates; as the said tariff is ultimately passed on to the consumers by the distribution licensee, while submitting its Annual Revenue Requirement (ARR), the UPERC therefore came to the conclusion, while exercising its regulatory powers by its order dated 22.02.2017 pursuant to the detailed hearing which had taken place on 29.11.2016, that, despite the fact that the solar tariff had substantially decreased and was also likely to decrease in future due to the falling cost of solar modules, the tariff arrived at was extremely high; after analyzing the matter in detail, and having taken note of

the various discovered tariff available in the country, the UPERC directed the petitioner to reconsider the matter after negotiating with the bidders in view of the circumstances mentioned in the order; the UPERC in its order dated 22.02.2017, by applying the provisions of Section 61 and 63, the Regulations, the Guidelines of the Central Government and the judgements in (i) **Essar Power Ltd. Vs. UPERC and NPCL** (Appeal No. 82 of 2011 dated 16.12.2011) **2011 SCC OnLine APTEL 185**, (ii) the Division Bench judgement of the Rajasthan High Court in ***M/s S.K.S. Power Generation Ltd. & Athena Power Ltd. Vs. State of Rajasthan & Others,*** **(**Special Appeal (Writ) No. 604 of 2014 and in Special Appeal (Writ) No. 538 of 2014 dated 18.04.2014), (iii) **Tata Power Co Ltd Transmission v. MERC; 2022 SCC OnLine SC 1615,** (iv) **Jaipur Vidyut Vitran Nigam Ltd. Vs. State of Rajasthan & Ors. (Judgement of the Supreme Court in Civil Appeal No. 6503 of 2022**), held that it could look into the fairness and reasonability of the tariff discovered through a competitive bidding process under Section 63 of the Electricity Act, 2003; the UPERC, thus, came to the conclusion that the tariff quoted by the appellants did not seem to be in sync with the tariff available in the market; while relying upon a table with regard to trend of solar tariff adopted in various States, the UPERC held that it had to closely scrutinize the reasonability of tariff before passing it on to the consumers; and it found that the tariff quoted by the bidders, under the bidding process carried out in FY 2015-16, for supply for a period of 12 years, was not aligned and in sync with the tariff available in the market; the scope of interference of the Commission under Section 63 is not limited to merely adopting the tariff; and the Commission can very well go into the question as to whether the tariff is line with the market prices or not.

It is also submitted, on behalf of UPPCL, that, pursuant to the concerns raised by the UPERC (vide its order dated 22.02.2017) with respect to the discovered tariff viz-a-viz the tariff of existing solar power plants in the market,

UPNEDA and UPPCL apprised the State Government, and the matter was referred to the Empowered Committee constituted under the U.P. Solar Policy, 2013 under the Chairmanship of the Chief Secretary of the State of U.P; the Empowered Committee held meetings with the developers of the solar power projects selected through the bidding process; certain developers, who were in the process of commissioning their project as per the PPA, agreed and, accordingly, the L1 rate of Rs.7.02 was finalized with all the 15 bidders which was also on the higher side considering the market rates applicable at that point of time; however, as the bidding process had already been completed, it was considered inappropriate to cancel the bidding process, more so when the developers had come under the Solar Policy of 2013; negotiations post bidding is an accepted practice as has been held by the Supreme Court in **Food Corporation of India Vs. M/s Kamdhenu Cattle Feed; (1993) 1 SCC 71;** the Empowered Committee constituted under the U.P. Solar Policy, 2013, keeping in mind the consumer interest and the observations of the UPERC in its order dated 22.02.2017, took a decision on 06.07.2017 in regard to the nine developers, who had completed their projects (including the appellant), that they would be entitled to the L1 rate of Rs.7.02 per unit which was the lowest discovered tariff under the bidding process quoted by M/s. Essel Infra Projects Ltd; pursuant to the hearing held on 25.10.2017, the UPERC, after taking note of the decision of the Empowered Committee constituted under the Solar Policy, 2013 and considering the fact that the tariff of Rs.7.02 per unit was close to the prevailing CERC benchmark tariff of Rs.7.06 per unit for the year 2015, passed the impugned order dated 21.11.2017 wherein the tariff of Rs. 7.02 per unit was adopted with respect to the nine selected bidders who had commissioned the project for a period of 12 years; however, for the subsequent 13 years, the bidders were bound to supply power to UPPCL at the Average Power Purchase Cost (APPC) (subject to the ceiling of Rs.7.02 per unit which was lowest) in terms of the PPA; and the UPERC further

directed that, for adoption of tariff, a supplementary PPA be entered into between the selected bidder and UPPCL; pursuant to the order of the UPERC dated 21.11.2017, wherein the tariff of Rs. 7.02/kWh wad adopted and directions were issued to carry out modifications in the signed PPA, the 2nd Respondent and the appellant-M/s Sael Ltd entered into an amended PPA on 07.12.2017 for all its 3 units; similarly, for PSPN, the date of amended PPA was 05.12.2017; and for Salasar it was 07.12.2017.

E. SUBMISSIONS OF THE APPELLANT - SRI. R.S. AWASTHI:

It is submitted, on behalf of Mr. R.S. Awasthi, that Clause 6.8 of MNRE Guidelines, 2012 provides that the rates quoted by the bidders needs to be aligned with the market prices and, in the event the rate quoted by the bidder is not aligned with the market prices, the Evaluation Committee/Distribution Licensee/State Commission shall have the right to reject all price bids; the intent, of the competitive bidding process under Section 63, is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with the Central Government's guidelines, standard document of Request for Proposal and the PPA; it is the duty and responsibility of the Distribution Licensee to ensure that power is supplied to the consumers at the most economical rate possible; the price, ranging from Rs. 7.02 to 8.60 per unit, was not aligned with the market price and was far in excess thereof; at the relevant time, the solar power tariff in India was progressively and drastically falling, namely from Rs. 15/Kwh in the Year 2008 to less than Rs 6 per kWh namely in the region of Rs. 4.63 to 5.73 per Kwh and thereafter, by 2017, even to Rs. 2.44/Kwh; the significant fall in the price, at which solar power can be procured, has been on account of the improvement in the technology related to solar power generation leading to efficiency gain and also substantial fall in the solar panel cost; the trend in the solar power price from 2011 to 2017 is also highlighted in the Economic

Survey for the Year 2017-18 published by the Ministry of Finance, Government of India**:**

> *"8.73 Tariff in many states have been increased due to tariff revision. But the higher tariff may face potential threat from lower solar and wind prices. As per latest available information, the solar energy price is at Rs.2.5 per KWH and wind energy price is at Rs.3.4 per KWH. The falling trend in solar prices is shown in figure 23".*

It is further submitted, on behalf of Mr. R.S. Awasthi, that, as observed by the State Commission itself in the earlier order dated 22.02.2017, even during the time when the bidding was initiated in the Year 2015, the price discovered in other States was in the range of Rs. 4.63 to 5.73 per Kwh; further, in the same month i.e. May, 2015 when the bid was initiated in Uttar Pradesh, another bid was conducted in Madhya Pradesh where a weighted average tariff of Rs. 5.36 per Kwh was discovered; in the order dated 22.02.2017, the State Commission had held that only the tariff which are in sync with the prevailing market tariff in FY 2015-16 should be considered; as per the trend prevalent in the year 2015, the price was in the region of Rs 4.42/Kwh and the said price was also showing a decreasing trend; and there was, therefore, no justification for the State Commission to have adopted the tariff of Rs 7.02/Kwh, even assuming for the sake of argument but not admitting that the relevant period for considering the prevalent market price is 2015 and not 2017.

F. JUDGEMENTS RELIED ON BY EITHER SIDE:

Before examining the rival contentions under this head, it is useful to take note of the judgements of this Tribunal, the Rajasthan High Court and the Supreme Court as referred to by Learned Counsel on either side.

(i) AAYAN ANTHAPURAMU SOLAR PRIVATE LTD. V. ANDHRA PRADESH ELECTRICITY REGULATORY COMMISSION & ORS. (JUDGMENT OF APTELIN APPEAL NOS.368, 369, 370, 371, 372 AND 373 OF 2019 DATED 27.2.2020),

In **Aayan Anthapuramu Solar Private Ltd. V. Andhra Pradesh Electricity Regulatory Commission & Ors. (Judgme nt of APTELin Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020),** this Tribunal held that, if tariff is discovered through a Bidding Route, under Section 63 of the Electricity Act, the appropriate Commission is required to adopt the tariff discovered, and the applicability of Section 86(1)(b) is limited to considering the merits of the case vis-à-vis the Central Govt guidelines; the State Commission can exercise its general regulatory powers only if no guidelines are framed or where the guidelines do not provide a procedure to deal with the given situation; in such a situation, the State Commission is only required to see whether the bidding process as initiated was in accordance with the Central Govt guidelines, and whether the said process was complied with strictly adhering to the Central Govt guidelines; and the procedure to be adopted is only to see whether the guidelines, providing for competitive bidding process, was followed or not.

(ii) ENERGY WATCHDOG V. CERC: 2017 14 SCC 80

In **Energy Watchdog v. CERC: 2017 14 SCC 80**, the Supreme Court held 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 general, and when the Commission adopts tariff under Section 63, it functions within its general regulatory power under Section 79(1)(b); such regulation takes place under the Central Government's guidelines; the reason why Section 62 alone has been put out of the way of Section 63 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 the 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; both Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff; 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; and it is only in a situation where no guidelines have been framed, 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.

(iii) TATA POWER CO. LTD. TRANSMISSION V. MAHARASHTRA ERC, 2022 SCC ONLINE SC 1615:

In **Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**, the Supreme Court held that Section 63 has five significant features : (i) Section 63 begins with a non-obstante clause. The non-obstante provision overrides Section 62 alone and not all the provisions of the Act; (ii) as opposed to Section 62 where the Commission is granted the power to determine the tariff, under the Section 63 route, the bidding process determines the tariff; (iii) the Commission is mandated to adopt such tariff that is determined by the bidding process; (iv) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (v) the twin conditions are that (a) the bidding process must have been

transparent; (b) the bidding process must have complied with the guidelines issued by the Central Government; Section 63 indicates that the provision would be invoked *after* the tariff has been determined by the bidding process; there is nothing in Sections 62 or 63 that could lead to the interpretation that Section 63 is the dominant route for determination of tariff. Both the provisions provide alternative modalities through which tariff can be determined; the non-obstante clause in Section 63 must be read in the context of Sections 61 and 62; Section 62 bestows the Commission with wide discretion to determine tariff; Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted; Section 63 contemplates that, in such situations where the tariff has been determined through the bidding process, the Commission cannot, by falling back on the discretion provided under Section 62, negate the tariff determined through bidding; and this interpretation of Section 63 is fortified by the use of the phrase 'such' in Section 63 - the Commission is bound to 'adopt' 'such' tariff determined through bidding.

The Supreme Court summarized the observations in **Energy Watchdog** as follows: (i) The Appropriate Commission while 'adopting' the tariff determined through bidding is not a mere 'post office'; and (ii) The Commission is mandated by Section 63 to adopt the tariff determined through bidding only if the bidding process was transparent, and such a process has been held in accordance with the guidelines issued by the Central Government under Section 63; and, if the bidding process does not satisfy the two checks, then the Commission shall determine the tariff through the RTM route under Section 62.

The Supreme Court then observed that the Appropriate Commission is not mandated to adopt the tariff determined through the bidding process irrespective of the fulfilment of the statutory requirements; the Commission can reject the tariff determined through the bid if the tariff process is not (i)

transparent; and (ii) in accordance with the guidelines issued by the Central Government; thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with Central Government guidelines) to determine if the Commission could have exercised its discretion to determine the tariff under Section 62 while rejecting the tariff determined under Section 63; and, therefore, Section 63 can only be invoked *after* the tariff has been determined through bidding.

(iv) ESSAR POWER LIMITED V. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION, 2011 SCC ONLINE APTEL 185:

The facts, in **Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185,** were that the distribution licensee Ms. Noida Power (R-2) had initiated the process of procurement of 200 MW (± 20%) of power under Section 63 of the Act, 2003 on a long term basis under tariff based Case-1 competitive bidding process as per Government of India guidelines, and had issued standard Request for Proposal (RFP) duly approved by the State Commission. Six bidders participated in this case - I bidding process, and one among them ie Essar Power Limited, the Appellant, emerged as the lowest bidder offering evaluated tariff of Rs. 4.0868 Paise per unit for 240 MW of power. Ultimately, the Evaluation Committee, set up by Noida Power (R-2) in accordance with Central Government's Guidelines, approved the bid of the Appellant as the successful bidder. Noida Power Company (R-2) filed a Petition on 7.4.2011 in Petition No. 741 of 2011 before the State Commission under Section 63 of the Electricity Act, 2003 for adoption of the tariff quoted by the Appellant-Essar Power. While the above petition was pending before the State Commission for adoption of the tariff quoted by the Appellant, Noida Power

(R-2) filed an interim application before the State Commission on 27.4.2011 stating that, subsequent to the filing of the Petition in Case No. 741 of 2011 for adoption of the tariff quoted by the Appellant, Noida Power (R-2) received a letter from another Company (3rd party) proposing to supply power to them on Long Term Basis at a levelised tariff of Rs. 3.667 per unit which was less than the tariff quoted by the Appellant.

The Appellant appeared before the State Commission and opposed the move for 3rd party negotiation. The State Commission, however, permitted Noida Power (R-2) to take necessary steps as per clause 2.5(b)(iii) of the Standard Documents of **Request for Proposal (RFP)** approved by the State Commission for procurement of power. Noida Power (R-2) sent a letter to the Appellant and other bidders calling upon them to submit their revised financial bid to match or offer a tariff lower than the levelised tariff of Rs. 3.667 per unit quoted by the 3rd party Company. Aggrieved thereby, the Appellant filed the Appeal before this Tribunal.

In its judgement, this Tribunal considered the following question, among others, ie: (a) the scope of power to be exercised and the procedure to be followed by the State Commission under Section 63 of the Electricity Act, 2003 while dealing with a petition seeking adoption of the tariff quoted by the successful bidder, and which was approved by the Evaluation Committee upon finding that the quoted levelised tariff was aligned to market conditions. (b) Having elected to procure power through the competitive bidding route under Section 63 of the Act, and having filed the petition before the State Commission seeking adoption of the tariff quoted by the successful bidder as declared by the Evaluation Committee, whether the procurer (R-2) could be permitted to go for 3rd party negotiations.

It is in this context that this Tribunal held that Section 63 starts with a non-obstante clause and excludes the tariff determination powers of the State

Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with the Central Government's guidelines, standard document of Request for Proposal and the PPA. The competitive bidding process under Section 63 is regulated in various aspects by the Statutory Framework. To promote competitive procurement of electricity by distribution licensees with transparency, fairness and level playing field, the Central Government has framed Bidding Guidelines. The Central Government had also notified Standard Bidding Document in the form of Request for Proposal and also model PPA. Any deviation from these standard documents is required to be approved by the State Commission. Admittedly, in the present case, Noida Power (R-2) had adopted these documents verbatim and the State Commission had also approved the same.

