

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 26 OF 2025 & IA NOs. 89, 88, 91, 253 & 707 OF 2025
and
APPEAL NO. 54 OF 2025 & IA No. 263 of 2025

Dated: 12th September, 2025

Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson
Hon'ble Ms. Seema Gupta, Technical Member (Electricity)

APPEAL NO. 26 OF 2025 & IA NOs. 89, 88, 91, 253 & 707 OF 2025

In the matter of:

M/s JSW RENEW ENERGY FIVE LIMITED

Through Jatin Sharma

JSW Centre, Bandra Kurla Complex,

Bandra (East), Mumbai City

Maharashtra – 400051.

... Appellant

VERSUS

**1. CENTRAL ELECTRICITY REGULATORY
COMMISSION**

Through Secretary

6th, 7th and 8th Floors, Tower B,

World Trade Centre, Nauroji Nagar,

New Delhi – 110029.

... Respondent No.1

**2. SOLAR ENERGY CORPORATION OF INDIA
LIMITED**

Through Managing Director

6th Floor, Plate-B, NBCC Office Block Tower-2,

East Kidwai Nagar,

New Delhi – 110023.

... Respondent No.2

**3. NATIONAL LOAD DESPATCH CENTRE (NLDC/
GRID-INDIA)**

Through Managing Director

C/o Grid Controller of India

(Formerly Power System Operation Corporation Ltd),
B-9 (1st Floor), Qutab institutional Area,
Katwaria Sarai, New Delhi – 110016.

... Respondent No.3

4. GUJARAT URJA VIKAS NIGAM LIMITED

Through Managing Director
Sardar Patel Vidyut Bhavan,
Race Course, Vadodra – 390007
Gujarat.

... Respondent No.4

Counsel for the Appellant(s): Aman Anand
Aman Dixit
Natasha Debroy

Counsel for the Respondent(s): Dhananjay Baijal **for Res.1**

Shri Venkatesh
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Aneesh bajaj
Shirsa Saraswati **for Res.2**

Anand K. Ganesan
Swapna Seshadri
Utkarsh Singh
Parth Bhalla
Sneha Singh Baghel **for Res.4**

APPEAL NO. 54 OF 2025 & IA No. 263 of 2025

In the matter of:

**SOLAR ENERGY CORPORATION OF INDIA
LIMITED**

Through its Deputy General Manager
6th Floor, Plate-B, NBCC Office Block Tower-2,
East Kidwai Nagar,
New Delhi - 110023

... Appellant

VERSUS

**1. CENTRAL ELECTRICITY REGULATORY
COMMISSION**

Through its Secretary

6th, 7th and 8th Floors, Tower B,
World Trade Centre, Nauroji Nagar,
New Delhi – 110029.

... Respondent No.1

2. JSW RENEW ENERGY FIVE LIMITED (BESS DEVELOPER (JREFL))

Through its Managing Director
JSW Centre, Bandra Kurla Complex,
Bandra (East), Mumbai City
Mumbai, Maharashtra – 400051.

... Respondent No.2

3. GUJARAT URJA VIKAS NIGAM LIMITED

Through its Managing Director
Sardar Patel Vidyut Bhavan,
Race Course, Vadodra – 390007
Gujarat.

... Respondent No.3

4. NATIONAL LOAD DESPATCH CENTRE

Through its Managing Director
C/o Grid Controller of India
(Formerly Power System Operation Corporation Ltd),
B-9 (1st Floor), Qutab institutional Area,
Katwaria Sarai, New Delhi – 110016.

... Respondent No.4

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Anand K. Ganesan
Swapna Seshadri
Utkarsh Singh
Parth Bhalla
Sneha Singh Baghel **for Res.3**

JUDGEMENT

PER HON'BLE MR. JUSTICE RAMESH RANGANATHAN, CHAIRPERSON

I. INTRODUCTION:

Both JSW Renew Energy Five Ltd, and the Solar Energy Corporation of India Ltd, are in appeal against the order passed by the Central Electricity Regulatory Commission ("CERC" for short) in Petition No. 138/AT/2024 dated 02.01.2025. The said Petition was filed by the Solar Energy Corporation of India Ltd ("SECI" for short), under Section 63 of the Electricity Act, 2003, seeking adoption of the competitively discovered tariff for the Pilot Project of 500 MW/1000MWh Stand-alone Battery Energy Storage System ('BESS' for short). By the Impugned Order, the CERC rejected adoption of tariff on the basis that the tariff proposed to be adopted was not aligned with the market prices, and was not in the interest of the public at large. While JSW Renew Energy Five Ltd ("JSW" for short) is the Appellant in Appeal No.26 of 2025, SECI is the Appellant in Appeal No. 54 of 2025.

According to the Appellant-JSW, the basis on which adoption of discovered tariff was rejected by the CERC, in the Impugned order dated 02.01.2025, is (a) the decision of the Supreme Court in ***Jaipur Vidyut Vitran Nigam Limited Vs. MB Power*** (Judgement in Civil Appeal No. 6503 of 2022 dated 08.01.2024) = (2024 (8) SCC 513) empowered the Commission 'to examine whether the prices quoted are market aligned or not'; (b) there has been a 'delay of 145 days in issuance of the LoA'; a 'delay of 160 days in execution of BESSA' from the date of issuance of the LoA; and a 'delay of 245 days in execution of the BESPAs' after signing of the BESSA; (c) subsequent to the e-RA for the subject project, e-RA for 'similar projects' were conducted in March 2024, June 2024 and August 2024, where the rates discovered were considerably lower; for the e-RA conducted in August 2024,

the Appellant was also the successful bidder with a considerably lower quoted price; thus, this decline reflected the decreasing cost of batteries due to reduction in material cost and growing competitiveness of BESS projects; as per the *'prevailing industry norms and even otherwise, the batteries are one of the last items to be purchased closer to the commissioning of the project by the developers for optimising cost'*; the guidelines stipulate that the schedule commissioning date shall be 18 months after the effective date of BESPA; the chronology of events reveals that there had been a *'delay in achieving the timelines specified in the guidelines and the RfS documents'*; (d) the unreasonable delay (for whatever reason) in the instant case will lead to *'unintended gains for the developer and a wrongful loss to the public at large'*; (e) the *'tariff proposed to be adopted is not aligned with the prevailing market prices in view of the delay in signing BESSA and BESPA'*; (f) *'SECI has not yet signed BESPA with the Appellant'* and the COD may further get extended giving undue benefit to the developer to take advantage of reduced price in the battery market; (f) the decision to reject the prayer for adoption was solely based on the *'circumstances in the present case – that is, due to inordinate delay in signing of BESPA/BESSA and subsequent cost reduction in BESS'* leading to undue benefit to the developer at the cost of the consumer, as the commission was conscious of the fact that the *'price falls post bidding cannot generally be a ground for rejecting and earlier bidding process and price discovery'*; and, even in the instant case, such occasion would not have arisen, notwithstanding subsequent developments *'had the project being completed within the original time lines'*.

SECI, on the other hand, has preferred Appeal No. 54 of 2025 only to the limited extent the CERC had concluded, in the Impugned Order dated 02-01.2025, that SECI had delayed: (1) in the issuance of Letter of Award ('LoA'); (2) in the signing of the Battery Energy Storage Purchase Agreement ('BESPA') which was 245 days after the Battery Energy Storage Sale

Agreements ('BESSA') was signed with the Discom. According to SECI, in the facts and circumstances of the present case, there was no delay attributable to SECI; and the time taken both in regard to issuance of the LoA, signing of BESSA with Gujrat Urja Vikas Nigam Limited ('GUVNL') on 26.06.2024, and signing of BESPA with JSW Renew Energy Five Limited ('JSW') on 05.03.2024 are as detailed in the Appeal. Reference is made by SECI to the List of Dates detailing the factual aspects and development placed before this Tribunal during the proceedings held on 24.04.2025, a copy of which has been enclosed to the Written Submissions.

II. FACTS IN BRIEF:

On 16.07.2021, the Ministry of Power constituted a Steering Committee, with representatives from CEA, CERC, POSOCO, CTUIL and SECI, to monitor and implement the pilot project on Battery Energy Storage System (BESS) and other activities. The Steering Committee decided to implement BESS pilot project with a capacity of 500 MW/ 1000 MWh for development of three different stand-alone BESS markets i.e. (i) development of DISCOM market for load shifting under Energy Storage Obligation (ESO), (ii) development of Ancillary Market for grid balancing by NLDC, and (iii) development of BESS Merchant market by developers. The pilot project was planned with an off-take tenure of 12 years and on Build Own Operate (BOO) or Build Own Operate Transfer Basis (BOOT) basis. SECI was appointed as the Nodal Agency to facilitate establishment of BESS through a competitive bid process with 70% capacity and energy earmarked for Discom supply/ use for ancillary services by NLDC and balance 30% as merchant capacity. After deliberations regarding the commercial viability of the project, the Steering Committee was of the view that there may be a gap between the discovered tariff through a bidding process for installation of BESS and tariff as per the PSAs with the Discoms, as also between recovery

under ancillary services. The Steering Committee proposed that the BESS pilot project be considered for Viability Gap Funding (VGF) under Para 5.1(c) of the Power System Development Fund (PSDF) guidelines i.e. “pilot and demonstrated projects”. This proposal of the Steering Committee was considered by the Appraisal Committee of PSDF, and in-principal approval was sought from the Monitoring Committee of PSDF. It was decided to revise the proportion to 60% for SECI (i.e. for further utilization of 30% from Discom and 30% from NLDC) and 40% for the BESS developer, while no support was provided for 40% of the merchant capacity, which would be with the BESS developer.

On 27.01.2022, the Monitoring Committee of PSDF approved the yearly funding from 2024 to 2036 to SECI with a cap of Rs.80 Crores per annum. In-principal approval was also directed to the issue, so that bids may be called by SECI. The final sanction order was to be issued after EFC approval only, and completion of the bidding process and conclusion of PSAs by SECI.

On 22.02.2022, the Ministry of Power, Government of India conveyed its in-principal approval to SECI, in terms of Clause 5.1(c) of the PSDF Guidelines and Clause 5.3 of the Guidelines for funding from PSDF, for establishing BESS. SECI was directed to establish BESS through competitive bidding process. SECI was also informed that the Monitoring Committee had given its in-principal approval for Rs.80 Crores (from PSDF) per annum with a stipulation that a final sanction order shall be issued after completion of the bidding process.

On 10.03.2022, the Ministry of Power notified the BESS Guidelines, under Section 63 of the Electricity Act, for procurement and utilization of BESS as part of generation, transmission and distribution assets along with ancillary services. On 13.04.2022, SECI issued the RfS based on the BESS

Guidelines dated 10.03.2022. The bidders were required to set up the project on Build, Own, Operate, and Transfer Basis.

By 29.07.2022, nine bids were received by SECI, including the Appellant's bid. On 03.08.2022, the techno-commercial part of the bids was opened and evaluation of technical bids was completed. On 24.08.2022, financial bids of the qualified bidders were opened, and eight bidders were shortlisted for e-Reverse Auction. The financial bids ranged from Rs.12,72,501 per MW per month to Rs.22,90,000/- per MW per month. On 25.08.2022, on completion of the e-Reverse Auction, the Appellant was declared as the successful bidder for two projects of 250 MWs each at the tariff of Rs.10,83,500/- per MW per month. In terms of Clause 31 of the RfS, the bid validity period was 180 days from the last date of submission of response, i.e. upto 24.01.2023.

On 10.10.2022, a review meeting was held by the Ministries of Power and New and Renewable Energy, Government of India regarding the BESS Pilot Projects, including further financial support to be decided by the Government of India to SECI in due course, depending on the progress and review of the project. In terms of the deliberations, the exposure to the selected Discoms was not to exceed Rs.6/ kWh.

On 31.10.2022, the minutes of the meeting held on 10.10.2022 with the Central Government was issued. By letters dated 14.11.2022, 17.11.2022 and 19.12.2022, SECI offered 150 MW/ 300 MWh, under the BESS Pilot Project, to various distribution licensees/ procurers (including GUVNL) and sought their consent. By the said letters, SECI informed that the L1 price, discovered through the e-Reverse auction was Rs.10.83,500 per MW per month; with the proposed estimated PSDF fund support to the Pilot Scheme, the effective price of the BESS capacity being offered was

estimated to be Rs.6,40,000 per MW per month; and the levelized cost of storage was estimated to be Rs. 6.00/ kWh.

On 21.11.2022, SECI requested NLDC/ Grid India to sign the BESSA at the earliest with a view to expedite implementation of the project. On 09.12.2022, the 79th Board meeting of SECI was held, wherein it was resolved to issue Letter of Awards (LoAs) to the successful bidder after receipt of the sanction order from the Government of India regarding release of PSDF.

On 06.01.2023, NLDC wrote to the CERC seeking a regulatory framework for participation of BESS in ancillary services for its share of 150 MW capacity. On 17.01.2023, the Ministry of Power, Government of India conveyed its approval for grant from the Power System Development Fund (PSDF) towards the scheme for implementation of 1000 MWh (2 Nos. of 250 MW/ 500 MWh) of Pilot BESS Projects at Fatehgarh-III sub-station. Letters of Award was issued to the Appellant, for 2x250 MWs units, on 18.01.2023.

On 01.02.2023, SECI issued an addendum to the letter of GUVNL dated 14.11.2022 with regard to the capacity charges to be paid by GUVNL after consideration of PSDF funding. On 10.04.2023, GUVNL gave its in-principal approval/consent to SECI for procurement of 150 MW/300 MWh capacity from the BESS project. GUVNL also sought for certain changes in the draft of BESSA. On 19.04.2023, SECI responded to the letter of GUVNL dated 10.04.2023 giving its response to the various provisions of the draft BESSA.

On 10.05.2023, NLDC wrote to CERC again seeking a regulatory framework for the BESS project for its share of 150 MW capacity. On 16.05.2023, SECI informed GUVNL that the quantum to be allocated was on first come first served basis, and requested GUVNL to sign BESSA at the

earliest. On 17.05.2023, NLDC/ Grid India informed that they had approached the Central Commission and would update SECI.

On 02.06.2023, a meeting was held under the Chairmanship of the Secretary (Power), Government of India wherein GRID-INDIA suggested that the funding of fixed cost can be through the DSM pool by selling the stored power under Reserve Regulation Ancillary Services (RRAS) and that the funding of fixed cost from DSM pool may require regulatory changes to be carried out by the Central Commission. GRID India also suggested that the charging power can be procured in DAM (Day Ahead Market) through a trader such as NTPC Vidyut Vyapar Nigam Ltd. (NVVN), and power can be discharged under RRAs. Grid India was called upon to work out a mechanism for procurement of charging power.

On 06.06.2023, GUVNL conveyed its consent to SECI to procure 150 MW/ 300 MWh capacity at the rate of Rs.6,44,473.06 per MW per month (excluding applicable GST, taxes and duties if any) and sought details for signing of the BESSA.

On 14.06.2023, a meeting was held under the Chairmanship of the Secretary (Power), Government of India wherein several decisions were taken regarding the progress of implementation of the BESS project, including that NVVN shall be the nodal agency for signing the contract with SECI for the portion earmarked for Grid Ancillary Services; Grid-India, SECI and NWN shall enter into an MoU for payment of fixed charges from the regulatory pool account on monthly basis to SECI directly for 150 MW/ 300 MWh BESS earmarked for ancillary services etc.

On 26.06.2023, SECI entered into the Battery Energy Storage Supply Agreement (BESSA) with Gujarat Urja Vikas Nigam Limited (GUVNL) for 150

MW capacity earmarked to the distribution licensee. On 04.07.2023, the Ministry of Power forwarded its communication regarding the decisions taken at the meeting on 14.06.2023. On 06.07.2023, SECI again requested Grid-India/ NLDC to sign BESS.

On 07.07.2023, at the request of SECI, the Appellant extended the time to sign BESPA in terms of Clause G(6) of the guidelines and Clause 44(d) of the RfS upto 31.10.2023. On 12.07.2023, Grid-India/ NLDC informed SECI that a petition was being filed before the Central Commission which would take some time, and meanwhile a conditional MoU may be considered subject to the regulatory provisions and approval of the Central Commission.

On 31.07.2023, NLDC filed Petition No. 249/MP/2023 before the CERC seeking regulatory directions for procurement of its earmarked capacity of 150 MWs under the Ancillary Service Regulations. On 31.10.2023, the timeline to sign BESPA was further extended, on the request of SECI, up to 31.03.2024. On 22.01.2024, the Appellant proposed re-configuration of the project to ensure that 150 MWs from one project was dedicated to GUVNL for which BESSA already stood executed, and 150 MWs from the second project be dedicated to NLDC for Ancillary Services. This re-configuration was approved on 08.02.2024, and the Appellant-JSW was called upon to submit the Bank Guarantees and to sign the BESPA for 150 MWs of BESS capacity to be off-taken by GUVNL.

On 21.02.2024, the CERC, after being apprised that NLDC, SECI and the Appellant had reached a consensus on various aspects of NLDC's proposal, granted permission to the parties to file a joint statement and reserved orders in Petition No. 249/MP/2023. The joint statement was filed by NLDC before the CERC on 22.02.2024. On 26.02.2024, the Appellant submitted a Performance Bank Guarantee dated 23.02.2024 for Rs.27.75 Crores to SECI for package/ Unit-1. On 05.03.2024, BESPA was executed

between the Appellant and SECI for 150 MW. On 06.03.2023, conformity certificates were issued by the Bid Evaluation Committee.

On 14.03.2024, SECI filed Petition No. 138/AT/2024 before CERC for adoption of tariff for the 'pilot projects' of 500MW/1000MWh stand-alone Battery Energy Storage Systems (BESS) in India under tariff based global competitive bidding (BESS-I) process, as per the Guidelines for Procurement and Utilization of Battery Energy Storage System as part of Generation, Transmission and Distribution assets, along with Ancillary Services dated 10.03.2022 ("*BESS Guidelines*") of the Ministry of Power, Government of India.

On 26.03.2024, the Appellant and SECI mutually extended the timeline for signing BESPAs for the remaining 150 MW till 31.07.2024. Petition No. 138/AT/2024 was admitted by the CERC on 08.05.2024, and notice was issued. The Appellant claims that they had issued Letters of Intent, for procuring the equipment for the project, starting from 07.05.2024 onwards.

On 15.05.2024, GUVNL filed Petition No. 2364/ 2024 before the GERC under Section 86(1)(b) for approval of procurement and BESSA. On 16.05.2024, CERC approved the NLDC's procedure based on the Joint Statement filed by the parties and, in Para 61 of its order, held that NLDC need not sign any sale agreement i.e. BESS with SECI.

On 09.07.2024, SECI filed Petition No. 26/RP/2024 seeking review of the order passed by the CERC in Petition No. 249/MP/2023 dated 16.05.2024 to the extent SECI was denied additional trading margin. On 29.07.2024, SECI wrote to JSW and IDBI Bank seeking extension of the validity of the Bank Guarantee which was towards EMD.

On 08.08.2024, the CERC reserved its Order in Petition No. 138/AT/2024. On 21.08.2024, the Appellant-JSW informed SECI that the bid

validity date was coming to a close, and they were giving their consent to extend the bid validity up to 30.11.2024.

On 18.09.2024, a Record of Proceedings was uploaded in Petition No. 138/AT/2024 seeking clarification on extension of time in terms of Clause G(6) of the bidding guidelines. On 23.09.2024, GERC approved the procurement and the BESSA executed between SECI and GUVNL in terms of Petition No. 2364 of 2024. In response to the Record of Proceedings dated 18.09.2024, SECI filed an affidavit on 05.10.2024 stating that the parties had mutually extended the time as per the provisions of Clause G(6) of the bidding guidelines. On 10.10.2024, CERC again reserved orders in Petition No. 138/AT/2024, and directed parties to file their affidavits on the aspect of extension of time. On 17.10.2024, the Appellant-JSW filed an additional affidavit in Petition No. 138/AT/2024, in compliance with the Record of Proceedings dated 18.09.2024, stating that the time for signing BESPA was extended till 30.11.2024. On 18.11.2024, CERC rejected the review petition No. 26/RP/2024 filed by SECI.

The impugned order was passed by the CERC on 02.01.2025 rejecting adoption of the discovered tariff on the ground that there was a delay in signing of the Battery Energy Storage Purchase Agreement (BESPA) of around two years and, in the interregnum, there was a substantial reduction in the discovered tariff under the BESS bids conducted two years after conclusion of the Appellant's bid.

Appeal No.26 of 2025 is filed by JSW, the successful bidder in the Section 63 bidding process, aggrieved by the order passed by the CERC in Petition No. 138/AT/2024 dated 02.01.2025. SECI has also filed Appeal No. 54 of 2025 against the Impugned order dated 02.01.2025.

III. GOVERNMENT OF INDIA GUIDELINES:

The Ministry of Power, vide Resolution No. 23/16/2020/RR/Part-I dated 10.03.2022, framed guidelines for procurement and utilization of battery energy storage system as part of the generation, transmission and distribution assets, along with Ancillary Services. Section 1 of the Guidelines gives the background and introduction. Clause 1 thereunder relates to background and Clause 1(b) states that, with various global developments in technology and manufacturing, RE power has become the most affordable and clean source for annual energy requirements; initial capacities have been successfully integrated to the grids so far, but with increasing penetration of RE in the energy mix, further capacity addition is expected to face issues due to supply-demand mismatch, wherein generation from RE sources happens mainly during the low demand period, and has the characteristic of being infirm in nature; some utilities have already started experiencing the effects of integrating renewables into their grids and forcing curtailment of power; the Central Electricity Authority (CEA), in its report titled “Optimal Generation Capacity Mix for 2029-30” dated January, 2020, has envisaged a key disruption in replacement of thermal based generation with renewable energy generation complemented with energy storage technology; and an excerpt from the said report states that this has been possible with the downward trend of cost of solar panels and newer technology options like battery energy storage systems; reduction in cost projections is very aggressive for Battery Energy Storage technology to render them financially viable in the near future; and planning for optimal generation capacity mix gains tremendous importance so that future generation capacity mix is cost effective as well as environmental friendly; and a horizon of 10-12 years is sufficient to gear up the systems and policies in the right direction to achieve the optimal generation mix.

Clause 2 of the Guidelines are the objectives, and thereunder the specific objectives of these Guidelines are: (a) to facilitate procurement of

BESS, as part of individual RE power projects or separately, for addressing the variability/firming power supply / increasing energy output / extending the time of supply from an individual RE project or a portfolio of RE projects, augmentation of existing RE Projects and/or to provide ancillary, grid support and flexibility services for the grid; (b) to facilitate procurement of BESS for optimum utilization of transmission and distribution network; (c) to ensure transparency and fairness in procurement processes/ and to provide for a framework for an Intermediary Procurer as an Aggregator/ Trading licensees/ Implementing Agency for the inter-state/intra-state sale-purchase of power; and (d) to provide standardization and uniformity in processes and a risk-sharing framework between various stakeholders, involved in the energy storage and storage capacity procurement, thereby encouraging competition and enhanced bankability of the Projects.

Under Scope of the Guidelines, Clause 1 relates to Applicability of the Guidelines and states that these Guidelines are being issued under the provisions of Section 63 of the Electricity Act, 2003 for procurement of energy from BESS by the 'Procurers', through competitive bidding, from grid-connected Projects to be set up on "Build-Own-Operate" or "Build-Own-Operate-Transfer" basis, with the minimum project size and bid capacity requirements as stipulated thereunder. Clause (2) stipulates that the provisions of these Guidelines shall be binding on the BESS Developer/Procurer/ Intermediary Procurer/End Procurer/Implementing Agency and the Authorised Representative of the Procurer; and the process to be adopted, in event of any deviation proposed from these Guidelines, is specified in Clause A Section V of these Guidelines.

Clause 4 provides that the said Guidelines shall be applicable for business cases identified above vide Sl. (ii) to (vii). For Sl. (i) above, i.e. in case of systems which contain RE generating stations along with BESS as

a single Project (co-located or multi-located), the respective Standard Bidding Guidelines issued for procurement of power from Solar, Wind and Hybrid Power Projects, or the Unified Standard Bidding Guidelines, as issued by the Ministry of Power, shall be applicable.

Section III of the Bidding guidelines relates to Bidding Process and Award of Projects Sub-Section A thereunder relates to preparation for inviting bids and project preparation. Clause 1 thereunder relates to the conditions to be met by the Procurer. Clause 1.4 relates to the Project Site specified by the procurer. The table below Clause 1.4 gives details of the milestones and the deadlines and thereunder, with respect to the milestone for the tendering process, the deadline stipulates that the bidding agency should try to conclude the tenders within three months of issuance of the tender documents. With respect to the milestone of signing of BESPA, the deadline stipulated is thirty days of issuance of LOA (may be extended depending on the tender conditions). With respect to the milestone for Scheduled Commissioning Date (SCD), the deadline stipulated is in line with Clause C of Section IV of these Guidelines.

Under the head “Bidding Parameters”, Clause B 2 (b) stipulates that the Procurer may invite bids for procurement in terms of BESS Capacity; a Capacity Procurement would entail that the Procurer pays for the availability of storage capacity; and the bidding parameter, accordingly, would be a quantum of VGF support required by the bidder for a pre-specified fixed Tariff/ Annuity specified.

Clause G relates to contract award and conclusion and Clause G-3 thereunder requires the BESPA to be executed between the BESS Developer and the Procurer; in case of involvement of an Intermediary Procurer, BESPA shall be executed between the BESS Developer and the Intermediary Procurer, and the BESSA shall be executed between the

Intermediary Procurer and the End Procurer; and the BESPAs should preferably be signed immediately after signing of the BESSAs. Clause G-4 requires the Intermediary Procurer to enter into the Battery Storage Purchase Agreement (BESPA)/Power Purchase Agreement with the Developer(s), and enter into a Battery Storage Sale Agreement (BESSA)/Power Sale Agreement with the distribution licensee(s)/ consumer(s); the BESSA shall contain the relevant provisions of the BESPA on a back-to-back basis; and the Intermediary Procurer shall be entitled to charge trading margin of seven paise/kWh or 0.5% of the Capacity Charges (as applicable) from the Buying entity/ Procurer for purchase and sale of such energy/capacity. Clause G-5 stipulates that, as long as the Intermediary Procurer follows these Guidelines for procurement of BESS, the End Procurer(s) shall be deemed to have followed these Guidelines for procurement of such power; the power procurement for Distribution licensees in some States is centralized through a holding company or another government agency; and such companies/ agencies will be considered as Procurer and not as Intermediary Procurer for the purposes of these Guidelines. Clause G-6 provides that, in case of delay in signing of BESPA beyond 6 months from the date of issuance of LoAs, or any other extended date as mutually agreed between the Bidding Agency and the successful bidders, the awarded capacity shall stand cancelled; in certain cases, after the above deadline, if the cumulative capacity eligible for signing of BESPAs is lower than the cumulative capacity awarded under the tender, further course of action will be decided by the Bidding Agency, which will be clearly specified in the tender document. Clause G-7 provides that, for the purpose of transparency, the Procurer shall, after execution of the BESPA, publicly disclose the name(s) of the successful bidder(s) and the tariff/charges quoted by them together with the break-up into components, if any; and the public disclosure shall be made by posting the requisite details

on the website of the Procurer for at least 30 (thirty) days. Clause G-8 stipulates that, subject to the provisions of the Electricity Act, the distribution licensee or the Intermediary Procurer, as the case may be, should approach the Appropriate Commission for adoption of tariffs (including capacity charges, if applicable) discovered and quantum of capacity / electricity to be procured, within 30 days of issuance of Letter(s) of Award to the successful bidder(s); and, in case the tariff (including capacity charges, if applicable) adoption procedure requires signed BESPA to be submitted along with it, the above timeline may be extended suitably. Clause G-10 provides that, subsequent to the End Procurer/Intermediary Procurer approaching the Appropriate Commission for adoption of tariff, in case the Appropriate Commission does not decide upon the same within 120 days from the Effective Date of the BESPA, the Procurer(s) shall grant appropriate extension of time in financial closure deadline and scheduled commissioning date to the BESSDs, corresponding to the delay (beyond 120 days of the Effective Date of BESPA) in adoption by the Appropriate Commission, till the date of adoption by the Appropriate Commission.

IV. RELEVANT CLAUSES OF THE RfS:

The request of selection document, for the subject pilot project, was issued by SECI on 13.04.2022. Section 1 of the RfS relates to introduction and invitation of bids. Clause 1.5 thereof records that SECI had received interest from prospective Buying Entities across the country, to utilize energy storage systems, on a “On-Demand” basis, suited to their requirements during the peak and off-peak hours; in view of the above, SECI hereby wishes to invite proposals for setting up of ISTS-connected Pilot Projects of stand-alone Battery Energy Storage Systems (BESS), for an aggregate storage capacity of 1000 MWh (500 MW x 2 hrs); SECI shall enter into a Battery Energy Storage Purchase Agreement (BESPA) with the successful

Bidders selected based on this RfS, for providing Energy Storage facility to SECI/Buying Entities as per the terms, conditions and provisions of the RfS and BESPAs.

Clause 1.6 of the RfS states that the Battery Energy Storage System Developers (hereinafter referred to as BESSDs) selected by SECI based on this RfS, shall set up the BESS on Build Own Operate Transfer (BOOT) basis in accordance with the provisions of this RfS document and standard BESPAs. BESPAs formats shall be shortly available for download from the ISNETS portal <https://www.bharat-electronictender.com>.

Section 2 of the RfS are the special conditions of the contract, and Clause 3 thereunder relates to the scope of the work. Clause 3.3 provides that setting up of BESS, and interconnection of the BESS with the ISTS network, will be under the scope of the BESSD; this RfS is technology agnostic on the nature of battery storage system being opted by the BESSD, as long as it meets the definition of BESS under this RfS, and the required performance criteria under the RfS and BESPAs. Clause 3.3 provides that the BESS may be charged by any source of energy ("BESS charging source"), including conventional energy sources; ownership of such energy source is not mandatorily to be held by the BESSD; and, for the capacity under contract with SECI, charging and discharging of the system will be under the scope of the Buying Entity.

Clause 8 relates to the performance criteria of the project and Clause 8.1 to the project performance parameters. Clause 8.1(a) provides that the contracted capacity of the Project shall be in terms of "MW"; SECI's obligation shall be for off-take of 60% of the contracted capacity and energy, and utilization of remaining 40% capacity is to be managed by the Developer; it is, however, clarified that the total Project capacity will be different from the contracted capacity under this RfS; and contracted capacity will be equal to

60% of the project capacity set up under the BESPAs, which will be off taken by SECI.

Clause 8.1(b) states that, for example, for a Project Capacity of 250 MW/500 MWh, contracted capacity shall be 150 MW/300 MWh under the BESPA; accordingly, for the Contracted Capacity of 150 MW, the BESPA shall entitle the off-taker to schedule discharge upto 300 MWh of energy from the BESS in each cycle, subject to the following: (i) the Buying Entity will schedule charging of the BESS with equal amount of energy plus energy expected to be lost as conversion losses (determined from the guaranteed Round-Trip Efficiency (RtE) of the system); Illustration: For a Contracted Capacity of 150 MW/300 MWh, assuming an RtE of 97.5%, Buying entity shall supply charging power to the tune of 307.7 MWh, to expect a discharge of 300 MWh as per the desired schedule; (ii) minimum energy scheduled for discharge in a given cycle during a year shall be more than or equal to the Minimum Dispatchable Energy Capacity at the End of Year as specified elsewhere under in this Clause.

Clause 8.1(e)(iv) states that, taking into consideration capacity degradation, the minimum dispatchable energy to be made available by the BESSD at the end of a given year shall be as follows:

Year	Min. Dispatchable Capacity at the end of Year (as a % of Capacity at the Beginning of Life/COD)
1	97.5%
2	95.0%
3	92.5%
4	90.0%
5	87.5%
6	85.0%
7	82.5%

8	80.0%
9	77.5%
10	75.0%
11	72.5%
12	70.0%

Clause 31 of RfS relates to the validity of the response to the RfS and stipulates that the Bidder shall submit the response to RfS which shall remain valid up to 180 (One Hundred Eighty) days from the last date of submission of response to RfS (“Bid Validity”); and SECI reserves the right to reject any response to RfS which does not meet the aforementioned validity requirement.

SECI issued an amendment to the RfS on 02.06.2022. Clause 2.2.2 and 2.2.4 of the amendments in the BESPAs document read thus: -

6.	2.2.2	At the end of the 12th Contract Year the BESSD would be required to demonstrate the Operational residue BESS capacity of not less than 70% of the Total project capacity () and duly transfer the entire Project () to SECI at Re and free from any encumbrances or liability. Such capacity demonstration shall be made by the BESSD in the	At the end of the 11 th Contract Year after COD, the BESSD would be required to demonstrate the operational residue BESS capacity of a value not less than 72.5% of the Project Capacity. Such capacity demonstration shall be made by the BESSD in the beginning of the 12th Contract Year as per the procedure for capacity demonstration detailed under Commissioning Procedure and shall be witnessed by a
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		beginning of the 12th Contract Year as per the procedure for capacity demonstration detailed under Commissioning Procedure and shall be witnessed by a Committee having SECI's representatives.	Committee having SECI's representatives.
8.	2.2.4	New Clause	Transfer of the Project to SECI: At the end of the 12th Contract Year after COD, the BESSD shall transfer the Project to SECI at Re. 1 (Rupee one only), with the Project being free from all encumbrances or liabilities. Any charges, duties, taxes, etc., applicable during the transfer of Project to SECI, shall be payable by the BESSD.

Clause 21.5 of the amendment made to the RfS on 02.06.2022 reads thus: -

27.	21.5Effective Date of the BESPA shall be the date as on 90 days from the date of issue of LoA, irrespective of the date of signing of BESPA (for example, if the date ofEffective Date of the BESPA shall be the date as on 90 days from the date of issue of LoA, or the date of signing of BESPA, whichever is later (for example, if the
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	LoA is 07.03.2022, the Effective Date will be 05.06.2022).In extraordinary cases of unavoidable delay on the part of SECI in signing the BESPA, the effective date of BESPA shall be the date of signing of BESPA.	date of LoA is 07.08.2022, the Effective Date will be 05.11.2022 or date of signing of BESPA, whichever is later).
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V. BATTERY ENERGY STORAGE SALE AGREEMENT (BESS): RELEVANT CLAUSES:

The Battery Energy Storage Sale Agreement (BESSA) was executed between Solar Energy Corporation of India Limited (SECI) and Gujarat Urja Vikas Nigam Limited (GUVNL) on 26.06.2023. The said Agreement records that it shall come into effect from the signing of the Agreement by both the parties, and such date shall be the Effective Date for the purpose of this Agreement.

Para-II provides that, notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either Party against the other under this Agreement shall be that, within 120 days after the Effective Date of the BESPA, SECI and/or the Buying Entity shall obtain adoption of tariff from its State Electricity Regulatory Commission and/or CERC (as applicable), on the terms and conditions contained in this Agreement read with the terms and conditions contained in the BESPA entered into between SECI and the BESSD; the Parties agree that, in the event the order of adoption of tariff as mentioned above is not issued by the SERC and/ or CERC (as applicable) within the time specified above, this shall entail a corresponding extension in Scheduled Financial Closure and the Scheduled

Commissioning Date of the projects for equal number of days for which the CERC/ SERC order has been delayed beyond the above deadline.

