

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

APPEAL NO. 22 OF 2016
AND
IA NOS. 55, 57 & 115 OF 2016

Dated: 18th July, 2018

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

In the matter of:

SunE Solar B.V.,
10th Floor, Menon Eternity
165 (Old No# 10)
St. Mary's Road, Alwarpet
Chennai (T.N.) – 600 018

.... Appellant

Versus

1. Delhi Electricity Regulatory
Commission (DERC)
Viniyamak Bhavan, C-Block
Shivalik, Malviya Nagar
New Delhi – 110 017

.... Respondent No.1

2. BSES Rajdhani Power Limited (BRPL)
BSES Bhawan, Nehru Place
New Delhi – 110 019

.... Respondent No.2

3. BSES Yamuna Power Limited (BYPL)
Shakti Kiran Building
Karkardooma
New Delhi – 110 032

.... Respondent No.3

Counsel for the Appellant(s) : Mr. Sanjay Sen, Sr. Adv.
Mr. Aditya K. Singh

Counsel for the Respondent(s) : Mr. Nikhil Nayyar
Mr. Dhananjay Baijal
Mr. N. Sai Vinod for R-1

Mr. Buddy A. Ranganadhan
Mr. Hasan Murtaza
Ms. Malavika Prasad
Ms. Anchal Arora
Ms. Varaa Masood for R-2 & R- 3

JUDGMENT

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

1. The SunE Solar B.V. (hereinafter referred to as the “**Appellant**”) being aggrieved filed this instant Appeal under Section 111 of the Electricity Act, 2003 (hereinafter referred to as the “**Act**”) against the order dated 29.12.2015 (“**Impugned Order**”) passed by Delhi Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in Petition No. 57 of 2015 wherein the State Commission has allowed the Respondent Nos.2 and 3 to withdraw the said petition and permitting them to carry out a reverse auction process for the procurement of renewable power.
2. The Appellant i.e. SunE Solar B.V. is a company incorporated under the laws of Netherlands and is a part of the Sun Edison group of companies engaged in the business of building and operating power

plants, including grid connected utility scale power projects worldwide.

3. The Respondent No. 1 i.e. Delhi Electricity Regulatory Commission is the Electricity Regulatory Commission in the National Capital Territory of Delhi discharging functions under the provisions of the Act.
4. The Respondent No. 2 i.e. BRPL and Respondent No. 3 i.e. BYPL are the Distribution Licensees and distribute power to Central and Eastern areas of the National Capital Territory (NCT) of Delhi respectively.

5. Brief facts of the instant Appeal are as follows:

- a) The Respondent Nos. 2 & 3 in 2013 invited bids for the procurement of power through case 1 re-bidding procedure and after discovery of lowest tariff applied for approval of the State Commission under Section 63 of the Act in the form of Petition Nos. 54/2013 and 55/2013. However, the Respondent Nos. 2 & 3 have withdrawn the said petitions on various grounds including downward revision in generic levellised Renewable Energy Tariff by Central Electricity Regulatory Commission (CERC). The State Commission allowed withdrawal of the said petitions vide its orders dated 25.09.2014.
- b) On 18.11.2014, the Respondent No. 2, again issued Request for Proposal (“**RFP**”) for procurement of long term power from Renewable Energy (RE) power projects under Case 1 bidding process under Section 63 of the Act (“**Case 1 Bidding**”) for

meeting the Renewal Purchase Obligations (RPO) of the Respondent Nos. 2 & 3.

- c) The bids under RFP were submitted on 19.1.2015 wherein the Appellant also submitted its bid. On 1.7.2015 after evaluating all bids the Appellant and other three other bidders were declared as successful bidders. The Appellant was issued amended Letter of Intent (“**LOI**”) for procurement of power, subject to the following conditions of grant of approval & adoption of Tariff by the State Commission, adherence to and fulfilment of the terms and conditions specified in RFP/PPA documents by the bidder and receipt of unconditional acceptance of LOI by the Appellant within 7 days of the issuance of the LOI. The Appellant had submitted unconditional acceptance to LOI with seven days, as required.

- d) The Respondent Nos. 2 & 3 filed Petition No. 57 of 2015 (“**the Petition**”) in terms of LOI and under Section 63 of the Act before the State Commission for adoption of tariff discovered in Case 1 Bidding and approval to sign the Power Purchase Agreement (PPA) with the Appellant.

- e) The Respondent Nos. 2 & 3 vide letter dated 6.11.2015 submitted before the State Commission requesting to withdraw the Petition and to initiate fresh tender process for procurement of RE power through reverse bidding process.

- f) The Respondent No. 2 issued new RFP dated 04.12.2015 for procurement of power from RE power projects on long term basis for fulfilling the RPO requirement of Respondent Nos. 2 & 3.
- g) The Appellant on 28.12.2015, sent a letter to the Respondent No. 2 with a copy to the State Commission representing that the Petition should not be withdrawn.
- h) The State Commission vide Impugned Order dated 29.12.2015, allowed the withdrawal of the Petition and allowing reverse bidding process for procurement of RE power by the Respondent Nos. 2 & 3. The Respondent No. 2 vide letter dated 12.01.2016, cancelled the LOI citing subsequent developments.
- i) Being aggrieved by the findings of the State Commission in the Impugned Order, the Appellant has preferred the present Appeal before this Tribunal.

6. Questions of Law:

The Appellant has raised the following questions of law in the present Appeal which are as follows:

- a) Whether the Impugned Order, based on extraneous considerations and without following the principle of natural justice (i.e. without representation of the aggrieved persons including the Appellant) and in clear violation of the Act could have been passed by the State Commission?