This Tribunal then considered the various stages which crystallize the commitments and rights of the parties concerned, as under: (a) The Procurer has the choice of process for procurement of power either through bilateral PPA with tariff determined by the Appropriate Commission under Section 62 of the Act or tariff discovered through a transparent process of competitive bidding in accordance with the Central Government's Guidelines under Section 63 of the Act; (b) After electing the 2nd route i.e. procurement of power through competitive bidding process, the procurer has to finalize the complete bidding process including finalization of RFP and other related documents with the approval of the State Commission at least 45 days before the bid submission date. (c) Short listing of qualified bidders on the basis of evaluation of non-financial bids; (d) Evaluation of financial component of the bids to determine the levelised tariff and evaluate whether such levelised tariff is aligned to the prevailing market prices. It is clearly stipulated that there shall be no negotiation on the bid and the quoted tariff, once the evaluation process

commences; (e) The bidder who has quoted lowest levelised tariff should be declared as successful bidder. Acceptance of the outcome of the bid evaluation resulting in issuance of Letter of Intent (LoI) in favour of the successful bidder and signing of PPA. (f) Followed by filing of the Petition for adoption of the tariff of the successful bidder by the Appropriate Commission under Section 63; and (g) The adoption of such tariff discovered by the competitive bidding governed by Section 63 is the statutory duty of the Appropriate Commission with no discretion in the matter.

This Tribunal further observed that 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; and (c) If 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.

This Tribunal further held that an important stage of the process is the selection of successful bidder from among the six qualified bidders. Clause 3.5.3 and 3.5.8 of the Request for Proposal (RFP) provide that the bidder quoting the lowest levelised tariff must be declared as the successful bidder and the letter of intent has to be issued to the said bidder. The only exception to this mandate is that the procurer can reject all the bids, if the quoted tariff is not aligned to prevailing market prices. Noida Power had attempted, by seeking for the above directions from the State Commission, to subvert the entire competitive bidding process under Section 63 ignoring the various procedures contemplated in the Government of India's guidelines and

Request for Proposal (RFP). The Government of India guidelines did not allow introduction of any 3rd party in the competitive bidding process who did not participate in the bidding process. In the absence of any valid reason to reject the bid quoted by the Appellant or in the absence of any valid ground to reject the petition filed by Noida power seeking adopting the tariff of Essar Power after declaring that its bid price is aligned to the market price, Noida Power cannot be permitted to adopt a different route which is not contemplated under Section 63 of the Act.

This Tribunal further observed that 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 transparency, fairness, consumer interest and viability. 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 deviations, it would not only destroy the basic structure of the guidelines but would also 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 Essar Power as a successful bidder and in view of the fact that on that basis, Noida Power had 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 the non-financial component of the bids by the bidders, no new participants could be introduced. (c) The process should have 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, Noida Power (R-2) cannot go for bilateral PPA.

This Tribunal also held that, 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 a transparent process conducted as per the bidding guidelines. While invoking Section 63, the State Commission has only the 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 the State Commission shall reject the petition for approval of the tariff. (b) once the process of bidding is completed strictly in accordance with the biding 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. Instead of adopting either of these two courses, the State Commission has resorted to following another course by passing an Order directing Noida Power to adopt the measures as it may deem fit as contemplated under clause 2.5(b)(iii).

In conclusion, this Tribunal summarized its findings thus: (i) the powers of the State Commission are limited under Section 63 of the Act. The State Commission, while dealing with the petition under Section 63 for adoption of

tariff, can either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with the Central government's guidelines, standard document of Request for Proposal and the PPA. Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission. This process must discover competitive tariff in accordance with market conditions from the successful bid-consistent with the guiding principles under section 61 of the Act. If 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. The contention of Noida Power that, under Section 63 of the Act, negotiation process is contemplated, is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under the competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring Essar Power as the successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed, on the recommendation of the Evaluation Committee, seeking adoption of tariff after it is discovered, it was not open for Noida Power to enter into negotiation with a 3rd party to reduce the tariff. (ii) Admittedly, in this case, the Appellant has been declared as a successful bidder by the Evaluation Committee which has been accepted by Noida Power (R-2). Clause 3.5.8 mandates that the letters of intent shall be issued to the successful bidder. Clause 3.5.12 provides that the procurer can reject the bids only when the quoted tariff are not aligned to the prevailing market prices. That is not the case here. Noida Power can exercise its powers

under clause 2.15 of the Request for Proposal only before it has accepted the bid of the successful bidder. The said power cannot be exercised after filing the petition before the State Commission for adoption of tariff under Section 63. When the petition, seeking adoption of tariff quoted by the Appellant, is pending before the State Commission, Noida Power cannot exercise its powers under the Request for Proposal (RFP) to withdraw the acceptance or reject any or all the bids. When the Evaluation Committee declared the Appellant as a successful bidder and recommended to accept the bid as its bid is aligned to the prevalent market conditions, and when Noida power has filed a petition before the State Commission seeking adoption of the Appellant's bid, and the same has been entertained by the State Commission, Noida Power at that stage cannot reject the bid. (iii) If Noida Power is permitted to negotiate with a third party and go back to the Commission for adoption of the tariff of the 3rd party, it would amount to nullifying the sanctity of the bidding process which will make the proceedings under Section 63 of the Act, 2003 nugatory. The objective of competitive bidding is to protect and balance the interest of all the parties concerned i.e. the distribution licensee, the bidder and the consumer. In other words, the entire competitive bidding process is not only to discover the tariff but also to discover the supplier who would be able to supply the required quantum of power to the procurer in a timely manner. Clause 2.5(b)(iii) does not give any separate powers to Noida Power to have a 3rd party negotiation which would defeat the purpose of the proceedings under Section 63.

(v) SKS POWER GENERATION (CHHATISGARH) LIMITED V. RAJASTHAN ELECTRICITY REGULATORY COMMISSION & ORS. (JUDGEMENT OF APTEL IN APPEAL NO.224 OF 2019 DATED 3.2.2020)

In **SKS Power generation (Chhatisgarh) Limited V. Rajasthan Electricity Regulatory Commission & Ors.(Judgement of APTEL in**

Appeal No.224 of 2019 dated 3.2.2020), the following three issues were framed: *"ISSUE NO. 1 : Whether the Respondent Commission could reject the tariff/bid of the Appellant, in terms of Section 63 of the Electricity Act, 2003 and the directions issued by the Supreme Court?; ISSUE NO. 2 : Whether there was a sufficient proof to show that the bid of the Appellant was market aligned?; and ISSUE NO. 3 : Whether the argument of Consumer interest be advanced by the Rajasthan Discoms in the facts of the present Appeal?"* . This Tribunal, while answering the first issue, came to the conclusion that the State Commission, while adopting tariff under Section 63, had to only consider that the Bidding Guidelines issued by the Central Government providing for the tariff structure had been complied with or not, the State Commission cannot exercise its powers *de hors* such guidelines, and the State Commission has no power to reject the tariff of a bidder.

In so far as the second issue is concerned, this Tribunal held that, since the bid of SKS Power was already evaluated and the subsequent certificates were issued by the BEC confirming the transparency of the bid, it was not open to the State Commission to go into the question, as to whether the tariff quoted by SKS Power was market aligned or not. In so far as the third issue with regard to consumers' interest is concerned, this Tribunal held that the said issue cannot be raised again at that stage when the same had been dealt with in detail by this Tribunal vide order dated 2nd February 2018 and also considered by the Supreme Court before passing the order dated 25th April, 2018. This Tribunal allowed the appeal vide order dated 3rd February 2020, set aside the order of the State Commission dated 26th February 2019, and directed that the tariff of SKS Power, as offered in its bid, shall be adopted. The parties were directed to revive and implement the PPA dated 4th February 2019.

The order dated 3rd February 2020, passed by this Tribunal was challenged by the DISCOMS and RVPN before the Supreme Court by way of

Civil Appeal No. 1937 of 2020 and Civil Appeal No. 2721 of 2020 respectively. Initially, the appeals in **Jaipur Vidyut Vikas Nigam Ltd vs M.B. Power: (2024) SCC Online SC 26**, were tagged along with the said appeals. However, vide order dated 10th October 2023, the same were de-tagged.

(vi) MB POWER (MADHYA PRADESH) LTD VS STATE OF RAJASTHAN & OTHERS (JUDGEMENT OF THE RAJASTHAN HIGH COURT IN DB CIVIL WP NO. 1481 5 OF 2020 DATED 20.09.2021)

In **MB Power (Madhya Pradesh) Ltd vs State of Rajasthan & others (judgement in DB Civil WP No. 14815 of 2020 dated 20.09.2021),** the Petitioner was assessed as L-7 among the 10 qualified bidders. Pursuant to subsequent meetings and discussions, L-1 was offered an additional capacity of 55 MWs aggregating to a total of 250 MWs, L-2 agreed to provide additional quantum of power to the tune of 99 MWs aggregating to a total of 410 MW, and L-3 offered an additional capacity of 250 MWs, aggregating to a total of 350 MWs, and further offered to reduce its tariff marginally.

An L.O.I was issued in favour of L-1 to L-3 on 27.09.2023, and thereafter PPAs were signed with them. On 04.01.2013 RRVPNL filed a petition before the Rajasthan State Electricity Regulatory Commission, under Section 63 of the Electricity Act, for adoption of tariff for purchase of long term based load power of 1000 MWs, as quoted by L-1 to L-3. However, the Energy Assessment Committee, in its subsequent meeting held on 21.05.2014, recommended that, as against a quantum of 1000 MWs, a demand of 500 MWs ought to be considered on account of availability of power from various sources, and to meet future contingencies. Based on the said recommendations, the Govt. of Rajasthan approved procurement of 500 MWs of Power on a long term basis as against the quantum of 1000 MW for which PPAs had already been executed. Based on the approval given by the Govt.

of Rajasthan in its letter dated 25.07.2014, RRVPNL filed an application before the State Commission, and the said petition was disposed of by the Commission on 22.07.2014 according approval for procurement of power only for 500 MWs.

Aggrieved thereby, L-1 to L-3 filed appeals before APTEL. Separate appeals were filed by L-4 & L-5 wherein, besides challenging the reduction of quantum from 1000 MW to 5000 MW, they also questioned the increase in the quantum which the respondents intended to procure from L-1 to L-3. The appeals were allowed by APTEL, by its order dated 02.02.2018, holding that the reduction in quantum from 1000 MW to 500 MW was incorrect, and the Commission had no power to reduce the requisitioned RFP quantum after the bidding process was completed. Aggrieved by the orders passed by APTEL, RRVPNL filed Civil Appeal No. 3481 & 3482 of 2018 before the Supreme Court contending, among others, that the RFP quantum could not be restored from 500 MWs to 1000 MWs. L-5 also filed an appeal before the Supreme Court contending that APTEL could not have permitted procurement of a higher quantum (than bid for) from L-2 and L-3.

The Supreme Court, by its order in Civil Appeal Nos.2502-2503 of 2018 & batch dated 25.04.2018, upheld the decision of APTEL whereby reduction of quantum of procurement from 1000 MW to 500 MW had been set aside. The operative portion of the order of the Supreme Court, in Civil Appeal Nos.2502-2503 of 2018 & batch dated 25.04.2018, reads as under:-

> *"We are in agreement with the earlier conclusion of the APTEL. We are of the view that the direction of reduction of capacity from 1000 mw to 500 mw by the State Commission was correctly set aside. Since L-1 to L-5 were represented before this Court, we direct that they shall be entitled to supply power in terms of the originally offered amount, mentioned above, in accordance with*

para 3.5 of the Request for Proposal. The power supply will now be reduced to a total of 906 mw. The State Commission may now go into the issue of approval for adoption of tariff with regard to L-4 and L-5. All Letters of Intent (LOIs) shall stand modified in terms of the above".

In the light of the directions afore-extracted, L-1 to L-5 were entitled to supply power in terms of the originally offered quantum. Since, the quoted quantum which L-1 to L-5 had offered to supply was 906 Mws, the Supreme Court had reduced the quantum of procurement from 1000 MWs to 906 MW. In terms of the Order of the Supreme Court, the Commission was required to examine the issue of approval of adoption of tariff for L-4 & L-5. The afore-mentioned directions of the Supreme Court was confined only to L-1 to L-5, and the Petitioner was L-7. After the order of the Supreme Court, L-3, L-4 and L-6 went into insolvency proceedings, and no PPAs were entered into with them by RRVPNL. As that had resulted in their becoming the 4th lowest bidder, and the order of the Supreme Court required the 2nd Respondent to consider 5 bidders (L-1 to L-5), the Appellant invoked the jurisdiction of the Rajasthan High Court. RRVPNL was the 2nd Respondent, the three Discoms were Respondent Nos. 3 to 5, and PTC India Ltd. was arrayed as the 7th Respondent in the said Writ Petition.

The Division Bench of the Rajasthan High Court, in its order in Civil Writ Petition No. 14815 of 2020 dated 20.09.2021, after noting that APTEL, vide its Order dated 3rd February, 2020, had considered the argument raised by the Learned Advocate General regarding public interest and consumer interest is concerned, observed that when a statutory body exercising expert jurisdiction has already held, the same read with the previous order of the APTEL which Order stands merged with the Order of the Supreme Court dated 25th April, 2018, there was no question of their revisiting the same in any manner whatsoever; the same has also to be seen in the light of the fact

that under the RFP, Respondent No. 2 has already declared L1 and L2 as successful bidders and were procuring power as per the quantity and levelized tariff offered by L1 and L2 bidders; accordingly, it could not be said in any manner whatsoever that public interest was being met by accepting the bids of L1 and L2 and not by accepting the other bidders; and the same would lead to a completely arbitrary and discriminatory stand of Respondent No. 2 which Respondent No. 2, being an instrumentality of State, could not be allowed to take. The Division Bench of the Rajasthan High Court allowed the writ petition by its order in Civil Writ Petition No. 14815 of 2020 dated 20.09.2021, and issued the following directions to Respondent Nos. 1 to 5 therein:-

> *"……..In terms of the order dated 25.04.2018 issued by the Hon'ble Supreme Court of India in Civil Appeal Nos.2502-2503 of 2018, (i) respondent Nos.1 to 5 are bound to purchase a total of 906 MW electricity from the successful bidders. Consequently, the present petitioner and the PTC India Ltd. (respondent No.7) are directed to supply 200 MW electricity power to the respondents (within the limit of 906 MW, as directed). Accordingly, the petitioner and the respondent No.7 may file an appropriate application before the respondent Nos.1 to 5 within two weeks from today complying with the necessary requisite conditions including bank guarantee etc., as required, in terms of the RFP. (ii) Respondent Nos.1 to 5 shall within two weeks from the date of receipt of the application, as directed under direction (i), issue LoI in respect of bid filed through respondent 7 – PTC India Ltd for supplying 200 MW power from the power generating station of the Petitioner at levelized tariff of 5.517 Rs./Kwh, being in terms of their bid qualified by the Bid evaluation committee and ranked L7, so as to meet the requirement of procuring 906 MW*

of power found sacrosanct vide Order dated 25th April, 2018 passed by the Hon'ble Supreme Court, followed by further Order dated 3rd February, 2020 of APTEL; (iii) In consequence thereof, the Respondent Nos.1 to 5 shall immediately within two weeks thereafter execute the Power Purchase Agreement (PPA) with Respondent 7 PTC India Ltd. for procuring 200 MW power from the power generating station of the Petitioner in accordance with the said qualified bid ranked L7, and then to start procuring power in accordance with law; (iv) While the tariff to be specified in the LoI and in the PPA above shall be the tariff specified in the original bid ranked L7 as aforesaid, without any changes and/or negotiations or qualifications, however, as an interim measure, on provisional basis, the tariff to be actually paid by the procurer Respondents shall be the interim tariff i.e. Rs.2.88 per unit, specified by the Hon'ble Supreme Court in its interim order dated 28th September, 2020 in I.A. No. 83693 of 2020 in pending Civil Appeal 2721/2020. The final adoption of tariff to be paid to the Respondent 7 under the PPA shall be subject to the final outcome of the said Civil Appeal 2721/2020 pending in the Hon'ble Supreme Court".