Clause 4.7 relates to compliance with the law, and provides that, despite anything contained in this Agreement but without prejudice to this Article, if any provision of this Agreement shall be in deviation or inconsistent with or repugnant to the provisions contained in the Electricity Act, 2003, or any rules and regulations made there under, such provision of this Agreement shall be deemed to be amended to the extent required to bring it into compliance with the aforesaid relevant provisions as amended from time to time. Clause 4.8 provides that the duly executed BESPA between SECI and BESSD shall be attached to this Agreement, and shall be read along with the Agreement as a composite back to back process for BESS Capacity under the provisions of the Electricity Act, 2003 and the Regulations notified thereunder.

VI. BESPA: ITS CONTENTS:

A Battery Energy Storage Purchase Agreement was signed between the Appellant-JSW Renew Energy Five Ltd and Solar Energy Corporation of India Ltd. on 05.03.2024. The BESPA initially records that (A) The Ministry of Power, Government of India has issued the "Guidelines for Procurement and Utilization of Battery Energy Storage Systems as part of Generation, Transmission and Distribution assets, along with Ancillary Services" vide Resolution dated 10th March 2022, including subsequent amendments and clarifications thereof, if any, issued until 29.07.2022; (B) SECI has been designated as a Nodal Agency for developing and facilitating the establishment of the Grid connected Battery Energy Storage Capacity in India in terms of the Policy/Guidelines issued by the Government of India; (C). SECI had initiated a Tariff Based Competitive Bid Process for development of 500 MW/1000 MWh of ISTS connected Battery Energy

Storage Project (Project) on the terms and conditions contained in the Request for Selection Documents (herein after referred to as 'RFS') issued by SECI vide RFS No. SECI/C&P/IPP/15/0001/22-23 dated 13.04.2022; (D). SECI has issued the Letter of Award No. SECI/C&P/BESSD/ESS-1/LOA/JREFL/P1/53418 dated 18.01.2023 in favor of the M/s JSW Renew Energy Five Limited for development and establishment of the 250 MW/500 MWh of Den "Project" or "BESS" at a location provided at Fathegarh-III S/s in the State of Rajasthan as per the terms and conditions contained in the RfS, this Battery Energy Storage Purchase Agreement (BESPA) and other bidding documents as well as the conditions contained in the Letter of Award; (E) M/s JSW Renew Energy Five Limited has been selected in the Competitive Bidding Process (hereinafter referred to as 'BESSD'), for development, and supply of BESS Capacity from the 250 MW/500 MWh of the Project/BESS to be established by BESSD in Fathegarh-III S/s, Rajasthan and for making available of such Battery Energy Storage Capacity by SECI as an Intermediary Agency to the Buying Utility(ies) (as defined] under a Battery Energy Storage Sale Agreement (BESSA) to be entered into between SECI and such Buying Utility(ies); (F.) SECI has agreed to purchase such Battery Energy Storage Capacity from the BESSD as an Intermediary Procurer and sell it to Buying Utility/Entity on back-to-back basis as per the provisions of the RfS. Accordingly, SECI has agreed to sign/has signed a Battery Energy Storage Sale Agreement (BESSA) with the Buying Utility (ies) /Entity (ies) to sell such Battery Energy Storage Capacity as per the provisions of the above said Guidelines and RfS; (G) In terms of the RfS and the Bidding Documents, the BESSD has furnished the Performance Bank Guarantee/ Payment on Order Instrument in the sum of Rs. 27,75,00,000/- in favour of SECI as per the format provided as a part of the Bidding Documents and a copy of the Bank Guarantee/ Payment on Order Instrument provided in Schedule - I to this Agreement; (H). BESSD has

fulfilled the terms of the RfS Documents and the terms of the Letter of Award for signing this Battery Energy Storage Purchase Agreement as a definitive agreement for developing the "Project" (or "BESS") of 250 MW/500 MWh at Fathegarh-III S/s, Rajasthan for making available Battery Energy Storage Capacity by the BESSD to SECI to enable SECI to make available such Battery Energy Storage Capacity to the Buying Utility(ies) / Entity(ies), as SECI may consider appropriate, under a Battery Energy Storage Sale Agreement (BESSA) and on a back-to-back basis to the Battery Energy Storage Purchase Agreement to be entered into with the BESSD; (I) SECI has signed the Battery Energy Storage Sale Agreement (BESSA) with the Buying Utility(ies)/ Entity(ies) of States in India /POSOCO; (J). The parties have agreed to execute this Battery Energy Storage Purchase Agreement in terms of the provisions of the RfS, the bidding documents and the Letter of Award in regard to the terms and conditions for development of the Project at Rajasthan, on Build, Own Operate and Transfer basis and for making available such Battery Energy Storage Capacity by the BESSD to SECI; and now therefore, in consideration of the premises and mutual agreements, covenants and conditions set forth herein, it is hereby agreed by and between the Parties as follows:

Article 2 thereof relates to the terms of the agreement and Article 2.1 to the effective date. Article 2.1.1 stipulates that the agreement shall come into effect from 05.03.2024, and such date shall be referred to as the effective date. Clause 2.1.2 records the agreement of Parties that decisions pertaining to adoption of the Tariff and approval of the same, for procurement of Contracted Capacity, shall be binding on all Parties concerned, as contained in the Electricity Act, 2003 and any amendments thereof. Clause 2.1.3 provides that, notwithstanding the Effective Date, the condition precedent for the enforcement of the obligations of either party against the other under this Agreement shall be that, within 120 days after the Effective

Date of the BESPAs, SECI and/or the Buying Entity(ies) shall obtain adoption of tariff from CERC (as applicable), on the terms and conditions contained in this Agreement read with the terms and conditions contained in the BSSA entered into between SECI and the Buying Entity(ies); the Parties agreed that, in the event the order of adoption of tariff as mentioned above is not issued by the CERC within the time specified above, the provisions of Article 2.1.4 shall apply. Clause 2.1.4 provides that, in case the order from the CERC is issued within the timeline as per Article 2.1.3, no extension for Financial Closure or Scheduled Commissioning Date shall be given; however, if the requisite CERC order is issued after the timeline as per Article 2.1.3, this shall entail a corresponding extension in Scheduled Financial Closure and the Scheduled Commissioning Date for equal number of days for which the CERC order has been delayed beyond such period as specified in Article 2.1.3.

Clause 2.2 relates to the Terms of Agreement and Clause 2.2.2 provides that, at the end of the 11th Contract Year after COD, the BESSD would be required to demonstrate the operational residue BESS capacity of a value not less than 72.5% of the Project Capacity; such capacity demonstration shall be made by the BESSD in the beginning of the 12th Contract Year as per the procedure for capacity demonstration detailed under Commissioning Procedure, and shall be witnessed by a Committee having SECI's representatives. Clause 2.2.3 provides that, in case BESSD fails to demonstrate operational residue capacity of a minimum value as per Article 2.2.2 above, BESSD, at its own risk and cost, shall augment the BESS capacity to meet the minimum criteria as per Article 2.2.2 above, within 180 days of demonstration made as per Article 2.2.2 above, failing which the cost estimated by the SECI, through a competitive bidding process for such augmentation of BESS, shall be recovered from the tariff payable for the balance term; the tariff payments as per Article 9 will not be applicable for

the above period of rectification; moreover, in case of non-payment of any aforementioned balance dues / compensation/penalty, SECI may debar the BESSD and Bidding Company including its Group Companies from participating for a period of 2 years in any of the Bidding Process conducted by the Procurer.

Clause 2.2.4 relates to Transfer of the Project to SECI and, thereunder, at the end of the 12th Contract Year after COD, the BESSD shall transfer the Project to SECI at Re.1 (Rupee one only), with the Project being free from all encumbrances or liabilities; any charges, duties, taxes, etc., applicable during the transfer of Project to SECI, shall be payable by the BESSD.

Clause 3.2 relates to consequences of non-fulfilment of conditions subsequent and financial closure. Clause 3.2.3, thereunder, provides that, in case of inability of the BESSD to fulfil the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfilment of the Conditions Subsequent and Financial Closure as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event; further, any delay in adoption of tariff by the Appropriate Commission, beyond 120 (one hundred twenty days) days after the Effective Date of this Agreement, shall entail a corresponding extension in the deadline as stipulated in Article 3.1.

Article 4.5 relates to Extension of time. Article 4.5.1 stipulates that, in the event the BESSD is prevented from performing its obligations under Article 4.1 by the Scheduled Commissioning Date due to: (a) any SECI Event of Default; or (b) Force Majeure Events affecting SECI/ Buying Entity(ies), or (c) Force Majeure Events affecting the BESSD, the Scheduled Commissioning Date and the Expiry Date shall be deferred for a reasonable period but not less than 'day for day' basis, to permit the BESSD or SECI/ Buying Entity(ies) through the use of due diligence, to overcome the effects

of the Force Majeure Events affecting the BESSD or SECI/Buying Entity(ies), or till such time such Event of Default is rectified by SECI.

Article 4.5.2 provides that any delay beyond 120 days from the Effective Date of BESPA in issuance of Order for the adoption of tariff by Hon'ble CERC, shall entail a corresponding extension in Scheduled Financial Closure and the Scheduled Commissioning Date for equal number of days for which the CERC order has been delayed beyond such period of 120 days from the Effective Date of BESPA.

Article 4.5.5 stipulates that, as a result of such extension on account of Article 4.5.1 or Article 4.5.2, the newly determined Scheduled Commissioning Date and newly determined Expiry Date shall be deemed to be the Scheduled Commissioning Date and the Expiry Date for the purposes of this Agreement.

VII. ORDER OF CERC IN PETITION NO. 249/MP/2023 DATED 16.05.2024:

NLDC filed Petition No. 249/MP/2023 before the CERC on 31.07.2023 seeking directions for advance procurement and dispatch of 150 MW/ 300 MWh Battery Energy Storage Systems stand-alone ISTS connected BESS pilot project. In the said Petition, NLDC prayed the CERC to approve the procedure proposed by NLDC for implementation of the BESS Pilot Project annexed and marked as Annexure 37; approve payment of fixed charges and charges for charging of BESS from the Northern Region (NR) Ancillary & DSM Pool Account as per the methodology outlined in the Procedure annexed and marked as Annexure 37; and, after the end of 12 years of useful life of the BESS portion earmarked to NLDC for grid-ancillary service, if there was a possibility of further use of the BESS system, the first right to use may be provided to NLDC.

Thereafter, an affidavit was filed by NLDC in Petition No. 249/MP/2023 wherein, in addition to the prayers in the main Petition, NLDC sought additional prayers in view of the revision in the original procedure for Scheduling, Metering, Accounting and Settlement for Grid Ancillary portion of the BESS (Pilot) Project. The additional prayers were to allow SECI to raise payment invoice in the name of GRID-INDIA after issuance of weekly Ancillary Services Accounts by NRPC; allow GRID-INDIA to deduct and deposit the TDS applicable, as per the prevailing rates on the amount payable to SECI; allow the entire yearly fixed charges (approximately Rs.195 Crores) including SECI's trading margin of 0.5%, on the fixed charges and applicable GST amount as per the prevailing rates, to be settled from the DSM Pool; allow priority payment of weekly charges payable to SECI over all other payments from the DSM Pool; and allow annual truing up of availability incentives/ penalties, rebate, surcharge etc. for the Ancillary portion of the BESS.

In its Order, in Petition No. 249/MP/2023 dated 16.05.2024, the CERC expressed its inclination to facilitate the procurement and deployment of BESS as envisaged in the guidelines issued by the MoP, Government of India. It invoked its power under Regulations 24 and 25 of the Ancillary Services Regulations to relax and remove difficulties in the implementation of the BESS pilot project for providing enabling regulatory framework and seamless participation of BESS in ancillary services. The CERC observed that, in view of the requirement of flexible resources, it was important to enable a regulatory framework for such a pilot project – the first of its kind – in the Indian grid system; and that it agreed with the consensus view among the parties to allow metering at the Project level as per the DSM regulations. The BESS Developer was directed to monitor the Sale of Charge (SoC), performance and computation of SRAS/ TRAS performance incentives, segment-wise as desired by NLDC. The CERC opined that, for the BESS

pilot Project, the second Respondent (Developer) shall be responsible for DSM, Reactive Energy, and Congestion settlement as the BESS developer; and, as it was a pilot project, the learning on primary frequency control would help further understand the features and create an enabling regulatory framework for compensation in the near future. The Commission directed the parties to explore the possibilities of utilizing the BESS pilot projects for all types of Ancillary Services, i.e. Primary, Secondary, and Tertiary response. The Commission directed that all payments towards the portion of the pilot project earmarked for ancillary services, including fixed charges, trading margin, GST applicable, incentive/ disincentive etc. shall be made from the DSM and Ancillary Pool Account; and the second Respondent-Developer shall raise an invoice in the name of GRID-INDIA as per the methodology outlined in the agreed procedures submitted by the parties.

The CERC directed NLDC to pay applicable charges to SECI on account of ancillary service from the DSM pool directly on a weekly basis, and held that the same may be adjusted once the grant from the PSDF was received. The Commission also directed annual truing up of rebates, surcharges etc. for an ancillary portion of the BESS project, if any. It also agreed with the views of NLDC that weekly charges payable shall be given priority over all other payments from the DSM pool. The Commission concluded by observing that, after incorporating the suitable changes as per the directions in the said order, they were approving the Procedure for Scheduling, Metering, Accounting and Settlement for BESS (Pilot) Project; and the approved procedure was enclosed as Annexure to the order. NLDC was directed to publish the same on its website and share it with the Respondents.

VIII. ORDER OF THE GERC IN PETITION NO. 2364 OF 2024 DATED 23.09.2024:

Petition No. 2364 of 2024 was filed by GUVNL before the GERC, under Section 86(1)(b) of the Electricity Act, 2003, on 15.05.2024 seeking approval of the Battery Energy Storage Sale Agreement signed by GUVNL with SECI for procurement of 150 MW/ 300 MWh Energy storage capacity procured by SECI under Tariff based Competitive Bidding process from the 500 MW/ 1000 MWh pilot project to be set up by the BESSD at Fatehgarh-III sub-station of Power Grid in Rajasthan.

In the said Petition No. 2364 of 2024, the Petitioner-GUVNL stated that SECI, as the central nodal agency for Solar, Wind, Hybrid, and Energy Storage System (ESS) tenders, had issued India's first-of-its-kind pilot project tender for a stand-alone Battery Energy Storage System (BESS) with a capacity of 500 MW/1000 MWh in April 2022; further, storage rates, discovered under GUVNL's stand-alone BESS pilot project Phase-II bid, was in the range of Rs. 4,48,996-4,49,996 per MW per month in March 2024; recently, in the BESS project Phase- III, it was discovered as Rs. 3,72,978 per MW per month in June 2024, whereas, SECIL had discovered the Battery Energy Storage System rates in April 2022; the BLOOMBERG survey, on price trends of manufacturing LFP cell and LFP cell price, depicted that, during FY 2022, the price of LFP cell was \$ 118.3 per kilowatt-hour (USD) in March 2022, and during FY 2024 the price of LFP cell was reduced to \$ 52.6 per kilowatt-hour (USD) in March 2024; and the above price trends provide corroboration to the discovered tariff in SECIL (ESS-1) pilot project Phase-1; based on these, among other, facts GUVNL had approached the GERC seeking approval of the Battery Energy Storage Sale Agreement signed by GUVNL with Solar Energy Corporation of India Limited (SECIL) for procurement of 150 MW/300 MWh Energy Storage capacity procured by SECI under Tariff Based Competitive Bidding Process for 500 MW/ 1000 MW Pilot Project to be set up by the BESSD at Fatehgarh-III Sub-Station of Power Grid in Rajasthan.

In its order, in Petition No. 2364 of 2024 dated 23.09.2024, the GERC took note of the submissions of GUVNL regarding the National targets for RE that the Government of India had committed in the revised Nationally Determined Contribution (NDC) at the global level, in terms of which 50% of the total electrical installed capacity of the Country was to be tied up from non-fossil fuel-based energy sources by 2030; GUVNL had been tying-up wind and solar power considering the RPO targets notified by the Commission & MoP, Government of India from time to time; the Ministry of Power, Government of India, vide Office Orders dated 22.07.2022 & 20.10.2023, had specified the long term RPO trajectory till 2029-30, and had fixed the minimum percentage of total consumption of electricity from RE sources which trajectory was higher than the RPO trajectory notified by the Commission; in order to fulfil the Renewable Purchase Obligation (RPO) specified by the Ministry of Power (MoP), Government of India, significant capacity addition of Renewable Energy (RE) Source was necessary; and additionally, to address the intermittent nature of RE Sources, there was a need for Energy Storage solutions.

The GERC further noted that, in response to the query of the Commission vide Daily Order dated 08.08.2024 about the effective price of BESS, GUVNL had submitted that the effective price of BESS capacity being offered was estimated to be Rs. 6,44,473.06 per MW per month (excluding the applicable GST, taxes and duties if any) after grant from the Power System Development Fund (PSDF); moreover, the levelized cost of the storage was estimated to be Rs. 6 per kWh considering the discount rate at 8.3% and the life of project as 12 years; it was a pilot project, and the storage rates discovered under GUVNLs' stand-alone BESS pilot project Phase-II bid was in the range of Rs. 4,48,996- 4,49,996 per MW per Month, and recently in the BESS project Phase- III it was discovered as Rs. 3,72,978 per MW per month; and the rates discovered had reduced due to reduction in

cost of material by 40-50%, which impacted the reduction in discovered rates.

The GERC, thereafter, noted that, in response to its queries, GUVNL had submitted that, in terms of the RfS, 60% of project capacity shall be procured by SECI and 40% of project capacity shall be identified as market component and, in case of any reduction in the project capacity, bifurcation of 60% and 40% shall be done on a pro-rata basis; the useful life of the project was for a 12-year period and, at the end of 12 years after commissioning of the project, the BESS developer would transfer the project to SECI at Re. 1/- with the project being free from any encumbrances; and the representative of GUVNL had agreed to provide justification regarding variation in the rates discovered in the earlier bid as well as the present bid for such type of Battery Energy Storage System projects.

The GERC took on record the affidavit filed by GUVNL dated 31.08.2024, pursuant to the daily Order passed by the Commission dated 08.08.2024, wherein they had submitted that they had signed a Battery Energy Storage Sale Agreement with SECI for procurement of 150 MW/300 MWh energy storage capacity procured by SECI under tariff based Competitive Bidding Process from the 500 MW/1000 MWh pilot project to be set up at Fatehgarh-III Sub-Station in Rajasthan; SECI had issued tenders for India's first-of-its-kind pilot project, for a stand-alone Battery Energy Storage System (BESS) with a capacity of 500 MW/1000 MWh in April 2022; the storage rates discovered under GUVNL' Stand-alone BESS pilot project Phase-II bid was in the range of Rs. 4,48,996-4,49,996 per MW per Month in March 2024, and recently in the BESS project Phase- III, it was discovered as Rs. 3,72,978 per MW per month in June 2024, whereas SECI had discovered the Battery Energy Storage System rates in April 2022; the BLOOMBERG survey, on price trends of manufacturing LFP cell and LFP

cell price, depicted that, during FY 2022, the price of LFP cell was \$ 118.3 per kilowatt-hour (USD) in March 2022, and during FY 2024 the price of LFP cell was reduced to \$ 52.6 per kilowatt-hour (USD) in March 2024; the aforesaid price trends provided corroboration for the discovered tariff in SECIL (ESS-1) pilot project Phase-1; and, based on this, GUVNL had approached the GERC seeking approval of Battery Energy Storage Sale Agreement signed by them with SECIL for Procurement of 150 MW/300 MWh Energy Storage capacity procured by SECI under Tariff Based Competitive Bidding Process for 500 MW/1000 MW Pilot Project to be set up by the BESSD at Fatehgarh-III Sub-Station of Power Grid in Rajasthan.

In view of the above, the GERC approved the Battery Energy Storage Sale Agreement (BESSA) executed between the Petitioner GUVNL and the Respondent No. 1 SECI on 26.06.2023 at the tariff of 6,44,473.06 per MW per month (excluding the applicable GST, taxes and duties if any), awarded by SECI to M/s JSW Renew Energy Five Limited (JSWREFL) as Battery Energy Storage System Developer (BESSD), for Procurement of Energy Storage capacity by GUVNL on behalf of four State DISCOMs. After noting that GUVNL had already executed the Battery Energy Storage Sale Agreement (BESSA) with SECI on 26.06.2023, GERC directed GUVNL, for the purpose of transparency, to publicly disclose the name (s) of the successful bidder(s) and the tariff quoted by them, together with the break-up with the component, for 30 days on its website in terms of the bidding guidelines as amended, for the knowledge and information of the stakeholders.”

IX. IMPUGNED ORDER OF CERC IN PETITION NO. 138/ AT/ 2024 DATED 02.01.2025:

Petition No. 138/ AT/ 2024 was filed by SECI before the CERC, under Section 63 of the Electricity Act, 2003, seeking adoption of tariff for the Pilot

Project of 500 MW/ 1000 MWh stand-alone Battery Energy Storage Systems in India under Tariff-Based Global Competitive Bidding (ESS-I) process as per the guidelines of the Government of India. The relief sought by SECI in the said petition was (a) Adopt the tariff discovered in the tariff based competitive bid process for the aggregate capacity of the BESS Projects on the terms and conditions contained in the BESPAs signed with the BESS Developer read with the BESSA signed with the Gujarat Urja Vikas Nigam Limited and the joint submission made in Petition No. 249/MP/2023; (b) Approve Trading Margin of 0.5% of the Applicable Tariff as agreed to by the Gujarat Urja Vikas Nigam Limited in terms of Regulation 8(1)(d) of the Trading License Regulations, 2020; (c) Approve Trading Margin of 0.5% of the Applicable Tariff for Capacity Charges and additional Trading Margin of INR 0.07/ kWh for charging/ discharging of BESS capacity allocated for grid ancillary portion as agreed to between SECI and NLDC by way of the joint submission in Petition No.249/ MP/ 2023; and/ or (d) Pass any other or further order which this Hon'ble Commission may deem fit and proper in the facts and circumstances of this case.

In the said Petition No. 138/ AT/ 2024, SECI stated that the orders of the CERC in Petition No. 249/ MP/ 2023 was currently awaited; the BESPA with JSW Renew Energy Five Limited, for purchase of 150 MW capacity for grid ancillary portion, was yet to be executed; adoption of tariff was consistent with the scheme and provisions of the Electricity Act, 2003 as provided in the National Tariff Policy notified by the Central Government under Section 3 of the Electricity Act, 2003; the tariff discovered for procurement of BESS capacity, from the BESS Developer under the present bidding process, was competitive and beneficial to the Buying Utilities/ Distribution Companies as well as the consumers of the Buying Utilities/ Distribution Companies; adoption of tariff under Section 63 of the Electricity Act, 2003 for sale of BESS capacity by the BESS Developer to SECI and re-

sale of the procured BESS Capacity by SECI to the Buying Utilities/ Distribution Companies/ NLDC was required for the BESS Developer; the terms and conditions of the BESPAs with the BESS Developer, BESSA with Gujarat Urja Vikas Nigam Limited, and joint submission with NLDC would govern the sale of power by SECI to the Buying Utilities/ NLDC; the tariff discovered in the competitive bid process was required to be adopted by the Commission under Section 63; and the terms and conditions of the BESPAs with the BESS Developer, BESSA with GUVNL, and the joint submission with NLDC would govern the purchase and sale of BESS capacity/ power.

In the impugned order passed by it, in Petition No. 138/AT/2024 dated 02.01.2025, the CERC noted that the Petitioner-SECI had filed the said petition under Section 63 of the Electricity Act, 2003 for adoption of tariff for the pilot project of 500 MW/1000 MWh stand-alone battery energy storage systems in India under tariff-based global competitive bidding (ESS-I) process as per the guidelines for procurement and utilization of battery energy storage systems; in the said Petition, SECI had sought the following reliefs ie (a) to Adopt the tariff discovered in the tariff based competitive bid process for the aggregate capacity of the BESS Projects on the terms and conditions contained in the BESPAs signed with the BESS Developer read with the BESSA signed with the Gujarat Urja Vikas Nigam Limited and the joint submission made in Petition No. 249/MP/2023; (b) Approve the Trading Margin of 0.5% of the Applicable Tariff as agreed to by Gujarat Urja Vikas Nigam Limited in terms of Regulation 8 (1) (d) of the Trading License Regulations, 2020; (c) Approve Trading Margin of 0.5% of the Applicable Tariff for Capacity Charges and the additional Trading Margin of INR 0.07/kWh for charging/ discharging of BESS capacity allocated for grid ancillary portion as agreed to between SECI and NLDC by way of the joint submission in Petition No. 249/MP/2023; and/ or (d) Pass any other or further

order which this Hon'ble Commission may deem fit and proper in the facts and circumstances of this case.

After referring to certain dates and events, the CERC observed that the petition was filed on 14.03.2024; it was admitted on 08.05.2024 and notices were issued to the Respondents to file their respective replies. Subsequently, the Commission through ROP dated 18.09.2024, while considering the matter for the final decision, noticed Clause 6 of G: Contract Award and Conclusion of Section III Bidding Process and Award of Project of the Guidelines; the Commission directed the parties to file an affidavit to the effect whether Clause 6 of G: Contract Award and Conclusion of Section III Bidding Process and Award of Project of the Guidelines, stands novated in terms of Section 62 of the Indian Contract Act, 1872; during the hearing held on 10.10.2024, SECI argued that the LoA itself provided that the BESPAs would be signed subsequent to the signing of the BESSAs with the buying utilities, and the aspect of signing of the BESSA by NLDC was decided by the Commission by order dated 16.5.2024 in Petition No. 249/MP/2023; parties had mutually consented to the extension of the bid validity from time to time; GERC had also approved the PSA; JSW Renew Energy Five Ltd had also confirmed mutually agreeing to extend the bid validity; on the Commission specifically enquiring as to whether SECI unequivocally and unconditionally accepts the tariffs and other terms of the contract with JSW Renew Energy Five Ltd., notwithstanding the delay and the latest developments on BESS, SECI replied in the affirmative and reiterated its commitment to the continuation of the contract; the Commission directed SECI and JSW Renew Energy Five Ltd. to file their affidavits as above within seven days; SECI was also directed to submit an affidavit in clear terms to the novation of the contract as per the clause cited in the previous ROP dated 18.09.2024 uploaded on the website of the Commission; and, subject to the above, the Commission had reserved the

order.

The CERC further observed that, in compliance with the above direction, JSW Renew Energy Five Ltd. had submitted its affidavit stating that the time for signing the BESPAs stands extended to 30.11.2024 i.e. beyond the prescribed period of 6 months from issuance of the letter of award dated 18.01.2023; however, SECI did not submit any affidavit as directed.

After taking note of the submissions of the Petitioner-SECI, the additional affidavits filed by SECI dated 22.07.2024 & 22.08.2024, and their additional submissions, the CERC noted the contents of the affidavit filed by JSW Renew Energy Five Ltd in compliance with RoP dated 18.09.2024, and then proceeded to consider SECI's prayers as regards adoption of tariff (s) for the Pilot Projects of 500 MW/1000MWh Standalone Battery Energy Storage Systems in India under the Tariff-Based Global Competitive Bidding (ESS-I) process as per the guidelines of the Government of India under Section 63 of the Act.

After extracting Section 63 of the Electricity Act, 2003, the CERC observed that, as per the above, the Commission was required to adopt the tariff upon being satisfied that a transparent process of bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Act had been followed; hence, in terms of the provisions of Section 63 of the Act, they had to examine whether the process as per provisions of the Guidelines had been followed in the present case for arriving at the lowest tariff and for selection of the successful bidder(s); the Ministry of Power, Government of India had notified the Guidelines under Section 63 of the Act, vide Resolution No. 23/16/2020-R&R(Part (1), on 10.03.2022 for the Procurement and Utilization of Battery Energy Storage Systems as part of Generation, Transmission and Distribution assets, along with Ancillary

Services, and also made subsequent amendment dated 30.05.2022 (the Guidelines).

After referring to the relevant provisions of the Guidelines, ie clause C relating to the bidding process, clause E relating to bid submission and evaluation, and clause G relating to contract award and conclusion, the CERC observed that the Guidelines contemplated that an intermediary agency was required to aggregate BESS capacity purchased from different developers and sell it to the end procurers under the BESS Scheme; the Guidelines further provided that the intermediary agency shall execute a Battery Energy Storage Purchase Agreement (BESPA) with the BESS Developer identified through the bidding process as per the Guidelines, and a Battery Energy Storage Sale Agreement (BESSA) with the end procurer on a back-to-back basis; the MoP had issued an office order on 16.07.2021 for the constitution of a Steering Committee to implement a battery energy storage system (BESS) Pilot Project for hybrid usages like ancillary services ramp up and ramp down, meeting peak requirements, etc; as per the recommendation of the Steering Committee, SECI had been appointed as the intermediary agency/aggregator for bidding and taking power from the BESS on a back-to-back basis on behalf of the buyers; on 13.04.2022, SECI had issued the Request for Selection (RfS) for the selection of a Battery Energy Storage System (BESS) developer for setting up of two BESS projects of 250 MW/ 500 MWh each for a total bidding capacity of 500 MW/ 1000 MWh as per the Guidelines dated 10.03.2022, along with the subsequent amendment dated 30.05.2022; the bidding documents also included the standard Battery Energy Storage Purchase Agreement (BESPA) and Battery Energy Storage Sale Agreement (BESSA); and, out of the total capacity of 500 MW, 200 MW was earmarked to be used by the Developer as merchant capacity, while the rest 300 MW was allocated to SECI for purchase from the developer and back to back sales to end users.

The CERC then noted that SECI had constituted a Bid Opening Committee and Bid Evaluation Committee (BEC); as on the date and time for submission of bids, i.e., 29.07.2022 (18.00 hrs), a total of nine (09) bids were received by SECI; the techno-commercial part of the bid was opened on 03.08.2022 for the capacity of 500MW/ 1000MWh, and the evaluation of technical bids was completed in the presence of the bid evaluation committee; based on the techno-commercial bid evaluation report dated 23.08.2022, on 24.08.2022, the financial bids of the nine (9) bidders were opened on the ISN ETS e-bidding portal on 25.08.2024; eight (8) bidders were shortlisted for e-reverse auction, as set out in the financial bid evaluation report; after completion of the e-Reverse auction, Respondent No. 1, JSW Renew Energy Five Limited was declared the successful bidder for the two BESS projects of 250 MW/ 500 MWh each for a total bidding capacity of 500 MW/ 1000 MWh at a tariff of Rs. 10,83,500/- per MW/month; on 18.01.2023, SECI issued Letters of Award (LoAs) to JSW Renew Energy Five Limited for the 2 X 250 MW project; out of each project of 250 MW, 150 MW was allotted to SECI for tying up with end users (300 MW in total), and 100 MW from each project was allocated as merchant capacity (200 MW total); and, while the e-Reverse Auction was conducted on 25.08.2022, SECI had issued a letter of award to the successful bidder, JSW Renew Energy Five Limited, after 145 days, on 18.01.2023.

After taking note of the relevant extract of the letter of Award to the successful bidder, the CERC observed that, as per the Guidelines, the Evaluation Committee was required to certify that the bidding process and the evaluation have been conducted in conformity with the provisions of the guidelines; and SECI had placed the certificates executed on 06.03.2024 on record. After extracting the contents of the conformity certificates I & II, the CERC observed that, as per No. SECI/C&P/IPP/15/0001/Clarifications-01 dated 02.06.2022 and as stipulated in the Letters of Award (LoA), the

BESPAs were to be executed subsequent to the signing of the BESSAs with the buying utilities; SECI had entered into a BESSA with the distribution licensee Gujarat Urja Vikas Nigam Limited on 26.06.2023; as per clause 3 of 'G: Contract Award and Conclusion' of 'Section III: Bidding Process and Award of Projects' of the Guidelines, the BESPA(s) should preferably be signed immediately after signing of the BESSA(s); SECI had signed BESPA for 150MW contracted capacity with the successful bidder identified through the competitive bidding process, i.e., JSW Renew Energy Five Limited, on 27.02.2024, which was 245 days after the BESSA signed with GUVNL; and SECI had not submitted any explanation for this delay.

The CERC, thereafter, observed that the balance capacity of 150 MW allocated to SECI had been earmarked for grid ancillary services, for which the National Load Dispatch Centre (NLDC/Grid Controller of India Limited) was the end user; after conclusion of the tender process, SECI had written to NLDC, offering it a capacity of 150 MW out of the 500 MW capacity of the BESS project; however, the NLDC expressed reservations about the signing of BESSA with SECI on the grounds of it being a statutory body entrusted with the responsibility of scheduling and despatch of reserves under the Ancillary Service Regulations and Grid Code; it was not the off-taker of the power under Ancillary Services; payment in respect of the deployment of Ancillary Services was being settled through the Deviation and Ancillary Pool Account entrusted with the NLDC as per the extant Regulatory Provisions; accordingly, on 31.07.2023, NLDC had filed Petition No. 249/MP/2023 before the Commission for regulatory directions for the procurement of this earmarked capacity under the Ancillary Service Regulations; meanwhile, SECI had also informed JSW Renew Energy Five Limited that it would take additional time to complete the signing process for the remaining 150 MW BESSA, *inter- alia* stating that it was anticipated that it may take additional time to complete the signing process for the remaining 150 MW BESSA; and,

therefore, both SECI and JSW Renew Energy Five Limited were requested to mutually extend the timeline for signing the BESPA till 31.07.2024 to ensure compliance with the contractual obligations; and JSW Renew Energy Five Limited, vide its email dated 26.03.2024, submitted their acceptance for the extension of the BESPA signing timeline for Project-2 till 31.07.2024;

The CERC then observed that the Gujarat Electricity Regulatory Commission (GERC), vide its order dated 23.09.2024 in Petition No. 2364 of 2024, had approved the Battery Energy Storage Sale Agreement (BESSA) executed between GUVNL and SECI for procurement of 150 MW/300 MWh Battery Energy Storage capacity from SECI's 500 MW/1000 MWh Pilot Project to be set up by the BESSD at Fatehgarh-III Sub-Station in Rajasthan. After extracting paras 7.21 of the GERC Order dt. 23.09.2024, the CERC observed that, while considering the matter for final decision, it had noticed Clause 6 of 'G: Contract Award and Conclusion' of 'Section III: Bidding Process and Award of Projects' of the Guidelines, and had directed the parties, vide ROP dated 18.09.2024, to file an affidavit, to the effect whether Clause 6 of G: Contract Award and Conclusion of Section III Bidding Process and Award of Project of the Guidelines, stands novated in terms of Section 62 of the Indian Contract Act, 1872; in compliance with the above direction, the Petitioner-SECI had submitted that the parties had mutually consented to the extension of the bid validity from time to time, and had pointed out that the Letter of Award itself provided that the BESPAs would be signed subsequent to the signing of the BESSAs with the buying utilities, and the aspect of the signing of BESSA by NLDC was decided by the Commission by order dated 16.05.2024 in Petition No. 249/MP/2023; the selection of the successful bidder had been carried out by the BPC through a transparent process of competitive bidding in accordance with the Guidelines issued by the Ministry of Power, Government of India under Section 63 of the Electricity

Act; however, developments subsequent to the selection process, had a bearing on the issue of adoption of the tariff so discovered.

The CERC, thereafter, extracted Paras 66 of the judgement of the Supreme Court in **Jaipur Vidyut Vitran Nigam Ltd. & Ors. Vs. Mb Power (Madhya Pradesh) Limited & Ors.** (Judgement in Civil Appeal No. 6503 OF 2022 dated 08.01.2024) wherein reference was made to paras 19 & 20 of its earlier judgement in **Energy Watchdog**. After extracting Paras 67 to 69, 73 to 79 and 92 of the judgement of the Supreme Court, in **Jaipur Vidyut Vitran Nigam Ltd. & Ors. Vs. Mb Power (Madhya Pradesh) Limited & Ors**, the CERC observed that, from the said judgement, it emerged that the Commission had the power to examine whether the prices quoted were market-aligned or not; there was a need to balance the consumers' interest with that of the generators; and it would be a lapse on the part of the Commission to take a one-sided view and only protect the interests of the generators, ignoring the consumers' interest and public interest.

