Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 76 of 2012

Dated 8th April, 2013

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. Rakesh Nath, Technical Member

In the matter of:

1. **M/s. Raj West Power Limited,**
   308-311, Geetanjali Towers,
   Ajmer Road,
   Jaipur-302 006

2. **Barmer Lignite Mining Company Limited,**
   308-311, Geetanjali Towers,
   Ajmer Road,
   Jaipur-302 006 ... Appellants

Versus

1. **Rajasthan Electricity Regulatory Commission,**
   Vidyut Viniyamak Bhawan,
   Near State Motor Garage,
   Sahakar Marg,
   Jaipur-302 005.

2. **Jaipur Vidyut Vitran Nigam Limited,**
   Vidyut Bhawan, Janpath,
   Jaipur-302 055
   Rajasthan.

3. **Ajmer Vidyut Vitran Nigam Limited,**
   Old Power House, Hathi Bhata,
   Ajmer-305 001 (Rajasthan).

4. **Jodhpur Vidyut Vitran Nigam Limited,**
   New Power House, Industrial Estate,
   Jodhpur-342003, Rajasthan

**5. Secretary (Energy),
Government of Rajasthan,
Secretariat, Jaipur-302005
Rajasthan.**

**6. Rajasthan State Mines and Minerals Limited
4, Meera Marg, Udaipur-303 001,
Rajasthan**

**7. Rajasthan Rajya Vidyut Utpadan Nigam,
Jyoti Nagar, Vidyut Bhawan,
Jaipur-302005 (Rajasthan)**

Counsel for Appellant(s) : Mr. M.G. Ramachandran,
Mr. Anand K. Ganesan
Ms. Swapna Seshadari

Counsel for the Respondent(s): Mr. R.K. Mehta with
Mr. Antaryami Upadhyay,
Mr. David A. and
Mr. Rajiv Ranjan Pathak for R-1
Mr. P.N. Bhandari for R-2,3 & 4
Mr. Virendra Lodha, Sr. Adv. with
Mr. Rohit Shukla,
Ms. Mamta Tiwari, Ms. Ritwika Nanda for R-5
Mr. G.L. Sharma (Rep.)
Mr. B.M. Sanadhya (Rep.)
Mr. D.P. Chirania (Rep.)

JUDGMENT

RAKESH NATH, TEHNICAL MEMBER

This Appeal has been filed by Raj West Power Ltd. and Barmer Lignite Mining Company Limited against the orders dated 5.1.2012 read with the order dated 17.8.2011 passed by the Rajasthan Electricity

Regulatory Commission ("State Commission") dealing with determination of transfer price of lignite for the generating station of the Appellant no. 1.

2. The Appellant no. 1 is a generating company. The Appellant no. 2 is a Joint Venture Company of the Appellant no. 1 and the Rajasthan State Mines and Minerals Ltd. ("RSMML"), a state owned Mining Company and the Respondent no. 6 herein. The State Commission is the Respondent no. 1. The Respondent nos. 2 to 4 are the distribution licensees and the Respondent no. 5 is the State Government. The 7th Respondent is Rajasthan Rajya Vidyut Utpadan Nigam, a generating company. The Respondent no. 6 ("RSMML") is a state owned company engaged in the business of mining of coal, lignite and other minerals and is majority

shareholder (51%) of the Joint Venture company (Appellant no.2).

3. The brief facts of the case are as under:

3.1 Raj West Power Ltd. (Appellant no.1), hereinafter referred to as "Raj West", is in the process of establishing a lignite based generating station with an aggregate capacity of 1080 MW, with 8 units of 135 MW each. At present 4 units of 135 MW each have been commissioned and are under commercial operation. For generation of electricity from the power project, the lignite mines at Kapurdi and Jalipa have been allotted to the project. The electricity generated from the project has to be supplied to the distribution licensees (R-2 to R-4).

3.2 The Power Generation cum Mining Project was awarded to Raj West pursuant to a competitive bidding process in the year 1996. On 29.5.2006, Raj West entered into an Implementation Agreement with the State Government providing for terms and conditions of development of the generating station and mining of lignite from the allotted mines.

3.3 In terms of the Implementation Agreement ("IA"), Raj West has the obligation of developing the generating station including the development and operation of the identified mines at Jalipa and Kapurdi. One of the clauses in the Implementation Agreement is that the State Commission has to provide for in-principle capital cost approval and the in-principle transfer price of lignite from the identified mines.

3.4 Consequently, in the year 2006, Raj West filed a petition before the State Commission under Section 62 of the Electricity Act, 2003 for in-principle determination of the capital cost of the generating station and transfer price of lignite.

3.5 By order dated 19.10.2006, the State Commission approved the in-principle capital cost of power component and mining component of the project and transfer price of lignite. The State Commission also directed outsourcing of mining of lignite from the designated mines to be awarded pursuant to a process of competitive bidding.

3.6 Thereafter, the Raj West and the distribution licensees executed the Power Purchase Agreement ("PPA") dated 26.10.2006.

