

**Kerala State Electricity Regulatory Commissions**  
**Thiruvananthapuram**

**Present** : **Shri. PremanDinaraj, Chairman**  
**Adv. A.J. Wilson, Member (Law)**

**O.P.No. 73/2021**

**In the matter of:** Petition filed by M/s NTPC Ltd seeking for a direction to the respondent KSEB Ltd to sign the final Power Purchase Agreement as per Order of this Commission dated 21-01-2021 in OP No. 11/2021

**Petitioners:** **M/s NTPC Limited,**  
Represented by its Additional General manager (Commercial),  
NTPC Bhavan, SCOPE Complex,  
7 Institutional Area, Lodi Road,  
New Delhi, Pin-110003

Petitioner

Represented by : Senior Adv. E.K. Nandakumar

**Respondent:M/s Kerala State Electricity Board Limited,**  
represented by its Secretary,  
VyduathiBhavanam, Pattom,  
Thiruvananthapuram

Respondent

Represented by: C.S. Sasankan Nair,  
Chief Engineer (Commercial & Tariff)

**Date of First Hearing: 28.02.2022**

**Daily Order dated17.03.2022**

1. M/s NTPC Ltd filed a Petition before the Commission seeking the following reliefs:
  - (a) Direct the respondent KSEB Ltd to finalise the Power Purchase Agreement for procurement of 90 MW Solar Power at the rate of Rs.2.97/unit, approved by this Commission as per Annexure -IV Order (Order No. 39/2020 dated 18-12-2020) expeditiously within a time frame prescribed by this Commission.
  - (b) Direct the respondent to implement Annexure-VII Order (as per Order of this Commission dated 21-01-2021 in OP No. 11/2021.) issued by this Commission.

(c) Grant such other incidental reliefs as this Commission may deem just and necessary on the facts and circumstances of this case.

**Summary of the petition is given below**

2. The petitioner is a Government Company within the purview of Section 2(45) of the Companies Act, 2013 involved in the generation and distribution of power to State Electricity Boards in the country. The Petitioner has established power generation plants in various parts of the country.
3. The Ministry of Power, Government of India, with the aim of procurement of electricity from solar PV powerplants by distribution licensees, has issued the Guidelines for Tariff Based Competitive Bidding process for Procurement of Power from Grid Connected Solar PV Power Projects as per resolution dated 03-08-2017 (Annexure-1)
4. The Commission vide Order dated 19-11-2018 in O.P.No.56/2018 had granted approval to the respondent Board for inviting bids on reverse e-bidding process for procuring 200MW Solar Power, based on Annexure-1 guidelines. The Respondent, on 14-12-2018, had floated an e-tender from the solar generators of Kerala, with a benchmark tariff of rs.3/50 per KWh. In the absence of proper response from the bidders, retender was done with certain modification in the tender conditions with the approval of the Commission on 02-03-2019. However, the tender was cancelled due to the lack of response. The Respondent Board thereafter decided to float a revised tender for the procurement of 200 MW solar power from Ground Mounted Power plants situated anywhere in India, with preference to plants to be set up within the State of Kerala. The respondent had preferred petition before this Commission to modify the bidding documents earlier approved by the Commission vide order dated 19-11-2018.
5. But, subsequently, the Ministry of New Renewable Energy had amended various clauses in the guidelines for Tariff based Competitive Bidding process for procurement of power from Grid connected Solar PV power projects. Hence, this Commission had directed the respondent to resubmit the petition for approval after incorporating the Amendments introduced vide Notification dated 22-10-2019. The petition was thereafter resubmitted before this Commission on 06-03-2020 and the Commission admitted the petition as O.P.No.09/2020.
6. The Commission after considering the petition preferred by the respondent had granted approval for inviting bids on reverse e-bidding for procuring 200 MW solar power for solar PV plants through competitive bidding route on all India basis with a preference of 10% requisitioned quantum to plants to be setup

within the State of Kerala. The Commission had directed the Respondent Board to submit a petition for adoption of tariff immediately after the completion of the bid process as per Order dated 25.08.2020 in O.P. No. 09/2020.