After referring to the abridged chronology of events, the CERC observed that the *e-Reverse Auction* was conducted on 25.08.2022, whereas the LoAs were issued on 18.01.2023, and hence, there was a delay of 145 days in the issuance of LoAs; further, BESSA was executed on 26.06.2023, i.e., after 160 days of issuance of LoAs; as per No. SECI/C&P/IPP/15/0001/Clarifications-01 dated 02.06.2022, and as stipulated in the Letters of Award (LoA), the BESPAs were to be executed subsequent to the signing of the BESSAs with the buying utilities; SECI had entered into a BESSA with the distribution licensee Gujarat Urja Vikas Nigam Limited on 26.06.2023; as per Clause 3 of 'G: Contract Award and Conclusion' of 'Section III: Bidding Process and Award of Projects' of the Guidelines, the BESPA(s) should preferably be *signed immediately after the signing of the BESSA(s)*; however, SECI signed BESPA for 150MW

contracted capacity with the successful bidder identified through the competitive bidding process, i.e., JSW Renew Energy Five Limited on 27.02.2024, which is 245 days after the BESSA signed with GUVNL; and SECI has not submitted any explanation for these delays.

The CERC, thereafter, observed that, subsequent to the e-reverse auction conducted on 25.08.2022 for the impugned project, several bids for similar projects were conducted as detailed in the following table: -

e-Reverse Auction	Details	Rate discovered
August, 2022	SECI's Project 1000MWh BESS tender capacity under Competitive Bidding Guidelines	Rs. 10,88,917/ MW/ month
March, 2024	GUVNL's Pilot Projects of 250 MW/500 MWh Standalone Battery Energy Storage Systems in Gujarat under Tariff-Based Global Competitive Bidding (Phase-II)	Rs. 4,48,996 to Rs. 4,49,996/ MW/ Month
June, 2024	GUVNL's Pilot project of 250 MW/500MWh Standalone BESS under competitive bidding guidelines (Phase-III)	Rs. 3,72,978/ MW/ Month
August, 2024	SECI project for 1000	Rs. 3,81,000 to

	MW/ 2000 MWh standalone BESS	Rs.3,81,999/ Month.	MW/
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The CERC observed that, from the above table, it was evident that the rates discovered in the subsequent bidding for similar projects were considerably lower than the price discovered in the said project; it was pertinent to note that JSW Renew Energy Five Limited had also won 500 MW/1000MWh capacity under this recent tender with a price of Rs. 3,81,000/MW/Month; they were of the view that this decline reflected the decreasing cost of batteries due to a reduction in material cost, and the growing competitiveness of BESS projects; as per prevailing industry norms, and even otherwise, the batteries were one of the last items to be purchased closer to the commissioning of the project by the developers for optimising cost; in the instant case, the Guidelines stipulated that the Scheduled Commissioning date (SCoD) shall be 18 months after the effective date of the BESPA; the chronology of events submitted by the Petitioner-SECI revealed that there had been a delay in achieving the timelines specified in the guidelines and the RfS documents; they were of the view that the unreasonable delay (for whatever reason) in the instant case would lead to unintended gains for the developer and a wrongful loss to the public at large; even though the bid evaluation process had been complied with as per the bidding guidelines, the tariff so proposed to be adopted was not aligned with the prevailing market prices in view of the delay in signing of BESSA and BESPA; in the power of adoption of tariff, as stipulated in Section 63 of the Act, there was an inherent power of the Commission for rejection of the tariff, which, according to the regulator, is not aligned with the market and is not in the interest of the public at large; the Petitioner-SECI had not yet signed BESPA with JSW Renew Energy Five Limited, and the SCoD may further get extended giving undue benefit to the BESS developer to take advantage of the reduced price in the battery market; in view of the above, they were of

the view that the tariff so proposed to be adopted would give an undue advantage to the BESS developer (by taking advantage of further reduction in the price of the Battery Storage System), and would be against public interest; and, as such, they were rejecting adoption of the tariff so discovered.

The CERC concluded by clarifying that its decision to reject the prayer for adoption of tariff was solely based on the circumstances in the present case – that is due to the inordinate delay in signing of BESP/BESSA and subsequent cost reduction in BESS leading to undue benefit to the developer at the cost of consumers; it was conscious of the fact that price falls post bidding could not, generally, be a ground for rejecting an earlier bidding process and price discovery; even in the instant case, there would not have been any occasion for review or rejection of the adoption of the tariff, notwithstanding subsequent developments, had the project been completed within the original timelines; SECI should have been more careful in adhering to the timelines; and the Commission could not have overlooked the consequences of delay.

X. RIVAL CONTENTIONS:

Elaborate submissions, both oral and written, were made by Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant-JSW Renew, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of the Appellant-SECI, Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC and Sri Anand K. Ganesan, Learned Counsel appearing on behalf of GUVNL. It is convenient to examine the rival contentions under different heads.

XI. PRELIMINARY OBJECTIONS:

i. VIOLATION OF PRINCIPLES OF NATURAL JUSTICE:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that there has been gross violation of the principles of natural justice, more particularly the principle of *audi alteram partem*; for this purpose, the chronology of facts may be noted :- (a) Petition No. 138/AT/2024 was taken up for hearing, firstly, on 2 occasions, ie on 08.05.2024 – Petition admitted and notice issued, and on 08.08.2024- when orders were reserved; there was no opposition to the tariff adoption by any party, nor was any query raised regarding the same from the CERC; (b) however, an undated ROP was uploaded on 18.09.2024 directing parties to file an affidavit as to whether clause 6 of G titled contract award and conclusion of the Section III bidding process and award of project guidelines, stood novated in terms of Section 62 of the Indian Contract Act, 1872; (b) SECI filed its affidavit in terms of the ROP uploaded on 18.09.2024, on 05.10.2024, *inter-alia*, stating that the date for signing of BESPAs stood mutually extended; SECI also placed on record, for the first time, the decision of the GERC dated 23.09.2024 approving the procurement of 150MW BESS capacity by GUVNL; the GERC in its order had noticed the rates discovered in 2 subsequent bids by GUVNL for stand-alone BESS project, in March 2024 and June 2024; GUVNL had also referred to the BLOOMBERG survey on price trends, which demonstrated that the price of LFP cell had reduced between March 2022 and March 2024; GERC found that the said price trend of LFP cells in March 2022 corroborated the tariff discovered in the instant bid and, therefore, approved the procurement and the BESSAs for 150MW; (c) the matter was then taken up for hearing on the 3rd occasion on 10.10.2024, where the Appellant also confirmed that the parties had mutually agreed for extension of time in terms of clause 6 of G; during the hearing held on 10.10.2024, to a pointed query as to whether SECI unequivocally

and unconditionally accepted the tariff and other terms of the contract, notwithstanding the delay and the latest developments on BESS, SECI replied in the affirmative and reiterated its commitment to the continuation of the contract; recording this statement and directing the Appellant to file an affidavit regarding mutual extension of time, the Commission again reserved orders in the Petition; and no further clarification on reasonability of rates, etc was sought by the CERC from either SECI or the Appellant; (2) it is clear, therefore, that the question of market alignment of the discovered tariff in the instant pilot project was never put in issue in the proceedings; and the documents and data of the subsequent bids, considered at paragraph 44 of the Impugned order, were also never put to the Appellant for it to explain the relevance of the same to the instant bid and to differentiate the parameters of the existing bid with the subsequent bids considered by the CERC; this position is not disputed by any of the parties even before this Tribunal; this is, by itself, a breach of the principles of natural justice and the mandate of Section 79(3) of the Act, and this rejection by CERC of tariff adoption deserves to be set aside on this ground alone; (3) rejection of tariff adoption has civil consequences for the Appellant; the Appellant and SECI have entered into a binding contract, with adoption of tariff being a condition of the contract; the effective date of the contract is 05.03.2024, which is the date from which the Appellant was supposed to start performing the contract; based on the contract, the Appellant has altered its position by entering into firm contracts with third party suppliers of goods and services for the BESS; expenditure to the tune of approximately Rs. 100 crores already stands incurred, and firm commitments for an amount running into thousands of crores have been made; the Appellant craves leave to rely on the contents of the Additional Affidavit dated 21.04.2025; and the Appellant ought to have been afforded an opportunity of being heard on these aspects by the CERC.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that it is not in dispute that the question of market alignment of the discovered tariff in the instant pilot project was never put in issue in the proceedings in Petition No.138/AT/2024; the documents and data of the subsequent bids, considered at paragraph 44 of the Impugned order, were also never put to the Appellant for it to explain its relevance to the instant bid; what is stated is that '*the data and market information... relied upon were publicly available and not secret...*'; the case of CERC that '*figures had already been taken judicial notice of in the order of GERC dated 23.09.2024, wherein the Appellant had admitted that the rates had fallen because the material was now cheaper was close to 50%*'; therefore, the issue of principles of natural justice on facts will be a '*mere formality*'; if the Appellant had notice of such exercise, it could have, *inter-alia*, canvassed before the CERC that (i) being a first of its kind project, market alignment of the tariff would be wholly irrelevant - as supported by the absence of 'market alignment' principle in the guidelines; (ii) market alignment has to be a comparison with the rates prevailing at the time of submission of bids, and not rates subsequently discovered after 2 years; (iii) they could have placed the material differences in the tender conditions of the 4 tenders having a direct commercial correlation with the tariff quoted; (iv) they could have also pointed out that the GERC order dated 23.09.2024 actually finds the tariff quoted by the Appellant as fair and reasonable, corroborated by the fact that post the e-reverse auction, the prices of LFP cells has come down; and (v) that the fall in the prices of LFP cells by 40%-50 % cannot and does not translate into an equivalent reduction in the price of the battery; the admission that factually no notice was given to the Appellant, of the comparison of the tariff quoted vis-à-vis the tariff discovered in the 3 subsequent bids, clearly establishes a breach of the *audi altrem partem* rule; this is not a case of notice being a mere formality; and the

decision taken by the CERC without putting the Appellant to notice has caused severe prejudice and miscarriage of justice qua the Appellant.

The Appellant relies on the order dated 07.08.2023 passed by this Tribunal in Appeal 88, 89 and 90 of 2021, titled **TEQ Green Power Private Limited Vs. GERC and batch (Re: Dholera Solar Park Case)**, in support of a complete remand owing to the violation of the *audi alteram partem* rule.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would also submit that arguments have been advanced and counsel for the parties have been heard at length by this Tribunal; the evidence on record is sufficient to enable this Tribunal to determine the case finally; considering the status of the present project, as placed on record vide additional affidavit dated 21.04.2025, and the difficulties which the Appellant is bound to suffer in case of further delay in tariff adoption, it is prayed that this Tribunal may determine the Appeal finally and adopt the tariff discovered in the bid for BESS pilot project; in the alternative, the matter may be remanded back to the CERC for fresh consideration in accordance with law, uninfluenced by its earlier observations or its stand in the counter affidavit filed by the CERC in the instant appeal, leaving all rights and contentions open; and the CERC may be directed to decide the case expeditiously in a time bound manner.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Appellant's contention that facts related to subsequent bids etc., were not put to the Appellant, or that the Appellant was not told that they would be considered, is both factually wrong and legally untenable; when either the intermediary procurer i.e. SECI, or the developer

i.e the Appellant, approaches the Commission for approval of tariff under Section 63 it is their duty to establish on facts that their bid is aligned to the market; absence of any pleading, qua the same in the application under Section 63, cannot be used as an excuse to state that the Commission cannot delve into this aspect, when it is a core regulatory function; a cursory examination of the Section 63 Petition filed by SECI in Petition No.138/AT/2023 would disclose that it sought approval of the discovered Tariff of Rs. 10,83,500 MW/month; the body of the Petition contained no discussion on the issue of market alignment or even an assertion that the bid was market aligned; and the Appellant's argument is akin to putting the cart before the horse as it was the Appellant's duty and obligation to establish that its bid was market aligned in the first place.

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would further submit that the factum of the subsequent bids, and the reasoning supplied to the GERC, were placed before the Commission during the course of the proceedings in the impugned order; an examination of the GERC's order would indicate that GUVNL had submitted that the prices had fallen by almost 50% by March of 2024; this was not rebutted by the Appellant or SECI despite being a party to the proceedings; the Bloomberg Price Survey, showing the decline, was also presented and not rebutted; the Commission, in its RoP dated 10.10.2024, specifically sought affidavits from all parties on whether they agreed to the contract given in the subsequent developments; SECI filed no affidavit and the Appellant did not seek to offer any justification on why and how its bid was market aligned or in consumer interest; the Appellant and/or SECI cannot hide behind their own deficient pleadings and then claim that they were not presented with an opportunity to make their case; the claim of violation of natural justice is also a misdirection and further given the stark nature of the subsequent bids, any further natural

justice would only be a useless formality (**Aligarh Muslim University Vs. Mansoor Ali Khan**, (2000) 7 SCC 529).

C. JUDGEMENT RELIED ON BEHALF OF THE APPELLANT:

In its order, in **TEQ Green Power Private Limited vs. GERC** (Appeal Nos. 88, 89 & 90 of 2021 dated 07.08.2023), this Tribunal noted the submissions urged on behalf of the Appellant that, in the earlier orders, the Commission, while raising certain queries and in calling upon the second Respondent-GUVNL to reply thereto, had made certain observations without putting the Appellants on notice and without giving them a reasonable opportunity of being heard; the said orders were in violation of principles of natural justice; in a proceeding, seeking adoption of tariff under Section 63, the Commission had undertaken the exercise of determining tariff which power was available to be exercised only under Section 62 of the Act; and the Commission could not have, after a Letter of Award had been issued, examined whether or not the price offered by the successful bidder was reasonable.

After taking note of the submission, urged on behalf of GUVNL, that the Appellants' right, if any, were inchoate till a PPA was actually executed after the Commission adopted the tariff, this Tribunal held that the queries put by the Commission to the 2nd Respondent-GUVNL, and the observations made by it in its earlier orders, were in violation of the rules of natural justice, and ought not to have been made without putting the Appellants on notice; the rule of *audi alteram partem* was one of the basic rules of natural justice, and any order passed in violation thereof necessitated being set aside; and the observations made in both the earlier orders of the Commission had resulted in adverse civil consequences for the appellants as the second Respondent had, consequent thereto, decided to invite bids afresh even

though a Letter of Award had been issued in their favour after completion of the bid process.

While setting aside the impugned order on the ground of violation of natural justice, this Tribunal made it clear that, in case the jurisdiction of the Commission was invoked by any of the parties to the three Appeals, the said petition should be considered by the Commission on its merits without being influenced by the observations made in the earlier orders.

D. ANALYSIS:

Rules of natural justice are not statutory rules, and are applicable either where the statutory provisions explicitly stipulate or are silent. Rules of natural justice can operate in areas not covered by any law validly made. They do not supplant the law but supplement it. If a statutory provision can be read consistently with principles of natural justice, the courts should do so as it must be presumed that the Legislature intended that the statutory authorities act in accordance with principles of natural justice (**C. B. Gautam vs Union of India: (1993) 199 ITR 530 (SC); A. K. Kraipak v. Union of India, AIR 1970 SC 150**). Principles of natural justice must be read into the unoccupied interstices of the statute unless there is a clear mandate to the contrary (**Institute of Chartered Accountants of India v. L. K. Ratna (1987) 61 Comp Cas 266 (SC): (1986) 4 SCC 537; C.B. Gautam v. Union of India: (1993) 1 SCC 78; and M.P. Enterprises v. State of Uttarakhand, 2019 SCC OnLine Utt 1046**). As long as the statute does not prohibit, either explicitly or by necessary implication- the application of the Rules of Natural Justice, the requirement of complying with the Rules of Natural Justice must be read into such statutory provisions. (**DIT (International Taxation) v. AAR, 2011 SCC OnLine AP 672; MRF Mazdoor Sangh v. Commissioner of Labour, 2013 SCC OnLine AP 188**). Rules of natural justice are neither cast in a rigid mould nor can they be put in a legal strait-jacket. They are not

immutable but flexible. These rules can be adapted and modified by statutes and statutory rules and regulations. (**Union of India v. Tulsiram Patel: (1985) 3 SCC 398**). The rules of natural justice are not constant: they are not absolute and rigid rules having universal application. The requirement of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the authority is acting, the subject matter that is being dealt with, and so forth. (**State of Kerala v. K.T. Shaduli Yousuff: (1977) 39 STC 478 (SC)**; **Suresh Koshy George v. The University of Kerala: [1969] 1 S.C.R. 317**; **Russel v. Duke of Norfolk: [1949] 1 All. England Reports 108**). As the rules of natural justice are not embodied rules, what particular rule of natural justice should apply to a given case must depend to a great extent on the facts and circumstances of that case and the framework of the law. (**Maneka Gandhi v. Union of India: AIR 1978 SC 597**; **Suresh Koshy George; AIR 1978 SC 597 D.F.O., South Kheri v. Ram Sanahi Singh (1971) 3 SCC 864 = AIR 1973 SC 205**).

Principles of natural justice is not a mantra to be applied in a vacuum. Natural justice is not an unruly horse, no lurking landmine, nor a judicial cure-all. The Court/Tribunal has to determine whether observance of the principles of natural justice was necessary for that particular case. (**Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee: (1977) 2 SCC 256**; **Tulsiram Patel (1985) 3 SCC 398**; **ECIL v. B. Karunakar: (1993) 4 SCC 727**; **Municipal Committee, Hoshiarpur v. Punjab State Electricity Board: (2010) 13 SCC 216**). It should not proceed as if there are inflexible rules of natural justice of universal application. Each case depends on its own circumstances. Rules of natural justice vary with the laws prescribed by the legislature, (**Chingleput Bottlers v. Majestic Bottling Co.: AIR 1984 S.C. 1030**) or the rules/regulations made by the subordinate Rule/Regulation making authority. Not only can principles of natural justice be modified but, in exceptional cases, they can even be

excluded where the nature of the action to be taken, its object and purpose and the scheme of the relevant statutory provisions warrant its exclusion. (**Tulsiram Patel: (1985) 3 SCC 398; State of U.P. v. Sheo Shanker Lal Srivastava: (2006) 3 SCC 276**). If a statutory provision either specifically, or by necessary implication, excludes the application of any or all the principles of natural justice, then the court cannot ignore the mandate of the Legislature or the statutory authority, and read into the concerned provision, principles of natural justice. (**Union of India v. Col. J.N. Sinha: (1970) 2 SCC 458; Tulsiram Patel; (1985) 3 SCC 398**). The implication of natural justice being presumptive, it may be excluded by express words of the statute or by necessary intendment. (**Swadeshi Cotton Mills v. Union of India: (1981) 1 SCC 664; Tulsiram Patel: (1985) 3 SCC 398**).

Natural justice is not a judicial cure-all. If fairness is shown by the decision-maker to the man proceeded against, the form, features and the fundamentals of such essential processual propriety being conditioned by the facts and circumstances of each situation, no breach of natural justice can be complained of. Unnatural expansion of natural justice, without reference to the administrative realities and other factors of a given case, can be exasperating. No man shall be hit below the belt — that is the conscience of the matter (**Chairman, Board of Mining Examination and Chief Inspector of Mines v. Ramjee (1977) 2 SCC 256**). Rules of natural justice are not rigid rules, they are flexible and their application depends upon the setting and the background of the statutory provision, nature of the right which may be affected, and the consequences which may entail its application depends upon the facts and circumstances of each case. These principles do not apply to all cases and situations. (**R. S. Dass v. Union of India [1986] Supp SCC 617**). Whether any particular principle of natural justice would be applicable to a particular situation, and whether there has been any infraction of the application of that principle, has to be judged, in

the light of the facts and circumstances of each particular case. The basic requirement is that there must be fair play in action and the decision must be arrived at in a just and objective manner with regard to the relevance of the material and reasons. (**K. L. Tripathi v. State Bank of India (1984) 1 SCC 43**). The application of natural justice depends upon the nature of the jurisdiction conferred on the authority, upon the character of the rights of the persons affected, the scheme and policy of the statute and other relevant circumstances disclosed in a particular case. (**K. L. Tripathi v. State Bank of India : 1984) 1 SCC 43, Union of India v. P. K. Roy AIR 1968 SC 850, Channabasappa Basappa Happali v. State of Mysore AIR 1972 SC 32**).

Realism must inform “reasonable opportunity”. If the decision-making body, after fair and independent consideration, reaches a just conclusion, there is no error in law. (**Ramjee: (1977) 2 SCC 256**). Principles of natural justice cannot be stretched too far. (**Bar Council of India v. High Court of Kerala (2004) 26 SCC 311**). They are not codified canons, but are principles ingrained in the conscience of man. Natural justice is the administration of justice with a common-sense. It is the substance of justice which should determine its form. (**Canara Bank v. V.K. Awasthy, (2005) 6 SCC 321**). What particular rule of natural justice should be applied, and what its content should be in a given case, must depend to a great extent on the facts and circumstances of the case, and the framework of the statute under which the enquiry is held. (**V.K. Awasthy, (2005) 6 SCC 321**).

The complaint of violation of the rules of natural justice, in the present case, is made not by SECI which had filed the Section 63 petition before the CERC seeking adoption of tariff, but by the Appellant-JSW in Appeal No. 26 of 2025 (the successful bidder). Appeal No.54 of 2025, filed by the SECI against the impugned order passed by the CERC on 02.01.2025, is confined only to the findings of the CERC that SECI had caused undue delay in

issuing the Letter of Award, thereafter in signing the BESPA with the Appellant-JSW, and later in filing a petition before the CERC seeking adoption of tariff.

The CERC has refused to adopt the tariff, in the exercise of its jurisdiction under Section 63 of the Electricity Act, 2003, on the ground that the bid quoted by the Appellant-JSW was not market aligned. As it is well settled that, save substantial prejudice being shown to have been caused, mere technical violation of the rules of natural justice would not, by itself, justify the impugned order being set aside, one must establish that prejudice has been caused by its non-observance, in order to sustain the allegation of violation of principles of natural justice. (**Syndicate Bank v. Venkatesh Gururao Kurati, (2006) 3 SCC 150**); **K.L. Tripathi v. State Bank of India (1984) 1 SCC 43**).; **Rajendra Singh v. State of M.P., (1996) 5 SCC 460**).; **Aligarh Muslim University v. Mansoor Ali Khan, (2000) 7 SCC 529**); and **State Bank of Patiala v. S. K. Sharma AIR 1996 SC 1669**). All that the Courts/Tribunals must examine is whether non-observance of any of these principles, in a given case, is likely to have resulted in deflecting the course of justice. (**State of U.P. v. Om Prakash Gupta, (1969) 3 SCC 775**). No interference is called for where procedural violations, if any, have not caused any prejudice to the delinquent. (**UCO Bank v. M. Venuranganath, (2002) 5 ALT 162 (D.B.)**); **C. Pattabhirama Sastry v. Bank of Baroda, (1998) 4 ALT 803**; and **Surya Alloy Industries Limited versus West Bengal Electricity Regulatory Commission: (Judgement of Aptel in Appeal No. 267 of 2023 dated 04.07.2025)**.

As has been held by the CERC in the impugned order, SECI, in the Section 63 petition filed by it before the CERC, has not even claimed that the subject bids were market aligned. The Appellant JSW's contention is that, if only they had the CERC had given them an opportunity of being heard, they

would have been able to show that the question of market alignment would not arise in the case of the subject bid which is a pilot project- the first of its kind in India; in any event, since the comparison of bids must be at the time when the subject bids were finalized and, admittedly, there were no comparable bids then in existence, the CERC was wholly unjustified in rejecting the subject bid on the ground that the tariff quoted therein was not comparable with the tariff quoted in subsequent bids, invited for other BESS projects, more than one and half years later; and even otherwise, since the conditions of the subject bid were wholly different from the conditions stipulated in the subsequent bids, such a comparison was not justified.

We shall examine each of these contentions a little later in this order. What must, however, be noted under this head is that neither SECI nor JSW had even raised the issue of market alignment before the CERC. The CERC as a regulator, and with a view to protect the larger public interest, more particularly consumers interest, could not have adopted the tariff for the mere asking, and was entitled, nay obligated, to examine various facets of the subject bid, including whether it was market aligned, before adopting the tariff in the exercise of its jurisdiction under Section 63 of the Electricity Act, 2003.

This issue is, in any event, academic since these contentions have now been raised by the JSW in its appeal preferred against the impugned order, and an appeal to this Tribunal is a continuation of the original proceedings before the CERC, which culminated in the impugned order being passed. A first appeal, under Section 111(1) of the Electricity Act, is, in view of Section 111(3) thereof, a continuation of original proceedings instituted before the Regulatory Commission, and is available both on questions of fact and law. The expression “appeal” has not been defined in the CPC. Black’s Law Dictionary (7th Edn.) defines an appeal as “a proceeding undertaken to have a decision reconsidered by bringing it to a higher authority”. It is a judicial

examination of the decision by a higher court of the decision of a subordinate court to rectify any possible error in the order under appeal. (**Malluru Mallappa v. Kuruvathappa, (2020) 4 SCC 313**). A first appeal is a full rehearing of the original proceedings, and the appellate forum possesses all powers, jurisdiction and authority as the forum of first instance, the jurisdiction and range of subjects being co-extensive. (**Southern Power Distribution Company of AP Limited v. Andhra Pradesh Electricity Regulatory Commission, 2022 SCC OnLine APTEL 110; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17**).

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

The parties have a right to be heard both on questions of law and on facts, (**Santosh Hazari v. Purushottam Tiwari, (2001) 3 SCC 179; Madhukar v. Sangram, (2001) 4 SCC 756; B.M. Narayana Gowda v. Shanthamma, (2011) 15 SCC 476; Sri Raja Lakshmi Dyeing Works v. Rangaswamy Chettiar, (1980) 4 SCC 259**), and the appellate court has the jurisdiction to reverse or affirm the findings of the trial court. (**H.V. Sreenivasa Murthy v. B.V. Nagesha, 2008 SCC OnLine Kar 837; Vinod Kumar v. Gangadhar, (2015) 1 SCC 391; B.V. Nagesh v. H.V. Sreenivasa Murthy, (2010) 13 SCC 530; H-Energy (P) Ltd. v. Petroleum & Natural Gas Regulatory Board, 2023 SCC OnLine APTEL 17**).

While the appellate jurisdiction of this Tribunal involves a re-hearing on law as well as on facts, and all questions of fact and law are open for consideration by re-appreciating the material and evidence, it also goes without saying that the jurisdiction exercised by this Tribunal is not in substitution of the original proceedings before the Commission, and this Tribunal need not, in each and every case, take upon itself the task of adjudicating issues which were not even considered by the concerned Regulatory Commission.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that arguments have been advanced and counsel for the parties have been heard at length by this Tribunal; the evidence on record is sufficient to enable this Tribunal to determine the case finally; considering the status of the present project, as placed on record vide additional affidavit dated 21.04.2025, and the difficulties which the Appellant is bound to suffer in case of further delay in tariff adoption, it is prayed that this Tribunal may determine the Appeal finally and adopt the tariff discovered in the bid for BESS pilot project; in the alternative, the matter may be remanded back to the CERC for fresh consideration in accordance with law,

uninfluenced by its earlier observations or its stand in the counter affidavit filed by the CERC in the instant appeal, leaving all rights and contentions open; and the CERC may be directed to decide the case expeditiously in a time bound manner.

As the Appellant has itself requested this Tribunal to consider all these issues in Appeal No.26 of 2025 filed by them, and since we shall be undertaking such an examination, it is wholly unnecessary for us to delve any further into the question of violation of principles of natural justice, for such aspects would have necessitated determination only if we were inclined to remand the matter to the CERC for its consideration afresh. Suffice it to observe that the Appellant's contention regarding clause G6 of the bidding guidelines shall also be examined later in this order.

ii. IS GUVNL BARRED FROM SUPPORTING THE IMPUGNED ORDER AT THE APPELLATE STAGE?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that GUVNL applied for approval of the BESSA and procurement of 150 MWs of BESS capacity before the GERC; during the course of the proceedings, GUVNL filed an affidavit justifying the tariff discovered in the BESS pilot project bid in August 2022; in that line, GUVNL referred to the tariff discovered in GUVNL – II bid in March 2024, and GUVNL -III bid in June 2024; relying on an excerpt from the BLOOMBERG report, GUVNL stated that *'the price trends provide corroborates to the discovered tariff in SECI (ESS-I) pilot project phase- I;* this submission was accepted by the GERC, and accordingly the procurement was approved; the GERC order dated 23.09.2024 has not been assailed by anyone and has attained

finality; and GUVNL cannot be permitted to approbate and reprobate on the same set of facts and take inconsistent shifting stands, and it cannot be permitted to argue completely against its stand on affidavit before the GERC and the GERC order.

B. SUBMISSIONS URGED ON BEHALF OF GUVNL:

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that the Appellant's contention, that GUVNL had taken a different stand in the proceedings before GERC and cannot be permitted to oppose the present appeal or support the order of the Central Commission, is misconceived; the proceedings before the GERC were for approval of the Agreement, wherein GUVNL justified why it had executed the Agreement on 26.06.2023, much prior to the subsequent bids; in any event, the adoption proceedings are not a *lis* between two contesting parties; even if GUVNL does not object, the Central Commission is bound to exercise its jurisdiction in terms of Section 63, and can reject the tariff; the decision of the Central Commission is regulatory in nature, and not dependent upon the consent of the parties; further, GUVNL has put forth its contentions in public interest in supporting the decision of the Central Commission; and merely because it is alleged that GUVNL did not make the same contentions in the past, cannot be a reason to fault GUVNL for putting forth contentions at present in public interest.

C. ANALYSIS:

It is no doubt true that GUVNL filed Petition No. 2364 of 2024 before the GERC, under Section 86(1)(b) of the Electricity Act, 2003, seeking approval of the Battery Energy Storage Sale Agreement signed by GUVNL with SECI on 26.06.2023 for procurement of 150 MW/300 MWh Battery Energy Storage Capacity procured by SECI under the subject pilot project.

In the said petition GUVNL itself had placed on record the tariff quoted in the subsequent bids, and had specifically stated that the bids received in the subsequent bids ranged from Rs.4,48,996 to Rs.4,49,996 in the bids of March, 2024; the discovered tariff was Rs.3,72,978 per MW in June, 2024; the price of LFP cells had reduced by more than half between March, 2022 and March, 2024, and GUVNL had also referred to the BLOOMBERG Report in this regard; and GUVNL appears to have sought approval of the GERC, with respect to the BESSA, on the premise that, since the subject bids were with respect to RfP issued in March/April, 2022, the price quoted in the subject bid could not have been compared with the subsequent bids quoted around two years later.

The jurisdiction exercised by the State Commission under Section 86(1)(b) is to regulate electricity purchase and the procurement process of distribution licensees including the price at which electricity shall be procured. The jurisdiction, conferred under Section 63 of the Electricity Act, is for adoption of the tariff in accordance with the guidelines issued by the Central Government. The general regulatory power conferred on the CERC is under Section 79(1) of the Electricity Act, 2003, a species of which is the regulatory power to adopt tariff under Section 63 of the Electricity Act. It is not even contended before us that the CERC lacks jurisdiction to entertain the Petition for adoption of tariff under Section 63 of the Electricity Act. The mere fact that GUVNL had filed a Petition before the GERC, seeking its approval with respect to the sale agreement (BESSA) executed by them with SECI, did not disable the CERC from examining the Petition, filed by SECI under Section 63 of the Act, in order to decide whether or not the tariff quoted by the selected bidder should be adopted.

The main question which arises for consideration in this appeal is whether or not the CERC was justified in rejecting the Section 63 Petition

filed by SECI, seeking adoption of the tariff, on the ground that the price quoted by the Appellant-JSW was not market aligned on comparison with the bids submitted around the time the Section 63 Petition was filed. Since the validity or otherwise of the impugned order passed by CERC necessitates examination in these proceedings, it matters little that GUVNL, which had supported the Section 63 Petition filed by SECI before the CERC, has now chosen to support the impugned order passed by the CERC refusing to adopt the tariff.

It is relevant to note that even SECI, which had filed the Section 63 petition before the CERC, has not chosen to question the validity of the impugned order on its merits or on the issue of market alignment, but has preferred an appeal to the limited extent that the CERC has held that there was undue delay on its part in issuing the LoA, thereafter in signing the BESPA, and later in filing the Section 63 petition.

In this context it is relevant to note that, in **Jhabua Power Pvt Ltd & others vs Kerala State Electricity Regulatory Commission & others** (Judgement of Aptel in Appeal Nos. 28 & 47 of 2024 dated 26.07.2024), certain generators, which had earlier supported the Petition filed by KSEB before the KSERC under Section 63 of the Electricity Act, later opposed the Review Petition filed by KSEB against the order of the KSERC rejecting the Section 63 Petition. They also filed an appeal against the latter order of the KSERC allowing the Review Petition. Before this Tribunal, the respondents (ie KSEB and KSERC) had contended that the appeals filed by the generators were not maintainable, as they were not entitled to prefer appeals against the review order passed by the Kerala State Electricity Regulatory Commission (“KSERC” for short) since these generators had earlier supported the Section 63 Petition filed by the Kerala State Electricity Board (“KSEB” for short), before the KSERC, seeking adoption of tariff; and,

having supported the action of the KSEB in finalizing the bid process and in selecting the bidders, the successful bidders could not later turn around and file an appeal.

In **Jhabua Power Pvt Ltd & others vs Kerala State Electricity Regulatory Commission & others** (Judgement of Aptel in Appeal Nos. 28 & 47 of 2024 dated 26.07.2024), this Tribunal held that the generators were persons aggrieved and were entitled to file an appeal. In the Appeal preferred against the said judgement of this Tribunal, in **Jhabua Power Pvt Ltd & others**, the Supreme Court, in its judgement in **Kerala State Electricity Board Ltd vs Jhabua Power Ltd and others** (Judgement in Civil Appeal Nos 10046-10047 of 2024 dated 30.09.2024), held that no fault could be found with the judgement of this Tribunal.

In the present case the appeal has been filed by the successful bidder aggrieved by the order passed by the CERC in rejecting the Section 63 Petition filed by SECI; and, since the validity or otherwise of the order of the CERC dated 02.01.2025 is under examination in these appellate proceedings, the mere fact that the Respondent-GUVNL now seeks to support the order of the CERC is of no consequence.

iii. HAS CERC SOUGHT TO IMPROVE ITS CASE AT THE APPELLATE STAGE?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the CERC, in the present Appeal, has filed a counter affidavit which is contradictory and goes beyond the Impugned order; it is well settled that a statutory and a quasi-judicial body like the CERC cannot improve upon its order by filing subsequent affidavits; on this ground

alone, the CERC affidavit should be disregarded and the Impugned order tested for what is stated and held therein; the Impugned order at para 39 specifically and categorically finds that *'the selection of the successful bidder has been carried out by the BPC through a transparent process of competitive bidding in accordance with the guidelines issued by the Ministry of Power, Government of India under section 63 of the Act;* however in the reply, contrary to the finding in the Impugned order, violation/waiver/deviation of clause G3 and G6 of the guidelines is alleged; and the CERC cannot be permitted to change its stand in such a manner.