3.7 In terms of the Implementation Agreement, a Joint Venture Company for Mining (Appellant no. 2) was incorporated on 19.1.2007 after a Joint Venture agreement was entered into on 27.12.2006 between Raj West and the Respondent no. 6 in regard to management and conduct of operations of the Joint Venture Company.

3.8 Raj West then conducted an International Competitive Bidding ("ICB") process through their consultant M/s. CRISIL to determine the competitive price for mining of lignite to decide on the nomination of the mining entity by the

Appellant no. 2 on such competitive price discovered in the process.

3.9 In terms of the Implementation Agreement, the State Government appointed one Mr. N.S. Bohra as Independent Person for determination and scrutiny of cost of extraction of lignite from the designated mines for supply to Raj West. The competitive bidding process and price discovery was scrutinized by the Government appointed nominee and was found fair.

3.10 Pursuant to above, the Appellant no. 2 filed a petition being no. 245 of 2011 before the State Commission to determine the transfer price of lignite as per the Tariff Regulations.

3.11 By order dated 17.8.2011, the State Commission held that the competitive bidding process was vitiated as it was conducted by Raj West and not in accordance of its earlier order dated 19.10.2006 and rejected the prayer for approval of the transfer price of lignite for supply by the Appellant no. 2 to the Appellant no. 1.

3.12 On 25.11.2011, the Appellant no. 2 filed a petition for clarification of the order dated 17.8.2011 before the State Commission. By order dated 5.1.2012, the State Commission disposed of the above petition holding that no clarification is required to be given. Aggrieved by the orders dated 5.1.2012 read with order dated 17.8.2011, the Appellants have filed this Appeal.

4. Learned counsel for the Appellant has made the following submissions:

4.1 The Implementation Agreement clearly indicates that the proposed project is an integrated project, viz. power generation and lignite mining and the Joint Venture company of Raj West and the Respondent no. 6 has to undertake mining activity and the mining contractor will be either Raj West or its Consortium Members with a right to Raj West to nominate the agency for development of the mines. The fundamental basis of the scheme was that the entire responsibility including the financial aspects, guarantees, etc., will be of Raj West without any liability either to the Respondent no. 6 or the Joint Venture Mining Entity (Appellant no. 2). Thus, the entire operation from the stage of development, operation and extraction of lignite till the power generation and supply shall be done by Raj West or its nominee and the State Government Corporation having no liability. A separate Joint Venture Company had to be formed as a mining entity only due to certain reasons relating to mining lease. The development of mines was, thus, clearly envisaged to be by Raj West or its nominee in the Implementation Agreement. The Implementation Agreement became fundamental for all relationship between the Raj West and the distribution licensees.

4.2 In the order dated 19.10.2006 approving the in-principle capital cost of the project, the State Commission did not at any place decided that the nomination basis provided in the

Implementation Agreement shall not be given effect to or mining operation shall be carried out only by the bidder selected through the Competitive Bidding process and not on nomination basis.

4.3 The Joint Venture Agreement dated 27.12.2006 between Raj West and RSMML (R- 6) clearly dealt with nomination of Raj West and/or its nominee to undertake the mining activities. Thus, all parties concerned, including the distribution licensees and RSMML, proceeded on the same basic premise of implementation of the nomination scheme envisaged in the Implementation Agreement and construed and implemented the order dated 19.10.2006 passed by the State Commission as maintaining the nomination and not as holding that the nomination provision under the Implementation Agreement was not to be implemented.

4.4 The action of the State Commission in extensively referring to the Implementation Agreement and thereafter not saying anything about over-riding of the nomination clearly shows that the order dated 19.10.2006 did not provide for non-implementation of the nomination under the Implementation Agreement.

4.5 The provision of nomination in the Implementation Agreement is also consistent with the Tariff Regulations, 2009.

4.6 The State Commission by the impugned order has attempted to reopen an issue which had been comprehensively addressed and decided in the order dated 19.10.2006 and that too after the Appellants have invested huge capital cost in the project based on the above understanding.

4.7 In the present case, the Appellant no. 2 had filed a petition before the State Commission as per the terms of the Implementation Agreement and Tariff Regulations, 2009 for the assessment of transfer price of lignite as determined by an independent expert appointed by the State Government. The transfer price of lignite had already been determined by the independent expert appointed by the State Government. It was, therefore, not necessary for the State Commission to decide the transfer price. The State Commission, however, decided to admit the petition in terms of the Implementation

Agreement which casts upon the Commission the duty to assess the transfer price, as scrutinized by the independent expert. The State Commission also admitted the application under the provisions of Implementation Agreement. Having chosen to act in accordance with the provisions of the Implementation Agreement, the State Commission now cannot say that Implementation Agreement is not binding on it.

4.8 The competitive bidding was basically to discover the base price and thereafter allow Right of First Refusal or a right to match the base price to Raj West. In the judgment of the Tribunal reported in 2011 ELR APTEL 234 in the case of GVK Power vs. Punjab State Electricity Regulatory Commission, the Tribunal has upheld the concept of price discovery through competitive bidding and allowing the power project developer to match the competitive price for mining. Besides this, there are a number of cases where the Competitive Bidding and matching of the base bid has been adopted as a matter of course. This is also an internationally accepted methodology followed by many Governments.