7. The respondent issued Request for Selection for procurement of 200 MW Solar Power on Long Term Basis (25 years) from Ground Mounted Grid connected Solar Photovoltaic Power Projects dated 18-09-2020. The non-financial bids of the tender were opened on 20.10.2020 and only two bidders including the Petitioner had submitted the bids. There was no participation from any bidders from Kerala. Evaluation Committee reviewed the offers and the documents on 04.11.2020 and recommended for opening of the financial bid on 12.11.2020 and the e-reverse auction on the same day. The discovered price after the e-reverse bid was:

- i. *NTPC Ltd-90 MW @ Rs.2.97/kWh; and*
- ii. *Tata Power Company-200 MW @ Rs.2.98/kWh.*

After L-1 price matching, final allotted quantum and the price are as follows:

(1) *NTPC Ltd- 90 MW @ Rs. 2.97/kWh*

(2) *Tata Power Company Ltd.-110 MW@ Rs.2.97/kWh*

8. The Respondent Board had preferred O.P.No.39 of 2020 before this Commission for adoption of Tariff at Rs.2.97 per unit for the procurement of 90 MW of solar power from the Petitioner and for 110 MW of solar power from M/s Tata Power Company Ltd, discovered through competitive bidding process as approved by this Commission. The Commission after considering the contentions put forth by the Respondent vide Order dated 18-12-2020 had proceeded to adopt the tariff of Rs. 2. 97 per unit(kWh) for the procurement of solar power from the above two bidders. The Commission had further directed the Respondent Board to finalize and initial the Power Purchase Agreements with the two successful bidders for their respective quantum of power and file them before this Commission for its formal approval under Section 86(1)(b) of the Electricity Act, 2003.
9. The Respondent had issued Letter of Award (hereinafter referred to as "LOA" in short) dated 06-01-2021 to the Petitioner confirming the rate for supply of 90 MW solar power as Rs.2.97/unit. The Petitioner was further directed to forward the completed draft PPA along with the unconditionally accepted LOA for further processing. In compliance of the direction of the Commission, the Respondent Board initialed the draft PPA with the petitioner on 05-02-2021 for procurement of 90 MW Solar Power at Rs.2.97/unit. The Respondent Board vide petition dated 08-02-2021 submitted the copy of the initialed PPA before this Commission for approval.
10. The Commission after examining the petition had approved the initialed PPA between the Respondent Board and the petitioner for the procurement of

90MW Solar power at the rate of Rs.2.97/unit. The Respondent Board was further directed to submit a copy of the final PPA signed with the petitioner before this Commission as per Order dated 21-06-2021 in O.P. No.11/2021. Accordingly, the respondent Board vide communication dated 30-06-2021 had requested the petitioner to forward specific documents in original and to proceed with the signing of the PPA. The Petitioner had requested the respondent to indicate the date of signing the PPA at the earliest, so that the project implementation and other modalities could be expedited as per the letter dated 06-07-2021. The petitioner had yet again requested the respondent to sign the final PPA with the Petitioner for 90 MW solar PV project at the earliest as per letter dated 31-08-2021.

11. On the strength of the LOA issued by the Respondent, the Petitioner had commenced the construction activities for the implementation of the solar PV project. Hence, the respondent Board was again reminded to sign the Final PPA at the earliest as per letter dated 30-09-2021. But the Chief Engineer of the respondent vide his letter dated 07-10-2021 (Annexure XII) has informed the petitioner that the Board is not intending to proceed with the procurement of 200 MW since the tariff offered by the firms are higher when compared with the offer of Solar Energy Corporation of India, and therefore the respondent is interested in entering into PPA at rates comparable with SECI.
12. Immediately on receipt of Annexure-XII, the petitioner had submitted a detailed reply asserting that the tariff having been adopted by the Commission under Section 63 of the Electricity Act and in view of the grant of LOA as well as the unequivocal acceptance by the respondent, it is not permissible for the Board to withdraw itself from executing the PPA. Petitioner had already made substantial headway and had commenced the project activities towards site mobilization and other ancillary activities, for which Balance of Supply contract of approximately Rs.145 Crores had already been awarded. The petitioner had also awarded a contract of approximately Rs. 270 Crores for supply of modules. For evacuation of solar power, the Central Transmission Utility of India Ltd. (CTUIL) has also granted Connectivity for 90 MW Solar PV Project and application for Long-Term Access has been held up due to the non-signing of the final PPA. The Petitioner had thus requested the respondent Board to retract from its arbitrary stand adopted in Annexure-XII and to comply with the orders issued by this Commission.
13. The respondent, in scant regard of the Orders issued by this Commission has intimated the petitioner vide letter dated 12-11-2021 (Annexure-XIV) that the Director Board of the respondent had observed that the rate quoted by the petitioner for 90 MW solar power is relatively high in comparison with various