B. ANALYSIS:

The submission, regarding deviation from Clause G 6 of the Central Govt Guidelines, has been noted by the CERC in its record of proceedings issued prior to the impugned order. In the Record of Proceedings, in Petition No. 138/ AT/ 2024 dated 18.09.2024, the CERC, after taking note of Clause 6 of G i.e. Contract Award and Conclusion of Selection III Bidding Process and Award of project of the Guidelines which stipulated that, in case of delay in signing of BESPA beyond 6 months from the date of issuance of LoAs, or any other extended date as mutually agreed between the Bidding Agency and the successful bidders, the awarded capacity shall stand cancelled, directed parties to file an affidavit as to whether Clause 6 of G stood novated in terms of Section 62 of the Indian Contract Act, 1872. In its affidavit filed before the CERC on 05.10.2024, SECI submitted that JSW had informed them, by their letter dated 21.08.2024, that, as the bid validity date was coming to a close, they were providing their consent to extend the bid validity upto 30.11.2024.

In its Record of Proceedings dated 10.10.2024, the CERC noted that it was submitted on behalf of SECI that parties had mutually consented to the extension of the bid validity from time to time; on its enquiry whether

SECI unequivocally and unconditionally accepted the tariffs and other terms of the contract with JSW, notwithstanding the delay and the latest developments on BESS, SECI had replied in the affirmative and had reiterated its commitment to the continuation of the contract. The CERC also noted the submission, urged on behalf of JSW, that parties had mutually agreed to extend the bid validity; and if the Commission so directed, JSW would also file its affidavit to the above effect. The CERC directed SECI and JSW to file their affidavits as above within seven days. SECI was also directed to submit its affidavit in clear terms to the novation of the contract as per the clause cited in the earlier ROP dated 18.09.2024; and, subject to the above, the Commission reserved orders in the matter.

With respect to Clause G3, which required BESPAs to be executed between JSW and SECI, the CERC had noted, in its Record of Proceedings dated 10.10.2024, the submissions urged on behalf of SECI that the Letter of Award itself provided that the BESPAs would be signed subsequent to the signing of the BESSAs with the buying utilities.

The Appellants were, in fact, called upon to file an affidavit as to whether extension of the period for signing the BESPAs amounted to novation of the agreement, under Section 62 of the Indian Contract Act, in the light of the Clause G 6. We find it difficult, therefore, to agree with the submission that the CERC has taken a stand in the appeal contrary to what it has held in the impugned order. In any event, the Appellant has sought to justify their action in terms of Clause G 3 to submit that, since the said clause requires the BESPAs to be preferably signed immediately after signing of the BESSA, the delay in signing the BESPAs, after the BESSA was signed by SECI with GUVNL, is not fatal, since Clause G 3 itself envisages, by using the word “preferably”, that it is not invariably, in all cases, that the BESPAs should be signed immediately after BESSA has been signed; and that there can be

situations where the delay in signing the BESPA is for just and valid reasons. Suffice it to observe that the submission that the CERC has taken a stand in its reply to the Appeal, contrary to what it held in the original proceedings in Petition No. 138/AT/2023, does not merit acceptance.

XII. PURPOSE OF THE PROJECT IS TO PROVIDE GRID SECURITY:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the CERC has ignored the very purpose of the BESS Pilot project which is to provide grid security and facilitate the integration of renewable energy in the grid at the time of generation; as renewable energy is generated based on the natural resource availability at that particular time, any loss of opportunity to generate renewable energy is lost forever; and, evidently, there were multiple grid interruption reported by NLDC in the northern grid at ISTS level, and up to 30% of renewable energy were curtailed for some of the developers at the same substation where the BESS Pilot project is envisaged.

B. ANALYSIS:

The importance of BESS project cannot be over-emphasised. We have no quarrel, whatsoever, with the submission urged on behalf of the Appellant-JSW that the BESS project was intended to provide grid security and facilitate integration of renewable energy in the grid at the time of generation. What we are, however, required to examine in this Appeal is not the purpose for which the project was conceived and was sought to be implemented, but whether the bid quoted by the Appellant-JSW was market aligned, and whether the CERC was justified in refusing to adopt the tariff quoted by the Appellant-JSW on the ground that the bids quoted in similar projects, around

the time the Section 63 Petition was filed by SECI before the CERC, were for a far lower tariff which established that the subject bid was not market aligned. Suffice it to make it clear that we have no reservation on the importance of the BESS project, nor have we undertaken any examination regarding the object for which the BESS project was sought to be introduced in the country and implemented.

XIII. UNDUE DELAY:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the finding that there has been a '*delay of 145 days in issuance of the LoA*' is against the bidding guidelines and the RfS, which provide no fixed timeline for the issuance of LoA, but provide that the bid validity shall be 180 days; in the present case, admittedly, the LoA was placed within the bid validity and, therefore, there is no question of any delay; similarly, the finding that there has been a '*delay of 160 days in execution of BESSA*', from the date of issuance of the LoA, is against the bidding guidelines and the RfS, which have no provision fixing a timeline for execution of the BESSA; again the finding that there has been a '*delay of 245 days in execution of the BESPA*', after signing of the BESSA, is also against the bidding guidelines and the RfS; the bidding guidelines and the RfS expressly provide for signing of the BESPA only after signing of the BESSA; they further provide that the BESPA should be executed within 6 months of the issuance of the LoA; however, this period of 6 months as per the bidding guidelines and the RfS itself is subject to mutual extension by SECI and the successful bidder; admittedly, these mutual extensions are in place; and, therefore, the finding of 'delay' are completely baseless and go against the mandate of the Section 63 guidelines; the finding that there had

been a '*delay in achieving the timelines specified in the guidelines and the RfS documents*' is perverse; the timelines for execution of the project, as specified in the guidelines and the RfS, are linked to the '*effective date*', which, as per the amended RfS clause 21.5 shall be the date as on 90 days from the date of issue of LoA or the date of signing of BESPA, whichever is later.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the finding that the unreasonable delay (for whatever reason) in the instant case will lead to '*unintended gains for the developer and a wrongful loss to the public at large*' is unsustainable; as explained hereinabove, there is no 'delay' from the original timelines; as far as the finding of unintended gains is concerned, the Appellant relies on the details of cost and expected RoE as submitted in the additional affidavit dated 21.04.2025; it will be seen that the expected RoE is not unrealistically high to be labelled as an unintended gain or profiteering; and there is no evidence or data on record to show any 'wrongful' loss to the public at large.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would also submit that clause G3 and G6 of the bidding guidelines, are being misread and misapplied by the CERC; Clause G3 only provides that '*the BESPA should preferably be signed immediately after signing the BESSA*'; *Firstly*, the word preferably itself indicates that the provision is not mandatory; *Secondly*, both the Appellant and SECI have sufficiently explained that the BESPA could not have been signed only for the GUVNL portion without there being a re-configuration of the off-take arrangement from the project; therefore, the provision is not mandatory, and the time lapse stands sufficiently explained before this Tribunal; Clause G6 of the guidelines itself provides for the mechanism for extension of time with mutual agreement of the procurer and the BESS developer; as a matter of

fact, these mutual extensions are admittedly in place; additionally, SECI in its Appeal and during arguments has sufficiently explained the reasons for the time lapse between issuance of the LoA and signing of the BESPA; therefore, there is no merit in the contention of the CERC regarding variation/waiver/deviation of/ from the bidding guidelines; in fact, to the contrary, disregarding the mutual extensions as specifically permitted by clause G6 (as has been done in the present case by the CERC) is contrary to the bidding guidelines, which decision deserves to be set aside; and, for the foregoing reasons, the decision in **All India Power Association Vs. Sasan Power, 2017 (1) SCC 487** is wholly irrelevant and inapplicable to the facts of the present case.

B. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-SECI:

Sri M.G. Ramachandran Learned Senior Counsel appearing on behalf of SECI, would submit that, in the Impugned Order, the Central Commission has concluded that SECI has delayed: (i) in the issuance of Letter of Award ('LoA'); (ii) in the signing of the Battery Energy Storage Purchase Agreement ('BESPA') which was 245 days after the Battery Energy Storage Sale Agreements ('BESSA') was signed with the Discom; in the facts and circumstances of the case, there was no delay attributable to SECI, and the time taken both in regard to issuance of the LoA, and signing of the BESSA with Gujrat Urja Vikas Nigam Limited ('GUVNL') on 26.06.2024 and signing of BESPA with JSW Renew Energy Five Limited ('JSW') on 05.03.2024 as set out herein.

On the issue of LOA, Sri M.G. Ramachandran, Learned Senior Counsel appearing on behalf of SECI, would submit that the LOA was issued on 18.01.2023, a day after the letter dated 17.01.2023 was issued by the Central Government- Ministry of Power conveying its firm approval for grant

from the Power System Development Fund ('PSDF') towards the scheme for "Implementation of the 1000 MWh (2 Nos. of 250 MW/500 MWh) of Pilot BESS Projects at Fatehgarh- III Sub Station of SECI" to the extent of INR 80 Crores for the Distribution Licensee ('Discom') portion and Rs.30 crores for the Ancillary portion for a set duration, and provided for the terms and conditions for the implementation of the grant; the said letter dated 17.01.2023 was the communication from the Central Government committing the amount of the Viability Gap Fund ('VGF')/Grant towards meeting the gap of the tariff discovered in the competitive bidding process to JSW for 300 MW/600 MWh based on which only could SECI make the final offer to the Discoms for the sale of 150 MW/ 300 MWh; vide letter 01.02.2023, SECI wrote to GUVNL on the breakup of the capacity charges, which was originally INR 10,83,500/MW per month for 150 MW/300 MWh payable to JSW and, after adjustment of the PSDF grant and including SECI's trading margin, was reduced to INR 6,44,473.06 MW per month; though, from the time of initiation of the competitive bidding process, there was a proposal of the Central Government giving the viability gap fund/grant, the same was only in principle, ad hoc and was not finally committed till 17.01.2023; there were deliberations, even after completion of the bidding process i.e. on 10.10.2022, on the extent of financial support to be decided by the Government of India; on 09.12.2022, the Board of Directors of SECI resolved on the issue of providing the LoA to the successful bidder after receipt of a sanctioned order from the Central Government regarding release of the PSDF grant; and this only came vide letter dated 17.01.2023.

On the delay in signing the BESPAs, Sri M.G. Ramachandran Learned Senior Counsel appearing on behalf of SECI, would submit that, in terms of the bidding documents, BESPAs with JSW for 300MW/600 MWh was to be signed after BESSAs for one part of 150 MW/300 MWh is signed with the Discom and another part of 150 MW/300 MWh with NLDC is duly executed;

further, though the configuration of the BESS was for 2 X 250 MW/500 MWh each, the capacity shares of the Discom, NLDC and merchant power of JSW were from both the units i.e. 75 MW each to Discom from both the units, 75 MW each to NLDC from both the units and 100 MW each for merchant power of JSW from both the units; accordingly, BESSA had to be signed by both GUVNL and NLDC with SECI for 300MW/600 MWh before SECI could sign BESPA with JSW; the 150 MW/300 MWh to NLDC for ancillary services was committed as far back as on 16.07.2021 i.e. even before initiation of the bid on 13.04.2022; the clear stipulation, as mentioned, was that NLDC will sign the BESSA for 150 MW/300MWh; the BESSA is the legal agreement, committing procurement of BESS services from SECI on a back-to-back basis, to enable SECI to enter into a legal commitment with the BESS developer by signing the BESPA; the financial commitment of SECI was to be on a back-to-back basis; and it was not possible for SECI to execute the BESPA without BESSA , and proceed with assuming any financial commitment vis a vis the BESS developer without the back-to-back arrangements with the ultimate procurer.

Sri M.G. Ramachandran Learned Senior Counsel appearing on behalf of SECI, would further submit that SECI was pursuing with NLDC since 21.11.2022 for signing of the BESSA; NLDC issued letters to the Central Commission seeking regulatory framework for the BESS project vis a vis the ancillary services; the issues pertaining to the NLDC part was also raised with the Central Government (in the meeting held on 02.06.2023, Meeting dated 14.06.2023, and Meetings held on 26.06.2023, 02.06.2023 and 14.06.2023; finally on 31.07.2023, NLDC filed Petition No. 249/MP/2023; SECI filed Reply dated 23.11.2023 to the said Petition No. 249/MP/2023 and participated in the proceedings; on 12.02.2024 and 21.02.2024, at the hearing before the Central Commission for Petition No. 249/MP/2023, it was deliberated that the Central Commission will be the authority to pass orders

on the financial commitment of NLDC as the entire money would be from the DSM Pool as per the orders of the Central Commission; subsequently, the parties could proceed on the basis of the NLDC not signing the BESSA (in variation to the bidding terms/RfS); this was confirmed in the order dated 16.05.2024 passed in Petition no. 249/MP/2023; in the meanwhile, on 08.02.2024, at the instance of JSW vide letter dated 22.01.2024, and because of the above developments qua NLDC, the configuration of the allocated capacity was changed i.e separate off-take arrangement for Discom and NLDC portion were made namely from Project-1: 150 MW/300 MWh for GUVNL and 100MW/200MWh for merchant sale; and Project-2: 150 MW/300 MWh for NLDC and 100MW/200 MWh for merchant sale; and in pursuance to the above, BESPA for 150 MW/300 MWh for the GUVNL share was executed by SECI with JSW on 05.03.2024.

Regarding the delay in filing of Adoption of Tariff petition, Sri M.G. Ramachandran Learned Senior Counsel appearing on behalf of SECI, would submit that the tariff adoption petition was filed on 14.03.2024 after the joint submissions were filed on 22.02.2024 in Petition No. 249/MP/2024, and pursuant to the BESPA dated 05.03.2024 for 150MW /300 MWh was signed for GUVNL's portion (upon reconfiguration of the allocated capacity of the units); the consistent process adopted by the Central Commission to entertain the Petition for adoption of tariff has only been after the PSAs followed by the PPAs are duly signed bringing into existence a legal commitment for all concerned; and, in the circumstances mentioned above, there was no delay on the part of SECI in the execution of the BESPA as held by the Central Commission in the Impugned Order.

**C. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-
CERC:**

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Commission, in the impugned order, noted that there had been an inordinate delay in the signing of the BESPA, and there was subsequent steep cost reductions apparently based on market trends; SECI, the intermediary procurer, had, in its limited appeal, attempted to offer new justifications for the delays; notwithstanding that the intermediary procurer had been afforded two opportunities, as per the Commission's Record of Proceedings dated 18.09.2024 & 10.10.2024 to provide a justification for its delays as well as market alignment (which it admittedly has even on date not attempted to defend), SECI's reasons do not hold up to scrutiny; and the modified timeline including SECI explanations is presented in the following table:

S. No.	Milestone	Timeline as per guidelines	Date achieved	Delay (Days)	SECI Reasons
1.	RFS and Corrigendum issued	—	13.04.2022	—	—
2.	E-reverse auction	To be concluded within 3 months of RFS	25.08.2022	-	
3.	LoA	-	18.01.2023	145 days from e-reverse auction	Coordination with MoP regarding PSDF entitlement.
4.	BESSA with GUVNL	To be signed before BESSPA.	26.06.2023	-	-

5.	NLDC Petition 249/MP/2023 filed	—	31.07.2023	—	—
6.	JSW Seeks reconfiguration of Project Capacity to enable signing GUVNL BESPAs	—	22.01.2024	—	—
7.	SECI approves reconfiguration	—	08.02.2024	—	—
8.	Joint Submission in 249/MP/23 filed before CERC	—	21.02.2024	—	—
9.	BESPA with JSW for GUVNL component signed	Immediately after BESSA with outer limit of 6 months from LOA.	05.03.2024	251 days from GUVNL BESSA	Pendency of NLDC petition and reconfiguration of project capacity.
10.	Tariff Determination Petition No. 138/AT/2024 filed		14.03.2024		
11.	Decision in 249/MP/2023. Approved procedure for procurement of NLDC component. No BESSA required to be signed	—	16.05.2024	—	—

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would further submit that, even if SECI's belated explanations are to be countenanced, its explanation is wholly insufficient and contrary to the record; in so far as its submission that the LoA was delayed on account of negotiations regarding the PSDF issue with the Central Government is concerned, the same is negated by the minutes of the meeting dated 10.10.2022 in which it was resolved that *'It was decided to issue LoA to successful bidder. No extension will be given for reason attributable to Bidder/Developer and project should be completed in time;* and it is, therefore, apparent that the very minutes show that at least, on 10.10.2022, the LoA should have been issued.

As to SECI's contention that pendency of NLDC's petition prevented it from approaching the Commission, Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the timeline, as presented by SECI, would show that the pre-requisite for filing the petition was not NLDC's petition but the signing of the BESPA for the GUVNL component and the alleged hold-up on that count was the lack of re-configuration of the project; SECI's list of dates, and note dated 24.04.2025, would show that the request for re-configuration, as well as approval of re-configuration, were actions wholly external and alien to Commission, and were internal matters of SECI; the said process as per SECI's own timeline and note concluded far before any joint submission was placed before the Commission in Petition No. 249/MP/2023; the linkage to Petition No. 249/MP/2023 is, therefore, plainly a red herring since, admittedly, the re-configuration was done on 08.02.2024, two weeks before the joint submission was filed on 22.02.2024; therefore, the stand taken in paragraphs 7, 8 & 10 of SECI's list of dates and note dated 24.04.2025 are not internally coherent and is an attempt to create a post facto justification for the delay; SECI and JSW have, at least till the date of the impugned

judgment, not signed the BESPA for the NLDC component even though the order of 16.05.2024 had cleared the way for the same; this issue of re-configuration, being an internal commercial decision of JSW and within the authority of SECI, could have been done at any point subsequent or even prior to the signing of the BESSA with GUVNL, and no valid explanation for the delay has been provided; further, the fact that this was in no way hampered or delayed by the Commission is *res ipsa loquitor* since, as per the admitted facts and dates, neither did the Commission play any role in the same; and the said event took place much before passing of the NLDC final order, and even any joint submission placed in the NLDC proceedings i.e 249/MP/2023; this apart, the act of filing a joint submission cannot be construed as a positive direction or a blessing for either SECI or JSW to take any subsequent action, while the Petition itself remained pending adjudication; and, in these circumstances, the finding of delay suffers from no infirmity and the impugned order requires no interference on this count.

D. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-GUVNL:

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that, in the present case, there were substantial delays in the bidding process; the petition for adoption of tariff itself was filed only on 14.03.2024; the BESPA itself was executed by JSW and SECI only on 05.03.2024 for the 150 MW capacity; the BESPA between JSW and SECI for the NLDC capacity of 150 MW is not executed; the apparent reason given of there being issues with NLDC and the petition filed by NLDC, being Petition No. 249/MP/2023, is also misconceived; the order in the NLDC petition came on 16.05.2024; however, the petition for adoption was filed on 14.03.2024; further, BESPA for GUVNL for 150 MW was itself executed only on 05.03.2024; there was no justifiable reason for not even executing the

BESPA for 150 MW in relation to GUVNL till March, 2024; no justifiable reason was found by the Central Commission for the delay in seeking adoption of tariff; there is also no allegation of delay or default whatsoever against GUVNL in the present case; while there are claims that have been raised qua JSW and SECI on the reasons for delay, they have no correlation to the claim that the high tariff ought to be adopted, and the consumers in Gujarat having to pay a high tariff as quoted by JSW, which does not align with the market prices; and in any event, whatever be the reason for such delay, consumers cannot be imposed with the liability to pay the higher tariff for adoption in 2024-25, when tariff from other bids at present are substantially lower.

E. JUDGEMENTS UNDER THIS HEAD:

In **All India Power Engineer Federation v. Sasan Power Ltd., (2017) 1 SCC 487**, the Supreme Court held that the moment electricity tariff gets affected, the consumer interest comes in and public interest gets affected; this is statutorily recognised by the Electricity Act in Sections 61 to 63 thereof; under Section 61, the appropriate Commission, when it specifies terms and conditions for determination of tariff, is to be guided inter alia by the safeguarding of the consumer interest and the recovery of the cost of electricity in a reasonable manner; Section 63 begins with a non obstante clause stating that, notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the Guidelines issued by the Central Government; the Guidelines dated 19-1-2005 issued by the Central Government under Section 63 make it clear that such Guidelines are framed with the following objectives in mind: (1) Promote competitive procurement of electricity by distribution licensees; (2) Facilitate transparency and fairness in procurement processes; (3) Facilitate

reduction of information asymmetries for various bidders; (4) Protect consumer interests by facilitating competitive conditions in procurement of electricity; (5) Enhance standardisation and reduce ambiguity and hence time for materialisation of projects; (6) Provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers; clause 2.3 of the said Guidelines reads as follows: “unless explicitly specified in these Guidelines, the provisions of these Guidelines shall be binding on the procurer. The process to be adopted in event of any deviation proposed from these Guidelines is specified later in these Guidelines under Para 5.16.”; all this would make it clear that even if a waiver is claimed of some of the provisions of the PPA, such waiver, if it affects tariffs that are ultimately payable by the consumer, would necessarily affect public interest and would have to pass muster of the Commission under Sections 61 to 63 of the Electricity Act; this is for the reason that what is adopted by the Commission under Section 63 is only a tariff obtained by competitive bidding in conformity with Guidelines issued; if at any subsequent point of time such tariff is increased, which increase is outside the four corners of the PPA, even in cases covered by Section 63, the legislative intent and the language of Sections 61 and 62 make it clear that the Commission alone can accept such amended tariff as it would impact consumer interest and therefore public interest.

F. ANALYSIS:

In the impugned order, the CERC observed that, in the instant case, the Guidelines stipulated that the Scheduled Commissioning date (SCoD) shall be 18 months after the effective date of the BESPA; the chronology of events submitted by SECI revealed that there had been a delay in achieving the timelines specified in the guidelines and the RfS document; the unreasonable delay (for whatever reason), in the instant case, would lead to

unintended gains for the developer and a wrongful loss to the public at large; even though the bid evaluation process had been complied with as per the bidding guidelines, the tariff so proposed to be adopted was not aligned with the prevailing market prices in view of the delay in signing of BESSA and BESPA; and SECI had not yet signed BESPA with JSW Renew Energy Five Limited, (evidently, for the NLDC component), and the SCoD may get extended further giving undue benefit to the BESS developer, to take advantage of the reduced price in the battery market, which would be against public interest.

The CERC has, in the impugned order dated 02.01.2025, highlighted the delay in issuing the letter of award and in signing the BESPA. There has also been considerable delay on the part of SECI in approaching the CERC seeking adoption of tariff under Section 63 of the Electricity Act.

i. DELAY IN ISSUING LETTER OF AWARD:

In the impugned order, the abridged chronology of events is detailed by the CERC as under:

S. No.	Milestone	Date
1.	<i>RfS issued by SECI</i>	<i>13.04.2022</i>
2.	<i>Corrigendum-01 to the RfS documents uploaded</i>	<i>13.04.2022</i>
3.	<i>Last date of bid submission</i>	<i>29.07.2022</i>
4.	<i>e-Reverse Auction conducted</i>	<i>25.08.2022</i>
5.	<i>Issuance of Letters of Award (LoAs) to successful bidder</i>	<i>18.01.2023</i>

6.	<i>BESSA executed by SECI with Gujarat Urja Vikas Nigam Limited on</i>	<i>26.06.2023</i>
7.	<i>BESPA executed on</i> <i>(i) GUVNL for 150 MW</i> <i>(ii) JSWREFL for 150MW</i>	<i>27.02.2024</i> <i>Not executed</i>

After extracting the abridged chronology of events, the CERC observed that the e-Reverse Auction was conducted on 25.08.2022, whereas the LoAs were issued on 18.01.2023; and, hence, there was a delay of 145 days in issuance of LoAs.

Section III of the Central Govt Bidding guidelines dated 10.03.2022 relates to the Bidding Process and Award of Projects. Sub-Section A thereof relates to preparation for inviting bids and project preparation. Clause 1 thereunder relates to the conditions to be met by the Procurer. Clause 1.4 relates to the Project Site specified by the procurer. The table below Clause 1.4 gives details of the milestones and the deadlines and thereunder, with respect to the milestone of tendering process, the deadline required the bidding agency to try and conclude the tender within three months of issuance of the tender document. The RfP was issued by SECI on 13.04.2022. SECI intimated the Secretary, CERC, vide letter dated 06.06.2022, regarding initiation of the bidding process under the Standard Bidding Guidelines for the BESS project, and informed them that, in this regard, SECI, an intermediary procurer under the Guidelines, had initiated the tender for selection of BESS project under the Guidelines which was currently live. The table thereunder records the tender reference number, the name of the tender as RfS for setting up of Pilot Project of 500 MW/1000MWh standalone Battery Energy Storage System in India under

Tariff based Global Competitive Bidding (ESS-I) Project, and the date of issuance as 13.04.2022. The last date for bid submission was 29.07.2022, and the e-reverse auction was conducted on 25.08.2022.

In terms of the deadlines stipulated in the above referred Guidelines, the tender was required to be concluded within three months of issuance of the tender document ie within three months of the RfS dated 13.04.2022 ie before 13.07.2022. The tender process stands completed with issuance of the letter of award. In the present case, the letter of award was issued only on 18.01.2023 ie more than 6 months after expiry, of the stipulated three months, on 13.07.2022.

In the review meeting, held under the Chairmanship of the Hon'ble Minister, Power & NRE on 10.10.2022, it was decided to issue LOA to the successful bidder. However, in the meeting of the Board of Directors of SECI held on 09.12.2022, it was resolved that the Letter of Award be issued to the successful bidder only after receipt of sanction order from the Government of India regarding release of PSDF of difference of discovered tariff and offered LCoS of Rs.6.00/ kWh.

The justification put forth on behalf of SECI, for this delay in issuing the Letter of Award, is that they were awaiting a letter from the Govt of India regarding final approval for the VGF funding. The Secretary, Ministry of Power informed SECI and Grid-India, vide letter dated 17.01.2023, that the competent authority had approved grant from PSDF, the Monitoring Committee had approved the proposal of SECI for development of the Battery Energy Storage System (BESS) with an Annual PSDF grant of Rs.80.00 Crores for the DISCOM portion and Rs.30.00 Crores for the Ancillary portion for 12 years, funds would be released to eligible entities in accordance with the approved guidelines, the PSDF grant of Rs.80.00 Crores per annum would be released for the DISCOM portion on monthly

basis in advance after submission of a request by SECI, and the funds would be released with a cap of Rs.30.00 Crores per annum for Ancillary Service portion, on a yearly basis, based on accounts to be submitted by Grid-India.

According to SECI, they issued the Letter of Award to the Appellant-JSW on 18.01.2023, immediately after receipt of the letter dated 17.01.2023 from the Secretary, Ministry of Power. Neither the Central Govt guidelines nor the RfS document require the LoA to await receipt of a sanction order from the Central Govt. As noted hereinabove, the table below Clause 1.4 of the guidelines stipulates the deadline, with respect to the milestone of completion of the tendering process, as three months from issuance of the tender document. It is within three months from 13.04.2022, when the RfS was issued, that the bidding agency ie SECI was required to try and conclude the tender process or, in other words, issue a letter of award, as the tender process would stand concluded on a LoA being issued.

As noted hereinabove, while the deadline of three months expired on 13.07.2022, even the e-reverse auction (wherein the Appellant-JSW was selected as the lowest bidder) was held more than a month thereafter on 25.08.2022. It is not known why despite the directions issued in the meeting, held under the chairmanship of the Hon'ble Minister of Power on 10.10.2022, to issue an LOA to the successful bidder, the Board of Directors of SECI had resolved to the contrary, in its meeting held on 09.12.2022, that the Letter of Award be issued to the successful bidder only after receipt of sanction order from the Government of India regarding release of PSDF of difference of discovered tariff and offered LCoS of Rs.6.00/ kWh. While SECI seems to attribute the delay to the receipt of the letter from the Ministry of Power (which they eventually appear to have received on 17.01.2023), the reasons for the delay in issuing the said letter is incapable of examination in these appellate proceedings (nor could the CERC have examined these aspects) since the

Govt, be it of the Union or the States, are not amenable to the jurisdiction of the CERC or this Tribunal and are, in any event, not a party to these proceedings. Whatever be the justification put forth by SECI for the delay, it is not in dispute that there was a delay in issuing the Letter of Award, which the CERC has computed as 145 days, taking the commencement date from 25.08.2022 when the e-reverse auction was held till the Letter of Award was issued to the Appellant-JSW on 18.01.2023.

ii. DELAY IN SIGNING OF BESSA:

In the impugned order, the CERC observed that the BESSA was executed (with GUVNL) on 26.06.2023, i.e., after 160 days of issuance of LoAs on 18.01.2023. Except to contend that the delay occurred as a result of the issues raised by NLDC, no other explanation is forthcoming for this delay. There is also no explanation as to why the re-configuration agreed to be undertaken by the Appellant-JSW, vide letter dated 22.01.2024, could not have been done earlier, for, if such an exercise had been completed earlier, the BESSA with GUVNL may have been signed much earlier, notwithstanding the delay caused with respect to NLDC.

iii. DELAY IN SIGNING OF BESPAs:

In the impugned order, the CERC observed that, as per No. SECI/C&P/IPP/15/0001/Clarifications-01 dated 02.06.2022 and as stipulated in the Letter of Award (LoA), the BESPAs were to be executed subsequent to the signing of the BESSAs with the buying utilities; SECI had entered into a BESSA with the distribution licensee Gujarat Urja Vikas Nigam Limited on 26.06.2023; as per Clause 3 of 'G: Contract Award and Conclusion' of 'Section III: Bidding Process and Award of Projects' of the Guidelines, the BESPAs should preferably be signed immediately after signing of the BESSA(s); however, SECI signed BESPAs for 150MW

contracted capacity with the successful bidder, identified through the competitive bidding process, i.e., JSW Renew Energy Five Limited on 27.02.2024 (should be 05.03.2024) which is 245 days after the BESSA signed with GUVNL; and SECI had not submitted any explanation for these days of delay.

Section III Clause 1.4 of the Central Govt Bidding guidelines dated 10.03.2022 relates to the Project Site specified by the procurer. The table below Clause 1.4, with respect to the milestone of signing of BESPAs, stipulates the deadline as thirty days after issuance of LOA (may be extended depending on the tender conditions). While the LOA was issued on 18.01.2023, the BESPAs with the Appellant-JSW were signed by SECI on 05.03.2024, and thereafter SECI filed the Section 63 Petition before the CERC on 14.03.2024. Clause G3 of the Bidding Guidelines stipulates that the BESPAs should preferably be signed immediately after signing of the BESSA. The second limb of Clause 21.1 of the RfS dated 13.04.2022 states that the BESPAs shall be signed within 90 of issuance of LoA, if not extended by SECI; and subsequent extension in this timeline shall be finalised as mutually agreed by SECI and BESSD (i.e, the Appellant JSW).

The fact, however, remains that, while the LoA was issued on 18.01.2023, the BESSA with GUVNL was signed on 26.06.2023, and the BESPAs with the Appellant-JSW were signed by SECI only on 05.03.2024, nearly 14 months after the LoA was issued, and more than eight months after the BESSA was signed. Further, though the CERC passed its regulatory order in Petition No. 249/MP/2023 on 16.05.2024, no BESPAs appear to have been signed by SECI with the Appellant-JSW, with respect to the NLDC component, till date.

It is contended, on behalf of SECI, that, in the light of NLDC objecting to signing of the BESSA with SECI, re-configuration was necessary; and it is

only thereafter that a BESPA could be signed with the Appellant-JSW. It is relevant to note that, on 22.01.2024, the Appellant-JSW proposed re-configuration of the project to ensure that 150 MWs from one project was dedicated to GUVNL for which BESSA already stood executed, and 150 MWs from the second project be dedicated to NLDC for Ancillary Services. This re-configuration was approved by SECI on 08.02.2024, and the Appellant was called upon to submit the Bank Guarantees and to sign the BESPA for 150 MWs of BESS capacity to be off-taken by GUVNL. No reasons are forthcoming either from SECI or from the Appellant-JSW as to why this re-configuration, which was a matter to be decided only between them, could not have been done earlier.

Clause G6, of the Central Govt Bidding Guidelines dated 10.03.2022, stipulates that, in case of delay in signing of BESPA beyond six months from the date of issuance of the LOA, or any other extended date as mutually agreed between the bidding agency and the successful bidders, the awarded capacity shall stand cancelled. On 07.07.2023, at the request of SECI, the Appellant extended the time to sign BESPA in terms of Clause G(6) of the guidelines and Clause 44(d) of the RfS upto 31.10.2023. On 31.10.2023, the timeline to sign BESPA was further extended by the Appellant-JSW, on the request of SECI, up to 31.03.2024. Both SECI and the Appellant-JSW signed the BESPA, with respect to the GUVNL part, on 05.03.2024. It is evidently, with respect to signing of BESPA for the NLDC part, that, on 26.03.2024, the Appellant and SECI mutually extended the timeline for signing BESPA for the remaining 150 MW till 31.07.2024. On 21.08.2024, JSW informed SECI that the bid validity date was coming to a close, and they were giving their consent to extend the bid validity up to 30.11.2024.

It is in this context that, on 18.09.2024, a Record of Proceedings was uploaded by the CERC in Petition No. 138/AT/2024 seeking clarification on

extension of time in terms of Clause G(6) of the bidding guidelines. In response to the Record of Proceedings dated 18.09.2024, SECI filed an affidavit on 05.10.2024 stating that the parties had mutually extended the time as per the provisions of Clause G(6) of the bidding guidelines. On 10.10.2024, CERC again reserved orders in Petition No. 138/AT/2024, and directed parties to file their affidavits on the aspect of extension of time. On 17.10.2024, the Appellant filed an additional affidavit in Petition No. 138/AT/2024, in compliance with the Record of Proceedings dated 18.09.2024, stating that the time for signing BESPA was extended till 30.11.2024. The fact, however, remains that no BESPA has been signed, between SECI and the Appellant-JSW, till date for the NLDC component

iv. SECTION 63 PETITION FILED BEFORE THE CERC:

Clause G8 of the Bidding guidelines stipulates that the intermediary procurer should approach the appropriate Commission for adoption of the discovered tariff, and for procurement of the quantity of capacity/electricity, within 30 days of issuance of the letter of award to the successful bidder. In case the adoption procedure requires a signed BESPA to be submitted along with it, the above time lines may be extended suitably. No provision either in the Bidding Guidelines dated 10.03.2022 or in the RfP dated 13.04.2022, which requires a signed BESPA to be filed along with the Section 63 Petition, has been brought to our notice. In terms of Clause G8 of the Bidding Guidelines, the Section 63 Petition should have been filed on or before 17.02.2023 (ie 30 days of issuance of the letter of award dated 18.01.2023) when, in fact, it was filed more than a year thereafter on 14.03.2024.

While initially it was contended, on behalf of SECI, that they were awaiting the decision of the CERC in Petition No. 249/MP/2023 before filing the Section 63 Petition, it was pointed out that they had, in fact, filed the Section 63 Petition on 14.03.2024 prior to the order of the CERC in Petition

No. 249/MP/2023 dated 16.05.2024. It was, thereafter, contended on behalf of SECI that it is after the joint statement was filed by NLDC before the CERC on 22.02.2024, that the BESPA was executed between the Appellant and SECI on 05.03.2024, on 06.03.2023 conformity certificates were issued by the Bid Evaluation Committee, and on 14.03.2024 SECI filed Petition No. 138/AT/2024 before the CERC for adoption of tariff.

It is relevant to note that, on 21.02.2024, the CERC, after being apprised that NLDC, SECI and the Appellant had reached a consensus on various aspects of NLDC's proposal, had granted permission to the parties to file a joint statement, and had reserved orders in Petition No. 249/MP/2023. It does not stand to reason that, merely because permission was granted by the CERC to file a joint petition, the CERC should be understood to have, thereby, expressed its intention to allow the said Petition filed by NLDC.