- b) Whether the action of Respondent Nos. 2 & 3 of withdrawal of the Petition was right in light of the fact that the Respondent Nos. 2 & 3 had filed the Petition for approval of the Tariff after completion of Case 1 Competitive Bid Process and issuance of LOI to successful bidders including the Appellant?
- c) Whether the State Commission has any discretion in allowing withdrawal of a petition for approval of tariff filed under Section 63 of the Act?
7. We have heard the learned senior counsel appearing for the Appellant and the learned counsel appearing for the Respondents at considerable length of time and also carefully gone through the written submissions and submissions put forth during the hearings. Gist of the same is discussed hereunder.
8. The learned senior counsel Shri Sanjay Sen appearing for the Appellant submitted the following submissions for our consideration on the issues raised in the instant Appeal as follows:-
- a) The State Commission has not considered the Appellant's letter dated 28.12.2015 and the statutory mandate under Section 63 of the Act while allowing withdrawal of the Petition. Under Section 63 of the Act, the State Commission is required only to adopt the tariff so discovered under competitive bidding and cannot issue directions which negate the bidding process after the process has been concluded. The State Commission has erroneously relied on the contention of the Respondent Nos. 2 & 3 regarding significant reduction in cost of solar power ignoring the fact that

the Petition was filed for adoption of tariff after completion of Case 1 Bidding in compliance to applicable laws and regulations and observation of evaluation committee that tariff was aligned with the prevalent market price.

- b) The State Commission has violated the principle of natural justice by passing the Impugned Order without hearing the Appellant and decided the matter in an arbitrary manner without adhering to the well-settled law. The State Commission has to ensure transparency while exercising its power and discharging its functions under the Act. The State Commission has passed the Impugned Order without dealing any issue and without giving any valid reasons.
- c) The State Commission in the Impugned Order has erred by solely relying upon the phrase "consumer's interest" by stating that there has been significant reduction in the cost of solar power, which will help in making solar power competitive with power from conventional sources and will enable the cost of renewable power procured by Respondent Nos. 2 & 3 to come down significantly in line with the emerging market trends, thus favorably impacting consumer tariff. This contention of the State Commission is misconceived as the consumer's interest alone cannot be the sole criteria for competitive bidding under Section 63 of the Act. If the consumer's interest alone is taken as the criteria, then Section 61 of the Act would become redundant which states that the Appropriate Commission shall while determining the tariff, be guided by various factors including the factors which would encourage competition, promote generation

of electricity from renewable energy sources and the generation, transmission, distribution and supply of electricity are conducted on commercial principle. The State Commission has also not made any effort to compare the prices claimed by Respondent Nos. 2 & 3 as discovered in Case 1 Bidding. The State Commission has the obligation in terms of the Act, National Electricity Policy (NEP), National Tariff Policy (NTP) to promote generation from renewable sources by way of incentivizing it. Section 86 (1) (e) of the Act sets out promotion of generation of electricity from renewable source of energy as one of the ongoing functions of the State Commission.

- d) Post issuance of LOI and filing of the Petition before the State Commission, the Appellant has a right to supply renewable energy to the Respondent Nos. 2 & 3 subject to approval of the State Commission. The Appellant has also invested huge amount of money in activities for ensuring its compliance of delivery of committed capacity in the bid.
- e) The State Commission ought to have considered the Petition on merits by listing the matter. The State Commission either ought to have passed a final Order in the Petition under Section 63 of the Act deciding the issue or ought to have passed appropriate orders after verifying as to whether the said tariff had been determined through transparent process of bidding and in accordance with the guidelines issued by the Central Government and thereafter directed the Respondents 2 & 3 to execute the PPA.

- f) The Clause 3.5.3 and 3.5.8 of the RFP provide issuance of LOI to the bidder quoting the lowest levelized tariff. The only exception available to the Respondent Nos. 2 & 3 that they can reject all the bids, if the quoted tariff is not aligned to prevailing market prices. The Respondent Nos. 2 & 3 after having sought adoption of tariff by the State Commission, were obliged to procure power from the successful bidder. Having not exercised that power under clause 3.5.12 of the RFP and having exhausted the right of rejection of all the bids under the RFP, the said power or right cannot now be exercised after the said stage is over. The said stage had crossed when the bid Evaluation Committee found Appellant's bid a successful bid which is aligned to the market price, and when the Respondent Nos. 2 & 3 accepted the said recommendation of the Committee and filed the Petition on 15.07. 2015 seeking adoption of tariff under Section 63 of the Act.
- g) The Respondent Nos. 2 & 3 have made wrong statement before this Tribunal regarding fulfilment of RPO. This is reflected in an Affidavit filed by the Respondent Nos. 2 & 3 on 21.11.2016 in response to the order dated 7.11.2016 of this Tribunal.
- h) On the issue of winding of the Appellant Company, this Tribunal on 7.11.2016 directed the Appellant to file an Affidavit. The Appellant vide affidavit dated 19.12.2016 has clarified that Sun E Solar is not a shareholder of the Company, SunE Solar Inc. has merely filed application under chapter 11 proceedings which is akin to debt restructuring mechanism and it will have no effect on

the Appellant and Sun E Solar Inc. has also emerged from Chapter 11 proceedings.

- i) The Appellant group company was also a bidder for supply of power to another distribution licensee in the State of Delhi i.e. Tata Power Delhi Distribution Ltd. The State Commission vide order dated 13.4.2015 has approved the tariff of Rs. 6.25/kWh and PPA of the Appellant group company. The tariff was similar to the tariff in the present case. The Appellant group company after such adoption of tariff is now supplying power to Tata Power Delhi Distribution Ltd. after negotiation.
- j) The learned senior counsel has made the following legal propositions for our consideration which are as follows:
 - i. The grant of LOI and unconditional acceptance thereto, gives rise to a binding contractual arrangement and it is not permissible for the Respondent Nos. 2 & 3 to withdraw the Petition before the decision of the State Commission in the Petition. In this context, reference has been made to the judgment of this Tribunal in case of Adani Power Limited v. Gujarat Electricity Regulatory Commission and Ors. in Appeal No. 184 of 2010.
 - ii. The State Commission's jurisdiction under section 63 is limited to adoption of tariff and approval of PPA. The State Commission could not allow suo-motu withdrawal of the Petition more so after declaration of successful bidder and issuance/ acceptance of LOI.