Aggrieved by the afore-said order, passed by the Division Bench of the Rajasthan High Court, Respondent Nos.2 to 5 in the said writ petition filed Special Leave to Appeal No.17350/2021 (ie **JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26),** and the Supreme Court, while granting leave, by its order dated 05.09.2022, directed that this Appeal be tagged along with CA No.1937 of 2020 and 2721 of 2020. However, vide order dated 10th October 2023, the same were de-tagged.

(vii) JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26:

The appeal in **Jaipur Vidyut Vikas Nigam Ltd vs M.B. Power: (2024) SCC Online SC 26** was preferred against the judgement of the Division Bench of the Rajasthan High Court in **MB Power (Madhya Pradesh) Ltd vs State of Rajasthan & others (judgement in DB Civil WP No. 14815 of 2020 dated 20.09.2021).**

Respondent No. 1-MB Power, in the appeal before the Supreme Court in **Jaipur Vidyut Vikas Nigam Ltd vs M.B. Power: (2024) SCC Online SC 26**, rested its claim, among others, on the order dated 3rd February 2020, passed by this Tribunal contending that, once it is certified that the bid evaluation process has been complied with as per the Bidding Guidelines issued by the Central Government, it is presumed that the process was transparent and it is not permissible for the State Commission to go into the question of market aligned tariff and also the consumer interest; without considering the question, as to whether the tariff was market aligned or not, the procurers were bound to accept supply from the bidders at the rates quoted by them; the power under Section 63 of the Electricity Act restricted the scrutiny only to two aspects, viz., (1) whether the Bidding Guidelines framed by the Union of India under Section 63 of the Electricity Act were followed; and (2) whether the bidding process was transparent or not.

It is in this context that the Supreme Court, in **Jaipur Vidyut Vikas Nigam Ltd**, referred to its earlier judgement in **Energy** Watchdog, and held that the appropriate Commission does not act as a mere post office under Section 63; the view expressed in **Energy Watchdog,** was approved in **Tata Power Company Limited Transmission**; Section 86(1)(b) of the Electricity Act gives ample power to the State Commission to regulate electricity purchase and procurement process of distribution licensees; it also

empowers the State Commission to regulate matters including the price at which electricity shall be procured from the generating companies, etc; Clause 5.15 of the 2005 Bidding Guidelines provides that the evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices; it is clear that the evaluation committee is empowered to consider, as to whether the rates quoted are aligned to the market price or not; and the evaluation committee has the right to reject all the price bids if it finds that the rates quoted are not aligned to the prevailing market price.

The Supreme Court further observed that, if the contention of respondent No. 1-MB Power that the procurer is bound to accept all the bids which had emerged in a competitive bidding process, once the bidding process was found to be transparent and in compliance with the Bidding Guidelines is to be accepted, it would do complete violence to clause 5.15 of the Bidding Guidelines itself; if that view is accepted, the DISCOMS will be compelled to purchase electricity at a much higher rate as compared with other suppliers; the said higher rate will be passed on to the consumers; as such, accepting the contention of respondent No. 1 would result in adversely affecting the interests of the consumers and, in turn, would be against larger public interest; when the Bidding Guidelines itself permit the BEC to reject all price bids if the rates quoted are not aligned to the prevailing market prices, there is no question of the State Commission being not in a position to go into the question, as to whether the rates quoted are market aligned or not, specifically in the light of ample powers vested with the State Commission under Section 86(1)(b) of the Electricity Act, which also includes the power to regulate the prices at which electricity shall be procured from the generating companies, etc; the contention that power, under clause 5.15 of the Bidding Guidelines, can be exercised only when the bidding process is found to be not in compliance with the Bidding Guidelines, and is not transparent in

respect of all the bidders and not in respect of some of the bidders, is without substance; applying the principle of literal interpretation, the evaluation committee/BEC would be entitled to reject only such of the price bids if it finds that the rates quoted by the bidders are not aligned to the prevailing market prices; it does not stipulate rejection of all the bids in the bidding process; if the contention that clause 5.15 of the Bidding Guidelines will come into play, which permits the Evaluation Committee to reject "all" price bids and not "any" one of them is accepted, it would result in absurdity, and such an interpretation would result in defeating one of the main objects of the enactment, i.e., protection of the consumer; the Supreme Court has time and again, in various judgments including in **GMR Warora Energy Limited,** recognised the requirement of balancing consumers' interest with that of the interest of the generators; and it will not be permissible to take a lopsided view only to protect the interest of the generators ignoring the consumers' interest and public interest.

(viii). MADHYA PRADESH POWER TRADING COMPANY LTD. Vs. MADHYA PRADESH ELECTRICITY REGULATORY COMMISSION METRO PLAZA, 2010 SCC ONLINE APTEL 45

In **Madhya Pradesh Power Trading Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission Metro Plaza, 2010 SCC OnLine APTEL 45,** the bids were evaluated by the Expert Committee which in turn recommended the acceptance of the Lanco Infratech bid and also recommended negotiations with RPL and EPL for reduction in their quoted prices. The Appellant then filed an application before the State Commission seeking approval and adoption of tariff as quoted by Lanco Infratech Limited, reserving the right to approach the State Commission for approval of the tariff for other bidders later if found suitable after negotiations. Accordingly, the State Commission passed an order accepting and adopting the tariff of Lanco

Infratech Ltd. under the bidding process and directed the Appellant to place before the State Commission the outcome of the negotiations with RPL and EPL before expiry of the bid period. The Appellant thereafter constituted a Negotiation Committee for negotiation of tariff for procurement of power from RPL and EPL based on the bids submitted by them. During the negotiation process, RPL reduced their tariff. The Board of Directors of the Appellant considered the reduced tariff of RPL, and approved acceptance of the same subject to approval of the State Commission. It suggested for further negotiations on the price with Essar Power Limited. The Appellant filed an application before the State Commission praying for approval of the negotiated price for procurement of power from RPL. In the meantime, EPL reduced the tariff from the bid price of Rs. 2.955 per kWh to Rs. 2.45 per kWh of power. Accordingly, a Letter of Intent (LOI) was issued by the Appellant to EPL subject to the approval of the State Commission. The State Commission however held that there was no provision for negotiations during or after the bidding process for determination of tariff by bidding process, and therefore, negotiations were not permissible; further, the Appellant did not obtain any prior approval of the State Commission for negotiations; the negotiation had not led to any reduction in price to the level of the said lowest bid; and, therefore, the price negotiated was on the higher side.

It is in this context that this Tribunal opined that the State Commission had granted approval in respect of Lanco Infratech Limited, and had permitted the Appellant to approach the Commission again after negotiations with the other bidders and place the result of the negotiations before the Commission which, in turn, would consider the same for necessary approval; this indicated that the Commission did not stand in the way of negotiation, and in fact the Appellant was directed to approach the State Commission again after the negotiation was over, thereby giving liberty to the Appellant to have such negotiation; when such a liberty had been given with a direction that they

should approach the State Commission after such negotiation was over, it was strange on the part of the State Commission to hold that such approval to the negotiation had never been obtained from the Commission; further, the State Commission having blamed the Appellant, as if they had not obtained any approval for the negotiations from the State Commission, had hastened to add in the same breath that there was no provision for negotiation; this observation was mutually contradictory and without application of mind; and a perusal of the relevant provisions, along with a reading of the RFP documents, would clearly indicate that there was no apparent restriction, either in the guidelines issued by the Central Government or in the bidding documents prohibiting the procurer to have negotiations with bidders for bringing down the price.

This Tribunal further observed that negotiations, as claimed by the Appellant before the State Commission, was only for reduction in the prices which was in the best interest of the consumers; in this case, negotiations had actually resulted in reduction in prices considerably; the reduction in prices, which was considerable, could be highly beneficial both to the State as well as to the consumers at large in the State; the bid documents provided that the Appellant had the right to reject any bids or all bids, if the quoted prices of tariff was not aligned to the market prices; this showed that the procurer itself could reject all the bids or any other bids if the quoted price was not acceptable or it was not aligned to the market prices; this would mean that the procurer could make efforts to ensure that it gets supply for the reduced price from the very same bidders; instead of rejecting the bids outright, the procurer was well within its right to negotiate with the parties to bring down the price which was aligned to the prevailing market price; in other words, when the procurer has the right to reject the bid, the procurer has got similar right to negotiate with the parties to bring down the price quoted in the bids;

and on going through the entire bidding documents, it could be concluded that negotiation is inherent and in-built in the bidding process.

This Tribunal relied on the judgement of the Supreme Court in **Food Corporation of India v. Messrs Kamdhenu Cattle Feed(1993) 1 SCC 71,** wherein it was held that the object of inviting tenders for disposal of a commodity was to procure the highest price while giving equal opportunity to all the intending bidders to compete; procuring the highest price for the commodity was undoubtedly in public interest, since the amount so collected goes to the public fund; accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price; the inadequacy may be for several reasons known in the commercial field; inadequacy of the price quoted in the highest tender would be a question of fact in each case; retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest; and a procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance, and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations, would ordinarily satisfy this requirement.

This Tribunal further held that the above principle was laid down by the Supreme Court was in a case of sale of foodgrains where higher price was beneficial for the public good; the present case relates to the purchase of electricity by the procurer for consumers at the lower price in the public interest; the ratio decided by the above decision, taking note of public interest, squarely applied to the present case as well; If the State Commission was of the view that there was no provision for negotiation or the procurer had no right for negotiation, the State Commission ought to have rejected the request

made by the Appellant to permit them to approach the Commission in respect of other bidders after negotiation; on the contrary, the State Commission referred to the request made by the Appellant for doing so, in its order dated 07.03.2008, and permitted the Appellant to approach the State Commission again with the outcome of the negotiation which the Appellant had with the other bidders; having held that there was no provision for negotiation and there was no prior approval for negotiation, the State Commission had given another strange reason to reject approval i.e. the negotiated price was not the lowest; when there is no right for negotiation as per the guidelines as well as the bid documents, as pointed out by the State Commission, there cannot be any power for the State Commission to grant such an approval; therefore, the question of granting approval by the State Commission for negotiation will not arise when there is no provision made available in the guidelines or in the bid documents; similarly, where there is no provision of approval for negotiation, as held by the Commission, question whether negotiated price is lowest or not does not arise; even assuming that there is no explicit approval obtained by the Appellant from the State Commission, there is no explicit embargo on the Appellant from having negotiations with the bidders for reduction of the prices so as to make them agree to the reduced price which is aligned with the market prices in the interest of the consumers at large; the ground for rejection of the petition that there was no provision for negotiation as per the guidelines and the RFP documents, and that there is no approval for negotiation obtained from the State Commission was totally wrong; on going through the entire bidding documents, it could be easily concluded that negotiation is inherent and in-built in the bidding process.

G. ANALYSIS:

The following principles can be culled out from the afore-said judgements. 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 Electricity Act (after laying down the terms and conditions for determination of tariff under Section 61) or under Section 63 where the Commission adopts the tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 86(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. (**Energy Watchdog v. CERC: 2017 14 SCC 80**). Section 86(1)(b) of the Electricity Act gives ample power to the State Commission to regulate electricity purchase and procurement process of distribution licensees. It also empowers the State Commission to regulate matters including the price at which electricity shall be procured from the generating companies, etc. **(JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26)**.

When the State Commission adopts the tariff under Section 63, it functions within its general regulatory power under Section 86(1)(b) in terms of the Central Government's guidelines. (**Energy Watchdog v. CERC: 2017 14 SCC 80**). In a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Commission is bound by those guidelines, and must exercise its regulatory functions, albeit under Section 86(1)(b), only in accordance with those guidelines. It is only in a situation where no guidelines have been framed, or where the guidelines do not deal with a given situation, that the Commission's general regulatory powers under Section 86(1)(b) can then be exercised. (**Energy Watchdog v. CERC: 2017 14 SCC 80**).

The Procurer has the choice of the process for procurement of power ie either through bilateral PPA with the tariff determined by the Appropriate Commission under Section 62 or tariff discovered through a transparent process of competitive bidding in accordance with the Central Government's Guidelines under Section 63. After electing the 2nd route i.e. procurement of

power through the competitive bidding process, the procurer has to finalize the complete bidding process including finalization of RFP and other related documents with the approval of the State Commission at least 45 days before the bid submission date. The qualified bidders should then be shortlisted on the basis of evaluation of the non-financial bids. Thereafter financial component of the bids should be evaluated to determine the levelised tariff, and to ascertain whether such levelised tariff is aligned to the prevailing market prices. There shall be no negotiation on the bid, and the quoted tariff, once the evaluation process commences. Thereafter the bidder, who has quoted the lowest levelised tariff, should be declared as the successful bidder. The next stage is acceptance of the outcome of the bid evaluation process resulting in issuance of a Letter of Intent (LoI) in favour of the successful bidder, and signing of the PPA. This should be followed by the filing of a Petition, before the Appropriate Commission under Section 63, for adoption of the tariff of the successful bidder. **(Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185).**

Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. Section 63 contemplates that, in such situations where the tariff has been determined through a bidding process, the Commission cannot, by falling back on the discretion provided under Section 62, negate the tariff determined through bidding. The Commission is bound to 'adopt' 'such' tariff determined through bidding. However, the Appropriate Commission, while 'adopting' the tariff determined through bidding, is not a mere 'post office'. The Commission is mandated by Section 63 to adopt the tariff determined through bidding only if the bidding process was transparent, and such a process has been held in accordance with the guidelines issued by the Central Government under Section 63. If the bidding process does not satisfy these checks, then the Commission shall

determine the tariff through the RTM route under Section 62. (**Energy Watchdog v. CERC: 2017 14 SCC 80; Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

If the tariff is discovered through a Bidding Route, under Section 63 of the Electricity Act, the appropriate Commission is required to adopt the tariff discovered, and the scope of enquiry under Section 86(1)(b) is limited to considering the merits of the case vis-à-vis the Central Govt guidelines. In such a situation, the State Commission is required to ascertain whether the bidding process was initiated in accordance with the Central Govt guidelines, and whether the said process was complied with strictly adhering to the Central Govt guidelines. **(Aayan Anthapuramu Solar Private Ltd. V. Andhra Pradesh Electricity Regulatory Commission & Ors. (Judgme nt of APTEL in Appeal Nos.368, 369, 370, 371, 372 and 373 of 2019 dated 27.2.2020).**

The Appropriate Commission can reject the tariff, determined through the bid, if the tariff process is not (i) transparent; and (ii) in accordance with the guidelines issued by the Central Government. Thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with Central Government guidelines). **(Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

Section 63 has five significant features: (i) Section 63 begins with a non-obstante clause. The non-obstante provision overrides Section 62 alone and not all the provisions of the Act; (ii) as opposed to Section 62 where the Commission is granted the power to determine the tariff, under the Section 63 route - the bidding process determines the tariff. (iii) Section 63 indicates that the provision would be invoked only after the tariff has been determined

by the bidding process. The Commission is mandated to adopt such tariff that is determined by the bidding process; (iv) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (v) the twin conditions are that (a) the bidding process must have been transparent; (b) the bidding process must have complied with the guidelines issued by the Central Government.(**Tata Power Co. Ltd. Transmission v. Maharashtra ERC, 2022 SCC OnLine SC 1615**).

