IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL NO. 280 OF 2021 &
IA NO. 835 OF 2021

Dated: **18th February, 2022**

Present: **Hon'ble Mr. Justice R.K. Gauba, Officiating Chairperson**
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member

In the matter of:

THE TATA POWER COMPANY LIMITED - TRANSMISSION
[Through its Head (Corporate Legal)]
Having its registered office at House 24,
Homi Mody Street, FORT,
Mumbai 400 001 (Maharashtra) ….. Appellant(s)
Email: tatapower@tatapower.com

VERSUS

1. **MAHARASHTRA ELECTRICITY REGULATORY COMMISSION**
[Through its Secretary]
World Trade Centre, Centre No.1,
13th Floor, Cuffe Parade,
Mumbai- 400 005 (Maharashtra)
Email: mercindia@merc.gov.in

2. **ADANI ELECTRICITY MUMBAI INFRA LIMITED**
CTS 407/A (New), 408 (old),
Village Eksar Devidas Lane, Off SVP Road,
Mumbai- 400 103 (Maharashtra)
Email: harshada.dhavale@adani.com

3. **ADANI ELECTRICITY MUMBAI LIMITED – TRANSMISSION**
CTS 407/A (New), 408 (old),
Village Eksar Devidas Lane, Off SVP Road,
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4. **MAHARASHTRA STATE ELECTRICITY TRANSMISSION COMPANY LIMITED**
Prakashganga, 4th Floor/A-Wing,
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Mumbai- 400051 (Maharashtra)
Email: ceremsedcl@gmail.com cs@mahatransco.in

5. GOVERNMENT OF MAHARASHTRA
[Through its Chairman]
Empowered Committee for Transmission Projects,
Department of Industries, Power and Labor,
Mantralaya, Churchgate,
Mumbai-400 020 (Maharashtra) ….. Respondents

Counsel for the Appellant (s) : **Mr. Sanjay Sen, Sr. Adv.**
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Mr. Suhael Buttan
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Mr. Shivanshu Singh
Mr. Harshit Singh
Mrs. Reshma Nathani
Mr. Tushar Srivastava
Mr. Sharan Balakrishnan
Ms, Raksha for R-2 & 3

Mr. Deepak Nargolkar, Sr. Adv.
Mr. Sudhanshu S. Choudhari
Mr. Mahesh Shinde for R-4

Mr. Sudhanshu Choudhari
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J U D G M E N T

PER HON'BLE MR. JUSTICE R.K. GAUBA, OFFICIATING CHAIRPERSON

PREFATORY

1. The first Respondent, *Maharashtra Electricity Regulatory Commission* (hereinafter “MERC” or "the State Commission" or “the Commission”), by Order dated 21.03.2021, has granted Transmission License for the proposed

1000 MW HVDC (VSC based) link between 400 kV MSETCL Kudus & 220 kV AEML Aarey EHV Station (for short, "*HVDC Transmission Project*") in favor of the second Respondent *Adani Electricity Mumbai Infra Limited* (for short, "AEMIL"). The Order was passed in Case No. 190/2020 filed by AEMIL and the third Respondent *Adani Electricity Mumbai Limited- Transmission* (for short, "AEML-T") - collectively referred as "*the Original Applicants*" - under Section 14 read with Section 15 of the Electricity Act, 2003 and *Maharashtra Electricity Regulatory Commission (Transmission License Conditions) Regulation, 2004* (hereinafter, "the Transmission License Regulations"). The Appellant, *Tata Power Company Limited- Transmission* (hereinafter, "TPC-T" or "the Appellant"), claiming to have an interest at stake has come up by the appeal at hand challenging the said order contending that the grant of license is unlawful and improper since the process of *Tariff Based Competitive Bidding* (for short, "TBCB"), it being dominant route, under section 63 of the Act has been bypassed, against public interest, and that the power vested In the fifth Respondent - *Empowered Committee for Transmission Projects* (for short, "EC") of the *Government of Maharashtra* ("GoM") – to consider award a project of such magnitude through TBCB route, in terms of Resolution dated 04.01.2019 promulgated by GoM, has been usurped.

2. The array of parties includes the *Maharashtra State Electricity Transmission Company Limited* ("MSETCL"), the *State Transmission Utility* ("STU"), impleaded as the fourth Respondent, it having been part of the deliberative and consultative exercise leading to the grant of license, lack of prompt action or initiative attributed to It, or some of its inputs, having attracted adverse comment by the Commission.

3. It may be mentioned here that the appellant had first approached the High Court of Bombay invoking its writ jurisdiction to mount a challenge to the impugned order dated 21.03.2021 but it was allowed to withdraw the said

writ petition (no. 10887/2021) by Order dated 11.05.2021 and granted liberty to file a statutory appeal before this tribunal, the present appeal having thus been filed on 24.05.2021.

4. It Is fairly conceded by the learned counsel for all parties that the core issue to be addressed, and on which the result of this challenge would hinge, is as to whether the subject matter of the license granted by the Impugned order is a new project within the meaning and scope of GoM Resolution dated 04.01.2019 and the guidelines governing TBCB.

THE LEGAL FRAMEWORK

5. It would be advantageous to bear in mind the legal regime governing the field, to aid in comprehending the issues urged for consideration, before narrating the factual matrix, in its chronology. Since the subject matter of this dispute concerns development of a transmission asset, our focus will primarily be on statutory and regulatory provisions relevant to transmission licensing, operation, maintenance, tariff etc.

6. The subject of "*Electricity*" is included (entry 38) in the concurrent list of the Seventh Schedule appended to the Constitution of India. It is, however, governed by the Electricity Act, 2003 (Act no. 36 of 2003), passed by Parliament, brought into force from 10.06.2003. The law has been enacted with the avowed aims, *inter alia*, of "*taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalisation of electricity tariff, ensuring transparent policies regarding subsidies, promotion of efficient and environmentally benign policies*" and to achieve these objectives it has created a special machinery including the *Central Electricity Authority* ("CEA"), the *Electricity Regulatory Commissions* ("ERCs") and this *Appellate Tribunal*, besides other fora and agencies. While delicensing the

activity of generation of electricity, it has streamlined the related business of transmission, distribution and trading in electricity, bringing them under the control, watchful gaze or oversight of the regulatory authorities. It is important to bear in mind that by virtue of the proviso to Article 162 of the Constitution of India, the executive power of the State is "*subject to, and limited by, executive power expressly conferred by (the) Constitution or by any law made by Parliament upon the Union or authorities thereof*".

7. The Electricity Act has established the *Central Electricity Authority* ("CEA"), by Section 70, conferring upon it the status of a high-level expert body with major role in guiding the electricity sector on the path of achieving the objective of ensuring availability of cost-effective quality power to each nook and corner of the country. Its functions and role are laid down thus:

> "*73. Functions and duties of Authority.– The Authority shall perform such functions and duties as the Central Government may prescribe or direct, and in particular to–*
>
> *(a) advise the Central Government on the matters relating to the national electricity policy, formulate short-term and perspective plans for development of the electricity system and co-ordinate the activities of the planning agencies for the optimal utilisation of resources to subserve the interests of the national economy and to provide reliable and affordable electricity for all consumers;*
>
> *(b) specify the technical standards for construction of electrical plants, electric lines and connectivity to the grid;*
>
> *(c) specify the safety requirements for construction, operation and maintenance of electrical plants and electric lines;*
>
> *(d) specify the Grid Standards for operation and maintenance of transmission lines;*
>
> *(e) specify the conditions for installation of meters for transmission and supply of electricity;*
>
> *(f) promote and assist in the timely completion of schemes and projects for improving and augmenting the electricity system;*
>
> *(g) promote measures for advancing the skill of persons engaged in the electricity industry;*
>
> *(h) advise the Central Government on any matter on which its advice is sought or make recommendation to that Government on any matter if, in the opinion of the Authority, the recommendation would help in improving the generation, transmission, trading, distribution and utilisation of electricity;*
>
> *(i) collect and record the data concerning the generation, transmission, trading, distribution and utilisation of electricity and carry out studies relating to cost, efficiency, competitiveness and such like matters;*

(j) make public from time to time the information secured under this Act, and provide for the publication of reports and investigations;
(k) promote research in matters affecting the generation, transmission, distribution and trading of electricity;
(l) carry out, or cause to be carried out, any investigation for the purposes of generating or transmitting or distributing electricity;
(m) advise any State Government, licensees or the generating companies on such matters which shall enable them to operate and maintain the electricity system under their ownership or control in an improved manner and where necessary, in co-ordination with any other Government, licensee or the generating company owning or having the control of another electricity system;
(n) advise the Appropriate Government and the Appropriate Commission on all technical matters relating to generation, transmission and distribution of electricity; and
(o) discharge such other functions as may be provided under this Act."

8. The provisions contained in sections 14 and 15 of Electricity Act which deal with grant of license may be extracted, to the extent necessary, for the present discussion:

"*14. Grant of licence.–The Appropriate Commission may, on an application made to it under section 15, grant a licence to any person–*
(a) to transmit electricity as a transmission licensee; or
(b) to distribute electricity as a distribution licensee; or
(c) to undertake trading in electricity as an electricity trader,
in any area as may be specified in the licence:

Provided that any person engaged in the business of transmission or supply of electricity under the provisions of the repealed laws or any Act specified in the Schedule on or before the appointed date shall be deemed to be a licensee under this Act for such period as may be stipulated in the licence, clearance or approval granted to him under the repealed laws or such Act specified in the Schedule, and the provisions of the repealed laws or such Act specified in the Schedule in respect of such licence shall apply for a period of one year from the date of commencement of this Act or such earlier period as may be specified, at the request of the licensee, by the Appropriate Commission and thereafter the provisions of this Act shall apply to such business:

Provided further that the Central Transmission Utility or the State Transmission Utility shall be deemed to be a transmission licensee under this Act:

…

Provided also that a distribution licensee shall not require a licence to undertake trading in electricity.

15. Procedure for grant of licence.–(1) Every application under section 14 shall be made in such form and in such manner as may be specified by the Appropriate Commission and shall be accompanied by such fee as may be prescribed.

(2) Any person who has made an application for grant of a licence shall, within seven days after making such application, publish a notice of his application with such particulars and in such manner as may be specified and a licence shall not be granted–

(i) until the objections, if any, received by the Appropriate Commission in response to publication of the application have been considered by it:

Provided that no objection shall be so considered unless it is received before the expiration of thirty days from the date of the publication of the notice as aforesaid;

(ii) until, in the case of an application for a licence for an area including the whole or any part of any cantonment, aerodrome, fortress, arsenal, dockyard or camp or of any building or place in the occupation of the Government for defence purposes, the Appropriate Commission has ascertained that there is no objection to the grant of the licence on the part of the Central Government.

(3) A person intending to act as a transmission licensee shall, immediately on making the application, forward a copy of such application to the Central Transmission Utility or the State Transmission Utility, as the case may be.

(4) The Central Transmission Utility or the State Transmission Utility, as the case may be, shall, within thirty days after the receipt of the copy of the application referred to in sub-section (3), send its recommendations, if any, to the Appropriate Commission:

Provided that such recommendations shall not be binding on the Commission.

(5) Before granting a licence under section 14, the Appropriate Commission shall–

(a) publish a notice in two such daily newspapers, as that Commission may consider necessary, stating the name and address of the person to whom it proposes to issue the licence;

(b) consider all suggestions or objections and the recommendations, if any, of the Central Transmission Utility or the State Transmission Utility, as the case may be.

(6) Where a person makes an application under sub-section (1) of section 14 to act as a licensee, the Appropriate Commission shall, as far as practicable, within ninety days after receipt of such application,–

(a) issue a licence subject to the provisions of this Act and the rules and regulations made thereunder; or

(b) reject the application for reasons to be recorded in writing if such application does not conform to the provisions of this Act or the rules and regulations made thereunder or the provisions of any other law for the time being in force:
Provided that no application shall be rejected unless the applicant has been given an opportunity of being heard.

(7) The Appropriate Commission shall, immediately after issue of a licence, forward a copy of the licence to the Appropriate Government, Authority, local authority, and to such other person as the Appropriate Commission considers necessary.

(8) A licence shall continue to be in force for a period of twenty-five years unless such licence is revoked."

9. The Electricity Act makes provision for both *inter-State* and *intra-State* transmission of electricity. The transmission of electricity "*within a State*" is the responsibility of the State Commission (in contrast of Central commission which is responsible for the *inter-State activities*), Section 30 declaring that it is the said regulator (State ERC) which "*shall facilitate and promote transmission, wheeling and inter-connection arrangements within its territorial jurisdiction for the transmission and supply of electricity by economical and efficient utilisation of the electricity*". The Electricity Act conceives of transmission utilities both at the Central and State levels. The role ascribed to the State Transmission Utility ("STU") is provided in Section 39 as under (quoted to the extent germane):

"*39. State Transmission Utility and functions.–(1) The State Government may notify the Board or a Government company as the State Transmission Utility:*

…

Provided further that the State Government may transfer, and vest any property, interest in property, rights and liabilities connected with, and personnel involved in transmission of electricity, of such State Transmission Utility, to a company or companies to be incorporated under the Companies Act, 1956 (1 of 1956) to function as transmission licensee through a transfer scheme to be effected in the manner specified under Part XIII and such company or companies shall be deemed to be transmission licensees under this Act.

(2) The functions of the State Transmission Utility shall be–

(a) to undertake transmission of electricity through intra-State transmission system;

(b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with–

(i) Central Transmission Utility;

(ii) State Governments;

(iii) generating companies;

(iv) Regional Power Committees;

(v) Authority;

(vi) licensees;

(vii) any other person notified by the State Government in this behalf;

(c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centers;

(d) to provide non-discriminatory open access to its transmission system for use by–

(i) any licensee or generating company on payment of the transmission charges; or

(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:

…"

10. There can be no dispute as to the fact that State Transmission Utility (STU) is the apex authority qua planning and implementation of *intra-State transmission system* of any State. In the State of Maharashtra, the functions of STU are vested with the respondent *Maharashtra State Electricity Transmission Company Limited* ("MSETCL"). As per Section 39 (2) of the Electricity Act, the STU has to not only undertake transmission of electricity, but has to discharge all functions of planning and coordination relating to intra-State transmission system with various entities, such as CTU, State Governments, generating companies, transmission system users ("TSU"), Central Electricity Authority, etc. The STU is required to reflect the major planning initiatives qua intra-State transmission system it is contemplating in the periodic five-year plans. It was brought out in particular context of State of Maharashtra, that the STU (MSETCL) has been publishing its five-year

plans accordingly, such plans being structured in such a way that they have a continuance and roll over in the sense that the first year upon elapse is replaced by another year being added at the far end (e.g. 2010-11 to 2014-15; 2011-12 to 2015-16; 2012-13 to 2016-17 and so on).

11. The transmission licensees discharge very important role vis-à-vis electricity sector in as much as it is the infrastructure maintained by them which facilitates transmission or wheeling of power from the source of generation to the end user. The statue prescribes the duties of such entity as under:

> **"***40. Duties of transmission licensees.–It shall be the duty of a transmission licensee–*
>
> *(a) to build, maintain and operate an efficient, co-ordinated and economical inter-State transmission system or intra-State transmission system, as the case may be;*
>
> *(b) to comply with the directions of the Regional Load Despatch Centre and the State Load Despatch Centre as the case may be;*
>
> *(c) to provide non-discriminatory open access to its transmission system for use by–*
>
> *(i) any licensee or generating company on payment of the transmission charges; or*
>
> *(ii) any consumer as and when such open access is provided by the State Commission under sub-section (2) of section 42, on payment of the transmission charges and a surcharge thereon, as may be specified by the State Commission:*
>
> *Provided that such surcharge shall be utilised for the purpose of meeting the requirement of current level cross-subsidy:*
>
> *Provided further that such surcharge and cross subsidies shall be progressively reduced in the manner as may be specified by the Appropriate Commission:*
>
> *Provided also that the manner of payment and utilisation of the surcharge shall be specified by the Appropriate Commission:*
>
> *Provided also that such surcharge shall not be leviable in case open access is provided to a person who has established a captive generating plant for carrying the electricity to the destination of his own use.*"
>
> (Emphasis supplied)

12. A bare reading of above provision makes it clear that the duties entrusted to the transmission licensees include not only maintaining or

operating the transmission system efficiently and economically but also build the same meeting requisite standards. It is trite that all activities relating to electricity industry depend on development, operation and maintenance of infrastructure and require heavy financial investments. India having adopted the policy of "*encouraging private sector participation in generation, transmission and distribution*" and "*distancing the regulatory responsibilities from the Government*", the Electricity Act was enacted with emphasis not only on "*safeguarding of consumers' interest*" but also on "*competition, efficiency, economical use of the resources, good performance and optimum investments*" balancing the interests by mandating "*recovery of cost of electricity in a reasonable manner*". Since the recovery of cost of electricity depends on *tariff determination* exercise, which covers not only the cost of generation but also its transmission (and distribution etc.), it is but natural that the principles prescribed for guiding such process be of utmost importance.

13. We, thus, take note of Sections 61 to 63, all of which fall in Part-VII of the statute governing the subject of "*Tariff*". The provisions read thus:

> "*Section 61: Tariff regulations:*
>
> *The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:-*
>
> *(a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
>
> *(b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
>
> *(c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
>
> *(d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
>
> *(e) the principles rewarding efficiency in performance;*
>
> *(f) multi year tariff principles;*

(g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;
(h) the promotion of co-generation and generation of electricity from renewable sources of energy;
(i) the National Electricity Policy and tariff policy:

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.

Section 62: Determination of tariff:

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee:
Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;
(c) wheeling of electricity;
(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

Section 63: Determination of tariff by bidding process:

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

14. Clearly, Section 61 contains the broad principles for guidance of the Regulatory Commissions qua determination of tariff. Some of the quintessential factors relevant for the matter at hand include the values and methodologies laid down by the *Central Electricity Regulatory Commission* – for short, "CERC" or "the Central Commission" - which are applicable for generating companies and transmission licensees [section 61(a)]; features that encourage efficiency, economical use of the resources, good performance, optimum investments, apart from encouraging competition [section 61(c)]; and the principles rewarding efficiency in performance [section 61(e)].

15. Section 62 deals with the power of an *Electricity Regulatory Commission* (for short, "ERC" or "the Commission") to determine tariff for generation, transmission and wheeling of electricity. Pertinent to add here that this is also often referred to as the *Regulated Tariff Mechanism* (for short, "RTM route") whereby tariff is determined in accordance with the tariff regulations framed under section 61. In contrast, Section 63 deals with the

Tariff Based Competitive Bidding (for short, "TBCB") route, the responsibility of the ERC being to adopt the bid discovered tariff after ascertaining and reaching the satisfaction that the selection has been made by a transparent process of competitive bidding held in accordance with the guidelines framed on the subject by the Central Government. Thus, the former provision (Section 62) generally deals with determination of tariff for generation, distribution and transmission assets implemented or developed under a *non-bidding route*. The battle at hand is waged essentially on the theme that RTM route is now redundant and must give way to TBCB route.

16. There exists a direct correlation and harmony, *inter-se*, the provisions of section 15 and Sections 62 & 63. With respect to section 62 route, a transmission license under section 15 can only be granted to an entity which has applied to develop a transmission project under such route. For the said purpose, while granting a transmission license under section 15, the license grant order contains the fact qua implementation of the project under Section 62. In fact, even in a section 63 bidding process, a transmission license is granted only after a bidder has become successful. This is evident from reading of the Clause 12.1 of the bidding guidelines requiring the "*Finally selected bidder*" to "*make an application for grant of transmission license to the appropriate Commission within one month of selection*".

17. As noted earlier, the grant of license for the specified activities (here, the transmission) is a matter within the domain of the appropriate Commission – here the MERC. In considering the application for grant of license for transmission, the Commission is expected to take into account the views of the STU and appropriate Government, the latter in the case at hand being the Government of State of Maharashtra, represented by the Empowered Committee (EC) established by it in January 2019, it being a party respondent herein.

POLICY & REGULATORY FRAMEWORK

18. The Central Government, in exercise of its power under Section 3 of the Electricity Act, 2003, had notified the *National Electricity Policy* as well as *Tariff Policy* in 2006. As would be noticed in due course, the Tariff Policy was revised in 2016. Earlier, in exercise of its power under Section 181 of the Electricity Act, the State Commission (MERC) had notified the *Maharashtra Electricity Regulation Commission (Transmission Licence Conditions) Regulations, 2004* ("the Transmission License Regulations").

19. On 13.04.2006, the Ministry of Power ("MoP"), Government of India ("GoI") had notified the *Tariff Based Competitive Bidding Process Guidelines* ("TBCB Guidelines") *for Transmission Service* with an objective to promote competitive procurement of transmission services, encourage private investment in transmission lines, transparency in procurement, and protect consumer interest by facilitating competitive conditions in the procurement of transmission services. On same date (i.e. 13.04.2006), the MoP also notified *Guidelines for Encouraging Competition in Development of Transmission Projects* ("Development Guidelines") thereby constituting an *Empowered Committee* ("EC") to perform the specified functions, viz. to identify and facilitate (a) projects to be developed under this Scheme; (b) preparation of bid documents and invitation of bid through a suitable agency; (c) evaluation of bids; (d) finalization and signing of Transmission Service Agreement (TSA) between the developer and concerned utilities; and (e) development of project under the Scheme. There can be no quarrel with the proposition that both these Guidelines for Encouraging Competition are also subject and subservient to the provisions of the Electricity Act read with the Tariff Policy.

20. On 28.01.2016, the MoP in GoI notified the revised National Tariff Policy, 2016, the following part of the communication issued being relevant here:

> *"5.0 GENERAL APPROACH TO TARIFF*
>
> *5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees.*
>
> ***5.2*** *All future requirement of power should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a company owned or controlled by the State Government as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 100% of the existing capacity.*
>
> *Provided further that the Appropriate Commission, as defined in the Electricity Act, 2003, shall ensure that in case of expansion of such projects, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumers through tariff.*
>
> *Provided also that the State Government can notify a policy to encourage investment in the State by allowing setting up of generating plants, including from renewable energy sources out of which a maximum of 35% of the installed capacity can be procured by the Distribution Licensees of that State for which the tariff may be determined under Section 62 of the Electricity Act, 2003.*
>
> *Provided that notwithstanding the provision contained in para 5.11(j) of the policy, the tariff for such 35% of the installed capacity shall be determined by SERC.*
>
> *However, the 15% of power outside long term PPAs allowed under para 5.7.1 of National Electricity Policy shall not be included in 35% allowed to be procured by Distribution Licensees of the State.*
>
> *5.3 The tariff of all new generation and transmission projects of company owned or controlled by the Central Government shall continue to be determined on the basis of competitive bidding as per the Tariff Policy notified on 6thJanuary, 2006 unless otherwise specified by the Central Government on case to case basis.*
> *Further, intra-state transmission projects shall be developed by State Government through competitive bidding process for projects*

costing above a threshold limit which shall be decided by the SERCs."

(Emphasis supplied)

21. It is vivid from the above that the Tariff Policy, 2016 rooted for intra-State Transmission Projects to be developed by TBCB process above certain threshold limit, which is to be decided by the respective SERCs.

22. The Electricity Act has established, among others, a statutory body called *Forum of Regulators* ("FoR"), by provision contained in Section 166. It is headed *ex officio* by the Chairperson of the CERC, the Chairpersons of the *State Electricity Regulatory Commissions* ("SERCs") being its *ex officio* members. The idea of this forum is to create a platform for the regulators to confabulate as indeed learn or gain from experience of each other, and bring about uniformity in approach and action-plan in furtherance of the objectives of the law and State policy. No doubt, the resolutions adopted by the FoR are in the nature of recommendations and do not have biding effect.