- iii. The Appellant had a vested right for execution of PPA and development of the project. Upon issuance of LOI and acceptance thereto, the Appellant has changed its position by making substantial investments in the project in the form of obtaining land etc. The State Commission had a legal obligation to issue notices to the Appellant and other similarly placed bidder(s) before permitting the withdrawal of the Petition. The order of the Commission violates the principles of natural justice.
 - iv. The Appellant counsel has placed reliance on the judgement of this Tribunal in case of DB Power Ltd. v. Rajasthan Electricity Regulatory Commission in Appeal No. 235 of 2015. The said judgment has been substantially upheld by the Hon'ble Supreme Court in its order dated 25.04.2018(SKS Power Generation Chhattisgarh Limited Vs DB Power Limited &Ors. (Civil Appeal No. 2502-2503 of 2018). The principle settled in the said judgment squarely applies to the present facts of the case.
 - v. The Appellant has also relied on the judgement of this Tribunal in the case of LancoKondapalli Power Private Limited Vs Haryana Electricity Regulatory Commission and Anr. in Appeal No. 156 of 2009 wherein it has been held that an LOI is in the nature of a contract and as such, a party to the said LOI cannot be allowed to wriggle out of its obligations there under.
- k) The State Commission's statutory jurisdiction on matters of tariff is not similar to a jurisdiction of a Civil Court in a *simpliciter*lis.

The question of a *dominus litus* having the ability to withdraw a Pleint or an Application before a Civil Court is completely different from withdrawal of a petition for adoption of tariff/ approval of PPA under the Act. The State Commission to allow withdrawal of the Petition after issuance of LOI constitutes abdication of its Regulatory function. The power to regulate does not permit the Commission to act in an arbitrary manner.

- l) At the Appeal stage, the Respondents are trying to bring new facts by supplying new reasons for the abrogation of the bidding process, which is not permissible. The same has been held by the Hon'ble Supreme Court of India in case of M/s. Modern Insulators Ltd. Vs. The Oriental Insurance Co. Ltd. in Civil Appeal No. 6895 of 1997. The same has been observed by the Hon'ble Supreme Court of India in case of Mohinder Singh Gill and Anr.v. The Chief Election Commissioner, New Delhi and Ors. (1978) 1 SCC 405.

- m) The RFP provides right to the Respondent Nos. 2 & 3 to terminate post issuance of LOI only for the reasons mentioned in Clause 3.5.11. Clause 2.2.8 of the RFP stipulates incorporation of the Project Company, which was incorporated by the Appellant and even it got registered this project company with Rajasthan Renewable Energy Corporation for supplying of the electricity to the Respondent Nos. 2 & 3.

- n) The Respondent Nos. 2 & 3 never exercised their right to termination on the ground for non-submission of the Contract Performance Guarantee (CPG) and have also not raised this

plea in the reply to this Appeal. Therefore, it can be safely assumed that Parties placing reliance on Clause 2.2.9 (which allows extension of the dates for submission of RFP and signing of the PPA) agreed for extension. Had it not been the case, the Respondent Nos. 2 & 3 in the letter dated 12.1.2016 informing termination of the LOI would have relied on para 3.5.11 of the RFP (which allows for the termination on the grounds mentioned in Clause 2.2.8 and Clause 2.2.9). In the said letter, the Respondent Nos. 2 & 3 have relied on Clause 3.15 of the RFP which will not be available post selection of the successful bidder and submission of the bid for tariff adoption by the Appropriate Commission. On this issue the Appellant has relied on the judgement of this Tribunal in case of Essar Power Limited v. UPERC & Ors. in Appeal No. 82 of 2011 wherein it has been held in identical matter placing reliance on the bid document that procurer has foregone its right to terminate the rights of successful bidder post filing petition with the appropriate commission and even right to terminate on the basis of the market condition has been foreclosed post issuance of the report of the evaluation committee.

- o) The Appellant is also claiming to supply power because in terms of Clause 2.1.2.4 of RFP it had not tied up with any other procurer for supplying of the power from the same source. According to the Appellant, it can be safely assumed that post selection of the Successful Bidder and issue of LOI, it has right to supply electricity.

p) The State Commission had entertained the Petition and passed Impugned order after giving its consideration without giving any opportunity to the Appellant. The Petition was numbered as 57 of 2015 and as per Regulation 15 of the Delhi Electricity Regulatory Commission Comprehensive (Conduct of Business) Regulations, 2001 the petition can be numbered only after removal of the defects. The Impugned Order does not refer to any defect in the Petition which has been now submitted by the State Commission. The judgment quoted by the State Commission in case of Ananthesh Bhakta v. Nayana S. Bhakta 2017 (5) SCC 185 at para 17 and 18 of the said judgment defines the word entertain as “to give judicial consideration” or “bear in mind” or “consideration” etc.

q) The Appellant counsel has submitted that the Judgment of the Hon’ble Supreme Court in case of Rishi Kiran Logistic Private Limited v. Board of Trustees of Kandla Port Trust and Ors.(2015) 13 SCC 233 is limited for the cases of judicial review (Section 226) regarding concluded contract and is different from the present case.

9. Mr. Nikhil Nayyar, learned counsel appearing for the State Commission submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

a) The LOI issued by the Respondent Nos. 2 & 3 was conditional wherein one condition stated was that LOI was to take effect upon grant of approval and adoption of tariff by the State

Commission and additional conditions, if any imposed by the State Commission and adherence to the conditions specified in the RFP and PPA. The parties have also not executed the PPA for supply of power. Accordingly, it can't be concluded that there is a concluded contract between the parties. The judgement of Hon'ble Supreme Court in case of Rishi Kiran Logistics Pvt. Ltd. v. Board of Trustees of Kandla Port Trust (2015) 13 SCC 233) has been relied on the issue of LOI being a concluded contract or not.

