

**APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO. 224 OF 2019 & IA NO. 1104 of 2019

Dated : 03rd February , 2020

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson
Hon'ble Mr. S.D. Dubey, Technical Member**

IN THE MATTER OF :

SKS Power Generation (Chhattisgarh) Limited
Through its Authorized Representative
B-501,Elegant Business Park,
Andheri Kurla Road, J.B Nagar,
Andheri- (E), Mumbai-400059

....APPELLANT

VERSUS

1. Rajasthan Electricity Regulatory Commission
Through Secretary,
Vidhyut Viniyamak Bhawan, Sahaskar Marg,
Near State Motor Garage,
Jaipur,
Rajasthan- 302001
2. Rajasthan Vidyut Prasaran Nigam Limited
Through Chairman and Managing Director,
Vidyut Bhawan, Jan Path, Jyothi Nagar,
Jaipur,
Rajasthan – 302005
3. Jaipur Vidyut Vitaran Nigam Ltd.
Through Chairman and Managing Director
Jaipur-Kishangarh Expy,

- Heerapura Ward No. 18,
Jaipur – 302026,
Rajasthan
4. Ajmer Vidyut Vitaran Nigam Ltd.
Through Chairman and Managing Director
Vidyut Bhawan, Panchsheel Nagar,
Makarwali Road,
Ajmer – 305004,
Rajasthan
5. Jodhpur Vidyut Vitaran Nigam Ltd.
Through Chairman and Managing Director
New Power Hours, Industrial Area
Jodhpur – 342003,
Rajasthan
6. Secretary, Government of India
Ministry of Power, Shram Shakti Bhawan
New Delhi-110001
7. Secretary, Government of Rajasthan
Department of Energy, Secretariat,
Jaipur,
Rajasthan-302007
8. PTC India Ltd.
Through its Director
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi – 110066
9. M/s DB Power Ltd.
Through its Chairman
Office Block 1A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opposite MP Nagar, Zone-I,
Bhopal-462016

10. Maruti Clean Coal & Power Ltd.
Through its Director
Ward No. 42, Building No. 14,
Civil Lines, Near Income Tax Colony,
Raipur, Chhattisgarh – 492001
11. Lanco Power Ltd.
Through its Director
397, Udyog Vihar,
Phase III, Gurgaon – 122016
12. Athena Chhattisgarh Power Ltd.
Through its Director
1024/1/RT, G-1, B-Block
Roxana Towers,
Green Lands,
Begumpet, Hyderabad-500015

...RESPONDENTS

Counsel for the Appellant (s) : Mr. Sajan Poovayya, Sr. Adv.
Mr. Lakshyadeep Singh Bhagadwal
Mr. Anurag Sharma

Counsel for the Respondent(s) : Mr. R.K. Mehta for R-1

Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Mr. Amal Nair for R-2

Mr. M.G. Ramachandran, Sr. Adv.
for R-3 to R-5

Mr. Ravi Kishore
Mr. Niraj Singh
Mr. Rajshree Chaudhary for R-8

J U D G M E N T

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

1. The present Appeal has been filed by SKS Power Generation (Chhattisgarh) Limited ("Appellant), against the order dated 26.02.2019 ("Impugned Order") passed by the Rajasthan Electricity Regulatory Commission ("Respondent Commission") in Petition Nos. RERC/431/13 and RERC/1388/18, wherein the Respondent Commission, acting without jurisdiction, and completely contrary and in blatant disregard of the directions issued by the Hon'ble Supreme Court in its orders dated 25.04.2018, 20.09.2019 and 19.11.2018 and 21.01.2019, declined to approve and adopt the Tariff of the Appellant as quoted under bidding process in accordance with Section 63 of the Electricity Act, 2003. In fact, the Hon'ble Supreme Court in the above order dated 25.04.2018, approved both the quantum and Tariff of the Appellant. This meant that the exercise of adoption of Tariff by the Respondent Commission under Section 63 of the Electricity Act, 2003 was only a formality.
- 1.1 The Appellant, SKS Power (Generation) Chhattisgarh Limited, is a company incorporated under the provisions of the Companies Act, 1956, and has set up a 1200 MW (4x300MW) power plant at Raigarh, Chhattisgarh.
- 1.2 The Respondent No. 1, Rajasthan Electricity Regulatory Commission, is the State Electricity Regulatory Commission in the state of Rajasthan exercising its powers and functions under the Electricity Act, 2003.

- 1.3** The Respondent No.2, Rajasthan Rajya Vidyut Prasaran Nigam Limited, has been authorized by Jaipur Vidyut Vitran Nigam Ltd, Ajmer Vidyut Vitran Nigam Ltd. and Jodhpur Vidyut Vitran Nigam Ltd., the Distribution Companies of the State of Rajasthan, to undertake the process of selection of Sellers for procurement of power to meet the power requirements of the aforementioned Discoms in the State of Rajasthan.
- 1.4** Jaipur Vidyut Vitran Nigam Ltd (hereinafter referred to as 'the Respondent No. 3'), Ajmer Vidyut Vitran Nigam Ltd. (hereinafter referred to as 'the Respondent No. 4') and Jodhpur Vidyut Vitran Nigam Ltd. (hereinafter referred to as 'the Respondent No. 5') are the State Electricity Distribution Companies of Rajasthan and are discharging functions under the provisions of the Electricity, 2003.
- 1.5** The Ministry of Power, Government of India and the Department of Energy, Government of Rajasthan are the Respondent Nos. 6 and 7 respectively. PTC India Ltd., the Respondent No. 8, is a company incorporated under the Companies Act, 1956 and is an inter-State trading licensee as envisaged under the Electricity Act, 2003.
- 1.6** M/s DB Power Limited, Maruti Clean Coal & Power Ltd. and Lanco Power Ltd., are Respondent No. 9,10 and 11 respectively, are generating companies incorporated under the Companies act, 1956 who were declared as the L1, L2, L3 Bidders in the bidding process for procurement of power by the Respondent No. 2.

1.7 Athena Chhattisgarh Power Ltd, the Respondent No. 12 respectively, is a generating company incorporated under the Companies Act, 1956 who had participated in the bidding process for procurement of power by the Respondent No. 2.

2. **FACTS OF THE CASE:-**

2.1 The brief facts leading to the institution of the instant appeal are as under:

- Respondent No.2, was authorized by the Distribution Licensees (Discoms) being Respondent No. 3, 4 and 5 in the state of Rajasthan, to conduct the process of selection of sellers for procurement of 1000 MW base load power under 'Case 1' of the "Guidelines for Determination of Tariff by Bidding Process for procurement of Power by Distribution Licensees" dated 19.01.2005 and amended on 30.03.2006, 18.08.2006, 27.09.2007, 27.03.2009 and 21.07.2010 (hereinafter collectively referred to as 'the Guidelines') issued by the Ministry of Power, Govt. of India, for the purpose of the Rajasthan Discoms to meet their load/ power requirements.
- Accordingly, Respondent No. 2 on 21.08.2009, filed a Petition being Petition No. 205 of 2009 for *inter alia* procurement of 1000 MW of power under Case-1 for round the year on long term basis for a period of 25 years. The Respondent Commission, vide its order dated 23.03.2011, "approved" the procurement of 1000MW under Case-2 or Case-1 bidding process, as the case may be.

- Subsequently, the Respondent No. 2 issued a Request for Proposal (RFP) inviting sellers to participate in a competitive bidding process for procurement of power under Case-I route in terms of the aforesaid guidelines.
- The Respondent No. 2, based on the preliminary evaluation of the non-financial bids by the Bids Evaluation Committee (BEC), sought clarifications from all seven participating bidders, including the Appellant. Upon the submission of clarifications, BEC declared seven bidders qualified for opening of the financial bids. Subsequently, since RKM Powergen and M/s NSL Nagapatnam Power & Infratech Limited chose not to extend the bid validity and hence their bids were not opened and the financial bids of only the 5 bidders, including the Appellant were opened.
- Subsequently, the Bid Evaluation Committee in its Minutes of Meeting dated 17.04.2013 and 22.04.2013, evaluated the bids, and accordingly the bidders were ranked as follows:

Rank	Qualified Bidder Name	Levelized Tariff (Rs/Kwh)	Capacity Offered	Cumulative Capacity Offered	Average Cumulative Tariff (Rs/Kwh)
L-1	PTC Maruti Clean Coal and Power Limited	4.517	195	195	4.517
L-2	PTCDB Power Limited	4.811	311	506	4.698
L-3	LPL Lanco Babandh Power Limited	4.943	100	606	4.738
L-4	PTC Athena Chhattisgarh Power Limited	5.143	200	806	4.839
L-5	SKS Power Generation	5.300	100	906	4.890

	(Chhattisgarh) Limited				
L-6	IPL Lanco Vidarbha Thermal Power Limited	5.490	100	1006	4.949
L-7	PTCMB Power(Madhya Pradesh) Limited	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Limited	5.572	475	1681	5.193
L-9	Jindal Power Limited	6.038	300	1981	5.321
L-10	LPL Lanco Amarkantak Power Limited	7.110	100	2081	5.407

- Thereafter, on 13.06.2013, in compliance with the provision of Clause 6.2 of the guidelines, the BEC issued the following certificates:
 - a) Certification on conformity of the bid process evaluation according to the provisions of the RFP document, by the Bid Evaluation Committee;
 - b) Certification on conformity of the bid process to the Guidelines by the Procurers.
- Out of the above-mentioned bids, Maruti Clean Coal & Power Ltd. was the L1 bidder with a quoted levellised tariff of Rs. 4.517 per Unit for the offered quantum of 195 MW. M/s DB Power Limited was declared as the L2 bidder with a quoted levellised tariff of Rs. 4.811 per Unit for the offered quantum of 311 MW. Lanco Power Ltd. was the L3 bidder with a quoted levellised tariff of Rs. 4.943 per Unit for the offered quantum of 100 MW. Further, apart from the aforementioned original bid quantum, the Respondent No. 2 also offered additional

quantums of 55 MW, 99 MW and 250 MW to the above 3 bidders.

- The above said additional quantums were taken from the quantum of power bid by L4, L5 and L6 bidders. Accordingly, Letter of Intents (LOIs) were issued by the Respondent No. 2 to M/s Maruti Clean Coal & Power Ltd. for 250 MW (195 MM original quantum + 55 MW additional quantum), M/s DB Power Ltd. for 410 MW (311 MW original quantum + 99 MW additional quantum) and M/s Lanco Power Ltd. for 350 MW (100 MW original quantum + 250 MW additional quantum). No LOI was issued to the any other bidders, including the Appellant.
- Accordingly, post the issuance of the LOIs and signing of Power Purchase Agreements (PPAs) with the aforementioned bidders, the Respondent No.2 filed a petition before the Respondent Commission under Section 63 of the Electricity Act, 2003, read with Clause 5.16 of the Bidding Guidelines for adoption of tariff for purchase of long term base load power of 1000 MW, being Petition No. 431 of 2013. The impugned order ensues out of the said petition.
- By virtue of allocation of additional quantum to the L-1 to L-3, the successful bidders i.e. L-4 and L-5 viz. Athena Power (200 MW) and the Appellant/ SKS Power Generation (Chhattisgarh) Ltd. (100 MW) were left out. Due to the arbitrary and illegal conduct on the part of the Respondent No. 2, the Appellant, along with Respondent No.12 filed a Civil Writ Petition No.

18699 of 2013 and 19437 of 2013, respectively before the Hon'ble High Court of Rajasthan, challenging the bidding process and the selection of the successful bidders. The said Writ Petitions were rejected by the Hon'ble Single Judge of the High Court of Rajasthan vide order dated 07.02.2014 on the ground that the Appellant herein had an alternate remedy before the Respondent Commission.

- The aforesaid order was subsequently challenged by the Appellant before the Division Bench of the Hon'ble High Court of Rajasthan vide DB Special Appeal (Writ) Nos. 604 of 2014 and 538 of 2014. The Hon'ble Division Bench vide its order dated 18.04.2014 rejected the appeals and confirmed the judgment of the learned single judge.
- Meanwhile, during the pendency of the aforementioned petition before the Respondent Commission, being Petition No. 431 of 2013, the Energy Assessment Committee (EAC), a Committee constituted by the Government of Rajasthan pursuant to Regulation 3(3) of the RERC (Power Purchase & procurement process of distribution licensee) Regulations, 2004 in its 4th meeting held on 29.01.2014 decided/ recommended that *“there is no requirement for long term procurement of 1000 MW power under Case-1 for which PPAs have been executed and tariff adoption petition has been filed before RERC”*. Subsequently, the EAC in its meeting dated 21.05.2014 decided/ recommended that as against the quantum of 1000MW power, for which PPAs have been executed and tariff adoption Petition was filed, a demand of

600 MW ought to be considered, on account of availability of power from various sources and to meet future contingencies.