The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in accordance with the market conditions and to finalize the competitive bidding process in accordance with the Central Government's guidelines, standard document of Request for Proposal and the PPA. To promote competitive procurement of electricity by distribution licensees with transparency, fairness and a level playing field, the Central Government has framed Bidding Guidelines. The Central Government has also notified Standard Bidding Document in the form of Request for Proposal and also model PPA. **(Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185)**.

The competitive bidding process stipulated under Section 63 must be consistent with the Government of India guidelines, and must discover the competitive tariff in accordance with the market conditions from the successful bid- consistent with the guiding principles under Section 61 of the Act. **(Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185).** The Bidding Guidelines, framed by the Central Government, empower the evaluation committee to consider whether the rates quoted are aligned to the market price or not, and to reject all the price bids if it finds that the rates quoted are not aligned to the prevailing market price. **(JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26).** While the Request for Proposal (RFP) provides

for the bidder, quoting the lowest levelised tariff, to be declared as the successful bidder and for a letter of intent to be issued in their favour, the exception to this mandate is that the procurer can reject all the bids, if the quoted tariff is not aligned to the prevailing market prices. **(Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission, 2011 SCC OnLine APTEL 185).**

While it is impermissible for the Appropriate Commission in Section 63 proceedings to determine tariff, or stipulate a tariff other than that quoted by the successful bidder, it is open to it, on its being satisfied that the quoted tariff is not market aligned, to refuse to adopt such of the bids that are not market aligned or to reject it. The Commission is not required to reject all the bids if it finds some of them are market aligned and some of them are not. It is open to the Commission to adopt the tariff of such of the bids which are market aligned and reject those which are not. If the Commission is held to be bound to accept all the bids which have emerged in a competitive bidding process once the bidding process has been found to be transparent and in compliance with the Bidding Guidelines, even though the bids are found not to be market aligned, the DISCOMS will be compelled to purchase electricity at a much higher rate as compared with other suppliers, and the said higher rate will be passed on to the consumers, which would result in adversely affecting the interests of the consumers and be against larger public interest. When the Bidding Guidelines itself permit the BEC to reject all price bids if the rates quoted are not aligned to the prevailing market prices, the State Commission can also go into the question, as to whether the rates quoted are market aligned or not, specifically, in the light of ample powers vested with it under Section 86(1)(b) of the Electricity Act, which also includes the power to regulate the prices at which electricity shall be procured from the generating companies, etc.

Accepting the contention that the Bidding Guidelines permits the Evaluation Committee to reject “all” price bids and not “any” one of them, would result in defeating one of the main objects of the enactment, i.e., protection of the consumer. Consumers’ interest must be balanced with that of the interest of the generators. It is not permissible to take a lopsided view only to protect the interest of the generators ignoring the consumers’ interest and public interest. **(JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26).**

This Tribunal, in **MP Power Trading Company vs. MPERC** (judgment in Appeal No. 44 of 2010 dated 06.05.2010), relied on the judgement of the Supreme Court, in **Food Corporation of India v. Ms. Kamdhenu Cattle Feed: (1993) 1 SCC 71.** wherein it was held that the high price offered in the tender would be a cogent ground for negotiating with the tenderers, giving them equal opportunity to revise their bids with a view to obtain the best available price. The principles laid down in the **Food Corporation of India** judgement, which relate to a normal tender process, may not automatically apply to a bidding process under Section 63 of the Electricity Act which must be conducted not only through a fair and transparent process but also in accordance with the Central Govt guidelines. Clause 3.1.4 (VII) of the amended Request for Proposal (**RfP**) dated 24.04.2015 issued by UPNEDA places restrictions on post-bid negotiations of the tariff, and stipulates that there shall be no negotiation on the Single Quoted Tariff between UPNEDA/ Procurer and the Bidder (s) during the process of evaluation. As the bidding documents do not provide for negotiations to be undertaken after certification by the Bid Evaluation Committee regarding compliance of the Central Government guidelines, it is difficult to hold that the Commission, on its jurisdiction under Section 63 being invoked, can force an unwilling generator to enter into negotiations with the procurer to further reduce the tariff below that quoted by him in his bid.

In **MP Power Trading Company,** the generators and the procurers had voluntarily, and on their own accord, entered into negotiations and had agreed on a reduced tariff. It is the State Commission, whose approval was sought by the procurer, which held that, since the bidding guidelines did not provide for negotiations, it was impermissible for the procurer to undertake negotiations. In the present batch of Appeals, however, a situation, such as in **MP Power Trading Company vs. MPERC** (judgment in Appeal No. 44 of 2010 dated 06.05.2010), does not arise for consideration. The dispute, in the present batch of appeals, is whether, in a Section 63 proceeding, the Appropriate Commission can force the successful bidder to negotiate with the procurer for reducing the tariff, and whether it can direct the generators to agree to the price determined by the Negotiation Committee. and unilaterally stipulate the tariff at which the PPA should be entered into between the generator and the procurers.

In this context, it is useful to note that Clause 4(1) of the Statement of Objects and Reasons for introduction of the Electricity Bill in Parliament, which eventually culminated in the passing of the Electricity Act, 2003, stipulated that generation was being delicensed and captive generation was being freely permitted. Section 7 of the Electricity Act stipulates that any generating company may establish, operate and maintain a generating station without obtaining a licence under the Act if it complies with the technical standards relating to connectivity with the grid referred to in clause (b) of Section 73. Section 10(2) enables the generating company to supply electricity to any licensee in accordance with the Act and the rules and regulations made thereunder and may, subject to the regulations made under Section 42(2), supply electricity to any consumer. Section 62(1)(a) confers on the Appropriate Commission the power to determine the tariff in accordance with the provisions of the Act for supply of electricity by a generating company to a distribution licensee.

While the generating company is free to supply electricity, generated by it, to any person including in the power exchange, it is permissible for the Appropriate Commission to determine its tariff only if the generator chooses to supply electricity to a distribution licensee. Consequently, it is only if the bids submitted by the bidding generators is not adopted by the Commission under Section 63 (meaning thereby that the bids are rejected) on the ground that it is not market aligned, can the jurisdiction of the Commission be invoked, to determine the tariff, in case the generator intends to supply electricity to a distribution licensee. As fetters, not stipulated in the Electricity Act, cannot be placed on a generating company, the Appropriate Commission does not, in our view, have the power, in Section 63 proceedings, to either force the generators to enter into negotiations with the distribution licensees or to unilaterally, and without their consent, impose upon them a tariff which is different from the tariff quoted by them in their bid.

That does not, however, mean that the Appropriate Commission is bound to accept the tariff quoted by the successful bidder merely because such a tariff has been approved by the Bid Evaluation Committee on their erroneous understanding that the said bid is market aligned. The Appropriate Commission is not a mere post office, and is empowered to independently examine, with a view to protect consumers interest, whether the tariff quoted by the successful bidder is higher than the price prevailing in the market when the bids were submitted. In case the Commission is satisfied that the bid quoted is higher than the then prevailing market rates, it can undoubtedly exercise jurisdiction, under Section 63 of the Electricity Act, to refuse to adopt the tariff or, in other words, refuse to grant permission to the procurers to enter into a PPA with the generator at the tariff quoted by them.

It does appear, from a reading of its order dated 22.02.2017 and the impugned order dated 21.11.2017, that the Commission had taken note of the certain data/information in coming to the conclusion that the bids quoted by

the Appellants were not market aligned. It is not clear, however, whether the appellants-generators were given an opportunity, in compliance with principles of natural justice, to put forth their views on the applicability of the data relied upon by the UPERC. The questions whether the Commission has failed to take into consideration the contents of the minutes of the meeting of the Bid Evaluation Committee, and whether this Tribunal should examine the said minutes to ascertain whether or not the subject bidding process had ensured that the discovered tariff was market aligned, are not being examined in these proceedings as, we are satisfied, for reasons stated later in this order, that the matter should be remanded to the UPERC for its consideration of the issues (i) whether the bids quoted by the appellants-generators are market aligned; and (ii) if not, whether the Petition seeking adoption of tariff should be rejected.

Suffice it to observe, under this head, that the UPERC could not have, in Section 63 proceedings, unilaterally reduced the tariff below that quoted by the successful bidder on the basis of the recommendations of a Negotiation Commission for that would, in effect, amount to determination of tariff under Section 62. In Section 63 proceedings, the Appropriate Commission only has jurisdiction either to adopt the tariff determined through a process of bidding, or to refuse to do so on the ground that either or both the twin conditions stipulated in Section 63 has not been fulfilled. Since the Central Government guidelines itself require the bids quoted by the bidders to be market aligned, inquiry by the Bid Evaluation Committee on these aspects is not final, and it is always open to the Appropriate Commission to undertake an independent examination as to whether or not the bids quoted by the successful bidders is market aligned.

We must express our inability to agree with the submission, urged on behalf of the intervenor, that the judgment of the Supreme Court, in **Jaipur Vidyut Vikas Nigam Limited and Others vs MP Power, Madhya Pradesh**

Limited (2024 SCC Online SC 26), has no application to the facts of the present case. In this context, it is relevant to note that, in **SKS Power Generation Chhattisgarh Limited vs. Rajasthan Electricity Regulatory Commission (judgment in Appeal No. 224 of 2019 dated 03.02.2020)**, this Tribunal had specifically held that, since the bid had already been evaluated and certificates were issued subsequent thereto by the Bid Evaluation Committee confirming the transparency of the bid, it was not open to the State Commission to examine whether the tariff quoted by SKS Power was market aligned or not. The very same contention is now urged before us on behalf of the intervenor. This specific conclusion of this Tribunal, in **SKS Power Generation Chhattisgarh Limited,** has been held to be erroneous by the Supreme Court in **Jaipur Vidyut Vikas Nigam Limited vs. MB Power (2024 SCC Online SC 26)** as Section 86(1)(b) empowers the State Commission to regulate matters including the price at which electricity shall be procured from the generating companies and, since Clause 5.15 of the 2005 Bidding Guidelines framed by the Government of India itself permitted the Bid Evaluation Committee to reject all price bids if the quoted rates were not aligned to the prevailing market prices, the State Commission could, in the exercise of its jurisdiction under Section 86 (1)(b) of the Electricity Act, certainly examine whether or not the rates quoted by the successful bidders were market aligned. It is relevant to note that Clause 5.15 of the 2005 Bidding Guidelines is more or less is *in pari materia* with Clause 6.8 of the 2012 Bidding Guidelines which are applicable in the present case.

CLAUSE 5.15 (TBCB Guidelines issued on 19.01.2005)	**CLAUSE 6.8** (Renewable Energy Sources Guidelines issued on December, 2012)
"5.15 The bidder who has quoted lowest levellised tariff as per evaluation procedure, shall be	*"6.8 The bidder, who has quoted lowest levellised tariff as per evaluation procedure, shall be*

considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices."	*considered for the award. The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices."*

Certification by the Bid Evaluation Committee under Clause 7.3 of the 2012 Guidelines, and such a certificate being forwarded to the Appropriate Commission for adoption in terms of Clause 7.6 of the said Guidelines, does not disable the Appropriate Commission from independently considering whether the bids so submitted by the successful bidders are market aligned or not. Accepting the submission urged on behalf of the intervenor, that the certification by the Bid Evaluation Committee is binding on the Appropriate Commission, would render the Appropriate Commission a mere post office requiring it to put its seal of approval to the certification by the Bid Evaluation Committee even if it were satisfied that the findings recorded by the said Committee, regarding the successful bids being market aligned, is erroneous. Accepting such a submission would place unjustified fetters on the regulatory powers of the State Commission under Section 86(1)(b), and also fall foul of the **JVVNL** judgment of the Supreme Court. Such a construction would also disable the Appropriate Commission from ensuring that the interest of the consumers is adequately safeguarded. The law laid down by this Tribunal, in **SKS POWER GENERATION (CHHATISGARH) LIMITED V. RAJASTHAN ELECTRICITY REGULATORY COMMISSION & ORS.(JUDGEMENT OF APTEL IN APPEAL NO.224 OF 2019 DATED 3.2.2020),** is no longer good law in the light of the subsequent judgement of the Supreme Court in **Jaipur Vidyut Vikas Nigam Ltd vs M.B. Power: (2024) SCC Online SC 26**.

In the **JVVNL** judgment, the Supreme Court considered both the two judge bench judgement in **Energy Watchdog** and the three judge bench

judgement in **Tata Power.** Since both the Judgments of the two judge bench in **Energy Watchdog** and the three judge bench in **Tata Power,** were considered by the two judge bench of the Supreme Court in the **JVVNL** judgment, the decision rendered by the earlier co-ordinate bench in **Energy Watchdog,** and a larger bench of the Supreme Court in **Tata Power**, as understood by the subsequent two judge bench of the Supreme Court in the **JVVNL** judgment, would require lower Courts/Tribunals in the hierarchy to follow the later decision (**Sakinala Hari Nath v. State of Andhra Pradesh, (1993) SCC OnLine AP 195; Adani Power Rajasthan Ltd. v. Rajasthan ERC, 2024 SCC OnLine APTEL 23**).

Further, in view of Article 141 of the Constitution, all courts/tribunals in India are bound to follow the decisions of the Supreme Court. Judicial discipline requires, and decorum known to law warrants, that appellate directions should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. (**Cassell & Co. v. Broome : [1972] 1 ALL ER 801 (HL); SMT. KAUSHALYA DEVI BOGRA (SMT) v. THE LAND ACQUISITION OFFICER, 1984 2 SCC 324).**

When the Supreme Court decides a principle it would be the duty of the High Court or a subordinate Court (or for that matter a statutory tribunal) to follow the decision of the Supreme Court. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court, or seeks to revive a decision of the High Court/Tribunal which has been faulted by the Supreme Court, is a nullity. (***Narinder Singh* v. *Surjit Singh*, (1984) 2 SCC 402); *Kausalya Devi Bogra* v. *Land Acquisition Officer*, (1984) 2 SCC 324; *Municipal Corporation of Guntur, Guntur* v. *B. Syamala Kumari*, 2006 SCC OnLine AP 838; *Somprakash* v. *State of***

***Uttarakhand*, 2019 SCC OnLine Utt 648; *Director of Settlements, A.P.* v. *M.R. Apparao*, (2002) 4 SCC 638)**. In the hierarchical set up of our courts, all subordinate Courts/tribunals are bound by the decisions of the Supreme Court. (**Sakinala Harinath v. State of A.P., 1993 SCC OnLine AP 195 (FB)).** In **DWARIKESH SUGAR INDUSTRIES Ltd. v. PREM HEAVY ENGINEEING WORK, 1997 6 SCC 450,** the Supreme Court held that, when a position in law is well settled as a result of judicial pronouncement of the Supreme Court, it would amount to judicial impropriety for the subordinate courts/tribunals, including the High Courts, to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position, such judicial adventurism cannot be permitted, and it was time that this tendency stopped.