While SECI filed the petition for adoption of tariff before the CERC on 14.03.2024, the impugned order, rejecting adoption of tariff, was passed by the CERC on 02.01.2025. Clause G10 of the bidding guidelines provides that, subsequent to the End Procurer/Intermediary Procurer approaching the Appropriate Commission for adoption of tariff, in case the Appropriate Commission does not decide upon the same within 120 days from the Effective Date of the BESPA, the Procurer(s) shall grant appropriate extension of time in the financial closure deadline and scheduled commissioning date to the BESSDs, corresponding to the delay (beyond 120 days of Effective Date of BESPA) in adoption by the Appropriate Commission, till the date of adoption by the Appropriate Commission. The delay, if any caused as a result of the pendency of the Petition before the CERC, is not of much significance in the present case, since the comparable

bids referred to in the impugned order related to March, June and August, 2024 long prior to the passing of the impugned order on 02.01.2025.

Whatever be the reasons/justification for the delay in filing the Section 63 Petition before the CERC, the fact remains that there was a delay of nearly one year seven months from 25.08.2022, when the e-reverse auction was held and the Appellant-JSW was found to be the lowest bidder, till 14.03.2024 when the Section 63 Petition was filed before the CERC. Prior to, and soon after, the subject Section 63 Petition was admitted by the CERC on 08.05.2024, there were similar bids which showed that the tariff quoted in the subject bid was not aligned with the market prices prevailing at that time.

As against the Appellant's bid, submitted in August, 2022, of Rs. 10,88,917 per MW per month, the lowest bid received in a similar bid invited by BSES Rajdhani Power Limited, New Delhi in October, 2023 (around five months prior to the Section 63 Petition filed by SECI before the CERC on 14.03.2024) was for Rs. 4,79,967.50/- per MW per month. Thereafter, the lowest bid received in the GUVNL (Phase-II) Pilot Project of 250/500 MWh in March, 2024 was for Rs. 4,48,996 per MW per month. The lowest bid received in the GUVNL (Phase-III) Pilot Project of 250/500 MWh in June, 2024 was for Rs. 3,72,978 per MW per month, and the lowest bid received in the SECI (ESS-II) Project in August, 2024 was for Rs. 3,81,000 per MW per month.

It is relevant to note that the Appellant-JSW had itself quoted a tariff of Rs. 4,85,000/- per MW per month in the bids invited by BSES Rajdhani Power Limited. Further, the Appellant was selected as the lowest bidder in the SECI-ESS-II Bid quoting a sum of Rs. 3,81,000/-/MW per month. As shall be detailed later in this order, it is in this context that the delay, from the date the Appellant was found to be the lowest bidder in the subject auction (ie on

25.08.2022) till the adoption petition was filed by SECI before the CERC (ie on 14.03.2024), and was admitted on 08.05.2024, assumes significance.

XIV. IS THE TEST OF MARKET ALIGNMENT INAPPLICABLE IN THE CASE OF A 'FIRST OF ITS KIND PILOT PROJECT' WHICH IS SUPPORTED BY 'VGF FUNDING'?

A. SUBMISSION URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the instant bid was for a first of its kind pilot project which also had a viability gap funding (VGF) support from the PSDF under the head 'pilot/demonstrative projects'; these facts clearly establish that there was no 'pre-existing market' when the bids for the present project were called for; the 'market' came into existence only when the bidders submitted their bids and participated in the e-RA; as such, the only market that could have been said to be prevailing at the time of submissions of the bids was the market developed in the bid process itself; as the Appellant had emerged as the lowest bidder, among 8 other independent bidders in the e-RA for the BESS pilot project, no further test of market alignment of the bid was called for or justified on commercial and/or legal principles; it is for this reason that even the Section 63 guidelines, in the present case, do not provide for market alignment of the lowest bids being tested at any stage; this is in stark contrast with various other bidding guidelines issued by the Central Government under Section 63, and which have fallen for judicial consideration; the bidding guidelines were proposed by the steering committee of which CERC was a part; the initial guidelines for solar and wind power procurement also did not include the market alignment concept; and it was only after a market was created that the market alignment concept

was included through subsequent amendment; and no such amendment has been carried out in the BESS Guidelines.

B. ANALYSIS:

It is no doubt true that when the RfS was issued for the subject project in April, 2022, the said BESS project was the first of its kind in India though it appears to have been successfully implemented earlier in other countries. It is for this reason that the Government of India had considered it appropriate to provide for Viability Gap Funding (VGF) support from the PSDF under the head “Pilot/Demonstrative Project”. The fact, however, remains that, around the time SECI sought adoption of tariff, by way of a Petition filed before the CERC under Section 63 of the Electricity Act on 14.03.2024, and around the time the said Petition was admitted thereafter on 08.05.2024, similar BESS projects were sought to be implemented in Delhi, Gujarat and by SECI itself. Around the time the Section 63 Petition was admitted by the CERC on 08.05.2024, and within a few months thereafter, there was enough information on record to show that the bids quoted, including by them, in these subsequent bids were far lower than the bid quoted by the Appellant-JSW of Rs. 10,88,917/MW/month with respect to the subject bid.

This question of market alignment may, possibly, not have arisen for consideration if SECI had filed the Section 63 petition soon after the bids were finalised, and had fulfilled the stipulated requirements within the timelines stipulated in the Central Govt Bidding Guidelines and the RfS, for then there may not have been any other subsequent bids discovered in any part of the country which could have formed the basis for comparison with the subject bid. The fact, however, remains that the Section 63 petition was filed by SECI on 14.03.2024, more than a year and half after the Appellant-JSW was identified as the successful bidder in the e-reverse auction held on

25.08.2022. Around the time the Section 63 Petition was admitted by the CERC on 08.05.2024, and within a few months thereafter, several other bids were discovered, which made the bids quoted therein available for comparison with the subject bid.

While the bid quoted by the Appellant, in the e-reverse auction conducted for the subject bid on 25.08.2022 was for Rs. Rs. 10,88,917/MW/month, even after adjustment of the VGF provided by the Govt of India, the sum which the Respondent GUVNL was required to pay the Appellant-JSW was Rs. 6,44,473.06 per MW per month, which also is substantially higher than the bids received in similar bid processes conducted around the time the Section 63 Petition was filed by SECI on 14.03.2024 and was admitted by the CERC on 08.05.2024.

XV. ABSENCE OF A SPECIFIC PROVISION IN THE CENTRAL GOVT GUIDELINES: ITS EFFECT:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the guidelines for the BESS pilot project do not contain any provision analogous/similar to clause 4 or clause 5.1 of the Central Government bidding guidelines dated 19.01.2005; there is no provision in the bid evaluation criteria which requires the committee to test market alignment of the rates; therefore, in absence of such provisions in the bidding guidelines for the present 'pilot project', the enquiry under Section 63 of the Act is to be confined to testing (i) whether the tariff has been determined through a transparent process of bidding and (ii) whether the process is in accordance with the guidelines issued by the Central Government; this, by itself, will not render the CERC a 'mere-post office' as

is sought to be contended by the Respondents-GUVNL and CERC; and to contend that the intended absence of provisions relating to market alignment, by the Central Government in the Section 63 guidelines, can be filled in by the CERC, which may test 'market alignment' in the exercise of its general regulatory powers, would be against the very object of the specific guidelines issued for a first of its kind pilot project.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Appellant is misconstruing and misinterpreting the provisions of Section 63 and Section 79 of the Electricity Act; the Commission's powers to regulate are not extinguished when undertaking an exercise under Section 63 of the Electricity Act; the Appellant's argument, that absence of a market alignment clause within the guidelines would override the general regulatory power to test market alignment, is specious; market alignment and ensuring that tariff is based on commercial principles is integral to the Electricity Act and a core function of the Respondent Commission; this is also embodied in Section 61 of the Electricity Act, which has not been put out of the way by Section 63; it is wholly uncertain if this core function can be overridden by even an express guideline or a subordinate regulation, let alone by its absence in the guidelines as sought to be canvassed by the Appellant; if the Respondent Commission were to be denuded of its power to examine consumer interest and market alignment, it would be reduced to the role of a mere post office, and the said principle has been repeatedly rejected and deprecated by the Supreme Court; and, therefore, absence of a market alignment clause by itself cannot be used as a reason to denude the Commission of its core regulatory powers. Reliance

is placed by the Learned Senior Counsel on **Energy Watchdog v CERC, (2017) 14 SCC 80**.

C. SUBMISSIONS URGED ON BEHALF OF RESPONDENT-GUVNL:

In response to the contention of the Appellant-JSW that, in the absence of any provision in the bidding documents, the CERC has no power to consider market alignment, Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that the jurisdiction of the Central Commission under Section 63 is not that of a post office; the Central Commission has to adopt tariff in accordance with the guidelines; in the absence of any prohibition in the guidelines, the Central Commission always has the regulatory jurisdiction to consider the reasonability of the tariff; this proposition is squarely covered by the decision in **Energy Watchdog (2017) 14 SCC 80, para 19 and 20**; it cannot be that, in the absence of a specific provision on market alignment, the Central Commission is bound to adopt whatever tariff is discovered in the bidding process, however exorbitant or contrary it may be to public interest; the jurisdiction of the Central Commission to consider the reasonableness of the tariff and public interest always exists; and the issue is only whether the jurisdiction is correctly exercised.

D. JUDGEMENT RELIED ON BEHALF OF THE RESPONDENT:

In **Energy Watchdog v CERC, (2017) 14 SCC 80**, the Supreme Court held that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1); this regulatory power is a general one, and it cannot be said that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b); for one thing, such regulation takes place under the Central

Government's guidelines; for another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, it cannot be said that the Commission's power to "regulate" tariff is completely done away with; the first rule of statutory interpretation is that the statute must be read as a whole; a concomitant of that rule, is that all the discordant notes struck by the various Sections must be harmonised; considering the fact that the non obstante clause advisedly restricts itself to Section 62, there is no good reason to put Section 79 out of the way altogether; the reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding; in either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff; Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff; Section 79(1)(b) is a wide source of power to "regulate" tariff; in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines; it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

E. ANALYSIS:

Section 1 Clause 1(b) of the Government of India Guidelines dated 10.03.2022 itself records the contents of the CEA report to the effect that there is a downward trend in the cost of solar panels and newer technology options like Battery Energy Storage System; and that reduction in cost projections is very aggressive for battery energy storage technology to render them financially viable in the near future. We must examine the Appellant-JSW's claim of absence of a specific provision in the Govt of India Guidelines dated 10.03.2022, regarding market alignment unlike a specific clause in the earlier guidelines, bearing in mind the fact that the afore-said Guidelines dated 10.03.2022 explicitly recognises that there is an aggressive reduction in the cost projections for battery energy storage technology.

In view of the law laid down by the Supreme Court, in **Energy Watchdog v CERC, (2017) 14 SCC 80**, in situations where there is a specific provision in this regard in the Central Government guidelines, the Appropriate Commission (in the present case the CERC) is obligated to examine the Section 63 adoption petition in the light of this specific provision. However, in the absence of a specific provision in this regard in the Govt of India Guidelines, the CERC is not expected to act as a mere post office. In such circumstances, it is always open to the CERC, in the exercise of its general regulatory powers under Section 79(1) of the Electricity Act, to examine the issue of market alignment with a view to protect consumer interest and to exercise its jurisdiction in larger public interest. It does not stand to reason that when similar bids, discovered around the time the tariff adoption exercise was undertaken by the CERC, were far lower than the tariff quoted by the Appellant-JSW in the subject bid, the CERC should be expected to turn a blind eye to the existing bids, and instead act like a mere post office to adopt the tariff quoted by the Appellant-JSW though the tariff quoted by them is substantial higher than similar bids discovered around the time the Section 63 adoption exercise was undertaken by the CERC, more

so when the subsequent bids quoted by the JSW itself (both in Delhi and in ESS-II project of SECI) was for Rs. 4,85,000/- per MW per month and Rs. 3,81,000/- per MW per month respectively, which is substantially lower than the bid quoted by the Appellant-JSW of Rs. 10,88,917/MW/month in the subject bid.

We are in agreement with the conclusion of the CERC, in the impugned order, that, while exercising the power of adoption of tariff under Section 63 of the Electricity Act, they can, in the exercise of their general regulatory power under Section 79(1) of the Electricity Act, reject the tariff which is not aligned with the market and is not in the interest of the public at large, even in the absence of a specific provision in this regard in the Central Govt Guidelines. While Section 1 Clause 1(b) of the Government of India Guidelines dated 10.03.2022 itself recognises the downward trend in the cost of solar panels and newer technology options like Battery Energy Storage System, and notes that reduction in cost projections is very aggressive for battery energy storage technology which would render them financially viable in the near future, it would hardly make a difference even if we were to proceed on the premise that there is no specific provision in the Central Govt Guidelines in this regard. In a situation where the said guidelines do not deal with a given situation, (which in the present case, is regarding market alignment), the Commission's general regulatory powers under Section 79(1) of the Electricity Act can then be used. In the present case, the CERC has exercised its general regulatory power, under Section 79(1) of the Electricity Act, to examine whether or not the subject bid is market aligned. As such a power is available to be exercised by the CERC, the Appellant's contentions under this head necessitate rejection.

XVI. SHOULD MARKET ALIGNMENT BE INVARIABLY TESTED WITH PRICES PREVAILING IN THE MARKET AT THE TIME OF SUBMISSION OF THE SUBJECT BID?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant-JSW, would submit that, even assuming that CERC is empowered to look into market alignment of the tariff discovered under Section 63 of the Electricity Act irrespective of the provisions of the bidding guidelines of the instant pilot project, the test of market alignment has to be compared with the '*prices prevailing at the time of submission of the bids*'; there is no evidence or discussion on the prices prevailing at the time of the bid in the instant case; and it is only the prices discovered in incomparable bids 2 years down the line, which alone have been considered; subsequent events and bids (in the present case after a gap of 2 years) cannot be taken into consideration to test market alignment; it is well settled that subsequent developments leading to price variation are not a relevant consideration in determining reasonability/adequacy of the price discovered in the bid; imagine, if the prices had gone up in the subsequent bids, could the developer be heard to argue that it would be legally justified in resiling from the earlier offer, and is not bound by the contractual obligations flowing from such offer and acceptance?; and the CERC, in its earlier orders, has consistently considered the subsequent events leading to a variation in price, as a factor irrelevant for the purposes of the tariff adoption proceedings. Reliance is placed, on behalf of the Appellant on the decision of this Tribunal in ***Mr. Ramashankar Awasthi Vs. UPPCL & Ors.*** (Judgement in Appeal No. 37 of 2018 dated 05.08.2024) and ***M/S Adani Green Energy (Uttar Pradesh***

Ltd.) Vs. UPERC (Judgement in Appeal No. 307 of 2018 and Appeal No. 275 of 2019 dated 28.11.2022) in this regard.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that, in the Impugned order, the CERC itself, at para 47, recognised '*that price fall post bidding cannot generally be a ground for rejecting an earlier bid process and price discovery*'; however the CERC, on a misconception regarding the delay in achieving 'original timelines', failed to adhere to this well-established principle; in fact, even the decision of the Supreme Court, in **Jaipur Vidyut's Case**, has repeatedly referred to market alignment being tested against 'prevailing market prices'; the guidelines themselves noticed that the reduction in cost projection for Battery Energy Storage Technology are very aggressive; and under such circumstances, if the rates discovered in subsequent bids - two years down the line- are taken into consideration for testing market alignment of the discovered rate, no bid will ever pass muster for tariff adoption.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Appellant's contention, that the Commission is bound only by bids prior to or contemporaneous in time to the bidding date of the present case, i.e. 25.08.2022, is also an incorrect proposition of law; analogous to the jurisprudence regarding tenders or auctions, the highest bidder or L-1 has no vested right (**Indore Vikas Praadhikaran v Shri Humud Jain Samaj, (2024) SCC OnLine SC 3511**); the Appellant can claim no vested right in the tariff adoption proceedings; the crucial fact that would bestow vested rights on parties is, admittedly, the adoption of tariff; this was the condition prerequisite as per the Clauses of the BESPAs; the obligation of the Appellant did not commence till the signing of the BESPAs i.e.

5.03.2024, and therefore no vested right could accrue till the tariff stood adopted; in fact, the BESPAs specifically accounts for the time taken during the proceedings before the Commission and therefore, if the said proceeding was not concluded in a timely manner, the Appellant-JSW was entitled to a deferment in its obligations; the facts as they stand today are more stark since the BESPA for the NLDC component is not signed till date, and the obligations qua that component have, as recorded in Para 46 of the impugned order, still not fructified.

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would further submit that acceptance of the proposition put forth by the Appellant-JSW would imply that the Commission, which in the present case was presented with the tariff petition only on 14.03.2024, would have to turn a blind eye to all developments in the market from 25.08.2022, a gap of around 587 days, while making a determination of market alignment; this would essentially imply that the Commission would have to turn a blind eye to a drastic fall of the discovered prices of BESS; and such a broad proposition as canvassed would defeat the very purpose of market alignment, and would actually lead to incentivizing delays, since players would bid keeping in mind that they could effectively delay the signing of the purchase agreements for one reason or the other to achieve a financially beneficial project kick-off date.

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would also submit that the present dispute exists in a narrow compass, namely a bid conducted on 25.08.2022 was delayed by the intermediary and the Developer till at least 5.03.2024, in contravention of the timelines as prescribed in the guidelines and presented to the Commission for adoption on 14.03.2024; by March, 2024, the market for what was being bid, i.e. for Battery Energy Storage System, had reduced drastically; the

Commission, exercising its core regulatory function under Sections 61, 63 and 79 of the Electricity Act, found the said bid not to be market aligned; the Respondent-Commission has noted that the findings are restricted to the facts of the present case, and the nature of delay and change in market dynamics at play; and given the facts of the present and the aforesaid submissions, the findings of the Respondent Commission were wholly appropriate and require no interference by this Tribunal.

C. SUBMISSIONS URGED ON BEHALF OF RESPONDENT-GUVNL:

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that the contention of the Appellant-JSW that, for adoption, the bids have to be compared only with the tariff that was prevalent when the bids were made and not when the bids were adopted is misconceived; rights are vested in the parties, and the obligations of parties to establish the project kicks in only on the adoption of tariff; the completion of the bidding process is always to be considered from the point of view of the procurer; and if, at the stage of adoption, the market tariff available is much lower, there is no justification for adoption of a much higher tariff, only because the tariff was quoted at a prior point of time.

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would further submit that procurement of power is only in the future; there is no dispute that there has been substantial reduction in the prices subsequent to the submission of bids; therefore, when it considers adoption at a particular stage, the Central Commission ought to consider only the prices as is then available for purchase from similar sources; otherwise, it will result in the consumers paying a much higher tariff, merely because the tariff was quoted earlier but adopted and the agreement performed only presently, and the present tariff from similar projects is much lower; this will be completely

contrary to public interest; even otherwise, in the present case, the cost is being incurred by JSW only in the year 2024-25 and therefore comparison with the bids in 2024 is also correct; firstly, the BESPA between JSW and SECI was entered into only on 05.03.2024; therefore, there was no obligation whatsoever on the part of JSW prior to 2024; in its affidavit dated 21.04.2025, the Appellant-JSW has itself stated that it has given the Order for project equipment starting only on 24.06.2024; therefore, it was not even the case of the Appellant-JSW that it had incurred costs in 2022 (even assuming any vested right of JSW); further, the Scheduled Commissioning Date of 05.09.2025 is also subject to adoption of tariff in terms of Article 2.1.2 of the BESPA; after providing for initial 4 months for adoption of tariff, in case of any further delay, all timelines in the agreement including financial closure get automatically extended [Article 3.2.3]; it is not even the case of JSW that there is an obligation on them to establish the project, without waiting for adoption; in the Affidavit dated 21.04.2025, JSW itself states that, even at this stage, JSW is in a position to complete the project by the original SCOD ie 05.09.2025; this itself shows that the time period of 18 months, even after providing for 4 months for adoption, is more than sufficient for the project commissioning; and there is no obligation to proceed further, without adoption of tariff in the first 4 months, or thereafter with the extended time line in terms of Article 3.2.3.

D. ANALYSIS:

The market alignment test, ordinarily, involves a comparison of the tariff quoted in the subject Bid with the market prices prevailing at around the time of submission of the bid or prior thereto, in order to ascertain whether the tariff quoted in the subject bid is higher than the prices prevailing in the market at around the same time, since it would not be in consumer interest, (which the Regulatory Commission is obligated to protect), to select a bidder

who has quoted a tariff higher than the price at which the procurer would have been able to purchase electricity from the market. Application of this test would, ordinarily, entail a comparison of the subject Bid with the prices quoted in other similar bids either before or around the time of finalization of the subject bid, for a bidder is neither expected to, nor can he, visualize the prices which may prevail in the market a year or two later.

The question which arises for consideration, in the present appeal, is whether the very same yardstick can be applied even in cases where more than a year and half has elapsed between when the bidder was selected in the subject bid, and when the Petition was filed before the CERC seeking adoption of tariff under Section 63 of the Electricity Act. Section 63 of the Electricity Act requires the Regulatory Commission, among others, to adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

As noted hereinabove, Section 1(1)(b) of the Central Government Guidelines dated 10.03.2022 takes note of the report of the Central Electricity Authority (CEA) dated January, 2020 (which is more than two and half years prior to the selection of the Appellant-JSW as the lowest bidder on 25.08.2022) that there is a downward trend in the cost of solar panels and newer technology options like battery energy storage systems, and the reduction in cost projections is very aggressive for Battery Energy Storage technology to render them financially viable in the near future. As the Central Government Guidelines itself recognizes the downward trend in the cost of the BESS system, and that there is an aggressive reduction in its cost projections, the CERC, on a petition being filed before it by SECI on 14.03.2024 seeking adoption of tariff under Section 63 of the Electricity Act, and on the said Petition being admitted on 08.05.2024, could not be expected to turn a blind eye or to ignore the prevailing prices quoted in similar

bids in the market, more so when some of these substantially lower bids were quoted by the Appellant themselves. The CERC has, in following this procedure, relied heavily on the judgment of the Supreme Court in **Jaipur Vidyut Vitran Nigam Limited vs. MP Power: (2024) 8 SCC 513** in this regard, detailed reference to which shall be made later in this order.

Accepting the submission, urged on behalf of the Appellant-JSW, would require us to hold that, since the subject Project was a pilot project-the first of its kind in India when the RfP was issued in April, 2022, and there were no comparable bids when the Appellant-JSW was selected as the successful bidder in August, 2022, their bid should have been accepted and the tariff quoted by them adopted by the CERC for the mere asking without ascertaining whether the bid quoted by them was market aligned, even though there were comparable bids around the time the Section 63 tariff adoption Petition, filed by SECI, was admitted by the Commission on 08.05.2024. This course of action would have rendered the CERC a mere post office which the Supreme Court, both in **Energy Watchdog** and in **Jaipur Vidyut Vitran Nigam Limited**, has held that it is not.

In this context, it is relevant to note that Clause G6, of the Central Govt Bidding Guidelines dated 10.03.2022, stipulates that, in case of delay in signing the BESPA beyond six months from the date of issuance of the LOA, or any other extended date as mutually agreed between the bidding agency and the successful bidders, the awarded capacity shall stand cancelled. Clause 44(d), of the Request for Selection (RfS) document issued by SECI on 13.04.2022, stipulates that, in case of delay in signing the BESPA beyond six months from the date for issuance of LoA, or any other extended date as mutually agreed between SECI and the successful bidders, the awarded capacity shall stand cancelled.

On 07.07.2023, at the request of SECI, the Appellant extended the time to sign BESPAs, in terms of Clause G(6) of the guidelines and Clause 44(d) of the RfS, upto 31.10.2023. On 31.10.2023, the timeline to sign BESPAs was further extended by the Appellant-JSW, on the request of SECI, up to 31.03.2024. Again on 26.03.2024, the Appellant and SECI mutually extended the timeline for signing the BESPAs, for the remaining 150 MW, till 31.07.2024. On 21.08.2024, JSW informed SECI that the bid validity date was coming to a close, and they were giving their consent to extend the bid validity up to 30.11.2024.

But for the Appellant-JSW giving its consent thrice for extension of time to sign the BESPAs, firstly on 07.07.2023, thereafter on 26.03.2024, and thirdly on its own accord on 21.08.2024, Clause G(6) of the Central Govt Guidelines dated 10.03.2022, and Clause 44(d) of the RfS dated 13.04.2022, would have applied, resulting in the awarded capacity being cancelled. It does appear that the Appellant-JSW readily agreed thrice for extension of time to sign the BESPAs for the GUVNL component, which they did on 05.03.2024, since the delay in signing the BESPAs, and the consequent delay in SECI filing the Section 63 Petition before the CERC, was to their benefit, as there was a continuous drastic reduction in the market prices of the equipment required to establish the BESS project, and the Appellant stood to gain financially as a result of the delay and the consequent price reduction, since they would, on the tariff being adopted, have been entitled to the tariff quoted by them more than a year and half earlier in July/August, 2022 of Rs. 10,88,917/- per MW per month.

If, as is contended, there had been an increase in the comparable market prices as on the date of filing of the Section 63 Petition, the Appellant-JSW may, possibly, have invoked Clause G6 of the Central Govt Bidding Guidelines dated 10.03.2022, and Clause 44(d) of the Request for Selection (RfS) dated 13.04.2022, and may have refused to sign the BESPAs, in case

the delay was beyond six months from the date of issuance of the LOA. In such a situation, the afore-said provisions may have come into play, and the Appellant may have been entitled to contend that the awarded capacity stood cancelled as a result. In any event, the submission that the CERC would not have directed cancellation of the bid, if the tariff quoted in the subsequent bids was higher than the subject bid, is, in the present context, merely an academic issue which this Tribunal would refrain from examination. Suffice it to observe that the earlier orders of the Commission, be it the CERC or the State, are not binding on this Tribunal as the Regulatory Commissions stand lower in hierarchy to this Tribunal in terms of the provisions of the Electricity Act.

Reference, in the judgement of the Supreme Court in **Jaipur Vidyut Vitran Nigam Limited**, to the expression “*prevailing market prices*”, was in the context of the market prices prevailing when the Commission undertook the exercise of adoption of tariff under Section 63 of the Electricity Act, and not the market prices prevailing when the bids were originally submitted, which is evident from the fact that the Supreme Court had approved the action of the Regulatory Commission in comparing the bids submitted in the year 2013 with the bids submitted/market prices prevailing/ in the subsequent years 2014, 2015 and 2016.

Reliance is placed by the Appellant on the decision of this Tribunal, in **Mr. Ramashankar Awasthi vs. UPPCS and others** (judgment in Appeal No. 37 of 2018, dated 05.08.2024), in support of their submission that the market prices, prevailing at the time of submission of the subject bid, can alone form the basis of comparison. Reliance is also placed, on behalf of the Appellant-JSW, on **M/s Adani Green Energy Uttar Pradesh Limited vs. UPERC** (judgment in Appeal No. 307 of 2018 and Appeal No. 275 of 2019 dated 28.11.2022), to contend likewise.

i. JUDGEMENTS RELIED ON BEHALF OF THE APPELLANT-JSW:

In **Mr. Rama Shanker Awasthi versus Uttar Pradesh Power Corporation Ltd. (UPPCL) (Judgement of Aptel in Appeal No. 37 of 2018 & batch dated 05.08.2024)**, the Appellants, in the batch of Appeals (except in Appeal No.37 of 2018), were generating companies which had established solar power projects at different locations in the State of Uttar Pradesh under a competitive bidding process, for solar power procurement carried out in the State in 2015, for procurement of 215 MW power from grid connected solar PV projects; the U.P. New and Renewable Energy Development Agency (“UPNEDA” for short), a nodal agency for procurement of 215 MW power from Grid Connected Solar Power Projects, had originally issued the Request for Proposal (RFP) on 31.01.2015, which stood amended on 24.04.2015; the financial bids of the 25 technically qualified bidders were opened in the presence of their representatives on 08.06.2015; the Bid Evaluation Committee, in its meeting held on 12.06.2015, recommended approval of the fixed tariff quoted by fifteen bidding companies for 12 years which was subsequently approved by the Empowered Committee on 04.07.2015, and finally by the U.P Government cabinet on 07.09.2015; all the PPA were signed in December, 2015, and the successful bidders had to achieve the commercial operation date, within 13 months from the date of signing of the PPA, by January, 2017; UPNEDA and UPPCL filed the petition before the UPERC on 04.05.2016, for adoption of the discovered tariff, wherein they referred to the discussions that took place on 18.05.2015, 30.05.2015, 08.06.2015, 12.06.2015 and 04.07.2015, prior to the filing of the Petition, before the bid evaluation committee which had looked into the viability as well as the alignment of tariff vis-à-vis the market price.

By its Order dated 22.02.2017, the UPERC directed the petitioners to take an appropriate decision in the background of the then prevailing and also the present market rate for solar energy, making it clear that they had not expressed any finding approving or disapproving the rates, and the next hearing in the matter would be held subsequent to the action taken on the basis of the afore-said directions. By its final order dated 21.11.2017, which was impugned in the appeals before this Tribunal, the UPERC adopted the tariff of Rs. 7.02/Unit for a period of 12 years, directed that, for the next period of 13 years, the bidders shall be bound to supply power to UPPCL at APPC as agreed in the PPA, subject to a ceiling of Rs. 7.02 /Unit, approved the PPA of the nine bidders, and directed that necessary modifications be made in the signed PPA, according to its order.

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

In this context, this Tribunal observed that the Appropriate Commission was not bound to accept the tariff quoted by the successful bidder merely because such a tariff has been approved by the Bid Evaluation Committee on

their erroneous understanding that the said bid is market aligned; the Appropriate Commission is not a mere post office, and is empowered to independently examine, with a view to protect consumer interest, whether the tariff quoted by the successful bidder is higher than the price prevailing in the market when the bids were submitted; in case the Commission is satisfied that the bid quoted is higher than the then prevailing market rates, it can undoubtedly exercise jurisdiction, under Section 63 of the Electricity Act, to refuse to adopt the tariff or, in other words, refuse to grant permission to the procurers to enter into a PPA with the generator at the tariff quoted by them.

This Tribunal saw no reason to scrutinize the material relied either by the appellant-generators or the material considered by the bid evaluation committee or the material relied upon by the UPERC in passing the orders dated 22.02.2017 and 21.11.2017 or even the material placed before the UPERC by the appellant-consumer. This Tribunal observed that it was open to the parties to the proceedings to draw attention of the UPERC to material relating to the market rates prevalent at the time of submission of the bids; and, while examining the question whether the bids quoted by the successful bidders were market aligned or not, any material which the UPERC may choose to rely upon shall be made available to the parties to the proceedings, and they shall be given a reasonable opportunity of being heard; Principles of natural justice required the Regulatory Commission, while considering the issue, to put the parties to the proceedings on notice regarding the material which the Commission may choose to rely upon and be given an opportunity of being heard regarding its relevance, before the material/data is considered by the Regulatory Commission.

This Tribunal also observed that the mere fact that the bid evaluation committee was of the view that the bids quoted by the appellants-generators were market aligned, did not disable the Regulatory Commission from independently

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

Stray sentences, in the second paragraph at page 123 of the judgement of this Tribunal in “**Mr. Rama Shankar Awasthi vs. UPPCL and Others**” (judgment in Appeal No. 37 of 2018 and Batch dated 05.08.2024), are made the basis of this submission. These sentences read thus:

“The Appropriate Commission is not a mere post office, and is empowered to independently examine, with a view to protect consumers interest, whether the tariff quoted by the successful bidder is higher than the price prevailing in the market when the bids were submitted. In case the Commission is satisfied that the bid quoted is higher than the then prevailing market rates, it can undoubtedly exercise jurisdiction, under Section 63 of the Electricity Act, to refuse to adopt the tariff or, in other words, refuse to grant permission to the procurers to enter into a PPA with the generator at the tariff quoted by them”.

ii. STRAY SENTENCES IN A JUDGEMENT SHOULD NOT BE READ OUT OF CONTEXT:

It is settled law that there is always peril in treating the words of a speech or a judgment as though they are words in a legislative enactment, and it is to be remembered that judicial utterances are made in the setting of the facts of a particular case. Circumstantial flexibility, one additional or different fact may make a world of difference between conclusions in two cases. **(Padma Sundara Rao (Dead) v. State of T.N. (2002) 3 SCC 533; Herrington v. British Railways Board (1972) 2 WLR 537).**

A stray sentence in a judgement cannot be read out of context. **(GUVNL V. GERC: APPEAL NO. 371 OF 2023 DATED 09.11.2023).** It is not a profitable task to extract a sentence here and there from a judgment and to build upon it. **(Quinn v. Leathern, [1901] A.C. 495; State of Orissa v. Sudhansu Sekhar Misra, AIR 1968 SC 647; Delhi Administration (NCT of Delhi) v. Manohar Lal, (2002) 7 SCC 222; Dr. Nalini Mahajan v. Director of Income-tax (Investigation), (2002) 257 ITR 123 Delhi) and Bhavnagar University v. Palitana Sugar Mill P. Ltd., (2003) 2 SCC 111; B.F. Ditiya v. Appropriate Authority, Income-Tax Department, 2008 SCC OnLine AP 904; Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171; Kanwar Amninder Singh v. High Court of Uttarakhand, 2018 SCC OnLine UTT 1026)** A word here or a word there should not be made the basis for inferring inconsistency or conflict of opinion. Law does not develop in a casual manner. It develops by conscious, considered steps. **(Sri. Konaseema Cooperative Central Bank Ltd. v. N. Seetharama Raju, AIR 1990 AP 171).**

A judgment is only an authority for what it actually decides. What is of the essence in a decision is its ratio, and not every observation found therein nor what logically follows from the various observations made in the judgment. **(State of Orissa v. Sudhansu Sekhar Misra: AIR 1968 SC 647; Quinn v. Leathern, [1901] A.C. 495).** As a case is only an authority for what

it actually decides, it cannot be quoted for a proposition that may seem to follow logically from it. (**Quinn v. Leathem [1901] A.C. 495; State of Orissa v. Sudhansu Sekhar Misra, (1968) 2 SCR 154**). A decision cannot be regarded as an authority in regard to its conclusion alone or even in relation to what could be deduced therefrom. (**Suneja Towers (P) Ltd. v. Anita Merchant, (2023) 9 SCC 194**).

Further, in **Mr. Rama Shanker Awasthi versus Uttar Pradesh Power Corporation Ltd. (UPPCL)**, the Bid Evaluation Committee, in its meeting held on 12.06.2015, recommended approval of the fixed tariff quoted by fifteen bidding companies; this was approved by the Empowered Committee on 04.07.2015, and finally by the U.P Government cabinet on 07.09.2015; all the PPA were signed in December, 2015; and UPNEDA and UPPCL filed the petition, before the UPERC on 04.05.2016, for adoption of the discovered tariff. Unlike in the afore-said case where the adoption petition was filed within nine months of approval of the Govt on 07.09.2015, the Section 63 Petition in the present case was filed by SECI on 14.03.2024, nearly one year seven months after the Appellant-JSW was found to be the successful bidder in the e-reverse auction held on 25.08.2022.

In **M/S Adani Green Energy Versus Uttar Pradesh Electricity Regulatory Commission: (Judgement of Aptel in Appeal No. 307 of 2018 & batch dated 08.11.2022)**, on which reliance is placed on behalf of the Appellant-JSW, this Tribunal noted the contention of the appellants that piece-meal adjudication by the State Commission by a series of orders, spread over almost two years, causing inordinate delay and consequently creating uncertainty was unfair, this having misled and misdirected the State Commission to assume that the bid discovered tariff was required to be aligned to the market price prevailing at the time of final disposition making it unjust and unrealistic.