- Accordingly, on 25.07.2014, based on the aforementioned decision/ recommendation of the EAC, the Government of Rajasthan issued a letter to the Respondent No. 2, and approved the purchase of a quantum of 500 MW power on long term basis as against the quantum of 1000 MW for which PPAs had already been executed.
- On the basis of the decision/ recommendation of the EAC, and the direction issued by the Government of Rajasthan, the Respondent No. 2 filed an application dated 24.11.2014 under Regulation 7 of the RERC (Power Purchase & Procurement Process of Distribution Licensee) Regulations 2004 in the aforementioned pending proceedings, being Petition No. 431 of 2013, before the Respondent Commission, to bring on record the EAC decision/ recommendation and the Government of Rajasthan approval, inter alia praying for adoption of tariff and approval of the reduced quantum of 500 MW of power to be purchased as against the original 1000 MW of power for which PPAs had already been executed with the successful bidders.
- Under the aforesaid Petition, all the successful bidders filed their respective objections with respect to the maintainability of the application filed by Respondent No.2, opposing the unilateral change in the quantum of power being proposed by

the Respondent No. 2. However, the Respondent Commission vide its order dated 22.07.2015 held as under:

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

71. Under Section 86(1)(b), this Commission has a function to regulate electricity purchased through agreements. In other words quantum of power to be procured has to be regulated which in turn has to depend on the requirement. Further, as pointed out earlier the petitioner can increase or decrease the quantum by more than 10% with the approval of the Commission. The consumer cannot be burdened with purchase of power which is not required. Therefore, we are in agreement with the contention of the Petitioner that this Commission has power to approve reduced quantity of power based on the requirement.

72. It is contended by the successful bidders that in a petition filed u/s 63 of Electricity Act, 2003, this Commission has to merely adopt tariff obtained through the bidding process and it cannot approve the purchase of the reduced quantity of power.

73. The prayers made in the petition do not limit the petition for mere adoption of tariff. It is also prayed in a petition that the Commission may approve additional quantity of power to be procured from L-1, L-2 & L-3. Thus, the petition is not merely for adoption of tariff but is also for purchase of additional quantum of power. Therefore, in the present petition Commission has power to consider decrease/increase in the quantity of power to be purchased.

74. We, therefore, hold that the Petitioner is entitled to restrict procurement of power to 500 MW as required by it now as against 1000 MW for which approval was given earlier.”

- Thereafter, 4 set of appeals were filed against the above order before this Tribunal, by the Appellant/ SKS Power (Appeal No. 264 of 2015), Respondent No. 9/ DB Power (Appeal No. 235 of 2015), Respondent No. 11/ Lanco Power (Appeal No.191 of 2015) and Respondent No. 12/ Athena Power (Appeal No. 202 of 2015). The appeals filed by the Respondent Nos. 9 and 11 (Appeal Nos. 235 and 191 of 2015) only challenged the reduction of RFP quantum of 1000 MW to 500 MW. On the other hand, the appeals filed by the Appellant and the Respondent No. 12 (Appeal Nos. 202 and 264 of 2015), apart from the issue of reduction of requisition quantum from 1000 MW to 500 MW, also challenged the allocation of additional quantum to the Respondent Nos. 9 and 11.
- This Tribunal segregated the above four appeals, thereby first deciding the appeals filed by Respondent Nos. 9 and 11, being Appeal Nos 191 and 235 of 2015, on the issue as to whether the Respondent Commission had powers to reduce the RFP quantum from 1000 MW to 500 MW after the bidding process was completed.

The above segregation was done on the logic that in the event it was held that the RFP quantum can be reduced, then the Appellant and Respondent No. 12 would automatically be knocked of. As such, the entire issue in the above two appeals was whether the Respondent Commission had powers to deviate from the requisitioned RFP quantum (i.e., from 1000 MW to 500 MW), once the Case-I bid process under section 63 was completed, and the bid evaluation committee had

issued certificates that the said bidding process was fair and transparent and in accordance with the Bidding Guidelines.

- Thereafter, this Tribunal passed a judgment dated 02.02.2018 in the above appeals filed by Respondent Nos. 9 and 11. In the above judgment, this Tribunal held that the powers of the State Commission are limited under Section 63 of the Act. It was held that the Respondent Commission, while dealing with a petition under Section 63 for adoption of tariff, could only go into the issue as to whether the Tariff has been discovered through a transparent bidding process. It was further held that the Respondent Commission had no power to reduce the requisitioned RFP quantum from 1000 MW to 500 MW after the bidding process was completed.
- However, while the appeals filed by the Appellant and Respondent No. 12 (Appeal Nos. 202 and 264 of 2015), were segregated and were pending, which dealt with the issue as to whether the additional quantum offered by the Respondent Discoms to the Respondent Nos. 9 and 11 is permissible under the bid documents, in the above judgment, it was also recorded that the Respondent Discoms would operationalize the agreements with the Respondent Nos. 9 and 11, including additional quantum. Accordingly, the Appellant was aggrieved to a limited extent by the above judgment, that when its appeal was pending adjudication, then the additional quantum of Respondent Nos. 9 and 11 could not have been ordered to be operationalized.

- Thereafter, the Appellant filed review petition, being R.P No. 01 of 2018, before this Tribunal which was dismissed vide an order dated 08.03.2019.
- In the meantime, aggrieved by the judgment dated 02.02.2018 passed by this Tribunal in Appeal Nos 235 and 191 of 2015, the Appellant filed limited Civil Appeals, being C.A Nos. 2502-2503 of 2018 before the Hon'ble Supreme Court. The Respondent Discoms also filed cross appeals, being Civil Appeal Nos. 3481-3482 of 2018 challenging the aforesaid judgment dated 02.02.2018 on the ground that the RFP quantum cannot be restored from 500 MW to 1000 MW.
- Under the aforesaid Civil Appeals, the Hon'ble Supreme Court passed an order dated 25.04.2018, wherein it was held 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 of 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.

All the appeals shall stand disposed of in term of the above order.”

By the above order, it was held that the Appellant became entitled to supply power to the Respondent Discoms, in terms of the originally offered amount, and the LOIs were modified.

Moreover, the total supply of power was quantified to 906 MW as per the following chart:

Rank	Qualified Bidder Name	Levelized Tariff (Rs/Kwh)	Capacity Offered	Cumulative Capacity Offered	Average Cumulative Tariff (Rs/Kwh)
L-1	PTC Maruti Clean Coal and Power Limited	4.517	195	195	4.517
L-2	PTCDB Power Limited	4.811	311	506	4.698
L-3	LPL Lanco Babandh Power Limited	4.943	100	606	4.738
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L-5	SKS Power Generation (Chhattisgarh) Limited	5.300	100	906	4.890
L-6	IPL Lanco Vidarbha Thermal Power Limited	5.490	100	1006	4.949
L-7	PTCMB Power(Madhya Pradesh) Limited	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Limited	5.572	475	1681	5.193
L-9	Jindal Power Limited	6.038	300	1981	5.321
L-10	LPL Lanco Amarkantak Power Limited	7.110	100	2081	5.407

- Pursuant to the passing of the aforesaid order, the Appellant on 14.05.2018, filed an application before the Respondent Commission seeking appropriate directions/ or consequential

orders for implementation of the order dated 25.04.2018 passed by the Hon'ble Supreme Court in Civil Appeal Nos. 2502-2503 of 2018. Accordingly, the Respondent Commission vide its order dated 29.05.2018, allowed the said application and further, directed Respondent No.2 to comply with order dated 25.04.2018 passed by the Hon'ble Supreme Court.

- Meanwhile, the Respondent No. 2 referred the matter to the Bid Evaluation Committee (BEC). On, 22.06.2018, the BEC after considering the tariff of the Respondent No. 12 (L-4) and the Appellant (L-5), and also the prevailing market prices prevalent from various sources during the past, when the bids were received and also for the future, recommended that the tariff of L-4 and L-5 are exorbitantly high and not aligned to marked prices.
- On 21.07.2018, due to the non-compliance of the direction of the Hon'ble Supreme Court by the Respondent Commission, the Appellant preferred a Contempt Petition being Contempt Petition (C) No. 1436-1437 of 2018 before the Hon'ble Supreme Court. Accordingly, the Supreme Court vide its order dated 20.09.2018 held as under:

"We are of the view that there is no doubt whatsoever that now the PPA has to be signed between the parties. However, the State Commission, may, as per our order, go into the issue of approval of adoption of tariff with regard to L-5, who is the party before us, and will decide the same within a period of six weeks from today.

PPA is to be signed immediately thereafter. The contempt petitions are disposed of accordingly."

- Thereafter, Review Petition, being Review Petition (C) No. 197-98 of 2019 was also filed by the Applicant/Appellant against the order dated 20.09.2018 in Contempt Petition (C) No. 1436-1437 of 2018, and the same was disposed of by the Hon'ble Supreme Court vide its order dated 21.01.2019, and held as follows:

"On 04.01.2019, after hearing counsel for both sides, we had allowed the petitioner to file a review petition bringing on record the Standard Bidding Guidelines. This has since been done. We find that as per the Standard Bidding Guidelines the PPA is first to be signed after which the question of adoption of tariff has to be taken up. With this clarification of the 20.09.2018 order, we dispose of the review and the M.A."

- Accordingly, the Appellant executed a Power Purchase Agreement(PPA) dated 04.02.2019 with Respondent No. 3, 4 and 5 for a total contracted capacity of 100 MW, as quoted under the Bid, and thereafter the Appellant approached the Respondent Commission for the adoption of Tariff.
- On 08.02.2019, the matter came up for hearing before the Respondent Commission. During the proceedings, the Appellant filed a reply to the affidavit of the Respondent No.2, seeking to contend that the levelized tariff of the Appellant is only Rs.4.019/ kwh as against Rs. 5.30/ kwh.
- On 26.02.2019, the Respondent Commission passed the impugned order wherein the tariff of the Appellant was rejected based upon the findings of the BEC in its Minutes of Meeting dated 22.06.2018. It was held that the said tariff of the Appellant is not aligned to the prevailing market prices.

- After the passage of the impugned order, the Respondent No. 3 issued a letter dated 08.03.2019 to the Appellant whereby it was stated that due to the passing of the impugned order dated 26.02.2019, there is no valid and subsisting PPA, and the bank guarantee furnished by the Appellant at the time of bidding, was returned.
- Being aggrieved by the above actions of the Respondents, the Appellant has now approached this Tribunal through this Appeal.

3. QUESTIONS OF LAW:-

The Appellant has raised following questions of law:-

- (i) Whether the Respondent Commission exceeded its jurisdiction as prescribed under Section 63 of the Electricity Act, 2003, wherein the Respondent Commission is only bound to adopt the tariff, while passing the impugned order?
- (ii) Whether the Respondent Commission could have gone beyond the order dated 25th April 2018 passed by the Hon'ble Supreme Court and re-evaluated the tariff quoted by the Appellant?
- (iii) Whether the Respondent Commission has gone beyond the RFP document and the Guidelines in determining the question of adoption of Tariff regarding the Appellant?
- (iv) Whether the Respondent Commission acted contrary to the settled position of law as already decided by this Hon'ble Tribunal and the Hon'ble Supreme Court of India in a catena of judgments?

- (v) Whether the Respondent Commission failed to comply with the directions passed by the Hon'ble Supreme Court in Civil Appeal No. 2502-2503 of 2018?
- (vi) Whether the Respondent Commission failed to comply with the direction of the Hon'ble Supreme Court in Contempt Petition (C) No. 1436-1437 of 2018?
- (vii) Whether the Respondent Commission erred in relying upon the BEC report while passing the impugned order?
- (viii) Whether the Respondent Commission has wrongly held that the Tariff of the Appellant is exorbitantly high and would impact the consumer's interest?
- (ix) Whether the Respondent Commission has rightly allowed the BEC to evaluate the bid of the Appellant in 2018, when the evaluation has already been done in 2014?
- (x) Whether Respondent Commission can determine the Tariff instead of Adoption of Tariff as per section 63?
- (xi) Whether Respondent Commission can accept a few bids if the tariff is not aligned to the Market Prices?