In the light of the law declared by the Supreme Court, in **JAIPUR VIDYUT VIKAS NIGAM LTD VS M.B. POWER: (2024) SCC ONLINE SC 26,** it is wholly impermissible for this Tribunal to rely on the contrary view taken earlier by this Tribunal in **SKS POWER GENERATION (CHHATISGARH) LIMITED V. RAJASTHAN ELECTRICITY REGULATORY COMMISSION & ORS.(JUDGEMENT OF APTEL IN APPEAL NO.224 OF 2019 DATED 3.2.2020)**. The submission that, once the Bid Evaluation Committee has considered and has certified that the successful bids are market aligned, it is impermissible for the Commission to again examine this issue, therefore necessitates rejection.

While the Appellants-generators contend that the bids quoted by them are market aligned and the Appropriate Commission was not justified in reducing the tariff to Rs.7.02 per unit, the submission of the Appellant-Consumer Shri R. S. Awasthi is that the tariff adopted by the UPERC at Rs. 7.02 per unit is also on the higher side, the tariff should in fact range between Rs.4.63 to 5.73 per unit, and the tariff of Rs.7.02 per unit as adopted by the Commission should be further reduced. While we are satisfied that the

Commission could not have either directed the unwilling Appellants-generators to enter into negotiation with UPPCL and UPNEDA or to unilaterally fix the tariff, as recommended by the Negotiation Committee, at Rs.7.02 per unit, we see no reason to undertake the exercise of examining the voluminous records, to ascertain whether or not the bids quoted are in fact market aligned. For reasons to be stated later in this order, we are of the view that the matter should be remanded to the UPERC for its consideration of all these issues afresh and in accordance with law.

XIII. PROTECTION OF CONSUMER INTEREST:

A. SUBMISSIONS OF UPPCL:

It is submitted, on behalf of UPPCL, that it was incumbent upon the UPERC, under Section 63 of the Electricity Act, to ascertain whether the discovered bid price is in tune with the market rate or not; UPERC was, therefore, justified in taking an equitable and balanced approach by ensuring both protection and safeguarding the interest of the consumers vis-à-vis the appellant and other similarly situated generators; the State Commission is not only an adjudicatory body but is also a Regulatory Authority to consider matters with respect to generation, distribution and transmission; therefore, while fixing appropriate tariff, either through the process of Section 62 or Section 63 of the Act, the paramount consideration of the Regulatory Authority would be the larger public interest apart from ensuring maintenance of transparency and fairness in the procurement process; the UPERC cannot be a mere spectator to the huge variation in the tariff within the same bidding process, and must be sensitive to the rights and interests of consumers; it should look into the circumstances as to whether the new generator would be in a position to give certain benefits which may ultimately benefit consumers at large; the UPERC cannot be treated as mere post box to give approval to the petition; the guidelines of the Government of India, issued under Section

63 of the Act, cannot be misinterpreted to mean that the UPERC has no role to play post bidding; and, as an expert body, the UPERC was justified in checking the reasonability of the tariff on the basis of the CERC benchmark tariff for FY 2015-16 of Rs.7.06 per unit. Reliance is placed, on behalf of UPPCL, on **All India Power Engineer Federation & Ors. vs. Sasan Power Ltd. & ors. (2017) 1 SCC 487**, ***Energy Watchdog vs. CERC (2017) 14 SCC 80***, and **Gujarat Urja Vikas Nigam Ltd. V. Solar Semiconductor Power Co. (India) (P) Ltd. (2017) 16 SCC 498**.

B. SUBMISSIONS OF APPELLANT-SRI R.S. AWASTHI:

It is submitted, on behalf of Mr. R.S. Awasthi, that the interest of the consumers at large is supreme and the entire issue relating to the price at which solar power should be purchased by UPPCL has to be considered on the touchtone of consumers' interest; if there were possibilities existing to reduce the cost to the consumers in procurement of solar power, there is no justification whatsoever for the State Commission to approve a higher tariff than what is available in the market at the time when the State Commission is required to adopt the tariff; in passing the impugned order, the State Commission has acted contrary to the basic objective under the Electricity Act, 2003 of safeguarding the interest of the consumers by adopting excessive tariff when Solar Power could be procured at a much lower price; in **Gujarat Urja Vikas Nigam Limited v. Solar Semi Conductor Power Company (India) Pvt. Ltd. (2017) 12 SCALE 781,** the Supreme Court has emphasized on the intent of the legislature to protect consumer interest and the role of the Courts while dealing with the issues pertaining to consumer interest; in **Tata Power Company Limited Transmission v. Maharashtra Electricity Regulatory Commission, 2022 SCC Online SC 1615**, (on which reliance is placed by the Appellants-Generators), the Supreme Court, after reference to **Energy Watchdog v. CERC & Ors., (2017) 14 SCC 80,** laid down the principle that the Commission does not act as a mere post office

while adopting the tariff; the Commission should adopt the tariff where the bidding process is transparent and the same is in accordance with bidding guidelines; an important test, prescribed in the bidding guidelines, is to check if the price is aligned to market price, and if the price is not aligned, the Commission possesses the necessary powers to reject the bids; the Appellants-Generators had placed reliance on the judgment passed by this Tribunal in **SKS Power Generation (Chhattisgarh) Limited v. Rajasthan Electricity Regulatory Commission** (Appeal No. 224 of 2019 dated 03.02.2020) to contend that, once the Bid Evaluation Committee has evaluated the bids, there is no scope for interference by the Commission; the said Judgment has been considered by the Supreme Court in **Jaipur Vidyut Vitaran Nigam Ltd. & Ors. V. MB Power (Madhya Pradesh) Limited & Ors. (Civil Appeal No. 6503 of 2022 and Batch dated 08.01.2024),** primarily with respect to the correctness of the Order dated 20.09.2021 passed by the Rajasthan High Court in DB Civil Writ Petition No. 14815 of 2020; the Supreme Court also examined the correctness of Judgment dated 03.02.2020 passed by this Tribunal in **SKS Power**; after noting the provisions of the Bidding Guidelines dated 19.01.2005, and the Judgment in **Energy Watchdog v. CERC & Ors. (2017) 14 SCC 80,** the Supreme Court held as under: (a) Appropriate Commission does not act as a mere post office under Section 63; (b) the aforesaid view of this Court in the case of **Energy Watchdog** (*supra*), which is a judgment delivered by two Judge Bench, has been approved by three Judge Bench of this Court in the case of **Tata Power Company Limited Transmission** (supra); (c) Section 86(1)(b) of the Electricity Act, 2003 gives ample power to the State Commission to regulate electricity purchase and procurement process of distribution licensees; (d) Clause 5.15 of the Bidding Guidelines provides that the evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices; I if the Procurer is bound to accept all the bids emerged in a competitive bidding process once the bidding process was

found to be transparent and in compliance with the Bidding Guidelines is to be accepted, it will do complete violence to clause 5.15 of the Bidding Guidelines itself; (f) if that view is accepted, the DISCOMS will be compelled to purchase electricity at a much higher rate as compared with other suppliers and the said higher rate will be passed on to the consumers; (g) when the Bidding Guidelines itself permit the BEC to reject all price bids if the rates quoted are not aligned to the prevailing market prices, there is no question of the State Commission being not in a position to go into the question, as to whether the rates quoted are market aligned or not, specifically, in the light of ample powers vested with the State Commission under Section 86(1)(b) of the Electricity Act, which also includes the power to regulate the prices at which electricity shall be procured from the generating companies, etc; (h) with regard to the contention that the power under clause 5.15 of the Bidding Guidelines can be exercised only when the bidding process is found to be not in compliance with the Bidding Guidelines and is not transparent in respect of all the bidders and not in respect of some of the bidders is concerned is without substance; in conclusion the Supreme Court held that the State Commission, after considering the detailed analysis of the Bid Evaluation Committee (BEC), had come to the considered conclusion that the prices offered by SKS Power (L-5 bidder) were not market aligned, and therefore, not in the consumers' interest; thereafter, the Supreme Court decided the issue of "all" or "any" bids and held that if all the bids had to be rejected then the above would lead to absurdity and would deprive the consumer of the lowest discovered tariff which would defeat one of the main objectives of the enactment i.e., protection of Consumer Interest; in view of the above, in terms of Section 86(1)(b) of the Electricity Act, 2003 read with Clause 6.8 of the Bidding Guidelines in the present case [*pari-materia with Clause 5.15 of the Bidding Guidelines considered in MB Power (Supra*)**),** the State Commission has rightly considered whether the prices discovered in the bids were market aligned and had come to a finding in the Order dated 22.02.2017 that *"it is*

outrightly visible that tariff discovered in U.P. is nowhere close to the tariff discovered across the country during the corresponding period".

It is further submitted, on behalf of Mr. R.S. Awasthi, that, in **MB Power,** the Supreme Court has held that the protection of consumers is one of the main objectives of the Act and, therefore, the contention of the Appellants-Generators that, in a Section 63 process, Consumer participation should not be allowed ought to be rejected.

C. JUDGEMENTS ON WHICH RELIANCE IS PLACED:

In **All India Power Engineer Federation & Ors. vs. Sasan Power Ltd. & ors. (2017) 1 SCC 487**, the Supreme Court held that**,** even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Section 61 and 63 of the Electricity Act; this is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with guidelines issued; if at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact customer interest and therefore public interest.".

In **Gujarat Urja Vikas Nigam Ltd. V. Solar Semiconductor Power Co. (India) (P) Ltd. (2017) 16 SCC 498**, the Supreme Court held that the Court should be careful in dealing with matters of exercise of inherent powers when the interest of consumers is at stake; the interest of consumers, as an objective, can be clearly ascertained from the Act; the Preamble of the Act mentions "protecting interest of consumers" and Section 61(d) requires that the interests of the consumers are to be safeguarded when the appropriate

Commission specifies the terms and conditions for determination of tariff; under Section 64 read with Section 62, determination of tariff is to be made only after considering all suggestions and objections received from the public; hence, the generic tariff once determined under the statute with notice to the public can be amended only by following the same procedure; and, therefore, the approach of the Court ought to be cautious and guarded when the decisions has its bearing on the consumers.

In ***Energy Watchdog vs. CERC (2017) 14 SCC 80,*** the Supreme Court held 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; and 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.

D. ANALYSIS:

There can be no quarrel with the submissions, urged on behalf of UPPCL and Sri R.S. Awasthi, that UPERC, as an independent regulatory body, is required to ensure protection of consumers' interest. It is for this reason that the Supreme Court, in the **JVVNL JUDGEMENT**, held that, in exercising its under Section 63 of the Electricity Act, to adopt the tariff discovered through the bidding process, the Regulatory Commission is not a mere a post office, affixing its seal of approval to the decision of bid evaluation committee, and the certificate issued by it, that the quoted tariffs are market aligned; and is, instead, required to independently examine whether, in fact, the bids quoted by the successful bidders, in the bidding process under Section 63 of the Electricity Act, is in alignment with the market prices prevailing at the time of submission of the bids. Since the obligation cast on it

under Section 63 is to adopt the tariff, the Regulatory Commission is undoubtedly entitled, with a view to protect consumers' interest and larger public interest, to independently examine whether, in fact, the tariff quoted by the successful bidders is market aligned or not. That does not however mean that, even if the bids quoted by the successful bidders are found to be market aligned, the Regulatory Commission can nonetheless force the bidders to negotiate and further reduce the tariff quoted by them. Section 63 does not confer power on the Regulatory Commission to force the successful bidders to enter into negotiations with the procurers to reduce the tariff quoted by them in their bid. If the Commission were to be satisfied that the tariff quoted by the successful bidders is not aligned to the market rates prevailing at the time of submission of the bids, it is open to the Commission to refuse to adopt such a tariff. It does not however confer, on the Commission, the power to force an unwilling generator to supply power at a tariff lower than what they have quoted in the bid process or to unilaterally fix a reduced tariff on the ground that the bids quoted by the successfully bidders are not market aligned, for that would amount to determination of tariff which process can only be undertaken under Section 62 of the Electricity Act. The power conferred on the Commission under Section 63 is only to adopt the tariff discovered through the bidding process, if the terms and conditions stipulated under Section 63 are satisfied, and the tariff quoted by the successful bidder is found to be market aligned and, if not, to reject the bids ie refuse to adopt the quoted tariff. Under the guise of protecting consumers interest, the Regulatory Commission cannot force an unwilling generator to enter into negotiations with the procurer or unilaterally reduce the tariff below that quoted by the successful bidder or require the successful bidder to supply electricity at a tariff lower than that quoted by them in their bid.

XIV. NON-CONSIDERATION OF THE MATERIAL RELIED UPON BY MR. R.S. AWASTHI:

A. SUBMISSIONS OF APPELLANT-SRI R.S. AWASTHI:

It is submitted, on behalf of Mr. R.S. Awasthi, that the Impugned Order provides for adoption of tariff at Rs 7.02 per kWh, ignoring the material available on record duly dealt with by the State Commission itself in its earlier order dated 22.02.2017, the tariff discovered in a competitive bid process in other States at the relevant time, and without recording a clear finding on such tariff being aligned to market conditions which is a pre-condition for adopting the tariff under Section 63 of the Electricity Act, 2003; in the impugned order, there is no reference to, much less any analysis of, the objections raised by the Appellant-consumer; the State Commission has ignored the submissions of the Appellant-consumer which were relevant and was made espousing the interest of the consumers in general; there has been gross violation of principles of natural justice and fair play in the conduct of the proceedings before the State Commission when the material placed by the consumer representation is ignored, particularly when the relevant material relates to the prices prevalent being much less than Rs. 7.02 per Kwh; and the above is contrary to the scheme, purpose and objective of the Electricity Act, 2003.

It is further submitted, on behalf of Mr. R.S. Awasthi, that the State Commission has ignored relevant material available to it including the trend in the Competitive Bid Process held in Rajasthan, Madhya Pradesh and Andhra Pradesh where the solar price discovered was in the region of Rs. 4.42/kWh to Rs 2.44/kWh with significant decreasing trend; the State Commission has allowed the tariff of Rs. 7.02 per unit purporting to base the same on the order dated 31.03.2015 passed by the Central Electricity Regulatory Commission in Petition No. SM/004/2015 (Suo-Motu) for determination of generic levellised generation tariff for the FY 2015 - 16 under Regulation 8 of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2012; the generic tariff of Rs. 7.04 per Kwh determined by the

Central Commission cannot be treated as a base tariff for a competitive bid process; it was to be considered only as the ceiling tariff; the generic tariff was determined without considering the steep decrease in prices which occurred subsequently; and the State Commission has to consider whether the tariff quoted is aligned to the market conditions, which can only be done by comparison to other competitive bid process.