4.9 The Appellant no.2 was going ahead with the fresh competitive bidding process as directed by the State Commission, but the Appellant no.1 or its nominee should be permitted 'Right of First Refusal' to match the price of the lowest bidder.

5. The submissions made by the State Commission are as under:

5.1 In the order dated 17.8.2011, the State Commission had directed fresh bidding to be undertaken in accordance with the order dated 19.10.2006. In guise of the clarification, the Appellant no. 2 by application dated 25.11.2011 had sought modification not only of the order dated 17.8.2011 but also its earlier order dated 19.10.2006 which had become final. Therefore, the State Commission rejected the application for clarification by order dated 5.1.2012.

5.2 It was nowhere stated in the order dated 19.10.2006 that bidding would be only for price discovery. On the contrary, the order clearly shows that the State Commission intended that the mining contract would be awarded by a two part bidding process.

5.3 Although bidding was initiated in the present case pursuant to order dated 19.10.2006, the mining contract was finally awarded to an associate company of Raj West, which neither participated in the bidding nor was qualified as per the specifications of bid document. Obviously, the bidding process turned into a process for price discovery for awarding the contract to a pre-selected party which was not visualized in the order dated 19.10.2006.

5.4 The submissions of the Appellant that object of providing for nomination clause in the Implementation Agreement is that the generating company is taking the sole responsibility for the complete project including the fuel supply and should, therefore, being in a position to minimize the risk of interruption or disruption in fuel supply is belied by the fact that M/s. South West Mining Ltd. ("SWML"), the nominee of Raj West, has sub-contracted the execution of lignite mining to two sub-contractors and under the said contracts, the sub-contractors have to indemnify M/s. SWML for all risks with regard to shortfall in the quantity of lignite extracted from the mine.

5.5 The findings of the Tribunal in GVK Power Ltd. case is not applicable to the present case.

5.6 The party for award of contract for outsourcing of lignite mine has to be selected through transparent competitive bidding instead of rendering the bidding as a process only for price discovery for awarding outsourcing contract to a pre-selected or nominated party.

6. Learned counsel for the Respondents 2 to 4 has made the following submissions:

6.1 Discovery of the mining rate is a very complex exercise. No two mines are alike. Therefore, no standard data is available for comparison as in case of thermal generation. There cannot be a more transparent method of discovering the mining rates then through the competitive bidding but the competitive bidding is reduced to an academic exercise due to the nomination clause because the parties know that the contract is not to be awarded to the successful bidder but the exercise is being done only for price discovery. In such a situation of no genuine contest between the bidders, the real price would not emerge.

6.2 The Implementation Agreement was not submitted before the State Commission either by the Appellants or the Respondent Distribution Licensees. The 2006 order of the State Commission has nowhere affirmed the Implementation Agreement. The State Commission is also not bound by the Implementation Agreement and the role of the State Commission cannot be bye passed through bilateral agreements between the parties.

7. The learned counsel for the State Government (R-5) in his brief submissions has explained the clauses of Implementation Agreement dealing with transfer price of lignite and stated that the transfer price has to be approved by the State Commission and that the Tribunal may decide the case on merit.

8. We have also heard some consumers who were the objectors before the State Commission, viz. Shri B.M. Sandhya, Shri D.P. Chirania and Shri G.L. Sharma who have supported the directions given by the State Commission.

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

i) Whether according to the State Commission's order dated 19.10.2006 the award for the outsourcing contract for extraction of lignite from the designated mines has to be awarded only to the successful Bidder after following a competitive bidding process or the mining contract could also be awarded to Raj West or their nominated company at the price discovered through the competitive bidding?

ii) Whether the State Commission should have permitted the competitive bidding for mining of lignite from the designated lignite mines with the condition of 'Right of first Refusal' to Raj West or their nominated company if they agree to match the price bid of the lowest bidder?

10. The above two issues are inter-related and, therefore, we shall be dealing with these together.

11. Let us first examine the Implementation Agreement dated 29.5.2006 entered into between the State Government and Raj West. The salient features of the Implementation Agreement relevant to the case are as under:

11.1 Implementation Agreement indicates that Raj West was selected by the State Government for setting up of lignite mining cum thermal power project on the basis of Competitive bidding. The project would be executed by the Consortium of JSW Energy Ltd. and South West Mining Ltd. through Raj West Power Ltd. (Appellant no. 1), a generating company formed for the said purpose and responsible for execution of the project.

11.2 A mining entity in the form of a Joint Venture Company would be formed by Raj West (Appellant no. 1) and RSMML (Respondent no.6) for mining component of the project.

11.3 Mining Component and Power Component of the Project would be distinctly separate cost, expenditure and income entities of Raj West.

11.4 Raj West would execute a Power Purchase Agreement (‘PPA') with the distribution licensees for sale of power from the power project after in-principle determination of project cost, fuel cost and tariff by the State Commission.