4. Mr. Sajan Poovayya, learned Senior Counsel appearing for the Appellant has filed the Witten Submissions for our consideration as under:-

4.1 Section 63 of the Electricity Act, 2003 provides for the determination of tariff under bidding process, which is set out hereinbelow:

“Section 63. (Determination of tariff by bidding process):

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

A perusal of Section 63 of the Act provides that the Respondent Commission has to adopt tariff discovered under a bidding process, if:

- a) the bidding process is transparent; and
- b) the bidding process has been conducted in accordance with the guidelines issued by the Central Government

4.2 With respect to the above legal position, Learned Senior counsel relied upon the judgment of this Tribunal passed in ***Appeal No. 106 of 2011, Vidharbha Industries Power Limited Vs. Maharashtra Electricity Regulatory Commission & Ors.***, wherein, it has been held that the scope of Section 63 is very limited, as the State Commission under the above section has to only verify whether the bid process has been done in a transparent manner and in accordance with the guidelines issued by the Central Government, and if the same are complied with, then the State Commission has to adopt the tariff under Section 63 bidding route.

4.3 Reliance was also placed on the judgment of this Tribunal dated 02.02.2018, passed in ***Appeal Nos. 235 and 191 of 2015***, being ***M/s. D.B. Power Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors. and Lanco Power Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors.*** In the said appeals, the parties in the instant appeal approached this Tribunal for the first time. Under para 16.16 of the judgment, this tribunal reiterated

the scope of Section 63, and held that the State Commission under the Section 63 bidding route has to only verify whether the tariff has been adopted in a transparent bidding process, and whether the said process was in accordance with the guidelines issued by the Central Government. The above judgment of this Hon'ble Tribunal was upheld by the Hon'ble Supreme Court, vide its judgment/ order dated 25.04.2018, to the extent of validation of the bidding process.

4.4 Further, with Respect to the *Energy Watchdog judgement*, the learned senior counsel submitted that the Hon'ble Supreme Court, qua the jurisdiction of regulatory commissions under Section 63, has held as follows:

- a) in a Section 63 bid process, regulatory powers have to be exercised by the Commissions in accordance with the bidding guidelines, if such guidelines are in existence;
- b) an appropriate Commission does not act as a mere post office under Section 63;
- c) the commission has to adopt the tariff which has been determined through a transparent process of bidding;
- d) the only requirement of the regulatory commissions is to see whether the provisions of the bidding guidelines issued by the Central Government, have been followed, especially Clause 4.

4.5 Therefore, it is apparent that under Section 63, the regulatory commission, after satisfying itself as to the transparency of the bidding process, has to only further consider, or clarify, qua any issue pertaining to Clause 4 of the bidding guidelines. Apart from

the same, a Regulatory Commission has to necessarily adopt the tariff discovered under Section 63 of the Act.

4.6 In view of the above, the Learned Senior Counsel submitted that the Respondent Commission, while adopting tariff of the Appellant since the bid process was transparent, had to only consider and clarify, if required, the issues appearing in Clause 4 of the bidding guidelines.

4.7 The learned Senior Counsel submitted that that the entire case of the distribution licensees, including the case of the Commission, was considered and argued before the Hon'ble Supreme Court before passage of the order/ judgment dated 25.04.2018, in Civil Appeal No. 2502/2503 of 2018 filed by the Appellant, against the additional quantum being awarded to Respondent Nos. 9 to 11 by this Tribunal in the judgment dated 02.02.2018 and Civil Appeal No. 3481/3482 of 2018 filed by the Respondent Nos. 3 to 5, challenging the bid quantum being restored to 1000 MW (\pm 10%) in the aforesaid judgment. In the said judgement/order of the Hon'ble Supreme Court, it was consciously held that the Appellant is "*entitled to supply of power in terms of the originally offered amount*".

4.8 Hence, the said order demonstrates the entire controversy was put to rest, as all the parties present in the instant appeal, were parties before the Hon'ble Supreme Court. Further, the parties raised all the issues which are being raised herein, including the argument of public/ consumer interest being raised by the Rajasthan Discoms, and only after considering the merits and demerits of the entire

issue in hand, the Hon'ble Supreme Court passed its aforementioned judgment/ order dated 25.04.2018.

4.9 The said judgment also mentions the table for quantum and price under the bid, submitted by the bidders, which is demonstrated as follows:

Rank	Qualified Bidder	Levelized Tariff (Rs/Kwh)	Capacity Offered	Cumulative capacity offered	Average Cumulative Tariff (Rs/Kwh)
L-1	PTC-Maruti Clean coal and Power Limited	4.517	195	195	4.517
L-2	PTC – DB Power Limited	4.811	311	506	4.698
L-3	LPL- Lanco Babandh Power Limited	4.943	100	606	4.738
L-4	PTC – Athena Chhattisgarh Power Limited	5.143	200	806	4.839
L-5	SKS Power Generation (Chhattisgarh) Limited	5.300	100	906	4.890
L-6	IPL- Lanco Vidarbha Thermal Power Limited	5.490	100	1006	4.949
L-7	PTC-MB Power (Madhya Pradesh) Limited	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Limited	5.572	475	1681	5.193
L-9	Jindal Power Limited	6.038	300	1981	5.321
L-10	LPL- Lanco Amarkantak Power Limited	7.110	100	2081	5.407

- 4.10** The Hon'ble Supreme Court, in its findings, while referring to the above table, further used the phrase "*in terms of the originally offered amount*". This was with respect to L-4 (Respondent No. 12) and L-5 (Appellant). Had there been any other intention, the Hon'ble Supreme Court would not have used the above phrase. Further, the Hon'ble Supreme Court modified the LOIs in terms of the directions rendered under the said judgment/ order.
- 4.11** The Learned Senior Counsel further submitted that the Respondents have argued that the direction upon the Respondent Commission to go into the issue of approval for adoption of tariff, gives absolute discretion and powers to again/ re-evaluate the bid of the Appellant, and that in the event the said bid is found to be "not market aligned", then the same can even be rejected. This argument is fundamentally flawed upon a simple reading of the aforementioned judgement/ order dated 25.04.2018 of the Hon'ble Supreme Court.
- 4.12** The Hon'ble Supreme Court mandated procurement of 1000 MW of power, instead of 500 MW. This means that the Respondent Discoms have to necessarily procure 1000 MW ($\pm 10\%$) in terms of the bid process conducted and the above procurement can only be from the Appellant (L-5) and Respondent Nos. 9 to 12 (L-1 to L-4).
- 4.13** Without procuring power from the Appellant, the aforementioned mandate of the Hon'ble Supreme Court to take 1000 MW (+ 10% i.e. 906 MW) of power, shall stand vitiated. There is no other manner in which the Rajasthan Discoms can by-pass the said mandate by deliberately rejecting the Appellant and in the event,

any bidder between L-1 to L-5 willfully decides not to supply power to the Rajasthan Discoms (as is the case with L-3/ Respondent No. 11 and L-4/ Respondent No. 12), then the said Discoms are free to either give up their right to procure such quantum or to seek appropriate legal remedy. However, the Rajasthan Discoms, or the Respondent Commission, had no ability whatsoever, to themselves reject the quantum of L-5 when the Hon'ble Supreme Court mandated the same to be procured for fulfilling the bid requisitioned capacity of 1000 MW \pm 10%(i.e. 906 MW).

4.14 The Learned Senior Counsel also referred to the subsequent orders dated 20.09.2018, 19.11.2018, and 21.01.2019, which arise from, and are consequent to the judgment/ order dated 25.04.2018 of the Hon'ble Supreme Court in order to further elaborate the powers which were available to the Respondent Commission in the present case. It is submitted that the said orders, were in line with the judgment/ order dated 25.04.2018 of the Hon'ble Supreme Court, which directed the State Commission to go into the issue of approval for adoption of tariff.

4.15 With respect to the Clause 4 of the Bidding Guidelines, as mentioned under the **Energy Watchdog case (Supra)**, it is evident that Clause 4 nowhere gives any power to the regulatory commissions to go into the issue of bid validity, as the same regulates the "tariff structure" to be followed for procurement of power by the Discoms. Clause 4 provides the broad parameters to be adhered by the distribution licensees for the purpose of making payments to the bidders/ generators for supply of power. Apart from the above, the Respondent Commission could have exercised any powers incidental to those mentioned under Clause

4, *inter-alia*, including the period of the power purchase agreement since more than 5 years of the said period for the Appellant has been lost in litigation, etc.

4.16 Hence, there was no power available with the Respondent Commission for rejecting the bid of the Appellant, since the same was beyond its powers, as per Section 63 read with the bidding guidelines, once the bid process was long over, and the Hon'ble Supreme Court had already approved the bid of the Appellant.

4.17 Further, the Learned Senior Counsel, in its written submissions has stated that pursuant to the submission of the bid of the Appellant, amongst other bidders, the BEC conducted meetings on 17.04.2013 and 22.04.2013, for evaluating the said bids. In the said meetings, it evidences that bid of the Appellant was extensively evaluated, along with the bid of Respondent Nos. 9 to 11, to whom the LOIs were initially issued.

4.18 Pursuant to the detailed exercise of evaluation of bids, the BEC issued certificate(s) dated 04.06.2013 confirming to the aspects of transparency in the bidding process, as also the compliance of the bid process with the necessary bidding guidelines of the Central Government. It is most vital to note that similar certificate(s) were also issued by the Respondent Discoms. Thus, the requisites as mandated under Section 63 of the Act were satisfied, and accordingly the Appellant was declared as the L-5 Bidder.

4.19 The alignment of the levelized tariff to the market prices is not for an individual bidder but the same is a requirement for all the bids or the entire bidding process. It cannot be that the tariffs quoted by

L-1 to L-3 (Respondent Nos. 9 to 11) are market aligned, while the tariff of the Appellant is not. Then the entire bid had to be cancelled as per Clause 3.5.12 of the RfP, and a re-bid conducted. Therefore, the Respondent No.2/ Rajasthan Discoms cannot at all raise any such contentions.

4.20 With respect to the Minutes of Meeting dated 22.06.2018 of the BEC, it was submitted that the holding of the above meeting was beyond the scope of the bid process. In this context, reference was made to the Request of Proposal (RfP) issued by the Rajasthan Discoms for conducting the bid process, which was pre-approved by the Respondent Commission itself vide an order dated 23.03.2011. From the said RfP, it is evidenced that any meeting for evaluation of bids can only be conducted under Step III, before the Step IV, which provides for selection of successful bidders. As per Clause 3.5.8 of the RfP, once Letters of Intent (LOIs) are issued under Step IV, no recourse, whatsoever.

4.21 Hence, once Step IV of Clause 3.5 was completed by the Rajasthan Discoms by issuing the initial LOIs to Respondent Nos. 9 to 11, which were subsequently “modified” by the Hon’ble Supreme Court in its judgment/ order dated 25.04.2018 by providing that an LOI has to be issued to the Appellant as well, there remained no scope, or power, whatsoever, for the Respondents to take recourse to Step III provided under Clause 3.4 of the RfP qua bid evaluation.

4.22 Without prejudice to the above, the Learned Senior Counsel submitted that the MoM dated 22.06.2018 had no legal standing as a result of the following:

- a) the Appellant submitted its bid on February 2013, whereas comparisons, under the MoM dated 22.06.2018, are made with bids made in November 2014, June 2015 and February 2016, etc.;
- b) the bids which were compared in the MoM dated 22.06.2018, were based on a completely different bidding regime, namely, Design, Built, Finance, Own and Operate (DBFOO) wherein energy charge/ fuel cost is a past through, which are fundamentally different from Case-1 bids (*under which the Respondent No. 2 issued the bid*) where the energy charge/ fuel cost is part of the bid risk. Therefore, DBFOO based bids and Case -1 bids are inherently incomparable; and
- c) in the said MoM, a comparison was made by taking into reference the report prepared by M/s. Deloitte Limited, wherein it categorically shows that the average levelized tariff in the year 2012 was *Rs. 4.47 per kWh*, and the levelized tariff quoted by the L-1 bidder in the present case, was at the rate of *Rs. 4.517 per kWh*.