offers before the Board and had thus issued direction to reconsider the proposal.

14. On informal query made by the Board regarding the reconsideration of rates, M/s T.P.Saurya Ltd.(100% subsidiary of Tata Power Company Ltd) on 27-09-2021 had agreed to reduce their offer price to Rs.2.44/unit and that the Petitioner had indicated no changes to the rates quoted. Hence, the Director Board of the respondent in the meeting held on 30-10-2021 had decided to procure 110 MW solar power from M/s TP Saurya Ltd @ Rs.2.44/unit as per their proposal dated 27-09-2021 as the lowest offer in the tender and had further decided to issue notice to the Petitioner for the balance supply of 90MW at the same terms and conditions agreed by M/s TP Saurya Ltd. Petitioner has also been directed to respond to the notice within 15 days. The Petitioner submitted before the Commission that the attempt on the part of the Board to arm twist the Petitioner into renegotiating the tariff, already adopted by this Commission is arbitrary and is liable to be interfered with.

Hence, the Petitioner being aggrieved by the erroneous and arbitrary impugned order passed by the Respondent has filed this Petition invoking the powers under Section 86(1)(b) and (f) of the Electricity Act, 2003.

### **Hearing on the Petition**

15. The Commission admitted the petition as OP No.73/2021 and hearing conducted through video conferencing on 28.02.2022. M/s NTPC was represented Adv. E.K. Nandakumar and presented the case.

### **Summary of the deliberations made by the petitioner's Counsel during the hearing is given below:**

16. The petitioner submitted that based on a very transparent process, the petitioner was awarded Annexure V *Letter of Award* by the Board and the tariff was fixed as Rs. 2.97per unit. There were only two bidders. The other bidder happened to be a subsidiary of TATA Power. After due process, both parties were declared successful in the bid process and were issued with *Letter of Award*.
17. In response to the clarification sought by the Commission regarding the word LOA or LOI, the petitioner clarified before the Commission that in this case the nomenclature issued by the Board is LOA. Hence it is neither intent to enter in to a contract nor an agreement but it is an Award following all required formalities. Relevant portion of the **LOA (Annexure V)** is extracted hereunder:

*Kind attention is invited to the above.*

*This is to inform that you are declared as successful bidder in the Bid invited vide ref (2) for procurement of 200 MW Solar Power on long term basis (25*

years) from Ground Mounted Grid Connected Solar Photo Voltaic Power Projects.

The final allotted quantum after e-reverse auction and L-1 price matching and approved by KSERC vide order under ref (6) against your offer to supply 90 MW Solar Power on long term basis (25 years) is detailed below.

<i>Name of Bidder</i>	<i>Quantum MW</i>	<i>Rate at Delivery point i.e. at Kerala periphery Rs.per unit</i>
<b><i>NTPC Ltd</i></b>	<b><i>90</i></b>	<b><i>2.97(Rupees Two and Paise Ninety Seven only)</i></b>

*This Letter of Award is being issued to you to in accordance with Clause 22 of Rfs under reference(1). Please record “Accepted unconditionally” on the duplicate copy of this LoA and duly sign and return the same to this office within seven days of receipt of this LOA.*

*You are also requested to fill up project specific details in the PPA format already published with the bid documents and forward the draft PPA to this office along with unconditionally accepted LOA, for further processing.*