11.5 Mining Lease would be transferred to the Joint Venture Company (Appellant no. 2) after obtaining the approval of the Government of India.

11.6 All investments in the mining project would be made by Raj West only with no financial liability on RSMML (R-6).

11.7 The Joint Venture Company (Appellant no.2) would enter into Fuel Supply Agreement with Raj West (Appellant no.1) for a period of 30 years for supply of lignite from the designated mines. The transfer price of lignite would be computed on the basis of cost plus formula i.e. cost of extractions, transportation plus royalty and applicable taxes plus margin.

11.8 The Joint Venture Company would enter into a mining contract with Raj West/its consortium members for development, opening and extraction of lignite from mines and transportation of lignite to the power plant on nomination basis. The cost of extraction in the long term contract on nomination basis would be scrutinized by an independent person to be appointed by the Govt. of Rajasthan. The Mining contract would provide for an indemnity to the Joint Venture Company (Appellant-2) against any liability under the Fuel Supply Agreement arising out of non-performance by the Mining Contractor.

11.9 The State Commission as part of tariff determination process would assess the transfer price of lignite to be supplied by the

Joint Venture Company (Appellant no. 2) to the Project. In case the State Commission revised the transfer price, the cost of extraction would be revised accordingly.

12. The scheme agreed in the Implementation Agreement is as under:-

i) Raj West was selected by the State Government for setting up lignite mining-cum-thermal power project.

ii) A Joint Venture Company of Raj West and RSMML would be formed for mining component of the project. All investments in mining would be done by Raj West with RSMML having no financial liability.

iii) Raj West would enter into a Power Purchase Agreement for sale of power with the distribution licensees.

iv) Mining lease would be transferred to the Joint Venture Company after obtaining necessary approvals.

v) Joint Venture Company would enter into a Fuel Supply Agreement with Raj West for supply of lignite for 30 years.

vi) Joint Venture Company would enter into mining contract with Raj West or its consortium members for extraction and supply of lignite on nomination basis. The mining contract would provide for indemnification of the Joint Venture Company by the mining contractor against any liability under the Fuel Supply Agreement.

vii) The transfer price of lignite would be determined on cost plus basis. The cost of extraction of lignite has to be scrutinized by an expert appointed by the State Government.

viii) Finally, the State Commission would assess the transfer price of lignite to be supplied by the Joint Venture Company to the power plant.

13. The Implementation Agreement did not provide for development of the lignite mines on the basis of competitive bidding but on nomination basis by Raj West or its consortium member with lignite transfer price to be determined on cost plus basis.

14. Let us now examine the order dated 19.10.2006 of the State Commission regarding in principle approval of the capital cost of the project and transfer price of lignite. The relevant portions of the order relating to transfer price of lignite are described as under:

14.1 The State Commission in paragraph 63 has described the scheme of development of the lignite mines as agreed in the Implementation Agreement, as also elaborated by us in paragraph 11 above.

14.2 The State Commission has considered three options for mining:

"Option- I Bucket Wheel Excavator (BWE) for removal of over burden and shovel and dumper system for lignite extraction.

Option –II Over burden removal by hydraulic shovels and rear dumper and lignite extraction and transportation by shovel and dumper system and

Option – III Outsourcing of face operation”.

The State Commission has considered the estimated cost of production of lignite in the above three options as assessed by their consultants.

14.3 The third option i.e. outsourcing of face operation has finally been approved by the State Commission.

14.4 In paragraph 96 of the order, the reply of Raj West regarding transparent bidding and observation of the State Commission have been recorded:

"96. As regards bidding of plant machinery & services, Raj West have replied as under:-

"We are following the following mechanism to ensure that techno commercially viable agencies are selected at the competitive price without affecting the project schedule:

a) *Reputed Consultants will be appointed for preparing the detailed scope and evaluation of the techno-commercial offers.*

b) *The enquiries for the outsourcing contract shall be floated to various reputed contractors from approved vendor list of the Consultant on limited tender basis.*

c) *The Consultant will evaluate the technical and commercial offers received from the contractors and will provide the Company their recommendation for the award of the contract.*

In view of the above, we do not envisage the need for association of the purchaser in this mechanism".

Thus, the submissions made by Raj West also did not indicate awarding of mining contract to Raj West or its consortium member at a price discovered through competitive bidding process.

14.5 The State Commission has also given the following directions for competitive bidding for mining.

"97. Our observations for such bidding as discussed at para 61 above for power plant will equally hold good for all mining packages, services and outsourcing".

14.6 In Paragraph 61 of the order, the State Commission has given directions for tendering through public notices and invitation of bids in two parts i.e. technical and financial bids by following a transparent competitive bidding process. The relevant extracts of the order are reproduced below:

"This is to ensure that capital cost is based on competitive prices. The proposed procedure vide para 51 (b) need also be revised so that tendering is through public notices and bids are invited in two parts i.e. technical and financial bid. Based on technical bids, short-listing of vendors need be made rather than on the basis of list of venders furnished by consultants."