This Tribunal then noted the submission of the respondents that the State Commission had the power and the responsibility to look after the larger consumer interests and, thus, requisite jurisdiction to examine the reasonability of the bid discovered price and take measures to align it with the prevailing market conditions.

It is in this context that this Tribunal observed that regulatory authorities under the Electricity Act were bound to bear in mind the larger consumer interest, but, at the same time, it was also their onus to ensure that the tariff determination exercise resulted in recovery of cost of electricity in a reasonable manner; even assuming negotiation post-bidding was permissible in law. the negotiations had resulted in the tariff of Rs.7.02 (lowest bid quoted price) which had already been adopted by order dated 21.11.2017; the further exercise of examining its reasonableness on the touch-stone of principles set out in Section 62 of the Electricity Act was questionable; the two routes were entirely different; the tariff had to be reasonable, and should be aligned with the market conditions; but, for such purposes, the market conditions prevailing at the time of the bid were to be kept in mind and not what may have been the position much later; the tariff adoption petition (No.1110/2016) was filed by UPPCL and UPNEDA on 04.05.2016; it was finally decided twenty months thereafter on 12.02.2018; the delay on the part of the Commission was inordinate; the acts of omission of the statutory body – lack of promptitude on the part of the regulatory authority here – could not cause prejudice to the interests of the stakeholders looking up to them for fair dispensation; over the period, market conditions were bound to change; the sanctity of the bidding process had to be protected; and for aligning the bid price with the market conditions, the prevailing price at the time of bidding only could have been kept in mind.

In **M/s Adani Green Energy**, the State Commission had resorted to piecemeal adjudication by passing a series of orders spread over two years

and had sought to examine, at the time of final disposal of the Section 63 adoption petition, whether the bid discovered tariff was aligned to the market prices prevailing at that time. The delay of two years, in the afore-said case, was caused because of the pendency of Section 63 proceedings before the UPERC. Consequently, the UPERC could not have taken advantage of its own delay of around two years, to hold that, by the time the Section 63 Petition came up for final disposal, the prevailing market prices were not aligned to the bid discovered tariff.

iii. In Case of Conflict, it is the Judgement of the Supreme Court which is Binding, and not that of a Co-Ordinate Bench of this Tribunal:

In any event, when this Tribunal is faced with a judgment of a Co-ordinate Bench of this Tribunal which is in conflict with the judgment of the Supreme Court, it is the judgment of the Supreme Court which would bind this Tribunal and not that of the Co-ordinate Bench. All courts/statutory tribunals in India are bound to follow the decision of the Supreme Court in view of Article 141 of the Constitution of India. Judicial discipline requires, and decorum known to law warrants, that appellate directions should be taken as binding and followed. In the hierarchical system of courts which exists, it is necessary for each lower tier to accept loyally the decisions of the higher tier. The judicial system only works if someone is allowed to have the last word and if that last word, once spoken, is loyally accepted. **(Cassell & Co. v Broome: (1972) 1 ALL ER 801 (HL); Smt. Kaushalya Devi Bogra (Smt) and Ors. vs The Land Acquisition Officer, 1984 2 SCC 324)**. When the Supreme Court decides a principle, it would be the duty of the High Court or a subordinate Court (or for that matter a statutory tribunal) to follow the decision of the Supreme Court. A judgment of the High Court (or Tribunal) which refuses to follow the decision and directions of the Supreme Court is

a nullity. (**Narinder Singh v. Surjit Singh**, (1984) 2 SCC 402); **Kausalya Devi Bogra v. Land Acquisition Officer**, (1984) 2 SCC 324; **Municipal Corporation of Guntur, Guntur v. B. Syamala Kumari**, 2006 SCC OnLine AP 838; **Somprakash v. State of Uttarakhand**, 2019 SCC OnLine Utt 648; **Director of Settlements, A.P. v. M.R. Apparao**, (2002) 4 SCC 638). In the hierarchical set up of our courts, the High Court/subordinate Tribunal is bound by the decisions of the Supreme Court. (**Sakinala Harinath v. State of A.P.**, 1993 SCC OnLine AP 195 (FB)).

When a position in law is settled as a result of judicial pronouncement of the Supreme Court, it would amount to judicial impropriety for the subordinate courts/tribunals to ignore the said decision, and then to pass a judicial order which is clearly contrary to the legal position settled by the judgement of the Supreme Court. Such judicial adventurism is impermissible. (**Dwarikesh Sugar Industries Ltd Versus Prem Heavy Engineering Works**: (1997) 6 SCC 450). No order of a subordinate Court/tribunal can be construed to run counter to the Supreme Court's order. (**Mohd. Aslam v. Union of India**, (1997) 5 SCC 475). The law declared by the Supreme Court binds Courts in India (**Rajeswar Prasad Misra v. State of W.B.**, AIR 1965 SC 1887). It is the duty of the High Court (as also statutory tribunals), whatever be its view, to act in accordance with Article 141 of the Constitution of India and to apply the law laid down by the Supreme Court. Judicial discipline to abide by the declaration of law, of the Supreme Court, cannot be forsaken by any Court/Tribunal oblivious of Article 141 of the Constitution of India. (**Chandra Prakash v. State of UP**, (2002) 4 SCC 234; **State of Punjab v. Bhag Singh**, (2004) 1 SCC 547 : 2004 AILD 204 (SC); and **State of Orissa v. Dhaniram Luhar**, (2004) 5 SCC 568 : 2004 AILD 277 (SC)). 838). In the light of the law declared by the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited Vs. MB Power**: 2024 (8) SCC 513, which is binding on this Tribunal under Article 141 of the Constitution of India

(detailed reference to which shall be made later in this order), reliance placed on behalf of the Appellant-JSW, on the judgements of this Tribunal, in **Mr. Rama Shanker Awasthi versus Uttar Pradesh Power Corporation Ltd. (UPPCL) (Judgement of Aptel in Appeal No. 37 of 2018 & batch dated 05.08.2024)**, and **M/S Adani Green Energy Versus Uttar Pradesh Electricity Regulatory Commission: (Judgement of Aptel in Appeal No. 307 of 2018 & batch dated 08.11.2022)**, is of no avail.

Yet another aspect which must be borne in mind, and which shall be elaborated later in this order, is that the lowest bidder has no vested right to execute the subject project, since adoption of tariff is a pre-requisite thereof. Clause 27.15, of the Request for Selection (RfS) document issued by SECI on 13.04.2022, stipulates that the Central Electricity Regulatory Commission shall be the Appropriate Commission to exercise the regulatory and adjudicatory jurisdiction in regard to matters between the BESSD (ie the Appellant-JSW) and SECI as well as SECI and buying entities (ie GUVNL). The exercise of adoption of tariff undertaken by the CERC is in terms of Section 63 of the Electricity Act which is an exercise of its regulatory jurisdiction by the CERC.

Clause 2.1.2 of the BESPAs, executed between SECI and JSW on 05.03.2014, records the agreement of parties that the decision pertaining to the adoption of the tariff, and approval of the same, for procurement of contracted capacity, shall be binding on all parties concerned, as contained in the Electricity Act, 2003 and any amendments thereof. Not only does Section 63 of the Electricity Act, but even the BESPAs executed between SECI and JSW, make it clear that it is only on the tariff being adopted by the CERC, in exercise of its jurisdiction under Section 63 of the Electricity Act, would the Appellant-JSW be entitled to execute the subject project. The rights, if any, of the successful bidder are inchoate till the tariff is adopted by

the Commission under Section 63 of the Electricity Act, and their right to execute and implement the project gets crystallized only on and after the tariff is adopted by the appropriate commission.

We are of the view that, in the light of the inordinate delay of more than one year and seven months in filing the Section 63 adoption petition on 14.03.2024 (from 25.08.2022 when the Appellant-JSW was identified as the successful bidder), and as there was a drastic reduction in prices around the period when the said Petition was filed and later admitted on 08.05.2024, the CERC was justified in examining whether the subject bid was aligned to the market prices prevailing at around the time the Section 63 Petition was filed and admitted. The contentions, urged on behalf of the Appellant-JSW under this head, necessitate rejection.

XVII. IS THE JUDGEMENT IN “*JAIPUR VIDYUT VITRAN NIGAM LTD*” INAPPLICABLE TO THE FACTS OF THE PRESENT CASE?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, in **Jaipur Vidyut Vitran Nigam Limited Vs. MB Power**: 2024 (8) SCC 513, the Supreme Court was considering the competitive bidding guidelines notified by the Central Government on 19.01.2005; these guidelines are the same guidelines which were considered by the Supreme Court even in the case of **Energy Watchdog Vs. CERC**: 2017 (14) SCC 80; the Supreme Court in **Jaipur Vidyut Vitran Nigam Ltd**, after noticing its earlier judgment in **Energy Watchdog** and clause 4 (relating to tariffs) of the bidding guidelines found section 86(1)(b) to be analogous to section 79 of the Electricity Act, 2003; thereafter, the terms of section 86(1)(b) of the Act were noticed and, thereafter, the

Supreme Court, in ***Jaipur Vidyut's Case***, upheld the power of the State Commission to go into the question as to whether the rates quoted are market aligned or not, on the basis of such a power being available to the bid evaluation committee under the Section 63 guidelines itself; and Section 63, by itself, provides for a transparent process of bidding and the bidding having been conducted in accordance with the guidelines, without anything further.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the counsel for GUVNL has argued that the Supreme Court's decision in ***Jaipur Vidyut case*** is an authority for the proposition that market alignment of the discovered tariff has to be tested against prices prevailing '*at the time of adoption of tariff*'- for which purpose prices posterior to the bid shall be taken into consideration; firstly, the decision of RERC dated 26.02.2019, in Petition No. 1338 of 2018 were read; in this case, the bids were invited in the year 2013 and the bid of SKS Power (L-5) was not considered by the bid evaluation committee, as the quantum of power procurement stood reduced and the entire reduced quantum was distributed amongst L-1 to L-3; litigation ensued up to the Supreme Court; the quantum of procurement was restored; and the bid of L-5 was directed to be considered; the bid evaluation committee in 2018 (a) compared the tariff quoted with the levelized tariff discovered in case 1 bid process for FY 2006-2012 since the bids were quoted in the year 2013; and found that the bid of L-5 was 18.57% higher than the levelized tariff in 2012, (b) the BEC also looked into the levelized tariff of various bids received by other states in FY 2014-15 to 2015-16, and found the bid of L-5 to be higher than even those bids; RERC noticed that the BEC has done a detailed study to examine the tariff quoted by L-5 with the 'prevailing market price' and also the 'current market prices' and concluded that the tariff of L-5 was not market aligned and was exorbitantly high; secondly, the decision dated 03.02.2020 of this

Tribunal in Appeal No. 224 of 2019 (appeal against the RERC order dated 26.02.2019), was cited to show that this Tribunal did not go into the issue of whether prices discovered in the period beyond FY 2006-12 could have been considered; but allowed the appeal on certain other grounds; lastly, para 139 of the decision of the Supreme Court in **Jaipur Vidyut's case** was read to contend that the said decision is an authority for the proposition as aforesaid; the judgment in **Jaipur Vidyut's Case**, was passed in the context of a challenge laid to the judgment and order dated 20.09.2021 passed by the DB of the High Court of Rajasthan, allowing DB Civil Writ Petition No. 14815 of 2020, filed by MB Power; MB Power was L-7 bidder in the bidding process conducted in February'2013; the bid bond of L-7 was returned on 16.01.2015, with a direction not to renew the same; MB Power was staking its claim on the basis of the theory of 'filling the bucket'; the High Court, relying on the observations of this Tribunal in the decision dated 03.02.2020, upheld the principle of 'filling the bucket' and, therefore, issued a mandamus in favour of MB Power; the Supreme Court, in view of clause 5.15 of the bidding guidelines, rejected the argument that all bids are bound to be accepted once the bidding process was found to be transparent and in compliance with the bidding guidelines; the Supreme Court further found that the evaluation committee is entitled to reject only such of the price bids that are found not aligned to the prevailing market prices, and clause 5.15 does not stipulate rejection of all bids; the Supreme Court then found that the High Court of Rajasthan was not justified in entertaining the Writ Petition; and, additionally, the Supreme Court found that the Writ Petition of MB Power ought to have been dismissed on the grounds of delay and latches.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that, on the point of the 'nature' of Mandamus issued by the High Court, i.e. direction to enter into an agreement to the discoms, after examining **AIR India Ltd. Vs. Kochin International Airport**

Ltd. and TATA Cellular, the Supreme Court re-iterated that it is not permissible for the Writ Court to interfere with the decision making process in award of contracts by government authorities, unless the decision making process is vitiated by arbitrariness, malafide or irrationality; it is in that vein that the decision of the BEC, which was approved by the state commission, is adverted to in the said decision; the Supreme court finds that the decision-making process of BEC was in accordance with law; and the Supreme Court holds that the High Court could not have issued the Mandamus.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would contend that, on a reading the judgment as a whole, the following position emerges :- (a) the issue of whether prices posterior to the bid can be taken into consideration for testing market alignment was not argued at all before the Supreme Court; the Supreme Court's decision does not record any argument in support or against the same; consequently, there is no consideration or reasoning in the entire judgment in support of the proposition canvassed by the counsel of GUVNL. (b) 'Law declared' to have a binding effect, as contemplated by Article 141, is not that can be culled out, but which is stated as law to be accepted and applied; there is no statement of law in the entire judgment to support the proposition canvassed; (c) a case is a precedent and binding for what it explicitly decides; and not what may logically flow from various observations made in the judgment; (d) the observations in para 139, not being a statement of law, is neither the *ratio decidendi* nor *obiter dicta* for the proposition canvassed; and the question was never required to be decided and could not have been or be treated to be decided. (Refer: **State of U.P. & Anr. Vs. Synthetics & Chemicals Ltd.**, 1991(4) SCC 139; **ICIC Bank & Anr. Vs. Municipal Corpn. Of Greater Bombay and Ors.**, 2005 (6) SCC 404; **Sanjay Singh & Anr. Vs. U.P. Public Service Commission, Allahabad and Anr.**, 2007 (3) SCC 720; and **Career**

***Institute Educational Society Vs. Om Shree Thakurji Educational Society*, 2023 (16) SCC 458.**

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further contend that the Civil Appeals filed by Jaipur Vidyut Vitran Nigam Ltd, against the decision of this Tribunal dated 03.02.2020, were different and were numbered as Appeal Nos. 1937 and 2721 of 2020; the said Civil Appeals have been disposed off by a separate order dated 07.05.2024 with reference to paragraphs 108, 117, 121, 122 and 125 of the judgment rendered in *Jaipur Vidyut's Case*; and, even otherwise, the CERC in the Impugned judgment and order has not even relied upon para 139 of the decision in *Jaipur Vidyut's case*.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Supreme Court, on facts in the **M.B. Power Judgement:** (2024) 8 SCC 513 case as shown by GUVNL, has upheld the consideration of bids from the years 2015 & 2016 for a bid that took place in 2012; observations to the contrary, if any, *in Rama Shanker Awasthi* (this Tribunal's judgment dt. 05.08.2024 in Appeal No.37 of 2018), should be understood accordingly; and the Commission's nuanced decision that notes that post bid examinations are to be done in exceptional cases, when timelines as prescribed are egregiously breached, suffers from no infirmity and would call for no interference by this Tribunal.

C. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-GUVNL:

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that this issue is fully covered by the decision of the Supreme

Court in **Jaipur Vidyut Vitran case: (2024) 8 SCC 513**; the said case arose from the decision of the Rajasthan Electricity Regulatory Commission (RERC) Order dated 26.02.2019 wherein the adoption of tariff of SKS Power was rejected on the ground that the tariff was exorbitant and not aligned to market prices; the following is evident from the State Commission's order dated 26.02.2019: (a) the bid of SKS Power was in the year 2013, which was being considered for adoption in the year 2019; (b) a specific objection was taken that the comparison can only be of the tariff at the time when the bids were submitted and subsequent bids cannot be compared; (c) a specific objection was also taken that the terms of subsequent bids were different from the terms of the present bid, and therefore they were incomparable; (d) the Bid Evaluation Committee compared the bid tariff to the tariff prevalent prior to the bids and also subsequent to the bids, in other States (Kerala and Andhra Pradesh (for 2014-15), through different bidding documents (DBFOO), the tariff of State Generators (2017-18) and also the tariff in the power exchange; (e) the State Commission held that the mode of procurement was irrelevant for consideration of alignment of market prices, as the purpose of bidding is to reduce the tariff to the consumer; and (f) the study and comparison made by the BEC to examine the tariff of the bidder was correct; in appeal, APTEL held that the State Commission did not have the power to re-evaluate the tariff, and that the tariff was required to be mandatorily adopted [**SKS Power v RERC, APPEAL NO. 224 OF 2019 dated 03.02.2020**]; the said decision was followed by the Rajasthan High Court in allowing the writ petition of MB Power [CWP No. 14815/2020 dated 20.09.2021] which was subsequently challenged before the Supreme Court by the DISCOMs; thereafter, the Supreme Court, in the **Jaipur Vidyut** case, (a) considered the correctness of the judgment of APTEL dated 03.02.2020 in the SKS Case, which arose from the decision of the RERC dated 26.02.2019; (b) followed **Energy Watchdog**, and reiterated that the State

Commission was not a mere post office; (c) it held that Section 86(1)(b) of the Electricity Act, 2003 gave ample power to the State Commission to regulate electricity purchase and procurement by the distribution licensees, and it also empowered the State Commission to regulate matters, including the price at which electricity shall be procured from the generating companies; (d) the contention that the bids quoted by the bidders are to be accepted without going into the question of the same being market aligned or not is without any substance; (e) if the contention that the procurer is bound to accept all the bids emerged in the competitive bidding process once the process has been found to be transparent and in compliance with the bidding compliance is to be accepted, then the Discoms will be compelled to purchase electricity at much higher rate as compared to the other supplier and the said higher rate of tariff will be passed on to the consumers; (f) the Tribunal has grossly erred in holding that the State Commission has no power to go into the question as to whether the prices quoted are market aligned or not, and also not to take into consideration the aspect of consumer interest; most importantly, the Supreme Court, in para 139 of the judgement, specifically considered and approved the decision making process adopted by the State Commission in its order dated 26.02.2019; the contention, that the decision-making process ought to be compared only with prices at the time of bidding, is grossly erroneous and is liable to be dismissed; and the purpose of such comparison is not qua the generator and whether there is no fault on the part of the generator to quote such a high price, but has to be looked at from the consumer's point of view

D. JUDGEMENTS UNDER THIS HEAD:

1. In **State of U.P. v. Synthetics and Chemicals Ltd., (1991) 4 SCC 139**, the Supreme Court held that a decision passes sub-silentio when the particular point of law involved in the decision is not perceived by the court

or present to its mind (*Salmond on Jurisprudence* 12th Edn., p. 153); in **Lancaster Motor Company (London) Ltd. v. Bremith Ltd. [(1941) 1 KB 675, 677 : (1941) 2 All ER 11**, the Court did not feel bound by the earlier decision as it was rendered 'without any argument, without reference to the crucial words of the rule and without any citation of the authority'; this principle was approved by the Supreme Court in **Municipal Corporation of Delhi v. Gurnam Kaur. [(1989) 1 SCC 101** wherein it was held that 'precedents sub-silentio and without argument are of no moment'; a decision which is not express and is not founded on reasons nor it proceeds on consideration of an issue cannot be deemed to be a law declared to have a binding effect as is contemplated by Article 141; that which escapes in the judgment without any occasion is not the *ratio decidendi*; in **B. Shama Rao v. Union Territory of Pondicherry: AIR 1967 SC 1480**, it was observed that a decision is binding not because of its conclusions but in regard to its ratio and the principles, laid down therein'; any declaration or conclusion arrived without application of mind or preceded without any reason cannot be deemed to be declaration of law or authority of a general nature binding as a precedent; and a conclusion, without reference to the relevant provision of law, is weaker than even casual observations.

2. In **ICICI Bank v. Municipal Corpn. of Greater Bombay, (2005) 6 SCC 404**, the Supreme Court held that the ratio and effect of the judgment is required to be ascertained with reference to the question of law as decided by the Court; the ratio of the judgment or the principle upon which the question before the Court is decided is alone binding as a precedent; the decision of the Supreme Court upon a question of law is considered to be a binding precedent, and this must be ascertained and determined by analysing all the material facts and issues involved in the case; in **Municipal Corpn. of Greater Bombay: (2002) 4 SCC 219** the Supreme Court held that normally the ratio of the case shall be deduced from the facts involved in the

case, and the particular provision of law which the Court has interpreted; and the decision shall be read with reference to and in the context of particular statutory provisions involved in the matter.

3. In **Sanjay Singh v. U.P. Public Service Commission, (2007) 3 SCC 720**, the Supreme Court held that, broadly speaking, every judgment of superior courts has three segments, namely, (i) the facts and the point at issue; (ii) the reasons for the decision; and (iii) the final order containing the decision. The reasons for the decision or the ratio decidendi is not the final order containing the decision; in a judgment of the Supreme Court, though the ratio decidendi may point to a particular result, the decision (final order relating to relief) may be different and not a natural consequence of the ratio decidendi of the judgment; it is the ratio decidendi of a judgment and not the final order in the judgment, which forms a precedent; and the term “judgment” and “decision” are used, rather loosely, to refer to the entire judgment or the final order or the ratio decidendi of a judgment.

4. In **Career Institute Educational Society v. Om Shree Thakurji Educational Society, (2023) 16 SCC 458**, the Supreme Court noted that the distinction between obiter dicta and ratio decidendi in a judgment, as a proposition of law, has been examined by several judgments of the Supreme Court; in **State of Gujarat v. Utility Users' Welfare Assn., (2018) 6 SCC 21**, “the inversion test” was applied to identify what is ratio decidendi in a judgment; it was held that to test whether a particular proposition of law is to be treated as the ratio decidendi of the case, the proposition is to be inversed i.e. to remove from the text of the judgment as if it did not exist; if the conclusion of the case would still have been the same even without examining the proposition, then it cannot be regarded as the ratio decidendi of the case; in **Jayant Verma v. Union of India, (2018) 4 SCC 743**, the Supreme Court referred to its earlier decision in **Dalbir Singh v. State of**

Punjab, (1979) 3 SCC 745, to state that it is not the findings on material facts, direct and inferential, but the statements of the principles of law applicable to the legal problems disclosed by the facts, which is the vital element in the decision and operates as a precedent; even the conclusion does not operate as a precedent, albeit operates as *res judicata*; thus, it is not everything said by a Judge when giving judgment that constitutes a precedent; the only thing in a Judge's decision binding as a legal precedent is the principle upon which the case is decided; and, for this reason, it is important to analyse a decision and isolate from it the *obiter dicta*.

E. ANALYSIS:

In **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited (2024) 8 SCC 513**, the Supreme Court, while setting aside the judgement of this Tribunal, had approved the order passed by the Rajasthan Electricity Regulatory Commission (“RERC” for short), which order had been set aside by this Tribunal. It is necessary for us therefore to refer, albeit in brief, to the order of the RERC and the judgement of this Tribunal, before taking note of the law declared by the Supreme Court in **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited (2024) 8 SCC 513**.

Two petitions were filed before the RERC. Petition No. RERC/431/13 was filed by the Rajasthan Rajya Vidyut Prasaran Nigam Limited (“RVPN” for short), on behalf of the Rajasthan Discoms, for adoption of tariff and approval of deviations regarding procurement of 1000 MW of power through Case-1 bidding process. Petition No. RERC/1388/18 was filed by M/s. SKS Power Generation (Chhattisgarh) Limited on 15.10.2018, under Section 63 of the Electricity Act, 2003, for adoption of tariff for purchase of long-term base load power through Case-1 bidding process in view of the order of the Supreme Court dated 20.09.2018.

RVPN had earlier filed a petition, under Section 63 of the Electricity Act, for adoption of tariff determined through a bidding process in the year 2012 from M/s. PTC India Limited and M/s. Lanco Power Limited. Thereafter RVPN filed an application to allow it to purchase only 500 MW of power as against the 1000 MW for which it had filed the adoption petition. The prayer was allowed, and RVPN was permitted to purchase power for 500 MW from out of the total 1000 MW. The Commission also adopted the tariff, by its order dated 22.07.2015, at Rs. 4.51/4.81. Appeal No. 235 of 2015 and Appeal No. 191 of 2015, filed against the order of the Commission dated 22.07.2015, was allowed by this Tribunal by order dated 02.02.2018, and the order of the Commission dated 22.07.2015 was set aside. Thereafter an application was filed by the developer for a consequential order to be passed in terms of the judgment of this Tribunal dated 02.02.2018, and to direct Respondent Nos.1 to 3 to procure power from the developer to the extent of 410 MW as per the PPA dated 01.11.2013. The appeal preferred against the order of APTEL dated 02.02.2018 was dismissed by the Supreme Court, and the order of this Tribunal was affirmed. The State Commission was directed to go into the issue of approval for adoption of tariff with regard to L4 and L5. Consequently, the Rajasthan Electricity Regulatory Commission ("RERC" for short), by its order dated 29.05.2018, directed RVPN/ Discoms to file appropriate applications/petition as per the orders of the Supreme Court.

In compliance with the said directions of the Commission, RVPN filed an application on 27.08.2018 contending that the tariff quoted by L4 and L5 bidders was very high and not aligned to the market price, and ought not to be adopted in terms of the competitive bidding guidelines. Consequent on the Commission passing an order on 16.10.2018, permitting RVPN to file an amendment application or seek directions of the Supreme Court, a Miscellaneous Application was filed by RVPN before the Supreme Court and an order was passed by the Supreme Court on 19.11.2018 clarifying that

RERC should decide the tariff under Section 63 of the Electricity Act, 2003 having regard to the law laid down both statutorily and by the Supreme Court.

Among the contentions urged before the RERC on behalf of M/s. SKS Power Generation (Chhattisgarh) Limited, in the subsequent Section 63 proceedings, was that the Bid Evaluation Committee had, in its meeting dated 22.06.2018, made comparisons which were incorrect since the bid of M/s. SKS Power Generation (Chhattisgarh) Limited was submitted in February, 2013, whereas the comparison was made with the bids made in November, 2014, June, 2015 and February, 2016 etc; further the bids, which were being used for comparison by RVPN, were received on design, build, finance and operate basis which were fundamentally different from the Case-1 bids and were incomparable; the report of M/s Deloitte Limited was for the entire bid price received by RVPN and did not specifically pertain to M/s. SKS Power, and therefore the contention of RVPN that the said report was applicable qua M/s SKS Power only was incorrect; its quoted price was aligned to the market price; the conclusion and comparison shown by the Bid Evaluation Committee was incorrect; as per Clause 5.15 of the bidding guidelines, the BEC had the right to reject all the price bids when the rates quoted were not aligned to the prevailing market prices; and, since the Commission had adopted the tariff of L1 and L2, the tariff of M/s SKS Power should also be necessarily adopted.

After relying on the judgment of the Supreme court in **Energy Watchdog vs. CERC: (2017) 14 SCC 80** (Para 19 and 20), the RERC observed that the main issue in adoption of tariff was whether the tariff quoted by L4 and L5 bidders was market aligned or not; and, for this, the Commission had looked into the report of the Bid Evaluation Committee dated 22.06.2018; the Commission had extracted the relevant paragraphs of the report of the Bid Evaluation Committee, and had then observed that the

Bid Evaluation Committee had compared the tariff quoted by L4 and L5 with the levelized tariff discovered in Case-1 bid process for the period from FY 2006 to FY 2012 as the prevalent tariff since the bids were quoted in the year 2013; the BEC found that the bids quoted by L4 and L5 was higher than the levelized tariff of Rs. 4.47/kWh in the year 2012, by 15.06% and 18.57% respectively; the BEC had also looked into the levelized tariff of various bidders received in the State of Kerala during FY 2014-15 and found that the levelized tariff of L4 and L5 bidders was higher by 42.86% and 47.22% vis-à-vis the lowest tariff and were higher by 19.88% and 23.54 % vis-à-vis the highest tariff of bidders; the BEC had compared the tariff of L4 and L5 with the tariff received for power stations to be set up on the basis of DBFO in Andhra Pradesh, and had found that the levelized tariff of L4 and L5 bidders was higher by 21.58% and 25.30% vis-à-vis the lowest tariff, and higher by 15.86% and 19.40% vis-à-vis the highest tariff of various bidders; the BEC had also recorded that the tariff approved by the Commission, for coal fired thermal power stations situated in Rajasthan for FY 2017-18, varied between Rs. 3.636 to Rs. 4.662; the levelized tariff of L4 and L5 bidders was higher by 41.44% and 45.80% vis-à-vis the lowest tariff at any of these units and higher by 10.37% and 13.73% vis-à-vis the highest tariff of any unit in Rajasthan.

The Commission further observed that the BEC had compared the tariff with the tariff arrived through various types of bids like Case-1 and Case-2 bidding process, long term basis power set up on design, build, finance and operate basis and tariff quoted on short term basis ie the power exchanges; and they were in agreement with RVPN that the mode of procurement was irrelevant for considering the alignment of market prices as the purpose of the bidding process was to reduce the tariff to the consumers; and therefore the contention of M/s. SKS Power that the comparison made by the BEC was unfair did not merit acceptance.

The Commission was of the view that the BEC had done a detailed study to examine the tariff quoted by L4 and L5 with the prevailing market prices ie in the year 2012 and also the current market prices ie in the year 2015-16, and had thus reached the conclusion that the tariff of L4 and L5 were not market aligned and were exorbitantly high; and M/s. SKS Power could not produce any material on record to prove that the tariff quoted by it was aligned with the market prices through the results of the other bids or through the market prices.

After relying on the judgment of the Supreme Court in **All India Power Engineers Federation vs. Sasan Power Ltd. (2017) 1 SCC 487**, wherein it was held that, when electricity tariff gets affected, then consumer interest comes in and public interest gets affected, the Commission opined that, if they adopted the tariff which was exorbitantly high and not market aligned, then a consumer of electricity would have to pay substantially more by way of tariff. In the light of the said discussions the Commission decided not to adopt the tariff quoted by L4 and L5 bidders.

Aggrieved by the orders passed by the RERC in Petition No. RERC/431/13 and Petition No. RERC/1388/18 dated 26.02.2019, M/s. SKS Power Generation (Chhattisgarh) Limited filed Appeal No. 224 of 2019 before this Tribunal. In the said Appeal, the Appellant contended, among others, that, under Section 63 of the Electricity Act, the Regulatory Commission, after satisfying itself as to the transparency of the bidding process, had to only further consider or clarify qua any issue pertaining to Clause 4 of the bidding guidelines; and, apart from the same, a Regulatory Commission had to necessarily adopt the tariff discovered under Section 63 of the Electricity Act.

In Appeal No. 224 of 2019, this Tribunal framed three issues. The first issue was whether the RERC could reject the tariff/ bid of the Appellant in

terms of Section 63 of the Electricity Act, 2003 and the directions issued by the Supreme Court. Issue No. 2 was whether there was sufficient proof to show that the bid of the Appellant was market aligned. Issue No. 3 was whether the argument of consumer interest could be advanced by the Rajasthan Discoms in the facts of the present Appeal.

On Issue No.1, this Tribunal, after referring to the judgment of the Supreme Court dated 25.04.2018, observed that the entire controversy arose on the issue as to whether, in terms of the directions issued by the Supreme Court with regards going into the issue of approval of adoption of tariff of the Appellant, the Commission was entitled to determine the tariff of the Appellant by evaluating their bid afresh as if the bid was made in the year 2018, and reject the bid of SKS Power in terms of the said fresh evaluation carried out by the BEC. This Tribunal opined that a bare reading of Section 63 of the Electricity Act, 2003 showed that, when a case is instituted before a Regulatory Commission under Section 63 of the Electricity Act, 2003, then it had to necessarily check whether there was transparency in the entire bidding process, and whether the bidding process was conducted in accordance with the guidelines issued by the Central Government; Section 63 confined the State Commission to the bidding guidelines, and the Commission could not exercise its powers de hors such guidelines; the tariff structure, as provided in Clause 4 of the bidding guidelines, specified the arrangement of tariff under a bidding process, which both the procurer and the bidders had to take into consideration, while finalizing a tariff to be quoted under the said bid; the said clause further specified as to how the two-part tariff had to be taken into consideration, the basis of payment of energy charges and capacity charges etc; the said clause did not give power to the Commission to reject the tariff of a bidder; and with respect to the aforesaid clause of the Bidding Guidelines, the Regulatory Commission had to only

check whether a Power Purchase Agreement, entered into between the procurer and the supplier, included such conditions or not.

This Tribunal was of the view that the decision of the Commission to reject the bid of the SKS Power was without merit, since the entire process regarding the validity of the bid had already taken place. This Tribunal opined that the Commission ought to have approved adoption of tariff of the Appellant along with the terms of the PPA dated 04.02.2019. This issue was answered in favour of the Appellant.

On Issue No. 2, this Tribunal examined the minutes of the meeting of the Bid Evaluation Committee dated 17.04.2013 and 22.04.2013, and observed that the entire bid was in fact evaluated by the BEC in the year 2013 itself; the bid of the Appellant was re-evaluated on 22.06.2018 post the judgment of the Supreme Court dated 25.04.2018; in the said evaluation exercise, the BEC had considered the levelized tariff discovered under Case-1 process carried out in the period 2006-2007; as per the said evaluation, even the tariff of L1 was not aligned to the prevailing market price; since the bid of the Appellant was already evaluated (in 2013), fresh evaluation of the bid of the Appellant (quoted in 2012-13) could not have been done once again (in 2018). This issue was also answered in favour of the Appellant.

This Tribunal allowed the appeal and set aside the order of the RERC dated 26.02.2019 and held that the tariff of the Appellant, as offered in its bid, shall be adopted. Parties were directed to revive and implement the PPA dated 04.02.2019 within a period not later than two months. Aggrieved thereby, Jaipur Vidyut Vitran Nigam Limited filed Civil Appeal No. 1937 of 2020. CA No. 2721 of 2020 was also filed against the order of this Tribunal in Appeal No. 224 of 2019 dated 03.02.2020.

Against the judgment of the Division bench of Rajasthan High Court, in **MB Power (Madhya Pradesh) Limited vs. State of Rajasthan (2021) SCC Online Rajasthan 4394** and the judgment of this Tribunal in **MB Power (Madhya Pradesh) Limited vs. RERC** (judgment in Appeal No. 466 of 2023 dated 01.06.2023), Jaipur Vidyut Vitran Nigam Limited and others had filed Civil Appeal Nos. 6503 of 2022, 6504 of 2022 and 4612 of 2023. All these three appeals were heard and decided together by the Supreme Court by its judgment dated 08.01.2024 (**Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited (2024) 8 SCC 513**). After noting all the facts, the Supreme court also noted that these Civil Appeals were initially tagged along with Civil Appeal Nos. 1937 and 3721 of 2020, however, by order dated 10.10.2023, the same have been de-tagged. The Supreme Court then extracted Clause 5.15 of the bidding guidelines which reads as under: -

“5.15. The bidder who has quoted lowest levelised tariff as per evaluation procedure, shall be considered for the award. *The evaluation committee shall have the right to reject all price bids if the rates quoted are not aligned to the prevailing market prices.*”

The Supreme Court then noted that this Tribunal had, by its judgment in Appeal No. 224 of 2019 dated 03.02.2020, set aside the order of the RERC dated 26.02.2019; MB Power (Madhya Pradesh) Limited (the first Respondent in the Civil Appeals) had rested its claim on the earlier order passed by the Supreme Court and the judgment of this Tribunal in Appeal No. 224 of 2019 dated 03.02.2020. The Supreme Court then observed that, before deciding the correctness or otherwise of the judgment of the Division Bench of the Rajasthan High Court, it was necessary for them to examine the correctness of the judgment of this Tribunal dated 03.02.2020.