18. The petitioner further submitted that thereafter a draft PPA i.e., Annexure VI was submitted by the Board themselves which was approved by this Commission vide Annexure VII order. The Order of the Commission read as follows:

*(1) Approve the initialled Power Purchase Agreement (PPA) between KSEB Ltd and NTPC Ltd for the procurement of 90 MW Solar Power at the rate of Rs.2.97/unit.*

*(2) KSEB Ltd shall submit a copy final PPA signed with NTPC Ltd before the Commission for information and record.*

*The petition filed by KSEB Ltd for approval of the initialled Power Purchase Agreement with NTPC Ltd for procurement of 90MW Solar Power @Rs 2.97/unit is approved.*

19. The petitioner also submitted that after approving the draft Agreement by the Commission, KSEBL issued the Annexure VII letter dated 30.06.2021 relevant portion is given below:

*Kind attention is invited to the KSERC order dated 21.06.2021 vide ref (4) and NTPC 'S letter under ref (5)*

*As per the order, KSERC has approved the initialed Power Purchase Agreement (PPA) between KSEB Ltd and NTPC vide ref (3) for the procurement of 90MW Solar Power at the rate of rs.2.97/unit.*

*Hence it is requested to forward the following documents in original for record and to proceed with signing of the Power Purchase Agreement.*

*1.Resolution of the Board of Directors of 'NTPC Ltd' authorizing the 'Authorized Signatory' to sign the Power Purchase Agreement on behalf of 'NTPC Ltd'.*

*2.Attested Identity proof with signature of the 'Authorised Signatory'.*

*3.Any other documents deemed necessary.*

*The modified Power Purchase Agreement as directed in the KSERC order is attached for your perusal and concurrence. Details of the "Authorised Signatory" to sign the Power Purchase Agreement on behalf of 'NTPC Ltd' may be incorporated in the draft PPA attached.*

*Kindly forward the requested documents in original and concurrence on the modified PPA attached to proceed with signing of the Power Purchase Agreement.*

*Thanking You,*

*Sd/-*

*Yours Faithfully*

*Chief Engineer (Commercial& Tariff)*

20.The petitioner further submitted that thereafter, the respondent forwarded an initialled PPA to the petitioner and the petitioner filed a request dated 06.07.2021 as shown below:

*"This has reference to the KSEBL letter dated 30.06.2021 regarding signing of Power Purchase Agreement for 90 MW solar power on long term basis. In the final PPA provided by KSEBL, following points may also please be modified.*

- 1) In clause 18.6.3, requested to modify in Address from CGM(Commercial) to ED (Commercial)*
- 2) In Schedule -1 (28), requested to modify Schedule month/Year of Commissioning to January 2023 in accordance with the 18 months from the date of signing of the Agreement.*

*NTPC is giving concurrence for signing of modified PPA with incorporating above changes.*

*In view of Covid-19 situation, it is requested that KSEBL may send signed copy of final PPA to NTPC SRHQ office in Hyderabad for*

*signing of the Agreement by authorized person of NTPC Ltd. Authorisation Letter for signing of this Agreement is also attached herewith for your records please. Original copy will be sent through the Speed-post to your good office.*

*Further as per KSERC Order dated 21.06.2021, KSEBL shall submit a copy of signed PPA to the Commission for information and record please.*

*In view of the above, you are requested to indicate the date of signing of PPA at the earliest so that Project implementation and other modalities can be further expedite.”*

21. Thereafter, nearly two months later, the petitioner issued another letter dated 31.08.2021. (Annexure- X) as follows:

*“This has reference to the signing of Power Purchase Agreement (PPA) for 90 MW solar PV Project with KSEBL which is pending at KSEBL end even after various follow ups.*

*It may please be noted that NTPC had won 90 MW Solar PV Project @ Rs. 2.97/kWh through the competitive bidding inviting by KSEBL. Subsequently, KSERC vide its order dated 18.12.2020, adopted the tariff for procurement of 90 MW solar power from NTPC. Further, KSEBL has issued Letter of Award dated 06.01.2021 to NTPC and PPA has been initialed by both NTPC and KSEBL for the same on 05.02.2021. KSERC vide its order dated 21.06.2021, approved the initialed PPA between NTPC and KSEBL for the procurement of 90 MW Solar Power at a tariff of Rs. 2.96/kWh. NTPC vide its letter dated 06.07.2021 has given concurrence to KSEBL for signing of PPA.*