Thus, the State Commission directed that the procedure to be followed for mining contract has to be the same as followed for the power project i.e. open competitive bidding with two part tendering i.e. technical and financial bids.

14.7 Finally the State Commission has decided the transfer price as under:

> *"With capital cost of mining as Rs.467.09 Crores (for alternative-III) as worked above, 'in principle' transfer price will be Rs.730.56 per ton for first year vide annexure-III, exclusive of royalty & tax and Rs.812.00 per ton with royalty & VAT. Annexure-III also gives lignite prices on constant price basis for 30 years along with royalty of Rs.50/- per MT & VAT @ 4% of transfer price plus royalty. While we are considering this rate, however, we may state that in determination of lignite price the rate as per outsourcing contract will be considered with taxes (including service tax, if paid to contractor) and duties as applicable and other charges based on capital cost and equity etc. determined as per principles set in this order".*

Thus the transfer price had to be adjusted taking into the rate as per the outsourcing contract to be decided after following the process of competitive bidding.

14.8 Annexure III of the order gives detailed calculation of transfer price. Out of total transfer price of Rs. 811.65 per MT for the first year, the outsourcing cost of mining (overburden and inter burden removal and lignite extraction) has been indicated as Rs. 570.81/MT.

15. Thus, by the order dated 19.10.2006, the State Commission directed for outsourcing of mining i.e. overburden and inter-burden removal and lignite extraction to be awarded by following a two part competitive bidding process i.e.

technical and financial bids, in the same manner as procurement of equipment and services for the power project. Even though Raj West had proposed that enquiries for outsourcing contract be floated to various reputed contractors from approved vendors list of the consultant on limited tender basis, the State Commission had directed for tendering through public notice and bids to be invited in two parts i.e. technical and financial bid and not on a limited tender basis. Even though the order dated 19.10.2006 notes the provision of the Implementation Agreement that the Joint Venture Company would enter into exclusive and irrevocable mining contract with Raj West or its consortium member for development, opening and extraction of lignite from mines and transportation of lignite to power plant on nomination basis there is no finding that the mining contract could be awarded to Raj West or its consortium member at the price discovered through the competitive bidding process.

16. It is evident from the order dated 19.10.2006 that the scheme for mining development has been altered by the State Commission from that provided in the Implementation Agreement. The Implementation Agreement provided for awarding of contract for development, opening and extraction lignite from mines and transportation to power plant to Raj West or its consortium members on nomination basis by the Joint Venture Company and for which the Joint Venture Company had to enter into an

agreement with Raj West or its Consortium Member and the transfer price of lignite had to be determined on cost plus basis i.e. cost of extraction, transportation plus royalty and taxes plus a margin on the basis of cost of extraction as scrutinized by an expert appointed by the State Government. The scheme approved by the State Commission in the order dated 19.10.2006 was that lignite extraction would be outsourced following two part competitive bidding process and the transfer price of lignite would be determined on the basis of the rate as per outsourcing contract with taxes (including service tax paid to the contractor) and duties as applicable and other charges based on the capital cost and return on capital as per the principle set out in the order.

The order did not state that the competitive bidding for mining contract was for price discovery for awarding the contract to Raj West or its consortium member or the competitive bidding would be with the condition that Raj West or its consortium member would have Right of First Refusal. These conditions are important for the bidding process and can not be considered as implied, unless there is an unambiguous finding of the Commission in the order. No such findings have been given by the State Commission in its order dated 19.10.2006. The order dated 19.10.2006 was not challenged by any of the parties and has since attained finality. The first question is decided accordingly.

17. Subsequently, Raj West carried out the ICB process for selection of Mine Developer and Operator through their consultants M/s. CRISIL. The final negotiated lowest rate for mining discovered through the bidding process conducted by M/s. CRISIL was Rs. 1075/- per MT based on 2008 costs with provision for escalation. Raj West exercised the right under the Implementation Agreement and awarded the outsourcing contract to their consortium partner, M/s. South West Mining Ltd. at the rate of Rs. 1055/- per MT i.e. Rs. 50/- lower than the lowest price bid received in the competitive bidding, with provision for escalation in accordance with the terms outlined in the tender.

18. The transfer price of lignite was scrutinized by Shri N.S. Bohra appointed by the State Government as an independent person and he recommended a price of Rs. 1732 per MT upto FY 2014-15 on the basis of outsourcing cost of Rs. 1055/- per MT payable to the Mine Development Operator by his report dated 17.1.2011.

19. Thereafter the Joint Venture Company (Appellant no. 2) filed a petition before the State Commission for fixation of transfer price of lignite on the basis of the report submitted by Shri N.S. Bohra.

20. Let us now examine the impugned order dated 17.8.2011 of the State Commission on the above petition filed by the Joint Venture

Company (Appellant no.2).. The State Commission has given a reasoned order while not accepting the proposal of the appellant no.2 regarding the transfer price of lignite.