23. The FoR in its 61st Meeting held on 22.09.2017 discussed the action to be taken by States in order to decide the threshold limit for developing intra-State Transmission Projects through TBCB and resolved as under:

"*The forum observed that in order to encourage transparency and efficiency in project costs, threshold limit for Intra State Transmission Projects is required to be determined by the SERCs as provided for in the Tariff Policy. Therefore, the Forum urged the members to determine the threshold limit for their respective state level transmission projects, while taking all relevant parameters of their state into consideration."*

(Emphasis supplied)

24. The GoM passed a Resolution, on 04.01.2019 (hereinafter referred to as "the GoM GR" or "GR dated 04.01.2019"), establishing its own *Empowered Committee* ("EC") to consider award of intra-state transmission projects for development under TBCB route, in accordance with the *TBCB Guidelines* and *Development Guidelines* dated 13.04.2006 issued by the

MoP of GoI. The document ("GoM GR dated 04.01.2019") was issued statedly in vernacular (Marathi) and its English translation, agreed upon by both contending parties, runs thus:

> *"For establishing new Transmission Projects, after considering the guidelines issued by the Central Government for the State Government has decided to implement Tariff Based Competitive Bidding-TBCB process for new Projects. An Empowered Committee as mentioned below is being constituted to undertake Transmission Project works in accordance with Central Government's guideline*
> *2. The functions of the said committee are as follows: -*
> *A) To provide impetus to new transmission projects in the State through this plan.*
> *B) Selection of transmission projects according to recommendations of State Transmission Undertaking.*
> *C) Helping in evaluation of received tenders as well as formation of Bid Empowered Committee."*
>
> (Emphasis supplied)

25. Since reference has been made to it in support of some arguments raised in the appeal at hand respecting the role of the STU in grant of approval by the ERC to an applicant for transmission license, it is necessary to also note the following provisions of *MERC Grid Code, 2006*, framed by the State Commission, in exercise of its statutory functions:

> *"8.4 The transmission system plan shall describe the plan for the InSTS and shall include the proposed intra-State transmission schemes and system strengthening schemes for the benefit of all Users:*
> *…*
> *12.7 STU may consult stakeholders such as Generators, SLDCs, Transmission Licensees and Distribution Licensees including Indian Railways and seek such information from InSTS User as may be required by it, including generation capacity addition, system augmentation and long-term load estimate and all applications for open access.*
> *…*
> *12.9 Transmission system plan prepared by the STU shall consist of the following sections:*

a) Executive summary of Transmission plan shall clearly indicate location of existing and proposed EHT substations, connecting lines, no. of bays at each voltage level with details of present occupancy and availability for future expansion.

…

14.2.2 Transmission Licensees and Users shall provide the following data to the STU from time to time in standard formats as provided by the STU:

a) Preliminary project planning data;
b) Committed project planning data; and
c) Connected planning data.

Provided that the STU shall provide a date for submission of information in the said formats, after providing reasonable time to Transmission Licensees and Users:

Provided that the STU shall develop standard formats, for submission of abovementioned data, within one month from notification of these Regulations and make the same available on its website:

Provided also that the STU shall be guided by the formats, developed for submission of abovementioned data, under the provisions of IEGC.

…

14.3.2 Detailed Planning Data shall be furnished by the Users and Transmission Licensees as and when requested by the STU."

26. The STU indisputably is obliged to publish its five-year plan as per the State Grid Code and its format as per these Regulations includes *schemes with the licensee's name*, this being the practice consistently adopted and followed throughout.

27. Reliance is also placed on a development which is subsequent to the impugned decision. It has been pointed out that, on 15.03.2021, the MoP in GOI issued a Notification highlighting the importance of the TBCB process and recommended its adoption for intra-State Transmission Projects.

"6. In line with provisions of the Tariff Policy 2016, generally inter-state transmission systems are developed through competitive bidding only, except for certain categories of transmission system as specified in the Tariff Policy, 2016. With adoption of Tariff Based Competitive Bidding for development of transmission system, following key benefits have been observed:

(i) Lower Tariff compare to Cost Plus: with large number of bidders participating in development of a transmission project, discovered tariff

for a transmission project can be lower than cost-plus tariff by about 30-40%.

(ii) Less burden on government finances: it will attract private investment's for development of projects, and scarce government fund can be spared for other priority sectors.

(iii) Risk sharing: it encourages risk sharing with private sector. Innovative Technology, it encourage use of advanced technology for improving cost and efficiency.

7. As Intra-state Transmission system has major share in the transmission sector in the country, adoption of Tariff Based Competitive Bidding (TBCB) in development of intra-state transmission system can effectively reduce burden on State Government finances as well as reduce tariff of intra State transmission system leading to consumer benefit. The matter was also discussed in a meeting taken by Hon'ble Union Minister of State (Independent Charge) for Power and New and Renewable Energy on 03.02.2021 and it was decided to request the State/UT Government to adopt TBCB in development of intra-state transmission system."

[Emphasis supplied]

28. We now proceed to the controversy at hand.

BACKGROUND FACTS

29. The parties have referred to the events leading to the passage of the impugned order, right from the times when the very idea of the project was conceptualized, in fact a little prior to that. We may trace it at the outset, to the extent necessary.

30. The project which is subject matter of the dispute is dependent on what is described as *High Voltage Direct Current (Voltage Source Convertor*) – in short, *HVDC (VSC based technology)*, concededly a technology by which unidirectional bulk power can be transmitted more efficiently, using underground cables, with less transmission losses over long distances. The alternative technology the use of which was under consideration of the authorities that be for some period is described as *High Voltage Alternating Current* ("*HVAC"*) which, it is explained, by contrast generally uses Overhead transmission lines.

31. We must note here that the events mentioned hereinafter occurred after the Central government had notified the *National Tariff Policy-2006* and also the *TBCB Guidelines* as indeed the *Development Guidelines* (both dated 13.04.2006). Some changes in the Tariff Policy would come in 2016, even while the events relevant here were unfolding, which shall be noted in due course of chronology.

32. The idea of the transmission project in question planned to bring additional quantum of electricity to Mumbai at place called *Aarey*, as indeed another similar scheme involving a sub-station at place named *Vikhroli* took shape and evolved simultaneously, survey having been commissioned and executed by *Reliance Energy Limited*, a subsidiary of *Reliance Infrastructure Limited* – in short, "R-Infra" (predecessor of AEML) and TPC (holding company of the appellant) respectively. Both said entities had taken the proposals to the MSETCL (STU) simultaneously if not together for consideration. Based on the deliberations and preliminary scrutiny with inputs from the proponents, the STU, concerned as it was with the issue of growing demand of power for Mumbai's load centers, addressed a communication to the CEA, on 12.11.2007, stating as under:

> *"M/s Reliance energy (REL) and M/s Tata Power Co. Ltd. (TPC) has carried out necessary survey and accordingly M/s REL has proposed to connect Mumbai new location to Ghodbunder partly by overhead line and partly by underground cables. Further, M/s REL also proposed to connect Mumbai New Location to Aarey by HVDC (VSC based technology).*
>
> *M/s TPC has planned to establish a 220 kV substation at Vikhroli and have existing Salset, Dharavi and Trombay substations. These substations will be fed from 440 kV proposed substation at Ghatkopar.*
>
> *State Transmission Utility (STU) office would appoint a Consultant who is having sufficient knowledge in VSC based HVDC technology for finalizing the scheme, subject to M/s REL agreeing to bear the cost of the same."*
>
> (Emphasis supplied)

33. On 05.05.2009, the MSETCL notified its Five-Year Plan for Financial Years (FY) 2010-11 to 2014-15, wherein High Voltage Direct Current ("HVDC") technology was envisaged to be used for the subject transmission project, mooted by R-Infra and endorsed by the STU.

34. The urgency of the proposal to create transmission infrastructure of above nature became more pronounced when, in November 2010, Mumbai experienced Partial Grid Disturbance. In the wake of such event, a committee was constituted (in 2010) by MERC, under Chairmanship of Prof. Dr. Khaparde (IIT Mumbai), to study the situation and make its recommendations for commissioning of a 700 MW Transmission Project. The said Committee published its report titled "*Partial Grid Disturbance in Mumbai*" ("IIT Report") in June 2011, recommending, *inter alia*, creation of requisite infrastructure, particularly rooting for HVDC Technology as a long-term solution for ensuring reliability of power supply for Mumbai for the proposed Transmission Project, with a 2x350 MW HVDC (VSC) based transmission link for Mumbai, identifying it as a critical bulk power injection scheme.

35. On 11.08.2011, allowing its request, the MERC granted Transmission License No.1/2011 to R-Infra. It may be added here that Adani Electricity Mumbai Limited would later acquire R-Infra on 29.08.2018. The Adani Electricity Mumbai Limited - Transmission ("AEML-T") subsequently took over as Licensee under the said Transmission License No.1/2011, with approval of MERC.

36. In December 2011, the Standing Committee of MERC submitted a report titled "*5-year Business plan for Mumbai Metropolitan Region*", recommending creation of requisite infrastructure, laying emphasis on the need of the Transmission Project based on HVDC Technology, reference being made to the following part of the said Report:

"Such implementation model can be easily replicated for development of all EHV Scheme (e.g. 400 kV infrastructure backbone). The VSC based HVDC project scheme may be perceived to be now amenable to competitive bidding due to extensive technical expertise requirement and limited number of operational experience, however, with growing number of international players/ technology supplies eg. ABB, Siemens, Areva etc. and project implementation experience in India, even VSC based HVDC, can be suitably structured to garner advantages of competitive bidding route. From the consumer/ transmission user perspective, the risk of sharing under such schemes can be better accomplished through competitive bidding route rather regulated tariff route under cost plus regime. Hence, it is strongly recommended that State Government (GOM) may be persuaded to formulate appropriate Guidelines and appointed Bid Process Co-ordinator to take up such schemes on urgent basis, as has been undertaken in other states for Development of transmission schemes."

37. On 01.02.2013, R-Infra (now AEML-T) submitted a *Detailed Project Report* ("DPR") to MERC for the appointment of a consultant for its proposed *2x500 MW HVDC* (VSC based) transmission line from MSETCL's 400 kV *Nagothane* sub-station to AEML-T's 220 kV *Aarey* substation ("*Transmission Project based on HVDC Technology*"). The MSETCL (the STU) took up the said DPR for considering its inclusion in its 5 Year Plan, as intimated by it to MERC by letter dated 07.03.2013. The STU concededly confirmed to MERC that R-Infra's Transmission Project based on HVDC Technology was a part of the Five-Year Plan 2013-14 to 2017-18 of the STU and also that AEML-T (then R-Infra) had been identified as the implementing utility. On 05.04.2013, MERC granted an *in-principle* approval to R-Infra (now AEML-T) for the hiring of a consultant for its Transmission Project based on HVDC Technology, also directing R-Infra to submit quarterly progress reports in such regard.

38. On 21.08.2013, MSETCL (the STU) granted its approval for grid connectivity to R-Infra (now AEML-T) Transmission Project based on HVDC Technology, for HVDC link between Nagothane and Aarey (as the scheme then stood), subject to compliance with various conditions including one

about its completion, mandating the proponent R-Infra (now AEML-T) to carry out works in terms of the scope adumbrated therein, the relevant part of said communication being as under:

> "*With reference to above you have applied for grid connectivity for proposed +320KV 2X500 MW HVDC link between NagothaneS/stn (MSETCL) and Aarey S/stn (Rinfra). Also the said project is included in STU 5 year plan and recommended in MMR 5 year plan submitted to MERC. Accordingly, your application is processed for grid connectivity of proposed +320 KV 2x 2x500 MW HVDC – IGBT VSC based link between Nagothane (MSETCL and Aarey (RInfra).*"
>
> (Emphasis supplied)

39. On 07.11.2013, A meeting was convened by MERC wherein the representatives of MSETCL, MSETCL, Energy Department of GoM and R-Infra (now AEML-T) participated, the proposal relating to augmenting injection of power into the city of Mumbai through a transmission system with HVDC Technology having been considered and approved, it being noted that embedded generation in the city of Mumbai could not be increased due to space constraints and environmental issues, the proponent R-Infra being called upon to submit the DPR for the approval of the MERC by December, 2013.

40. On 20.11.2013, in a meeting participated by MSETCL and R-Infra concerning HVDC connectivity to the Aarey substation, a rethink on the route of the transmission line came up for deliberations and it was recorded in the minutes as under:

> "*Director (Operations) suggested that R-Infra can avail connectivity from 400kV Kudus (MSETCL) substation which is much near to Aarey substation (R-Infra) as compared to 400kV Nagothane (MSETCL) substation (125km). Proposed 400 kV Kudus (MSETCL) substation will be commissioned within 2 years. 400kV Kudus S/s will have a strong source of 765 kV Kudus (PG) and other 400kV network from Vapl (PG), 400kV Babhaleswar (MSETCL), 400kV Nashik (MSETCL),*

400 kV Padghe (MSETCL) 400kV Bolsar (PG) compared to 400 kV Nagothane (MSETCL) s/s. Therefore, 400kV Kudus substation is a better option for HVDC connectivity. The route cable linkage cost will be considerably lower.

…

R-Infra expressed their concern to consider the revision scope of connectivity that was decided by the Standing Committee. R-Infra already initiated procurement of land near Nagothane (MSETCL) s/s and detail survey. All required clearance proposals are initiated by R-Infra for which approvals are in a pipeline and at this stage it is very difficult to consider the new proposal.

Director (Operations) agreed to R-Infra's concern however, advised R-Infra to examine the suggested proposal in detail and submit their observations/ comments."

(Emphasis supplied)

41. The thrust of the above was that possibility of connectivity from Kudus instead of Nagothane to Aarey was expected to be considered by all concerned, the planners and the proponents etc.

42. R-Infra submitted its DPR for the Transmission Project based on HVDC Technology on 14.02.2014 and forwarded its compliance in respect of the issues assigned to it as per the decisions taken on 07.11.2013 at the meeting with the STU on 28.02.2014 seeking '*In Principle*' approval for allotment of land for the then HVDC Project. In March 2014, MERC raised queries of R-Infra, by communications dated 24.03.2014 and 29.03.2014, respecting data gaps on the application for approval of DPR filed by the latter (R-Infra) on 14.02.2014, the prime concerns being as to whether amendment of the license was imperative because the DPR under consideration was not part of the license of R-Infra and as to current status of land acquisition for the Project at Nagothane and Aarey end-points. The project proponent (R-Infra) responded by reply on 30.03.2014 apprising MERC that R-Infra would make an application for a Transmission License or Amendment of existing License when the DPR had been approved; the land had been identified at Aarey and Nagothane the same being owned by Dairy Department of

Government of Maharashtra and locals or farmers respectively, follow up process having been initiated in respect of former and being in advanced stage of discussion for the latter. The reply while indicating gestation period also stated that the proponent had undertaken certain activities viz. floating of enquiry for consultancy, conduct of pre-bid meeting, submission of bids by consultants the bid evaluation being in progress.

43. On 10.04.2014, the MERC granted *in-principle* approval to R-Infra for the DPR for the erection of the proposed Transmission Project based on HVDC Technology, the scheme having been described at that stage as 2x500 MW HVDC (VSC based) transmission line from MSETCL's 400kV *Nagothane* substation to R-Infra 220kV *Aarey* substation, conditional upon it (R-Infra) filing an application for amendment of its transmission license for addition of an asset into the scope of work as transmission licensee. Pertinent to add here that the copies of this communication were also endorsed to various stake-holders including Prayas Energy Group, Vidarbha Industries Association, Mumbai Grahak Panchayat, SICOM Ltd. and Thane Belapur Industries Association, the process indisputably being in public domain.

44. On 10.11.2014, at the meeting of the Steering Committee of STU (including all the constituent Utilities), R-Infra made its presentation in respect of the Transmission Project, and the use of HVDC technology informing, *inter alia*, that the Transmission Scheme based on HVDC Technology was proposed to be commissioned during FY 2019-20.

45. Around this period, however, the STU started entertaining doubts as to advisability of use of HVDC technology. On 05.01.2015, it (MSETCL) shifted its position and came up with a revised scheme for strengthening Mumbai's transmission system, proposing a 400KV Kudus (MSETCL) - Aarey (MSETCL) HVAC O/H Scheme ("*Transmission Project based on HVAC Technology*") from Kudus to Aarey instead of the Transmission

Project based on HVDC Technology mooted by R-Infra. In the communication on the subject addressed to the MERC, it was stated thus:

> *"9) … the HVDC project of R-Infra T is reviewed considering uncertainties in source generation and upcoming strong source of 400 kV Kudus at much shorter distance (approx. 80 km) than 400 kV Nagothane S/s. Therefore, considering the above changes in network configuration, it is proposed to establish 400 kV substation in Mumbai for the enhancement of Transmission corridor capacity to Mumbai system through 400 kV D/C Quad line from 400 kV Kudus (MSETCL) substation. This will enhance the transmission capacity by 1500 -2000 MW.*
>
> *...*
>
> *11) The scope of proposed scheme for above purpose is as given below;*
>
> i) *400 kV Kudus (MSETCL)-400 kV Aarey (MSETCL) D/c (sic. Double circuit) quad line-80 km.*
>
> ii) *400/220 kV, 2x500 MVA ICTs.*
>
> iii) *220 kV Interconnection between 400/220 kV Aarey and proposed 220 kV Goregaon Film city with bays.*
>
> iv) *6x220 kV bays for 220 kV interconnection with TPC and RInfra (T) lines.*
>
> v) *400 kV spare bays for interconnection with 400 kV Vikhroli (TPC).*
>
> vi) *400/220 kV, 2x500 MVA ICTs for future expansion.*
>
> *The Scheme of establishment of 400 kV Aarey (MSTECL) will be included in five-year STU Plan 2015-16 to 2019-20 for commissioning during 2017-18. The HVDC project stands cancelled for the reasons as mentioned above. Necessary DPR of the Scheme will be submitted to Hon'ble Commission in due course of time for in-principal clearance*."
>
> (Emphasis supplied)

46. The above proposal of MSETCL for cancellation of the HVDC Technology was opposed by R-Infra by communication issued on 23.01.2015 to MSETCL, offering at the same time to change the inter-connection point from Nagothane to Kudus, as recommended by MSETCL in aforementioned meeting dated 20.11.2013 and letter dated 05.01.2015, the relevant part of the letter reading thus:

"We refer to the cope of your letter addressed to the Secretary, MERC- ref no. MSETCL/CMD/STU/No.0199 dated 05the January 2001, received by us on 6th January 2015. This letter MSETCL has proposed cancellation of HVDC VSC based Scheme (2X500 MW Nagathone – Aarey) and proposed 500KV AC scheme with over head transmission Line from Kudus (MSETCL)- Aaray (MSETCL)….
In view of the above, we would reiterate that the HVDC (VSC based) Scheme, as approved, except for relocation of injection point to Kudus, should be continued."

47. We may recall here that on 28.01.2016, the Central Government had promulgated the revised National Tariff Policy, 2016 the relevant parts whereof have already been taken note of. It needs to be borne in mind that the thrust of the revised policy is on "*introducing competition in different segments of the electricity industry*", one of the key features of the Electricity Act, 2003, it expected to "*lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations*", the insistence being that all *future* requirement of power "*should continue to be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a company owned or controlled by the State Government as an identified developer*", it being expected that the ERCs "*shall ensure that in case of expansion of such projects, the benefit of sharing of infrastructure of existing project and efficiency of new technology is passed on to consumers through tariff*" and that the "*tariff of all new generation and transmission projects of company owned or controlled by the Central Government shall continue to be determined on the basis of competitive bidding as per the Tariff Policy notified on 6th January, 2006 unless otherwise specified by the Central Government on case to case basis"*. In the particular context of the *"intra-state transmission projects"*, the policy would insist that the same "*shall be developed by State Government through competitive bidding process for projects costing above a threshold limit which shall be decided by the SERCs*".

48. We may observe here itself that the National Tariff Policy, as revised in 2016, lays emphasis on competition in the matter of *new arrangements* for procurement of power excluding the cases of expansion of the existing projects though in context of latter the thrust is on securing the interests of consumers at large by sharing of existing infrastructure and infusion of efficiency through new technology. The Central Government has called upon the State Governments to adopt the TBCB route for new intra-State transmission projects but given to them the discretion to decide on the minimum threshold limit in matter of project costs. Concededly, the decision is in the hands of the State ERCs after consultation with stake-holders including the State Government, STU, etc. Admittedly, the MERC has not yet taken a decision on the threshold limit.

49. Having considered the submission that the reply of STU was awaited at the time – quite apparently in the context of change of its view about advisability of utility or feasibility of the technology recommended earlier and the objections raised by R-Infra in such regard, while undertaking review of "*capex schemes approved for R-Infra-T*", by its order issued on 02.05.2016, MERC cancelled the in-principle approval granted for the HVDC technology to be employed for the transmission Project.

50. As noted earlier, AEML-T acquired R-Infra on 29.08.2018. On 12.09.2018, the MERC, by its order in Case No.201/2017 (for Truing up), directed AEML-T to file the petition of amendment of its Transmission License four months prior to filing the next ARR Petition, expecting it to ensure that the assets position in the Transmission License were accurate and updated.

51. There is no contest to the fact that in view of the challenges in overhead (O/H") transmission system and *Right of Way* ("RoW") issues in the congested city of Mumbai, the HVAC Technology proposed by MSETCL never took off and was eventually given up, the STU having made an about-

turn on its position yet again to revert to HVDC. The MERC remained concerned about the capacity of utilities in State of Maharashtra in general, and Mumbai city in particular, to meet the growing demands for electricity supply. It had convened a meeting of its Standing Committee on 29.01.2018 on the subject of "*Strengthening electricity supply system to Mumbai city*", and reconsidered the need for Transmission Project based on HVDC Technology for bulk power injection in Mumbai. Clearly, the Commission had had a rethink and was now veering around to the view that recall of earlier decisions on the subject of technology at the instance of the STU was incorrect and itself required a revisit. On 02.01.2019, the Commission would pass order in Case No.249/2018 (BEST petition for approval of PPA), expressing concerns respecting the transmission constraints of Mumbai observing that *"… Without strengthening of Mumbai transmission system, it would be difficult to meet the growing electricity demand of Mumbai city and its suburbs …"*.

52. In the midst of such deliberations as above, on 12.10.2018, the MERC in a meeting, *inter alia*, carried out review of the critical transmission schemes to overcome the transmission constraints being faced in Mumbai. Indisputably, in pursuance of the deliberations in the said meeting, AEML-T, submitted on 23.11.2018 an amended application for grid connectivity to MSETCL, for its 1000 MW HVDC (VSC based) link between MSETCL Kudus and AEML-T Aarey substations ("*Transmission Project based on HVDC Technology*"), and requested MSETCL to recommend to MERC that the project be included in its (AEML-T's) Transmission License.

53. It must be recalled here that on 04.01.2019, the State Government ("GoM") had constituted the Empowered Committee ("EC") by GoM GR "*to implement Tariff Based Competitive Bidding-TBCB process for new Projects*", the functions of the EC being inclusive of providing "*impetus to new transmission projects in the State*".

54. As mentioned earlier, the appellant (TPC-T) had been awarded the *Vikhroli Project* during 2011-2017 pursuant to which it (TPC-T) was responsible for developing 400kV *Khargar -Vikhroli Line* (hereinafter referred to as "*the Vikhroli project*"). However, due to lack of any progress, the MERC by its order passed on 29.01.2019, in Case No.03/2019, directed the STU to submit its recommendation concerning execution of 400 kV Vikhroli Transmission Project under TBCB as per GoM Resolution dated 04.01.2019 and for a credible mechanism to be setup for continuous monitoring to ensure that the Project remained on track to avoid further delay.

55. On 11.02.2019, MERC held a meeting with all stakeholders including the STU, wherein all critical transmission schemes, including the Transmission Project based on HVDC technology, and their progress were reviewed for resolving all the transmission constraints in Mumbai and decide on the way forward. Concededly, the issue concerning the transmission constraints was referred to CEA with a request to carry out requisite load flow studies and Mumbai Power System analysis. In the wake of the above, AEML-T addressed a letter of request on 26.03.2019 to CEA, seeking suggestions on bulk power injection scheme for strengthening of existing network of Mumbai, destination of HVDC termination (from feeding source like Kudus) in Mumbai Transmission System and suggesting the implementation of a VSC based underground cable system. On 11.04.2019, the STU referred the issue of appropriate Bulk power injection scheme for Mumbai to CEA and, on 28.05.2019, published its 5-year Plan (FYs 2018-19 to 2023-24) as per Section 39 of Electricity Act and Regulation 8 of MERC (State Grid Code) Regulations, 2006, including therein the AEML-T Transmission Project based on HVDC Technology aligning its views again with MERC.