- b) During the pendency of the Petition, the Respondent Nos. 2 & 3 vide letter dated 6.11.2015 before the State Commission sought permission for withdrawal of the Petition. The Petition was accompanied by Interlocutory Application (IA) No. 78 of 2015 seeking exemption from depositing the requisite fee, which was heard and the staff of the State Commission was directed to examine the issue in the said IA. The said IA was listed for hearing on 17.11.2015 which was declared holiday by Govt. of NCT of Delhi. In view of the same, the State Commission is yet to entertain the Petition for adoption of tariff.
- c) The Petition filed by the Respondent Nos. 2 & 3 was defective to the effect that the fee as per the DERC Comprehensive (Conduct of Business) Regulations, 2001 was not deposited and the said IA was yet to be adjudicated. Accordingly, the Petition has not been entertained by the State Commission.
- d) No vested rights accrue to the Appellant on the basis of LOI and the same does not reveal any justifiable cause to be heard at the

stage of admission/ withdrawal. The disputes between the parties on the contractual disputes/ obligations or determination of vested rights is not under the adjudicatory powers of the State Commission under Section 63 of the Act nor the same has been contemplated in the MNRE Guidelines. The State Commission's role is limited to examine disputes related to tariff. In the present case there was never an occasion to examine the merits of the Petition by the State Commission. As per MNRE guidelines, the remedy for dispute lies in the form of arbitration between the parties.

- e) The prayer of the Appellant to initiate the approval process of tariff in Case 1 Bidding is not maintainable. On this issue, the State Commission has relied on the judgement of the Hon'ble Supreme Court in case of Energy Watchdog v. CERC (2017) 14 SCC 80 and this Tribunal's judgement in case of DB Power Ltd. v. RERC in Appeal No. 235 & 191 of 2015. According to the said judgements when the State Commission is satisfied, the process of adoption of tariff under Section 63 of the Act can begin. As per the MNRE Guidelines the Respondent Nos. 2 & 3 were required to submit signed PPA along with other documents.

- f) The reliance of the learned counsel for the Appellant placed on the judgement of this Tribunal in case of DB Power Ltd. v. RERC is distinguished as the said judgement was in relation to change in procured capacity by the procurer. Similarly the judgement in case of LancoKondapalli Power Pvt. Ltd. v. HERC relied by the Appellant has no application in present case as the same is not

related to Section 63 of the Act and also the LOI issued therein does not contain any conditions as in the present case.

- g) The State Commission cannot determine the tariff forcibly nor can it prevent the Distribution Licensee from withdrawing the tariff petition. The Impugned Order is in accordance with the regulations and legal framework.
 - h) The Appellant has not made any representation before the State Commission on the issue meeting of RPO by the Respondent Nos. 2 & 3 and the same cannot be raised by it for the first time before this Tribunal.
 - i) The letter dated 28.12.2015 cited by the Appellant was received at the State Commission on 30.12.2015 when the Impugned Order was already passed. However, the letter was not in the form of application and was merely marked as a copy to the State Commission while it was addressed to the Respondent No. 2 requesting not to withdraw the Petition.
 - j) Further the learned counsel appearing for the State Commission vehemently submitted that the Order impugned passed by the State Commission is in accordance with law and there is neither error nor legal infirmity in the Impugned Order. Therefore, interference of this Tribunal does not call for.
10. The learned counsel Mr. Buddy A. Ranganadhan appearing for the Respondent Nos. 2 & 3 submitted the following submissions for our consideration on the issues raised in the instant Appeal are as follows:-

- a) As per the scheme of the Act, the Appellant cannot claim any vested right to sell power to the Respondent Nos. 2 & 3 only on issuance of LOI. The Appellant being aware of letter dated 6.11.2015 regarding withdrawal of the Petition has chosen not to represent before the State Commission in the proceedings leading to the Impugned Order. The Appellant is also not barred from participating in any future bidding process conducted by the Respondent No. 2. The question of violation of Article 14 of the Constitution of India does not arise.
- b) It is well settled principles of law that contract is a commercial transaction and evaluation & awarding of contracts are essentially commercial functions. In such cases, the principle of natural justice stay at a distance. The judgement of the Hon'ble Supreme Court in case of Siemens Public Communication Pvt. Ltd. v. Union of India AIR 2009 SC 1204 has been relied. In the present case, withdrawal of Case I Biding and cancellation of LOI has been exercised in public interest at large. In fact, the whole bidding process has been postponed.
- c) There is no arbitrariness in the present case. The right to choose cannot be considered as arbitrary power and as held in the judgement of Hon'ble Supreme Court in case of Tata Cellular v. Union of India AIR 1996 SC 11. In the present case no other party has been chosen by the Respondent No. 2 & 3. Further, it has been held in case of Lotus Constructions v. Govt. of AP AIR 1991 AP 200 that a letter of communication of acceptance of tender is not enough unless the same is followed

by an agreement. Accordingly, in absence of any agreement no concluded contract could be said to have come into existence.

- d) The principle of promissory estoppel has no application in the present case and the Respondent No. 2 & 3 cannot be compelled to enter into any contract with the Appellant.
- e) The LOI issued was subject to grant of approval by the State Commission and once the Petition was allowed to be withdrawn by the State Commission there was no adoption of tariff and the Appellant cannot claim its right to supply power. LOI is not a concluded contract. The judgement of Hon'ble Supreme Court in case of Rishi Kiran Logistic Pvt. Ltd. v. Board of Trustees of Kandla Port & Ors. has been relied in this regard.
- f) In view of the Respondent Nos. 2 & 3 being dominus litis, are entitled to have dominion over the Petition before the State Commission and no one else has the right to insist for prosecution of the Petition. Accordingly, the Impugned Order cannot be challenged by the Appellant. On this issue the Respondent Nos. 2 & 3 has relied on the judgement of Hon'ble Supreme Court in case of Shaik Hussain & Sons v. MG Kannaiah & Anr. 1981 SC 1725 and judgement of Punjab & Haryana High Court in case of Satish Bhardwaj v. Dhani Ram ILR 1999 (2) P & H 45.
- g) The Appellant has not filed for any claim or prayer before the State Commission which it could agitate in the present Appeal. If the Appellant has a remedy in law then it was for the Appellant to institute a substantive original proceeding before a

court or forum of original jurisdiction. The present Appeal could not be utilised to institute an original claim or prayer.