Hence, by such standards, even the bid of the L-1 (Respondent No. 10) is higher than the levelized tariff of *Rs. 4.47 per kWh* as per the Respondents' own admission.

4.23 In terms of the above, as per Clause 3.5.12 of the RfP, either all successful bids have to be accepted, or rejected. The same cannot be done in a piece meal. It is further submitted that the Respondent Rajasthan Discoms cannot now reject any of the bids

as the Hon'ble Supreme Court in its judgment/ order dated 25.04.2018 has directed the said Discoms to procure 906 MW (i.e. + 10% of 1000 MW as per the RfP).

4.24 With respect to the contention of the Respondents qua Clause 5.15 of the Bidding Guidelines, the Learned Counsel submitted that the argument of the Respondent is erroneous on account of the following:

- a) under Section 63 of the Act, bidding is to be conducted strictly in terms of the bidding guidelines issued by the Central Government;
- b) the bidding framework includes the Request for Proposal (RfP) issued by a distribution licensee under the bidding guidelines;
- c) in the present case, the RfP was issued with the specific pre-approval of the Respondent Commission vide an order dated 23.03.2011;
- d) Clause 5.15 of the bidding guidelines specifically includes the phrase 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*";
- e) based upon the above clause of the bidding guidelines, the Respondent Rajasthan Discoms issued the RfP, which contained Clause 3.5.12, wherein it was provided that the procurer has the right to reject "all" bids if the tariff quoted is not aligned to the prevailing market prices;

- f) the Respondent Commission had the power to deviate from Clause 5.15 of the bidding guidelines, and modify the above clause of the RfP by providing that even a singular bid can be rejected. This power to deviate, is provided under Clause 5.16 of the bidding guidelines;
- g) no such deviation was resorted to by the Rajasthan Discoms, nor the same was ordered by the Respondent Commission while passing its order dated 23.03.2011 wherein the RfP was approved for issuance to the general public; and
- h) once the bidders have participated based upon the above criteria of the RfP, the Respondents cannot at all argue today that the word “all” appearing in Clause 5.15 of the bidding guidelines is erroneous, or the same includes the power to reject any singular bid.

4.25 The Learned Counsel also relied upon the judgment of the Hon’ble Supreme Court titled as **Central Coalfields Ltd. v. SLL-SML (Joint Venture Consortium)**, reported in **(2016) 8 SCC 622**, wherein it was held that the bid/ tender conditions cannot at all be read or modified to the detriment of the successful bidders once the tender/ bid process is completed.

4.26 Further, the Learned Senior Counsel in his submission has stated that the as per the Respondents’ own admission, after the evaluation of the entire bidding process, the Respondent No. 2 called the L-1 to L-3 bidders for negotiations (Respondent Nos. 9 to 11) qua tariff. In this context, reference be made to Clause 3.5.9 of the RfP, which prohibits any negotiations on tariff. In fact, a

perusal of the MoM dated 17.04.2013 and 22.04.2014 clearly shows that the Respondent No. 2/ Rajasthan Discoms consultants themselves stated that the no negotiations should be carried out with the bidders. This mischief was done by the Respondent Rajasthan Discoms for reasons unknown, which was corrected by the Hon'ble Supreme Court in its judgment/ order dated 25.04.2018 wherein it took away the additional quantum arbitrarily offered to Respondent Nos. 9 to 11 (L-1 to L-3), and gave the Appellant its due share of 100 MW.

4.27 Further, the Respondents, as an afterthought, have now gone to the extent of making hypothetical arguments that had the Appellant quoted a tariff in the range of Rs. 4.92 to Rs. 4.94 per unit, the same would have been accepted by them. In this context, it is submitted that no such range of Rs. 4.92 to Rs. 4.94 was ever contemplated or provided by the Respondent No. 2 before or during the process of bid and as such is an absurd, and desperate, contention raised at this stage, in appellate proceedings before this Hon'ble Tribunal, as the tariff rate of the Appellant was discovered through a process of transparent bidding under Section 63 of the Act, in conformity with the competitive bidding guidelines issued by the Central Government.

4.28 The learned senior Counsel has also made submissions, with respect to the validity of consumer interest for deciding competitive bidding under Section 63 of the Act. It was submitted that the Parliament of India enacted the Electricity Act, 2003. As the Parliament is elected by the people of India, any laws made by it, are deemed to be in public interest Section 61 of the Act provides

the broad tariff parameters upon which tariff is to be determined, including commercial principles under Section 61(b) and consumer interest in Section 61(d), and this Tribunal in the judgment dated 16.12.2011 passed in **Appeal No. 82 of 2011, titled as Essar Power Ltd. v. UPERC & Anr.**, held that the bidding guidelines have been issued to comply with the principles of Section 61 of the Act.

4.29 The above judgment was followed by this Tribunal in the judgment dated 02.02.2018 i.e. first round of litigation between the parties herein, and held that *“The Government of India guidelines contain the mandate to safeguard consumer interest as well as to encourage competition, efficiency, economical use of the resources. The stated objectives of the Government of India guidelines are to strike a balance between transparency, fairness, consumer interest and viability”*.

4.30 As already submitted hereinbefore, the Hon’ble Supreme Court while passing its judgment/ final order dated 25.04.2018 (i.e. in the present case) considered the submissions of the Respondent Rajasthan Discoms regarding consumer interest, before rejecting the same and directing that the Appellant is entitled to supply power to the said Discoms. Further, the LOIs issued to Respondent No. 9 to 11 (L-1 to L-3) were ordered to be modified. Hence, the argument of the Respondents pertaining to the consumer’s interest is bogey and hypothetical, and it does not stand in merit.

5. Learned Counsel, Mr. R.K Mehta appearing on behalf of the Respondent Commission submitted before us a brief list of

dates, and further, justified the impugned order, on account of the following:

- 5.1** The Commission had the powers to reject the tariff of the Appellant if the same was not in accordance with the guidelines issued by the Central Government under Section 63.
- 5.2** The Hon'ble Supreme Court in its judgment/ order dated 25.04.2018, while holding that the Respondent No. 12 and the Appellant are entitled to supply power under the bid, also directed the Commission to look into the issue of approval of tariff of the Appellant, along with Respondent No. 12. The same was also held by the Hon'ble Supreme Court in the subsequent orders dated 20.09.2018, 19.11.2018 and 21.01.2019. Hence, the Commission was bound to decide the issue of approval of tariff of the Appellant.
- 5.3** Since the bid of the Appellant was not evaluated previously, the BEC in its Minutes of Meeting dated 22.06.2018 evaluated the bid of the Appellant, and found that the tariff quoted by the Appellant was exorbitantly high and not aligned to the prevailing market prices. Based on the said evaluation, the Commission rightly rejected the bid of the Appellant.
- 5.4** Clause 5.15 of the Central Government Bidding Guidelines and Clause 3.5.12 of the RfP gives the power to the Evaluation Committee and the procurer, respectively, to reject a bid if the same is not market aligned.
- 5.5** Based on the evidence placed on record, the Commission declined to adopt the tariff of the Appellant since the tariff was exorbitantly high and not market aligned.

6. Learned Senior Counsel, Mr. Basava Prabhu S. Patil, appearing for the Respondent No. 2 has filed the Witten Submissions for our consideration as under:-

6.1 The primary ground of challenge by the Appellant in the present appeal is that when the bid process was found to be valid and transparent for the L-1, L-2 and L-3 bidders, the tariff for the L-1, L-2 and L-3 bidders were found to be acceptable, there is no basis for the State Commission to come to the finding that the tariff of the Appellant (L-5) bidder was not aligned to market prices. The legality and validity of the impugned Order has been challenged by the Appellant with reference to the earlier round of selection of Bidders L-1, L-2 and L-3 which has been the subject matter of challenge before the Hon'ble Tribunal and before the Hon'ble Supreme Court.

6.2 The Hon'ble Supreme Court in the Order dated 25/04/2018 specifically states that the State Commission may go into the issue of approval for adoption of tariff for the L-4 and L-5. The said order cannot be interpreted to claim that the price quoted by the Appellant for 100 MW capacity has been held to be aligned to market prices and the adoption of tariff of Rs. 4.50/kWh for the said quantum of 100 MW by the State Commission is only a formality. If so, the Hon'ble Supreme Court would have directed the conclusion of the matter without the need to remand the matter to the State- Commission.

6.3 The directions in the next order dated 20/09/2018 is to the effect that *“However the State Commission may as per our order go into the issue of approval of adoption of tariff with regard to L-5 who is party before us and will decide the same within a period of six*

weeks from today” and further in the order dated 19/11/2018 to the effect “we only clarify that the Rajasthan Electricity Regulatory Commission (the State Commission) is to decide the tariff under Section 63 of the Electricity Act, 2003 having regard to the ‘law laid down both statutory and by this court.” In the light of the above, it possibly cannot be contended by the Appellant that the State Commission has no power to go into the issue of approval for adoption of tariff, or that the State Commission has no discretion in the matter but to adopt the tariff.

- 6.4** The contention of the Appellant that the Hon'ble Supreme Court has mandated 1000 MW to be procured and therefore the same has to be necessarily procured irrespective of the tariff (even if not aligned to market prices) is grossly misconceived. The Hon'ble Supreme Court has on the contrary, specifically directed the State Commission to go into the issue of approval for adoption of tariff and decide the issue.
- 6.5** The perversity in the argument of the Appellant would be evident by the fact that even if the tariff goes up to Rs. 10/- per unit or so, if 1000 MW is to be procured, the power has to be procured at such tariff also. This is contrary to the plain direction given by the Hon'ble Supreme Court, the purpose of adoption of tariff and also the provisions of the Bidding Guidelines.
- 6.6** The learned Senior Counsel contended that tariff was never accepted at any point of time in the first round, as the Appellant was to be considered for award of PPA and adoption of tariff only pursuant to the directions of the Hon'ble Supreme Court.

- 6.7** The Appellant's case came to be considered for the first time in relation to the adoption of tariff only pursuant to the order of the Hon'ble Supreme Court dated 25/04/2018.
- 6.8** Both the State Commission and this Tribunal in the earlier round approved the procurement of power only from the L-1, L-2 and L-3 bidders for the entire capacity of 1000 MW. The case of the Appellant (L-5) was never considered by the procurers, the State Commission or the Tribunal earlier.
- 6.9** The status of the selection of L-1, L-2 and L-3 in the first round including the negotiation held with them for increase in the quantum of power, the decision by the Evaluation Committee etc. are stated in the earlier judgment and order dated 2.2.2018 passed by this Hon'ble Tribunal in Appeal Nos. 235 of 2015 and 191 of 2015.
- 6.10** The above decision on the aspect of the increase in the quantum of power through negotiation has since been set aside by the Hon'ble Supreme Court and is, therefore, no longer res-integra.
- 6.11** In Para 16.6 and 16.7, this Tribunal has listed various stages. In terms of the above, this Tribunal has considered the steps of evaluation of financial component of the bid to determine the levelised tariff and the consideration whether such levelised tariff is aligned to the prevailing market prices and adoption of such tariff discovered through the Competitive Bidding Process.
- 6.12** The conclusion of the Tribunal is at Para 16.12 wherein it was recognised that RVPN can reject the bids of quoted Tariff if the same is not aligned with the market conditions. Further, it has been held that the Evaluation Committee had declared the rate

quoted by the Appellants therein {L-1 to L-3} are aligned with market rates. The same clearly shows that this finding of fact by this Tribunal is only restricted to L-2 and L-3 bidders, and the entire capacity of 1000 MW was then exhausted with the L-1 to L-3 bidders. This Tribunal did not consider it necessary to procure from L-4 and L-5 and therefore the question of tariff does not arise.

6.13 Therefore, it is incorrect on the part of the Appellant to contend that its tariff was already considered and found to be aligned to market prices and nothing further was required to be done.

6.14 In the first round of bidding, the Evaluation Committee in the meeting held on 17/04/2013 and 22/04/2013 had only listed the bidders in the ascending order. This was done in terms of Clause 3.5.2 of the RFP, which requires the bidders to be ranked in the ascending order. There was no finding by Bid Evaluation Committee on the tariff of L-5 being aligned to market prices.

6.15 On the other hand, the finding of the Bid Evaluation Committee in the meeting held on 04/06/2013 that there was considerable variation in the tariff and therefore negotiations should be held. RVPN then proceeded to negotiate with L-1, L-2 and L-3 on the quantum of power. L-1, L-2 and L-3 bidders were selected for award of the contract, and the Evaluation Committee on 04/06/2013 certified the process adopted to be in conformity with the Guidelines.