*In view of the above, as the Commission has already adopted the tariff of Rs. 2.97/kWh and approved the initialed PPA, it is yet again requested that KSEBL may sign the final PPA with NTPC for 90 MW solar PV project at the earliest so that related modalities like LTA application etc can be taken up.”*

22. Thereafter the petitioner sent Annexure XI letter, after issuing Annexure X. Subsequently, the petitioner received Annexure XII letter which is very important. Relevant portion is given below:

*“KSEBL is not intending to proceed with the Solar bid for procuring 200 MW since the tariff offered by the firms are higher when compared with the offer of SECI. KSEBL is interested in entering into PPA at rates comparable with SECI.”*



23. Subsequently, the petitioner issued Annexure XIII letter to the respondent. Hence the basic question is after a transparent bidding process and after obtaining approval of the Commission for adoption of tariff, approval of PPA by the Commission, unconditional acceptance by the petitioner and the respondents, and the respondent issuing to the petitioner the **Letter of Award dated 07.10.2021**, whether the KSEB Ltd can rescind on their legal contractual obligation. The petitioner therefore stated that the KSEB Ltd cannot go back on their commitment, once tariff is approved by the Commission including the initialing the draft PPA is done and the Commission has approved it. Hence they submitted that there is no scope for renegotiation at all.
24. The petitioner submitted before the Commission that once the tariff is determined by the bidding process, the Commission shall adopt the tariff and such tariff is final. In support of his arguments, the petitioner cited two judgments issued by the Hon'ble APTEL which are squarely applicable to the present case. The relevant portion of the judgments are extracted hereunder:

**1. Lanco Kondapalli Power Pvt Ltd. v Haryana Electricity Regulatory Commission (2010 ELR (APTEL) 0036)**

*2. The bids were invited by Haryana Power Generation Corporation Limited (Respondent-2) from various generating companies for supply of power to the Corporation. After the bid process was over, the Appellants became the successful bidder. Accordingly, the Corporation (Resp-2) issued a Letter of Intent in favour of the Appellant. Bid bond was also paid by the Appellant to the credit of the Corporation (Resp-2). However, there was a delay on the part of the Appellant to sign the Power Purchase Agreement (PPA). In spite of the best efforts taken by the Corporation (Resp-2), the Appellants did not come forward to sign the PPA as agreed.*

*3. Under the circumstances, the Corporation (Resp-2) filed a petition under Section 86(1)(f) of the Act before the State Commission seeking direction for the specific performance of the applicant's obligation to sign the PPA under the LOI issued to them. On receipt of notice issued in that petition the Appellants appeared before the State Commission and raised preliminary objection regarding the jurisdiction of the State Commission on entertaining the same. The State Commission took up the matter to decide the preliminary issue and heard the parties. At the end the State Commission dismissed the said petition holding that the State Commission has got jurisdiction to entertain the petition and adjourned the matter for further proceedings. This order deciding about the jurisdiction was passed by the State Commission on 31st August, 2009. Aggrieved by this, the Appellants have filed this appeal.*

6. *The questions of law that may arise for consideration in the present case are as follows:*

*(i) Whether the petition filed by the Power Corporation (R-2) before the State Commission under Section 86(1)(f) of the Act is maintainable in law?*

*(ii) Whether the State Commission has got a jurisdiction to grant the relief of specific performance for the contract which is said to be not concluded?*

32. *The guidelines which could be culled out by the Supreme Court and other Courts in regard to this issue are summarised as follows:*

*(IV) It is true that a LOI may be construed as a letter of acceptance. It is common in contracts involving detailed procedure in order to save time, LOI is issued communicating the acceptance of the offer and asking the contractor to start the work. If such a letter had been issued to the contractor, it may amount to acceptance of the offer resulting in a concluded contract between the parties. The question as to whether the LOI is merely an expression of intention to place order in future or whether it is a final acceptance of the offer leading to a contract is a matter which has to be decided with reference to the terms of the said letter.*