- h) The Respondent Nos. 2 & 3 had to cancel the LOI as the tariff quoted by the Appellant was not aligned to the market rates and a fresh reverse auction bidding process would have furthered the public interest with the objective of procuring RE power at lower rates.
- i) The action of the Respondent Nos. 2 & 3 is in accordance with the law and bid documents. According to the RFP issued by the Respondent No. 2, the RFP was subject to the approval of the State Commission and the Respondent No. 2 had reserved the right to cancel or modify the process without assigning any reason and without any liability. Further, as per the Clause 2.5 of the RFP the Respondent No. 2 has the right to annul the bid process or take any such action as may be deemed fit if LOI is cancelled for any reason. Accordingly, the Appellant was aware that the Respondent No. 2 reserved the right to cancel the LOI for any reason and annul the bid process. The withdrawal of the Petition and the Impugned Order was in consumer interest by way of lower tariff and accordingly the LOI was cancelled.
- j) The Respondent No. 2 reserves the right to reject the bids without assigning any reasons and without incurring any liability on any account in terms of Clause 2.15 of the RFP.
- k) The Respondent Nos. 2 & 3 has also referred to various other clauses of the RFP regarding bidding process, definition of RFP

Document & Seller, Scope, Qualification Requirements, execution of RFP Documents, time schedule for bid process etc. As per the bid documents the bid process although not defined is complete only when the PPA is signed.

- l) LOI was also subject to the Appellant fulfilling other terms and conditions of the RFP like submission of CPG within a specified time limit after the issuance of the LOI by the Respondent Nos. 2 & 3. The Appellant has failed to do the same. Accordingly, the LOI had evaporated in absence of fulfilment of the conditions of the RFP by the Appellant.
- m) The Respondent Nos. 2 & 3 are not avoiding their RPO obligations but they are trying to procure RE power at cheaper cost to the benefit of the consumers. Further, as per Clause 2.1 of the RFP the Appellant is responsible for all costs associated with the bid and the Respondent No. 2 & 3 are not responsible in any way for any such costs.
- n) The Appellant cannot undertake change in shareholding or financial status of either the bidder or the Parent Company without the written permission of the Respondent Nos. 2 & 3. The Appellant/ Parent Company Sun Edison has filed bankruptcy in the USA and has not placed this fact before this Tribunal. The Appellant is in breach of the RFP as the qualification requirement of the bidder was to be maintained till the execution of the PPA.

o) All the judgements cited by the Appellant are not applicable to the present case. In the DB and Adani cases the PPAs were signed and in the present case the whole process has been scrapped. The Lanco judgement cited by the Appellant supports the contention of the Respondent Nos. 2 & 3 regarding LOI being not a concluded contract.

11. We have heard the learned senior counsel appearing for the Appellant and the learned counsel appearing for the Respondents at considerable length of time on various issues raised in the present Appeal for our considerations are as follows: -

a) The Appellant in the present Appeal is mainly aggrieved by the decision of the State Commission to allow the Respondent Nos. 2 & 3 to withdraw the Petition and approval to carry out reverse bidding process for procurement of power from RE sources thereby resulting in cancellation of the LOI issued to it.

b) On Question No. 6. b) i.e. Whether the action of Respondent Nos. 2 & 3 of withdrawal of the Petition was right in light of the fact that the Respondent Nos. 2 & 3 had filed the Petition for approval of the Tariff after completion of Case 1 Competitive Bid Process and issuance of LOI to successful bidders including the Appellant?, we observe as below:

i. The Appellant has contended that the Respondent Nos. 2 & 3 once submitted the Petition before the State Commission for adoption of tariff under Section 63 of the Act cannot be allowed to withdraw the same as the LOI has already been

issued and accepted by the Appellant and this forms a binding contract between the parties and the Appellant has the right to supply the power to the Respondent Nos. 2 & 3.

- ii. The Respondent Nos. 2 & 3 had contended that in terms of the RFP the bidding process was subject to approval of the State Commission and it reserves the right to cancel or modify the process without assigning any reason and without any liability. Further, the amended LOI issued and accepted by the Appellant was also subject to the approval of the State Commission. The State Commission has also reiterated that the LOI was subject to the approval of the State Commission and once the Respondent Nos. 2 & 3 have applied for withdrawal of the Petition, the State Commission cannot be forced for determination/ adoption of tariff specifically when the initial hearing yet to be started and it was only the IA which was taken up for disposal.
- iii. From the Impugned Order and perusal of the communication dated 6.11.2015 for withdrawal of the Petition it can be seen that the Respondent Nos. 2 & 3 have contended that there has been significant reduction in the cost of solar power, which will enable the cost of renewable power that is procured by the Respondent Nos. 2 & 3 to come down significantly in line with the emerging market trends and favorably impacting consumer tariff.

- iv. At this juncture, it is important to analyse the various provisions of the RFP. The Serial No. 5 of the 'Disclaimer' reads as follows:

*"5. The bidding process is subject to approval of Delhi Electricity Regulatory Commission ("**DERC**"). BRPL reserves the right to cancel or modify the process without assigning any reason and without any liability."*

From the above it can be seen that the bidding process was subject to the approval of the State Commission and BRPL has the right to modify or cancel the process without assigning any reason and without any liability.