6.16 The above process was considered by the Hon'ble Tribunal in the judgment dated 02/02/2018 to hold that the tariff of L-2 and L-3

bidders were found to be aligned to market prices. This obviously was only for L-1, L-2 and L-3 bidders, as the entire capacity was exhausted with the above bidders.

6.17 In terms of the above, in the first round, the following are the implications:

- (a) The Evaluation Committee as well as RVPN did not consider the entire range of price quoted by L-1 to L-10 Bidders i.e. Rs 4.50/kWh to Rs 7.20/kWh to be aligned to market prices;
- (b) The bids of L-1, L-2 and L-3 at Rs 4.517/kWh, Rs 4.811 /kWh and Rs 4.943/kWh were only found to be aligned to market price and therefore, negotiation was held for increasing the quantum with them;
- (c) The bid of the Appellant/L-5 at Rs 5.30/kWh was not found to be aligned to the market price and, therefore, L-5 was not considered for negotiation. Similarly, L - 4 and L -6 to L-10 were not considered as the quoted Tariff was much higher above Rs 5/kWh
- (d) The negotiation held was for increased in the quantum except that L-3 voluntarily offered to reduce 5 Paise from its quoted tariff of Rs 4.943/kWh to Rs. 4.892/- per unit.
- (e) By the above process, the entire capacity was tied up with the generators, whose tariff was less than Rs. 5 per unit.

6.18 Learned senior Counsel submitted that the difference in the price of L-3 at Rs 4.892/kWh and L-5 at Rs 5.30/kWh is about 40 Paise/kWh. This was considered to be excessively high for the

Respondents to procure power from L-5. Further, there is nothing on record to show that the price of Rs 5.30/kWh should be considered as aligned to market prices. On the other hand, the report of the Evaluation Committee dated 22/06/2018, pursuant to the Supreme Court direction on going into the issue of adoption of tariff, clearly show that the Appellant's bid at Rs 5.30/kWh is exorbitantly high and not aligned to market price.

6.19 The Learned Senior Counsel further submitted that the Bid Evaluation Committee, the procurers and the State Commission have separate and independent powers to examine the tariff in relation to prevalent market prices as provided for in the bidding guidelines, the bid documents and under section 63 of the electricity act and reject the tariff if it is not aligned to prevalent market prices.

6.20 He further submitted that State Commission under Section 63 is not a mere post office and certainly has the jurisdiction to consider whether the tariff is in accordance with the guidelines and bidding documents, which require the tariff to be aligned to prevalent market prices.

6.21 There is no dispute to the fact that the tariff under Section 63 cannot be varied or re-determined by the State Commission, unlike the tariff under Section 62 of the Electricity Act. However, it does not mean that whatever tariff that is discovered in the Section 63 bidding process is to be accepted, without any power to the procurers, Bid Evaluation Committee or the State Commission to consider whether the tariff is reasonable, aligned to market prices and is required to be adopted.

6.22 The power and authority of Evaluation Committee in the bidding process are in relation to the tariff being aligned to market prices and also in relation to the transparency of the bid process and conformity to the Guidelines. In this regard, the following are relevant:

- (a) In terms of Clause 5.15 of the Guidelines, the Evaluation Committee shall have the right to reject the bid if it considers that the rates quoted are not aligned to the market price. In the present case the finding of the Bid Evaluation Committee is that the tariff of the Appellant is very high and not aligned to market prices;
- (b) In terms of Clause 6.2 of the Guidelines, the Evaluation Committee is to provide an appropriate certification on conformity of the bid process evaluation according to the provisions of the RFP documents. This relates to the transparency of the bidding and not on the tariff discovered.

6.23 Learned Senior Counsel for the Respondent No. 2 further submitted that independent of the power of the Bid Evaluation Committee in terms of Clause 5.15 of the Guidelines, in terms of Clause 3.5.12 of the RFP, the Procurer has the right to reject the bids if the quoted tariff is not aligned to the prevailing market price.

6.24 Hence, in a given case, even if the Bid Evaluation Committee does reject a bid as not being aligned to market prices, the Procurer has the independent power to reject the bids for the reason of the tariff not being aligned to market prices.

- 6.25** Apart from the above, the Learned Senior Counsel submitted that under Section 63 of the Electricity Act, the State Commission certainly has the power to examine the tariff and the power to reject adoption of tariff if the tariff is not aligned to market prices and therefore not in terms of the Guidelines.
- 6.26** Further, the reliance placed by the Appellant on judgment of this Tribunal the case of Vidharbha Industries (Appeal No. 106 of 2011) and Essar Power Limited (Appeal No. 82 of 2011), has been reversed by the by the Hon'ble Supreme Court in the case of **Energy Watchdog case (Supra)** wherein it has been held that the State Commission is not a mere post office and also that the State Commission has also the regulatory powers.This authority of the State Commission is notwithstanding that the certification has been given by the Evaluation Committee/Procurer or that the Evaluation Committee and the Procurer have also confirmed that the bid quoted tariff is aligned to market price.
- 6.27** Further, the contention of the Appellant that the State Commission can only examine under Clause 4 of the Bidding Guidelines and not the application of Clause 5.15 is grossly misconceived. The Hon'ble Supreme Court in the Energy Watchdog matter (in para 19) has only referred to Clause 4 in particular on the two-part tariff. The principle laid down is that the State Commission is not a mere post office and can examine the compliance with the Guidelines, which also includes Clause 5.15.
- 6.28** Learned senior Counsel has also advanced argument that the bidding guidelines, as well as the bidding documents provide for the tariff to be rejected if not aligned to market prices, in view of

the fact that the tariff is passed on to the consumers. public and consumer interest being involved, the tariff discovered in the bidding process ought not to be higher than what is otherwise available in the market.

- 6.29** In the bidding process, there is no prudence check by the State Commission or any other authority on the costs and expenses considered. The State Commission has no power to vary the tariff or otherwise re-determined the tariff determined in the bidding process.
- 6.30** However, it does not result in a situation wherein the tariff as quoted in the bidding process should automatically be accepted. The purpose of the bidding process is to ensure competitive forces are at play to bring down the tariff. The tariff payable to the generator is a pass through in the consumer tariff, and therefore a higher tariff would directly affect consumer and public interest.
- 6.31** The contention of the Appellant that consumer interest is irrelevant is grossly misconceived. On the contrary, one of the primary objectives of the Bidding Guidelines itself is to protect consumer interest. In this regard, the Learned Senior Counsel has referred to the Competitive Bidding Guidelines, wherein under clause 4 of the Preamble provides "*Protect consumer interests by facilitating competitive conditions in procurement of electricity*". In addition to the above, the protection of consumer interest is also recognized by the Hon'ble Supreme Court in the case of **All India Power Engineers Federation v. Sasan Power Limited, (2017) 1 SCC 487**.

6.32 It is for this purpose that Clause 5.15 of the Bidding Guidelines and the Clause 3.5.12 of the Bidding Documents provide for a right to reject the bids, if the tariff quoted is not aligned to market prices. The State Commission has not decided the matter on the general notion of consumer interest, de-hors the bidding guidelines and bidding documents. On the other hand, the State Commission has decided the matter on the specific provisions of the Bidding Guidelines, the Bidding Documents and the power of the State Commission under Section 63 of the Electricity Act.

6.33 Further, the Learned Senior Counsel submitted that the contention of the Appellant, that either all bids can be rejected or all bids have to be accepted as being aligned to market prices is misconceived. There is also a rationale to the above contention of the Appellant. In a bid process, it could be that 4 bidders quote very competitive tariff, but one bidder to spoil the entire process quotes Rs. 15 per unit. If the contention of the Appellant is accepted, all bids, even those with competitive tariff has to be rejected. This will defeat the entire bidding process under Section 63.

6.34 The provision in Clause 5.15 is to be read as all such bids which are not aligned to market prices can be rejected. It does not mean that the tariff of bids which are aligned to market prices cannot be accepted at the same time.

6.35 The Learned Senior Counsel has submitted that the bid evaluation committee has correctly considered the tariff of the Appellant to be not aligned to prevalent market prices, and consequently, the State

Commission has also correctly considered the tariff of the appellant to be not aligned to prevalent market prices.

- 6.36** The Bid Evaluation Committee has in fact considered the tariff of the Appellant as against the tariff discovered from Case 1 bids from 2006 to 2012. The tariff in the year 2012 was Rs. 4.47/- per unit. Further, the tariff of the generating companies of the Rajasthan utilities were also compared. The tariff of the Appellant was found to be excessive to this as well.
- 6.37** The tariff from Section 63 bidding process in the years 2014, 2015, 2016 was also considered. The offers for supply of power to Rajasthan distribution licensees was also considered.
- 6.38** Even ignoring all other comparisons, even by the comparison of the tariff of the Appellant with the tariff of L-1, L-2 and L-3, the tariff of the Appellant is substantially higher. The tariff above Rs. 5 per unit was not accepted by the Procurers.
- 6.39** The requirement under the bidding guidelines is for the tariff to be aligned to market prices. Whether the tariff in the market is discovered in a bidding process or otherwise, the terms of the bidding process involved etc. are irrelevant. The requirement is that the tariff that is discovered in the bidding process should be aligned to the prices that are prevalent in the market, not that the tariff in the bidding process should be aligned to tariff discovered in other bid process based on the very same bidding documents and terms and conditions.

- 6.40** The learned Senior Counsel has submitted that the Appellant has not placed any material on record to show that the tariff quoted was actually aligned to market prices. Neither in the proceedings before the State Commission nor in the present proceedings before this Tribunal has the Appellant placed any material to show that the tariff was actually aligned to market prices.
- 6.41** Even the computations sought to be made by the Appellant before the State Commission to contend that its tariff was in fact lower than that of the other bidders was misleading. To support its contention that its tariff is actually lower, the Appellant had considered the tariff for 22 years with the first three years taken as zero. The discounting factor was however applied for the entire 25 years and thereby arriving at the artificially suppressed tariff of Rs.4.019. Either the tariff and the discounting factor was required to be taken for 22 years or taken for the entire 25 years. By the levelisation of the tariff for 22 years considering the discounting factor for the said 22 years, the levelised tariff of the Appellant works out to Rs. 5.653/- per unit. This is higher than the levelised tariff of about Rs. 5.30 for 25 years.
- 6.42** In addition to the above, the Learned Counsel has also submitted that the PPA dated 04.02.2019 does not give any vested right to the Appellant, as the tariff adoption is to be gone into independently and after the execution of the PPA , and the PPA itself expressly states that it is subject to adoption of tariff.
- 6.43** The PPA expressly states that the PPA is subject to the adoption of tariff by the State Commission. The PPA signed between the Appellant provides that the PPA is subject to adoption of tariff by

RERC. Further the PPA states *“in term of guidelines issued by Government of India the bid evaluation committee meeting dated 23.06.2018 held that the rates offered by the L-4 and L-5 bidders are not aligned to market complied before RERC. the decision of RERC shall form part of this clauses.”*

6.44 In the circumstances, it is incorrect on the part of the Appellant to rely on the PPA to claim any vested right in relation to adoption.

7. Learned Senior Counsel, Shri M.G Ramachandran appearing for the Respondent Discoms i.e. Respondent Nos. 3 to 5, has majorly accepted the contentions raised by Learned Senior Counsel for Respondent No. 2. However, Shri. Ramachandran has also submitted the written submission which are briefly considered as follows:

7.1 The status of the selection of L-1, L-2 and L-3 in the first round including the negotiation held with them for increase in the quantum of power, the decision by the Evaluation Committee etc. are stated in the earlier judgement and order dated 2.2.2018 passed by this Hon'ble Tribunal in Appeal Nos. 235 of 2015 and 191 of 2015. The relevant observations and findings in regard to the process adopted on the acceptance of the tariff of L-1, L-2 and L-3 contained in the above Order Dated 2.2.2018 are at paras 16.16 and 16.17.

7.2 In the said order it has been taken note of if the fact that RFP was in terms of the standard bidding documents and that the State Commission had approved the RFP. In Para 16.6 and 16.7, the Hon'ble Tribunal has considered the steps of evaluation of financial component of the bid to determine the levelised tariff and the consideration whether such levelised tariff is aligned to the

prevailing market prices and adoption of such tariff discovered through the Competitive Bidding Process.