56. The CEA responded to the letter dated 26.03.2019 of AEML-T on 13.06.2019, as under:

"4.0 With provision of 1000 MW feed from Kudus to Array it is observed that

i) All transmission elements are N-1 compliant (except for Kalwa-Mulund 220 kV S/C lines – 2 nos. This can be overcome by LILO of either Kalwa-Trombay 220kV S/C line or Kalwa-Borivali 220 kV S/C line at Mulund or by shifting of LILO at Bhandup from Mulund – Borivli 220 kV line to Kalwa-Borivali 220 kV line

ii) *The ladings on transmission elements are reduced.*

5.0 In view of above Kudus – Array 1000 MW HVDC link provides infeed to Mumbai as well as increases reliability. The link being VSC technology would also help in Voltage regulation.

6.0 Keeping in view future requirements, possibility of provisions in terms of RoW and space at Kudus for another 1000 MW may be explored along with Kudus to Array HVDC link. This second 1000 MW link could be extended to other suitable locations based on studies and implementation feasibility."

(Emphasis supplied)

57. The STU (MSETCL) confirmed the Kudus-Aarey 1000 MW HVDC Scheme on 27.06.2019. On 28.06.2019, MERC by a communication addressed to it (MSETCL) regarding "*Review of Mumbai Transmission Strengthening*" mandated thus:

"5. Considering the STU Plan of incorporating 2x500 MW Kudus-Aarey HVDC link for Mumbai region, and STU's confirmation vide its letter dated 27.06.2019, the Commission directs MSETCL/STU to take all necessary steps for expeditious execution of Kudus-Aarey 1000 MW HVDC link by AEML-T as per 5-year Transmission Plan of STU dated 28.05.2019 communication to Commission."

(Emphasis supplied)

58. On 01.08.2019, AEML-T filed a License Amendment Petition – Case No.195/2019, before MERC, seeking to include certain assets within its Transmission License, including the Transmission Project based on HVDC Technology. The STU (MSETCL), meanwhile, by its letter and email to AEML-T, forwarded MERC's letter dated 28.06.2019, highlighting that, on the basis of the study report of CEA dated 13.06.2019, it had confirmed (vide its letter dated 27.06.2019) that Transmission Project based on HVDC

Technology was required for injecting additional power into Mumbai as the link creates a separate additional transmission corridor.

59. On 03.01.2020, AEML-T submitted the Revised DPR to MSETCL for the Transmission Project based on HVDC Technology and requested its approval mentioning, *inter alia*, the history wherein the project had been earlier "*withdrawn in favour of 400 KV HVAC Overhead Connectivity between MSETCL Kudus and Aarey*".

60. On 03.01.2020, the second Respondent Adani Electricity Mumbai Infra Limited ("AEMIL"), one of the petitioners before the CERC, was incorporated, It Indisputably being a 100% owned subsidiary of the third Respondent Adani Electricity Mumbai Limited- Transmission ("AEML-T"), the other petitioner before CERC.

61. On 07.01.2020, TPC-T filed its suggestion/objections in Case No. 195 of 2019 in response to Public Notice dated 07.12.2019 by AEML-T stating that HVDC Scheme should be executed under TBCB as per the GoM GR dated 04.01.2019. On 13.01.2020, MSETCL forwarded the DPR for the Transmission Project based on HVDC Technology to the MERC for its approval. On 15.01.2020, MERC issued a letter to MSETCL ascertaining its recommendation on the Licence Amendment Application filed by AEML-T under Section 15 of the Act. On 22.01.2020, MSETCL, by its letter to MERC in the License Amendment Application of AEML -T (Case No. 195 of 2019), submitted that it had referred the Transmission Project based on HVDC Technology to the EC for consideration.

62. On 07.02.2020, AEML-T submitted the DPR for the Transmission Project based on HVDC Technology to MERC for in-principle approval, *inter alia*, stating thus:

> *"3. In line with the recommendations provided in both the above mentioned committees, the HVDC Scheme comprising of 2 x 500 MW from MSETCL Nagothane EHV Station to AEML Aarey EHV Station with Cable connectivity was approved by STU and subsequently by*

the Hon'ble Commission vide letter No. MERC/ CAPEX/ 2014-15/ 00097 dated 10.04.2014 at a cost of Rs. 7089 Crores. However, subsequently, this project was withdrawn by both STU and the Hon'ble Commission in favour of 400 K/v HVAC Overhead connectivity between MSETCL Kudus EHV Station and Aarey EHV Station to be executed by MSETCL."

(Emphasis supplied)

63. On 30.03.2020, the MERC passed Multi-Year Tariff ("MYT") Order in Petition No. 297 of 2019 filed by AEML-T, *inter alia*, observing as under:

"*2.1.22 As regards the project to be undertaken under TBCB, the STU vide its letter dated 22 January, 2020 has submitted that the 1000 MW HVDC Kudus-Aarey schemes has been referred to the Empowered Committee formed by the Govt. of Maharashtra and the decision of Empowered Committee is awaited.*

2.1.23 In view of the above, the Commission will decide regarding the HVDC Scheme during proposed Transmission Licensee Amendment of AEML-T in Case No. 195 of 2019 or any other proceedings as deemed appropriate.

"5.3.4 AEML-T has provided full details of the various capital expenditure schemes proposed during 4th Control Period. The capital expenditure and capitalization (inclusive of IDC) are given below:

…

DPR (schemes at various stages of discussion with STU)					
HVDC	*1090.00*	*1286.04*	*2243.31*	*1122.21*	*561.10*

5.3.7 The Commission has observed that DPRs are not submitted for majority of schemes for which capitalization is proposed by AEML-T during 4th Control Period. In absence of any DPR, it is difficult to assess requirement of particular schemes and reasonability of the associated cost. Hence, it is important to have approved DPR for any scheme before proposing recovery of associated cost through ARR from the beneficiaries.

5.3.12 … The HVDC scheme is already part of the STU Five Year Plan (FY 2018-19 to FY 2023-24) and as per the plan, the scheme is envisaged to be executed by AEML-T in the year 2023-24. In this regard, AEML-T has already approached the Commission with a Petition to amend its existing Transmission License in Case No. 195 of 2019 to include the proposed HVDC scheme along with other

proposed amendments which is under consideration with the Commission. Also, in order to assess its reasonability of the cost, AEML-T has recently submitted its DPR for in-principal approval of the Commission. Considering the critical nature of these schemes and time required for obtaining the necessary regulatory approvals, the Commission directs the STU and AEML-T to initiate all the necessary steps for implementing the critical schemes within the timeframe envisaged in the STU Five Year Plan. However, the implementation of the scheme would be subject to necessary Regulatory approvals."

(Emphasis supplied)

64. On 30.05.2020, the EC (constituted by GoM), at its 4th Meeting deferred decision on threshold limit and the consideration of the 1000 MW Transmission Project based on HVDC Technology recording its views at that stage in the minutes as under:

"Agenda No. 2: Notification of Threshold Limit as per Tariff Policy
As per the Electricity Act, 2003 (36 of 2003) and provisions of the National Electricity Policy, 2005 and the Tariff Policy, 2016, Hon'ble MERC asked to submit recommendation regarding Determination of threshold Limit for development of intra-state transmission projects through tariff based competitive bidding.
C.E. (STU) informed the Empowered Committee (EC) members that the two State Electricity Regulatory Commission have finalized the threshold limits for projects under TBCB 1) Punjab State (Rs. 50 Crores) and 2) Bihar State (Rs. 100 Crores.). MERC order in case of 302 of 2019 for determination of MSETCL, ARR the Hon'ble MERC has opined that the threshold limit for projects to be executed under TBCB is a policy related issue which needs to be addressed separately. Further Hon'ble MERC asked to submit recommendations regarding "determination of threshold limit for development of intra state transmission projects through tariff based competitive bidding".
C.E. (STU) informed the Empowered Committee (EC) members regarding CERC advisory dated 14th October 2016 to Ministry of Power, para 12 (a), advices that,
"Splitting the network into components and award of the Project through TBCB complicates the execution of project. Therefore, it is advisable to identify the entire network for development through TBCB, instead of comparatively smaller elements, commissioning of which depends upon commissioning of all upstream/downstream elements."

The threshold limit should be decided in such a way that it should not only encourage serious and genuine competition to bring in efficiencies in capital investment in the intra-state transmission system, but also ensure that small and urgent capital works are not

hindered for need of the process every time and can be undertaken by the transmission licensee directly.

Members discussed the issue in detail. It was opined that the threshold limits fixed by Punjab and Bihar cannot be directly accepted for Maharashtra.

Hon'ble Principal Secretary (Energy), GOM opined that the determination of the threshold limit for projects to be undertaken in TBCB is a complex process and needs to be studied in detailed and suggested that a separate study group be formed comprising of technical experts and financial experts along with representatives of major transmission licensees who will study the same and submit the report to the Empowered Committee within a month after formation.

After deliberations the Empowered Committee members concurred for the formation of study group.

Agenda No. 3: 1000 MW HVDC Project of Kudus Aarey to be taken under TBCB

…
It was also informed to the Empowered Committee (EC) members that a final review of the HVDc schemes will be taken only after the review of the load growth of Mumbai system along with review of AC schemes planned for 2023-24.

… it was informed that the earlier STU plan (18-19 to 23-24) had both the HVDC schemes as a part of it. Only after subsequent studies carried by STU these schemes are now dropped from the STU plan 19-20 to 24-25. …
…
Empowered Committee Members concurred that the HVDC schemes not being part of STU five year plan the same need not be considered for TBCB as of now and thus deferred the subject. Further Empowered Committee directed STU to send 19-20 to 24-25 STU plan to MERC immediately."

(Emphasis supplied)

65. The MSETCL discussed the study report of Mumbai system perspective plan on 10.07.2020 with representatives of stakeholders, including the AEML-T Transmission Project based on HVDC Technology and submitted its 5-year development plan (FYs 2019-20 to 2024-25) to MERC on 03.09.2020, the transmission project based on HVDC Technology,

and the HVDC terminals at Kudus and Aarey having been included therein, *albeit* with following comments:

> *"Note*
> ***1000 MW HVDC Terminal Stations at Kudus-Aarey and HVDC Link-Two HVDC Schemes were a part of STU Plan 2018-19 to 2023-24 with a note that consolidated detail study will be carried out considering all Mumbai related schemes separately. Subsequently STU Study indicated that with inclusion of 400 kV Velgaon, 400 kV Velgaon, 400 kV Kalwa Stitching , 400 kV Kalwa Padhge line etc. these HVDC Schemes will not be required. However, in view of the earlier CEA study in this regard and as HVAC Scheme was not referred to CEA, the STU study including these HVAC Schemes has been now referred to CEA for their comments. Hence 1000 MW Kudus Aarey HVDC Link is included in the year 2024-25 of this STU Five Year Plan (2019-20 to 2024-25) is subject to averse comments if any by CEA in the matter may lead to deletion of the Scheme from STU Five Year Plan."*

66. On 03.09.2020, MSETCL, by its letter to CEA, requested for its assessment in the matter of Transmission Project based on HVDC Technology.

67. On 10.09.2020, AEML-T, by its email to MSETCL, requested the inclusion of 220kV AIS to GIS Conversion at AEML Aarey EHV Substation in the STU 5-year plan.

68. On 21.09.2020, AEML-T filed Application No.51/2020 in Case No.195/2019 before MERC proposing an amendment of its License Amendment Petition, the request being to drop the Aarey-Kudus Transmission Project based on HVDC Technology from AEML-T's Transmission License and instead sought a fresh Transmission License for the said Project under the name of its 100% subsidiary company, Adani Electricity Mumbai Infra Limited ("AEMIL"), the claim being that this was as per industry practice where certain projects are implemented through dedicated SPVs.

69. On same date, i.e. 21.09.2020, AEMIL and AEML-T filed Case No.190/2020 before MERC praying for grant of Transmission License to AEMIL for the development of the Transmission Project based on HVDC Technology, contending, *inter alia*, as under:

> "10. Meanwhile, STU/ MSETCL proposed 400 Kv O/H HVAC (Aaray-Kudus) Scheme and accordingly requested this Hon'ble Commission to cancel the approved HVDC Scheme proposed by AEML-T on 05.01.2015. AEML-T made its submissions on the said letter on 23.01.2015. Thereafter the Hon'ble Commission, vide its letter dated 02.05.2016, cancelled its approval accorded to AEML-T's HVDC DPR in view of the STU proposed 400 Kv O/H HVAC (Aaray- Kudus) Scheme."

70. The MSETCL was impleaded as a Respondent in Case (No.190/2020) on 22.09.2020. It is in the said case that the order (21.03.2021) impugned by the appeal at hand would be passed by MERC in due course, the prime prayers being:

> "a. Allow the present Petition/ Application thereby granting transmission licence under Section 14, read with Section 15 of the Electricity Act 2003 and MERC (Transmission Licence Conditions) Regulations, 2004, to Adani Electricity Mumbai Infra Limited, which is a 100% owned Subsidiary of Adani Electricity Mumbai Ltd., for development of the transmission system for 1000 MW HVDC (VSC based) Link between 400kV MSETCL Kudus & 220 kV AEML-T Aarey EHV station (HVDC Scheme);
> b. Grant/ approval for considering the HVDC Scheme as part of the Intra-State Transmission System (InSTS) and allow recovery of transmission charges as a part of InSTS order in accordance with MYT Regulations issued by the Hon'ble Commission from time to time;
> c. Direct that the Detailed Project Report submitted for the HVDC Scheme, by parent AEML-T, be treated as submitted by its subsidiary, AEMIL, for further processing the same for an in-principle approval…"

71. On 07.10.2020, MSETCL, by its letter to AEML-T, stated that the Transmission Project based on HVDC Technology had been referred to the CEA for its comments and that the DPR for the scheme will be considered after receiving the views from the CEA on the viability of the said scheme**.**

An affidavit was filed by it (MSETCL) before MERC on 12.10.2020 stating that *"The Empowered Committee will be appraised about the subsequent changes in STU plan and reference made to CEA about this scheme in the next Empowered Committee meeting."*

72. On 23.10.2020, CEA, by its letter to MSETCL, on the request of AEML-T, stated thus:

> *"…*
> *iii. It may be noted that considering the need for availability of power supply in the Mumbai area and ROW problem in constructing overhead transmission lines to Mumbai, CEA on the request of AEML has already suggested a scheme for bulk power injection to Mumbai i.e., 1000 MW VSC based HVDC from Kudus to Array along with future provision for another 1000 MW. This suggestion was made based on the studies carried out for 2024-25 conditions. Requisite land provision in AEML S/S at Kudus and Array is available for construction of the VSC HVDC S/S. This system would provide the required reliability of additional independent feed to Mumbai area when the generation sources in TATA system is likely to go down.*
> *…*
> *In view of above, additional infeed to Mumbai area from sources such as 1000 MW VSC based HVDC from Kudus to Array as suggested by CEA need to be implemented on priority basis."*
>
> (Emphasis supplied)

73. On 13.11.2020, AEML-T, by its letter to MSETCL, submitted a revised DPR for the Transmission Project based on HVDC Technology in terms of the discussion held with MSETCL on 09.11.2020. The revised DPR excluded works of conversion of 220 KV AIS to GIS at AEML-T Aarey EHV substation, as MSETCL had pointed out that these assets are already part of AEML-T's License. The revised DPR for the Transmission Project based on HVDC Technology was submitted by AEML-T and AEMIL before MERC for grant of in-principle approval on 20.11.2020.

74. The application of AEMIL for grant of Transmission License was admitted by MERC by order dated 28.11.2020, AEMIL having been directed to issue a Public Notice in accordance with Section 15(2) of the Act,

compliance in which regard was made on 01.12.2020. On 10.12.2020, the STU (MSETCL) forwarded the revised DPR submitted by AEML for execution of HVDC Scheme for approval of MERC, based on technical evaluation.

75. The EC (of GoM) at its 5th meeting, on 24.12.2020, was apprised by the STU about the CEA report regarding AEML-T's Aarey-Kudus HVDC Scheme and also of the inclusion of AEML-T's Aarey-Kudus HVDC Scheme in the STU's Five Year Plan. At the same meeting, the EC also deliberated upon the threshold limits for consideration of projects to be executed under TBCB and resolved thus:

> *"Agenda No. 3: Notification of Threshold Limit as per Tariff Policy, (2016-17):*
> Hon'ble MERC in the meeting held on 15/12/2020 asked STU to submit recommendation regarding "Determination of Threshold Limit for development of intra-state transmission projects through tariff based competitive bidding".
> It was discussed that whether a particular project qualifies for TBCB route should depend upon techno-commercial considerations. Decision in any particular case will have to weigh in financial requirements as well as technical assets like delineability of a project technically from other parts of the grid, being end to end to ensure accountability of service being provided, new or modern *technology etc. These aspects should be seen for particular project once a recommendation is made by STU. Also, number of independent transmission companies have to be kept at a manageable level. Given these diverse aspects of decision making as well as number of projects beyond various thresholds as per STU plan, after deliberations, the committee recommended the following threshold limits for consideration of projects to be taken under TBCB –*
>
> *1) <u>All the projects in the STU plan costing 500 Cr or more will be referred to EC for consideration for execution under TBCB</u>.*
>
> 2) *If STU proposes that a project costing more than 500 Cr. is not to be taken under TBCB for reasons peculiar to the project and is to be executed under other mechanism, the same will be referred to the EC with necessary justification for such proposal.*
> *…*
> *5) Once MERC decides to recommend a project under TBCB or otherwise, STU to petition MERC for final approval of granting a fresh transmission licence or extending existing transmission licence as the case may be, by following due process of law.*

6) The issue of applicability of this limit to new / old projects was discussed. After deliberation committee decided the following:

i. All the projects that already part of license of a transmission licensee as decided by MERC and MERC has already allotted the work for execution to the licensee, will not be forwarded for further consideration of the committee.

ii. Projects that are under active consideration of MERC where STU has already recommended execution under a particular mechanism and where MERC has initiated substantially the process of inclusion of the project in scope of any existing or new transmission license on the basis of this recommendation, may not be put to committee for fresh consideration. Any further recommendation, if asked of STU by MERC or any other legal forum, STU may agitate the committee for the same as per the threshold limit decided above.

7) The Committee also asked STU to appraise about projects costing more than 500 Crs. In the present STU five-year plan in next meeting. These recommendations of threshold limits shall be communicated to MERC."

(Emphasis supplied)

76. On 26.12.2020, the appellant (TPC-T) addressed a letter to the EC expressing its interest in the HVDC Transmission Project and requested that the status of the implementation of the said Project under the TBCB process and the timeline for inviting bids be shared. On 29.12.2020, it (TPC-T) filed its objections before MERC on the ground that EC was yet to take a final decision and that TBCB Process had not been followed and the Scheme was a New Scheme and not an old one. The proponents (AEML-T and AEMIL) submitted their response on 31.12.2020 to the said objections dated 29.12.2020 filed by the appellant, *inter alia*, stating as under:

"*26. Following chronology clearly reflects that the AEML HJVDC Scheme is not a new scheme: Meanwhile, STU/ MSETCL proposed 400 Kv O/H HVAC (Aaray- Kudus) Scheme by justifying Kudus as a better source point for the scheme and accordingly requested the Hon'ble Commission to cancel HVDC Project on 05th January 2015. AEML informed to STU on 23rd January 2015 that it shall change the interconnection point in the scheme in Kudus as suggested by STU. While the conformation of STU on the same was awaited, the Hon'ble Commission based on the STU letter dated 05th January 2015, vide its letter dated 02nd May 2016 mentioned that in principle approval of DPR*

of the HVDC Scheme stands cancelled only because the proposal of MSETCL to construct HVAC Scheme, and not for any other reasons attributable to AEML-T."

(Emphasis supplied)

77. On 20.01.2021, the STU (MSETCL) filed additional submissions in Case No. 190 of 2020 stating that it would proceed as per the decision of the EC on the subject, following part of such submissions having been referred at the hearing:

> *"…*
> *2) In our earlier submission dated 12th Oct 2020, it was stated that the Empowered Committee will be apprised about the subsequent changes in STU plan and reference made to CEA. The Empowered Committee in its 5th meeting held on 24-12- 2020, is apprised by STU about the CEA report regarding 1000 MW VSC based HVDC from Kudus to Array scheme.*
> *…*
> 4) STU will proceed as per decision of Empowered Committee in this regard."

78. On 25.01.2021, MSETCL issued a letter to Principal Secretary (Energy), GoM, providing information of Transmission Projects costing more than Rs 500 Crores as referred to EC for the execution of Transmission Project under TBCB as per the threshold limit recommendations. The STU filed its additional submissions before MERC on 27.01.2021 thereby placing on record a copy of the communication dated 25.01.2021 which was addressed to EC to include the HVDC Scheme in the Agenda for the 6th EC Meeting. This was followed by AEMIL and AEML-T filing their Rejoinder to the Additional Submissions dated 27.01.2021 filed by STU.

79. On 08.02.2021, MSETCL filed its written submissions, *inter alia*, laying stress on the facts that Aarey-Kudus Transmission Project of AEML-T based on HVDC Technology is required for bulk power injection in the city of Mumbai and is part of the 5-year plan prepared by it. It also submitted that AEML-T Aarey-Kudus Transmission Project based on HVDC Technology is

an ‘old’ Project, as the same was being perceived since many years and already recommended, it falling under Clause 6(ii) of Agenda No. 3 of the 5th EC Meeting dated 24.12.2020, the MERC having initiated the process of inclusion of this project in scope of AEML-T. It pointed out that STU and AEML-T had been directed by MERC to implement the AEML-T Aarey-Kudus Transmission Project based on HVDC Technology, adding that land at Kudus and Aarey, as well as RoW, is available with AEML-T. It referred to the fact that that most of the Projects in Mumbai Metropolitan Region had come stuck for want of land. It further stated that the threshold limit as decided by the EC in its meeting dated 24.12.2020 has yet not been approved by the MERC and also that the TBCB route was more time-consuming referring to the experience in Vikhroli-Kharghar Transmission and other MMR Projects.

80. On 13.03.2021, MERC, by its final order in Case No.195/2019, directed for deletion of the Aarey-Kudus Transmission Project based on HVDC Technology from the proposed assets to be included in the transmission license of AEML-T.

81. On 21.03.2021, MERC passed its final order in Case No.190/2020, whereby AEMIL was granted transmission license to develop the Aarey-Kudus Transmission Project based on HVDC Technology under Section 62 of the Electricity Act, 2003. While dealing with the matter, the Commission considered key issues, which included some raised as objections by the appellant, as under:

a. *Need for HVDC Bulk Power Injection Scheme for Mumbai;*

b. *Whether the HVDC Bulk Power Injection Scheme for Mumbai Transmission Strengthening is a new Scheme or existing Scheme;*

c. *Applicability of the GoM GR dated 4 January, 2019 for the present matter;*

d. *Whether the proposed HVDC Scheme as planned by STU should be implemented through TBCB under Section 63 of the EA or through Regulated Tariff Mechanism (RTM) under Section 62 of the EA;*

e. *Sharing of Transmission Charges;*

f. *Whether AEMIL qualifies for grant of Transmission Licence.*

82. As noted in the factual narrative, a lot of confusion has prevailed on the choice of technology to be deployed for bulk power injection scheme for Mumbai, the STU having flitted between HDVC and HVAC more than once. By the time the impugned order was passed, it (STU) had accepted the HDVC technology commended by the original proponents of the subject project. The MERC has finally accepted the same observing, in the impugned order, *inter alia*, as under:

"*35.41 The advantages of HVDC technology over HVAC technology, and advantages of VSC technology over CSC technology for HVDC installations are as under:*

a. HVDC lines are cheaper per kilometre than HVAC lines, and unlike HVAC, HVDC lines do not consume reactive power, and are therefore, not limited by length or the requirement for periodic reactive power compensation;

b. The losses of a DC line are lesser than the losses of an AC line due to high voltages and thus lower currents;

c. The breakeven point for HVDC is typically 600–800 km for overhead lines or 50–100 km for cables (which have higher reactive power exchange per kilometre);

d. HVDC can transmit more power for a given transmission corridor size than HVAC. Where space is constrained, especially in a city like Mumbai, HVDC has distinct advantages over HVAC system. Some examples of such city-based HVDC systems are

DC links directly into the downtown area of large cities like New York (Hudson Project) and San Francisco (Transbay Cable);

e. VSC HVDC can provide a variety of power quality support functions. Thus, reactive power support, AC voltage control, and black-start functionality can be provided;

f. Other functions include firewalling one AC system so that disturbances do not spread to an adjacent system; providing frequency stabilizing functions and artificial fast frequency response;

g. VSC HVDC is highly flexible and can be integrated as part of the smart grid architecture;

h. VSC is more compact and beneficial when space/land cost is at a premium;

i. VSC HVDC gives greater control flexibility in operation;

j. Usage of underground cables as against overhead lines will face lower opposition and result in shorter lead times."