- v. Now let us consider the definition of LOI, PPA and Successful Bidder(s) as provided in the RFP. The same are reproduced below:

"Letter of Intent" or "LOI" shall mean the letter to be issued by the Procurer/ Authorised Representative to the Successful Bidder (s) for supply of power pursuant to Clause 3.5 of the RFP.

As per the definition of LOI, the LOI was to be issued by the Procurer to the Successful Bidder for supply of power after being selected as Successful Bidder.

"PPA" shall mean the agreement to be entered into between the Procurer(s) and the Seller pursuant to

which the Seller shall supply power to the Procurer(s) as per the terms and conditions specified therein and a draft of which is attached hereto and marked as Enclosure 1 of Format 5.3 of this RFP, including all the schedules, annexures and all amendments or modifications.

As per the definition of the PPA, the Seller, pursuant to signing of the PPA shall supply power to the procurers as per the terms of the PPA.

“Successful Bidder(s)” shall mean the Bidder(s) selected by the Authorised Representative, pursuant to this RFP for supply of power by itself or through the Project Company as per the terms of the RFP Documents and to whom a Letter of Intent has been issued.”

Successful Bidder is the Bidder selected by the Authorised Representative for supply of power to whom the LOI is issued.

The RFP Documents are defined as below in the RFP.

“RFP Documents” shall mean the following documents to be entered into by the parties to the respective agreements in connection with the supply of power:

- a) PPA
- b) Any other agreements designated as such, from time to time by the Authorised Representative;

- vi. The completion of bidding process is covered under Clause 2.8.2 of the RFP which is reproduced below:

“2.8.2 The following shall be the time schedule for completion of the bidding process:

<i>Event</i>	<i>Schedule</i>
<i>Date of issue of RFP</i>	<i>17th Nov 2014</i>
<i>.....</i>	
<i>Bid Submission and Opening of Non-Financial Bid</i>	<i>02nd Jan 2015</i>
<i>Short listing of Successful Bidder(s) and issue of LOI</i>	<i>02nd Feb 2015</i>
<i>Signing of RFP Documents</i>	<i>16th Feb 2015</i>

From the above it can be seen that the bidding process includes the steps from the date of issuance of the RFP and ends with signing of RFP Documents, which includes PPA and in between is the process of issuance of LOI to the Successful Bidder.

- vii. The Clause 3.5.11 of the RFP provides as below:

“3.5.11 If the Successful Bidder, to whom the Letter of Intent has been issued does not fulfil any of the conditions specified in clauses 2.2.8 and 2.2.9, the Procurer / Authorised Representative reserves the right to annul the award of the Letter of Intent of such

Successful Bidder. Further, in such case, the provisions of Clause 2.5 (b) shall apply.”

The Clause 2.2.8 is related to the incorporation of a Project Company and Clause 2.2.9 is related to obligations of the Successful Bidder to provide CPG and execution of PPA and other RFP Documents within a period of 30 days from issuance of LOI. The timeline of 30 days can be extended on day-by-day basis until the end of bid validity period if these activities are not completed due to reasons attributable to the Procurer.

- viii. Now let us analyse the conditions of the amended LOI which was duly accepted by the Appellant. The relevant extract is reproduced below:

“

May please note that, this LOI shall be to effect subject to following conditions:

- i. Grant of approval and adoption of Tariff by Hon’ble Delhi Electricity Regulatory Commission and additional conditions, if any, imposed by DERC.
- ii. Adherence to and fulfilment of the terms and conditions specified in RFP and PPA documents by the Bidder.
- iii. *Receipt of unconditional acceptance of LOI from the Successful Bidder within 7 days of the issuance of the RFP.”*

From the above it can be seen that the LOI was to be effective only after grant of approval and adoption of tariff by the State Commission and adherence to the terms and conditions by the bidder specified in RFP & PPA documents.

- ix. The Appellant has also contended that by issuance of LOI and other provisions of the RFP, it has right to supply electricity to the Respondent Nos. 2 & 3. From the definitions of LOI and PPA as reproduced above it can be seen that the right to supply power accrues to the Appellant only when the PPA is signed. PPA uses the term “shall supply power pursuant to signing of the PPA as per the terms of the PPA” and LOI issued only intends for supply of power to the procurer and in present case LOI is even subject to certain terms and conditions.
- x. From perusal of the provisions of the RFP as discussed above it becomes clear that the bidding process cannot be said to be completed merely on issuance of the LOI. LOI is not the process in itself. It is a one of the milestones towards completion of the bidding process. The bidding process is said to be completed only after the signing of the RFP Documents which includes the PPA and the same was before the State Commission for approval in the Petition. As per the RFP, the Respondent No. 2 has the right to modify or cancel the bidding process which was subject to the approval of the State Commission without assigning any reason and without any liability. Thus, the whole bidding process was hedged by

the Respondent No. 2 in the form of this 'Disclaimer', which is legally sustainable. Further, as per the amended LOI dated 1.7.2015 issued by the Respondent No. 2, the LOI can come into effect only after the approval and adoption of the tariff by the State Commission.

- xi. On the issue of the LOI being a binding contract between the parties the judgement of Hon'ble Supreme Court in case of Rishi Kiran Logistic Private Limited v. Board of Trustees of Kandla Port Trust and Ors. (2015) 13 SCC 233 has been relied by the learned counsel for the Respondents. The relevant para from the said judgement is reproduced below:

"34. At this juncture, while keeping the aforesaid pertinent features of the case in mind, we would take note of the 'Rules and Procedure for Allotment of Plots' in question issued by Kandla Port Trust. As per clause 12 thereof the Port Trust had reserved with itself right of acceptance or rejection of any bid with, specific stipulation that mere payment of EMD and offering of premium will not confer any right or interest in favour of the bidder for allotment of land. Such a right to reject the bid could be exercised 'at any time without assigning any reasons thereto'. Clause 13 relates to 'approvals from statutory authorities', with unequivocal assertion therein that the allottees will have to obtain all approvals from different authorities and these included approvals from CRZ as well. As per clause