- 7.3** The conclusion of the Hon'ble Tribunal is at Para 16.12. It has been recognised that RVPN can reject the bids of quoted Tariff if the same is not aligned with the market conditions. Further it has been held that the Evaluation Committee had declared the rate quoted by the Appellants therein {L-1 to L-3} are aligned with market rates. This finding of fact by this Tribunal is only restricted to L-2 and L-3 bidders, and the entire capacity of 1000 MW was exhausted with the L-1 to L-3 bidders. The Hon'ble Commission did not consider it necessary to procure from L-4 and L-5 and therefore the question of tariff does not arise.
- 7.4** At no point of time, the bid submitted at a price above quoted price of L-3 i.e. Rs. 4.892/kWh was considered to be aligned to market price. The difference in the price of L-3 at Rs 4.892/kWh and L-5 at Rs 5.30/kWh is about 40 Paise/kWh. This was considered to be excessively high for the Respondents to procure power from L-5.
- 7.5** There is nothing on record to show that the price of Rs 5.30 /kWh should be considered as aligned to market prices. On the other hand, the report of the Evaluation Committee dated 22.6.2018, pursuant to the Supreme Court direction on going into the issue of adoption of tariff, clearly show that the Appellant's bid at Rs 5.30/kWh is exorbitantly high and not aligned to market price. It is also wrong to claim that if any one or more bids are not aligned to market prices all the bids (even those aligned to market forces) are required to be abandoned/rejected. There is no rationale in this contention.

7.6 Further, with respect to the contention regarding the judgment/orders of the Hon'ble Supreme Court, the Learned Senior Counsel has made his submissions in line with the submission made by the Learned Senior Counsel for the Respondent No. 2.

8. **We have heard learned senior counsel appearing for the Appellant, learned counsel for the Respondent Commission, learned senior counsel for the Respondent No. 2, and the learned senior counsel for the Respondent Nos. 3 to 5/DISCOMS at considerable length of time and have gone through carefully their written submissions/arguments and also taken note of the relevant material available on records during the proceedings. On the basis of the pleadings and submissions available, the following principal issues emerge in the instant Appeal for our consideration:-**

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 Hon'ble Supreme Court?

ISSUE NO. 2: Whether there was a sufficient proof to show that the bid of the Appellant was market aligned?

ISSUE NO. 3: Whether the argument of Consumer interest be advanced by the Rajasthan Discoms in the facts of the present Appeal?

9. **Issue No.1:-**

9.1 To decide the issue on the rejection of tariff/ bid of the Appellant, it is relevant to extract the portion from the impugned order on the issue. The relevant extract is quoted as under:

“42. Commission examined in detail the recommendation and finding of the Bid Evaluation Committee.

43. Commission observes that BEC has compared the tariff quoted by the L-4 and L-5 with the levelized tariff discovered in Case-1 bid process for the period from FY 2006 to 2012 as prevalent tariff since the bids were quoted in the year 2013. BEC found that the tariff quoted by the L-4 and L-5 is higher than the levelized tariff of Rs.4.47/Kwh in 2012 by 15.06 &18.57% respectively.

44. BEC also looked into the Levelized tariff of various bidders received in the Kerala State for financial year 2014-15 and found that the levelized tariffs of L-4 & L-5 bidders are higher by 42.86 % &47.22 % vis à vis the lowest tariff and are higher by 19.88% &23.54% vis à vis highest tariff of bidders.

45. BEC when compared the tariff of L-4 and L-5 with the tariff received for power station to be setup on the basis of DBFO in Andhra Pradesh, it found that levelized tariffs of L-4 & L-5 bidders are higher by 21.58 % & 25.30 % vis à vis the lowest tariff and higher by 15.86% & 19.40% vis à vis highest tariff of various bidders.

46. BEC also recorded that the tariff approved by the Commission for coal fired thermal power stations situated in Rajasthan for FY 2017-18 is varying between Rs. 3.636 to Rs. 4.662. The levelized tariff of L-4 & L-5 bidders is higher by 41.44 % & 45.80 % vis à vis the lowest tariff of any of these units and higher by 10.37% & 13.73 % vis à vis highest tariff of any unit in Rajasthan.

47. Commission further observes that the BEC, while comparing the tariff in the present scenario also compared the tariff of L-4 and L-5 with the tariff of power exchange which shows that the tariff quoted by L-4 and L-5 is on higher side.

48. It is observed that BEC has compared the tariff with tariff arrived through various type of bids like Case-1 and Case-II bidding process, Long Term basis power stations set up on Design, Build, Finance and Operate basis and Tariff quoted in short term basis i.e. in power exchange. We are in agreement with the Petitioner that the mode of procurement is irrelevant for consideration of alignment of market prices as purpose of the bidding process is to reduce the tariff to the consumers. Therefore, the contention of the M/s SKS power that the comparison made by the BEC is unfair is not merit acceptance.

49. Commission is of the view that BEC has done detailed study to examine the tariff quoted by L-4 and L-5 with the prevailing market prices i.e. the year2012 and also current market prices

i.e. year 2015-16 and thus reached to conclusion that tariff of L-4 and L-5 are not market aligned and exorbitantly high.

50. Commission further observes that M/s SKS Power also could not produce any material on record to prove that the tariff quoted by it, is aligned with market prices through the results of other bids or prevalent market prices.

51. Regarding the contention of the M/s SKS Power that if tariff of the first 3 years is not to be taken into consideration, the effective levelized tariff of M/s SKS Power comes to Rs. 4.019/KWh which is much lower than the L-1 bidder in the bid, Commission observes that the M/s SKS Power, while calculating the tariff after applying the discounting factor, has considered the period of 25 years instead of 22 years. If tariff is calculated for 22 years than it has to be spread on the same period i.e. 22 years. Therefore, tariff quoted by M/s SKS Power i.e. Rs. 4.019 is erroneous and not acceptable.

52. M/s SKS Power also contended that as per the bidding guidelines, if all the bids are not aligned to the market prices then the entire bidding process must be cancelled.

53. In this regard, Commission observes that as per Section 13 (2) of the General Clauses Act, 1897, words in the singular may include the plural and vice versa. Therefore, to arrive at correct interpretation with true spirit of bidding guidelines, the words "all bids" may be read as "any bid" and the Clause 5.15 of the Bidding Guidelines should be read as "any bid may be rejected which is not aligned to the prevalent market price." Hence it is not necessary to cancel all bids, if one or more bids are not aligned to market prices.

54. Petitioner submitted that if tariff quoted by M/s SKS Power Generation Ltd. is adopted than it would result in additional financial burden of more than Rs. 1715 Crores on the consumers of the State as compared to the tariff of L-1.

55. In this regard, Commission observes that the Hon'ble Supreme Court in the case of All India Power Engineer Federation and Ors. Vs Sasan Power Ltd. & Ors (2017) 1 SCC 487 has settled that when electricity tariff gets affected than consumers interest comes in and public interest gets affected.

56. In Commission's view, if we adopt the tariff which is exorbitantly high and not market aligned then a consumer of electricity would have to pay substantially more by way of tariff.

57. In light of above discussions, Commission decides not to adopt the tariff quoted by L-4 and L-5 bidder.

58. Accordingly, both the petitions stand disposed of.”

- 9.2** It would thus appear that the Respondent Commission, on the recommendation of the BEC in its Minutes of Meeting dated 22.06.2018, has rejected to adopt the tariff of the Appellant, as the same was not market aligned. The first argument raised by the Appellant is that the Respondent Commission did not have the jurisdiction to re-evaluate the tariff of the Appellant, rather, could only adopt the tariff in terms of the law settled under Section 63 of the Electricity Act, 2003.
- 9.3** It has been further contended by the Appellant that the Hon’ble Supreme Court vide its judgment/ order dated 25.04.2018 has held that the Appellant is entitled to supply power to the Respondents, in terms of the originally offered amount i.e. 100 MW at Rs. 5.30 per unit, and the LOIs were modified, in terms of the said order. Further, the orders dated 20.09.2018, 19.11.2018, and 21.01.2019 passed by the Hon’ble Supreme Court were in line with the aforesaid judgment/ order dated 25.04.2018. The relevant para of the judgment/ order dated 25.04.2018 is quoted herein below:

“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 of 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.”

Further, in the said judgment/ order, the Hon’ble Supreme Court directed that the Respondent Commission may go on the issue of approval for adoption of tariff with regard to the L-4 i.e. the

Respondent No. 12 in the instant appeal, and L-5 i.e., the Appellant.

- 9.4** There is no dispute that the Hon'ble Supreme Court has entitled the Appellant to supply power to the Respondents under the bid issued by the Respondent No. 2, in terms of the originally offered quantum of 100 MW at the originally offered tariff of Rs. 5.30/- per unit, and it was further directed by the Hon'ble Supreme Court that the LOIs issued to L1 to L3, whereby the quantum of power was wrongfully additionally allocated to such L1 to L3 bidders, stand modified.

Therefore, the entire controversy arises on the issue as to whether in terms of the directions issued by the Hon'ble Supreme with regard to going into the issue of approval for adoption of tariff of the Appellant, would mean that the Respondent Commission could determine the tariff of the Appellant, by afresh evaluating the bid as if the said bid was made in the year 2018, and reject the Appellant's bid, in terms of the said fresh evaluation carried out by the BEC.

- 9.5** The Appellant has contended that as per the directions of the Hon'ble Supreme Court, there exists a mandatory procurement of 1000 MW (\pm 10%) of power, instead of 500 MW, which means that the Respondent Discoms have to procure 1000 MW (\pm 10%) in terms of the bid issued by the Respondent No. 2. Further, the said procurement can only be from the Respondent Nos. 9 to 11, who had already been issued LOIs, alongwith the Respondent No. 12 and the Appellant, who have been issued the LOI in terms of the directions of the Hon'ble Supreme Court. Without procuring power from the Appellant, the aforementioned mandate of the Hon'ble

Supreme Court to take 1000 MW (\pm 10% i.e. 906 MW) of power, shall stand vitiated. We observe that the Rajasthan Discoms cannot by-pass the said mandate by rejecting the Appellant.

9.6 The Respondents on the other hand have argued that the Hon'ble Supreme Court has specifically directed that the State Commission has to go into the issue of approval for adoption of tariff, and it cannot be contended by the Appellant that the State Commission has no power to go into the issue of approval for adoption of tariff, or that the State Commission has no discretion in the matter but to adopt the tariff.

9.7 Accordingly, it would be appropriate to first look into the provisions of Section 63 of the Electricity Act, 2003 which is quoted as under:

“Section 63. (Determination of tariff by bidding process):

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

9.8 A bare reading of the aforesaid provisions shows that when a case is instituted before a Regulatory Commission, under Section 63 of the Electricity Act, 2003, then it has to necessarily check whether there was transparency in the entire bidding process, and whether the bidding process was conducted in accordance with the guidelines issued by the Central Government.

9.9 With regard to the law under Section 63, the Appellant has relied upon the judgment of this Tribunal in **Appeal No. 106 of 2011, Vidharbha Industries Power Limited Vs. Maharashtra Electricity Regulatory Commission & Ors.**, wherein, this

Tribunal has discussed the scope of Section 63 of the Act, and held under Section 63, the State Commission has to merely verify the bid of the bid process has been done in a transparent manner and in accordance with the guidelines issued by the Central Government and if it is complied with, the State Commission shall give approval and adopt the tariff discovered in the bid process. Further, reliance has also been placed on the judgment of this Tribunal dated 02.02.2018 passed in **Appeal Nos. 235 of 2015 and 191 of 2015, M/s. D.B. Power Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors. and Lanco Power Ltd. Vs. Rajasthan Electricity Regulatory Commission & Ors.**, which is the previous round of litigation of the parties involved in the instant appeal. In the said judgment, the aforementioned law with regard to the jurisdiction of the State Commission under Section 63 was reaffirmed and held as follows:

“16.16.....

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

(a) To verify as to whether the tariff has been adopted through transparent bidding process;

(b) Whether the bidding process has been in accordance with the guidelines issued by the Central Government.

.....”