21. The relevant extracts of the impugned order dated 17.18.2011 are described as under:-

21.1 Proposed lignite price after adding prices variations comes to Rs. 1953 per MT inclusive of royalty and taxes as against Rs. 812 per MT in principle transfer price determined by the State Commission by order dated 19.10.2006. The major share of amount payable to Mine Development Operator relates to lignite extraction cost. The amount payable to the Mine Development Operator as per the Appellant no. 2 worked out to Rs. 1115/- per

MT excluding service tax as against Rs. 570.81 per MT as per the 2006 order.

21.2 The mining contract had been proposed to be given to a party pre-selected in advance, namely M/s. SWML, a nominee of Raj West, therefore, the entire bidding process had been carried out to discover the contract price for the said pre-selected party.

21.3 Raj West had played a key role in the entire bidding process. M/s. CRISIL was appointed by Raj West as its consultant and the bidding documents and technical evaluation were approved by Raj West.

21.4 There is conflict of interest in the price determination for mine development and operation as Raj West is a company of JSW group and SWML is also an associate company of JSW Energy Ltd. and SWML is the consortium partner in execution of the power project through Raj West and the entire bidding was conducted by M/s. CRISIL on behalf of Raj West.

21.5 The bidding had evoked only limited response leading to opening of price proposals only of two parties. According to the factual position emerging from the draft report of the consultant of the State Commission to the best of his knowledge there was no Indian Company other than Government Company which could satisfy the eligibility criteria envisaged in the bidding documents. Apparently the qualification criteria in the bidding was such that the process resulted in very limited participation.

21.6 SWML which was proposed to be given mining contract did not meet the stipulated eligibility criteria as per the bidding documents. Thus, if SWML with a particular credential and capability could be entrusted with the contract why similarly situated parties were made ineligible to participate in the bidding even if the process was only for price discovery?

21.7 The nominated Mine Development Operator had in turn given sub-contract to two parties and these parties would virtually be undertaking the entire lignite extraction work in different areas allocated to each one of them. When a pre-selected party is to be awarded contract, the bidding becomes a non-serious exercise because many potential participants in bidding would shy away if they would come to know that the contract has to be given to a pre-selected party.

21.8 The bid was invited for and the contract period was subject to right of revision for both Raj West and Mine Development Operator only after 12 years. However, the mine development operation contract had been given to SWML for a period of 30 years. This vitiates the entire process of bidding.

21.9 The corrigendum dated 25.5.2008 added later provided that if mine plant necessitated for setting up of surface lignite handling plant, the owner/Raj West would finance and own the lignite handling plant at site, but, the plant would be operated and maintained by the Mine Development Operator throughout the term of contract. This would lead to considerable uncertainty in scope of work of the Mine Development Operator. Such a situation would not lead to correct price discovery.

21.10 The price bids of the qualified bidders was opened on 07.12.2007 but the same were not announced as some deviations were noticed in the proposal of one of the bidders who was asked to resubmit its price proposal in light of the corrigendum issued on 25.05.2008. Opening the price bids and not announcing the same and seeking fresh offers based on corrigendum was an unusual practice and puts question mark on the correctness of process.

21.11 The price discovered through bidding is higher by 84.82% over the in principle transfer price determined by the State Commission two years back by order dated 19.10.2006.

21.12 RSMML, the majority shareholders in the Joint Venture Company in their written submissions stated that the lignite transfer price as well as variable cost appeared to be on higher side.

21.13 The report of the consultant M/s. CRISIL did not contain assessment or evaluation regarding reasonability of the price of the lowest bidder.

21.14 In view of above, the State Commission has come to the conclusion that the price discovery process suffered from numerous flaws and could not be said to be transparent. The State Commission has come to conclusion that the bidding undertaken for outsourcing of lignite extraction was not in accordance with its earlier order dated 19.10.2006 and therefore the lignite transfer price endorsed by the independent person appointed by the State Government could not be accepted. The State Commission also directed that a fresh bidding for outsourcing of mining contract was required to be undertaken as per the direction given in the order dated 19.10.2006.

22. We find that the State Commission has passed a reasoned order in concluding that the bidding carried out by Raj West through its consultant M/s. CRISIL had been vitiated and the approval of transfer price of lignite as sought by the Appellant could not be accorded and that fresh bidding for outsourcing of lignite mining would need to be undertaken as per the directions given in the 2006 order.

23. We are in agreement with the findings of the State Commission that the bidding for lignite mining undertaken by the consultant of Raj West has been vitiated on account of following:

(a) Raj West or their consortium members did not participate in the bidding process and the bidding evoked a limited response as only two eligible parties participated in the bidding. According to the indication given by the consultant of the State Commission, none of the Indian companies other than the Government Company would satisfy the eligibility criteria envisaged in the bidding documents. However, ultimately the contract was awarded to M/s. SWML, consortium member of Raj West which did not meet the stipulated eligibility criteria. M/s. SWML, the consortium member of Raj West and the proposed Mine Development Operator has in turn given sub-contract to two parties who would be carrying the entire lignite extraction.

(b) The bids were invited for operation for mine for 15 years even though mine development contract has been given to M/s. SWML for a period of 30 years.