83. We must note here that the debate over choice between HVDC and HVAC for the subject transmission project has come to an end as no challenge to the above decision on this score has been brought by any party.

84. The MERC did not accept the objections of the appellant and rejected the same for reasons set out in detail on each issue which we shall note to the extent necessary at appropriate stages. Presently, it may be mentioned that the Commission ruled that the HVDC Scheme as per the STU Plan 2019-20 to 2024-25 is to be undertaken by the original applicants, under Section 62 of the Electricity Act, with necessary safeguards as stipulated in the order. The license, as prayed for, has been granted by MERC in favor of AEMIL, by the impugned order, in the following terms:

"*41.1 In exercise of the powers vested with the Commission under Section 14 of the EA, the Commission hereby grants a Transmission Licence to AEMIL for a period of 25 years from the date of this Order under Alternative 2 and in accordance with the MERC (Transmission*

Licence Conditions) Regulations, 2004 and its subsequent amendments.

41.2 The Grant of Transmission Licence to AEMIL is subject to the fulfillment of the following conditions throughout the period of Licence and it shall, unless revoked earlier, remain in force for a period of 25 years:

i. The Transmission Licensee shall comply with the provisions of the Transmission Licence Regulations or any subsequent enactment thereof and the terms and conditions of the Licence during the period of subsistence of the Licence;

ii. The Transmission Licensee shall abide by the system specifications as provided and agreed in the Licence Application. In case of any deviation, prior approval of the Commission shall be required;

iii. The Transmission Licensee shall not enter into any contract for or otherwise engage in the business of trading in electricity during the period of subsistence of the Transmission Licence;

iv. The Transmission Licensee shall remain bound by the provisions of the Act, the Rules and Regulations framed thereunder, in particular the Transmission Licence Regulations, the Grid Code, the Standards specified by the Central Electricity Authority, and Orders and directions of the Commission issued from time to time;

v. The Transmission Licensee shall maintain separate audited accounts of its Transmission Business, including the business of the undertaking utilising assets of the project, in such form and containing such particulars as may be specified by the Commission and till such time these are specified by the Commission, the accounts shall be maintained in accordance with the Companies Act, 2013, as amended from time to time;

vi. The Transmission licensee shall have the liability to pay the Licence Fee in accordance with the Schedule of Fees and Charges of the MERC (Fees and Charges) Regulations, 2017. Delay in payment or non-payment of Licence Fee or a part thereof for a period exceeding sixty days shall be construed as breach of the terms and conditions of the Licence;

vii. The Transmission Licensee shall endeavour to commission the project within 48 months of issue of the Transmission Licence and as per the applicable Technical Standards and Grid Standards of CEA. AEMIL has indicated the time-frame for commissioning the project as 48 months after receipt of all statutory approvals, however, the Commission is of the view that one of the key reasons for this Scheme being approved to be undertaken by AEMIL under RTM is AEMIL's submission that the ground work for land acquisition and clearances has already been done and the urgent

need for this transmission project for Mumbai. Hence, AEMIL should endeavour to commission the project within 48 months of issue of the Transmission Licence;

viii. The Transmission Licensee shall obtain all consents, clearances and permits relating but not limited to road/ rail/ river/ canal/ power line/ crossings, telecom, defence, civil aviation, right of way/ way-leaves and environmental and forest clearance from relevant authorities required for developing, financing, constructing, maintaining/ renewing all such consents, clearances and permits in order to carry out its obligations under the Transmission Licence, and shall promptly furnish to the Commission the copy/ies of consents, clearances and permits, which it obtains;

ix. The Transmission Licensee shall have the responsibility to acquire the necessary land for Substation and Lines, etc., required for the project;

x. Failure of AEMIL to comply with the provisions of Transmission Licence/ EA and Rules and Regulations, etc., this Transmission Licence would be liable to be cancelled after due process."

85. The operative part of the impugned order reads thus:

"*1. Case No. 190 of 2020 is allowed.*

2. The Transmission Licence is granted to Adani Electricity Mumbai Infra Limited for the Transmission Scheme as mentioned in Table - 1 of this Order.

3. The Transmission Licence shall come into effect from the date of issuance of this Order.

4. The Transmission Licence No. 2 of 2021 dated 21 March, 2021 granted to Adani Electricity Mumbai Infra Limited is appended with this Order.

5. The Secretariat of the Commission is directed to forward a copy of the Transmission Licence to the Government of Maharashtra, all Electricity Transmission Licensees and Distribution Licensees in the State of Maharashtra, the Central Electricity Authority, the concerned Local Authorities/ Local Self-Governments (Zilla Parishad, Municipal bodies) of the District and cities/ towns through which the Transmission Line passes, and upload the same on the Commission's website.

6. The Transmission Licensee shall provide monthly progress report to the State Transmission Utility, Central Electricity Authority and the Commission, with regard to obtaining necessary clearances and

approvals, Right of Way issues, equipment ordering and installation, and slippages with respect to the Schedule, if any, to enable continuous and close monitoring of the Project.

7. Considering the importance of High Voltage Direct Current (HVDC) Scheme for strengthening the Mumbai Transmission system, the Commission will separately notify a Committee for closely monitoring the progress of this Project to ensure strict adherence to the planned timelines for its identified milestones."

THE CHALLENGE

86. The impugned order is assailed by the appellant primarily on the broad submissions which may be quoted in extenso:

(a) it violates the principle of Competition and Efficiency as enshrined under the Act.

(b) the MERC proceeded with the adjudication of the Transmission Application filed by the Original Applicant while the recommendation of the EC formed vide GR dated 04.01.2019 for the HVDC Project was pending consideration to be awarded through the TBCB route which is impermissible in law.

(c) the MERC while passing the impugned Order has subverted the stated objective of the Act and circumvented the GR dated 04.01.2019 despite the fact that the TBCB Guidelines were Statutory Guidelines and Ld. MERC as per Section 86(4) is bound to follow it.

(d) the MERC failed to appreciate that the present HVDC Scheme is admittedly a New Scheme as there is a change in point of connectivity, line length, network configuration, load flows from the Original Scheme implemented in the year 2011.

(e) the MERC by passing the impugned Order has violated its statutory duty as envisaged under Section 86(3) of the Act which stipulates that Commission is bound to act in a

transparent manner, however, transparency has been given a complete go by passing the Impugned Order.

87. We proceed to examine the contentions urged at the hearing, presented in the shape of slightly differently nuanced arguments in law.

IS SECTION 63 PREDOMINANT?

88. It has been canvassed that the public policy, of late, has veered around the view that in grant of largesse by the State and its agencies, the public auction route is to be followed since it ensures transparency. It is argued that the law on auction of private contracts is now well laid that in large public contracts, element of Article 14 of Constitution of India is required to be considered. It is the submission of the appellant that the statutory mandate is of transparent Competitive Bidding as expressed through Section 63, the amended language of the National Tariff Policy, 2016 ('NTP") and recognized by this tribunal in the Judgment of *Shri Rama Shankar Awasthi vs. UPERC & Ors*. (Appeal No. 150 of 2017). It is also submitted that even if it is assumed that there was no such positive mandate, the above-mentioned decisions clearly lay down that when such large public contracts are being awarded, the element of Article 14 of the Constitution of India is required to be considered. Reliance is placed on *Presidential Reference Judgment* titled as *Natural Resources Allocation*, *In Re: Special Reference No.1 of 2012* (2012) 100 SCC 1, which held that while Competitive Bidding is not a Constitutional mandate, it is the most preferrable method for *allotment of public contracts, the departure being permissible under specific circumstances, for some compelling reasons and not out of the expense of transparency or out of compromise, not the least guided by extraneous considerations as it would deny equality*. Reliance is also placed on rulings

in *Ramana Dayaram Shetty v. International Airport Authority of India,* (1979) 3 SCC 489; *Fertilizer Corpn. Kamgar Union v. Union of India,* (1981) 1 SCC 568; *Sachidanand Pandey v. State of W.B.,* (1987) 2 SCC 295; *Haji T. M. Hassan Rawther v. Kerala Financial Corporation*, (1988) 1 SCC 166; *Netai Bag and Ors. v. The State of West Bengal and Ors*., (2000) 8 SCC 262; *West Bengal State Electricity Board v. Patel Engineering Co. Ltd. and Ors*., (2001) 2 SCC 451*; Presidential Reference Judgment* titled as *Natural Resources Allocation*, *In Re: Special Reference No.1 of 2012* (2012) 100 SCC 1; and *Manohar Lal Sharma v. Principal Secretary* (2014) 9 SCC 516.

89. In the case of *Haji T.M. Hassan Rawther v. Kerala Financial Corpn.* (Supra), the Supreme Court had held thus:

> "*14. The public property owned by the State or by any instrumentality of the State should be generally sold by public auction or by inviting tenders. This Court has been insisting upon that rule, not only to get the highest price for the property but also to ensure fairness in the activities of the State and public authorities. They should undoubtedly act fairly. Their actions should be legitimate. Their dealings should be aboveboard. Their transactions should be without aversion or affection. Nothing should be suggestive of discrimination. Nothing should be done by them which gives an impression of bias, favouritism or nepotism. Ordinarily these factors would be absent if the matter is brought to public auction or sale by tenders. That is why the court repeatedly stated and reiterated that the State-owned properties are required to be disposed of publicly. But that is not the only rule. As O. Chinnappa Reddy, J. observed "that though that is the ordinary rule, it is not an invariable rule". There may be situations necessitating departure from the rule, but then such instances must be justified by compulsions and not by compromise. It must be justified by compelling reasons and not by just convenience*."
>
> (Emphasis supplied)

90. Similarly, in *Netai Bag v. State of W.B.* (Supra), the relevant observations may be quoted thus:

> "*19. Though the State cannot escape its liability to show its actions to be fair, reasonable and in accordance with law, yet wherever challenge is thrown to any of such action, initial burden of showing the prima facie existence of violation of the mandate of the Constitution lies upon the person approaching the court. We have found in this*

case, that the appellants have miserably failed to place on record or to point out to any alleged constitutional vice or illegality. Neither the High Court nor this Court would have ventured to make a rowing inquiry particularly in a writ petition filed at the instance of the erstwhile owners of the land, whose main object appeared to get the land back by any means as, admittedly, with the passage of time and development of the area, the value of the land had appreciated manifold. It may be noticed that in the year 1961 the erstwhile owners were paid about Rs 5.5 lakhs and the State Government assessed the market value of the property which was paid by Respondent 5 at Rs 71,59,820. The appellants have themselves stated that the value of the land roundabout the time, when it was leased to Respondent 5 was about Rs 11 crores. There cannot be any dispute with the proposition that generally when any State land is intended to be transferred or the State largesse decided to be conferred, resort should be had to public auction or transfer by way of inviting tenders from the people. That would be a sure method of guaranteeing compliance with the mandate of Article 14 of the Constitution. Non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner. Making an exception to the general rule could be justified by the State executive, if challenged in appropriate proceedings. The constitutional courts cannot be expected to presume the alleged irregularities, illegalities or unconstitutionality nor the courts can substitute their opinion for the bona fide opinion of the State executive. The courts are not concerned with the ultimate decision but only with the fairness of the decision-making process.

20. …One of the methods of securing the public interest when it is considered necessary to dispose of the property is to sell the property by public auction or by inviting tenders. But such a rule is not an invariable rule. There may be situations where there are compelling reasons necessitating departure from the rule. As and when a departure is made from the general rule, it must be shown that such an action was rational and not suggestive of discrimination…"

(Emphasis supplied)

91. In *W.B. State Electricity Board v. Patel Engineering Co. Ltd. & Ors.* (Supra) it was reiterated as under:

"*33. We may, however, clarify that the appellant is not obliged to award contract to any of the bidders at their quoted price bid. It is always open to the Appellant to negotiate with the next lowest bidder for awarding the contract on economically-viable price bid.*"

92. In *Natural Resources Allocation, In re* (supra), the Constitution Bench concluded that auction despite being a more preferable method of alienation/allotment of natural resources cannot be held to be constitutional requirement or limitation for alienation of all natural resources and, therefore, every method other than auction cannot be struck down as *ultra vires* the Constitutional mandate. The Court also opined that auction as a mode cannot be conferred the status of a constitutional principle. While holding so, the Court held that alienation of natural resources is a policy decision and the means adopted for the same are, thus, executive prerogatives. The Court summarised the legal position as under:

> ***"****Potential of abuse*
>
> *132. It was also argued that even if the method of auction is not a mandate under Article 14, it must be the only permissible method, due to the susceptibility of other methods to abuse. This argument, in our view, is contrary to an established position of law on the subject cemented through a catena of decisions.*
>
> …
>
> *146. To summarise in the context of the present Reference, it needs to be emphasised that this Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. It respects the mandate and wisdom of the executive for such matters. The methodology pertaining to disposal of natural resources is clearly an economic policy. It entails intricate economic choices and the Court lacks the necessary expertise to make them. As has been repeatedly said, it cannot, and shall not, be the endeavour of this Court to evaluate the efficacy of auction vis-à-vis other methods of disposal of natural resources. The Court cannot mandate one method to be followed in all facts and circumstances. Therefore, auction, an economic choice of disposal of natural resources, is not a constitutional mandate. We may, however, hasten to add that the Court can test the legality and constitutionality of these methods. When questioned, the courts are entitled to analyse the legal validity of different means of distribution and give a constitutional answer as to which methods are ultra vires and intra vires the provisions of the Constitution. Nevertheless, it cannot and will not compare which policy is fairer than the other, but, if a policy or law is patently unfair to the extent that it falls foul of the fairness requirement of Article 14 of the Constitution, the Court would not hesitate in striking it down.*

147. Finally, market price, in economics, is an index of the value that a market prescribes to a good. However, this valuation is a function of several dynamic variables: it is a science and not a law. Auction is just one of the several price discovery mechanisms. Since multiple variables are involved in such valuations, auction or any other form of competitive bidding, cannot constitute even an economic mandate, much less a constitutional mandate.

148. In our opinion, auction despite being a more preferable method of alienation/allotment of natural resources, cannot be held to be a constitutional requirement or limitation for alienation of all natural resources and therefore, every method other than auction cannot be struck down as ultra vires the constitutional mandate.

149. Regard being had to the aforesaid precepts, we have opined that auction as a mode cannot be conferred the status of a constitutional principle. Alienation of natural resources is a policy decision, and the means adopted for the same are thus, executive prerogatives. However, when such a policy decision is not backed by a social or welfare purpose, and precious and scarce natural resources are alienated for commercial pursuits of profit maximising private entrepreneurs, adoption of means other than those that are competitive and maximise revenue may be arbitrary and face the wrath of Article 14 of the Constitution. Hence, rather than prescribing or proscribing a method, we believe, a judicial scrutiny of methods of disposal of natural resources should depend on the facts and circumstances of each case, in consonance with the principles which we have culled out above. Failing which, the Court, in exercise of power of judicial review, shall term the executive action as arbitrary, unfair, unreasonable and capricious due to its antimony with Article 14 of the Constitution."

(Emphasis supplied)

93. In *Manohar Lal Sharma* (supra), having reviewed the past decisions on the subject, the Supreme Court observed and held thus:

"...
41. The background in which Section 3(3) of the CMN Act was amended to permit private sector entry in coal mining operation for captive use has been sought to be explained by the Central Government. It is stated that nationalisation of coal through the CMN Act was done with the objective of ensuring "rational, coordinated and scientific development and utilisation of coal resources consistent with the growing requirements of the country" and as a first step in 1973, 711 coal mines specified in the Schedule appended to the CMN Act were nationalised and vested in the Central Government. By the 1976 Nationalisation Amendment Act, the Central Government alone was permitted to mine coal with the limited exception of private companies engaged in the production of iron and steel. In 1991, the country was facing huge crisis due to (a) the situation regarding balance of

payments; (b) the economy being in doldrums; (c) dismal power situation; (d) shortage in coal production; and (e) inability of Coal India Ltd. (CIL) to produce coal because of lack of necessary resources to maximise coal production amongst other reasons. There was a huge shortage of power in the country. The State Electricity Boards were unable to meet power requirements. Post liberalisation, in the Eighth Five Year Plan (1992-1997) a renewed focus was placed on developing energy and infrastructure in the country. CIL was not in a position to generate the resources required. It was in this background that in a meeting held by the Deputy Chairman of the Planning Commission on 31-10-1991, it was decided that "private enterprises may be permitted to develop coal and lignite mines as captive units of power projects". The approval of the Cabinet was consequently sought vide a Cabinet note dated 30-1-1992 for "allowing private sector participation in coal mining operations for captive consumption towards generation of power and other end use, which may be notified by Government from time to time". The Cabinet in the meeting held on 19-2-1992 considered the above Cabinet note and it was decided that the proposal may be brought up only when specific projects of private sector participation in coal mining come to the Government for consideration. Subsequently, another Cabinet note dated 23-4-1992 was placed before the Cabinet containing references to certain private projects like the two 250 MW thermal power plants of RPG Enterprises, which had been recommended by the Government of West Bengal. The proposal contained in the Cabinet note dated 23-4-1992 was approved by the Cabinet on 5-5-1992. On 15-7-1992, the Bill for amendment of Section 3(3) of the CMN Act was introduced in Rajya Sabha and the same was passed on 21-7-1992. The Bill was passed in Lok Sabha on 19-4-1993 and got assent of the President on 9-6-1993.

....

62. The submission of the learned Attorney General that the seven States—Maharashtra, Madhya Pradesh, Chhattisgarh, Odisha, Jharkhand, Andhra Pradesh, and West Bengal—which have coal deposits, have accepted, and acknowledged the source of power of the Central Government with regard to allocation of coal blocks is not fully correct. Odisha has strongly disputed that position. Odisha's stand is that the system of allocation of coal blocks by the Central Government is alien to the legal regime under the CMN Act and the 1957 Act. It is true that many of these States have taken the position that allocation letter confers a right on such allottee to get mining lease and the only role left with the State Government is to carry out the formality of processing the application and for execution of lease deed, but, in our view, the source of power of the Central Government in allocation of coal blocks is not dependent on the understanding of the State Governments but it is dependent upon whether such power exists in law or not. Indisputably, power to regulate assumes the continued existence of that which is to be regulated and it includes the authority to do all things which are necessary for the doing of that which is authorised including whatever is necessarily incidental to and consequential upon it but the question is, can this incidental power be

read to empower the Central Government to allocate the coal blocks which is neither contemplated by the CMN Act nor by the 1957 Act? In our opinion, the answer has to be in the negative. It is so because where a statute requires to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden [Nazir Ahmad v. King Emperor, (1935-36) 63 IA 372 : (1936) 44 LW 583] . This is uncontroverted legal principle.

...

69. In view of the foregoing discussion, we hold, as it must be, that the exercise undertaken by the Central Government in allocating the coal blocks or, in other words, the selection of beneficiaries, is not traceable either to the 1957 Act or the CMN Act. No such legislative policy (allocation of coal blocks by the Central Government) is discernible from these two enactments. Insofar as Article 73 of the Constitution is concerned, there is no doubt that the executive power of the Union extends to the matters with respect to which Parliament has power to make laws and the executive instructions can fill up the gaps not covered by statutory provisions but it is equally well settled that the executive instructions cannot be in derogation of the statutory provisions. The practice and procedure for allocation of coal blocks by the Central Government through administrative route is clearly inconsistent with the law already enacted or the rules framed.

....

86. The learned Attorney General vehemently contends that allocation of coal blocks without auction is not unlawful. He submits that lack of public auction does not render the allocation process arbitrary. Moreover, according to him, when coal mining sectors were first opened up to private participants, the idea of the Central Government was to encourage the private sector so that they could come forward and invest. Allocation of coal blocks by public auction in such a scenario would have been impractical and unrealistic. As a matter of fact, he would submit that when the proposal for introduction of competitive bidding was first mooted in June 2004, the State Governments expressed their reservations and concerns. In this regard, the learned Attorney General referred to the letters sent by the Governments of Chhattisgarh, West Bengal, Rajasthan, and Odisha. The learned Attorney General submits that the concerns of the State Governments could not have been brushed aside by introducing competitive bidding by an administrative fiat. Moreover, according to the learned Attorney General, competitive bidding could have resulted in increase in the input price which would have a cascading effect.

95. There are numerous decisions of this Court dealing with the mode and manner of disposal of natural resources but we think it is not necessary to refer to all of them. Having indicated the view taken by this Court in some of the cases, now we may turn to 2G case [Centre for Public Interest Litigation v. Union of India, (2012) 3 SCC 1] . In that case, the two-Judge Bench of this Court stated that a duly publicised auction conducted fairly and impartially was perhaps the best method for alienation of natural resources lest there was likelihood of misuse by unscrupulous people who were only interested in garnering

maximum financial benefit and have no respect for the constitutional ethos and values. The Court laid emphasis that while transferring or alienating the natural resources, the State is duty-bound to adopt the method of auction by giving wide publicity so that all eligible persons can participate in the process.

…

105 ...The end products of these basic industries are, in turn, used as inputs in almost all manufacturing and infrastructure development industries. Therefore, the price of coal occupies a fundamental place in the growth of the economy and any increase in the input price would have a cascading effect. The auction of coal blocks could not have been possible when the power generation and, consequently, coal mining sectors were first opened up to private participants as the private sector needed to be encouraged at that time to come forward and invest. Allocation of coal blocks through competitive bidding in such a scenario would have been impractical and unrealistic. ...."

(Emphasis supplied)

94. The principles which have been consistently followed by the Supreme Court are that non-floating of tenders or not holding of public auction would not in all cases be deemed to be the result of the exercise of the executive power in an arbitrary manner; the courts are not concerned with the ultimate decision but only with the fairness of the decision-making process; and disposal of property or natural resources by public auction is not an invariable rule for there may be situations wherein there can be a departure from the rule.

95. It needs to be recalled here that a Constitution Bench Hon'ble Supreme Court in *PTC India Ltd. v. CERC*, (2010) 4 SCC 603, held as follows:

"*17. The 2003 Act is enacted as an exhaustive code on all matters concerning electricity. It provides for "unbundling" of SEBs into separate utilities for generation, transmission and distribution. It repeals the Electricity Act, 1910; the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions Act, 1998. The 2003 Act, in furtherance of the policy envisaged under the Electricity Regulatory Commissions Act, 1998 (the 1998 Act), mandated the establishment of an independent and transparent regulatory mechanism, and has entrusted wide-ranging responsibilities with the Regulatory Commissions. While the 1998 Act provided for independent regulation in the area of tariff determination; the 2003 Act has distanced the Government from all forms of regulation, namely, licensing, tariff regulation, specifying Grid Code, facilitating competition through open access, etc.*"

(Emphasis supplied)

96. We agree with the respondents that none of the judgments cited deal with a statute which specifically provides a cost plus (non-bidding) route for giving out government largesse. It was in the absence of any such provision that the Supreme Court as a general rule observed that tenders ought to be awarded. The present matter is governed by a special law viz. the Electricity Act. The subject here is not largesse being doled out by State agencies. It relates to statutory functions of a regulatory authority taking decisions on infrastructural development with aid and advice of expert bodies such as STU and CEA. The statute specifically provides for cost plus tariff determination under section 62, as well as tariff determination through competitive bidding under section 63, without specifying section 63 as the preferred route. As such, the aforesaid judgments cannot be applied to the present case, covered by a special law, so as to conclude that Section 63 is now the dominant mode.