After referring to its earlier judgement, in **Energy Watchdog vs. CERC: (2017) 14 SCC 80**, and Clause 5.15 of the bidding guidelines dated 19.01.2005, the Supreme Court observed that clause 5.15 of the Bidding Guidelines provided that the bidder, who had quoted lowest levelized tariff as per the evaluation procedure, shall be considered for the award; it also provided that the evaluation committee shall have the right to reject all price bids if the rates quoted were not aligned to the prevailing market prices; it was thus amply clear that the evaluation committee was empowered to consider as to whether the rates quoted were aligned to the market price or not, and that the evaluation committee shall have the right to reject all the price bids if it finds that the rates quoted are not aligned to the prevailing market price; the orders which were relied upon by APTEL, specifically the order dated 19-11-2018 [**SKS Power Generation (Chhattisgarh) Ltd. v. Sanjay Malhotra, 2018 SCC OnLine SC 3887**] of the Supreme Court, had specifically clarified that the State Commission was to decide the tariff under Section 63 of the Electricity Act having regard to the law laid down both statutorily and by the Supreme Court; in this background, the State Commission was justified in considering Clause 5.15 of the Bidding Guidelines, which specifically permitted rejection of all price bids if the rates quoted were not aligned to the prevailing market prices.

The Supreme Court further observed that, if the contention of Respondent 1 MB Power that the procurer was bound to accept all the bids emerged in a competitive bidding process once the bidding process was found to be transparent and in compliance with the Bidding Guidelines was to be accepted, it would do complete violence to Clause 5.15 of the Bidding Guidelines itself; if that view was accepted, the DISCOMS would be compelled to purchase electricity at a much higher rate as compared with other suppliers; the said higher rate would be passed on to the consumers; as such, accepting the contention of Respondent 1 would result in adversely

affecting the interests of the consumers and, in turn, would be against larger public interest; for example, if in a bidding process for 1000 MW power, 10 persons emerged as “qualified bidders”. L-1 bidder quoted Rs 2 per unit for 100 MW power and L-2 bidder quoted Rs 2.25 per unit for another 100 MW power, and from L-3 bidder onwards, they start quoting Rs 10 per unit and above for the balance 800 MW power, could the public interest be subserved by compelling the procurer to buy balance 800 MW power at Rs 10 per unit and above when the prices quoted are totally not aligned to market prices; they were of the considered view that APTEL had grossly erred in holding that the State Commission had no power to go into the question, as to whether the prices quoted were market aligned or not, and also not to take into consideration the aspect of the consumers’ interest; when the Bidding Guidelines itself permitted the BEC to reject all price bids if the rates quoted were not aligned to the prevailing market prices, there was no question of the State Commission being not in a position to go into the question, as to whether the rates quoted were market aligned or not, specifically, in the light of ample powers vested with the State Commission under Section 86(1)(b) of the Electricity Act, which also included the power to regulate the prices at which electricity shall be procured from the generating companies, etc; and the finding of APTEL WAS totally erroneous.

The Supreme Court thereafter observed that the State Commission, after considering the detailed analysis of the BEC, had come to the considered conclusion that the prices offered by SKS Power (L5 bidder) were not market aligned, and were not in consumer interest; this Tribunal had erred in reversing the well-reasoned order passed by the State Commission which was, in turn, based on the decision of the BEC in accordance with Clause 5.5 of the bidding guidelines. The Supreme Court also rejected the contention that power under Clause 5.5 of the bidding guidelines could be exercised only when the bidding process was found not to be in compliance

of the bidding guidelines and was not transparent in respect of all bidders, and not in respect of some of the bidders. The Supreme Court found the said contention to be without substance.

The Supreme Court then observed that, if the contention that Clause 5.15 of the Bidding Guidelines will come into play, which permits the Evaluation Committee to reject “all” price bids and not “any” one of them is accepted, it will lead to absurdity; suppose, if L-1 bidder quotes Rs 3 per unit and L-5 bidder quotes Rs 7 per unit, requirement to reject the bid of L-1 bidder, whose bid is found market aligned along with that of L-5 bidder, which is not market aligned, would lead to an anomalous situation; the consumer could not be deprived of the electricity to be procured from L-1 at a market aligned price, only because some of the bidders had quoted much higher prices, and were not market aligned; such an interpretation would result in defeating one of the main objects of the enactment i.e. protection of the consumer; the Supreme Court, time and again, in various judgments including in **GMR Warora Energy Ltd. v. CERC, (2023) 10 SCC 401 : 2023 INSC 398**, had recognised the requirement of balancing consumers’ interest with that of the interest of the generators; it would not be permissible to take a lopsided view only to protect the interest of the generators ignoring the consumers’ interest and public interest.

The Supreme Court, in **Jaipur Vidyut Vitran Nigam Ltd. v. MB Power (M.P.) Ltd., (2024) 8 SCC 513**, concluded in Para 139 thus: -

“139. In the present case, the decision-making process, as adopted by the BEC was totally in conformity with the principles laid down by this Court from time to time. The BEC after considering the competitive rates offered in the bidding process in various States came to a conclusion that the rates quoted by SKS Power (L-5 bidder) were not market aligned. The said decision has been

approved by the State Commission. Since the decision-making process adopted by the BEC, which has been approved by the State Commission, was in accordance with the law laid down by this Court, the same ought not to have been interfered with by the learned APTEL.”

As noted hereinabove, the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited (2024) 8 SCC 513**, observed that the BEC, after considering the competitive rates offered in the bidding process in various States, had come to the conclusion that the rates quoted by SKS Power (L-5 bidder) were not market aligned; and the decision-making process adopted by the BEC, (which compared the bids quoted by L-4 and L5 in the bids invited in 2013 with the bids invited in other States in the subsequent years 2014 to 2016), was in conformity with the principles laid down by the Supreme Court from time to time. The Supreme Court further observed that, since the decision-making process adopted by the BEC, which had been approved by the State Commission, was in accordance with the law laid down by the Supreme Court, the same ought not to have been interfered with by APTEL.

While the Civil Appeals filed against the judgment of this Tribunal (judgment of APTEL in Appeal No. 224 of 2019) dated 03.02.2020 were not under challenge before the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited (2024) 8 SCC 513**, the correctness of the judgment of this Tribunal dated 03.02.2020 was considered by the Supreme Court in **Jaipur Vidyut Vitran Nigam Limited**, since reliance was placed thereupon by the Respondent- MB Power (Madhya Pradesh) Limited. The Supreme Court in **Jaipur Vidyut Vitran Nigam Limited**, while holding that this Tribunal had grossly erred in reversing the well-reasoned order passed by the State Commission, also

observed that the decision making process adopted by the BEC was in conformity with the principles laid down by the Supreme Court from time to time; the BEC, after considering the competitive rates offered in the bidding process in various States, had come to the conclusion that the rates quoted by SKS Power (L5 bidder) was not market aligned; the said decision, as had been approved by the State Commission, was in accordance with the law laid down by the Supreme Court; and the same ought not to have been interfered with by APTEL.

As noted hereinabove, the BEC had considered the bids quoted in the bidding process undertaken by other States during the years 2014 to 2016, subsequent to the completion of the bidding process in the year 2013 by RVPN, and had upheld the exercise so undertaken by the Bid Evaluation Committee.

In this context it is also relevant to note that Civil Appeal Nos. 1937 of 2020 and 2721 of 2020, filed by Jaipur Vidyut Vitran Nigam Limited and others, against the judgment of this Tribunal in Appeal No. 224 of 2019 dated 03.02.2020, came up for hearing before the Supreme Court later. By its judgment in Civil Appeal Nos. 1937 of 2020 and CA No. 2721 of 2020 dated 07.05.2023, the Supreme Court observed that the correctness of the impugned judgment and orders had already undergone scrutiny in **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited 2024 SCC Online SC 26**. After referring to paras 108, 117, 121, 122 and 125 of its earlier judgment in **Jaipur Vidyut Vitran Nigam Limited**, the Supreme Court opined that they had, in unequivocal terms, held the impugned judgment and order to be totally erroneous in law and not sustainable; and, for the reasons recorded in **Jaipur Vidyut Vitran Nigam Limited**, these two appeals were also allowed, the impugned judgment and orders of this Tribunal were quashed and set aside. The Supreme Court, however, clarified

that, if the Respondents chose to take such proceedings as were permissible in law, the order passed by the Supreme Court would not come in their way.

As noted hereinabove, the issue of comparison of the subject Bid with the market prices prevailing a couple of years after selection of the bidder arose for consideration before the Rajasthan Electricity Regulatory Commission. A specific contention was urged on behalf of the Respondent-Generator that the Bid Evaluation Committee had erred in comparing the subject Bid in its meeting dated 22.06.2018, since the bid of the Generator was submitted in February 2013, whereas comparison was made in the bid made in November 2014, June 2015 and February 2016. This contention was specifically rejected by the Regulatory Commission holding that the Bid Evaluation Committee was justified in comparing the bids for the subsequent years including with the tariff approved in Rajasthan for FY 2017-2018.

It is this Order of the State Regulatory Commission which was overturned in appeal by this Tribunal. The Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited**, upheld the order of the Commission and that of the Bid Evaluation Committee holding that the decision making process adopted by the BEC was in conformity with the principles laid down by the Supreme Court from time to time; after considering the competitive rates offered in the bidding process in various States, the BEC had concluded that the rates quoted by L5 bidder were not market aligned; the said decision had been approved by the State Commission; and since the decision-making process adopted by the Bid Evaluation Committee, which had been approved by the State Commission, was in accordance with the law laid down by the Supreme Court, APTEL had erred in interfering with the said judgment.

In the light of the law declared by the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited** (which judgement is binding on this Tribunal), we may not be justified in upholding the submission urged on behalf of the Appellant-

JSW that comparison of the subject Bid can only be with similar bids prevailing at the time when they had submitted their bid, and not with bids submitted around the time the Section 63 Petition, seeking adoption of tariff, was filed on 14.03.2024 and was admitted by the CERC on 08.05.2024. As the Section 63 Petition was belatedly filed by SECI before the CERC on 14.03.2024, one year and seven months after the lowest bidder was selected in the subject bid on 25.08.2022, neither SECI nor the Appellant-JSW can be heard to contend that the subsequent events which transpired thereafter should be ignored and, notwithstanding the inordinate delay in filing the Section 63 Petition, the situation prevailing as on 25.08.2022 should alone be considered as that would be to the Appellant JSW's benefit, even if consumer interest would suffer grave and substantial prejudice as a result.

i. OBITER DICTA OF THE SUPREME COURT IS ALSO BINDING;

It is necessary to note that the High Courts/ Subordinate Tribunals are bound even by the obiter dicta of the Supreme Court. An "obiter dictum", as distinguished from a ratio decidendi, is an observation by the court on a legal question suggested in a case before it, but not arising in such manner as to require a decision. (**State of Haryana v. Ranbir (2006) 5 SCC 167, ADM, Jabalpur v. Shivakant Shukla (1976) 2 SCC 521, Girnar Traders (2011) 3 SCC 1; Divisional Controller, KSRTC v. Mahadeva Shetty (2003) 7 SCC 197; [2003] SCC (Cri) 1722, Director of Settlements, A. P. v. M. R. Apparao (2002) 4 SCC 638; Larsen and Toubro Ltd. v. State of A. P., 2015 SCC OnLine Hyd 866**). Obiter dicta of the Supreme Court is binding upon all other courts/tribunals in the country (**Sanjay Dutt v. State through CBI, Bombay (1994) 5 SCC 402; Larsen and Toubro Ltd. v. State of A. P., 2015 SCC OnLine Hyd 866**) in the absence of a direct pronouncement on that question elsewhere by the Supreme Court (**Oriental Insurance**

Company Limited v. Meena Variyal [2007] 137 Comp Cas 116 (SC); (2007) 5 SCC 428), and is entitled to considerable weight. (**Commissioner of Income-tax v. Vazir Sultan & Sons: AIR 1959 SC 814; Larsen and Toubro Ltd. v. State of A. P., 2015 SCC OnLine Hyd 866**). As it is not only the *ratio decendi* but also an *obiter dicta* in the judgment of the Supreme Court, which is binding on this Tribunal, the submission urged on behalf of the Appellant-JSW, that the judgement of the Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited vs. MB Power (Madhya Pradesh) Limited 2024 SCC Online SC 26**, is inapplicable to the facts of the present case, necessitates rejection.

It is wholly impermissible for this Tribunal and would, in fact, amount to gross judicial indiscipline (even judicial heresy) for this Tribunal to hold judgments of the Supreme Court to have been passed *sub silentio* or to have been rendered *per incurium*. The law declared by the Supreme Court is binding on this Tribunal under Article 141 of the Constitution of India and it is impermissible for this Tribunal, when the law declared therein is squarely applicable to the facts of the present case, to take a different view. The contentions, urged on behalf of the Appellant-JSW under this head, also necessitates rejection.

XVIII. ARE THE TERMS AND CONDITIONS OF THE SUBSEQUENT TENDERS (REFERRED TO IN PARA 44 OF THE IMPUGNED ORDER) INCOMPARABLE WITH THE TERMS AND CONDITIONS OF THE BESS PILOT PROJECT?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant-JSW, would submit that the Appellant had handed over a

comparative chart, during the hearing, comparing the essential commercial terms of the present BESS pilot project with the three subsequent bids, which have been used for rate comparison by the CERC; a perusal thereof would show that, in the present tender, only 60% of the project capacity was bid for, while the balance 40% is merchant capacity to be managed by the developer itself i.e. Appellant-JSW in the present case; against this, 100% of the project capacity is tied-up in the three subsequent tenders relied upon in para 44 by the CERC; in the present tender, bids were made on 'Build Own Operate and Transfer Basis' (BOOT) basis; with the entire project being transferred for a consideration of Re. 1 at the end of 12 years to SECI, with minimum operational residue of not less than 72.5% of the project capacity, to be demonstrated at the beginning of the 12th year; in contrast, the three subsequent tenders, relied upon by the CERC in para 44 of the Impugned order, were all based on 'Build Own and Operate Basis', with no stipulation of transfer of the project; the projects, in the subsequent tenders, would remain with the project developers after 12 years of operation; these material differences, in the fundamental commercial terms, makes the rates discovered in the three subsequent bids incomparable with the rate discovered in the present bid; in addition, the SECI ESS-II bid, where the Appellant emerged as the successful bidder also stands annulled and, therefore, the same could not have been relied upon; even the fate of GUVNL phase -II and GUVNL phase – III bids appear to be in a state of flux as the successful bidder therein, i.e. GENSOL Engineering Ltd., has subsequently run into troubled waters with the financial institutions and government authorities.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the submission of the CERC in its reply, that 'all though the subsequent bids may differ in certain contractual details (for example with respect to the quantum of capacity procured or ancillary

term), the overall pricing trend is sufficiently comparable in terms of the project specifications, such as duration of contract, size of the project and technical requirements of BESS, etc.’, is completely baseless and has been made without application of mind; and the Appellant has demonstrated the material difference between the terms and conditions of tender in the instant case and the three other cases used for comparison.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the Appellant, in its additional affidavit, is attempting to draw this Tribunal and subsequently the Commission to go into the underlying assumptions that formed the basis of their bid; such an exercise can be undertaken in a Section 62 proceeding, but is outside the scope of a bid process under Section 63; under Section 63, the only aspect that is to be examined is the price determined at the end of the auction; in the present case, as noted in paragraph 44 of the impugned order, the rate discovered on 25.08.2022 was Rs. 10,88,917/MW/month and the rates discovered between March to August, 2024 ranged from 4,49,996/MW/month to 3,72,978/MW/month; the argument, justifying the higher price on the ground that the later bids were 100% procurement by the beneficiary as opposed to the Appellant being entitled to a guaranteed procurement of 60%, and 40% was to be sold through the merchant route, would imply that the Appellant is cross subsidizing its merchant sale by hiking the price of its bid for the contracted power; and this is grossly against consumer interest and is liable to be rejected.

C. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-GUVNL:

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that the contention of the Appellant-JSW, that the bidding terms in the subsequent bids were different, and are therefore not comparable, is erroneous; firstly, the terms are irrelevant; further, the contention on merits are also erroneous; in the case of **Jaipur Vidyut**, the State Commission had in fact specifically held that the mode of procurement is irrelevant for consideration of alignment of market prices as the purpose of the bidding process is to reduce the tariff to the consumers; the Supreme Court has upheld the said decision of the State Commission; the purpose of the project is that the consumers get the power at the lowest cost, and not what went into the cost of the generators; in any event, the contention on merits is also erroneous; the fact that the project has to be handed over by JSW to SECI is extraneous to the adoption, as the project does not come to GUVNL or to the benefit of the consumers in Gujarat; it is not that the asset would come to GUVNL for it to be a relevant consideration in the adoption proceedings; further, the entire cost of the asset would obviously be recovered by JSW in the 12 years of operation from the tariff; therefore, it would result in GUVNL and the consumers paying for the entire depreciable cost of the asset in the 12 years, and the asset to be enjoyed by others after 12 years; the other provision that 40% capacity is merchant capacity has no basis to further the contention of JSW; merely because JSW is establishing merchant capacity does not mean that GUVNL has to pay higher tariff for its capacity; and, in fact, this contention would be completely contrary to public interest, as consumers are to subsidise the merchant capacity of JSW, without any risk to JSW of such merchant capacity.

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would further submit that, in the Affidavit dated 21.04.2025, JSW has itself admitted that: (a) when the revenue from merchant capacity is taken as zero, the Return on Equity comes to around 16.41%; (b) when the merchant

capacity realization is taken as Rs. 0.97/- per unit, the Return on Equity comes to around 19.90%; and this ought to be the sole reason for rejection of the tariff adoption, as the entire risk of such merchant capacity is being loaded only to GUVNL.

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would also submit that, apart from the contention on comparison with subsequent bids, and the two differences in the bidding terms, the Appellant-JSW has not raised any other contention on the correctness of the comparison made by the Central Commission; in any case, there is no dispute that the tariff in the subsequent bids are substantially lower, about 60-70% drop in the quoted tariff; in the present case, the quoted tariff in 2022 was Rs. 10,83,500/MW/month; the Central Commission has compared it with the bids of March, 2024 of about Rs. 4,49,000/MW/month, in June 2024 of about Rs. 3,72,978/MW/month and in August 2024 of Rs. 3,81,000/MW/month; further, in the Order dated 01.05.2024 passed by the Delhi Electricity Regulatory Commission (“DERC”) in Petition No. 02 of 2024, DERC has adopted the tariff of Rs. 4,79,967.5/- per MW per month (Rs. 57,59,610/- per MW per annum); this bidding process was of October, 2023, much prior to execution of the BESPA in the present case; the Appellant-JSW had itself quoted the tariff of Rs. 4,85,000/- per MW per month before the DERC; the difference in the reduced cost of such battery storage projects is so substantial that there is no justification whatsoever to adopt the tariff for procurement at such a high tariff at this stage; and the very purpose of adoption of the tariff, and exercise of jurisdiction under the Section 63 process, would be defeated if the Central Commission were to ignore the prevalent market prices, and the comparison of prices as discovered in the bid process.

D. ANALYSIS:

In Para 44 of the impugned order, the CERC observed that, subsequent to the e-reverse auction conducted on 25.08.2022 for the impugned project, several bids for similar projects were conducted; and the details of the said bids are furnished in the form of a table which reads as under: -

e-Reverse Auction	Details	Rate discovered
August, 2022	SECI's Project 1000MWh BESS tender capacity under Competitive Bidding Guidelines	Rs. 10,88,917/ MW/ month
March, 2024	GUVNL's Pilot Projects of 250 MW/500 MWh Standalone Battery Energy Storage Systems in Gujarat under Tariff-Based Global Competitive Bidding (Phase-II)	Rs. 4,48,996 to Rs. 4,49,996/ MW/ Month
June, 2024	GUVNL's Pilot project of 250 MW/500MWh Standalone BESS under competitive bidding guidelines (Phase-III)	Rs. 3,72,978/ MW/ Month
August, 2024	SECI project for 1000MW/ 2000 MWh standalone BESS	Rs. 3,81,000 to Rs.3,81,999/ MW/ Month.

The CERC, thereafter, observed that the rates discovered in the subsequent bidding for similar projects were considerably lower than the price discovered in the said project; the Appellant-JSW Renew Energy Five

Limited had also won 500MW/1000MWh capacity under the recent tender (ie the ESS-II project of SECI) with a price of Rs. 3,81,000/MW/Month; and this decline reflected the decreasing cost of batteries due to a reduction in material cost, and the growing competitiveness of the BESS projects.

Sri Anand. K. Ganesan, Learned Counsel appearing on behalf of GUVNL, placed before us a copy of the Order passed by the Delhi Electricity Regulatory Commission in Petition No. 02 of 2024 dated 01.05.2024, in support of his submission that the DERC had adopted the tariff of Rs.4,79,967.50/- per MW per month (Rs. 57,59,610/- per MW per annum); this bidding process was of October, 2023, much prior to the execution of the BESPAs in the present case; and JSW had itself quoted the tariff of Rs. 4,85,000/- per MW per month in the said bid.

In this context, it is relevant to note that BSES Rajdhani Power Limited had filed Petition No. 02 of 2024 before the Delhi Electricity Regulatory Commission under Section 86(1)(b) & (k) and Section 63 of the Electricity Act, 2003 for in-principle approval of the Agreement for Battery Energy Storage System dated 22.12.2023 with Kilokari BESS Private Limited (BESS) and adoption of single-part tariff in the form of capacity charges. In the said Petition, BSES Rajdhani Power Limited made the following prayers:

- (a) Approve the Battery Energy Storage System Agreement dated 22.12.2023 for setting up the Battery Energy Storage Project of 20 MW/ 40 MWh at 33/ 11 kV Kilokari Grid Sub-Station, for making the storage facility for charging and discharging of electricity for BRPL; (b) approve the deviations in the Request for Proposal from the Guidelines for Procurement and Utilization of Battery Energy Storage System as part of Generation, Transmission and Distribution assets, along with Ancillary Services notified by the Ministry of Power; and (c) adopt the single-part tariff in the form of

capacity charges being Annual fixed cost of Rs.57,59,610/- per MW per year which would be billed on a monthly basis.

Among the submissions made by BSES Rajdhani before the DERC was that, on 10.03.2022, the Ministry of Power notified “Guidelines for Procurement and Utilization of Battery Energy Storage System as part of Generation, Transmission and Distribution assets, along with Ancillary Services” (MOP Guidelines); on 24.08.2023, they had given consent to the Energy and Research Institute (‘TERI’ for short) to publish and to act as Bid Manager for the Request for Proposal related to the setting up a distribution level Grid Scale BESS of 20 MW/ 40 MWh; on 01.09.2023, TERI had issued the RfP to invite bids from the intending bidders for the BESS Project; on 17.10.2023, TERI submitted a detailed report of the Tender Evaluation Process, and informed that IndiGrid 2 Limited was the successful Bidder whose Bid had been determined to be the least-cost bid after reverse auction (RA) as per the evaluation criteria mentioned in the RfP; on 23.10.2023, the L1 Bidder had given its acceptance to the LOI issued by the Petitioner; and, on 22.12.2023, the BESS Agreement was executed between BSES Rajdhani Power Limited and Kilokari BESS Private Limited (BESS). They further stated that, in the E-Reverse Auction conducted with the three bidders on 13.10.2023, the start price of the auction was set at the L1 bid of Rs.80,52,000/- and the minimum decrement bid was set at 0.25% of the L1 bid; the winning bidder was IndiGrid 2 with a tariff of Rs.57,59,610/- per MW per year (which, as stated on behalf of GUVNL, comes to Rs. 4,79,967.50/- per MW per month), and the Terms of the Agreement was 12 years from the Commercial Operation Date i.e. the date on which the Commissioning Certificate was issued; the tariff applicable for sale of BESS capacity was capacity-based tariff of Rs.57,59,610/- per MW per year (ie Rs. 4,79,967.50/- per MW per month), and would be billed on a monthly basis; the tariff discovered in the bidding process, and agreed in the BESS Agreement, of

Rs.57,59,610/- per MW per year was lesser in comparison to the price submitted along with proposal of the Petitioner i.e., AFC of Rs.101.2 Lakh per MW; and the Commission had, vide the letter dated 26.07.2023, granted in-principle approval on the said proposal.

In its order, in Petition No. 02 of 2024 dated 01.05.2024, the DERC observed that the process conducted by BSES Rajdhani Power Limited was in line with the MOP Guidelines with certain minor deviations outlined in the RfP; these deviations were justified by the Petitioner to achieve a single-part tariff in the form of a capacity charge at Rs.57,59,610/- per MW per year, which was lower than the anticipated capacity charge of Rs.101.20 Lakhs per MW per year as proposed by the Petitioner on 07.07.2023; and taking into account the nature of the project, where the Petitioner was not investing any CAPEX, any financial benefits from the project would be transferred to the consumers as a net offset in the power purchase cost of the Petitioner in the ARR.

The Commission accorded approval for - (a) the BESS Agreement dated 22.12.2023 for the establishment of the Battery Energy Storage Project of 20 MW/ 40 MWh at the 33/ 11 kV Kilokari Grid Sub-Station; (b) the Commission adopted the single-part tariff in the form of capacity charges; set at an Annual fixed cost of Rs.57,59,610/- per MW per year, which would be billed monthly as per the Agreement dated 22.12.2023 as part of the Petitioner's power purchase cost subject to terms and conditions in respect of performance of BESS, as per the agreement, and (c) the Commission also approved the deviations with the directions as given earlier in the order. It also made it clear that any monetary benefits to the Petitioner (BRPL), resulting from operation of the project in line with the benefits mentioned in the Petition, shall be entirely passed on to the consumers in the Petitioner's ARR as a net-off in the power purchase cost.

It is relevant to note that, among the three bidders who had participated in the E-Reverse auction conducted by BSES Rajdhani, included JSW Neo Energy which had quoted a tariff of Rs.58,20,000/- per MW per year which translates to around Rs. 4,85,000/- per MW per month, which is substantially lower than the tariff quoted by JSW Renew Energy Five Limited in the present Bid of Rs. 10,83,500/MW/month, and the tariff payable by GUVNL (after adjustment from the VGF) of Rs. 6,44,473.06/- per MW per month.

As noted hereinabove the CERC, in Para 44 of the impugned order, has noted that the rates discovered on 25.08.2022 in the subject Bid, was Rs.10,88,917 per MW per month whereas the rates discovered in and around the time the petition was filed before the CERC by SECI, in March 2024 seeking adoption of tariff, ranged from Rs.4,49,996 per MW per month to Rs.3,72,978 per MW per month; and, in the SECI-ESS-II Bid, the Appellant was selected on their quoting a sum of Rs. 3,81,000/-/MW per month.

Further, as is evident from the adoption order of the Delhi Electricity Regulatory Commission in Petition No. 02 of 2024 dated 01.05.2024, the bids for which an RfP was issued on 01.09.2023 (based on the very same guidelines of the Central Government dated 10.03.2022), and which bids were finalized on 17.10.2023, the winning bid was for Rs.4,79,967.50 per MW per month; and the Appellant, having participated in the said bidding process, had itself quoted Rs.4,85,000/- per MW per month which is substantially lower than the present bid submitted by them of Rs.10,83,500 per MW per month.

The Appellant's contention, under this head, is that the subject bid submitted by them could not have been compared with the subsequent bids firstly because the subject tender is on a "Build Own Operate and Transfer" basis, in terms of which the entire project is required to be transferred by the Appellant-JSW to SECI at the end of 12 years for a consideration of Re.1.00

with a minimum operational residue of not less than 72.5% of the project capacity to be demonstrated at the beginning of the 12th year; in contrast, the three subsequent bids, relied upon by the CERC in Para 44 of the impugned order, are all on a Build Own and Operate basis without any stipulation for transfer of the project, and the project in the subsequent tenders would continue to remain with the Developers even after 12 years of its operation. Secondly, in the present tender, only 60% of the project capacity was the subject matter of the present bid, while the balance 40% of merchant capacity is required to be managed by the Developer itself i.e. the Appellant-JSW whereas, in the subsequent tenders, the entire 100% of the project capacity is tied up. These distinctions, the appellant-JSW claims, makes the bids invited for the subject tender incomparable with the subsequent tenders.

Clause 1.6 of the RfS of the subject Pilot Project required the Battery Energy Storage System Developer to set up the BESS on a Build Own Operate Transfer (BOOT) basis in accordance with the provisions of the said RfS document. Section 2 of the RfS contains the special conditions of contract and, thereunder, Clause 3 relates to the scope of the work. Clause 3.4 stipulated that, after expiry of the term of the BESPA, the Project would be transferred to SECI in working condition with defined energy throughout at the end of the term on a “as is where is” basis, in line with the provisions of the BESPA. Clause 8 of the RfS related to performance criteria of the project and Clause 8.1 related to project performance parameters. Under Clause 8.1(a), the contracted capacity of the project shall be in terms of “MW”, SECI’s obligation shall be for off-take of 60% of the Contracted Capacity, and energy and utilization of remaining 40% capacity is to be managed by the Developer. It is evident, from the table below Clause 8.1(iv), that the minimum dispatchable capacity at the end of the 11th year (or the beginning of the 12th year) should be 72.5% of the capacity.

The amendment made to Clause 2.2.2 of the BESPAs on 02.06.2022 provided that, at the end of the 11th Contract Year after COD, the BESS Developer would be required to demonstrate the operational residue of BESS capacity of a value not less than 72.5% of the Project Capacity. Further Clause 2.2.4 of the BESPAs, after its amendment, expressly stipulated that, at the end of the 12th Contract Year after COD, the BESS Developer shall transfer the Project to SECI at Re.1 (Rupee one only), with the Project being free from all encumbrances or liabilities; and any charges, duties, taxes etc, applicable during the transfer of Project to SECI, shall be payable by the BESS Developer.

The Appellant has filed copies of the RfS pertaining to the three tenders referred to in the impugned order. The RfS for the GUVNL/ BESS/ Phase-2 Pilot Project was issued by GUVNL. Clause 9.1(c) of the said RfS stipulated that the total Project Capacity shall be for supply to and off-take by GUVNL, and there will be no merchant capacity; and the BESS shall adhere to the specifications and performance requirements laid out in Annexure-A of the RfS. Clause (A) under the Bid Information Sheet states that the projects will be set up under “BOO” model i.e. Build Own Operate basis. Consequently, the Developer of the said project would continue to retain the project even after 12 years.

The Bid Information Sheet of the RfS for the GUVNL Phase-III Pilot Project makes it clear that the Project would be set up under “BOO” model. Clause 9.1(c) of the RfS states that the total Project Capacity shall be for supply to and off-take by GUVNL, and there will be no merchant capacity, and the BESS shall adhere to the specifications and performance requirements laid out in Annexure-A of the said RfS in this regard.

Clause 1.7 of the RfS for the ESS-II project issued by SECI stipulated that, for this tranche, 100% of the awarded capacity shall be off-taken by the

Buying Entities. Clause 1.6 stipulated that the BESS Developer shall set up the BESS on Build Own Operate (BOO) basis in accordance with the provisions of this RfS document.

Appendix 2, of the Written Submissions, filed on behalf of the Appellant-JSW on 02.07.2025, contains a comparative chart of the subject bid, and the three bids invited subsequent thereto but prior to the date of the impugned order. The contents of the said table read as under: -

S. No.	Term	ESS-1	GUVNL (Phase-II)	GUVNL (Phase-III)	SECI-ESS (Annulled/the Appellant was the successful bidder)
1.	Tied up Capacity	60% (40% merchant capacity to be tied up by the developer)/ <i>P.103@115-Cl. 8.1</i>	100% <i>P. 1402@14 15- Cl. 9.1(c).</i>	100% <i>P. 1600@1 613 Cl.9.1(c)</i>	100% <i>P. 1256@ 1262- Cl.1.7</i>
2.	Ownership	BOOT/ <i>P. 10 3@105-A(2),109-cl.1.6</i>	BOO/ <i>P. 1402@14 04-A(2)</i>	BOO/ <i>P. 1600@1 602-A(2)</i>	BOO/ <i>P.1256 @ 1258- A(2), 1262-Cl. 1.6</i>
3.	Transfer of project	Transfer the project after 12 years @ Re.1 with 70% battery capacity, with test result of 72.5% at the end of 11th year/	Developer retains the project	Developer retains the project	Developer retains the project

		<i>P. 243@249- Cl. 2.2.2 r/w P. 961@976- Cl. 2.2.2-2.2.4 & P.103@118- cl-8.1(e)(iv)</i>			
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It is evident, from what has been stated in the afore-said table furnished on behalf of the Appellant-JSW, that the distinction between the subject Bid, and the other three tenders referred to in the impugned order, are (1) with respect to ownership i.e. while the subject Project is on BOOT basis, the three subsequent Projects are on BOO basis. Further, unlike the subject Project which requires the Developer to transfer ownership at the end of the 12th year after COD to SECI at Re.1.00 with 72.5% capacity at the end of the 11th year, in the three subsequent Projects, referred to in the impugned order, the question of transfer does not arise.

The other distinction is with regards tied-up capacity. While the tied-up capacity in the subject Project is 60% with the remaining 40% being merchant capacity to be tied up by the Developer on its own, in all the three subsequent Projects, which is made the basis of comparison in the impugned order, the tied-up capacity is 100%.

The question which would necessitate consideration is whether these distinctions make the Bids incomparable. As noted hereinabove, Petition No. 138/ AT/ 2024 was filed by SECI before the CERC, under Section 63 of the Electricity Act, 2003, seeking adoption of the tariff discovered in the tariff based competitive bid process for the aggregate capacity of the BESS Projects on the terms and conditions contained in the BESPAs signed with the BESS Developer read with the BESSA signed with the Gujarat Urja Vikas Nigam Limited and the joint submission made in Petition No. 249/MP/2023.

In so far as ownership and transfer of the asset is concerned, the subject Project requires the asset to be transferred not to GUVNL or NLDC to whom electricity is required to be supplied through the BESS, but to SECI which is the intermediary procurer. As noted hereinabove, on 26.06.2023, SECI entered into the Battery Energy Storage Supply Agreement (BESSA) with Gujarat Urja Vikas Nigam Limited (GUVNL) for the 150 MW capacity earmarked to the distribution licensee. It is not as if there is any provision in the Rfs or in the BESSA requiring SECI, in turn, to transfer the assets relating to the subject project to GUVNL. In short GUVNL, which is required to pay Rs. 6,44,473.06 per MW per month to the Appellant-JSW, does not get the benefit of transfer of ownership of the asset at all, since ownership is required to be transferred by the Appellant JSW only to SECI which is the intermediary procurer. There is no corresponding obligation on SECI to transfer ownership of BESS to the ultimate procurers ie GUVNL or NLDC.

We find considerable force in the submission of Sri Anand. K. Ganesan, Learned Counsel, that handing over of the project by JSW to SECI is extraneous to the adoption under Section 63, as the project does not come to GUVNL or to the benefit of the consumers in Gujarat; and that the entire cost of the asset would obviously be recovered by the Appellant-JSW, in the first 12 years of its operation, from the tariff, which would result in GUVNL and its consumers paying for the entire depreciable cost of the asset within these 12 years, only for the asset to be enjoyed by others after 12 years. It is evident, therefore, that this distinction between the subject Bid vis-à-vis the other three Bids, in so far as it concerns the eventual procurer of electricity, is of no consequence.