It is also submitted, on behalf of Mr. R.S. Awasthi, that the approval given by the State Commission to a tariff of Rs. 7.02 per Kwh is also contrary to the judgment of this Tribunal in **JBM Solar Power Private Limited and Ors. v. Haryana Electricity Regulatory Commission** (judgment dated 09.03.2018 in Appeal No. 278 of 2016 and Batch), wherein, after observing that *"….the price of the solar panels are falling progressively as indicated by various bidding process cannot be ignored",* this Tribunal approved a tariff of Rs. 5.68 per Kwh to be payable to solar power developers as against Rs. 6.44 per Kwh discovered in the competitive bidding process held by Haryana Power Purchase Centre **('HPPC')** in the State of Haryana in FY 2014-15; the said order was challenged before the Supreme Court, by JBM Solar Private Limited, in Civil Appeal No. 5843 of 2018 and Batch, and vide order dated 10.10.2023 the Supreme Court dismissed the said appeal; and, in view of the above, the tariff of Rs. 5.68 per kWh, i.e., the levellised generic tariff determined by the Central Commission for FY 2016-17 can only be said to be admissible to the Generators, if such tariff is acceptable to the Generators.

B. JUDGEMENT RELIED UPON BY THE APPELLANT-CONSUMER:

In **JBM Solar Power Private Limited and Ors. v. Haryana Electricity Regulatory Commission (judgment of this Tribunal in Appeal No. 278 of 2016 and Batch dated 09.03.2018),** this Tribunal observed that the whole issue of power purchase/PPAs was hovering around the application of

Section 63 of the Act; in the present case, no guidelines/ SBD had been issued/notified by GoI at the point of bidding and till completion of the bid process and even up to the date of the Impugned Order; the 2nd Respondent had initiated the bidding process on draft guidelines only and had informed the State Commission of the same at a later stage when the bidding process was completed and when they had approached the State Commission for approval of the PPAs it had entered into with the selected bidders; the State Commission had also not gone into the details by checking whether such guidelines /SBD had been notified by the GoI; the State Commission vide letter dated 8.8.2014 had also given go ahead for the bidding process to the 2nd Respondent; and the State Commission further directed that, after the bids are opened, the 2nd Respondent should analyze the same and submit details to the Commission for its order and approval of the PPA with the successful bidders.

This Tribunal opined that both the State Commission and the 2nd Respondent had made a mistake, the 2nd Respondent making its bid process on non-existent guidelines/SBD and the State Commission passing the Impugned Order on the premise that guidelines/ SBD existed; while the issue was between the State Commission and the 2nd Respondent, the sufferers were the Appellants who had already installed the solar power plants based on the LoI issued and PPAs signed with them for no fault of theirs; 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 had made some observations; and 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 worked out to Rs.5.68 per kWh (without accelerated depreciation), this

Tribunal had allowed the Appellants to supply power to the 2nd Respondent as an interim measure.

This Tribunal opined that the whole exercise of bidding was premised and based on the wrong notion that competitive bidding guidelines/ SBD existed which was not true; the Solar Power purchase was initiated by the 2nd Respondent based on repeated directions from/observations of the State Commission in various ARR orders as well as in the letter dated 8.8.2014; Respondent No. 2 had followed the bidding documents which it had submitted to the State Commission, and the State Commission too has given the go ahead with the bidding process; negotiations too were carried out by Respondent No. 2 in accordance with the bidding documents; PPAs too were signed after compleion of the bidding process and the Appellants had already set up the solar power plants; the State Commission in the Impugned Order had also allowed 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; and this Tribunal as an interim allowed the said CERC tariff of FY 2016-17 to the Appellants.

This Tribunal held that there was a competitive bid process initiated by the 2nd Respondent for selection of solar power developers to supply solar power to the 2nd Respondent; 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 2nd Respondent and the selected bidders could not be denied; the State Commission was also informed of the bidding process being undertaken by the 2nd Respondent and the State Commission did not stop the process at the relevant time by stating that the 2nd Respondent should wait until the guidelines are issued under Section 63 of the Act or on the ground that there exists guidelines of GoI which needed

to be followed; the entire process was allowed to beimplemented without the State Commission exercising itsregulatory powers to either stop or otherwise provide the course of action to be adopted for the 2nd Respondent to complete the bidding process; and it was 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.

Relying on the judgement of the Supreme Court, in **Energy Watchdog v. CERC,** (judgement in Civil Appeal Nos. 5399-5400 of 2016 dated 11.4.2017), this Tribunal held that, in case where there were no guidelines, regulatory powers under Section 79(1)(b) and under Section 86(1)(b) of the Act empowered 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.

Considering the circumstances of the case equitably and the fact that the Solar Power Projects had been established by the Appellants and in terms of Section 86 (1) (e) of the Act, the power generation from renewable sources of energy needed to be promoted, this Tribunal considered it appropriate to approve the PPAs between the Appellants and the 2nd Respondent 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.

Reliance placed, on behalf of the Appellant-Consumer, on **JBM Solar Power Private Limited and Ors. v. Haryana Electricity Regulatory Commission (judgment of this Tribunal in Appeal No. 278 of 2016 and Batch dated 09.03.2018)**, is misplaced since, in the said case, there existed no bidding guidelines. In the present case, however, the 2012 Central Govt guidelines are applicable.

C. ANALYSIS:

As shall be elaborated later in this order, we see no reason to scrutinize the material relied either by the appellant-generators or the material considered by the bid evaluation committee or the material relied upon by the UPERC in passing the orders dated 22.02.2017 and 21.11.2017 or even the material placed before the UPERC by the appellant-consumer. Suffice it to observe that it is open to the parties to the proceedings to draw attention of the UPERC to material relating to the market rates prevalent at the time of submission of the bids; and, while examining the question whether the bids quoted by the successful bidders are market aligned or not, any material which the UPERC may choose to rely upon shall be made available to the parties to the proceedings, and they shall be given a reasonable opportunity of being heard.

Principles of natural justice require the Regulatory Commission, while considering the issue, to put the parties to the proceedings on notice regarding the material which the Commission may choose to rely upon and be given an opportunity of being heard regarding its relevance, before the material/data is considered by the Regulatory Commission.

XV. MINUTES OF THE MEETINGS OF THE BEC:

A. SUBMISSIONS OF APPELLANTS-GENERATORS:

It is the submission, of the Appellant-generators in Appeal No.102/2018 and 129/2018, that, in *arguendo*, various minutes of meetings of the BEC would reveal that the bids submitted by various generators were market aligned; in particular, the various minutes of meetings of the BEC show the following facts: (a) comparison of the tariffs discovered in the year 2017, (when due to a number of factors the solar power tariff throughout the country had reduced to a record low) with the tariff bids submitted in the year 2015 is

totally misconceived; (b) the discovered tariff of Rs.2.44/kWh and Rs.3.25/kWh in the States of Madhya Pradesh and Andhra Pradesh are tariffs discovered in the year 2017 and cannot be compared to the tariff bids submitted in the year 2015 when the financial and technical factors relating to solar power generation was totally different, and the Appellant is comparing incomparable figures of discovered tariffs; (c) during the period from February, 2015 to June, 2015, a perusal of the rates of tariff reveal that the prevalent market rates as discovered under various solar power auctions during the period when the subject bids were submitted and the discovered tariffs approved by the UPERC, were ranging between Rs.6.16/kWh – Rs.8.04/kWh which are very much in line with the bids submitted by the generators; the contention, that the UPERC failed to appreciate the tariff discovered in other States even when bidding was initiated in 2015, is not tenable; (d) the prevalent market rates of solar power tariffs throughout India were as under:

Sl. No.	**Description of Bidding**	**Year**	**Capacity on Offer (MW)**	**Highest Bid (Rs./KWh)**	**Lowest (Rs./KWh)**	**Weighted Avg. Price (Rs./KWh)**
1.	Punjab (Capacity 5-24 MW)	Feb 2015	100	7.45	6.88	7.17
2.	Punjab (Capacity 25-100 MW)	Feb 2015	100	7.56	6.88	7.16
3.	NTPC Anantapur	May 2015	250	-	-	6.16 (L1)
4.	Uttar Pradesh Phase 2	June 2015	215	8.60	7.02	8.04

and (e) in fact various minutes of the meetings of the BEC would reveal that tariff on the lower side (if at all) was in respect of PPAs that had a 25 year term, whereas the present PPAs are only for a term of 12 years; and even the

CERC benchmark tariff referred to by the UPERC, in the order dated 22.02.2017, was for a PPAs having a term of 25 years.

B. ANALYSIS:

As noted hereinabove the mere fact that the bid evaluation committee was of the view that the bids quoted by the appellants-generators were market aligned, does not disable the Regulatory Commission from independently considering not only the material which was taken into consideration by the bid evaluation committee, but also such other material as may be available for scrutiny by the Commission. While the material considered by the bid evaluation committee must undoubtedly be examined by the UPERC before deciding whether or not the bids quoted by the successful bidders are market aligned, it is not precluded from considering any other material/data available in this regard including any material/data placed before it by any of the parties to the proceedings or even material which may come to its notice. As long as the Commission complies with the rules of natural justice before relying on such material, there is nothing in the Act or the Regulations which precludes them from considering any fresh material which may be brought to its notice by any of the parties or even from independent sources.

XVI. OTHER MISCELLANEOUS CONTENTIONS:

1. DO THE APPELLANT GENERATORS HAVE A VESTED RIGHT FOR THE TARIFF QUOTED BY THEM TO BE ADOPTED?

A. SUBMISSIONS OF APPELLANT-SRI R.S. AWASTHI:

It is submitted, on behalf of Mr. R.S. Awasthi, that there is no vested right in the bidders to suggest that their bids ought to have been accepted at the discovered tariff as the ceiling price in the RFP was Rs. 9.33 per unit; the ceiling price is not reflective of the market price; the ceiling price is only the entry point below which the bids would be considered, and beyond which the

bids would not even be considered; in the solar industry as the tariff was continuously decreasing, the ceiling price cannot be considered at all as the market price; there is no vested right in any of the bidders, who had participated in the Competitive Bid Process in the year 2015, to demand that the PPA shall be entered into by UPPCL with them at the tariff discovered through the Competitive Bid Process held in 2015; till such time, the State Commission considers the tariff and adopts the same, there is no binding agreement between UPPCL and the Solar Power Developers and no right accrues to the Solar Power Developers for sale of electricity to UPPCL;

B. ANALYSIS:

While it is no doubt true that the bidders have no vested right to have the bids quoted by them adopted as the discovered tariff merely because the bids quoted by them were below the ceiling price fixed at the time of invitation of bids, the successful bidders would undoubtedly have a right to have their bids, which have been approved and certified by the bid evaluation committee, considered for adoption so long as the twin conditions stipulated in Section 63 are satisfied, and the bids quoted by them are independently found by the Regulatory Commission to be aligned to the market prices prevailing at the time when the bids were submitted. We have refrained, for reasons to be stated later in this order, from undertaking an independent examination, at the appellate stage of the proceedings, as to whether bids quoted by the Appellant generators are market aligned or not.

2. HAVE UPPCL AND UPNEDA TAKEN CONFLICTING STANDS?

A. SUBMISSIONS OF APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellant-generators, that, in the process of tariff adoption, conflicting stands have been taken by UPPCL and UPNEDA; at the first instance, when UPNEDA published the RfP with a ceiling tariff of Rs.9.33/kWh, it was reasonable for the Appellants to assume

that, having itself prescribed a ceiling of Rs.9.33/kWh, any tariff below the said rate was to be considered by UPPCL and UPNEDA as market aligned; when the tariff bids of the Appellants were accepted by the BEC, the same were done after extensive analysis of the same being aligned to market prices; the BEC consisted of representatives from UPPCL and UPNEDA and, pursuant to the Appellants being declared the successful bidders, both UPNEDA and UPPCL issued certificates, certifying that the bids were in compliance with the Government of India Guidelines (and thus market aligned), and had been discovered in a transparent manner; as such, during the proceedings before the UPERC, the discovered tariffs of the Appellants were considered as market aligned by UPPCL and UPNEDA; thereafter when UPERC, under its interim Order dated 22.2.2017, directed the parties to negotiate, keeping the CERC generic tariff of Rs.7.06/kWh as the benchmark; this lead to a tariff of Rs.7.02/kWh being suggested for acceptance by the Negotiation Committee; curiously this tariff became 'market aligned' for UPNEDA and UPPC; finally, when the said tariff of Rs.7.02/kWh was adopted and the same came to be challenged in Appeal No.37 of 2018 seeking a further reduction, UPNEDA and UPPCL have sought to support the case of Sri. Rama Shankar Awashti; as such, without filing any Appeal against the impugned Order, UPPCL and UPNEDA are now indirectly seeking to contend that, even the tariff of Rs.7.02/kWh, is not market aligned; the stand of UPPCL and UPNEDA has therefore been constantly shifting to the prejudice of the Appellants, and they have clearly acted in the most arbitrary and whimsical manner not expected of any State utility **(LIC of India & Anr. V. Consumer Education and Research Centre & Ors (1995) 5 SCC 482]**; and, from its decision in **Uttar Pradesh Power Corporation Ltd. & Anr Vs. Jackson Engineers Ltd. & Ors.** (Order of the UPERC in *Petition No.1050/2015* dated 6.4.2016), which had been passed in a Petition for tariff adoption of tariff discovered in a bidding process conducted immediately preceding the present process, it is manifest that the UPERC, while adopting a tariff of

Rs.9.33/kWh for solar power, had chosen to be guided by the very same findings of this Tribunal in the ***Essar Judgment***, which it subsequently declined to accept in the case of the Appellants which is clearly arbitrary**.**

B. JUDGEMENT RELIED UPON BY THE APPELLANTS-GENERATORS:

In **LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482,** the Supreme Court held that every action of the public authority should be guided by public interest; if it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law; its actions must be based on some rational and relevant principles; it must not be guided by irrational or irrelevant considerations; and every administrative decision must be hedged by reasons.

After referring to **LIC v. Escorts Ltd: (1986) 1 SCC 264; Dwarkadas Marfatia & Sons v. Board of Trustees of the Port of Bombay: (1989) 3 SCC 293; Mahabir Auto Stores v. India Oil Corpn: (1990) 3 SCC 752,** the Supreme Court, in **LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482**, held that, in the sphere of contractual relations, public authorities are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision; the duty to act fairly is part of fair procedure envisaged under Articles 14 and 21; and every

activity of the public authority or those under public duty or obligation must be informed by reason and guided by public interest.

C. ANALYSIS:

The present appeals have not been filed by UPPCL or UPNEDA. This batch of appeals have been filed by the appellant-generators and one by the appellant-consumer. An appeal, under Section 111 (1) of the Electricity Act, lies against the order of the Regulatory Commission. In examining whether the impugned order passed by the Regulatory Commission accords with law or not, it is wholly unnecessary for this Tribunal to examine whether or not UPPCL or UPNEDA have taken conflicting stands for, irrespective of the stand taken by UPPCL and UPNEDA, this Tribunal is obligated to consider and examine whether or not the impugned order is valid and in accordance with law.