16, the allotment was to be made subject to the approval of Kandla Port Trust Board/ Competent Authority. In view of this material on record and factual position noted in earlier paras we are of the opinion that observations in the case of Dresser Rand S. A. v. M/s. Bindal Agro Chem. Ltd. & Anr.; AIR 2006 SC 871, would be squarely available in the present case, wherein the court held that a letter of intent merely indicates a parties intention to enter into a contract with the other party in future. A letter of intent is not intended to bind either party ultimately to enter into any contract. It is no doubt true that a letter of intent may be construed as a letter of acceptance if such intention is evident from its terms. It is not uncommon in contracts involving detailed procedure, in order to save time, to issue a letter of intent communicating the acceptance of the offer and asking the contractor to start the work with a stipulation that a detailed contract would be drawn up later. If such a letter is issued to the contractor, though it may be termed as a letter of intent it may amount to acceptance of the offer resulting in a concluded contract between the parties. But the question whether the letter of intent is merely an expression of an intention to place an order in future or whether there is a final acceptance of the offer thereby leading to a contract, is a matter that has to be decided with reference to the terms of the letter. When the LOI is itself hedged with the condition that the final allotment would be made later after obtaining CRZ and

other clearances, it may depict an intention to enter into contract at a later stage. Thus, we find that on the facts of this case it appears that a letter with intention to enter into a contract which could take place after all other formalities are completed. However, when the completion of these formalities had taken undue long time and the prices of land, in the interregnum, shot up sharply, the respondent had a right to cancel the process which had not resulted in a concluded contract.”

From the above what is emerged that, a hedged LOI with a condition depicts intention to enter into a contract at a later stage.

In the present case also the Appellant has accepted the amended LOI where there is a condition that LOI would be effective only after grant of approval and adoption of tariff by the State Commission. Hence, in line with the said judgement of the Hon'ble Supreme Court the LOI in present case cannot be termed as a concluded contract.

- xii. The Appellant counsel has also relied on the judgements related to Lanco and DB on the nature of LOI. After perusal of the said judgements we find that the matters in the said judgements and the instant case are different and could not be compared. In case of Lanco there was no condition attached to the LOI as in the present case. In DB judgement the PPA was already executed between the parties and the

matter was related to change in the procured capacity whereas in the present case there was no execution of the PPA and the whole process was cancelled. Accordingly, both the cases are differentiated in respect of present case in hand.

- xiii. In view of our discussions as above, we are of the considered opinion that the action of the Respondent Nos. 2 & 3 for withdrawal of the Petition was permissible in law even though the Respondent Nos. 2 & 3 had filed the Petition for adoption of the tariff after completion of Case 1 Competitive Bid Process and issuance of LOI to the Appellant. The other contentions raised by the Appellant counsel in this regard have become infructuous in view of our decision as above.
- xiv. After thorough evaluation of the oral, documentary and other relevant materials available on the file and also after considering the judgements of Apex Court and of this Tribunal this issue is decided against the Appellant.
- c) On Question No. 6. a) i.e. Whether the Impugned Order, based on extraneous considerations and without following the principle of natural justice (i.e. without representation of the aggrieved persons including the Appellant) and in clear violation of the Act could have been passed by the State Commission? and On Question No. 6. c) i.e. Whether the State Commission has any discretion in allowing withdrawal of a petition for approval of tariff filed under Section 63 of the Act?, we observe as below:

- i. Let us first analyse the impugned findings of the State Commission. The relevant extract is reproduced below:

“ **ORDER**

(Date of Order:29.12.2015)

1. *M/s BRPL and BYPL has filed the instant Petition for seeking adoption of Tariff through transparent process of Case-I RE Bidding for procurement of renewable power.*

2. *Whilst the petition is pending for initial hearing and the proceedings are yet to commence, the Petitioners through their counsel submitted letter dated 06.11.2015 seeking permission of the Commission to withdraw the Petition. Additionally, the petitioner is also seeking permission to carry out of a reverse auction process as per MNRE guidelines for procurement of renewable power.*

3. *The Commission has perused and examined the request made by the Petitioner and it is observed that as contended by the Petitioner, there has been significant reduction in the cost of solar power, which will greatly help in making solar power competitive with power from conventional sources. This will enable the cost of renewable power that is procured by Discoms to come down significantly in line with the emerging*

market trends, thus favourably impacting consumer tariff.

4. Considering the documents available on record connected with the Petition, and the case in its entirety and the plea made by the petitioners as aforesaid, the Commission acceded to the request of the Petitioners by granting permission to carry out a reverse auction process as sought by the Petitioners and allowing them to withdraw the petition. Accordingly, the petition stands disposed of as withdrawn.

5. Ordered accordingly.”

From above it can be seen that the State Commission has allowed the Petition to be withdrawn by the Respondent Nos. 2 & 3 on their request based on the significant reduction in the cost of solar power pursuant to this bidding process making it competitive with power from conventional sources and eventually benefitting the interest of the consumers of the State. The State Commission has also granted the request of the Respondent Nos. 2 & 3 to carry out reverse auction as per MNRE guidelines for procurement of power from RE sources.

- ii. The learned counsel for the State Commission has submitted that the Petition had never come up for hearing and was in initial stages only. It was the IA regarding payment of fee for the Petition which was taken up for hearing when the request from the Respondent Nos. 2 & 3 was received by the State

Commission for withdrawal of the Petition. According to the State Commission, the Petition can only be taken up for hearing when the defect related to requisite fee could be settled. The learned counsel has also contended that the letter dated 28.12.2015 of the Appellant addressed to the Respondent No. 2 and copy marked to the State Commission was received in the State Commission only on 30.12.2015 after pronouncement of the Impugned Order on 29.12.2015. There is no cause for the State Commission to entertain such letter, which is not in the form of application. We agree to the contentions made by the State Commission as above, although not specifically spelt out in the Impugned Order.