In so far as tied up capacity is concerned, the Appellant-JSW has filed an additional affidavit before this Tribunal on 21.04.2025. In Para 5 of the said Additional Affidavit, the Appellant- JSW stated that, based on the actual

approved project cost ie Rs.1926 crores, and considering revenue assumptions as zero for 40% capacity (as no assurance was provided in the bid conditions), the project Return on Equity (RoE), based on the annual levelized cash flows/investments, works out to 16.41%, the details of which are provided in Table No.3 below.

Table No.3 Actual Base Case (No Realization on Open Capacity) – Annual Levelized					
Description					Remarks
	Project Capacity (MW)	500	MW		
	Project Capacity (MWh)	1000	MWh		
SECI (60%)	Tariff (Lacs/MW/Month)	10.83	Lacs		SECI-60% Capacity
Open 40%	No Realization on 40% Open Capacity	0			JSW-40% Open Merchant Capacity
	Total Project Cost	1925.83	Rs Cr		
70%	Debt	1348.081	Rs Cr		
30%	Equity	577.749	Rs Cr		
	Revenue (Annual) – SECI	1 389.88	Rs Cr		SECI – 60% Capacity
	Revenue (Annual) – Open	2 0.00	Rs Cr		JSW – Merchant 40% Capacity

	O&M	41.00	Rs Cr	1) Aux Power - 24 Cr per Year 2) Other O&M Cost – 17 Cr per Year
	Insurance	6.50	Rs Cr	
	Interest & Repayment (Levelized)	215.69		10 Year Loan Period (Project Life – 12 Years), Interest Rate – 9% & Repayment – 10%
	Balance	126.69	Rs Cr	
	Tax	25%		
	Normalized Return after tax RoE	16.41%		

In Para 6, of the Additional Affidavit filed by the Appellant JSW on 21.04.2025, it is stated that, based on the actual approved project cost and reasonable revenue assumptions for 40% open capacity, the project Return on Equity (RoE) based on annual levelized cash flows/investments works out to 19.90%, the details of which are provided in Table No.4 below:

Table No. 4: Actual' Base Case (With Merchant Case on 40% Open capacity}-Annual Levelized				
Description				Remarks
	Project Capacity (MW)	500	MW	

	Project Capacity (MWh)	1000	MWh	
SECI (60%)	Tariff (Lacs/MW/Month)	10.83	Lacs	SECI-60% Capacity
Open 40%	Marginal merchant Realization (Per Cycle per KWh)	0.97	INR/KWh	Base Case as per actual past IEX data
	Total Project Cost	1925.83	Rs. Cr	
70%	Debt	1348.081	Rs Cr	
30%	Equity	577.749	Rs Cr	
	Revenue 1 (Annual) – SECI	389.88	Rs Cr	SECI – 60% Capacity
	Revenue 2 (Annual) – Open	26.91	Rs Cr	JSW – Merchant 40% Capacity
	Toal Revenue	416.79		
	O&M	41.00	Rs Cr	1) Aux Power - 24 Cr per Year 2) Other O&M Cost – 17 Cr per Year
	Insurance	6.50	Rs Cr	
	Interest & Repayment (Levelized)	215.69		10 Year Loan Period (Project Life – 12 Years), Interest

				Rate – 9% & Repayment – 10%
	Balance	153.59	Rs Cr	
	Tax	25%		
	Normalized Return after tax RoE	114.97	Rs Cr	
	RoE	19.90%		

In the Note below the said Table, it is stated that the revenue assumptions on 40% open capacity was calculated on the basis of actual tariff discovered in the Day Ahead Market (DAM) at Indian Energy Exchange Ltd (IEX) for the Calendar Year (CY) 2018, 2019 and 2021 (except CY 2020 which was not considered being an exceptional year due to COVID).

It is evident, from the tables referred to in the additional affidavit filed by the Appellant-JSW on 21.04.2025, that the price quoted by them was based on the premise that they would not realize any amount from the 40% merchant capacity, in which event also they get the normalized RoE at 16.41%; and, in case the merchant realization is taken as Rs 0.97 per kWh (i.e. less than Rs.1.00 per unit), the Appellant-JSW would then have got a return of 19.90% ie approximately 20%.

The Respondent CERC may well be justified in stating that the Appellant-JSW is seeking to cross subsidize its merchant sale of 40% capacity by hiking the price of its bid for the contracted capacity of 60%. We also find considerable force in the submission, urged on behalf of GUVNL, that its consumers cannot be required to subsidize the 40% merchant capacity of the Appellant-JSW, without any risk to JSW with respect to such merchant capacity. We cannot readily brush aside the submission, urged on

behalf of the Respondents, that the entire merchant capacity of 40% is sought to be recovered from the 60% tied up capacity, thereby making this distinction in the tied up capacity wholly illusory or of no effect.

Yet another distinction sought to be drawn by the Appellant-JSW, between the subject bid and the subsequent three bids referred to in the impugned order passed by the CERC, is that the SECI ESS-II bid, where the Appellant emerged as the successful bidder, stands annulled, and the fate of GUVNL phase -II and GUVNL phase – III bids appear to be in a state of flux as the successful bidder therein, i.e. GENSOL Engineering Ltd., has subsequently run into troubled waters with the financial institutions and government authorities. For this reason, the Appellant-JSW contends, these subsequent bids cannot be relied upon.

What we are concerned, in the present appeal, is with the question whether or not the subject bid is market aligned. As noted hereinabove, as against the Appellant's bid, submitted in August, 2022, of Rs. 10,88,917 per MW per month, the lowest bid received in a similar bid invited by BSES Rajdhani Power Limited, New Delhi in October, 2023 was for Rs. 4,79,967.50/- per MW per month. Thereafter, the lowest bid received in the GUVNL (Phase-II) Pilot Project of 250/500 MWh in March, 2024 was for Rs. 4,48.996 per MW per month. The lowest bid received in the GUVNL (Phase-III) Pilot Project of 250/500 MWh in June, 2024 was for Rs.3,72,978 per MW per month, and the lowest bid received in the SECI (ESS-II) Project in August, 2024 was for Rs. 3,81,000 per MW per month. Further, with respect to two of these subsequent bids, the Appellant-JSW had itself quoted a tariff of Rs. 4,85,000/- per MW per month in the bids invited by BSES Rajdhani Power Limited; and they were selected as the lowest bidder in the SECI-ESS-II Bid quoting a tariff of Rs. 3,81,000/-/MW per month.

The possibility of these projects running into troubled waters is irrelevant, for what is of significance is the bids quoted therein, more so as, in a couple of these subsequent bids, the Appellant-JSW had themselves quoted a substantially lower tariff as compared to the tariff quoted by them in the subject bid. The bidders for these subsequent projects, including the Appellant-JSW herein, would evidently have quoted the tariff, in such bids submitted by them, on the premise that these BESS projects would be established. That these projects did not fructify later, has no bearing on the tariff quoted by them earlier.

Viewed from any angle, the contentions, urged on behalf of the Appellant-JSW under this head, necessitate rejection.

XIX. IS CONSUMER INTEREST ADVERSELY AFFECTED?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the other argument, made on behalf of GUVNL, was regarding consumer interest being adversely affected by acceptance of the bid, without anything further; Consumer interest is a broad term and amongst others involves reliable, quality and uninterrupted power on long term basis besides being competitive; Consumer interest or public interest cannot be conflated with evaluation of monetary gain and loss alone; in any case, consumer interest alone cannot be the sole criteria for competitive bidding under Section 63 of the Electricity Act; it has been repeatedly held by this Tribunal that the guidelines of the Central Government take care of the interest of all stakeholders; and, if consumer interest alone is taken as the criteria, then the guidelines framed by the Central Government would become redundant.

B. SUBMISSIONS URGED ON BEHALF OF THE RESPONDENT-CERC:

Sri Nikhil Nayyar, Learned Senior Counsel appearing on behalf of the CERC, would submit that the facts, as presented by the Appellant, would show that it unilaterally pressed for re-configuration in 2024 by which time the market prices had already crashed, and then placed its orders in May 2024 after the fall in prices had taken place; and the Appellant is benefiting at the cost of consumers who would, otherwise, be getting the same power at much cheaper rates.

C. ANALYSIS:

The Supreme Court, in **Jaipur Vidyut Vitran Nigam Limited**, has placed great emphasis on the need for Regulatory Commissions to protect consumer interest, and has equated consumer interest with that of public interest. Asking the consumers to pay a substantially higher tariff, when the market prices prevailing at around the time the adoption proceedings were instituted under Section 63 of the Electricity Act in March, 2024, and was admitted by the CERC in May, 2024, were far lower, besides indicating a rapid downward trend in such market prices, would undoubtedly adversely affect consumer interest, as consumers would be required to pay a far higher tariff if the Appellant-JSW's tariff is adopted, than the tariff discovered in similar bids in and around the time the Section 63 Petition was filed by SECI and was admitted by the CERC.

We have no quarrel with the submission that reliable, quality and uninterrupted power on long-term basis would also be in consumer interest. If such reliable, high quality and uninterrupted power on a long-term basis is available, by use of the BESS, at a far lower price then consumer interest would be better served, instead of their having to pay the substantially higher

tariff quoted by the Appellant, in case the CERC had adopted the said tariff in the Section 63 proceedings.

XX. LEGITIMATE EXPECTATION:

A. SUBMISSION URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that, in view of the BESPAs dated 05.03.2024 having been signed, the NLDC's Petition No. 249/MP/2023 having been allowed by the CERC (on the basis of a joint statement dated 22.02.2024) on 16.05.2024, coupled with the fact that, in the past, the CERC has consistently taken a view that delay in adoption of tariff and the consequent impact on prices is not within the scope of the tariff adoption proceedings, and that the GERC after considering the question of reasonability of rates, had passed an order under Section 86(1)(b) dated 23.09.2024, approving procurement of 150MWs of the BESS project by GUVNL, the Appellant also had a legitimate expectation that the tariff would be adopted by the CERC; and this legitimate expectation has been defeated without giving an opportunity of being heard to the Appellant.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that rejection of tariff adoption has civil consequences for the Appellant; the Appellant and SECI have entered into a binding contract, with adoption of tariff being a condition of contract; the effective date of the contract is 05.03.2024, which is the date from which the Appellant was supposed to start performing the contract; based on the contract, the Appellant has altered its position by entering into firm contracts with third party suppliers of goods and services for the BESS; expenditure to the tune of approximately Rs. 100 crores already stands incurred; and firm

commitments for an amount running into thousands of crores have been made.

B. SUBMISSIONS URGED ON BEHALF OF RESPONDENT-GUVNL:

In support of his contention that the Appellant-JSW has no vested right, Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would submit that the test to be applied in considering such cases of bids is whether the procurement is in public interest and is in terms of the bidding documents; the bidders have no vested right till the final approval is granted by the Commission; the only right available to the bidder is to equality in the bidding process and a fair treatment in the evaluation of bids of interested persons in response to the bid; this settled position has been reiterated in (a) ***UP Avas Evam Vikas Parishad v. Om Prakash Sharma*, (2013) 5 SCC 182, para 29 and 30**; and (b) ***Haryana Urban Development Authority v. Orchid Infrastructure Developers Pvt Ltd.*, (2017) 4 SCC 243, para 13 and 14**; therefore, the fact that any action has been taken by JSW in the present case is a completely irrelevant consideration to the issue of adoption of tariff; there is no vested right of JSW for the award of the bid; and the only contention available to JSW is on merits ie whether the Central Commission has correctly considered the adoption of tariff.

Sri Anand K. Ganesan, Learned Counsel for the Respondent-GUVNL, would further submit that the contention of JSW based on the GERC Order dated 23.09.2024, that the Central Commission ought to adopt the tariff in the present case, is misconceived; GERC did not exercise jurisdiction under Section 63, but was only concerned with the approval of the Agreement; and adoption of tariff, in exercise of the jurisdiction under Section 63, is solely and exclusively that of the Central Commission.

C. JUDGEMENTS RELIED UNDER THIS HEAD:

1. In **U.P. Avas Evam Vikas Parishad v. Om Prakash Sharma, (2013) 5 SCC 182**, the Supreme Court referred to its earlier judgement in **Meerut Development Authority: (2009) 6 SCC 171**, wherein it was held that the bidders participating in the tender process have no other right except the right to equality and fair treatment in the matter of evaluation of competitive bids offered by interested persons in response to the notice inviting tenders in a transparent manner and free from hidden agenda; the Authority has the right not to accept the highest bid and even to prefer a tender other than the highest bidder, if there exist good and sufficient reasons, such as, the highest bid not representing the market price but there cannot be any doubt that the Authority's action in accepting or refusing the bid must be free from arbitrariness or favouritism; in **Rajasthan Housing Board: (2007) 1 SCC 477**, the Supreme Court held that the bidder acquires no right to claim that the auction be concluded in its favour; so long as an order regarding final acceptance of the bid had not been passed by the Chairman of the Housing Board, the highest bidder acquires no vested right to have the auction concluded in his favour; and the auction proceedings could always be cancelled.

2. In **HUDA v. Orchid Infrastructure Developers (P) Ltd., (2017) 4 SCC 243**, the Supreme Court held that it is settled law that the highest bidder has no vested right to have the auction concluded in his favour; and there was no right acquired and no vested right accrued in favour of the plaintiff merely because his bid amount was highest and had deposited 10% of the bid amount.

D. ANALYSIS:

Legitimate expectation may arise (a) if there is an express promise given by a public authority; or (b) because of the existence of a regular practice which the claimant can reasonably expect to continue. Such an expectation must be reasonable. (**Madras City Wine Merchants' Assn. MANU/ SC/ 0815/ 1994: (1994) 5 SCC 509; B. Venkateswarlu v. Govt. of A.P., MANU/AP/0079/2014**). Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. A bona fide decision of the public authority reached in this manner would satisfy the requirement of non-arbitrariness and withstand judicial scrutiny. (**Food Corporation of India v. Kamdhenu Cattle Feed Industries MANU/ SC/ 0257/ 1993: (1993) 1 SCC 71; Jasbir Singh Chhabra, MANU/SC/0152/2010: (2010) 4 SCC 192; B. Venkateswarlu v. Govt. of A.P., MANU/AP/0079/2014**).

If denial of legitimate expectation, in a given case, amounts to denial of a right guaranteed or is arbitrary, discriminatory, unfair or biased, gross abuse of power or violation of principles of natural justice, the same can be questioned on the well-known grounds attracting Article 14 of the Constitution, but a claim based on mere legitimate expectation, without anything more, cannot ipso facto give a right to invoke these principles. It can be one of the grounds to consider, but the court must lift the veil and see whether the decision is violative of these principles warranting interference. (**Attorney General for New South Wales v. Quin (1990) 64 Aust LJR 327 and National Buildings Construction Corpn. v. S. Raghunathan (1998) 7 SCC 66**). To strike down the exercise of administrative power, solely on the ground of avoiding the disappointment of the legitimate expectations of a person, would be to set the court adrift on a featureless sea of pragmatism.

Moreover, the notion of a legitimate expectation (falling short of a legal right) is too nebulous to form the basis for invalidating the exercise of power when its exercise otherwise accords with law. (**Union of India v. Hindustan Development Corpn. (1993) 3 SCC 499, Attorney General for New South Wales (1990) 64 Aust LJR 327 and S. Raghunathan (1998) 7 SCC 66**).

Legitimate expectation cannot be upgraded to a legally enforceable right which it is not, as it is merely a part of the rule of non-arbitrariness to ensure procedural fairness of the decision. The requirement of public interest can outweigh the legitimate expectation of private persons and the decision of a public body on that basis is not assailable. (**Ghaziabad Development Authority v. Delhi Auto & General Finance (P) Ltd. MANU/ SC/ 0471/ 1994: (1994) 4 SCC 42; B. Venkateswarlu v. Govt. of A.P., MANU/AP/0079/2014**). There is also a distinction between a mere hope and a legitimate expectation. (**R. Selvaraj MANU/ TN/ 1308/ 2001: 2002 (1) MLJ 627; Madras City Wine Merchants Association's, MANU/ SC/ 0815/ 1994: (1994) 5 SCC 509; B. Venkateswarlu v. Govt. of A.P., MANU/ AP/ 0079/ 2014**).

For legal purposes, the expectation cannot be the same as anticipation. It is different from a wish, a desire or a hope. It cannot amount to a claim or demand on the ground of a right. However earnest and sincere a wish, a desire or a hope may be, and however confidently one may look to them to be fulfilled, they by themselves cannot amount to an assertible expectation, and a mere disappointment does not attract legal consequences. A pious hope, even leading to a moral obligation, is not a legitimate expectation. The legitimacy of an expectation can be inferred only if it is founded on the sanction of law or custom or an established procedure followed in regular and natural sequence. Every such legitimate expectation does not by itself fructify into a right and, therefore, does not amount to a

right in the conventional sense. (**Punjab Communications Ltd. v. Union of India** MANU/SC/0326/1999 : (1999) 4 SCC 727, **Chanchal Goyal (Dr.) v. State of Rajasthan**, MANU/SC/0133/2003 : (2003) 3 SCC 485, **J.P. Bansal v. State of Rajasthan**, MANU/SC/0235/2003 : (2003) 5 SCC 134, **State of Karnataka v. Umadevi**, MANU/SC/1918/2006 : (2006) 4 SCC 1, **Kuldeep Singh v. Govt. of NCT of Delhi**, MANU/SC/8215/2006 : (2006) 5 SCC 702; **Ram Pravesh Singh v. State of Bihar**, MANU/SC/4176/2006 : (2006) 8 SCC 381 and **Sethi Auto Service Station v. DDA**, MANU/SC/8127/2008 : (2009) 1 SCC 180; **Union of India v. Hindustan Development Corpn** MANU/SC/0219/1994 : (1993) 3 SCC 499; **Jasbir Singh Chhabra**, MANU/SC/0152/2010 : (2010) 4 SCC 192).

For a legitimate expectation to arise, the decision of the administrative authority must affect the person by depriving him of some benefit or advantage which either: (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until he has been communicated some rational grounds for withdrawing it, on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker that they will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn. The procedural part of it relates to a representation that a hearing or other appropriate procedure will be afforded before the decision is made. The substantive part of the principle is that, if a representation is made that a benefit of a substantive nature will be granted or if the person is already in receipt of the benefit that it will be continued and not be substantially varied, then the same could be enforced (**Council of Civil Service Unions v. Minister for the Civil Service**, [MANU/UKHL/0045/1984 : (1984) 3 W.L.R. 1174; **Chanchal Goyal (Dr):** MANU/SC/0133/2003 : 2003 (2) L.L.N. 415 (SC)).

A claim based on legitimate expectation requires reliance on representations and resulting detriment to the claimant in the same way as claims based on promissory estoppel. (**National Buildings Construction Corpn. v. S. Raghunathan**). Legitimacy of an expectation can be inferred only if it is founded on the sanction of law. (**International Trading Co.**). Whether the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. (**Food Corporation of India v. Kamdhenu Cattle Feed Industries; Independent Gas based Power Producers Association v. Union of India, 2015 SCC OnLine Hyd 41**).

A person who bases his claim on the doctrine of legitimate expectation, in the first instance, has to satisfy that he has relied on the said representation and the denial of that expectation has worked to his detriment. The Court could interfere only if the decision taken by the authority was found to be arbitrary, unreasonable or in gross abuse of power or in violation of principles of natural justice and not taken in public interest. But a claim based on mere legitimate expectation without anything more cannot ipso facto give a right to invoke these principles. (**Sethi Auto Service Station v. Delhi Development Authority (2009) 1 SCC 180**).

Legitimate expectation may not by itself be a distinct enforceable right, but failure to consider and give due weight to it may render the decision arbitrary, and this is how the requirement of due consideration of a legitimate expectation forms part of the principle of non-arbitrariness, a necessary concomitant of the rule of law. Every legitimate expectation is a relevant factor requiring due consideration in a fair decision-making process. Whether

the expectation of the claimant is reasonable or legitimate in the context is a question of fact in each case. Whenever the question arises, it is to be determined not according to the claimant's perception but in larger public interest wherein other more important considerations may outweigh what would otherwise have been the legitimate expectation of the claimant. (**Food Corporation of India v. Kamdhenu Cattle Feed Industries (1993) 1 SCC 71**).

An expectation could be based on an express promise or representation or by established past action or settled conduct. The representation must be clear and unambiguous. It could be a representation to the individual or generally to a class of persons. (**R. Govinda Rao v. Director, National Institute of Technology, 2005 SCC OnLine AP 980**). The plea of legitimate expectation would arise where a person is deprived of some benefit or advantage which he had earlier been permitted to enjoy and which he can legitimately expect to be permitted to be continued or that he has received an assurance from the decision-maker that they will not be withdrawn without giving first an opportunity of advancing reasons for contending that they should not be withdrawn. (**R. Govinda Rao v. Director, National Institute of Technology, 2005 SCC OnLine AP 980**).

The doctrine of legitimate expectation is not limited only to cases where there is some contractual relationship or other pre-existing legal relationship between the parties. The principle would be applied even when the promise is intended to create legal relations or affects a legal relationship which would arise in future. (**Motilal Padampat Sugar Mills (1979) 2 SCC 409; State of Punjab v. Nestle India Ltd., (2004) 6 SCC 465**).

It is not even the Appellant-JSW's case that they have been deprived of some benefit or advantage which they had earlier been permitted to enjoy and which they can legitimately expect to be permitted to be continued, or

that they have received any assurance that such benefit will not be withdrawn without giving first them an opportunity of explaining why such a benefit should not be withdrawn. Even otherwise, the legitimacy of an expectation can be inferred only if it is founded on the sanction of law, and it is only if the Appellant is able to establish that legally the CERC cannot undertake the exercise of determining whether the subject bid is market aligned, can they base their claim on the doctrine of legitimate expectation. As market alignment is to be considered when the Commission undertakes the exercise of adoption of tariff under Section 63 of the Electricity Act, the doctrine of legitimate expectation would have no application in the case on hand. In any event, a claim based on mere legitimate expectation, without anything more, cannot ipso facto give a right to invoke these principles.

Conscious as the Appellant-JSW was that it had no vested right to execute the Project unless the tariff quoted by them was adopted by the CERC under Section 63 of the Electricity Act, they have relied on the doctrine of legitimate expectation. Neither was the Appellant assured that the bids quoted by them would be accepted even without undergoing the adoption process under Section 63 of the Act, nor is it the past practice for such a course to be adopted. The doctrine of legitimate expectation has no application to the facts and circumstances of the present case.

As noted hereinabove, it is only on and after the tariff discovered in the bidding process is adopted by the CERC under Section 63 of the Electricity Act, would any right accrue to the selected bidder, in whose favour a letter of award is issued, to execute the project, notwithstanding that a BESPA was executed between SECI and the Appellant-JSW on 05.03.2024 prior to the Section 63 Petition being filed by SECI before the CERC on 14.03.2024. Till the discovered tariff is adopted by the CERC, under Section 63 of the Electricity Act, the rights of the lowest bidder are inchoate, and they have no

vested right to execute the subject project, since adoption of tariff is a prerequisite thereof.

Clause 27.15, of the Request for Selection (RfS) document issued by SECI on 13.04.2022, stipulates that the Central Electricity Regulatory Commission shall be the Appropriate Commission to exercise the regulatory and adjudicatory jurisdiction in regard to matters between the BESSD (ie the Appellant-JSW) and SECI as well as SECI and buying entities (ie GUVNL). The exercise of adoption of tariff undertaken by the CERC is in terms of Section 63 of the Electricity Act which is an exercise of its regulatory jurisdiction by the CERC.

Further Clause 2.1.2 of the BESP, executed between SECI and JSW on 05.03.2014, itself records the agreement of parties that the decision pertaining to the adoption of the tariff, and approval of the same, for procurement of contracted capacity, shall be binding on all parties concerned, as contained in the Electricity Act, 2003 and any amendments thereof. Not only does Section 63 of the Electricity Act, but even the BESP executed between SECI and the Appellant-JSW, make it clear that it is only on the tariff being adopted by the CERC, in the exercise of its jurisdiction under Section 63 of the Electricity Act, would the Appellant-JSW be entitled to execute the subject project.

The contentions, urged on behalf of the Appellant-JSW under this head, also necessitate rejection.

XXI. SIGNING OF BESP BETWEEN JSW AND SECI PERTAINING TO NLDC:

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the finding that '*SECI has not yet signed BESPA with the Appellant*' and the COD may further get extended giving undue benefit to the developer to take advantage of reduced price in the battery market is factually incorrect; the BESPA for 150 MWs capacity stands executed between the Appellant and SECI on 05.03.2024; and the procurement of 150MWs of BESS capacity pertaining to the NLDC portion is to be governed by the regulatory order dated 16.05.2024, passed by the CERC in Petition No. 249/MP/2023; the CERC, in its order dated 16.05.2024, has categorically held that a sale agreement between SECI and NLDC need not be signed; *a fortiori*, the BESPA for the NLDC quantum between the Appellant and SECI need not be signed; and the effective date will be the date of the order in Petition No. 249/MP/2023 dated 16.05.2024.

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would further submit that the finding that the order rejecting tariff adoption would not have been passed '*had the project being completed within the original time lines*' is unsustainable; the guidelines and the RfS link the timelines for the project execution only to the effective date, and not any other milestone; the CERC, in the impugned order, has failed to identify the so called 'original timelines', which were neither fixed in the guidelines nor in the RfS; no delay has been attributed or is attributable to the Appellant at all; there was considerable amount of time consumed in getting confirmation for VGF funding from MoP/Government, and adjudication of NLDC Petition and tariff adoption Petition by CERC; and the Appellant relies on the principle of ***actus curiae neminem gravabit***.

B. ANALYSIS:

Unlike the BESSA signed between SECI and GUVNL, the order of the CERC in Petition No. 249/MP/2023 dated 16.05.2024 enabled NLDC not to

sign a BESSA with SECI. That did not discharge either SECI or the Appellant-JSW from signing the BESPAs for the NLDC component, since Clause 1.5 of the Rfs obligated parties to execute such an Agreement. It appears, from the written submissions filed on their behalf, that the Appellant-JSW now claims that in the light of the order of the CERC, in Petition No. 249/MP/2023 dated 16.05.2024, no BESPAs need be executed between them and SECI for the NLDC component. If that be so, it does not stand to reason that the Appellant-JSW and SECI, after having signed the BESPAs (with respect to the GUVNL component) on 05.03.2024, should thereafter, on 26.03.2024, mutually extend the timeline for signing the BESPAs for the remaining 150 MW till 31.07.2024; and again, on 21.08.2024, the Appellant-JSW should inform SECI that, the bid validity date was coming to a close and they were giving their consent to extend the bid validity up to 30.11.2024.

Further, in the additional affidavit filed by them before the CERC on 17.10.2024 in Petition No. 138/AT/2024, in compliance with the Record of Proceedings of the CERC dated 18.09.2024, the Appellant-JSW had stated that the time for signing BESPAs was extended till 30.11.2024. As the BESPAs, with respect to the GUVNL component, had already been signed on 05.03.2024, reference to the signing of BESPAs, in the additional affidavit filed more than seven months thereafter on 17.10.2024, could only have been in relation to the NLDC component. It is also relevant to note that the CERC had passed its order, in Petition No. 249/MP/2023 dated 16.05.2024, more than five months before the Additional affidavit was filed by the Appellant-JSW before the CERC on 17.10.2024. When they filed the said affidavit, the Appellant-JSW was aware that no BESSA was required to be signed between SECI and NLDC in view of the order of the CERC dated 16.05.2024, and yet they stated, in their affidavit dated 17.10.2024, that the time for signing BESPAs was extended by them till 30.11.2024. Their contention, in

their written submissions, that no BESPA need be signed for the NLDC component, in the light of the order of the CERC in Petition No. 249/MP/2023 dated 16.05.2024, is evidently an after-thought to avoid having to explain why the said BESPA has not been signed till date.

The maxim "actus curiae neminem gravabit" means that an act of a court/quasi-judicial authority shall prejudice no man. This maxim is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law. (**Arora Enterprises v. Dy. Commr., CT, 2010 SCC OnLine AP 586; Devesh Kumar Sharma v. State of Uttarakhand, 2019 SCC OnLine Utt 215**). The maxim "actus curiae neminem gravabit", obligates the Court to undo the wrong done to a party by the act of the Court. Any undeserved or unfair advantage gained by a party, invoking the jurisdiction of the Court, must be neutralized as the institution of litigation cannot be permitted to confer any advantage on a party by the delayed action of the Court. (**Kalabharati Avertising v. Hemant Vimalnath Narichania: (2010) 9 SCC 437; A.R. Sircar (Dr.) v. State of U.P.: 1993 Supp (2) SCC 734; Shivsankar v. Board of Directors, U.P. SRTC: 1995 Supp (2) SCC 726; Inter College, Arya Nagar Kanpur v. Sree Kumar Tiwary: (1997) 4 SCC 388; GTC Industries Limited v. Union of India: (1998) 3 SCC 376; and Jaipur Municipal Corporation v. C.L. Mishra: (2005) 8 SCC 423**). No person can suffer from the act of the Court. Interests of justice requires that any undeserved or unfair advantage gained by a party, invoking the jurisdiction of the Court, must be neutralized. (**Ramakrishna Verma v. State of U.P.: (1992) 2 SCC 620; Grindlays Bank Ltd. v. ITO: (1980) 2 SCC 191; Mahadeo Savlaram Shelke v. Pune Municipal Corporation: (1995) 3 SCC 33**) : 1987 SCC OnLine SC 347 at page 402

The maxim *actus curiae neminem gravabit* — An act of the Court shall prejudice no man, is explained in Broom's *Legal Maxims*, 10th Edn., 1939 at

page 73 that this maxim is founded upon justice and good sense; and affords a safe and certain guide for the administration of the law. (**Raj Kumar Dey v. Tarapada Dey, (1987) 4 SCC 398; Mohd. Gazi v. State of M.P., (2000) 4 SCC 342**).

That no one shall suffer by an act of the Court is not a rule confined to an erroneous act of the Court. The act of the court embraces, within its sweep, all such acts which the court may form an opinion in any legal proceedings that it would not have so acted had it been correctly apprised of the facts and the law. The factor, attracting applicability of restitution, is not the act of the Court being wrongful or a mistake or an error. The test is whether, on account of an act of the party persuading the Court to pass an order held at the end as not sustainable, the earlier order had resulted in one party gaining an advantage which it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the Court and the act of such party. (**South Eastern Coalfields Ltd. v. State of M.P., (2003) 8 SCC 648**).

The injury, if any, caused by the act of the Court shall be undone and the gain which the party would have earned, if it was not interdicted by the order of the Court, would be restored to, or conferred on, the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust, if not disastrous, consequences. Litigation may turn into a fruitful industry. Unscrupulous litigants may feel encouraged to approach the Courts, persuading it to pass interlocutory orders favourable to them by making out a prima facie case when the issues are yet to be heard and determined on merits and, if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits which the interim order yielded, even though the

battle is lost at the end. This cannot be countenanced. **(South Eastern Coalfields Ltd.2).**

This doctrine of *actus curiae neminem gravabit* would have been applicable only if this Tribunal had found the impugned order passed by the CERC to be erroneous, had set aside the said order, and had directed that the Appellant-JSW should be restituted for the loss they may have suffered as a result of the erroneous order passed by the CERC. As we are satisfied that the impugned order of the CERC does not suffer from any legal infirmity, and see no reason to interfere therewith, this doctrine has no application to the case at hand.

As noted earlier in this order, the BESPA between the Appellant-JSW and SECI is required to be signed, for the NLDC quantum, as the order of the CERC, in Petition No. 249/MP/2023 dated 16.05.2024, only enabled NLDC not to sign the BESSA with SECI. There is nothing in the Regulatory order of the CERC dated 16.05.2024 which exempted SECI and the Appellant-JSW from signing a BESPA for the NLDC component when, in terms of the GOI Guidelines and the RfS, such a BESPA is required to be signed. That this is also the understanding of both SECI and the Appellant JSW is evident from the fact that both the parties mutually extended the time for signing the BESPA even after executing a BESPA for the GUVNL component on 05.03.2024. As this aspect has been examined earlier in this order, it is unnecessary for us to delve into this aspect again.

The finding of the CERC that the order rejecting tariff adoption would not have been passed '*had the project being completed within the original time lines*' must be understood in its context. If the subject Project had been completed within the prescribed timelines, there would not have been any comparable bids in existence, as the first of the comparable bids noted by the CERC was the bids discovered by GUVNL in March, 2024. The bids

discovered earlier in the bids invited by BSES Rajdhani, Delhi were also in October, 2023, and if the stipulated time-lines had been adhered to, the Section 63 Petition would have been filed and the tariff adopted by CERC prior thereto.

The contentions, urged on behalf of the Appellant-JSW under this head, also necessitates rejection.

XXII. WAS BATTERY PROCURED CLOSER TO COMMISSIONING OF THE PROJECT?

A. SUBMISSIONS URGED ON BEHALF OF THE APPELLANT-JSW:

Sri Sanjay Sen, Learned Senior Counsel appearing on behalf of the Appellant, would submit that the CERC, in its reply, has made certain factually incorrect statements regarding admission by Appellant of '*battery being procured closer to commission the project*'; and admission that '*the rates had fallen because the material was cheaper was close to 50%*' etc., which have been disputed and dealt with adequately in the rejoinder; the finding that, '*as per prevailing industry norms and even otherwise, the batteries are one of the last items to be purchased closer to the commissioning of the project by the developers for optimising cost*' is nothing more than a conjecture; there is no evidence of any such industry practice; the entire system has to be designed around the batteries and not the other way round; as a matter of fact, battery was the first item to be locked in by the Appellant, in its procurement schedule.

B. ANALYSIS:

The right to execute the Project, and procure the equipment required for such execution, is claimed by the Appellant-JSW in terms of the BESPA executed by them with SECI on 05.03.2014. As noted hereinabove, Clause 2.1.2 of the BESPA dated 05.03.2024 itself records the agreement of parties that decisions pertaining to adoption of the Tariff and approval of the same, for procurement of Contracted Capacity, shall be binding on all parties concerned, as contained in the Electricity Act, 2003 and any amendments thereof. Consequently, the Appellant-JSW's right to procure equipment to execute the project, in terms of the BESPA dated 05.03.2024, was inchoate till adoption of tariff by the CERC. Crystallization of such a right would have taken place only if, and after, the tariff was adopted by the CERC in the exercise of its jurisdiction under Section 63 of the Electricity Act. In the absence of the tariff being adopted, the Appellant-JSW has no vested right to execute the subject BESS Project save, if this Tribunal had interfered with and had set aside the order passed by the CERC refusing to adopt the tariff. As we see no reason to do so, it is unnecessary for us to dwell on this issue any longer.

XXIII. CONCLUSION:

For the afore-mentioned reasons, we are of the view that the CERC was justified in not adopting the tariff, bearing in mind that, in and around the time the Petition was filed by SECI on 14.03.2024 seeking adoption of tariff, and the said Section 63 Petition was admitted on 08.05.2024, there was a downward spiral in the market prices relating to BESS, as is evident from the bids submitted with respect to other similar Projects during that period.

Viewed from any angle, the impugned order of the CERC dated 02.01.2025 does not necessitate interference in the present Appeal. Appeal No.26 of 2025 fails and is, accordingly, dismissed. Appeal No.54 of 2025 is

disposed of in terms of the observations made earlier in this order. The IAs, in both the Appeals, stand dismissed.

Pronounced in the open court on this the **12th day of September, 2025.**

(Seema Gupta)
Technical Member

(Justice Ramesh Ranganathan)
Chairperson

REPORTABLE / ~~NON-REPORTABLE~~