9.10 The issue with regard to the jurisdiction of the State Commission under Section 63 was also raised before the Hon’ble Supreme Court in Civil Appeal No. 3481/3482 of 2018, filed by the Respondent Nos. 3 to 5 herein. In this context, the ground raised

by the Respondent No. 3 to 5 before the Hon'ble Supreme Court is reproduced hereinbelow:

“C. FOR THAT the Appellate Tribunal has grossly erred in coming to the finding that Section 63 is a self-contained code. The Appellate Tribunal has ignored the decision of the Hon'ble Supreme Court in the case of Energy Watchdog vs Central Electricity Regulatory Commission & Ors. (2017) 14 SCC 80, wherein the specific contention that Section 63 is a self-contained code was specifically rejected and the Hon'ble Court held that the power to regulate cannot be excluded. The Appellate Tribunal has proceeded to rely on its previous decisions on the interpretation of Section 63 ignoring the specific decision of the Hon'ble Supreme Court holding to the contrary, though this was specifically cited before the Appellate Tribunal.”

However, the Hon'ble Supreme Court vide its judgment/ order dated 25.04.2018 upheld the finding given by this Tribunal in the aforesaid judgment dated 02.02.2018, and held that this Tribunal rightly confirmed that the Respondent Commission under Section 63 does not have the jurisdiction to reduce the procurement of power from 1000 MW to 500 MW. Accordingly, the Respondents cannot again raise the same argument before us, which has been rejected by the Hon'ble Supreme Court.

Further, time and again, the law under Section 63 has been settled in a way that the jurisdiction of the Regulatory Commission is very limited, and has to only confirm whether the bidding process conducted in a transparent manner, and whether the said bidding process was in accordance with the guidelines issued by the Central Government. The State Commission having a very limited role, cannot exceed its powers, as has been done in the present case.

- 9.11** The Respondents, while relying upon the Energy Watchdog case, have further contended that the State Commission is not a mere post office and also that the State Commission has Regulatory Powers. Accordingly, the Commission exercised such powers while passing the impugned order.
- 9.12** The Appellant on the other hand has argued that from the Energy Watchdog case (Supra), it is apparent that under Section 63, the regulatory commission, after satisfying itself as to the transparency of the bidding process, has to only further consider, or clarify, qua any issue pertaining to Clause 4 of the bidding guidelines. Apart from the same, a Regulatory Commission has to necessarily adopt the tariff discovered under Section 63 of the Act. The Appellant further contends that Clause 4 of the said guidelines, provides for the tariff structure, and can be considered by the regulatory commission at the stage of tariff adoption. All other parameters of the guidelines are not related to tariff, but are all procedural dealing with transparency. Once the Respondent Commission approved the tariffs of L-1 and L-2 (Respondent Nos. 9 and 10) bidders, and their power is already flowing, the same means that the bid process is transparent. Hence, according to the Appellant, recourse to any other parameter or provision, other than Clause 4 of the guidelines, is closed for the Commission.
- 9.13** We are in agreement with the argument of the Appellant, on the above issue of the powers of the Commission. Infact, the Hon'ble Supreme Court in the Energy Watchdog case (Supra) has held as follows:

“19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” tariff already determined under Section 63. Thirdly, such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.

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

tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.”

(underline supplied)

9.15 In view of the above observations, it is clear that the Hon’ble Supreme Court has held that a Regulatory Commission does not have to simply go by the exact reading of Section 63. As mentioned under Para 19 of the aforementioned judgment, the Respondent Commission, while adopting tariff under Section 63, has to only consider if the Clause 4 of the Central Govt. Bidding Competitive Guidelines, which provides for Tariff structure, are being complied with. Further, the Hon’ble Supreme Court, under Para 20 has held that the determination of tariff can only be with respect to the guidelines issued by the Central Government. Therefore, Section 63 confines the State Commission to the bidding guidelines, and cannot exercise its powers *de hors* such guidelines.

9.16 Now, coming to as aspect of the Clause 4 of the Bidding Guidelines, we find that the Tariff structure as provided under the said guidelines specifies the arrangement of tariff under a bidding

process, which both the procurer and the bidders have to take into consideration, while finalizing a tariff to be quoted under the said bid. The said clause further specifies as to how the two-part tariff, as rightly pointed out by the Respondents, has to be taken into consideration, the basis of payment of energy charges and capacity charges, the requisite Letters of Credit to be paid etc. However, the said clause does not anywhere give the power to the Commission to reject the tariff of a bidder. Therefore, with respect to the aforesaid clause of the Bidding Guidelines, a Regulatory Commission has to only check whether a Power Purchase Agreement, entered into between the procurer and the supplier, includes such conditions or not.

9.17 Therefore, in view of aforesaid analysis, we find no merit in the decision of the Respondent Commission to reject the bid of the Appellant, since the entire process with regard to the validity of the bid had already taken place. Further, the requisitioned capacity of 906 MW i.e., $\pm 10\%$ of 1000 MW was fulfilled, in terms of the judgment/ order dated 25.04.2018 passed by the Hon'ble Supreme Court. Hence, the Respondent Commission ought to have approved the adoption of tariff of the Appellant alongwith the terms of the PPA dated 04.02.2019. Accordingly, this issue is answered in favour of the Appellant.

10. Issue No. 2:-

10.1 In order to decide the issue as to whether the bid of the Appellant was market aligned, two elements need to be examined, first, if the bid of the Appellant was at all evaluated previously, and second, does the BEC and Respondent No. 2 has the right to reject any

bid in terms of the provisions of the Bidding Guidelines of the Central Government, and RfP.

10.2 The Appellant has submitted that pursuant to the submission of the bid of the Appellant, amongst other bidders, the BEC conducted meetings on 17.04.2013 and 22.04.2013, for evaluating the said bids. The Minutes of Meeting of the BEC clearly evidences that bid of the Appellant was extensively evaluated, along with the bid of Respondent Nos. 9 to 11, to whom the LOIs were initially issued. Subsequently, the BEC issued certificate(s) dated 04.06.2013 confirming to the aspects of transparency in the bidding process, as also the compliance of the bid process with the necessary bidding guidelines of the Central Government. It is relevant to note that similar certificate(s) were also issued by the Respondent Discoms. Thus, the requisites as mandated in the Guidelines under Section 63 of the Act were satisfied, and accordingly, the Appellant, through the process of aforesaid evaluation, was declared as L-5 bidder. The entire bid process and also the bid of the Appellant was transparent, in conformity with the bidding guidelines of the Central Government, and fulfilled the obligations of Section 63 of the Act. The Appellant further contended that the alignment of the levelized tariff to the market prices is not for an individual bidder but the same is a requirement for all the bids of the entire bidding process. It cannot be that the tariffs quoted by L-1 to L-3 are market aligned, while the tariff of the Appellant is not. Then the entire bids had to be cancelled as per Clause 3.5.12 of the RfP and a re-bid conducted. Therefore, the Respondents cannot at all raise any such contentions.

10.3 The Respondents in their counter have stated that the bid of the Appellant was never evaluated in the year 2013. It is only pursuant to the judgment/ order dated 25.04.2018, that the bid of the Appellant was evaluated. Hence, it cannot be contended that the Respondent Commission or the BEC or the Procurers are precluded from considering the tariff of the Appellant as to whether it was aligned to market prices.

10.4 In order to decide the issue, we need to first examine the contents of the Minutes of Meeting dated 17.04.2013 and 22.04.2013. The relevant extract of the MOM is quoted herein below:

“Minutes of the meeting of the Bid Evaluation Committee held on 17th and 22nd April, 2013 for evaluation of bids for Procurement of 1000 MW Power under Case-1 bidding guidelines of Gol.

Fourth and Fifth Meeting of the Bid Evaluation Committee (BEC) constituted vide order No. RVPN/AAO/Admn-Store/F. /D. 227 dated 24.09.2012 of the Secretary (Admn.) RVPN, Jaipur was convened on 17th April, 2013 and 22nd April 2013 in Room No. 329, Vidyut Bhawan, Jaipur to discuss the evaluation of financial RFP bids for Procurement of 1000 MW Power under Case-1 bidding guidelines of Gol opened on 04.04.2013.

The following members were present:

- 1. Shri S.K. Jain, Chief Engineer (NPPGR), RVPN, Jaipur.*
- 2. Shri N.K. Mathur, Chief Controller of Accounts, RVPN, Jaipur.*
- 3. Shri B.M. Bhamu, Chief Engineer (RDPPC), Jaipur.*
- 4. Shri P.C. Sharma, Chief Engineer (Commercial), JVVNL, Jaipur.*
- 5. Shri J.P. Sharma, Chief Engineer (PPF&C); RVUN, Jaipur.*
- 6. Shri Tarun Agarwal CA, Partner of M/s Shyam Lal Agrawal & Co. Jaipur*

Shri M.L. Gupta Suptdg. Engineer (NPP&R), Sh. Sudhir Jain, Executive Engineer (NPP&R) & Sh. Puneet Khandelwal of M/s

Deloitte Touche Tohmatsu India Private Limited were associated in the meeting. The bids opened are detailed in the table below:

Sr. No.	Bidder/Name	Capacity Offered (MW)
1	Jindal Power Limited	300
2	KSK Mahanadi Power Company Limited	475
3	SKS Power Generation (Chhattisgarh) Limited	100
4	Lanco Power Limited	300
(a)	Lanco Amarkantak Power Limited	100
(b)	Lanco Babandh Power Limited	100
(c)	Lanco Vidarbha Thermal Power Limited	100
5	PTC India Limited (which has bid from following developers)	906
(a)	Maruti Clean Coal and Power Limited	195
(b)	MB Power (Madhya Pradesh) Limited	200
(c)	DB Power Limited	311
(d)	Athena Chhattisgarh Power Limited	200
	Total	2081

Sh. Puneet Khandelwal explained the Financial Evaluation Observation Report. (Annexure-1) submitted by the Consultant in detail. The levelised tariff calculated by the Consultant has been discussed based on bid- evaluation model submitted to bidder as part of RFP pursuant to Clause 5.9 of RFP pursuant to Clause 5.9 of RFP and financial bid formats submitted by bidders on the bid deadline.

BEC considered the applicable injection point for financial bid evaluation and agreed to take injection point as per below which are in line with communication with PSOCO (Copy of letter from POSOCO annexed at Annexure-2), who are operator of NLDC and Nodal Agency for implementation of PoC charges:

<i>Bidder No.</i>	<i>Qualified Bidder Name</i>	<i>Applicable Injection Point /CERC Order dated 3rd April 2012</i>
1	Jindal Power Limited	Jindal Inj.
2	KSK Mahanadi Power Company Limited	Chhattisgarh Inj
3	SKS Power Generation (Chhattisgarh) Limited	Chhattisgarh Inj
6	Lanco Power Limited	
6 (A)	LancoAmarkantak Power Limited	LancoInj
6 (B)	LancoBabandh Power Limited	OdishaInj
6 (C)	LancoVidarbha Thermal Power Limited	Maharashtra Inj
7	PTC India Limited	
7 (A)	Developer 1: Maruti Clean Coal and Power Limited	Chhattisgarh Inj

7 (B)	Developer 2: MB Power (Madhya Pradesh) Limited	Madhya Pradesh Inj
7 (C)	Developer 3: DB Power Limited	Chhattisgarh Inj
7 (D)	Developer 2: Athena Chhattisgarh Power Limited	Chhattisgarh Inj

The BEC also considered the issue of applicable “Scenario 2” in cases where the bidder is using Domestic Coal from both linkage and captive mine (as mentioned in table above) for financial bid evaluation. BEC agreed to use “Scenario 2” for evaluation in case of following bidders as they have confirmed before opening of financial bids that their bids are based on “Scenario 2”

Qualified Bidder Name	Type of Fuel Used	Scenario for Bid Evaluation
Lanco Power Limited- LancoBabandh Power Limited	Domestic Linkage Coal + Domestic Captive Mine	Scenario 2 (Clarified from Bidder letter dated 28 th Dec 2012)
PTC India Limited – DB Power Limited	Domestic Linkage Coal + Domestic Captive Mine	Scenario 2 (Clarified from Bidder letter dated 2 nd Jan 2013)
PTC India Limited – Athena Chhattisgarh Power Limited	Domestic Linkage Coal + Domestic Captive Mine	Scenario 2 (Clarified from Bidder letter dated 2 nd Jan 2013)

The BEC also considered the issue of distance of coal source and decided to use the same for evaluation as follows:

- The coal distance mentioned in format 4.13 (part of non- financial bid) in case of Lanco Power Limited for financial bid evaluation.
- The coal distance of Linkage Coal to be taken for evaluation of financial bid of Lanco Babandh Power Limited as the same has been clarified by the bidder during non – financial bid process (before opening of financial bid).