(c) The Corrigendum that if setting up of lignite handling plant was necessitated it would be financed by Raj West and would be operated by the Mine Development Operator led to uncertainty in scope of work.

(d) The price bids were first opened without openly disclosing the price quoted by the parties and the parties were again asked to submit fresh bids considering the corrigendum.

(e) The price discovered through bidding was considered high.

24. It has been submitted by the Learned Counsel for the Appellants that they have accepted the directions of the State Commission for carrying out competitive bidding process again for mining. However, the State Commission should allow Right of First Refusal to Raj West or its nominated company if they are able to match the price offered by the lowest bidder. According to him, this would be in consonance with the provisions of the Implementation

Agreement which provided for Joint Venture Company to enter into an exclusive and irrevocable mining contract with Raj West or its consortium members on nomination basis which was binding on the State Commission.

25. In support of his argument that competitive bidding with Right of First Refusal was an acceptable practice both nationally and internationally, the Learned Counsel for the Appellant has referred to following cases where such bidding was adopted:-

[a] The Ld. Counsel for the Appellant has referred to bidding process adopted for privatization of Delhi and Mumbai Airports wherein right of first refusal in the bidding for development of subsequent airport in the

vicinity of Delhi/ Mumbai Airports to the successful bidders was provided for. We find from the documents submitted by the Ld. Counsel for the Appellant that the bidding had a provision that in case any new Airport was to come up within 150 KM area of the existing Airport than the right of first refusal for the development of such new Airport project would be with winner of current bid as a Airport in the vicinity may discourage serious bidders for the current Airport. In the event JV of current Airport is not a successful bidder for the second Airport coming up within 150 KMs radius but within 10% of the most competitive bid received, the JV would have right of first refusal and would need to match the lowest bid for the second Airport, subject to their having a satisfactory performance without any material default at the time of exercising the right of first refusal.

[b] Another case of right of first refusal referred to by the Ld. Counsel for the Appellant is auction for lease of Taj Mahal Hotel, New Delhi by New Delhi Municipal Committee where the lease of the Indian Hotels company who was running the propriety had expired. In the bidding process for the fresh lease, M/s. Indian Hotel Company has been given the right of first refusal.

[c] Another example of right of first refusal referred to is the case of West Bengal Government selling its equity shares in Haldia Petrochemicals Ltd. where the right of

first refusal would be given to another promoter based on the highest price discovered after the auction process.

[d] He has also referred the findings of the Supreme Court of Manila in the case of JG Summit Holdings Vs. Court of Appeals, Committee on privatization etc., to stress that bidding with right of first refusal to a party was prevailing internationally. In this case a Joint Venture Company was formed by a Government Corporation and a Private Company for construction and operation and management of a shipyard with 60:40 participation in capitalization of the shipyard. The Joint Venture Agreement between the parties had a condition of granting to the parties first right of refusal should either of

them decided to sell, assign or transfer its interest in the Joint Venture. The share holding of the Government company were bid out and the private Joint Venture partner was offered to exercise their option to top up the highest bid which was that of the Petitioner. This was challenged by the Petitioner. In this case the Supreme Court of Manila held that the right to top granted to the private company and exercised by them did not violate the rules of competitive bidding.

[e] This Tribunal in its judgment dated 13.1.2011 in Appeal no. 70 of 2009 in the matter of GVK Ltd. vs. Punjab Electricity Regulatory Commission & Ors. has held that the generating company was free to match the

lowest bid received in the bidding process for developing & operating the captive coal mine at such lowest bid received.

26. We feel that Right of First Refusal can be adopted in certain cases of competitive bidding. For example in privatization of Delhi/Mumbai airport described above, the Right of First Refusal has been provided in the future competitive bidding for airport which may come up within 150 km. area of existing airport to the winner of the current bid of Delhi/Mumbai airport to encourage more serious bidders to participate in the bidding for the existing airport and enhance competition. Right of First Refusal has been provided for the existing lease holder in the bidding for fresh lease for Taj Mahal Hotel. In some cases Right of First

Refusal for acquiring the share of a promoter in a company has been given to another co-promoter in auction of shares as per a prevailing agreement between the promoters.

27. In GVK case the State Commission had permitted Right of First Refusal in the competitive bidding for development of coal mine to the generating company and the Tribunal upheld the same. It was the finding of the Tribunal in the circumstances of that case and not a ratio that in all such cases Right of First Refusal has to be necessarily adopted for development of coal mine attached to the power project. In GVK case there was no provision of a Joint Venture Company of a state owned company and the project developer for development of coal mine and there was a cap

on price of coal. The State Commission in that case felt that Right of First Refusal could be granted to the generating company in the competitive bidding for coal mining and the Tribunal upheld the same.