*(V) The proposal must be sufficiently defined to promote the conclusion of a contract by mere acceptance. Similarly, the acceptance should be final and unqualified expression of assent to the terms of the offer. An unqualified, unconditional acceptance of the offer creates a contract.*

33. *Keeping in mind all these guidelines, if you look at the facts of the case, the correspondence exchanged between the two parties would clearly show the intention of the parties which agree to accept the basic terms of the contract by issue of a LOI dated 17th July, 2008.*

34. *In this case, as indicated above, it is the Appellant who approached the civil Court requesting for extension of time to execute the PPA. It never sought a relief to the effect that they are not agreeable for the contract and, therefore, they cannot be compelled to sign the PPA. On the other hand, the details of the various documents referred to above, pursuant to the LOI, and various steps which have been taken by the Appellant to start the power project by approaching the Orissa Government requesting for necessary sanctions would clearly indicate that there were meeting of the minds between the parties in regard to the contract. Therefore, it cannot be said that the contract has not been concluded. As indicated above, the contents of the LOI and its subsequent developments taken place in pursuance of the LOI would clearly show that contract had already been concluded and whatever*

*else was required to be done thereafter was a mere signing of the PPA which is only a ministerial and formal act.*

**2. Essar Power Ltd (Mumbai) v Uttar Pradesh Electricity Regulatory Commission(2012 ELR (APTEL) 182).**

*The short facts are as follows:*

*(a) Essar Power Limited, the Appellant is a generating Company having generation capacity of 1600 MWs. The Uttar Pradesh Electricity Regulatory Commission (State Commission) is the Respondent-1. The 2nd Respondent is Noida Power Company Limited(Noida Power). Noida Power, a Distribution Licensee is carrying out the business of distribution of power in the area of Greater Noida in Western Uttar Pradesh.*

*(g) In the process, the Appellant emerged as the lowest bidder offering evaluated tariff of Rs.4.0868 Paise per unit for 240 MW of power. Ultimately Evaluation Committee, set up by Noida Power (R-2) in accordance with Central Government's Guidelines, approved the bid of the Appellant as the successful bidder.*

*(h) In pursuance of the same, the Noida Power Company (R-2) filed a Petition on 7.4.2011 in Petition No. 741 of 2011 before the State Commission under Section 63 of the Electricity Act, 2003 for adoption of the tariff quoted by Essar Power, the Appellant, being the successful bidder.*

*(i) While the above petition was pending before the State Commission for adoption of tariff quoted by the Appellant, Noida Power (R-2) filed an interim application before the State Commission on 27.4.2011 stating that subsequent to the filing of the petition in case No. 741 of 2011 for adoption of the tariff quoted by the Appellant, the Noida Power (R-2) received a letter from another Company (3rd party) proposing to supply power to Noida Power (R-2) on Long Term Basis at a levelised tariff of Rs.3.667 per unit which is less than the tariff quoted by the Appellant and praying that appropriate Orders be passed after taking note of this fresh development.*

*xxxxxx*

*76. The whole case of Noida Power (R-2) is relied upon the phrase "consumer's interest" stating that after filing the main application in Petition No. 741 of 2011 they received a letter from the Athena Power offering to supply power at a price lower by over 10% by which the financial gains for consumers for over 25 years would be from Rs.1,800 Crores to Rs.2,224 Crores. This contention is totally misconceived because the consumer's interest alone cannot be the sole criteria for*

*competitive bidding under Section 63 of the Act. If that was so, there was no need for Government of India guidelines. In fact, these guidelines framed by the Central Government are so detailed and elaborate so as to take care and interest of all the stake holders of the Sectors. In other words, if the consumer's interest alone is taken as the criteria, then the guidelines framed by the Central Government would become redundant.*

*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.*

*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.*

*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.*

*79. At the risk of repetition, it has to be stated that if these requirements have not been followed and if the process has failed to safeguard the consumer interest as well as to promote competition and efficiency by permitting the deviations, it would not only destroy the basic structure of the guidelines but also would frustrate the objectives of the Government guidelines.*