XVII. AMENDED PPAs EXECUTED BY THE APPELLANTS AT REDUCED TARIFF: ITS EFFECT:

A. SUBMISSIONS OF THE APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellant-generators, that, on 25.10.2017, the UPERC held another public hearing for adoption of 'negotiated tariff' and, on 21.11.2017, passed the impugned order whereby it reduced the discovered tariffs of the Appellants to Rs.7.02/kWh (being the lowest discovered bid) for a period of 12 years on the basis that the same appeared to be close to the CERC benchmark tariff, and thus market aligned; it, accordingly, directed the PPAs entered into by the Appellants with UPPCL to be modified as per the approved/reduced tariff; in completely adverse circumstances of not receiving any payment from UPPCL, for the power supplied and under severe pressure from lenders, the Appellants executed amended PPAs with UPPCL; such execution was without prejudice to the

rights and interests of the Appellants as categorically stated in the letter dated 7.12.2017 of SAEL; such execution of PPA could never be held against the Appellants neither through the doctrine of waiver nor estoppel as has wrongly been contended by UPPCL. **(Chairman & MD NTPC Ltd. V. Reshma Construction (2004) 2 SCC 663;** and **All India Power Engineers Federation V. Sasan Power Ltd. (2017) 1 SCC 487);** since PSPN Synergy and Salasar Energy Green had already rejected the re-negotiated tariff of Rs. 7.02/kWh, as recorded in paragraph 8 of the Impugned Order, no further letters were written after execution of the amended PPAs; despite commissioning of the respective solar power plants by PSPN Synergy and Salasar Energy Green, no payment was made until the signing of the amended PPAs; and, thus, the amended PPAs were signed under economic duress.

It is further submitted, on behalf of the Appellants-Generators, that, when the Appellants refused to participate in the unilateral negotiations directed under the interim Order dated 22.2.2017, UPPCL completely stopped making any payments despite receiving power; this constrained the Appellants to execute PPAs at a tariff of Rs.7.02/kWh; however, in the present Appeals, UPPCL has wrongly alleged that, since the Appellants have signed the PPAs at tariffs of Rs.7.02/kWh, they have waived their right to challenge the impugned Order, and are estopped from claiming any increase in the tariff.

B. SUBMISSIONS OF UPERC:

It is submitted, on behalf of the UPERC, that, though in paragraph 8 of the impugned order dated 21.11.2017, it had observed that, out of the 9 projects which had been commissioned, 6 (who are appellants herein) had not agreed to the tariff of Rs. 7.02/unit, subsequently all the six Project owners (all the 4 Appellants) had executed the amended PPA agreeing to the tariff of Rs.7.02/unit; the Appeals were filed much after the signing of the Amended

PPA agreeing with the negotiated tariff of Rs. 7.02/unit; therefore, the Appellants had acquiesced to the negotiated tariff of Rs. 7.02/unit; and the date of signing of the PPA and issuance of objection letters and contents, if any, and the date of filing Appeal by the Appellants are as follows:-

Appeal No.	**Date of execution of the Amended PPA**	**Date of issuance of letter of objection**	**Date of filing the Appeal**
Appeal No. 88/2018 Re:-M/s SAEL (formerly Sukhbir Agro)	07/12/2017	07/12/2017 @pg 473 Vol-III	31/01/2018- Appeal filed about 70 days after passing of the impugned order
Appeal No. 102 /2018 Re:-M/s PSPN Synergy Pvt. Ltd.	05/12/2017	No letter issued after execution of the PPA on 05/12/2017- letter issued to joint secretary, Dept. of Addl. Source of Energy on 6/7/2017 @310 Vol III i.e before execution of the amended PPA	01/02/2018 Appeal filed about 70 days after passing of the impugned order
Appeal No. 302/ 2018 Re:- M/s. Lohia Developers	16/12/2017	No letter issued after execution of the PPA on 05/12/2017-letter issued on 08/11/2017 i.e before execution of PPA	13/06/2018 Appeal filed after about 179daysafter passing of the impugned Order.
Appeal No. 129/2018 Re:-M/s. Salasar Energy	07/12/2017	No letter issued	23/04/2018 Appeal filed after about 138days of the impugned order.

It is further submitted, on behalf of UPERC, that it was clear from the above table that, though the Appellants had initially objected to the tariff of Rs. 7.02/unit, subsequently they had agreed to the tariff, and had executed the amended PPAs as directed @ para 15 of the impugned order; the

impugned order has been complied with by the Appellants; having executed the Amended PPA with the tariff of Rs. 7.02/unit without any objection, the Appellants have acquiesced to the said tariff; the Appeals were filed much after execution of the amended PPA; for instance Appeal No. 129/2018 filed by M/s Salasar, and Appeal No. 302 of 2018 filed by M/s Lohia Developers were filed after 138 days and 179 days of passing the impugned order respectively; and the Appellants, in Appeal No. 102 of 2018, 302 of 2018 and 129 of 2019, have not issued any letter of objection after execution of the amended PPA.

C. SUBMISSIONS OF UPPCL:

It is submitted, on behalf of UPPCL, that the appellant has signed the supplementary PPA for the tariff of Rs.7.02/KWH in compliance with the order of the UPERC dated 21.11.2017; signing of a supplementary PPA amounts to waiver of the right to challenge, as the parties to the PPA had knowingly and willingly entered into an agreement which cannot be subsequently made sub-judice or rendered null and void by means of a challenge to the previous order; the Appellants have taken an oral plea of duress in signing the PPA, which is in stark contrast with the position of law as laid down in **Transmission Corporation of Andhra Pradesh (A.P. TRANSCO) Vs. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34**; the appellants, having taken benefit of the order dated 21.11.2017 and signed the PPA, cannot now challenge the same as it is impermissible under law to approbate and reprobate (**Shyam Telelink Ltd. v. Union of India, 2010 (10) SCC 165);** subsequent to adoption of the tariff by the Appropriate Commission, as per the provisions of Section 63 of the Electricity Act 2003, the tariff is fixed for the stipulated period as mentioned in the contract, and as per the terms and conditions of the contract which have been arrived at through the transparent bidding process; change in the terms and conditions of the bidding document cannot be permitted, as the same would amount to changing the terms and

conditions of the bid subsequent to the bidding process already concluded, and the PPA and Amended PPA having been entered into as a conclusive contract between the parties.

It is further submitted, on behalf of UPPCL, that the details of the communication/alleged Protests leading to the signing of the Supplementary PPAs are as under:-

Appellant & Appeal No.	Date of Communic a-tion (Date & Contents)	Date of Signing of Supp. PPA (Date)	Date of Filing of Appeal (Date)	Delay in filing of appeal (Days)	Whether PPA is under challeng e	Whether duress is a ground of Challeng e
Appeal No. 88/2018 Re:-M/s SAEL (formerly Sukhbir Agro)	Letter dt. 07.12.2017 Regarding pending bills	07.12.2017	31.01.2018	70 (Approx)	NO	No
Appeal No. 102 /2018 Re:-M/s PSPN Synergy Pvt. Ltd	Letter dt. 06.07.2017 Regarding protest to Rs. 7.02/kWh	05.12.2017	01.02.2018	70 (Approx)	NO	No
Appeal No. 302/ 2018 Re:- M/s. Lohia Developers	Letter dt. 08.11.2017 Regarding protest to Rs. 7.02/kWh	16.12.2017	13.06.2018	179	NO	No
Appeal No. 129/2018 Re:-M/s. Salasar Energy	No Letters issued	07.12.2017	23.04.2018	138e	NO	No
NOTE: During the course of oral arguments, all the appellants have categorically stated that they are not challenging the orders/PPA on the grounds of duress. Therefore, no evidence towards the same has been led by them.						

It is also submitted, on behalf of UPPCL, that, from a perusal of the table above, it is clear that, at the time of signing of the supplementary PPA, none of the appellants had raised any issue vis-a-vis duress; at this stage, the appellants are estopped from raising such a plea; in fact, all communications are prior to the signing of the supplementary PPA, and even the appeals have been filed at a belated stage; further, no Appellant has challenged the validity of the supplementary PPA in its appeal; even otherwise, to substantiate the plea of duress, the appellants must lead evidence to that effect; in the present matter, the appellants have not placed even a shred of evidence to substantiate their plea of duress; the PPA is a contract entered into between the parties and, therefore, the parties are bound by the terms and conditions and the timelines and the milestones of the contract entered into; the appellants are, therefore, estopped from making a claim with respect to the adopted tariff which cannot be adjudicated before this Tribunal; as the appellants have already accepted the tariff adopted by the UPERC signing the amended PPA dated 17.12.2017, and as they failed to challenge the amended PPA in the present appeal, even if the prayers sought in the present appeal are granted by this Tribunal, the status of the amended PPA will not change; and the present appeal deserves to be dismissed on this count alone**.**

D. JUDGEMENT RELIED ON BEHALF OF UPPCL:

In **Transmission Corporation of Andhra Pradesh (A.P. TRANSCO) Vs. Sai Renewable Power (P) Ltd., (2011) 11 SCC 34**, the Supreme Court held that, to encourage participation in the field of generation of energy through non-conventional methods, some incentives were provided, but these incentives under the guidelines, as well as under the PPAs signed between the parties from time to time were subject to review; in any case, the matter, was completely put at rest by the order of 20-6-2001; the PPAs, voluntarily signed by the parties at that time, had also provided such stipulations; if such

stipulations were not acceptable to the parties, they ought to have raised objections at that time or at least within a reasonable time thereafter; the agreements had not only been signed by the parties but they had been fully acted upon for a substantial period; the Regulatory Commission was entitled to determine the tariff; in this situation, the view taken by the Tribunal that the Regulatory Commission had no jurisdiction and that fixation of tariff did not include purchase price for buy-back of the generated power, could not be accepted; the order dated 20-6-2001 was never questioned by any of the parties to any favourable results; even in these proceedings there was no challenge to the said order which, admittedly, had been acted upon and had attained finality; and the power generators/non-conventional energy developers had executed the PPAs without any protest and, in fact, did nothing to challenge such agreements or any part thereof, till passing of the impugned order.

E. ANALYSIS:

It is relevant to note that, subsequent to the judgment of the UPERC dated 21.11.2017, the Appellants-generators executed PPAs at the tariff adopted by the UPERC, in its judgment dated 21.11.2017, of Rs.7.02 per unit. While the Appellant SAEL had, vide its letter dated 07.12.2017 subsequent to execution of the PPA on the same date, informed UPPCL that such execution was without prejudice to their interests, none of the other Appellants-generators have raised any objections subsequent to their having signed the amended PPAs. While the Appellant-SAEL had executed the amended PPA on 07.12.2017, PSPN Synergy had executed the amended PPA on 05.12.2017, M/s Lohia Developers had executed the amended PPA on 16.12.2017, and M/s Salasar Green Energy had executed the amended PPA on 07.12.2017.

Since elaborate submissions have been put-forth on behalf of the Appellant generators, in support of their contentions that they had executed the amended PPAs under duress, and the doctrine of waiver has no application more so as SAEL vide letter dated 07.12.2017 informed the UPPCL that they had signed the amended PPA without prejudice, it is necessary to take note of the relevant judgments in this regard.

I. DURESS:

"Necessitas non habet legem" is an age-old maxim which means necessity knows no law. A person may sometimes have to succumb to the pressure of the other party to the bargain who is in a stronger position. Such a case must, however, be made out and proved. **(Chairman and MD NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663).** Courts will not enforce and will, when called upon to do so, strike down an unfair and unreasonable contract, or an unfair and unreasonable clause in a contract, entered into between parties who are not equal in bargaining power. This principle will apply, among others, where a man has no choice, or rather no meaningful choice, but to give his assent to a contract or to sign on the dotted line in a prescribed or standard form or to accept a set of rules as part of the contract, however unfair, unreasonable and unconscionable a clause in that contract or form or rule may be. This principle, however, will not apply where the bargaining power of the contracting parties is equal or almost equal. This principle may not apply where both parties are businessmen and the contract is a commercial transaction. **(Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401; Central Inland Water Transport Corpn. Ltd. v. Brojo Nath Ganguly, (1986) 3 SCC 156).**

Where the maker of a statement retracts it later alleging that it was obtained under coercion, threat or duress, the burden is on the maker of the statement to prove such coercion, threat or duress. **(S. N. Ojha v.**

Commissioner of Customs, 2015 SCC OnLine Del 13272). The burden to prove duress or coercion is on the person making such a claim. **(Benara Solar (P) Ltd. v. Solar Energy Corpn. of India Ltd., 2024 SCC OnLine Del 2709).** It is settled law that fraud or duress has to be proved by the party which alleges it by leading cogent evidence that the alleged fraud or duress was played upon him. **(Ilam Chand v. Shmer Singh, 1992 SCC OnLine P&H 481).** A bald plea of fraud, coercion, duress or undue influence is not enough and the party who sets up such a plea must establish the same by placing material before the Court. **(Union of India v. Master Construction Co., (2011) 12 SCC 349).**

II. WAIVER:

The maxim *qui approbat non reprobat* (one who approbates cannot reprobate) is firmly embodied in English common law and often applied by courts in India. It is akin to the doctrine of benefits and burdens which, at its most basic level, provides that a person taking advantage under an instrument, which both grants a benefit and imposes a burden, cannot take the former without complying with the latter. A person cannot approbate and reprobate or accept and reject the same instrument. **(Shyam Telelink Ltd. v. Union of India, (2010) 10 SCC 165),** for it is well settled that when a person, by his conduct, has accepted the correctness of the order and then acted upon it, it is not open to him to challenge the order subsequently. (**State of Punjab v. Krishan Niwas, (1997) 9 SCC 31).** The basis for this principle is that such a person has, by his conduct, waived his right.