28. The competitive bidding for development of mine could have been undertaken either with Right of First Refusal to Raj West or its consortium member provided they participated in the competitive bidding and qualify the qualification criteria or open competitive bidding without any Right of First Refusal. Both the arrangements would be legal. However, the State Commission has directed two part open competitive bidding without any Right of First Refusal, which is also perfectly legal. Further, the order dated 19.10.2006 of

the State Commission did not envisage competitive bidding with Right of First Refusal to Raj West or its consortium members. Therefore, we would not like to interfere in the mode of competitive bidding prescribed by the State Commission unless we find that not allowing Right of First Refusal to Raj West or its consortium member would be detrimental to the smooth functioning of the project and not in consonance with the principles of tariff determination laid down in the Electricity Act, 2003.

29. Section 61 of the Electricity Act, 2003 provides that the State Commission shall be guided by the following in specifying the terms and conditions for determination of tariff:

(a) …………

(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;

(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;

(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;

(e) the principles rewarding efficiency in performance;

…………………..

30. According to learned counsel for the Appellant the State Commission should have assessed the transfer price of lignite on cost plus basis on the recommendations of the expert appointed by the State Government. We feel that even in

cost plus approach the State Commission can and should insist for award of contracts for supply, erection and commissioning of the equipments and services following a competitive bidding process in order to obtain the most competitive rates as done in the present case. The methodology decided by the State Commission is in consonance with the principles of tariff determination laid down in Section 61 i.e. safeguarding the consumers' interest and at the same time recovery of the cost of electricity in a reasonable manner.

31. Competition is one of the main objectives of the Electricity Act. We find that in the present case for outsourcing of mining the competitive bidding conducted by Raj West did not evince

much interest of the Mine developers as only two qualified bids were received. Ultimately, the mining sub-contract was awarded by the consortium member of Raj West to two companies at negotiated price. The bidding was also found to be flawed for various reasons as discussed in this judgment. Therefore, conducting an open competitive bidding with no strings attached i.e. without Right of First Refusal to Raj West or its consortium member would be more prudent and should be preferred in the present case to attract more parties and enhance competition. However, Raj West or their consortium members are free to participate in the competitive bidding for mining being conducted by the Joint Venture Company.

32. The concern of Raj West for ensuring smooth supply of lignite by the mine developer could be safeguarded by a provision for indemnification of the Joint Venture Company by the mining contractor against any liability under the Fuel Supply Agreement. We find from the submissions made by the State Commission that similar indemnification of the Joint Venture Company has been provided in the mining sub-contract of the two companies which were proposed to be awarded mining sub-contract by M/s. SWML, the consortium member of Raj West.

33. Thus, the two part open competitive bidding without any Right of First Refusal to any party appears to be more prudent and should be

preferred for attracting competition in mining and would not be detrimental to the smooth functioning of the project if adequate safeguards are taken in mining contract and is also in consonance with the principles laid down in Section 61 of the Act. In view of above, we do not like to interfere with the findings of the State Commission for conducting of competitive bidding for mining contract by the Joint Venture Company without any Right of First Refusal to Raj West or their consortium member.

34. Learned counsel for the Appellants has argued that the Implementation Agreement is binding on the State Commission. We find that the State Commission by its order dated 19.10.2006 had altered the scheme for development of the lignite mine and the same

was accepted by all the parties. The order dated 19.10.2006 was not challenged. In any case, the State Commission has authority to deviate from the Implementation Agreement if in its view, the same is not in the interest of obtaining competitive tariff for electricity or not in consonance with the provisions of the Electricity Act or Rules & Regulations framed thereunder. In the present case the State Commission directed two part open competitive bidding for award of mining contract with a view to obtain the most competitive price of lignite.

35. Thus, the second question raised by us is answered in negative.

36. **Summary of findings:**

(i) The State Commission in its order dated 19.10.2006 did not state that the price for mining contract would be discovered through a competitive bidding process to enable awarding of the mining contract to Raj West or its consortium member at the price discovered through the competitive bidding or the competitive bidding would be with the condition that Raj West or consortium member would have Right of First Refusal. Such an important condition of the bidding process has to be clearly and unambiguously decided in the findings and can not be considered as implied as it was not specifically disallowed. The order dated

19.10.2006 was not challenged and has since attained finality.

(ii) The State Commission in the impugned order has correctly held that the bidding for lignite mining undertaking by the consultant of Raj West has been vitiated on account of a number of flaws as indicated in the judgment.

(iii) It was open for the State Commission to decided for competitive bidding for development of mine either with the condition of Right of Refusal to Raj West or its consortium member provided they participate in the competitive bidding and qualified the qualification criteria or

through open competitive bidding without any Right of First Refusal as both the arrangements would have been legal. However, in the present case, the two part open competitive bidding without any Right of First Refusal to any party appears to be more prudent and should be preferred for attracting competition in mining and would not be detrimental to the smooth functioning of the project and will be in consonance with the principles laid down in Section 61 of the Act.

iv) **In view of above we do not like to interfere with the findings of the State Commission for conducting of competitive bidding for mining contract by the Joint Venture**

company without any Right of First Refusal to Raj West or their consortium member.

37. In view of above the Appeal is dismissed without any cost.

38. Pronounced in the open court on this 8th day of April, 2013.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

√

REPORTABLE~~/NON-REPORTABLE~~

vs