97. The prime thrust of the appeal against the impugned order of MERC is that Section 63 of the Electricity Act is the dominating route. In this context, it is essential to bear in mind the said provision and connected provisions contained in Sections 61 and 62, all of which fall in Part-VII of the statute governing the subject of "*Tariff*" as indeed the subject of grant of license (here, transmission) governed by Sections 14 and 15 of Electricity Act.

98. We have already looked at the above-mentioned provisions. To recapitulate, we may say that though in the process under Section 63, the responsibility of the ERC while adopting the bid discovered tariff primarily is to ascertain and reach a satisfaction that the selection has been made by a transparent process of competitive bidding held in accordance with the TBCB guidelines, the broad principles guiding the process of determination of tariff by the Regulatory Commissions - encouraging efficiency, economical use of the resources, good performance, optimum investments, encouraging competition and rewarding efficiency in performance – are germane just as

they would be for RTM route. We would elaborate on this a little later. The TBCB Guidelines came with a mandate to promote competitive procurement of transmission services; encourage private investment in transmission lines, facilitate transparency and fairness in procurement processes; facilitate reduction of information asymmetries for various bidders; protect consumer interests by facilitating competitive conditions in procurement of transmission services of electricity; enhance standardization and reduce ambiguity and hence time for materialization of projects; and ensure compliance with standards, norms and codes for transmission lines while allowing flexibility in operation to the transmission service providers.

99. The appellant, while pointing out that the Tariff Policy 2006 had laid emphasis on the need for competition, refers to the TBCB and Development Guidelines, and also to the Revised Tariff Policy – 2016, stressing on competitive biddings for intra-State transmission projects, followed by the GoM GR dated 04.01.2019 prescribing the TBCB route for allotment of intra-State Transmission Projects in the State of Maharashtra and constituting its own Empowered Committee ("the GoM EC") conferring on it the role to decide which projects would be awarded through TBCB Route. Reliance is also placed on the notification issued by the Central Government on 15.03.2021, after the impugned order had been passed, insisting on adoption of the TBCB Guidelines for intra-State Projects. The argument is that the overall scheme of the Electricity Act as well as the Tariff Policy is to follow Section 63 as the *dominant route* for grant of intra-State Transmission Projects. It is submitted that the MERC in its Regulation 19.3 of MYT Regulations, 2019 itself promotes and envisages that all future procurement of short-term or medium-term or long-term power shall be undertaken through the TBCB Route under Section 63 of the Electricity Act and in accordance with the Guidelines framed thereunder.

100. The learned Counsel for the appellant argued that Section 61 (c) unequivocally mandates promotion of competition and economical use of resources, the TBCB Guidelines and Development Guidelines having recognized the need of promoting transparency and competition and mandated promotion of TBCB Bidding for inter-State as well as intra-State Projects. It is his plea that since the said Guidelines as well as the National Tariff Policy, 2016, are statutory in character, they are binding on all stakeholders including the MERC, reliance being placed on ruling in *Energy Watchdog. Vs. CERC* (2017) 14 SCC 80.

101. Arguing that since Section 63 starts with a *non obstante* clause it makes the bidding route dominant particularly because the Central Government has notified guidelines in its terms. It is pointed out that the Tariff Policy, 2006 prescribed that tariff for new generation and transmission projects should be decided on the basis of competitive bidding after a period of 5 years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition whereas in the Tariff Policy-2016, the language *qua* 'Transmission' has been drastically changed, to positively mandate that all 'intra-State' projects shall be developed through TBCB. It is argued that the Revied Tariff Policy-2016 carries an absolute mandate for TBCB to be followed.

102. Reliance is placed on judgment dated 06.08.2021 of this tribunal in the matter of *Shri Rama Shankar Awasthi vs. UPERC & Ors*. (supra). It is the submission of the learned Counsel for the appellant that the said ruling of this tribunal makes it clear that Section 63 is the rule with certain exceptional scenario wherein Section 62 can be invoked, the ethos of the legislation being transparency and, hence, it being always desirable that Tariff based bidding is carried out. The main thrust of the argument is that Section 63 is the dominant route, and good reasons have to be provided before ignoring the said provision and invoking section 62.

103. On plain reading of the provisions contained in Sections 62 and 63 of the Electricity Act, seen in the overall scheme of the legislation, it emerges that the latter (section 63) is merely an alternate to the former (section 62), the TBCB route (under section 63) envisaged to kick in only under the condition *if* tariff has been determined through a transparent process of bidding in accordance with the bidding guidelines issued by the Central Government. The legislation visualizes both as two parallel routes under which tariff is determined by Regulatory Commission, the discretion to choose either path being vested with such Commission. It is the concerned Regulatory Commission which determines the tariff under sections 62 under RTM route or approves it under section 63 if TBCB mode was chosen. In either case, the tariff determined or approved must be in accord with the tariff regulations framed in accordance with the principles contained under section 61 so that the tariff which is finally determined is in line with the said principles. It is trite that under section 63, the bidding process under which tariff is discovered is conducted in accordance with the bidding guidelines issued by the Central Government which bidding guidelines, in turn, are based upon the tariff principles contained in section 61.

104. In above context, we may quote the following observations in judgment dated 16.12.2011 of this tribunal in the matter of *Essar Power Ltd. v. UPERC & Ors.* (Appeal No. 82 of 2011):

> "*48. In the light of the above submissions made by the Appellant, it is appropriate to refer to the bid process under Section 63 of the Act which has been invoked by the Noida Power. The Bid process under Section 63 of the Act is different from normal procurement of goods. Unlike the stated objectives of Section 63 of the Electricity Act 2003 and the objectives of the Government of India guidelines, all the other non-statutory procurement process are driven to a sole objective of:*
>
> *(a) In cases of public sector or state procuring supply of goods or services from the private sector, securing lowest possible price from a credible party;*

(b) In case of auction of public assets in most of the cases securing maximum price for such sale. In some cases, some social objectives like coverage and roll out obligations may be the objective.

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

49. The competitive bidding process adopted under the Act must, therefore, meet the following statutory requirements:

(a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal (RFP) and model PPA notified by the Government of India must be approved by the State Commission.

(b) This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act.

(c) If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines.

…

77. As indicated above, the bid process under Section 63 of the Act is entirely different from normal procurement of goods through competitive bidding process which is not governed by specific statutory scheme and guidelines. The bidding process under Section 63 is wholly based upon the objective of section 61 of the Act as well as the objectives of the Government of India guidelines. The Government of India guidelines have been framed to comply with the principles specified under Section 61 of the Act. The Government of India guidelines contained the mandate to safeguard the consumer's interest as well as to encourage competition, efficiency and economical use of the resources. Let us quote Section 63 of the Act for better understanding.

78. Thus the competitive bidding process as contemplated under Section 63 of the Act must meet the following mandatory statutory requirements:

(a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines and Request for Proposal (RFP) including the finalized PPA approved by the State Commission

(b) The process must discover competitive tariff in accordance with market conditions from the successful bid – consistent with the guiding principles under Section 61 of the Act as well as the Government of India guidelines which strike a balance between the transparency, fairness, consumer interest and viability."

(Emphasis supplied)

105. In a Section 63 project, every aspect qua tariff discovery and approval depends upon the Request for Proposal and the Agreement with beneficiaries or users executed thereafter. However, Section 62 dispensation is *interactive* in nature whereby the planning agencies and proponents or the implementing entity engage each other the Commission in deliberations. There is no specific procedure prescribed for invoking sections 62 by Regulatory Commissions. In a section 62 project, various developments take place where the Commission wears an administrative hat and acts even through letters, communications, etc, apart from exercising legislative, regulatory or judicial powers [*PTC India Limited v. CERC* (supra)].

106. There is no quarrel with the proposition indicated earlier that both under section 62 and under section 63, it is the concerned Regulatory Commission which finally determines or approves the tariff, there being no distinction if the tariff is for an entity which is owned by the Government or a private company. The ERCs have absolute powers to curtail or prune the tariff claimed under section 62 based on the tariff regulations which, as already observed, are based on section 61 principles. Similarly, the ERC may reject the tariff discovered under section 63 if it is not aligned to market. Pertinent to note here that Clauses 7.1, 7.6, 9.6.3, 9.6.4, 9.7, 9.8, 9.10, 12.3 and 12.4 of the bidding guidelines contain evaluation criteria which is required to be ultimately approved by the Commission. The bidding guidelines, it bears repetition to say, are based upon section 61 principles. Thus, whether it is Section 62 or 63, the Commission only determines tariff.

107. The following observations of Supreme Court in *Energy Watchdog* (supra) are germane to the present discussion:

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

108. The ruling does highlight that the non-obstante clause of Section 63 is confined to Section 62 and it is evident that a Regulatory Commission has the domain and the requisite jurisdiction to either adopt section 62 route or seek implementation of a transmission under section 63, based upon the peculiar facts and circumstances of a case.

109. Pertinent to note here that this tribunal, by judgment dated 31.03.2010 in *BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission & Ors.* (Appeal nos. 106 and 107 of 2009), held that both the above routes (section 62 or 63) are statutorily available, and that the provisions of the Tariff Policy cannot take away the power of the Commissions to determine tariff under section 62, the following observations being of import:

"*18. (ii) ... <u>The wording contained in Sections 62 and 63 of the Act would make it clear that Section 63 is not couched as a non-obstante clause being an exception carved out from Section 62. Section 62 is a substantive provision. Section 63 is an exception. So, the exception contained in Section 63 cannot override the scope of the substantive namely Section 62</u>. In other words, Section 62 provides substantive power to the Appropriate Commission for determination of tariff with the sole exception of price discovery through the Competitive Bidding Process under Section 63.*

…

30. …As referred to above, the State Commission has rightly pointed out that Section 62(1)(a) and Section 63 are <u>alternative</u> methods available to the Appropriate Commission for determination of tariff and therefore, it is open to the Appropriate Commission to adopt either of the procedures prescribed under Section 62(1) and under Section 63 of the Act in relation to the determination of tariff."

(Emphasis supplied)

110. We do not accept the submission of the appellant that the decision in *BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission & Ors.* (supra) is not applicable because it was rendered when Tariff Policy-2006, was in force, the Tariff Policy-2016 having brought about a material change. The language of clause 5 of the 2006 policy and 2016 policy shows that the principle of '*competitive bidding*' has remained the same, the 2016 policy adding a condition under Clause 5.3 that the threshold limit has to be decided by SERCs for project to be considered under competitive bidding. The principle that a policy issued under section 3 of the Electricity Act cannot override the express provisions of the parent legislation remains valid. We reiterate that the tariff policy cannot dilute or take away the discretion available with the Regulatory Commissions for invoking either section 62 or section 63 and that a delegated legislation cannot override the provisions of a statute. This principle continues to apply to the Tariff Policy issued in the year 2016.

111. In taking the above view, we draw strength from jurisprudential principle settled by Supreme Court in a catena of judgments including *St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr*. (2003) 3 SCC 321 and *J.K. Industries Ltd. v. Union of India,* (2007) 13 SCC 673.

112. In *St. Johns Teachers Training Institute v. Regional Director, National Council for Teacher Education and Anr*. (supra), it was held thus:

> "*10. A regulation is a rule or order prescribed by a superior for the management of some business and implies a rule for general course of action. Rules and regulations are all comprised in delegated legislations. The power to make subordinate legislation is derived from the enabling Act and it is fundamental that the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need for delegated legislation is that they are framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilisation of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed. Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature. (See Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi [(1975) 1 SCC 421 : 1975 SCC (L&S) 101 : AIR 1975 SC 1331] .)"*

113. In *J.K. Industries Ltd. v. Union of India,* (2007), it was observed as under:

> "*133. It is well settled that, what is permitted by the concept of "delegation" is delegation of ancillary or subordinate legislative functions or what is fictionally called as "power to fill up the details". The judgments of this Court have laid down that the legislature may, after laying down the legislative policy, confer discretion on administrative or executive agency like the Central Government to work out details within the framework of the legislative policy laid down in the plenary enactment. Therefore, power to supplement the existing law is not abdication of essential legislative function. Therefore, power to make subordinate legislation is derived from the enabling Act and it is fundamental principle of law which is self-evident that the delegate on whom such power is conferred has to act within the limitations of the authority conferred by the Act. It is equally well settled that rules made on matters permitted by the Act in order to supplement the Act and not to supplant the Act, cannot be held to be in violation of the Act. A delegate cannot override the Act either by exceeding the authority or by making provisions inconsistent with the Act. (See Britnell v. Secy. of State for Social Security [(1991) 1 WLR 198 : (1991) 2 All ER 726 (HL)] , All ER at p. 730.)."*

114. On plain reading of the scheme of the Electricity Act, we find that the provisions contained in Sections 62 and 63 are clear having absolutely no element of ambiguity. Both exist parallelly and offer alternative choices to the regulator and planners or allied agencies. There is nothing in the legislation as may even remotely hint at the dominance of section 63 over section 62. It is settled principle of law that 'external aids' to construction of statutes can be resorted only in the event the statute is silent or ambiguous qua a particular provision [*R.S. Nayak v. A.R. Antulay*, (1984) 2 SCC 183]. We repel the argument that the Tariff Policy-2016, which provides for competitive bidding qua intra-state transmission projects in Clause 5.3, binds the ERCs with a regime that must prefer section 63 over section 62.

115. The reliance on decision of this tribunal in *Shri Rama Shankar Awasthi v. UPERC & Ors.* (supra) to contend that a protocol has been created wherein section 62 route can only be awarded if section 63 process has

failed is misplaced. In the said case, the distribution licensee (NPCL) had attempted bid process under section 63 but the same could not materialize into execution of a power purchase agreement (PPA) and adoption of tariff. Subsequently, the distribution licensee had executed a PPA with its sister company under section 62, which was approved by the Regulatory Commission as well as this tribunal.

116. In *Shri Rama Shankar Awasthi* (supra), it was held as under:

> *"383. We have gone through the rival submission of the Appellant and Respondent and also has taken a note of various decisions of this Tribunal and the Hon'ble Supreme Court. It is not in dispute that the National Tariff Policy provides for the procurement of power by the Distribution licensee through a bidding process under section 63 of the Electricity Act. However, the Act in no way prohibits in entirety that power cannot be procured under Section 62 of the Act. In the fact and circumstances of the case, it is crystal clear that second Respondent/NPCL made several attempts to procure power on long term basis through competitive bidding but due to the one or the other reason the same was not successful. In such a situation, second Respondent had no option but to enter into a PPA through bilateral negotiated route under the provisions of Section 62 with the Respondent No.3/DIL as the tariff was competitive and DIL was prepared to supply power immediately as its plant was already in operation.*
>
> *…*
>
> *387. It is pertinent to note from the above that any competitive bidding if not reacted to its logical conclusion leading to signing of PPAs for supply of power cannot be taken for reference in evaluating the merits of other contract as being attempted by the Appellant in the instant case. Neither, the bid process in State of UP nor by PSC could see the light of the same on account of one or the other reason. The same collectively cannot be any basis for comparison of tariff finalized in other process either under Section 62 or Section 63. It is desirable that to have more transparency in procurement of power, the rates are decided through bidding process as per the National Tariff Policy. However, the Section 62 process cannot be negated totally under which the Commission exercised their regulatory power to apply prudence check for the ultimate benefit of the end consumers."*
>
> (Emphasis supplied)

117. Though the bidding route was found to be more transparent, this tribunal held that Section 62 "*cannot be negated*" particularly as the regulator retains the power and jurisdiction to exercise prudence check to protect the

consumers' interest. As quoted above, it was held that the Electricity Act "… *in no way prohibits in entirety that power cannot be procured under Section 62* …", the consideration of "*transparency in procurement of power"* making it more desirable that "… *the rates are decided through bidding process*…".

118. The appellant heavily relies on *Vikhroli* case, wherein the Commission has directed award of a similar project under Section 63. While in *Rama Shankar Awasthi* (supra), section 63 process had failed and then the section 62 process was adopted, in the matter of license granted to the appellant ("*Vikhroli project*"), it was a reverse position. The license for the transmission project awarded to it (the appellant) under Section 62, simultaneous to the one which is subject matter at hand in favor of R-Infra, was cancelled by MERC, owing to inordinate delays and the path of Section 63 was chosen to select another entity to take it forward.

119. We may note the facts of *Vikhroli* case in brief. On 02.06.2011, the MERC had approved a 400 kV Receiving Station at Vikhroli with capital cost of Rs. 846.19 Cr to be developed by the appellant by March, 2015. By letter dated 03.10.2011, MERC had approved DPR for construction of 400 kV Kharghar Vikhroli transmission line in order to provide input power to Vikhroli EHV substation. The expected completion was FY 2015. Therefore, basic scheme of substation receiving and transmission line of Vikhroli as stated above was envisaged as combined project to meet the power demand of Mumbai, the scheme having been recommended by the STU (MSETCL). The appellant submitted the revised DPR twice, the Commission having given its approval in September, 2013 with target completion date as March, 2017 and again in March, 2015 setting the target completion date as March, 2019. Later, the appellant sought revised completion date as March, 2022 for both the said schemes. In the submission of the STU, with which MERC agreed, there was urgency for completion of 400 kV Vikhroli scheme, the STU having "*highlighted the scheme of 400 kV Receiving station at Vikhroli*

as an essential scheme which requires implementation for strengthening of Mumbai Corridor", the proposed 400 kV Receiving station at Vikhroli being "*the first 400 kV receiving Station within Mumbai and if commissioned, would help in resolving the transmission constraints of bringing the power to Mumbai from outside of the Mumbai*". In that background, the STU proposed TBCB route to be adopted it being a case of inordinate delay caused by the appellant, it having "*failed to provide any time-frame for the completion of the scheme*", it being added that this would envisage transparency both in economics and factual matrix. On these facts and in the circumstances, the MERC, by its order dated 19.09.2018 in case no. 204 of 2017, cancelled the license in favor of the appellant and decided to go on the path of TBCB.

120. The appellant had sought review by filing a Petition (Case No. 03 of 2019) which was rejected by MERC, by its order dated 29.01.2019, observing thus:

> "*21. The Commission in its Order dated 23 September, 2017 in Case No.25 & 26 of 2017, 12 September, 2018 in Case No. 204 of 2017 and 2 January, 2019 in Case No. 249 of 2018 has clearly pointed out that 400 kV Vikhroli substation scheme has been substantially delayed by TPC-T. The Commission at every count has given priority to strengthening of Mumbai Transmission thereby protecting power security of Mumbai. Contrary to this TPC-T has miserably failed to commence the implementation of 400 kV Vikhroli project even after 8 years of its approval thereby putting Mumbai power security at great risk. As planning authority of Maharashtra Transmission, STU has also not bothered to ensure implementation of the project recommended by it and kept silence all along as if it is nowhere concerned. Had TPC-T executed the scheme as per schedule proposed (i.e., 2015- 16), the scheme could have been in service of consumers without jeopardizing the supply of power to Mumbai and without substantial increase in capital cost.*"
>
> (Emphasis supplied)

121. The view taken by MERC in case of *Vikhroli project* was upheld by this tribunal, by judgment dated 23.09.2019 ("*Vikhroli judgment*") in appeal no. 88 of 2019 preferred by the appellant, observing thus:

> *"77. The contention of the Appellant that if the implementation of scheme under TBCB is allowed, it would further delay the scheme in question is not acceptable to us, since in the TBCB process the scheme has to be executed on timely basis, which also optimises the cost of the project thereby reducing the financial burden on the consumers. The Appellant, right from 2011 till date, has not taken any active steps to achieve the completion of the project, which helps the consumers of Mumbai. Now, at this stage, the Appellant claims that it has put in lot of efforts and is ready to complete the project. The Appellant was also permitted to participate in the TBCB process. Therefore, the observation of the Commission pertaining to delay in implementing the scheme in question by 8 years cannot be found fault with. In the above paragraphs several observations on facts are made how the Appellant moved at snail's pace to start and implement the project. The TBCB process is in conformity with the tariff policy notified by the Ministry of Power, Government of India. As far as the so called efforts and the expenditure made, if any, by the Appellant, the Respondent-Commission has made observations that the said amount spent/claimed by the Appellant has to be refunded to the Appellant since it is part of conditions of the bid in question.*
>
> *79…Admittedly, there was no contract of any nature between the Appellant and the 2nd Respondent-STU. The time for completion of the contract was March 2019, which is also at the instance of the Appellant. The deemed closure of the scheme in question was September 2018 i.e., six months prior to the scheduled completion date. Apparently, the time for completion of the scheme was undertaken by the Appellant itself up to March 2015, and later on, at its instance, it was extended up to March 2019. When the proceedings, in which the impugned order came to be passed in September 2018, was taken up, the inordinate delay in commissioning of the scheme in question came to the notice of the Commission. Leave alone the completion of the scheme in March 2019, except acquisition of land and some paper work like obtaining certain permissions/ consents, no development/ commencement of work was made on ground, that is to say actual construction of the infrastructure was not even commenced. Therefore, the Appellant, admittedly, was not in a position to complete the scheme by 31st March 2019. In that context, the Respondents were contending that the Appellant could not have sought enforcement of the contract or enlargement of time for completion of the scheme in question, in view of Section 55 of the Indian Contract Act.*
>
> *84. …It may not be out of place to mention that since there is scarcity of power in Mumbai city and the Kharghar-Vikhroli transmission line and the substation being not completed, importing power from outside*

> *through open access (at much lesser tariff than the tariff of the Appellant) is not possible. Therefore, it is quite possible that the delay in completing the project on time would benefit the Appellant more, since power has to be purchased from them as it is one of the embedded generating plant.*
>
> *…*
>
> *"87. By applying the above principle one has to see "whether in the case on hand since public interest is involved, the procedure now adopted i.e., TBCB process, would be more economical and beneficial apart from being transparent"? Since the terms of bid provided specific clauses ensuring completion of responsibilities/liabilities by contracting parties, and failure of same resulting in liquidated damages by making time as essence of the contract, one can expect prevention of delay. Admittedly, the Appellant is also permitted to participate in the ongoing tender process.*"
>
> (Emphasis supplied)

122. The views expressed in *Vikhroli* (supra) have to be seen in the factual backdrop of the said case. The appellant, granted the license to develop the transmission infrastructure in a time-bound manner had miserably failed to implement causing delay of more than eight years, under section 62, which had constrained the MERC to put the Vikhroli transmission project under section 63, such approach being upheld by this tribunal. The observations in para 87 quoted above make it abundantly clear that the decision to take the project back from the hands of the appellant was upheld on considerations and expediency specific to the *Vikhroli* project rather than as a general rule. On the facts presented, this tribunal found that by delaying the *Vikhroli* project for over eight years, the appellant had been gaining since it was to the benefit of its embedded generation capacity, least bothered about adverse impact on the interest of the consumers at large. The observations that under TBCB process the scheme will be executed "*on timely basis*" and the cost of the project would be optimized are general in nature and do not amount to rejection of Section 62 as undesirable. The tribunal was only recording satisfaction that the alternative path chosen by MERC for the Vikhroli project was appropriate in the factual matrix of inordinate delay seemingly deliberately caused for ulterior purposes by the appellant, the change in approach by MERC being in conformity with the tariff policy. There

is nothing in this decision from which it could be inferred that Section 63 was treated as the preferred mode.