From the above facts it is clear that once the due process has been fulfilled, the Petitioner cannot negotiate the parties for a better price. This is a statutory scheme, with the guidelines, framed by Government as required under section 63 of the Act. Once these requirements have been fulfilled under Section 63 of the Electricity Act, 2003, the Commission's Order becomes final. The Petitioner invited the attention of the Commission to Para 119 of the which is given below:

*119. Under Section 63 there are only two options for the State Commission:*

*(a) Either to reject the petition if it finds that the bidding was not as per the statutory frame work;*

*Or*

*(b) to adopt the tariff if it is discovered through transparent process conducted as per the bidding guidelines.*

*163. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation to reduce the tariff.*

**XXXXXXXXXX**

## **212. Summary of our Findings**

*(A) The first question relates to the scope of power to be exercised and the method of procedure to be followed by the State Commission under section 63 of the Act.*

*The powers of the State Commission are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 for adoption of tariff could either reject the petition if it finds that the bidding was not as per the statutory framework or adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines. Section 63 starts with non-obstante clause and excludes the tariff determination powers of the State Commission under Section 62 of the Act. The entire focus of the competitive bidding process under Section 63 is to discover the competitive tariff in*

*accordance with the market conditions and to finalize the competitive bidding process in accordance Central government's guidelines, standard document of Request for Proposal and the PPA. Under Section 62 of the Act, the State Commission is required to collect various relevant data and carryout prudence check on the data furnished by the licensee/generating company for the purpose of fixing tariff. Hence determination of tariff under Section 62 is totally different from determination of tariff through competitive bidding process under Section 63. 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. 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. 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. In this case the above procedure had not been followed. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party with the approval of the State Commission even after the bidding process is completed is contrary to the provisions of the Act as well as the bidding guidelines. Even assuming that negotiations are permitted under competitive bidding process, the said negotiation can take place at any time only prior to Noida Power declaring the Essar Power as successful bidder by filing the petition under Section 63 of the Act for adoption of the tariff. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Noida Power to enter into negotiation with 3rd party to reduce the tariff.*

*(B) The next question relates to the admissibility of an interim application seeking for the directions to go for third party negotiation when the main petition was pending seeing for the adoption of tariff quoted by the Appellant.*

*XXXXXXXXXXXXXXXXXXXX*

*Therefore, the interim application is not maintainable.*

*(C) Third question relates to the right of the Noida Power to seek for initiating negotiation with third party which did not participate in the competitive bidding process and which did not qualify for the technically qualified bidding submissions.*

*As indicated above, if the Noida Power is permitted to have a negotiation with the third party and go back to the Commission for adoption of the tariff of 3rd party, it would amount to nullifying the sanctity of the bidding process which will make the proceedings under Section 63 of the Act, 2003 nugatory.*

25. The petitioner concluded his arguments with the prayer to allow the petition by directing the respondent to implement the Order issued by the Commission for the procurement of 90 MW Solar Power @ Rs. 2.97/unit.

**Then the Commission directed the respondent to respond to the contentions raised by the petitioner.**

26. Shri.C.S. Sasankan Nair, Chief Engineer (Commercial & Tariff) has attended the hearing on behalf of the KSEB Ltd. KSEB Ltd sought adjournment of the case granting twenty days' time to present their version.

**The Commission allowed the request subject to the condition that the respondent shall not do anything which is detrimental/contrary or against whatever has been done till now, which is agreed by the respondent.**

27. Based on the deliberations during the first hearing and also considering the request made by the respondent KSEB Ltd for an adjournment of the hearing, the Commission hereby directs the respondent KSEB Ltd that the respondent shall not do anything which is detrimental/contrary or against whatever has been done till now. The petition is adjourned to 21<sup>st</sup> March, 2022 for the next hearing.

Sd/

**Adv. A. J. Wilson**

**Member (Law)**

Sd/-

**Preman Dinaraj**

**Chairman**

**Approved for issue**

Sd/-

**C R Satheesh Chandran**

**Secretary**