- iii. The Appellant counsel has contended that as per the DERC Regulations 2001, a petition can be numbered only when all defects are removed and the Respondents cannot bring additional facts at the Appeal stage.

The relevant extract of the DERC Regulations 2001 is reproduced below:

“15.....

(viii) If on scrutiny, the Petition is not refused or any order of refusal is rectified by the Secretary or by the Chairman of the Commission, the Petition shall be duly registered and given a number in the manner to be specified by the Commission.

(ix) As soon as the Petition and all necessary documents are lodged and the defects and objections,

if any, are removed, and the Petition has been scrutinised and numbered, the Petition shall be put up before the Commission for preliminary hearing and admission.”

From the above it can be seen that if the petition is not refused on scrutiny, the petition shall be registered and given a number. In case if there are defects and objections to a petition then on removal of the same the petition is scrutinised and numbered.

In the present case it is seen that the Petition was accompanied by an IA for adjustment of the fee paid earlier by the Respondent Nos. 2 & 3 and hence the IA was first required to be dealt to clear the issue related to the payment of fee for the Petition. The State Commission was also in the process of hearing the IA so that main petition can be taken up for hearing. Here IA cannot be treated as a defect in true sense until it is disposed of against the party for the purpose it was intended. Here the State Commission has applied prudence in numbering the Petition based on the facts available with the State Commission related to payment/adjustment of the fee. Until IA is cleared the Petition cannot be taken up for the hearing. During the process of hearing of the IA the Petition was withdrawn by the Respondent Nos. 2 & 3. Accordingly, we do not see any legal infirmity in the numbering of the Petition by the State Commission. Hence, the contention of the Appellant is not sustainable.

- iv. We have already decided at para 11. b) above that the Respondent Nos. 2 & 3 have rightly applied for withdrawal of the Petition before the State Commission. This finding alone is sufficient to answer the questions of law, being dealt now, against the Appellant. However, the State Commission while arriving to the said decision as above has observed that the decision has been taken considering the documents available on record connected with the Petition, the case in its entirety and the plea made by the Respondent Nos. 2 & 3. Since the Petition was still in the initial stages and only IA was in process of being heard it was not the occasion for the State Commission to deal the issues and give a reasoned order.
- v. The Respondent Nos. 2 & 3 have contended that principles of natural justice are at a distance while dealing with the commercial contracts. On this issue the learned counsel for the Respondent Nos. 2 & 3 has also placed reliance on the judgement of Hon'ble Supreme Court in case of Siemens Public Communication Pvt. Ltd. v. Union of India AIR 2009 SC 1204. (Relevant para reproduced below):

“34. On examining the facts and circumstances of the present case, we are of the view that none of the criteria has been satisfied justifying Court's interference in the grant of contract in favour of the appellants. When the power of judicial review is invoked in the matters relating to tenders or award of contracts, certain special features have to be considered. A

contract is a commercial transaction and evaluating tenders and awarding contracts are essentially commercial functions. In such cases principles of equity and natural justice stay at a distance. If the decision relating to award of contracts is bonafide and is in public interest, Courts will not exercise the power of judicial review and interfere even if it is accepted for the sake of argument that there is a procedural lacuna.”

The Hon'ble Court has held that a contract is a commercial transaction and evaluating tenders & awarding contracts are essentially commercial functions. In these cases principles of equity and natural justice stay at a distance. The court has further observed that if the decision to award a contract is bonafide and is in public interest, Courts will not exercise the power of judicial review.

- vi. In present case, the purchase of power from the Appellant was to be entered into a contract by way of signing PPA after the approval of the State Commission. The Respondent Nos. 2 & 3 based on the emerging situation of substantial reduction in power generation cost from solar plants has withdrawn the Petition contemplating consumers' interest, which is public interest. The State Commission has also allowed withdrawing the Petition on the same pretext. We also observe that the Act also safeguards the interest of the consumers and the Petition was allowed to be withdrawn at the initial stage by the State Commission. In view of the above, it cannot be said that the

principles of natural justice & provisions of the Act have been violated by the State Commission.

- vii. The learned counsel for the Appellant has also placed reliance on the DB judgement of this Tribunal on the issues of transparency, natural justice, dealing of petition under Section 63 of the Act. We have gone through the said judgement and we find that the case in the said judgement was related to reduction in procurement capacity by the State Commission post signing of the PPA while in the present case no PPA has been signed and the petition was withdrawn at the initial stage itself and hence the two cases are not comparable.
- viii. The contentions of the learned counsel for the Appellant on the contents of the termination letter dated 12.1.2016 issued by the Respondent No. 2 to the Appellant regarding provisions of the RFP are also misplaced as the said letter was issued after the Impugned Order and have no bearing on the Impugned Order against which the Appeal is filed.
- ix. Further, the issue of RPO raised by the Appellant and issue of change in shareholding of the Appellant raised by the Respondent Nos. 2 & 3 do not merit dealing as the same are outside the purview of the present Appeal and if there are any issues regarding the same are first required to be taken up before the State Commission appropriately. In any case in view of our foregoing reasons in the present Appeal the said issues have become redundant.

- x. After careful evaluation of the oral, documentary and other relevant materials available on the file, the State Commission has rightly justified the findings answering the issues against the Appellant just and reasonable. We do not find any error in the Impugned Order. Therefore, interference of this Tribunal does not call for.

ORDER

For the foregoing reasons as stated supra, we are of the considered opinion that the issues raised in the instant Appeal have no merit.

Hence, the Appeal is hereby dismissed devoid of merits and the Impugned Order dated 29.12.2015 passed by the Central Commission is hereby upheld.

Accordingly, IA Nos. 55, 57 & 115 of 2016 stand disposed of as having become infructuous.

No order as to costs.

Pronounced in the Open Court on this **18th day of July, 2018.**

(Justice N. K. Patil)
Judicial Member

√

REPORTABLE/NON-REPORTABLE

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(I.J. Kapoor)
Technical Member