123. The appellant places reliance on the following views expressed by MERC in License Order (Case No. 70 of 2011 on petition of R-Infra), decided on 11.08.2011:

> *"25. However, the Transmission Licence Conditions Regulations provides for two alternatives for grant of Transmission Licence which has been detailed in para 1 above. The Commission evaluated both the alternatives and arrived at a view provided below:-*
>
> *….*
>
> *iii. The Commission further referred to the clarification issued by the Ministry of Power dated December 9, 2010 on Clause No. 5.1 & 7.1 of National Tariff Policy, wherein it is apparent that all transmission projects except transmission projects of STUs/CTU for upgradation/strengthening of existing lines & associated sub-stations and projects for which BPTA(s)/TSA(s) have been signed on or before January 5, 2011, should be through competitive bidding.*
>
> *iv. Clause 7.1(6) of the Tariff Policy notified by the Central Government in exercise of its power under Section 3 of the Electricity Act, 2003, provides as under:*
>
> *"Investment by transmission developer other than CTU/STU would be invited through competitive bids. The Central Government will issue guidelines in three months for bidding process for developing transmission capacities. The tariff of the projects to be developed by CTU/STU after the period of five years or when the Regulatory Commission is satisfied that the situation is right to introduce such competition (as referred to in para 5.1) would also be determined on the basis of competitive bidding."*
>
> *….*
>
> *v. The Tariff Policy was notified by Ministry of Power vide Resolution No. 23/2/2005- R&R (Vol.III) dated 6th January, 2006 in Extraordinary Gazette of India, Part-I, Section-1. The Tariff Policy came into force on 6th January, 2006. Consequently, the substantive provisions of the Tariff Policy also came into effect from the said date. Clause 7.1(6) of the Tariff Policy contains substantive provisions stating clearly that "Investment by transmission developer other than CTU/STU would be invited through competitive bids….*
>
> *vi. The "Tariff based Competitive-bidding Guidelines for Transmission Service" are said to be made under the provisions of section 63 of the Electricity Act, 2003 ("EA 2003"). The scope of the said Guidelines is for the procurement of transmission services for transmission of electricity. In Clause 2.2, it is stated that the said Guidelines shall apply for procurement of transmission services for transmission of electricity through tariff based competitive bidding, through the mechanisms described in the said Notification and to select transmission service provider for a new transmission line and to build, own, maintain and*

operate the specified transmission system elements.

vii. It is stated in Clause 2.4 of the said Guidelines that procurement of transmission services would include all activities related to survey, detailed project report formulation, arranging finance, project management, obtaining transmission licence, obtaining right of way, necessary clearances, site identification, land compensation, design, engineering, equipment, material, construction, erection, testing and commissioning, maintenance and operation of transmission lines and/or substations and/or switching stations and/or HVDC links including terminal stations and HVDC transmission line…….

xiii. MSETCL, as the STU have the key responsibility of network planning and development based on the National Electricity Plan in co-ordination with all concerned agencies as provided in the 2003 Act. The STU is responsible for planning and development of the intra-state transmission system [Ref. paragraph 5.3.2 of the National Electricity Policy ("NEP")]. The role and functions of STU under Section 39 of the Act and as a transmission licensee under Section 40 of the Act are different…..

26. In view of the above, RInfra cannot be granted transmission licence for the entire state of Maharashtra as paragraph 5.1 read with 7.1 (6) of the Tariff Policy would require Tariff based Competitive-bidding for Transmission Service. These provisions have to be taken to mean that till the year 2011 (or when the Commission is satisfied that the situation is ripe to introduce such competition), RInfra may not be granted transmission licence for the entire state of Maharashtra as it is needed to be selected on the basis of competitive bidding for the identified projects from the STU"s five year plan.

27. If RInfra is granted transmission licence for the entire state of Maharashtra and be permitted to build transmission systems without the need of going under competitive bidding, then the purpose of "Guidelines for Encouraging Competition in Development of Transmission Projects" and the "Tariff based Competitive-bidding Guidelines for Transmission Service" is lost. In order to comply with above guidelines, RInfra cannot be granted transmission licence under Alternative 1 of the MERC (Transmission Licence Conditions) Regulations, 2004.

28. In turn, the Commission is to be guided by the Tariff Policy at the time when the Commission is to adopt the tariff determined through transparent process of bidding in accordance with Section 63 of the 2003 Act. When the "Investment by transmission developer other than ...STU." is invited through competitive bids, in terms of Clause 7.1(6) of the Tariff Policy then the Commission would be required to adopt such tariff as determined based on the bidding process.

29. Section 2 (47) of the 2003 Act casts a duty on the Commission to specify by regulations in accordance with which "open access" i.e., the non-discriminatory provision will be made for the use of transmission lines. Such use of transmission lines, as aforesaid, will have to be paid for by the user in accordance with the tariff which is either determined under section 62 or required to be adopted under Section 63 of the Act. The Commission is required to be guided by the Tariff Policy so far as it is applicable to transmission licensees. The "Guidelines for

Encouraging Competition in Development of Transmission Projects" notified on 13th April, 2006 and "Tariff based Competitive-bidding Guidelines for Transmission Service" notified on 17th April, 2006, clearly manifest the objectives of these Guidelines, as stated therein, are as follows:

i. Promote competitive procurement of transmission services.

ii. Encourage private investment in transmission lines.

iii. Facilitate transparency and fairness in procurement processes;

iv. Facilitate reduction of information asymmetries for various bidders;

v. Protect consumer interests by facilitating competitive conditions in procurement of transmission services of electricity;

vi. Enhance standardization and reduce ambiguity and hence time for materialization of projects;

vii. Ensure compliance with standards, norms and codes for transmission lines while allowing flexibility in operation to the transmission service providers.

30. Therefore, considering the merit of introduction of the competitive bidding in the transmission sector in the state and the benefits of competition to be accrued by the Consumers, the Commission is of the view that Transmission Licence under Alternative 2 should be granted to RInfra.

(Emphasis Supplied)

124. It is argued that the MERC while relying upon the NTP, Section 63 and the guidelines framed thereunder had earlier held that AEML would only be granted License on the basis of TBCB. The grievance is that the Commission has taken a different view in the present case without justification.

125. This line of argument based on above-quoted decision of 10.08.2011 is not fair. The context has to be kept in mind. The application of R-Infra was for a general transmission license for entire State of Maharashtra This was not accepted by the Commission. It has been pointed out by the respondents that a similar request by the appellant for a general license for entire State of Maharashtra was also rejected by the Commission on similar reasoning. We find that the Commission was right in such approach since the initiative to choose between RTM and TBCB had to be retained by it in its hands for decisions to be taken on case-to-case basis. It cannot be ignored that even the appellant was beneficiary of such prerogative retained in that the *Vikhroli* project under Section 62 came in the hands of the appellant around the same

period though it later lost the same for inordinate delay and lack of any progress.

126. The STU is right in pointing out that tariff is approved by the Regulatory Commission in cases both of Sections 62 and 63, tariff under latter provision being approved in terms of competitive bidding conducted in accordance with the bidding guidelines framed by the Central Government such guidelines also having been framed to fulfil section 61 principles. As such, a tariff determined under section 62 cannot be condemned as a general rule to be against the interest of consumers since such exercise is based on the tariff regulations which, in turn, incorporate principles contained in section 61, the project cost being allowed only after prudence check post detailed scrutiny, such that only justified and reasonable cost is recovered through tariff, all such decisions being subject to appellate scrutiny by this tribunal and finally by the Supreme Court.

127. The Electricity Act being a complete and exhaustive code in itself concerning all matters related to electricity, its provisions hold primacy over any other general principles which may favor bidding in the absence of a non-bidding route. The regulated tariff mechanism (RTM) route is expressly recognized and provided under section 62 of the Electricity Act and cannot be questioned or termed as redundant on account of section 63. We, thus, have no hesitation in concluding that the entire argument of the appellant that section 63 is the dominant route is premised on a fundamental flaw in reading the provisions of the Electricity Act which nowhere so contemplate reducing Section 62 to a position subservient or inferior to the former provision.

OLD SCHEME : NEW SCHEME

128. The discussion on the captioned issue arises, *inter alia*, in the wake of the GoM GR dated 04.01.2019 and the decisions taken by the EC of GoM in its 5th Meeting held on 24.12.2020, already quoted earlier.

129. Submissions similar to those urged before us were agitated by the appellant before the Commission but were repelled by detailed reasons set out in the impugned order some part whereof may be extracted as under:

> "*36.35 The issue as to whether the proposed HVDC Scheme as planned by STU is an old Scheme or is a new Scheme has been debated at length by the Parties, with the Petitioners contending that the Scheme is an old Scheme, in existence since the Year 2011, while the stakeholders, viz., L&TIDPL, SPTL, TPC-T, and TBIA have contended that the proposed HVDC Scheme is a new Scheme.*
>
> ***...***
>
> *36.47 It is seen that the HVDC Scheme proposed by AEMIL has a different point of injection, the route of line has changed, there is a change in line length, change in type of line and route of line, load flows have changed, etc., with respect to the original Scheme that had been approved earlier by the Commission in 2014. The approval granted by the Commission for the earlier/original HVDC Scheme was cancelled by the Commission in May 2016, as per the request of MSETCL/STU. Once the approval to the Scheme is cancelled, it ceases to exist for consideration. Hence, though the need for the bulk power injection for Mumbai has always been accepted and existed, it cannot be said that the present Scheme is the same as the HVDC Scheme under consideration since 2011, as the approval to the earlier HVDC Scheme was cancelled based on STU's request*.
>
> *…*
>
> *36.56 In summary:*
>
> *a) The requirement of HVDC Bulk Power Injection Schemes for Mumbai have been envisaged since the year 2011 and have been recommended by the Dr. Khaparde Committee and Zalte Committee post 2010 Mumbai Grid failure;*
>
> *b) The original HVDC Scheme from MSETCL 400 kV Nagothane to 220 kV R-Infra Aarey EHV station was cancelled by the Commission based on STU's recommendation; however, the STU has not progressed at all since last 5 years on any of the alternative HVAC Schemes proposed from time to time, except reversal in approach by dropping and including the HVDC bulk power injection scheme of Mumbai;*
>
> *c) The 1000 MW HVDC Scheme from 400 kV Kudus to Aarey, with the same configuration as at present, was first proposed in November 2018, i.e., before the GoM GR dated 4 January, 2019;*

d) The same Scheme was included by STU in its Plan for 2018-19 to 2023-24 on 28 May, 2019, i.e., after the GoM GR dated 4 January, 2019 but 1 year before the 4th EC meeting held on 30 May, 2020, when the first agenda item related to Projects other than 400 kV Kharghar Vikhroli Project under TBCB, were taken up by the EC for consideration;

e) STU informed the EC that the Scheme has been removed from the Plan 2018-19 to 2023-24, on account of alternative HVAC Schemes being considered;

f) The Licence Application related to the HVDC Scheme, has been submitted by the Petitioners on 21 September, 2020, i.e., after notification of the GoM GR dated 4 January, 2019 and after the 4th EC meeting held on 30 May, 2020, when the first agenda items related to Projects other than 400 kV Kharghar Vikhroli Project under TBCB, were taken up by the EC for consideration;

g) The EC, in its 5th Meeting dated 24 December, 2020 did not recommend the HVDC Scheme under TBCB, and stated that the HVDC Scheme shall be dealt with in accordance with the decision taken regarding existing Schemes under particular mechanism;

h) The HVDC Scheme has again been included in the STU Plan 2019-20 to 2024-25 to be executed by AEML-T, and has been confirmed in the STU Plan after STU settled on the HVDC option based on CEA recommendation dated 23October 2020.

36.57 In light of the above, the Commission is of the view that the 1000 MW HVDC Scheme from Kudus to Aarey is an 'existing' Scheme within the meaning of the GoM GR dated 4 January, 2019, and that is the reason for the EC not coming out with a clear recommendation of TBCB on the proposed HVDC Scheme in its 5th Meeting dated 24 December, 2020.

130. The question as to whether GR dated 04.01.2019 of GoM is applicable to the subject project is connected to the issue at hand. The MERC has considered it by the impugned order as under:

"37.27 The Tariff Policy notified in January 2016 stipulates as under:
"5.3…
Further, intra-state transmission projects shall be developed by State Government through competitive bidding process for projects costing above a threshold limit which shall be decided by the SERCs."

37.28 It is to be noted that the Threshold Limit for transmission projects is applicable only at the State level, as the Empowered Committee recommends projects to be undertaken under TBCB or Regulated Tariff Mechanism (RTM) as appropriate, at the Central level.

37.29 The Supreme Court, in its Judgment in the Energy Watchdog matter, observed that the Tariff Policy is statutory. The relevant extracts of the Judgment are reproduced below:

> *"53... Both the letter dated 31st July, 2013 and the revised tariff policy are statutory documents being issued under Section 3 of the Act and have the force of law…"*

37.30 For deciding which Intra-State Transmission Projects are to be undertaken through TBCB route, the Tariff Policy mandates that the Commission should decide the Threshold Limit. In this regard, the Forum of Regulators (FOR), in its 61st Meeting held on 22 September, 2017, discussed the action to be taken by States to decide the threshold limit for developing intra-State transmission projects through TBCB, as under:

> *"The Forum observed that in order to encourage transparency and efficiency in project costs, threshold limit for intra-State transmission projects is required to be determined by the SERCs as provided for in the Tariff Policy. Therefore, the Forum urged the Members to determine the threshold limit for their respective State-level transmission projects, while taking all relevant parameters of their State into consideration."*

37.31 Subsequently, FOR sent a letter to the Commission on 30 January, 2018 seeking the status on the matter. The Commission, vide email dated 1 February, 2018 asked MSETCL to provide the details and sought STU's suggestions to decide the Threshold Limit for TBCB projects as per the provisions of the Tariff Policy.

37.32 As per Minutes of 4th EC meeting held on 30 May 2020, it was stated that "determination of threshold limit for project to be undertaken under TBCB is a complex process and needs to be studied in detailed through a separate study group". In the Minutes of 5th EC meeting held on 24 December, 2020, the Threshold Limit has been decided by EC as Rs. 500 crore, with certain exceptions.

37.33 It has thus, unfortunately taken the STU more than 3 years, after the Commission sought inputs from STU, to provide its inputs on the Threshold Limit that may be determined by the Commission.
37.53 As regards whether the present Licence Application falls under the second exception stipulated under the EC recommendations, i.e., Projects that are under active consideration of the Commission where STU has already recommended execution under a particular mechanism and where the Commission has initiated substantially the process of inclusion of the project in scope of any existing or new

transmission licensee on the basis of this recommendation, the analysis is as under:

a) On 21 September 2020, AEML-T filed a Miscellaneous Application (MA No. 51 of 2020) in Case No.195 of 2019 (A Petition of AEML-T for amendment to its Transmission Licence) and requested the Commission to delete proposed HVDC scheme from its Licence Amendment Petition as it has filed the separate Petition in Case No. 190 of 2020 for grant of Transmission Licence for HVDC scheme. The MA in Case No. 195 of 2019 has been accepted and the Order in Case No. 195 of 2019 has been issued on 13 March, 2021;

b) The HVDC Project was identified to be executed by AEML-T, in the STU Plan of 2018-19 to 2023-24 (before the date of EC recommendation), and AEML-T also forwarded the DPR for the Project to the Commission for its approval. However, subsequently, STU informed the EC that it had removed the Scheme from the STU Plan of 2018-19 to 2023-24, and the EC did not take up this Scheme for consideration in its 4th Meeting, as the Scheme was not part of the STU Plan;

c) After the STU included this Scheme again in the STU Plan of 2019-20 to 2024-25 after CEA recommendation, the EC discussed this Scheme in its 5th Meeting and decided that this Scheme would be considered as per the decision laid down in Agenda No. 3;

d) The Commission has already appointed IIT Bombay to evaluate the Scope, design aspects, reasonability of cost, alternatives, etc., of the HVDC Scheme to ensure a technically appropriate and cost-effective solution for mitigating Mumbai's transmission constraints;

e) The Project is thus, under active consideration of the Commission based on the STU five-year Plans wherein this Project has been allocated to AEML-T and where the Commission has initiated substantially the process of inclusion of the project in scope of any existing/new Transmission Licensee on the basis of this recommendation.

37.54 Hence, the Commission is of the view that the present Licence Application falls under the second exception, and hence, the EC's recommendations for undertaking Projects costing more than Rs. 500 crore through the TBCB route would not be applicable to the HVDC Scheme proposed to be undertaken by the Petitioners. Thus, the EC has not recommended that the HVDC Scheme, being an existing project, be taken up under the TBCB route.

37.58 In light of the above discussions, the Commission is of the view that the GoM GR dated 4 January, 2019 is not applicable to the 1000 MW HVDC Scheme from Kudus to Aarey Scheme, and the EC has also not recommended that the HVDC Scheme being existing project be taken up under the TBCB route. In other words, it is not mandatory for the HVDC Scheme to be undertaken through the TBCB route."

131. As noted in the chronology of facts, the partial grid failure in Mumbai in November 2010 and the growing demands had prompted the concerned authorities to examine the possibility of augmenting the infrastructure for making higher quantum of electricity available for the region. In the wake of Khaparde Committee report, these efforts gained momentum particularly with the objective of urgent creation of additional transmission lines and infrastructure. The proposals for connecting HV transmission line to Aarey, using DC (VSC based) technology, from new location identified in Mumbai and from Ghatkopar to Vikhroli, mooted by R-Infra and TPC-T (the appellant) respectively, based on their survey reports had already become the subject matter of consideration with the STU in 2007, it having solicited the views of CEA in such regard, the STU (MSETCL) having included the same in its Five-Year Plan, notified on 05.05.2009, for FY 2010-11 to FY 2014-15, it having continued to be part of the Plan for FY 2013-14 to FY 2017-18, as confirmed by MERC on 07.03.2013. The project took shape, *inter alia*, over the period with submission of DPRs, and came to be labelled as *HVDC (VSC based) Nagothane-Aarey transmission line*, R-Infra (now AEML) having been acknowledged as the project developer. MERC had granted in-principle approval on 10.04.2014. However, doubts were raised as to use of the proposed technology and also later as to the point of inter-connectivity. It is in that backdrop that the project underwent modification. The initially proposed *Nagothane-Aarey* route was changed to *Kudus-Aarey,* the distance to be covered for latter (80 kms.) being shorter as compared to former (125 kms.). More important than this, the doubts entertained by STU

as to the technology having been dispelled, it gave up its insistence on *HVAC O/H Scheme* and after review in February 2019, and post-consultation with CEA, reverted to HVDC (VSC based) technology finalized as Kudus-Aarey transmission line and, accordingly, brought it back in its Five-Year Plan for FY 2018-19 to FY 2023-24 published on 28.05.2019. Meanwhile, we may recall, the GoM GR dated 04.01.2019 had been adopted in terms of which the "*new transmission projects*" were envisaged to be routed through TBCB process.

132. It is the contention of the appellant that the subject project is a "new project" within the meaning of GoM GR and, therefore, allowing it as a project under Section 62 is incorrect. It is argued that the Commission has fallen in error both in facts and in law. The respondents (including EC of GoM) contend to the contrary, the MERC having accepted this position terming it as an old scheme which is not under the domain of EC set up by the GR of the State Government.

133. The appellant insists that the project squarely fell within the domain of the EC set up by the GoM. It is not in dispute that in the wake of the guidelines on the subject by the Central government and the National Tariff Policy, the MERC has not decided till date any threshold limit for TBCB route to apply. The appellant, however, argues that ERCs have generally gone by the threshold limit of Rs. 500 crores and, therefore, the present project having been valued at over Rs. 7000 crores must come within the responsibility of the EC of GoM.

134. The MERC has held that the cancellation of DPR vide letter dated 02.05.2016 was specific to "*technology*". The appellant argues that AEML-T while objecting to the cancellation of HVDC Scheme on 23.01.2015 had itself admitted and acknowledged that STU had proposed cancellation of the HVDC Scheme. It is submitted that the approval dated 10.04.2014 was specific to the earlier Scheme proposed by R-Infra-T, it having been

cancelled by MERC, by its decision communicated vide letter dated 02.05.2016, on the basis of the STU's advice dated 05.01.2015. Pointing out that the MERC has returned a conclusive finding (para 36.47 of the impugned order - quoted earlier) that once the 2011 Scheme was cancelled, it ceased to exist for consideration, the appellant argued that there is no question of AEML-T claiming any vested right based on any event prior to 2016, such finding not having been challenged. The appellant assails the conclusion of MERC that as the fresh connectivity application of 23.11.2018 pre-dates the GoM GR dated 04.01.2019, therefore, the same will be considered as an existing scheme arguing that the connectivity application of AEML-T cannot decide proceedings under Section 15 of the Electricity Act. It is submitted that an application for connectivity cannot create vested rights to undertake a project when the said project itself is not under the current STU Five-year plan itself. It is pointed out that it was with reference to the connectivity application that the STU on 11.04.2019 had sought CEA recommendation which was granted on 13.06.2019, the STU having re-included the Scheme as part of 5-year plan on 28.05.2019, all such events taking place after 04.01.2019. The argument is that MERC has erroneously proceeded to rely upon the preparatory steps taken by AEML-T in the nature of discussions with stakeholders for acquiring land, etc. It is contended that no number of concrete steps can create a vested right in favor of a party when the statute in terms of Section 63 and Tariff Policy with TBCB Guidelines prescribe the dominant route of Competitive Bidding.

135. The appellant submits that the MERC has fallen in factual and legal error when it concludes that the Scheme was under its active consideration and, therefore, STU should not have referred the HVDC Scheme to EC in absence of Threshold Limit which has to be decided by the State Commission. It is submitted that STU as early as on 22.01.2020 had informed the MERC, by way of reply filed in case No. 195 of 2019 (*AEML's*

Petition seeking Amendment of its License wherein HVDC Scheme was added by AEML as a Proposed Scheme), that the Scheme was referred to the EC. The AEML-T on 21.09.2020 (eight months after STU Reply) had amended the application to delete HVDC Scheme and, on 21.09.2020, filed a fresh Petition for grant of License. The submission is that the *effective consideration* of HVDC Scheme in law only started on 21.09.2020.

136. The MERC has found that HVDC Scheme was confirmed in the 5-year STU Plan for 2019-20 to 2024-25 under AEML-T scope on 23.10.2020 and that the HVDC Scheme is an existing scheme because it was first proposed in November 2018 and the EC in its 5th Meeting dated 24.12.2020 did not recommend HVDC Scheme under TBCB. The appellant argues that these conclusions are wrong since the Scheme was cancelled and ceased for consideration. It submits that this is contradictory to the fact that the relevant date for assessing whether the HVDC Scheme is an old scheme or new scheme is that of GoM GR (dated 04.01.2019). It is pointed out that the STU had referred the HVDC Project for the 6th Meeting of EC for consideration under TBCB as per the decision taken by the EC in of its 5th Meeting.

137. The STU, while supporting the MERC decision and contesting the appeal, submits that the concept of old or new transmission project was brought in by the GoM GR dated 04.01.2019 which stated that "new" transmission projects were being contemplated to be implemented through bidding process in light of the mandate contained under Clause 5.3 of the revised Tariff Policy-2016, such distinction being adopted by EC in its minutes dated 24.12.2020. Referring to the chronology of events, in particular the letter dated 23.01.2015 issued by R-Infra (now AEML-T) agreeing to align its project by changing the inter-connection point from Nagothane to Kudus in terms of the suggestions in the meeting dated 20.11.2013 of the STU read with its letter dated 05.01.2015, it asserts that the transmission project based on the HVDC technology is an existing or old

project. It has been submitted that the request submitted on 23.11.2018 by AEML-T with STU seeking amendment of the connectivity granted on 21.08.2013 was for aligning the connectivity with the STU's suggestions made in meeting held on 20.11.2013 and letter dated 05.01.2015.

138. Pertinent to note here that the EC of GoM, fifth respondent in the matter at hand, by its reply submitted through the Coordinator and Member Secretary of EC, refers to the decision taken against agenda item nos. 3 ("*Notification of Threshold Limit as per tariff Policy (2016-17*)") and 4 ("*1000 MW Kudus-Aarey Project*") in the 5th meeting held on 24.12.2020. The minutes against the former agenda item (*threshold limit*) have already been quoted. The same (by para 6) leave no room for doubt that old or existing projects as also such projects as were under "*active consideration of MERC where STU has already recommended execution under a particular mechanism and where MERC has initiated substantially the process of inclusion of the project in scope of any existing or new transmission license on the basis of this recommendation*" were expressly excluded from the domain of EC. On the specific subject of the project, i.e. 1000 MW Kudus-Aarey HVDC project, the EC taking note (against agenda item 4) of the fact of its inclusion in five year plan of STU called upon the latter (STU) to proceed as per decision on the subject of threshold limit. Noticeably, the EC has not made any adverse comment in its reply on the subsequent decisions of STU and MERC to treat the project in question as an old one and covered by the exclusions set out in para 6 of the resolution on threshold limit against agenda item no. 3 in its 5th Meeting referred to above.