The word “waiver” has been described in Halsbury's Laws of England, 4th Edn., Para 1471, thus: *“1471. Waiver.—Waiver is the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. … A person who is entitled to rely on*

a stipulation, existing for his benefit alone, in a contract or of a statutory provision, may waive it, and allow the contract or transaction to proceed as though the stipulation or provision did not exist. Waiver of this kind depends upon consent, and the fact that the other party has acted on it is sufficient consideration……It seems that, in general, where one party has, by his words or conduct, made to the other a promise or assurance which was intended to affect the legal relations between them and to be acted on accordingly, then, once the other party has taken him at his word and acted on it, so as to alter his position, the party who gave the promise or assurance cannot afterwards be allowed to revert to the previous legal relationship as if no such promise or assurance had been made by him, but he must accept their legal relations subject to the qualification which he has himself so introduced, even though it is not supported in point of law by any consideration.". In Halsbury's Laws of England, Vol. 16(2), 4th Edn., Para 907, it is stated: *"The expression "waiver" may, in law, bear different meanings. The primary meaning has been said to be the abandonment of a right in such a way that the other party is entitled to plead the abandonment by way of confession and avoidance if the right is thereafter asserted, and is either express or implied from conduct. It may arise from a party making an election, for example whether or not to exercise a contractual right… Waiver may also be by virtue of equitable or promissory estoppel; unlike waiver arising from an election, no question arises of any particular knowledge on the part of the person making the representation, and the estoppel may be suspensory only… Where the waiver is not express, it may be implied from conduct which is inconsistent with the continuance of the right, without the need for writing or for consideration moving from, or detriment to, the party who benefits by the waiver, but mere acts of indulgence will not amount to waiver; nor may a party benefit from the waiver unless he has altered his position in reliance on it."*

Waiver is an intentional relinquishment of a known right. Waiver must be spelt out with clarity for there must be a clear intention to give up a known right. **(All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487).** For considering, as to whether a party has waived its rights or not, it will be relevant to consider the conduct of a party. For establishing waiver, it will have to be established that a party, expressly or by its conduct, has acted in a manner, which is inconsistent with the continuance of its rights. However, the mere act of indulgence will not amount to waiver. A party claiming waiver would also not be entitled to claim the benefit of waiver, unless it has altered its position in reliance on the same. **(Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401).**

Waiver cannot always and in every case be inferred merely from the failure of the party to take the objection. Waiver can be inferred only if and after it is shown that the party knew about the relevant facts and was aware of his right to take the objection in question. Waiver or acquiescence, like election, pre-supposes that the person to be bound is fully cognizant of his rights, and, that being so, he neglects to enforce them, or chooses one benefit instead of another, either, but not both, of which he might claim. **(Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401; Manak Lal v. Prem Chand Singhvi: AIR 1957 SC 425).** For applying the principle of waiver, it will have to be established, that though a party was aware about the relevant facts and the right to take an objection, he has neglected to take such an objection. (**Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401)**

Although the principle of waiver is akin to the principle of estoppel, estoppel is not a cause of action and is a rule of evidence, whereas waiver is contractual and may constitute a cause of action. It is an agreement between the parties and a party fully knowing its rights has agreed not to assert a right for a consideration. Whenever waiver is pleaded, it is for the party pleading

the same to show that an agreement waiving the right in consideration of some compromise came into being. (**Kalpraj Dharamshi v. Kotak Investment Advisors Ltd., (2021) 10 SCC 401; Krishna Bahadur v. Purna Theatre, (2004) 8 SCC 229).**

III. "WITHOUT PREJUDICE": ITS MEANING:

The term 'without prejudice' has been defined in *Black's Law Dictionary* as: *'Where an offer or admission is made "without prejudice", or a motion is denied or a bill in equity dismissed "without prejudice", it is meant as a declaration that no rights or privileges of the party concerned are to be considered as thereby waived or lost, except in so far as may be expressly conceded or decided'.* Similarly, in *Wharton's Law Lexicon* the term 'without prejudice' is defined as: *'The words import an understanding that if the negotiation fails, nothing that has passed shall be taken advantage of thereafter; so, if a defendant offers, "without prejudice", to pay half the claim, the plaintiff must not only rely on the offer as an admission of his having a right to some payment.* (**Supdt. (Tech. I), Central Excise v. Pratap Rai : (1978) 3 SCC 113; Chairman and MD NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663).**

The rule is that nothing written or said "without prejudice" can be considered at the trial without the consent of both parties — not even by a judge in determining whether or not there is good cause for depriving a successful litigant of costs. The word is also frequently used without the foregoing implications in statutes and inter-partes to exclude or save transactions, acts and rights from the consequences of a stated proposition and so as to mean "not affecting", "saving" or "excepting".' In short, the implication of the term 'without prejudice' means (*1*) that the cause or the matter has not been decided on merits, (*2*) that fresh proceedings according to law were not barred." **(Chairman and MD NTPC Ltd. v. Reshmi**

Constructions, Builders & Contractors, (2004) 2 SCC 663; Supdt. (Tech. I), Central Excise v. Pratap Rai : (1978) 3 SCC 113)

In **Chairman and MD NTPC Ltd. v. Reshmi Constructions, Builders & Contractors, (2004) 2 SCC 663,** the Supreme Court observed that the appellant therein had, in its letter dated 20-12-1990, used the term "without prejudice"; it had explained the situation under which the amount under the "No-Demand Certificate" had to be signed; the question may have to be considered from that angle; furthermore, the question as to whether the respondent had waived its contractual right to receive the amount or was estopped from pleading otherwise, would itself be a fact which had to be determined by the Tribunal.

We cannot, however, ignore the submission, urged both on behalf of UPERC and UPPCL, that the Appellants-generators had filed the present Appeals long after executing the amended PPAs. It is pointed out that M/s SAEL had filed the present Appeal on 31.01.2018, nearly two months after signing the amended PPA, M/s PSPN Synergy had filed their appeal on 01.12.2018 after having executed the amended PPA on 05.12.2017, M/s Lohia Developers had filed the appeal on 13.06.2018 after having executed the amended PPA on 16.12.2017, and M/s Salasar Green Energy had filed the appeal on 23.04.2018 after having executed the amended PPA on 07.12.2017. The submission, urged by UPERC and UPPCL, is that the very fact that the Appellants-generators chose not to subject the order of the UPERC dated 21.11.2017 to challenge by way of an appeal, till long after having executed the amended PPAs, would also go to show that the Appellants-generators had acquiesced to the order passed by the UPERC on 21.11.2017 and, by executing the amended PPAs, had waived their right to questions the validity of the said order.

The law declared by the Supreme Court, as referred to hereinabove, is that the plea of duress/waiver must be proved by the person raising such a contention. In the present case, while the Appellant generators claim that they had signed the amended PPAs under duress, the Respondent – UPPCL contends that, as they had signed the amended PPAs after the judgment of the UPERC dated 21.11.2017. the Appellants-generators had waived their right to challenge the said order dated 21.11.2017. The burden is on the Appellants-generators to establish their plea of duress, and for UPPCL to establish their contention that the Appellants-generators had waived their right to challenge the order of the UPERC dated 21.11.2017 after having signed the amended PPAs at a tariff of Rs.7.02 per unit. As the amended PPAs were signed after the impugned order dated 21.11.2017 was passed, there was no occasion for UPERC to examine whether the Appellants-generators had executed the amended PPAs under duress, or whether the UPPCL was justified in its submission that the Appellants-generators had waived their right to challenge the order dated 21.11.2017 consequent on their having executed the amended PPAs.

XVIII. PASSING AN ORDER OF REMAND: WILL ANY USEFUL PURPOSE BE SERVED THEREBY:

A. SUBMISSIONS OF APPELLANTS-GENERATORS:

It is submitted, on behalf of the appellant-generators, that the conduct of the Respondents is such that, even if the case of adoption of tariff of the Appellants is remanded back by this Tribunal for re-consideration, apart from the fact that the same would further delay the process of adoption of tariff for PPAs whose tenure is only 12 years (out of which 7 years have already elapsed), the same would not lead to any fruitful solution in as much as the Respondents, including the UPERC, are most likely to proceed with a pre-conceived mind against the Appellants Reliance is placed, on behalf of the

appellants, in this regard on **Arvind Jaiswal (D) Thr. LRs. V. Devendra Prasad Jaiswal Varun:** (judgement in SLP(C) No.9172/2020 dated 13.2.2023)

It is the submission of the Appellants-generators that, since the UPERC had failed to examine the material placed before it, particularly the minutes of the meetings of the BEC, this Tribunal, as the appellate forum enjoying wide powers under Order 41 of the CPC **[Shivakumar & Ors. V. Sharahabaspa & Ors. (2021) 11 SCC 277 – para 26]**, is empowered to examine the said minutes of the meeting and finally decide the issue without remanding the Appeals back to the UPERC (as had been done by this Tribunal in **SKS Power generation (Chhatisgarh) Limited V. Rajasthan Electricity Regulatory Commission & Ors** (Judgement in Appeal No.224/2019 dated 3.2.2020 – para 10.4)**;** and, while the Supreme Court in its recent decisions in ***Jaipur Vidyut Vitran Nigam Ltd*** has expressed that the decision of this Tribunal in ***SKS Judgment*** was incorrect, the Appellant wishes to rely upon the same only to the extent of the process adopted by the Tribunal of examining the minutes of the BEC rather than directing a remand.

B. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANTS-GENERATORS:

In **Arvind Jaiswal (D) Thr. LRs. V. Devendra Prasad Jaiswal Varun:** (judgement in SLP(C) No.9172/2020 dated 13.2.2023)**,** the Supreme Court held that an order of remand prolongs and delays the litigation and, hence, should not be passed unless the appellate court finds that a re-trial is required, or the evidence on record is not sufficient to dispose of the matter for reasons like lack of adequate opportunity of leading evidence to a party, where there had been no real trial of the dispute or there is no complete or effectual adjudication of the proceedings, and the party complaining has suffered material prejudice on that account; where evidence has already been

adduced and a decision can be rendered on appreciation of such evidence, an order of remand should not be passed remitting the matter to the lower court, even if the lower court has omitted to frame issue(s) and/or has failed to determine any question of fact, which, in the opinion of the appellate court, is essential; the first appellate court, if required, can also direct the trial court to record evidence and finding on a particular aspect/issue in terms of Rule 25 to Order XLI, which then can be taken on record for deciding the case by the appellate court.

In **Shivakumar v. Sharanabasappa, (2021) 11 SCC 277,** the Supreme Court held that the case before it was one where the parties had adduced all their evidence, whatever they wished to; it was not the case of the appellant-plaintiffs that they were denied any opportunity to produce any particular evidence or that the trial was vitiated because of any like reason; and, as the High Court had meticulously examined the evidence and circumstances and had come to a conclusion that appeared to be sound and plausible, and did not appear to suffer from any infirmity, there was no reason or occasion for the High Court to consider remanding the case to the trial court.

C. ANALYSIS:

It is no doubt true that a first appeal, under Section 111(1) of the Electricity Act, is a continuation of original proceedings instituted before the Regulatory Commission, and is available both on questions of fact and la**w.** The expression “appeal” has not been defined in the CPC. *Black's Law Dictionary* (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority”. It is a judicial examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. (**Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313)**. A first appeal is a full re-hearing of the original proceedings, and the appellate forum possesses all

powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. (***Southern Power Distribution Company of AP LImited* v. *Andhra Pradesh Electricity Regulatory Commission*, 2022 SCC OnLine APTEL 110**; **(H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17).**

An appeal is a continuation of the proceedings of the original court. Ordinarily, the appellate jurisdiction involves a rehearing on law as well as on fact and is invoked by an aggrieved person (**Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; H.K.N. Swami v. Irshad Basith, (2005) 10 SCC 243; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259; Shankar Ramchandra Abhyankar v. Krishnaji Dattatreya Bapat, (1969) 2 SCC 74; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17),** unless the statute conferring a right of appeal limits the rehearing in some way. **(*Hari Shankar* v. *Rao Girdhari Lal Chowdhury* : AIR 1963 SC 698).** It is a valuable right of the parties and, unless restricted by law, the whole case is therein open for rehearing both on questions of fact and law. (**Girijanandini Devi v. Bijendra Narain Choudhary : AIR 1967 SC 1124; Santosh Hazari v. Purushottam Tiwari; (2001) 3 SCC 179; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17)**

The parties have a right to be heard both on questions of law and on facts, **(Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259),** and the appellate court has jurisdiction to reverse or affirm the findings of the trial court. **(H.V.**

Sreenivasa Murthy v. B.V. Nagesha, 2008 SCC OnLine Kar 837; Vinod Kumar v. Gangadhar, (2015) 1 SCC 391;B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17).

While this Tribunal can examine the validity of the impugned order of the UPERC dated 21.11.2017, both on facts and law, that does not mean that the appellate proceedings before this Tribunal can be converted or be treated as the original proceedings which would lie only before the Commission. While the order dated 21.11.2017, impugned in this batch of appeals, was no doubt passed more than six and half years ago, and an order of remand may well result in further delay in giving a quietus to the lis, the fact remains that. subsequent to the impugned order of the UPERC dated 21.11.2017, the appellants-generators have executed Power Purchase Agreements with UPPCL at the tariff adopted by UPERC ie at Rs. 7.02 per unit. The validity or otherwise of such PPAs has not even been subjected to challenge till date, and was therefore not the subject matter of enquiry in the proceedings before the UPERC which culminated in the impugned order dated 21.11.2017 being passed. As the PPAs executed by the appellants-generators cannot be interdicted since it has not even been subjected to challenge, adjudication of all other contentions would matter little as, in any event, the appellants-generators would be bound by the terms and conditions of the PPAs executed by them. It is only if the appellants-generators' claim of duress were to be accepted and the contention urged on behalf of UPPCL, that the appellant generators have waived their right to challenge the impugned order by executing the PPAs were to be rejected, can the PPAs executed by the appellants-generators be interfered with, and only thereafter can their claim, for adoption of the tariff quoted by them, be examined. As the onus of establishing duress/waiver is on the person who has put forth such a plea, both the appellants- generators and UPPCL may be required to challenge the

validity of the PPAs and adduce evidence in support of their respective pleas in this regard. Further, as an appeal to this Tribunal lies only against the order of Commission, and this issue have even not been agitated before the UPERC, this Tribunal may not be justified in converting an appellate proceeding into an original proceeding or to permit parties to raise these issues for the first time at the appellate stage.

The doubts cast on the independence of the UPERC is wholly unjustified. While the correctness of the view taken by the UPERC can always be put in issue, unsubstantiated allegations regarding the independent exercise of their adjudicatory/regulatory powers does not merit acceptance.

XIX. CONCLUSION:

For the reasons aforementioned, we are of the view that the UPERC was not justified in directing the appellants-generators to participate in a negotiation exercise or to unilaterally determine the tariff at Rs. 7.02 per unit in proceedings under Section 63 of the Electricity Act. While it was always open to the UPERC to refuse to adopt the quoted tariffs if it were to be satisfied that the quoted tariffs were not aligned with the then prevailing market rates, it was obligated, before arriving at any such conclusion, to put the parties to the proceedings on notice regarding the material on which its conclusions were based, and to afford them a reasonable opportunity of being heard.

As the appellants-generators have not challenged the validity of the PPAs executed by them, suffice it to make it clear that the order of remand, now passed by us, shall not disable the appellants-generators, if they so choose, from challenging the validity of the PPAs executed by them by filing independent petitions before the UPERC. It is made clear that we have not expressed any opinion on the scope or validity of such Petitions, if filed by the Appellants-generators, as they are all matters for the UPERC to consider in

accordance with law. Needless to state that, if any such petitions are filed within two months from today, such Petitions shall be considered in accordance with law, and on its merits, along with Petition No. 1110 of 2016 filed by UPPCL and UPNEDA.

The impugned order dated 21.11.2017 is set aside, and Petition No. 1110 of 2016 is remanded to the UPERC for its consideration afresh in accordance with law, and in the light of the observations made by us in this order.

As the matter has been pending consideration for a considerable length of time, we request the UPERC to adjudicate and decide Petition No. 1110 of 2016, along with petitions if any filed on behalf of the appellants-generators, with utmost expedition preferably within six months from the date of receipt of a copy of this order.

Pronounced in the open court on this the **5th day of August, 2024**.

(Sandesh Kumar Sharma)
Technical Member (Electricity)

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~