Levelized tariff for qualified bidder using bid illustration provided to bidder pursuant to Format 5.9 of RFP

computed by the Consultant has been checked and order from lowest to highest levelized tariff is as follows:

<i>Rank</i>	<i>Qualified Bidder Name</i>	<i>Levelized Tariff (Rs./kWh)</i>	<i>Capacity Offered</i>	<i>Cumulative Capacity Offered</i>	<i>Average Cumulative Tariff (Rs./kWh)</i>
<i>1</i>	<i>2</i>	<i>3</i>	<i>4</i>	<i>5</i>	<i>6</i>
L-1	PTC- Maruti Clean Coal and Power Limited	4.517	195	195	4.517
L-2	PTC- DB Power Limited	4.811	311	506	4.698
L-3	LPL – Lanco Babandh Power Limited	4.943	100	606	4.738
L-4	PTC- Athena Chhattisgarh Power Limited	5.143	200	806	4.839
L-5	SKS Power Generation (Chhattisgarh) Limited	5.300	100	906	4.890
L-6	LPL-LancoVidarbha Thermal Power Limited	5.490	100	1006	4.949
L-7	PTC- MB Power (Madhya Pradesh) Limited	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Limited	5.572	475	1681	5.193
L-9	Jindal Power Limited	6.038	300	1981	5.321
L-10	LPL- LancoAmarkantak Power Limited	7.110	100	2081	5.407

- Column 6 is calculated based on Column 3, Column 5 and assuming 85% availability of power plant.

The meeting ended with vote of thanks to the Convenor.

.....”

10.5 A perusal of the above shows that the entire bid was infact evaluated by BEC in the year 2013, since the same is evidenced from the heading of the aforesaid MOM. Further, with respect to the argument of the Respondents that the bid of the Appellant was not evaluated, we find no proof in the MOM which could demonstrate that the Bid of only L-1 to L-3 was evaluated, and neither have the Respondents brought on record, any document which evidence the same. Further, BEC in its certificate dated 04.06.2013, and the consequent certificates of Respondent Nos. 3 to 5, it has been confirmed that the entire bidding process was transparent, and in conformity with the guidelines issued by the Central Government, under Section 63 of the Act.

10.6 Further, we have also examined the aspect of Clause 5.15 of the Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees dated 19.01.2005, issued by the Ministry of Power, Government of India, which is quoted herein below:

“5.15 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.”

10.7 The Respondent No. 2, in accordance with the aforesaid clause of the guidelines, incorporated Clause 3.5.12 in the RfP dated 28.05.2012 and the same is quoted herein below:

“3.5.12 The Procurer / Authorized Representative, in its own discretion, has the right to reject all Bids if the Quoted Tariff are not aligned to the prevailing market prices.”

10.8 We have examined the aforesaid clauses of the Guidelines and the RfP. It has been argued by the Respondents that the both BEC and the procurer, which is the Respondent No. 2 in the present case, have independent powers to reject the bid of the Appellant, in terms of what has been provided under the guidelines and the RfP. However, we are of the view that the same is not the immediate concern which needs to be looked upon. Irrespective of such independent powers, we need to consider whether, as per the above two clauses, did BEC or Respondent No. 2 had a right available with them to reject the bid of any bidder, or all the bidders who were evaluated in the bid.

10.9 As per the judgment of this Tribunal dated 02.02.2018, in Appeal Nos. 235 and 191 of 2015, which was the previous round of litigation between the parties herein, the said aspect was taken into consideration, and was held as follows:

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

10.10 We are in conformity with the previous view of this Tribunal that as per the mandate of the Bidding Guidelines, as well as, the RfP, that the alignment of tariff with the prevailing marked prices, is not

for an individual bidder, rather the same is mandatory requirement for all the bids under a bidding process. Neither the BEC, nor the Respondent No. 2 had the powers under the Guidelines and the RfP, to reject the bid of one of the bidder, the same means that if the tariff quoted by L-1 to L-3 bidders, are found to be market aligned, then the bid of the Appellant is also aligned to the prevailing market prices, in the year 2013.

10.11 Thereafter, the bid of the Appellant was re-evaluated on 22.06.2018, post the judgment/ order dated 25.04.2018 of the Hon'ble Supreme Court. In the said bid, the BEC has considered the levelized tariffs discovered under Case-1 bidding process, carried out during the period from 2006 to 2012. The same is quoted herein below:

“x. As per the report dated 12.04.2013 of the Consultant M/s Deloitte Limited, the weighted average levelized tariff discovered in Case-1 bid process for the period 2006-2012 is as follows:

<i>Year</i>	<i>2006</i>	<i>2007</i>	<i>2008</i>	<i>2009</i>	<i>2010</i>	<i>2011</i>	<i>2012</i>
<i>Levelized Tariff (Rs./kWh)</i>	<i>2.89</i>	<i>2.36</i>	<i>2.67</i>	<i>3.37</i>	<i>3.14</i>	<i>3.69</i>	<i>4.47</i>

10.12 A perusal of the above shows that in the year 2012, the weighted average levelized tariff discovered under Case-1 bid process was Rs. 4.47/ kWh. However, the tariff of the L-1 bidder, i.e. Respondent No. 9 is Rs. 4.517. Therefore, we are in agreement with the argument of the Appellant that as per the said evaluation, even the tariff of L-1 was not aligned to the prevailing market prices. Further, as contended by the Respondents, that after the negotiations, the difference in tariff of the Appellant and L-

3 was of 40 paise/ kWh, the same is not acceptable since the above evaluation conducted by BEC evidences that the difference between the tariff quoted by the L3 bidder, after negotiations, and the levelized tariff prevailing in the year 2012 i.e. Rs. 4.47/ kWh, is of 42.2 paise/ kWh, which is more than the difference of tariff between L-3 and the Appellant. Hence, we do not find any merit in the argument of the Respondents.

10.13 Therefore, since the bid of the Appellant was already evaluated, and the subsequent certificates were issued by the Respondents confirming the transparency of the bid, and finding the same in accordance with the Bidding Guidelines of the Central Government, and the subsequent judgments of the Hon'ble Supreme Court by which the Appellant was entitled to supply power. The Respondent Commission should have adopted the evaluated tariff of the Appellant, in accordance with Section 63, as per the PPA dated 04.02.2019. In fact, the issue of afresh re-evaluation of the bid of the Appellant (quoted in 2012-13) could not have been done once (in 2018) the Hon'ble Supreme Court passed its final order dated 25.04.2018 after considering all the aforesaid contentions. Accordingly, this issue is also answered in favour of the Appellant.

11. Issue No. 3:-

11.1 We have examined the submissions made by all the parties with respect to the issue of consumer interest, for rejection of tariff of the Appellant. There is no denying that protection of consumer interest is an important factor which needs to be taken into

consideration while evaluating the bid under a bidding process, however, the same cannot be the sole-criteria for rejection of a bid under a bidding process.

11.2 The issue of consumer interest was also raised before this Tribunal in the previous round of litigation between the parties, wherein this Tribunal, vide its judgment dated 02.02.2018, held as follows:

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

.....

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

11.3 Therefore, it is quite clear that the guidelines of the Central Government extensively cover the aspect of consumer interest. Even the Respondent No. 2 in its written submissions has relied upon the preamble of the aforesaid guidelines, as well as the judgment of the Hon'ble Supreme Court in **All India Power Engineers Federation vs Sasan Power Limited**, reported in **(2017) 1 SCC 487**, to focus upon the aspect of consumer interest.

However, as already decided by us in the previous issue, the bid of the Appellant was evaluated on 17.04.2013 and 22.04.2013, as evidenced from the Minutes of Meeting of the BEC, and thereafter, the BEC vide its certificate dated 04.06.2013 has confirmed that the bidding process was in conformity with the Central Government bidding guidelines, which covers the aspect of Consumer interest. Therefore, we find that the bid of the Appellant has also been considered by BEC with respect to Consumer's interest. Moreover, the above judgment is not at all relevant to the facts and circumstances of the present case.

11.4 Further, the argument by the Respondent Discoms with respect to the consumer interest, was also raised by them before the Hon'ble Supreme Court in their Civil Appeal No 3481/ 3482 of 2018. In this regard, reference is made to the following ground raised by the Respondent Nos. 3 to 5 in their Civil Appeal:

“D. FOR THAT the Appellate Tribunal has failed to appreciate that the purpose for approval of the PPA by the State Commission is that before vested rights get created and the PPA becomes valid and binding. the State Commission is required to consider whether the power is required, whether there is demand in the State, whether burden is to be placed on the consumers etc. Only upon the satisfaction of the State Commission to such factors as considered necessary is the approval under Section 86(1)(b) granted and thereafter the PPA

becomes binding and enforceable contract. The Appellate Tribunal has itself in previous decisions held that without approval of the PPA under Section 86(1)(b), the PPA does not become valid and binding.”

The Hon'ble Supreme Court, thereafter, passed its order dated 25.04.2018 and held that the Appellant is entitled to supply power to the Respondent Discoms, and all the LOIs were also modified. This clearly shows that even the Hon'ble Supreme Court had taken into consideration the interest of consumers, and consequently passed the aforesaid order. Hence, we are of the view that the Respondents are precluded from raising the same argument in the present Appeal, when the same stands considered by the Hon'ble Supreme Court in passing the judgment/order. Accordingly, this issue is decided against the Respondents.

12. Summary of our findings:

- 12.1** In view of the discussions and reasoning mentioned hereinabove, we hold that in terms of the categorical directions rendered by the Hon'ble Supreme Court in its judgment/order dated 25.04.2018, the Respondent Commission ought to have adopted the tariff quoted and evaluated under Section 63 of the Act instead of determination of tariff.
- 12.2** The issue with regard to the bid of the Appellant being aligned to the prevailing market prices, we hold that the bid of the Appellant was evaluated in the year 2013, as evidenced from the Minutes of Meeting dated 17.04.2013 and 22.04.2013, wherein the bid of the Appellant was evaluated amongst the other bidders, including L-1 to L-3, who were originally issued with the LOIs. Further, as per Clause 5.15 of the Bidding Guidelines and Clause 3.5.12, the

Respondent No. 2 had the right to reject all the bidders, and not a single bidder, if the tariff quoted was not market aligned. Further, since Appellant is the L-5 bidder, and has been held to be entitled to supply power in terms of the order dated 25.04.2018 of the Hon'ble Supreme Court and PPA dated 04.02.2019 was executed as per the Hon'ble Supreme Court Order dated 21.01.2019, the Respondent Commission was required to adopt the tariff of the Appellant without raising any question as to whether the bid of the Appellant was market aligned.

- 12.3** With respect to the issue of Consumer interest, we hold that the said issue cannot be again raised at this stage when the same has been dealt in detail earlier by this Tribunal and also considered by the Hon'ble Supreme Court before passing the order dated 25.04.2018.
- 12.4** Coming on to the PPA dated 04.02.2019, Schedule 8 of the said PPA which specifies that *"in terms of guidelines, issued by Government of India, the Bid Evaluation Committee meeting dated 22.06.2018 held that the rates offered by the L-4 & L-5 bidders are not market complied before RERC, the decision of RERC shall form part of this Clause"*, shall not be applicable, in view of our findings stated in above mentioned paras
- 12.5** In view of the above, the letter date 08.03.2019 issued by the Respondent No. 3, whereby the PPA dated 04.02.2019 was terminated, is hereby quashed. Consequently, the PPA stands revived. Further, the Appellant shall furnish the requisite Bank Guarantees.

ORDER

For the forgoing reasons, as stated supra, we find merits in Appeal No. 224 of 2019, and accordingly, it is allowed. The impugned order dated 26.02.2019 passed by Rajasthan Electricity Regulatory Commission in Petition Nos. RERC/431/13 and RERC/1388/18 is set aside, in accordance with our findings and directions set out in Para 12.1 to 12.5 above.

Accordingly, the Tariff of the Appellant, as offered in its bid shall be adopted. The parties are hereby directed to revive and implement the PPA dated 04.02.2019, as expeditiously as possible, but not later than two months from today.

In view of the disposal of the Appeal, the relief sought in the IA No. 1104 of 2019 does not survive for consideration and accordingly stands disposed of.

No order as to costs.

Pronounced in the Open Court on this **03rd day of February, 2020.**

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~

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