139. The appellant referred to the tariff policy of 2006 to argue that EC was authorized as per the Development Guidelines to decide which projects are to be awarded through TBCB Route. The Guidelines for Encouraging Competition issued in 2006 are being labelled as EC by the appellant to give the impression that the Empowered Committee (EC) has been in position

since 2006 which is not correct. The EC for the State was established by GoM through GR dated 04.01.2019.

140. The contention of the appellant that the MERC awarded the Transmission Project based on HVDC technology to the original applicants by wrongly introducing the concept of old (or existing) versus new project for allocating the same under section 62 is founded in flawed interpretation of the statutory provisions of Electricity Act. As discussed at length in separate part of this judgment, the aspect of historicity traces its roots to section 61 particularly clauses (c) and (e) contained therein. To put it simply, the statutory provision casts a duty upon the Regulatory Commissions to take into account 'efficiency' and 'economical use of resources' as well as optimum investments, while invoking Section 62 or Section 63 of the Electricity Act.

141. The Tariff Policy-2016, in para 5.3, expressly stated that the tariff of all new generation and transmission projects of company owned or controlled by the Central Government shall continue to be determined on the basis of competitive bidding as per the Tariff Policy-2006 unless otherwise specified by the Central Government on case-to-case basis. It also clarified that intra-State transmission projects shall be developed by State Government through competitive bidding process for projects costing above a threshold limit which shall be decided by the SERCs. The subsequent para of Clause 5.3 is an extension of the main provision and not in the nature of a proviso. Thus, it is the Tariff Policy which introduced the classification of "new" generation and transmission projects owned or controlled by the Central Government stipulating that the tariff in their respect is to be determined under competitive bidding route.

142. The GoM GR dated 04.01.2019 formalized a decision taken by the State Government in pursuance of the TBCB guidelines notified by the Central Government, *inter alia*, suggesting that the State Government may

adopt the guidelines for inter-state transmission projects or may set up similar committees to facilitate transmission projects in the State. The decision unequivocally declared that the Empowered Committee was being set up "*to implement a Tariff Based Competitive Bidding (TBCB) process*" for setting up of "*new transmission projects in the State*". The mandate of the GR clearly is that it would apply to "*new*" transmission projects. This is how even the EC set up by GoM understood the government directive in as much as, in its 5th meeting held on 24.12.2020, it (EC) resolved (para 6 of Agenda No. 3) acknowledging that an exception has to be made for awarding transmission projects under section 62 based on consideration as to whether it is "*new*" or "*old*" project.

143. Reference by the appellant to Regulation 19.3 of MERC MYT Regulations, 2019 is misplaced since the said regulation itself envisages that all "*future*" procurement of short-term or medium-term or long-term power shall be undertaken through the TBCB Route under Section 63 of the Act and in accordance with the Guidelines framed thereunder. Even otherwise, the Regulation relates to "*procurement of power*" and not for implementing transmission projects.

144. We thus hold that the conceptualization of an old or new transmission project is not alien to the statutory and policy framework governing generally the subject matter of award of a transmission project.

145. The requirement of the Tariff Policy qua determination of a threshold limit by the concerned State Commission is yet to culminate and be finalized in the State of Maharashtra. As already concluded, in terms of the statutory scheme of the Electricity Act, both sections 62 and 63 stand on an equal footing. There is, thus, no doubt that a Regulatory Commission is vested with complete discretion to choose either of the said routes for awarding a transmission project. The Tariff Policy-2016, by its Clause 5.3, provides an additional protocol for limiting the above discretion vested with a Regulatory

Commission to choose either section 62 or 63, by providing a threshold limit but then such threshold limit has to be decided by the SERC.

146. The determination of a threshold limit by a Commission is a policy issue which has to be finalized in a way that the same not only encourages competition, but also ensures that urgent capital works are not hindered. The well settled principle that when law provides for a certain thing to be done in a certain manner, then the said thing has to be done in that manner only applies. [*King-Emperor v. Khwaja Nazir Ahmed 1944 SCC OnLine PC 29; Chandra Kishore Jha v. Mahavir Prasad*, reported in *(1999) 8 SCC 266; Captain Subhe Singh & Ors. v. LT. Governor of Delhi & Ors.*, reported in *(2004) 6 SCC 440*]. The argument of the appellant that the threshold limit is irrelevant qua the present case considering that the Transmission Project based on HVDC technology is worth around Rs. 7000 crores does not appeal to us. Till such time as the MERC does not decide the threshold limit for award of transmission projects under section 63, the discretion to choose section 62 or 63 route, keeping in mind the facts and circumstances of each case, is not taken away.

147. The Transmission Project was based on HVDC Technology from the very beginning. The load/evacuation point for power to be received into Mumbai City remained the same from 2007 onwards viz. Aarey. This connection point under this very scheme was merely changed to Kudus subsequently. Every transmission infrastructure project undergoes changes by way of routine improvisations based on technicalities. In any transmission infrastructure project, there are always changes arising from the initial planning due to ground situation including but not limited to factors like land availability, objections of other utilities, litigation, geological issues etc. Modification in a transmission system of this nature does not result in a new transmission system being planned every time there is a change arising from such factors.

148. The respondents have established by reference to the chronology of events that the Transmission Project which is the subject-matter here was an existing or old project vis-à-vis the GoM GR dated 04.01.2019 and that all stake holders, including the appellant, had been in agreement with the proponent (R-Infra) since beginning that it is to be executed by the latter. Reference may be made to letter dated 12.11.2007 issued by STU to the CEA wherein the Transmission Project in question (HVDC based) and Vikhroli transmission project were mentioned, the responsibility of developing of the former being of AEML (then R-Infra) and the latter being entrusted to the appellant. This impression is reinforced by the CEA communication dated 13.6.2019 reflecting the deliberations of two meetings dated 08.05.2019 and 31.05.2019 convened by CEA in which both contenders in this appeal (TPC-T and AEMIL) had participated and revalidated the Kudus-Aarey HVDC Project for implementation by the latter.

149. The cancellation of the in-principle approval earlier accorded cannot render it a new scheme since the STU itself later took an about-turn on its objections as to the technology for which reason the cancellation had been earlier commended and so acted upon by the Commission. The scheme has remained the same, the prime change being with regard to modified route (to save distance and costs) the HVDC technology being the one initially proposed and now eventually accepted by the STU upon endorsement by CEA. The effect of the confusion caused by the flip-flop or re-think more than once by the STU is being discussed by us in the section that follows (under the caption "*Shifting stand of STU on HVDC project*") and dwelling upon it here will make the discourse repetitive. Suffice it to say here that such confusion for reasons attributable to the indecisiveness of the STU cannot divest the scheme of its "old" character because, with some hiatus (again on account of doubts over HVDC as compared to HVAC), the Scheme has consistently and throughout remained, since FY 2013-14, part of the five-

year plans of the STU, as a project entrusted to the proponent R-Infra (now AEML-T or its SPV), the GR of GoM having come in much later in the day.

150. We, thus, do not find any error, infirmity or impropriety in the conclusions reached by the Commission on the captioned issue. The arguments of the appellant to the contrary are rejected.

SHIFTING STAND OF STU ON HVDC PROJECT

151. The grievance encapsulated by the caption may entail discussion that may sound repetitive. But it is our duty to consider the dimension thereby added. It is one of the arguments of the appellant that the STU (Respondent MSETCL) has been changing its position unfairly and this ought to vitiate the end-result. It is pointed out that the STU had granted approval for the grid connectivity through the HVDC Scheme of R-Infra (now AEML-T) and its inclusion in STU 5-Year Plan FY 2013-14 to 2017-18 on 21.08.2013. On 05.01.2015, however, it requested the Commission to cancel the approved HVDC Scheme. On 11.04.2019, the issue of appropriate Bulk Power Injection Scheme for Mumbai including HVDC Scheme to be executed by AEML-T was referred to CEA by STU. Close on the heels of the same, on 28.05.2019, STU submitted 5-Year Plan for 2018-19 TO 2023-24 to the MERC thereby including HVDC Scheme and confirming on 27.06.2019 that the HVDC Scheme is to be executed by AEML-T advising the latter (i.e. AEML-T) on 04.09.2019 to initiate further needful action for execution. This was followed by submission of the DPR of AEML-T HVDC Scheme by the STU to the MERC for in-principle approval on 13.01.2020. On 22.01.2020, the STU submitted that HVDC Scheme had been referred to EC for consideration under TBCB. On 30.05.2020, the EC set up by GoM in its 4th Meeting was informed by the STU that the HVDC Scheme had been dropped from 5-Year STU Plan 2018-19 to 2023-24 and, therefore, "*the same need not be considered for TBCB as of now*". However, on 03.09.2020, the STU

submitted its 5-Year Plan 2019-20 to 2024-25 to the MERC which included the HVDC Scheme to be executed by AEML-T.

152. In sharp contrast to the above, on 12.10.2020 STU filed objection to the Petition Case No. 190 of 2020 and did not recommend grant of Transmission License to Original Applicants taking the position that *"… consideration of 1000 MW HVDXC Project from Kudus– Aarey to be taken under TBCB was proposed for Empowered Committee …"* and consequently it (STU) was not recommending "*… issue of transmission license for 1000 MW HVDC scheme as a part of intra-State Transmission System (InSTS) to Adani Electricity Mumbai Infra Limited (AEMIL)*". On 20.01.2021, the STU took the position before MERC that it would be proceeding as per decision of the EC. However, on 08.02.2021, by its written submissions before the MERC, the STU chose to support the HVDC Scheme to be undertaken by AEMIL stating that it is to "*be considered as old project and where MERC has initiated substantially the process of inclusion of this project in scope of petitioner* (original applicants)".

153. It is the argument of the appellant that the STU had drastically changed its position from contending that the decision on the HVDC Project will be as per the decision of the EC to contending that HVDC Scheme is an old scheme in the proceedings before MERC. It is pointed out that the MERC has also observed in the impugned order that the STU has adopted an *ad-hoc* approach towards the implementation of GoM GR.

154. The STU has sought to explain before this tribunal that as the apex planning body for intra-State transmission projects, it was its paramount duty to look after the transmission constraints in the State of Maharashtra, including the City of Mumbai, in the intra-State grid. In this context, it required to bear in mind that Mumbai is the financial capital of the country and its power demand is ever increasing, which mandates that the intra-State transmission grid, which is the most important infrastructure for providing

power to the door steps of various distribution licensees for onward supply to the end consumers in the State of Maharashtra, has to be updated and its efficiency maintained for the purpose of meeting such ever increasing power demand of the Mumbai City. It is submitted that, for such reasons, the STU in discharge of its responsibility in terms of Section 39 had issued on 12.11.2007 a communication to the CEA the concerns about need to connect Mumbai New Location to Aarey by HVDC (VSC based technology), expressly mentioning that the proposal of HVDC technology-based Transmission Project was of REL, the predecessor entity of AEML. Accordingly, on 05.05.2009, STU being duty bound to do so had notified its five-year plan for FY 2010-11 to 2014-15 where HVDC technology was envisaged to be used for a transmission project. Referring to the event of partial grid failure in Mumbai in November 2010 and submissions of reports of Khaparde Committee and Standing Committee of MERC, the STU points out that upon submission of the DPR to MERC for appointment of a consultant towards implementation of R-Infra's proposed 2 x 500 MW HVDC transmission project (then Nagothane to Aarey), it had addressed a communication to MERC on 07.03.2013 confirming that the transmission project of R-Infra (now AEML-T) based on HVDC technology is part of the five year plan qua FY 2013-14 to 2017-18, having identified the latter (AEML-T) as the implementing utility.

155. Referring to the events which followed, the STU points out that after evaluation of the two options over the period, it had resolved to opt for HVAC technology and resolved to undertake the project on its own changing the route from Nagothane-Aarey to Kudus-Aarey. It submits that R-Infra had agreed to shift the interconnection point from "Nagothane to Kudus" with respect to the very same transmission project, in line with the suggestions of STU vide meeting dated 20.11.2013. The STU explains that in view of the anticipated challenges in transmission system and RoW issues, the idea of

HVAC technology (with overhead line and not underground cable as was proposed with HVDC technology) was shelved and the original proposal for HDVC technology revived. It clarifies that since HVDC technology had been given up at the stage and HVAC technology was not being implemented the transmission project was not shown in the five-year plan for FYs 2016-17 and 2017-18. It submits that the AEML-T submitted on 23.11.2018 an application, in the wake of deliberations in the meeting convened by MERC on 12.10.2018 for change of the inter-connection point from 'Nagothane to Kudus' and based on the later discussions the STU had re-included the transmission project based on HVDC technology in its five-year plan for FY 2018-19 onwards as published on 28.05.2019. Pointing out that the CEA recommended the transmission project based on HVDC technology on 13.06.2019 with respect to AEML-T's letter dated 26.03.2019 and the STU letter dated 11.04.2019, it justifies confirmation of the transmission project based on HVDC technology on 27.06.2019, denying the allegation that it had indulged in unnecessary flip flop.

156. The STU points out that in terms of the MERC Grid Code (quoted earlier), it is duty-bound to publish in its five-year plan not only the proposed schemes but also the particulars of the licensee. It also refers to the tariff order in tariff petition filed by AEML-T (case no. 297 of 2019) passed by MERC on 30.03.2020 directing the STU and AEML-T to initiate necessary steps for implementing the transmission projects, including the HVDC technology project subject to necessary regulatory approvals.

157. Referring to the minutes of the 5th meeting of the EC held on 24.12.2020, the STU points out that the threshold limit of Rs. 500 crores for transmission projects to be referred under bidding route was a recommendation subject to approval by MERC and that there was clear exclusion of transmission projects which are already part of license of a particular licensee and allotted for execution or projects which are under the

active consideration of the MERC or where STU has recommended their execution under a particular mechanism and where the MERC has initiated substantially the process of inclusion of the project in the scope of any new license. It explains that while making submissions before the MERC, it had aligned its stand with the minutes of the 5th EC meeting held on 24.12.2020 and keeping in mind the historicity of the transmission project it had conceded that it was an existing project. The STU explains that it is not the entity which awards transmission license or approves the tariff of transmission infrastructure, it though being within its domain to come to a logical conclusion qua a transmission project. It submits that the departure in submission filed on 27.01.2021 from what was decided in the 5th EC meeting held on 24.12.2020, does not restrict the ability of the STU to recalibrate and align its stand with what has been decided in the said meeting which was also reiterated by the STU in the earlier submissions dated 20.01.2021.

158. The appellant is also aggrieved on the ground that the STU had altered its position by written submissions placed before the Commission on 08.02.2021 after the hearing had been concluded by the Commission this, according to the argument, constituting violation of the Principle of Natural Justice.

159. We do not find any substance in the arguments of the appellant on above score. The submissions made in writing by the STU on 08.02.2021 have not been the turning point. The Commission has passed adverse comments on the conduct of the STU. We only wish to add that a more decisive and timely approach in context of infrastructural projects of such immense importance was expected from such an expert body as the STU entrusted with responsibilities of developing and overseeing maintenance of "*an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load*

centres". There was virtually no resistance on the suggestion for change of route (Kudus rather than Nagothane being one end) as the proponent readily agreed to it. The flip-flop vis-à-vis the appropriate technology (HDVC versus HVAC) is where the progress came stuck for a prolonged period. We do find merit in the explanation of the STU about exclusion of the scheme from its published plans for a few years in-between. After all, the STU having switched its planning away from HDVC technology, it having so communicated to the MERC, the continuance in the plans contrary to such thinking would have been a contradictory approach. But once the CEA had endorsed the better utility of HDVC, and the STU having realized the challenges involved in HVAC proposal, it came around and was within its rights, rather duty-bound to do so, to align its position and revive the old scheme (*albeit* with route modified for good reasons). The temporary uncertainty in the mind of the STU, which had only a recommendatory role, has only delayed the decision-making process. It, however, cannot vitiate the decision taken by the MERC in whose hands the jurisdiction is placed by the law to take a call on grant of license.

160. We repel the contentions to the contrary urged by the appellant.

IMPUGNED DECISION CONTRARY TO SECTION 15?

161. It is argued by the appellant that the MERC by allocating the project to the Original Applicants in the capacity of Transmission Licensee has also violated Section 15 of the Electricity Act. The focus of the argument is on the provision contained in Section 15 (quoted earlier), particularly sub-section (5) in terms of which, before the grant of the transmission license, the Commission is required to "*publish a notice in two such daily newspapers, as that Commission may consider necessary, stating the name and address of the person to whom it proposes to issue the licence*" and also "*consider*

all suggestions or objections and the recommendations, if any, of the Central Transmission Utility or State Transmission Utility, as the case may be". Reference is made to the following part of the impugned order to submit the procedure adopted is flawed:

> *"38.53 It is clear that AEML-T has been given to understand by STU, vide the periodic STU Plans, that the Scheme is to be undertaken by AEML-T. The proposed HVDC Scheme in the same configuration has been included in two STU 5-Year Plans, viz. FY 2018-19 to FY 2023-24 and FY 2019-20 to FY 2024-25, and in both these Plans, the Scheme has been allocated to be undertaken by AEML. The HVDC Scheme, with a different configuration was included in the earlier Plan in 2013, and was also allocated to AEML (erstwhile RInfra-T). Thus, on all the occasions when the Scheme has been part of the STU Plan, it has been allocated to AEML. Against this background, it is a reasonable expectation for AEML or any Transmission Licensee that the proposed HVDC Scheme would be undertaken by it, and AEML has accordingly taken steps such as discussions with stakeholders for acquiring land, etc. The Licence Application has also been submitted by AEML and processed by the Commission against the same frame of reference."*

162. It is the submission of the appellant that the above is contrary to the procedure laid down under the Electricity Act and also creates an impression that the license has been granted to AEMIL with a prejudged mind. The argument is that if the finding of MERC is to be accepted, then the process envisaged under Section 15 is rendered otiose. Placing reliance on *Dipak Babaria & Ors. v. State of Gujarat & Ors*., (2014) 3 SCC 502, it is submitted that there is violation of the principle that when a statute prescribes something to be done in a manner then it has to be done in that manner and not otherwise.

163. It is the argument of the appellant that its participation in the 2011 regime is of no consequence as all of it predates the revised Tariff Policy-2016 and the GoM GR dated 04.01.2019. It is submitted that a vested right in favor of AEML-T cannot be accepted before the grant of License since that would turn an application under Section 15 an empty formality and for the

reason that mere expectancy of future benefits, or contingent interest in property founded on anticipated continuance of existing laws does not constitute vested rights and a “settled expectation” or “vested right” cannot be countenanced against public interest or convenience, reliance being placed on the ruling in *JS Yadav vs. State of Uttar Pradesh & Anr.* (2011) 6 SCC 570.

164. The argument is that after cancellation of the DPR by the MERC on 02.05.2016, no vested right existed in favor of AEML-T. As per the appellant, the inclusion or exclusion in the STU plan does not give a right to the AEML-T for transmission license since the STU is not the grantor of concession or license and so inclusion in its five-year plan only means that the project is necessary for Mumbai, this having no relevance as to who will execute the project. It is argued that the Tariff policy, Bidding Guidelines and Section 63 of the Electricity Act do not recognize vesting or creation of prior interest so as to avoid the statutory route and allow a private grant.

165. We agree with the respondents that the contentions of the appellant qua Section 15 in context of grant of transmission license are fallacious, nothing but smoke-screen. We do not have the least doubt that even in a Section 63 project, a license application can only be made by the person who has emerged as the successful bidder, and that no other person has the right to apply for such a transmission license. It is factually wrong to say that the procedure under Section 15 was not followed by the MERC as there was no STU consent before public proceedings. It is rightly pointed out that the Public Notice issued by the MERC for grant of license under Advertisement No. 21/2020-21 dated 06.01.2021 stated as under:

> “*7. The HVDC scheme is part of STU's five year plan from FY 2019-20 to FY 2024-25 and is also recommended by the CEA vide its letters dated 13 June, 2019 and 23 October,2020. STU vide its letter dated 10 December, 2020 has submitted the DPR of 1000 MW HVDC for in-*

principle approval of the Commission for treating it as part of InSTS plan."

166. The STU vide its letter dated 10.12.2020 had confirmed that the revised DPR for 1000 MW Kudus-Aarey scheme had been submitted by AEML-T and had been technically vetted by it (the STU) and submitted to MERC for further needful action, the consent of STU being inherent in this communication.

167. We endorse the view canvassed by the respondents that the proceedings relating to grant of license under section 15 can never be conducted *de hors* the entity which has to implement a project either under section 62 or section 63 of the Electricity Act. It is trite that Sections 14 and 15 go together and, therefore, the grant of license under Section 15 does not trigger unless there is an application moved under section 14. To put it differently, a grant of license, such as a transmission license, cannot happen in the air, without any clarity qua the entity which has to implement a project either under sections 62 or 63. We do not accept the suggestion that a transmission license can be granted in vacuum or isolation where the entity which is being granted such license has no connection in any manner whatsoever with the asset which it is entitled to develop within the framework of the law. The Section 15 proceedings cannot be independent or completely *de hors* the award of a project under section 62 or section 63.

168. A license entitles a licensee to undertake various activities. For a transmission licensee, such activities are provided primarily under Section 40. Under Section 40(a), the licensee has the duty to build and maintain a transmission system (inter-State or intra-State, as the case may be). Other duties of a transmission licensee are provided in Sections 40(b) and 40(c), wherein it has to comply with the directions of the load dispatch centers and to provide non-discriminatory open access to its transmission system. If a license is granted without clarity of the entity which has to implement a

transmission project either under section 62 or section 63, then it is bound to lead to absurdity since the licensee would be entitled to build and maintain a system, without any system allocated under Sections 62 or 63. Further, under Section 164 of the Electricity Act, a licensee can be granted the powers available to a telegraph authority qua laying of transmission lines etc. Surely, such powers cannot be conferred upon a licensee without the said licensee having been allocated a transmission project either under Sections 62 or 63. In such view, the fact qua the implementation of a transmission project by an entity, is a material guiding factor in a proceeding for grant of transmission license under Section 15 of the Electricity Act.

169. We conclude that the procedure envisaged in Section 15 has been followed and there is no infraction vitiating the process.

HVDC SCHEME – TBCB BETTER ROUTE?

170. The State Commission has examined this question under the fourth issue and set out the reasons for opting for RTM route as under:

> "*38.61 In summary:*
>
> *a) There is no right or wrong approach for undertaking this HVDC Bulk Power Injection Scheme for Mumbai, in terms of whether the Scheme is decided to be undertaken under Section 62 (RTM) or Section 63 (TBCB) route, as both RTM and TBCB route can be justified for its implementation;*
>
> *b) This is a case where the most appropriate route for undertaking the Project has to be selected, considering the need for this Scheme, the urgency associated with the Scheme, the historical background, and the peculiarities of this Scheme;*
>
> *c) This Project is being considered by the Commission because it is part of the STU Plan FY 2019-20 to FY 2024-25, wherein this Scheme is allocated to AEML;*

d) The cost benefits in case the Project is awarded under the TBCB route cannot be assessed, as there is no precedent of any completed HVDC Scheme with UG cabling being awarded through the TBCB route;

e) HVDC Scheme is a high-cost project with high-end technology with limited international suppliers, and hence, has relatively limited scope for cost reduction as compared to HVAC schemes;

f) Steps already taken by the Petitioners for procuring land at Aarey and Kudus for HVDC terminal station will facilitate timely completion of the Project;

g) The Commission has asked IIT Bombay to evaluate the Scope, design aspects, reasonability of cost, alternatives, etc., of the Scheme to ensure a technically appropriate and cost-effective solution for mitigating Mumbai's transmission constraints;

h) The contracting for the Project would be through international competitive bidding as a pre-condition of the Licence, and hence, the least cost is likely to be achieved. Further, the cost incurred on the Scheme could be verified through experts after completion of the Scheme before allowing recovery through ARR;

i) The Commission allows recovery of capital cost for Section 62 Projects only after prudence check based on detailed scrutiny, so that only justified and reasonable cost is recovered through tariff;

j) The STU has expressed reservations regarding undertaking the HVDC Scheme through the competitive bidding route, and has stated that additional time of 1-2 years may be required for completion of the competitive bidding process;

k) The two Transmission Schemes in Maharashtra that have been decided to be undertaken under TBCB route, other than Kharghar Vikhroli Transmission Project, have not seen any progress at all, even after passage of almost 3 years in one case;

l) It will be in no one's interest if the Scheme is awarded under TBCB route especially when the planning and feasibility of the Scheme is at final stage, even if it is at a lower cost than that estimated by AEMIL, if it either does not come up at all or does not come up within the desired timelines;

m) The rationale adopted at the Central level to undertake HVDC Projects on RTM basis despite the high cost of such Schemes, has been the intention of compressing the execution time schedule, which is equally applicable to the present Mumbai transmission system;

n) Section 62 Projects can be closely and regularly monitored by the Commission for aspects such as timely execution, cost escalation, etc., unlike Section 63 Projects where the Bidders are bound by the conditions and responsibilities stipulated in the TSA, and on which the Commission has a limited regulatory oversight;

*o) The Commission has already constituted the Maharashtra Transmission Committee (**MTC**) in accordance with the MEGC, under the aegis of the Grid Coordination Committee (**GCC**), which shall be responsible for planning and monitoring timely execution of transmission projects in Maharashtra including Mumbai area. Considering the importance of HVDC Scheme for strengthening the Mumbai Transmission system, the Commission will separately notify a Committee for closely monitoring the progress of this Project to ensure strict adherence to the planned timelines for its identified milestones;*

p) The Scheme has to be undertaken at the earliest in a time-bound manner in the interest of strengthening Mumbai's transmission system, especially since almost 10 years have passed since the HVDC Bulk Power Injection Scheme was first proposed for Mumbai;

q) The early and timely completion of the HVDC Bulk Power Injection Scheme for Mumbai will provide access to alternative power procurement sources as compared to the embedded generating units; while there is no guarantee that power procurement through competitive bidding will discover rates lower than that of the embedded generating units, at least the option will be available to the Mumbai Distribution Licensees and Commission's approval, and the lower power procurement costs can be passed on to the consumers through reduction in tariff;

r) Considering the expected retirement of the embedded generation capacity and Transmission constraints, import of potentially cheaper power into Mumbai through competitive bidding will be facilitated by implementation of the HVDC Scheme, which is likely to reduce the cost of power for the end-consumers.

38.62 In light of the above discussions, taking a holistic view of the matter as summarised in earlier para, the Commission rules that the HVDC Scheme as per the STU Plan 2019-20 to 2024-25 shall be undertaken by the Petitioners under Section 62 of the EA, with necessary safeguards as stipulated in this Order."

171. The arguments of the appellant in this regard are virtually rehash of what has already been considered. As noted earlier, the appellant contends

that, by GoM GR dated 04.01.2019, a robust mechanism to implement the TBCB Guidelines within the State of Maharashtra was set up, in terms of which the GoM EC was empowered to decide which projects are to be implemented through TBCB, in consonance with the TBCB Guidelines and Development Guidelines of the Central Government, the relevant framework having thereby been made available in the State of Maharashtra to carry out the intent of the Electricity Act i.e. promotion of competition.

172. It is the argument of the appellant that Regulation 19.3 of MERC MYT Regulations, 2019, envisages that all future procurement of short-term or medium-term or long-term power shall be undertaken through the TBCB Route under Section 63 of the Electricity Act and in accordance with the Guidelines framed thereunder. It is submitted that Regulation 12.13 of the MERC State Grid Code, 2020 envisages that the inclusion of the investment plan for transmission system submitted by STU is to be first approved by the MERC. However, in the impugned order the Commission has taken a position that since the HVDC Project has been included in the scope of AEML-T, it was the reasonable expectation of AEML-T that it will carry out the scheme. It is argued that this finding defeats Sections 14, 15 and 63 of the Electricity Act, particularly as the Commission has agreed that TBCB is more economical than the regulated cost-plus tariff**.**

173. It is argued that the only apparent advantage the grantee (AEMIL) had was that it had already acquired a piece of land for the proposed substation and IIT Bombay had been awarded the job to evaluate the DPR, the project being still at an initial stage. The appellant contends that land can never be the determinative factor for award of a contract. It submits that in cases of thermal projects which are undertaken through TBCB process, the land is always acquired for the project in question prior to the initiation of Bidding Process as per the applicable Standard Bidding Guidelines. Even if it were decided that the very same plot of land as is in possession of the

AEMIL is required for the HVDC Project then the piece of land could be transferred to the selected bidder for the purpose of execution of the Project. It is submitted that the MERC has not considered the fact that there are several other equally competent entities in India which are equally competent, technically and financially, to execute the HVDC Project.

174. The appellant counters the argument of the original applicants to the effect that HVDC Projects have been implemented in India mostly thorough Cost-Plus Method by saying that such HVDC Projects in India (with one exception - a dedicated transmission line which was subsequently granted License) have been developed by CTU or STUs. It is submitted that if the Commission wanted the HVDC Project to be expeditiously executed it ought to have awarded the project to MSETCL (the STU) which is the only entity in the State which has executed a HVDC Project.

175. We have already concluded that the GR of GoM does not apply to the present case since the project precedes the setting up of EC by the State Government. As also noted, the EC of GoM does not oppose the impugned decision nor asserts that it falls in its domain. Its resolution in 5th Meeting expressly excludes it because it is an old project which had been not only part of the plans of STU over the years but also under active consideration of MERC as evident from the orders as early as of 05.04.2013.

176. The submission of the appellant is that the MERC vide letter dated 28.06.2019 could not have directed implementation of the project by R-Infra (now AEML) since it is contrary to the rulings of Supreme Court, bidding or auction being the favored route. This submission does not impress us in the case at hand. We have already considered and rejected the argument based on the rulings cited that Section 63 of the Electricity Act is dominant route as compared to Section 62.

177. As also noted earlier, the STU has argued that resort to competitive bidding, as envisaged under the GoM GR dated 04.01.2019, read with the

revised Tariff Policy-2016, is contingent upon determination of a threshold limit by the State Commission which is yet to take a decision on such aspect. It submits that till such limit is decided, the MERC retains all the powers to approve transmission projects either under section 62 or section 63 on a case-to-case basis. It points out that departures have been made, illustrating this by reference to Power Grid Corporation of India (PGCIL) having awarded transmission projects based on HVDC technology worth above Rs. 30,000 crores post the issuance of the revised tariff policy on 28.01.2016. Any proposal to undertake the project by bidding as per Section 63 of the Electricity Act, 2003, or Section 62 (regulated tariff mechanism) is to be decided by the regulatory authorities based on feasibility and other technicalities and ground realities, including how central grid is undertaking HVDC projects. The appellant does not dispute the submission of the respondents that till date PGCIL has constructed HVDC projects to the tune of around Rs. 34000 Crores under Section 62, and not under Section 63.

178. The argument of the second and third Respondents that the opposition to the Transmission Project by the appellant is because of the fact that it has a vested interest in delaying the said project cannot be lightly brushed aside. In the impugned order (para 35.36), the MERC has set out details of the Mumbai distribution licensees and their PPAs with generating companies showing that, except Dahanu, all other generating companies are owned by the appellant. The Commission has also observed (see para 35.37 and 35.38) that there is limited embedded generation in the City of Mumbai which requires import of power from outside Mumbai. For importing power from outside Mumbai, the Transmission Project based on HVDC technology is critical.

179. Pertinent to add here that by its order passed earlier on 29.01.2019, in Case No.03/2019, the Commission had concluded thus:

> *"18. Considering the geographical location of Mumbai, density of the population, environmental issues and scarcity of power generation resources, increase of embedded generations does not appear viable. Hence, only option available to increase ATC of Mumbai.*
>
> 19. Existing transmission lines importing power to Mumbai are critically loaded and cannot carry additional power to Mumbai … further delay in increase in ATC of Mumbai Transmission would jeopardize the power security of Mumbai …"

180. Further, by the impugned order, the Commission has also opined (para 35.39) that because of the transmission constraints in Mumbai, the local distribution licensees could not call bids for procurement of power under section 63 as no power can come inside Mumbai because of such constraints, this having compelled MERC to decide to extend the validity of the existing section 62 PPAs of embedded generating stations of Mumbai, which majorly belong to the appellant. On these facts, and in the circumstances, we find some substance in the argument that a direct fallout of the transmission line in question being constructed would be reduced reliance of the Mumbai licensees upon the generating stations of the appellant which not being in the interest of the latter is being referred to the prime reasons for its opposition.

181. It bears repetition to say, based on the chronology of events set out earlier, that the appellant and R-Infra (now AEML) were in agreement so long as the earlier decision that the Transmission Project in question (i.e, HVDC based) was to be developed by AEML, while the Vikhroli transmission project was to be developed by TPC, was being acted upon. It is significant to note that the appellant never posed a challenge to the various steps taken by STU or MERC or AEML (R-Infra) from the year 2007 to 2019 towards implementation of the HVDC line by AEML. The CEA had recommended the transmission project based on the HVDC technology by conducting meetings on 08.05.2019 and 31.05.2019, in which TPC-T also participated. Further, in its letter, CEA refers to AEML-T letter dated 26,0.2019 in which AEML-T

specifically mentioned the subject Transmission Project based on HVDC Technology. However, no objection was ever raised by TPC-T to the effect that the execution of the above Project ought not to be done by AEML-T. The protest was made by the appellant only from the year 2019 after it had lost the Vikhroli Transmission project because it was unable to execute it for more than eight years and was unable to justify the inordinate delay which factor had singularly persuaded the MERC to put the said project (Vikhroli) under section 63 (bidding route).

182. It is against the above-mentioned backdrop that AEML had submitted a DPR and proposed to MERC for appointment of a consultant, it having been agreed that the cost of the consultant was to be borne by AEML, the approval having been given followed by the STU granting its approval for grid connectivity to AEML qua the transmission project. The 23.11.2018 letter of AEML was not a standalone development, the history tracing it back to 2013, including the original approval of grid connectivity granted by STU on 21.08.2013, which approval was never revoked. The introduction of Kudus as the inter-connectivity point (in lieu of Nagothane) qua the transmission project is a development rooted in the year 2013. The MERC granted in-principle approval to AEML qua the DPR and also called it upon to take steps for necessary amendments in its transmission license. It is due to the change in location from Nagothane to Kudus by STU that AEML was required to submit connectivity request dated 23.11.2018 again specifying references of earlier approved connectivity. Such request for connectivity dated 23.11.2018 was continuation of earlier process only. Further, because HVAC technology was not finding acceptance, the HVDC technology of AEML was revisited and revived. It is significant that the CEA, after convening two meetings dated 08.05.2019 and 31.05.2019, in which both TPC-T and AEMIL participated, issued the communication dated 13.06.2019, thereby not only revalidating the existing Transmission Project

based on HVDC technology but also recommended another similar project of 1000 MW transmission capacity.

183. As concluded earlier, unless the threshold limit is first decided, the MERC is empowered to take an independent decision as to whether to award the transmission project under section 62 or section 63. The contention that the transmission project in the present case has been awarded under section 62 only because threshold limit has not been decided is, however, incorrect. It is wrong to argue that section 63 option was not available to the MERC because the threshold limit is not yet decided. Rather, the said option was available fully and nothing stopped the appellant as well to itself file an application seeking grant of license under Section 62. It is clear from the impugned order that, based on an independent analysis of facts, coupled with historicity so necessary to be considered in terms of section 61(c), the MERC has decided to award the transmission project under section 62 by granting transmission license under Section 15 of the Electricity Act which cannot be faulted.

184. As already concluded, the cancellation of the HVDC technology by MERC on 02.05.2016 is inconsequential since the DPR of the Transmission Project was approved to be executed by R-Infra (now AEML) on 10.04.2014. The order of cancellation was issued solely upon the proposal of the STU to change the technology for implementing the transmission project, from HVDC to HVAC, which suggestion itself was withdrawn and STU also reverted to original scheme. From this, it follows that the entire project was not cancelled, the confusion on account of flip-flop on technology having been settled, the original project stood revived, the subject proposal based on HVDC from Kudus to Aarey being same as before.

185. The appellant has made a lot of argument to press home the point that bidding process is more advantageous or beneficial than the non-bidding route. In this context, we may recall the opinion given by the Supreme Court

in *Natural Resources Allocation, In re* (supra), as already quoted earlier, giving clarification as to the position of law in context of the view taken in *Public Interest Litigation v. Union of India*, *(2012) 3 SCC* 1 (*2G Spectrum judgment*). It was observed that the Court cannot conduct a comparative study of the various methods of distribution of natural resources and suggest the most efficacious mode, if there is one universal efficacious method in the first place. The judicial organ would respect the mandate and wisdom of the executive in such matters, the methodology pertaining to disposal of natural resources being clearly an economic policy entailing intricate economic choices. It cannot be the endeavor of the adjudicatory forum, not the least of a tribunal sitting in appeal over the technical decision of such nature taken by a regulatory authority, to evaluate or lay down a general unexceptional rule on the efficacy of auction vis-à-vis other methods of disposal of natural resources, an economic choice of disposal of natural resources, being not a Constitutional mandate.

186. We do not accept the argument of the appellant that historicity and past factual aspects have no relation with tariff determination under Sections 62 or 63 of the Electricity Act. As already concluded, Section 61 tariff principles are the common fulcrum upon which tariff determination or approval takes place whether under Section 62 or Section 63. In fact, it bears repetition to recall, Section 61(c) categorically envisages that efficiency, economical use of the resources, good performance and optimum investments are one of the corner stones of principles behind tariff determination, this being relevant even in the exercise of adoption of bid-discovered price under Section 63. The parameters of 'efficiency' under section 61(c) can only be implemented if the applicant for a project is capable of demonstrating its efficiency, including that of the project. For evaluating efficiency, a Regulatory Commission has to necessarily look into the past history, conduct and also as to whether the past projects have been implemented and operated in an

efficient manner by such applicant. The above vital aspect is further continued to be followed by the Commissions even after a project is allocated, in terms of section 61(e) whereby inefficiency in operations results in penalization when tariff is finally determined for a project under Section 62. These considerations are germane while conducting a bidding process under Section 63. As noted earlier, this is evident from a reading of Clause 9.1 (read with Clauses 9.4.4 and 9.4.5) of the bidding guidelines, the purpose of Request for Proposal (RFP) issued by the Bid Process Coordinator ("BPC") whereunder is to first shortlist prospective bidders on the basis, *inter alia*, of past experience. Surely, once bidders respond to the RFQ, the BPC evaluates the claims of such bidders qua their past experience, including whether they have a clean track record.

187. The other criteria concerning historicity and past factual aspects qua an applicant for a project is provided under Section 61(c), whereby the Commissions have to ensure 'economical use of resources' as well as optimum investments. For ensuring 'economical use of resources' as well as optimum investments, the resources and capital invested by an applicant on a project is one of the factors for awarding a project under Section 62. This is because if the initial investments and ground work has been done by an applicant qua a particular project, based upon the historicity, then the same is a factor to be considered when such a project is to be awarded under Section 62. If the route of Section 63 is adopted, Clauses 9.4.1 and 9.4.2 of the bidding guidelines indicate that the successful bidder has to take upon itself the entire risks associated with the project in terms of the transmission service agreement which is part of the RFQ, for ensuring 'economical use of resources' as well as optimum investments itself.

188. In above view, we hold that historicity, past conduct and factual aspects are relevant considerations for the purpose of awarding a project either under sections 62 or 63 of the Electricity Act. The arguments to the

contrary urged by the appellant do not appeal to us. The contention of appellant that the Commission fell into error by factoring in historicity while approving the project under Sections 62 is rejected.

189. We agree with the submission that Section 62 does not entail generally, or in the case of the subject project particularly, any higher burden for the end-consumer since the State Commission would in any case carry out Prudence Check of the costs incurred by the entity executing the project. Sufficient safeguards have been put in position by the Commission even in the impugned order the operative part whereof has been extracted earlier.

190. In such circumstances, there cannot be any question raised that the approval of the Transmission Project based on HVDC technology to be executed by the second and third respondents under Section 62 route is within the framework of Electricity Act, in general, and in exercise of statutory authority vested in MERC, in particular.

191. We must also observe here that this tribunal is duty-bound to follow the basic tenet that as the appellate forum, it is not expected to substitute its own view with that of the forum of first instance, if both views could possibly be taken. [see *Collector of Customs* v. *Swastic Woolens (P) Ltd.*, 1988 Supp SCC 796; *Satya Gupta (Smt.) Alias Madhu Gupta* v. *Brijesh Kumar*, (1998) 6 SCC 423; *Amrita Daulata Pawar* v. *Shri Sahu Co-operative Housing Society*, 2001 SCC OnLine Bom 421; *West Bengal Electricity Regulatory Commission* v. *CESC Ltd.*, (2002) 8 SCC 715; *Commissioner of Customs, Mumbai* v. *Bureau Veritas*, (2005) 3 SCC 265; and *Kashmir Singh* v. *Harnam Singh*, (2008) 12 SCC 796]. It is apt to quote the following observations of the Supreme Court in *U.P. Coop. Federation Ltd.* v. *Sunder Bros*, AIR 1967 SC 249 : 1966 Supp. SCR 215:

> *"…In dealing with the matter raised before it at the appellate stage the appellate court would normally not be justified in interfering with the exercise of the discretion under appeal solely on the ground that if it had considered the matter at the trial stage it may have come to a contrary*

conclusion. If the discretion has been exercised by the trial court reasonably and in a judicial manner the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion…"

192. We find no merit in the arguments of the appellant and, thus, reject the objections to the choice of RTM route made by MERC in relation to the subject project.

SUMMING UP

193. We are satisfied that MERC has granted the transmission license to second respondent for reasons properly articulated based on a detailed analysis of facts and materials available to it. The CEA and the STU are authorities established by the Electricity Act conferring upon each of them, as indeed other agencies or institutions set up by the same legislation, role of great importance, to achieve the objective, *inter alia*, of "development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas". The continuance by this legislation of Regulatory Commissions is aimed at distancing the executive organ from "*all forms of regulation, namely, licensing, tariff regulation, specifying grid code, facilitating competition through open access, etc.*"[*PTC v. CERC* (*supra*)]. The CEA has played an advisory role in due discharge of its statutory functions, *inter alia*, of specifying "*the Grid Standards for operation and maintenance of transmission lines*"(clause 'd'), promoting and assisting in "*the timely completion of schemes and projects for improving and augmenting the electricity system*"(clause 'f'), advising the "*State Government, licensees or the generating companies on such matters which shall enable them to operate and maintain the electricity system under their*

ownership or control in an improved manner and where necessary, in co-ordination with any other Government, licensee or the generating company owning or having the control of another electricity system"(clause 'm') and advising the State Government and the State Commission "*on all technical matters relating to generation, transmission and distribution of electricity*"(clause 'n') under Section 73 of the Electricity Act. As also already seen, the functions of the STU in terms of Section 39 include, amongst others, "… *planning and co-ordination relating to intra-State transmission system with … State Governments … Authority* (i.e. CEA) *… licensees* (etc.)" and to "*to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centers*" under clauses (b) and (c) of sub-section 2. We are conscious that, in terms of Section 15(4), the views of the STU are recommendatory and not binding on the State Commission but there is nothing in the impugned order that the MERC has treated the same in any other way. Mere fact that MERC has taken into consideration the submissions of the STU, or been guided by the views of CEA, does not mean the decision is vitiated since such inputs are not extraneous material. On the contrary, both the said agencies have a statutory role and it was incumbent and only appropriate that their views were factored in.

194. The conduct of STU has indeed been far from satisfactory. Its flip-flop vis-à-vis the technology (HDVC versus HVAC), reflective more of indecisiveness than anything unholy, has been the cause of delay and a whole lot of confusion. Not that, the changes in the scheme made at its instance over the period were wholly wrong. The change of point of inter-connectivity from Nagothane to Kudus would have resulted in substantial savings in terms of effort, work, money, *et al*. Be that as it may, the Commission has undertaken an intricate examination of critical aspects (availability of necessary land, know-how, experience, capability – financial

and otherwise, etc.) for implementation of the transmission project in an efficient and timely manner to accord the final approval for the respondent AEMIL as the project developer.

195. The deliberative exercise wherein all stake-holders and interest groups have been participating has thus resulted in a scheme evolving which is not only so essential to the overall interest of ever-increasing power demands of Mumbai region but also promises of a project founded on (going by expert views which have been acted upon) most suitable modern technology with optimum benefits as indeed expected to go forward with inherent assurance of expeditious execution given the involvement of the entity which has been granted license from the very inception – the drawing board stage.

196. It is not correct to assail the decision on the ground that AEMIL, a new company cannot be awarded the Transmission Project under Section 62 of the Electricity Act, the said entity being a wholly owned subsidiary of the original proponent set up as a Special Purpose Vehicle (SPV) company in line with the accepted power industry practice followed particularly in relation to transmission projects. The execution period of the said Scheme is around four years and being a capital-intensive Scheme, it requires to be financed by multiple financial institutions. The schemes which require huge financial investments, such as the present HVDC Scheme, it is an industry practice that the financial institutions look for identified targeted use of funds to ensure that the funds are not diverted, and can be strictly monitored & controlled. to make the financing more fluid, feasible and cater to the basic requirements of the financial institutions, execution of the HVDC Scheme is proposed to be carried out by AEMIL, which is a 100% owned subsidiary of AEML.

197. The chronology of events in the backdrop of which this challenge was brought demonstrates that an unduly long time has been frittered away in planning, all of which though would not have been wasteful. But there now has to be a sense of urgency lest delay in execution should render the

planned infrastructure inadequate or outdated by the time it is completed or placed in service of the people at large.

198. We note that the MERC has emphasized on the necessity of the timely completion of the transmission project by the licensee within the period stipulated (48 months) and at the same time directed adherence to cost optimization by utilizing the means of international competitive bidding (ICB) for necessary contracting purposes while implementing the same (para 38.61) and thereby laying ground for the least cost to be achieved. As noted earlier, the conditions attached to the license include (clause vii of para 41.2) that the "*Transmission Licensee shall endeavour to commission the project within 48 months of issue of the Transmission Licence and as per the applicable Technical Standards and Grid Standards of CEA*", the "*ground work for land acquisition and clearances* (having) *already been done*", this in addition to the stipulation that the expenditure incurred would be subject to prudence check.

199. Since reliance was placed on it, we must add here that the Notification dated 15.03.2021 issued by the MoP in GOI cannot retrospectively displace a decision taken by the State ERC in exercise of its statutory jurisdiction on the basis of extant norms.

200. We have not found substance in the plea of the appellant that Section 63 of the Electricity Act is the dominant route reducing Section 62 to a subservient or inferior position. Both co-exist and provide choices to the regulatory authority to be exercised on case-to-case basis guided, *inter alia*, by the State policy reflected in the legislation. The project in question was conceived and planned by the concerned agencies and authorities long before the issuance of the GR dated 04.01.2019 by the State government establishing the Empowered Committee and even in terms of the decisions taken by the said Committee it is an "old" project which has been under constant and active consideration of the State Commission, the changes

made in the route at the instance of the STU being inconsequential in this regard. We have not found any infraction of Section 15 of Electricity Act in the process leading to grant of license. The Commission has chosen the RTM route under Section 62 for reasons which cannot be termed as incorrect, perverse or inappropriate. There is no reason for this tribunal sitting in appeal to supplant the views of the Commission only because there may have been some reasons justifying other option under Section 63 to be chosen. Given the fact that it is an old scheme which is perceived by all planners and stake-holders as critical for the power-starved Mumbai region, interference by this tribunal in the choice made would be incorrect, retrograde and counter-productive since that would set at naught the progress already made, the licensee under the impugned order having already been bound by the conditions laid down to take it forward in a time-bound and transparent manner to achieve completion in near future, the expenditure incurred being subject to prudence check by regulatory authority.

201. For the foregoing reasons, we find the appeal at hand unmerited. Thus, the appeal and the pending application are dismissed.

PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO CONFERENCING ON THIS 18TH DAY OF FEBRUARY, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson