

Kerala State Electricity Regulatory Commissions
Thiruvananthapuram

Present : Shri. Preman Dinaraj, 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,
Vyduathi Bhavanam, Pattom,
Thiruvananthapuram

Respondent

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

Date of First Hearing: 28.02.2022

Date if final hearing: 10.06.2022

Order dated 05 .07.2022

1. M/s NTPC Ltd filed a Petition before the Commission on 30.11.2021, 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 Power, 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 90 MW 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.

Hearings on the Petition

15. The Commission admitted the petition as OP No.73/2021 and the first hearing was conducted through video conferencing on 28.02.2022. During the hearing 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 first hearing is given below:

16. The petitioner submitted that based on a very transparent process, the petitioner was awarded Annexure V Letter of Award (LoA) by the Board and the tariff was fixed @ Rs. 2.97 per 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 KSEERC 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>
<i>NTPC Ltd</i>	<i>90</i>	<i>2.97(Rupees Two and Paise Ninety Seven only)</i>

*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 initialed 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 sent 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 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 initialling 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.

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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.

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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.

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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 adjourned the petition vide Daily Order dated 17.03.2022 with direction to the respondent KSEB Ltd that the respondent shall not do anything which is detrimental/contrary to the present position or against whatever has been done till now.
- 28. The respondent KSEB Ltd filed a Counter Affidavit vide Letter No. KSEB/TRAC/G/SOLAR/2021-22 dated 18.04.2022. In the said Affidavit the respondent KSEB Ltd submitted as follows:**
29. In their affidavit KSEB Ltd submitted before this Commission that there is no dispute between the KSEB Ltd. and the petitioner, M/s. NTPC Ltd., the largest public sector undertaking in the country in power sector. The respondent KSEB Ltd. has made a fervent appeal to the successful bidders to reduce adopted tariff (Rs.2.97/kWh) under section 63 of the Act, in conformity with the prevalent rate in the market, for the procurement of 200 MW solar power for a period of 25 years.
30. M/s. TP Saurya Limited, one of the successful bidders has considered their request favourably and agreed to supply the 110 MW solar power at a reduced tariff of Rs. 2.44 and this Commission has adopted this rate as per Order dated 28.01.2022 in O.P. No.3/2022 filed by KSEB Ltd. Also, KSEB Ltd. has submitted the Power Purchase Agreement executed with M/s. TP Sourya Limited, in line with the initialled PPA which was approved by this Commission.

31. The respondent KSEB Ltd being a public sector undertaking, is supplying 37.66 % of the energy purchase from outside the State and also KSEB Ltd being a prompt payer the cost associated with power purchase, (Rs.182 Cr / month on an average), the petitioner NTPC could have considered the request favourably without any hesitation. KSEB Ltd has adhered all the directions issued by this Commission throughout the procurement process. KSEB Ltd. The respondent KSEB Ltd further submitted their version on the contention of the petitioner regarding the **Investment made by the petitioner the KSEB Ltd submitted as follows:**

a) As part of URJA Kerala policy for the procurement of 1000 MW Solar Power from within the State of Kerala, KSEB Limited had invited bid for the procurement of 200 MW Solar Power with preference to plants within the state of Kerala with the approval of this Commission. Kerala State Electricity Board Limited (KSEB Ltd), on 17.08.2018, filed a petition before the Commission for the approval for inviting bids on reverse e-bidding route with e-reverse auction for procuring 200 MW solar power from solar PV. KSEB Ltd has also sought approval the Commission for the deviations in the Standard Bid Documents (SBD) from the guidelines of MoP, GoI dated 03.08.2017 and its amendment dated 14.06.2018, vide the above said petition. Among deviations proposed, three clauses are relevant as far as this case is concerned and the order in (O.P. No. 56/18 dated 19.11.2018) of the Commission in this regard is reproduced below:

i) ***Clause 3.2.3 of the amended guidelines: Period of Land acquisition to be revised to within 12 months of date of PPA to 12 months of LoA.***

As per the amendment dated 14.06.2018 to the clause 3.2.3 of the standard bidding guidelines, within 12 months from the execution of the PPA, the developer has to submit the documents of the land acquisition/ lease agreements to establish the possession/ right to use 100% of the required land in the name of the Solar Power Generator or its affiliate. However, KSEB Ltd proposed to count the 12 months period from the Letter of Acceptance instead of the execution of the PPA. According to KSEB Ltd, the proposed deviation is for avoiding the delay in commencement of the project activities.

*The Commission noted that, the letter of award (LOA) cannot be treated as a legally valid contract. Hence, the date of LOA cannot be considered instead of the date of execution of the PPA as specified in the bidding guidelines notified by the Central Government. Since the model PPA also uploaded as part of the bidding documents along with the notice inviting tenders, the Solar Power Generators, who participated in the bidding process also aware of these facts. **KSEB Ltd can specify the time limit for execution of the PPA in the LOA.***

Decision of the Commission

The Commission decline the proposal of KSEB Ltd due to the reasons given in the preceding paragraph and the clause 3.2.3 of the standard bidding guidelines shall be followed as such in the bidding documents.

ii) *Clause 12: Financial closure.*

As per the amendment dated 14.06.2018 to the clause 12 of bidding guidelines, the time period for financial closure shall be 12 months from the date of signing the PPA.

However, KSEB Ltd to propose to amend the same to date of letter of acceptance (LOA).

Decision of the Commission

The Commission decline the proposal of KSEB Ltd and direct to follow the clause-12 of the standard bidding guidelines as such in the bidding documents.

(iii) *Clause 14.3 Commissioning schedule*

As per the amendment dated 14.06.2018 to the clause 14.3 of the standard bidding guidelines, the projects shall be commissioned within a period of 21 months from the date of execution of the PPA. However, KSEB Ltd proposed to count the date from the date of issuance of LOA instead of date of signing the PPA.

Decision of the Commission

The Commission decline the proposal of KSEB Ltd and it shall follow the clause-13.3 of the standard bidding guidelines as such in the bidding documents.

- 32.** Thus, from the above order, it is evident that the time period for achieving various milestones like financial closure, land acquisition and commissioning of plant etc. are to be fixed from the date of execution of PPA. As per the initialed PPA, all the timelines are specified from the date of execution of PPA and as per the approved initialed PPA, the agreement shall come into effect from the date of execution by both the parties and such date shall be referred as the effective date. (clause 2.1) . Here, in the instant case, no such agreement has been executed (in conformity with initialed PPA duly approved by this Hon'ble Commission) and hence the investment made by the petitioner as pointed out in the petition, based on the LOA, for site mobilization and supply of modules are made at the risk and cost of the petitioner and hence KSEB Ltd. will not be held liable for such untimely action of petitioner. The petitioner also submitted that application for LTOA has been held up due to non-signing of the **final PPA**. It may please be noted that, Central Transmission Utility is considering final PPA for granting LTOA for evacuation purpose.

M/s. NTPC has proposed the Solar power project on their own thermal power station at ANTA, Rajasthan and the proposed Solar project will be interconnected with existing 220 kV NTPC Anta switchyard which is a part of ISTS system. Hence the revelation of the NTPC that they had moved forward in executing the project is not correct and the additional financial expenses claimed in the petition is not true.

Section 63 of Electricity Act:

The petitioner's argument that attempts on the part of this respondent to refix the tariff is in contravention to the principles enshrined under the Electricity Act, 2003 and is unlawful. The KSEB Ltd has not made any attempt to refix the adopted tariff, duly approved this Hon'ble Commission

The Commission, vide Order dated 18.12.2020 in petition OP No. 39/2020 filed by the Respondent, adopted the tariff as per the Section 63 of the Electricity Act, 2003. The relevant portion of the Order is extracted below.

- (i) The Tariff of Rs. 2.97 per unit (kWh) for the procurement of 90 MW of solar power from M/s NTPC Ltd. and 110 MW of solar power from M/s Tata Power Company Ltd.; discovered by KSEB Ltd. through the competitive bidding process as per the bidding guidelines notified by the Central Government is adopted under Section 63 of the Electricity Act, 2003.*
- (ii) KSEB Ltd shall finalize and initial the PPAs 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. The formal approval of the PPAs by this Commission is a condition precedent and the PPAs shall come into effect only after this.*

33. The respondent KSEB Ltd further submitted that, KSEB Ltd had approached for adoption of tariff under section 63 of the Act before this Commission after determining the tariff through a transparent process of bidding in accordance with the guidelines issued by the Central Government and the deviations thereon duly approved by this Hon'ble Commission. KSEB Ltd did not make any attempt to reconsider the adopted tariff under section 63 of the Act ie during the tariff determination process. But after initialling the draft PPA, KSEB Ltd has made a request before generators to reduce the tariff, in conformity with the prevalent low rates in the market. It may please be noted that the prime objective of the transparent bidding process is to discover a reasonable rate to provide electricity to the needy consumers and at the same time to ensure the financial reasonability of the DISCOM and Generator/ Trader. Financial reasonability and

the public interest are the sole consideration of the request made by KSEB Limited before the successful bidders.

Execution of final PPA:

The petitioner's request before this Commission to issue a direction to KSEB Ltd to sign the final PPA as per Order dated 21.06.2021 in OP No. 11/2021 (Part-1). The Commission vide order dated OP No.11/2021 dated had ordered the following:

- (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.*

Para 10 of the above order which is reproduced below:

*In compliance of the direction of the Commission, KSEB Ltd initialled the **draft PPA** with NTPC Ltd on 5th February 2021 for procurement of 90MW Solar Power @Rs 2.97/unit. KSEB Ltd. vide the petition dated 08.02.2021 submitted the copy of the initialled PPA before Commission to **grant formal approval** for the initialled PPA with NTPC Ltd.*

The Commission examined in detail the initialled PPA with NTPC Ltd with the model PPA approved the along with bidding documents vide Order dated 25.08.2020, in petition OP No. 09/2020, and noted that, the articles, clauses and other conditions in the initialled between KSEB Ltd and NTPC Ltd is as per the model PPA approved by the Commission along with the bidding documents dated 25.08.2020 in petition OP No. 09/2020. Hence the Commission decided to grant approval for the initialled Power Purchase Agreement (PPA) dated 05.02.2021 with NTPC Ltd.

34. Thus, it is clear that, draft initialled PPA submitted before the Commission is to ensure whether the clauses /articles incorporated in the initialled PPA is in conformity with the Standard bidding documents/ deviations from bidding guidelines /adopted tariff duly approved by the Commission. The respondent KSEB Ltd So further requested before the Commission to decline the request of the petitioner as the conditions are detrimental to the interest of the KSEB Ltd. and consumers under the utility. KSEB ltd. is ready to execute the final PPA with the petitioner @ Rs.2.44/unit with the approval of the Commission.

35. The respondent also invited the attention of the Commission's Order dated 15.03.2021 in petition (O.P. No.02/2021) in respect of the PPA of Rajiv Gandhi Combined Cycle Power Project (RGCCPP), Kayamkulam, for the years from

2019-20 till the end of the current PPA period (i.e. till 28-2-2025) under Section 86 of the Electricity Act 2003.

In the order the Commission has observed that *the role of the Commission is to approve the PPA under Section 86(1)(b). While doing so, the Commission has to examine the reasonableness of continuation of PPA and the conditions attached to it.*

In the order, the Commission had approved the annual fixed charge of Rs.100 crore per annum as agreed to by the parties for the PPA period, though there is specific CERC determined tariff for the project. The Commission's appropriate and prudent intervention in the matter is turned out be financially beneficial to the public and the utility. A similar approach may please be taken in the matter also.

36. Request for rate revision

The KSEB Ltd filed the petition before the Commission on 17.08.2018, for the approval for inviting bids on reverse e-bidding route with e-reverse auction for procuring 200 MW solar power from **solar PV power plants to be established in Kerala** on IPP mode. The Commission vide Order dated 19.11.2018 (O.P.No. 56/18) has approved benchmark tariff @ Rs 3.50/unit for the proposed procurement. KSEB Ltd had proposed this benchmark parameter before the Commission mainly based on the tariff offered by NTPC to KSEB Ltd, for supplying power from the proposed solar plant to be established by NTPC at RGCCPP Kayamkulam. The offer of the petitioner at that time was Rs.3.00/unit under MoU route. Due consideration has been given to the rate proposed by the petitioner in fixing the bench mark tariff for the procurement process. The high ceiling rate proposed at that time is due to high cost of land in Kerala and due to non-availability of large extent of suitable barren land for the development of solar PV projects. Only one bid was received at that time. In order to materialize the project, **KSEB Ltd. has decided to invite bid from ground mounted solar power plants situated anywhere in India** with preference to Kerala bidders (upto 10% of the requisitioned capacity) who prefer to match the quoted rates at the end of e-reverse auction process, with the approval of the Bidders too. It was also decided to modify the ceiling rate as Rs. 3/unit for ensuring participation of Kerala bidders. The Order of the Commission to execute the PPA with the generators was placed before the Full Time Directors of KSEB Ltd., and the Board observed that the rate discovered through bidding route for the procurement of 200 MW solar power is relatively high in comparison with various offers of SECI, and hence issued direction to reconsider the power procurement process. The rate offered by SECI from Tranche IX ISTS

tender currently pursued by KSEB Ltd. is Rs 2.44 per unit (including trading margin @ 7ps per unit).

In the tariff-based bidding auction conducted by SECI on 23rd November 2020 for selection of Solar Power Developers for Solar PV projects, NTPC has won the contract for 470 MW Solar power as L2 bidder @ Rs. 2.01/kWh. This new low tariff will also impact DISCOMs, which needs to be treated as a new benchmark. KSEB Ltd bid was invited on September, 2020. Thus, it is evident that NTPC's quoted rate is much on the higher side compared with their quoted rate in other solar tenders at that time.

On an analysis of the financial impact, it is seen that KSEB Ltd and consumers of Kerala would have to bear an additional liability of more than Rs 492 crore during the PPA period, if KSEB Ltd has finalized the tender at the rate of Rs 2.97 per unit compared with the other renewable power offer having tariff @ Rs 2.44/unit. Meeting was held with NTPC officials at KSEB Ltd office on 24.09.2021 and the position of KSEB Ltd was well explained.

- 37.** KSERC (Renewable Energy and net metering) regulation 2020 published on 07-02-2020, in which, the Commission has noted that, the tariff of Solar PV derived through bid route in the recent bids is in the range of Rs 2.50 to Rs.2.60/unit only.

Hence the petitioner has been intimated formally on 07.10.2021 itself that KSEB Ltd is not intending to proceed with the Solar bid for procuring 200 MW as the tariff offered by the firms is higher when compared with the other competitive offers. The offers before the KSEB Ltd during the period were price range between @ Rs 2.44/kWh (Incl TM) to @ Rs 2.73/kWh (Incl TM). The respondent KSEB Ltd has also invited the attention of the Commission to the lowest Solar bids in Reverse auction in India (Rs/kWh) from Feb 2020.

- 38.** As per Forum of Regulators (FOR), report dated 30th April 2021 on 'Analysis of factors impacting retail tariff and measures to address them', it is observed that the tariffs being discovered through competitive bidding are significantly lower than the tariffs approved by the Central regulator.

A comparison table has been published by FOR in the report which is as detailed below.

Sl No	Company	Year	Lowest Quoted Tariff (Rs/kWh)	State	Tariff approved by SERC (Rs/kWh)
1	SECI, 1070 MW Solar Auction	2020-21	2.00	Rajasthan	2.5 (for FY 2020)

2	GUVNL, Raghnesda Park 100 MW, Gujarat	2019-20	2.65	Gujarat	5.34 (for FY 2018)
3	SECI, Kadapa Solar Park (AP)	2018-19	2.70	Andhra Pradesh	3.5 (for FY 2019)
4	NTPC, Ananthapuram Solar Park 750 MW (AP)	2018-19	2.72	Andhra Pradesh	3.5 (for FY 2019)

Having considered all the above facts, the decision of the Board of Directors of KSEB Ltd to reconsider the procurement process for procurement of 200 MW ISTS connected solar power was diligent prudent and most appropriate decision to avoid a huge financial liability to KSEBL for a period of 25 years and to protect the interest of consumers in Kerala.

As there is a difference of around Rs 0.53 per unit in comparison with the latest offer of SECI and the discovered tariff of Rs 2.97 per unit of Solar bid, the additional financial commitment for KSEBL and consumers of Kerala will be more than Rs. 492 Cr. during the PPA period with the present CUF of 25 % by the bidders of Solar bid. Considering the financial impact, KSEB Ltd. has explored the possibility of reconsideration of rates with the successful bidders. M/s. TP Saurya Ltd (100 % subsidiary of The TATA Power Company Limited) on 27.09.2021 have reduced their offer price to Rs 2.44 per unit in place of Rs 2.97 per unit, whereas the NTPC Ltd has not reduced the rates and stick on their bid rate. Accordingly, KSEB Ltd. has filed a petition before the Hon'ble Commission for adoption of the revised tariff of Rs.2.44 /unit and the Commission vide Order dated 28.01.2022 (O.P. No 3/2022) has approved the same. Relevant portion of the Order is reproduced below:

*The reduced tariff @Rs 2.44/unit offered by the SPG and the same accepted by KSEB Ltd is **beneficial to the ultimate consumers of the State**, the Commission also approve the action of KSEB Ltd to accept the reduced tariff @Rs 2.44 per unit instead of Rs 2.97/unit adopted earlier. KSEB Ltd. has considered the interest of the consumers alone, while making a request before the generators in proposing a reduced rate. The offers of generators for supplying solar power to KSEB Ltd were in the range of Rs. 2.44 to Rs.2.73/unit during period from 08/2018 to 08/2021. Even the petitioner had offered solar power at a discovered tariff of Rs. 2.59/unit to Rs.2.60/unit (plus trading margin of 7 paise /unit) vide their letter date 24.08.2018. In response to the above, KSEB Ltd. expressed its willingness to procure 200 MW solar power vide letter dated*

05.12.2008 at the discovered tariff subject to the adoption of tariff and approval of trading margin by the Commission. There was no response on the part of the petitioner till this date.

39. Judgments of Hon'ble APTEL cited by the Petitioner.

i) Appeal No. 156 of 2009 : In this case the respondent Corporation invite bids for procuring power and the successful bidder, the appellant refused to supply power citing that the contract is not a concluded one as there is no PPA among the Appellant and 2nd respondent, Corporation. The appellant also cited that they are not a generating company. Hon'ble Tribunal, after analyzing the RFQ, observed that the appellant cannot be allowed to make a plea to escape from its obligation to sign PPA and from supplying power to the respondent.

KSEB Limited has undertaken all the bidding process in accordance with bidding guidelines notified by the Central Government. The Commission has also accorded sanction for the deviations in the Standard Bid Documents (SBD) from the the guidelines of MoP, GoI dated 03.08.2017 and its amendment dated 14.06.2018.

In all bidding documents, the time period for achieving various milestones like financial closure, land acquisition and commissioning of plant etc. are to be fixed from the date of execution of PPA and not from the date of issuance of LoA. As there is specific guidelines issued by the Central Government and orders issued by the Commission, the judgment has no relevance in this case.

ii) Appeal No. 82 of 2011

In this case the petitioner is M/s. ESSAR Power Ltd. and the Respondents are Uttar Pradesh Electricity Regulatory Commission and Noida Power Company In this case Noida Power Company filed a Petition 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. While the above petition was pending before the State Commission for adoption of tariff quoted by the Appellant, Noida Power filed an interim application before the State Commission stating that subsequent to the filing of the petition for adoption of the tariff quoted by the Appellant, the Noida Power received a letter from another Company (3rd party) proposing to supply power to Noida Power on Long Term Basis at a low levelised tariff which is less than the tariff quoted by the Appellant and praying that appropriate Orders be passed after taking note of this fresh development. It may please be noted that in this case the procurer has made bilateral negotiations with the 3rd party, who had not even participated in the bidding process. In KSEB Ltd, the bidding process is transparent and Hon'ble

Commission has adopted the tariff under section 63 of the Act. There has not been interference on the adoption process and there is no third-party negotiation. The judgment has no relevance in this case

40. The respondent KSEB Ltd has concluded their affidavit that KSEB Ltd being a public sector utility has explored the possibility of reduced rates in good faith, considering the drastic reduction in RE Solar power cost else there will be huge financial loss to state of Kerala and its population. Hence the argument of the petitioner that the stand adopted by KSEB Ltd to reduce the tariff is without any justifiable reason is not admissible. Considering the judgements issued by the Hon'ble Appellate Tribunal for Electricity and orders issued by the Commission, the present petition filed by M/s. NTPC Ltd is liable to be dismissed.

The petitioner NTPC Ltd filed the reply Affidavit on 02.06.2022.

41. In the said reply the petitioner reiterated their contentions. The gist of the replies filed by the petitioner NTPC Ltd is extracted hereunder:

1. The contentions in the Counter Affidavit are prima facie proof of the fact that the Respondent has unilaterally attempted to revise the tariff discovered through competitive bidding and adopted by the Commission. The Relevant excerpts of the Commission's Order in OP.No.39/2020 dt.15.12.2020 is reproduced below:

Analysis and Orders of the Commission:

6. In view of the foregoing facts, deliberations and clarifications given during the hearing, the earlier orders of this Commission in the matter and the provisions of the Electricity Act, 2003: the Commission hereby orders the following:-

*(1) The Tariff of Rs. 2.97 per unit (kwh) for the procurement of 90 MW of solar power from M/s NTPC Ltd. and 110 MW of solar power from M/s Tata Power Company Ltd: discovered by KSEB Ltd. through the competitive bidding process as per the bidding guidelines notified by the Central Government is **adopted under Section 63 of the Electricity Act, 2003.***

The same was mentioned and accepted by KSEB as mentioned in OP No.11/2021 dt.10.3.21 which is extracted hereunder:

KSEB Ltd submitted that, the Commission vide Order dated 18.12.2020 in Petition O.P No. 39/2020 adopted the tariff of Rs.2.97/unit, for the procurement of 90MW Solar Power from M/s NTPC Ltd and 110 MW from M/s TATA Power Company Ltd.

Commission in the said Order has directed KSEBL to finalise and initial the PPA with the two successful bidders and file the initialed PPA before the Commission for approval as per Section 86(1)(b) of the Electricity Act, 2002.

In compliance of the direction of the Commission, KSEBL initialed the draft PPA and draft PPA and submitted for the approval of the Commission. The Articles and Clauses of the initialed PPA is as per the bidding documents including the model PPA approved by the Commission vide Order dated 25.08.2020.

2. The Counter Affidavit further proves the mala fide action on the part of the respondent in not signing the Final PPA as per the directions of this Hon'ble Commission.
3. The averment in Para-3 is misleading. A perusal of Annexure XII and XIV communications issued by the Respondent requiring the petitioner to adopt tariff at Rs.2.44 per unit and further stating that the KSEBL would be forced to explore other competitive solar offers available in the event of non-reduction of tariff; is clear evidence of the strong –arm tactics adopted by the Respondent.
4. The contention of the Respondent in Paragraph-5 is not legally tenable. Section 3 of the Indian Contract Act, 1872 mandates that “*The Communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptance respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicated such proposal, acceptance or revocation or which has the effect of communicating it.*” Section 4 of the Act stipulates that “*The Communication of a proposal is complete when it becomes to the knowledge of the person to whom it is made. The Communication of an acceptance is complete-as against the proposer, when it is put in a course of transmission to him so as to be out of the power of the acceptor. The Communication of a revocation is completed –as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it; as against the person to whom it is made, when it comes to his knowledge.*”

Furthermore, Section 8 of the Act provides that acceptance of a proposal can also be by the conduct or by performance of the condition by the Acceptor.

The petitioner also reiterated the decisions of the Hon'ble APTEL in Lanco Kondapalli Power Pvt Ltd and Ors vs Haryana Electricity Regulatory Commission and Ors [2010 ELR (APTEL 36)] has culled

out the guidelines pertaining to the existence of a concluded contract. The Hon'ble APTEL after finding that the Contract had been concluded between the parties had further observed that "***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.***"

5. The Respondent Board had issued LOA accepting the tariff quoted by the petitioner. The Respondent had also preferred the petition before this Hon'ble Commission to approve the initialled PPA. Thus, the existence of a concluded contract is evident from the conduct of the parties. It is only on the basis of the LOA initialled PPA that the Petitioner had commenced the project activities towards site mobilization, and other ancillary activities and thus the Respondent cannot wriggle out of its liability at the fag-end.
6. Section 63 of the Electricity Act stipulates that "*notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.*" Thus, the State Commission, on being satisfied that the tariff has been adopted through a transparent bidding process and that the bidding process has been conducted in accordance with the guidelines issued by the Central Government ought to mandatorily adopt the tariff determined through the competitive bidding process. It is also pertinent to point out that the acceptance of tariff at a lower rate by M/s TP Saurya does not in any manner absolve the respondent from its obligation to finalise the Power Purchase Agreement with the Petitioner for the procurement of 90MW Solar Power at the rate of Rs.2.97/unit, approved by this Hon'ble Commission as per Annexure-IV order.
7. The Petitioner respectfully submits that the reliance placed by the respondent in the order dated 15-03-2021 of this Hon'ble Commission in O.P.No.02 of 2021 is misguided. The observations relied upon by the Respondent were rendered on a completely different factual matrix and has no relevance to the facts of this case.
8. The reference made by the Respondent to the solar bids quoted by generating companies in different tender processes is unfounded and irrational. Pursuant to the Order of this Hon'ble Commission, the Respondent Board, 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 modifications in the tender conditions with the approval of the Commission on 02-03-2019. However, only one bid for 10MW solar power was received. The tender was thus cancelled in view of the lack of response to the tender.

9. As per the Bid Parameter enunciated in Clause 1.11 of Annexure-III, the competitive tariff quoted by the successful bidder/bidders during the bidding process shall be firm and cannot be more than Rs.3,000/- per kWh (Rupees Three only). The maximum rate of tariff has been quantified in by the Respondent Board in Annexure-III after due discussions and deliberations. The tariff quoted by the petitioner is well within maximum tariff stipulated in Annexure-III and thus the contention tat the tariff quoted by the petitioner is non the higher side in comparison with the tariff quoted by the generating companies in other tender processes incongruous.
 10. The Petitioner reiterates that the Respondent Board is disentitled to re-fix the tariff invoking the ground of consumer interest. The Hon'ble APTEL in *Essar Power Ltd. v. Uttar Pradesh Electricity Regulatory Commission (2012 ELR (APTEL) 182)* while deliberating upon the scope of Section 63 of the Electricity Act has observed that: *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.*” Thus, the attempt on the part of the KSBEL vide Annexures XII and XIV directing the petitioner to reconsider the Tariff already approved by this Commission, on the ground that the approved tariff is higher in comparison with the offer of SECI, is in violation of Section 63 of the Electricity Act as well as Annexure-1 guidelines issued by the Central Government.
 11. The petitioner concluded their replies praying that this Commission may be pleased to allow the original petition and direct the Respondent Board to sign the Final Power Purchase Agreement as per the Order of this Hon'ble Commission dated 21-06-2021 in O.P.No.11/2021.
- 42.** The Commission after examining the Counter Affidavit filed by the respondent KSEB Ltd and the reply to the Counter Affidavit filed by the petitioner NTPC Ltd has **posted the case for the second hearing on 10.06.2022.**
- 43.** During the final hearing held on 10.06.2022, Adv. E.K. Nandakumar appeared on behalf of the petitioner and Adv. N. Sakthidharan Nair, appeared on behalf of the respondent. In addition to the above, shri. Adithya, Shri.R.R. Surana the AGM Commercial, NTPC and Mr.V.V. Sivakumar, NTPC were attended the hearing on behalf of the petitioner and Shri. Edward, AEE, KSEB Ltd attended the hearing on behalf of the respondent KSEB Ltd.

44. The petitioner during the hearing reiterated that their arguments have summarised in the Daily Order issued by this Commission dated 17.03.2022. Hence the petitioner is not wished to repeat their arguments.

45. The Commission observed that the entire arguments of the petitioner has been summed up in the Daily Order issued by this Commission dated 17.03.2022. Thereafter, the respondent KSEB Ltd filed a Counter Affidavit on 18.04.2022. Reply to the said Counter Affidavit has been filed by the petitioner on 02.06.2022. The respondent KSEB Ltd also filed copies of Orders issued by this Commission in O.P No.03/2022 dated 28.01.2022 and O.P No. 56/2018 dated 19.11.2018 as additional documents. In view of the above circumstance, the Commission allowed the respondent to submit their averments.

46. Summary of the deliberations made by the respondent's Counsel during the Second Hearing held on 10.06.2022 is in the following lines:

1. The summary of the findings in the Daily Order dated 17.03.2022 would show that the first question relates to the scope of power to be exercised and method of procedure to be followed by the State Commission under section 63 of the Electricity Act, 2003 which reads as follows:

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.

2. So, the price is to be determined in a transparent process. Clause 10.1 to 10.4 of the Guidelines would clarify the term transparent process thus:

10.1 The PPA shall be signed with the successful bidder/project company or an SPV formed by the successful bidder.

10.2 After the conclusion of bidding process, the Evaluation Committee constituted for evaluation of RfS bids shall critically evaluate the bids and certify as appropriate that the bidding process and the evaluation has been conducted in conformity to the provisions of the RfS.

10.3 For the purpose of transparency, the Procurer shall, after the execution of the PPA publically disclose the name(s) of the successful bidder(s) and the tariff

quoted by them together with breakup into components, if any. The public disclosure shall be made by posting the requisite details on the website of the Procurer for at least 30 (thirty) days.

10.4 Subject to provisions of the Act, the distribution licensee or the Intermediary Procurer, as the case may be, shall approach the Appropriate Commission for adoption of tariffs by the Appropriate Commission in terms of Section 63 of the Act. In case, the Appropriate Commission does not decide upon the same within sixty days of such submission, the tariffs shall be deemed to be have been adopted by the Appropriate Commission.

3. So, as per the guidelines issued by the Central Government, only on signing the Power Purchase Agreement it become a concluded contract. The power purchase agreement is a concluded contract. As such the question to be considered as to whether a Letter of Award amount to a concluded contract? Under the Contract Law, there is offer and acceptance and when an offer is accepted there is a concluded contract. Whether that principle can be adopted in this PPA, is the crucial point to be considered.
4. The respondent further submitted before the Commission that the principle contained in the Indian Contract Act, 1872 i.e, offer and acceptance cannot be adopted in this case because, in a contract, there are only two parties, promisor and promisee. Here there is a third party which is a statutory authority, which has been given ample power of surveillance right from the beginning. A mere issuance of LoA by the licensee cannot be treated as a concluded contract because, it is merely a Letter of Intent. Letter of Intent is not enforceable.
5. The Commission admitted the fact that in this case there are three parties an offeror, offeree and a third party. But the Commission sought clarification on a point as to whether the LoA was issued after the approval of the Commission?
6. The respondent admitted before the Commission the fact that LoA was issued after the approval of the Commission.
7. The Commission further observed that in this case, the petitioner has not raised any contention that the transparent process after the bidding process is not over. It is the bounden duty of the KSEB Ltd to tell the petitioner NTPC, that clauses 10.1 to 10.4 of the Standard Bidding Documents process has not been completed. But such a contention cannot be taken after the bidding process is over. Further the Commission sought clarification from the respondent as to why did the petitioner participate in the entire proceedings and get the Order and why did the respondent at the initial hearing stage itself submit before the Commission that as per SBD clauses 10.1 to 10.4 have to be fulfilled, this process yet to be completed, therefore the petition is premature, at any stage of the hearing while the petition filed by the KSEB Ltd for adoption of tariff was pending.

8. The respondent submitted before the Commission that now each and every bidding process is under the supervision and surveillance of this Commission. So, the petitioner has to enlighten what are the procedures.
9. The Commission noted that today the Order was become ineffective, the very fact that the petitioner did not object and cannot go and start reagitating the case. If the respondent has any point, the petitioner has to present the point at that point of time. But the petitioner cannot later on take this when they are filing a petition and bring out facts which already determined, decided and after issuing a final order. The new contentions are not permitted and the respondent cannot go back to the original bidding documents. Further the Commission has taken a final decision to adopt the tariff after conducting several hearings.
10. The KSEB Ltd further contended that the price discovered in the process is Rs. 2.97 per unit and subsequently the price as per SECI price has been Rs.2.44 per unit. Accordingly, the petitioner made a request before this Commission to sign the PPA for the power vide O.P. No 03/2022. The Commission at para 8 of the Order dated 28.01.2022 held as follows:

8. The Commission examined the submission of KSEB Ltd in detail. Though the Commission, had earlier adopted the tariff @Rs 2.97/unit for procuring 110MW of Solar Power from and also approved the initialed PPA between the parties, the Commission noted the fact that the Solar Power Generator M/s TP Saurya Ltd had agreed to KSEB Ltd. 's request to reduce the adopted tariff @Rs 2.97/unit to Rs 2.44/unit for the entire term of the PPA of 25 years and the procurer M/s KSEB Ltd accepted the offer of reduced rate. The reduced tariff @Rs 2.44/unit offered by the SPG and the same accepted by KSEB Ltd is beneficial to the ultimate consumers of the State, the Commission also approve the action of KSEB Ltd to accept the reduced tariff @Rs 2.44 per unit instead of Rs 2.97/unit adopted earlier.
11. The Commission pointed out that at para 8 of the Order dated 28.01.2022, “ ***the Commission noted the fact that the Solar Power Generator M/s TP Saurya Ltd had agreed to KSEB Ltd. 's request to reduce the adopted tariff @Rs 2.97/unit to Rs 2.44/unit for the entire term of the PPA of 25 years***” clearly specifies that there is a request on the part of the respondent KSEB Ltd to M/s TP Saurya Ltd to *reduce* the tariff. Such a request was accepted by M/s TP Saurya Ltd. The Commission further sought clarification on the respondent KSEB Ltd as to whether the petitioner made a similar request before the NTPC to reduce the tariff and has the NTPC agreed to their request. The respondent clarified that the request made by them to the petitioner NTPC to reduce tariff was not agreed by the petitioner.

12. The Commission observed that the last SECI price for 2000 MW was Rs.2.12 per unit. Hence the sanctity of the arguments to reduce of Rs.2.44/- per unit to the tune of SECI price is not a valid ground. The Commission further observed that the Commission determined tariff consequent to an open transparent bidding process conducted by the respondent and the Commission is bound to accept a rate. When the petition was filed by KSEB Ltd, the Commission having perused the entire process have come to the conclusion that the petitioner has complied with the requirements of Section 63 of the Electricity Act, 2003 and also the requirements of the SBD. Based on such satisfaction the Commission has adopted the tariff. The Commission determined the tariff based on the relevant rate of solar power during 2020. The rate of Rs.2.97/- per unit was discovered by the Commission since the rate was found to be reasonable. Accordingly, based on the request of the respondent this Commission approved the initialled PPA.
13. The Commission noted that the request of the respondent to re-determine the tariff already adopted by the Commission in pursuance of a transparent bidding process is not in order. The Commission observed that such request is contrary to the Circular No. 23/5/2022-R&R dated 11th May, 2022 issued by the Government of India, Ministry of Power, to maintain the sanctity of Power Purchase Agreements. The Commission also objected the contention made by the respondent that no PPA was executed and further contention that in view of the Order issued by the Commission to reduce the price to Rs. 2.44/- in respect of 90 MW from M/s TP Saurya Ltd, price fixed by the Commission to NTPC @Rs.2.97/- per unit also has to be reduced. The Commission also rejected the contention made by the respondent that the provisions of the Indian Contract Act, 1872 is not in strict sense applicable. The commission clarified that the provisions of Electricity Act, 2003 shall not override the provisions of the Indian Contract Act, 1872.
14. The Commission further observed that in the present case, KSEB Ltd and NTPC had initialled the PPA. Initialling a PPA and submission before the Commission is a due legal process. The KSEB Ltd cannot go back from an initialled PPA since the initialled PPA by both parties is a mutually signed legal document. The Commission is a quasi-judicial body and hence the orders issued by the Commission cannot be altered by the Board of Directors according to their whims and fancies.
15. The KSEB Ltd concluded their arguments submitting that the statue conferred power on the Regulatory Commission to be vigilant in fixing tariff price. Now

the price of solar power is reduced. Hence the price to be adopted to the tune of Rs. 2.44/- per unit for consumer interest.

16. The Commission observed that under the “Law of Contract”, every contract is a legally valid document. Documents like PPA, PSA etc are governed by the Law of Contract. By initialling the PPA by both the parties, basic requirements of a contract have been full filled. In this case, the Commission (the third party) has been accepted it. The role of the Commission is to ensure that there is no deviation from the guidelines. Further, the Commission satisfied those various clauses included in the PPA are in line with the model PPA which has been floated by the Ministry of Power and also satisfied that due transparent bidding process has been followed in this case. Accordingly, the Commission consented to adopt the tariff. As per Clause 10.4 of the guidelines issued by the MoP, if the Appropriate Commission does not decide upon the same within sixty days of such submission, the tariffs shall be deemed to be have been adopted by the Appropriate Commission. The Commission cannot do an illegality since the Commission is bound by the Act, Rules and Regulations. The directions issued by the MoP dated 11th March, 2022 is relevant. However, the Commission fully appreciate the effort taken by the respondent KSEB Ltd to reduce the determined price of solar power in consultation with M/s TP Saurya Ltd. The Commission suggested that the respondent KSEB Ltd can also made request to the petitioner to reduce the price to safeguard the interests of the consumers. The respondent sought 5 days’ time and the Commission allowed it.

17. Accordingly, the KSEB Ltd vide letter No.CE (C&P)/SOLAR/200MW Bid/2022-23/108 dated 10.06.2022 has requested to the petitioner NTPC Ltd to reduce the tariff of 110 MW solar power @ Rs. 2.44/- per unit in tune with the reduced tariff in respect of M/s TP Saurya Ltd. The respondent KSEB Ltd vide letter 16.06.2022 has informed this Commission that they have requested the petitioner NTPC to match with the reduced price of Rs. 2.44/- per unit. But the petitioner sought further time of 5 days w.e.f. 22.06.2022.

Analysis and Decision of the Commission

47. The Commission has examined in detail the 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, the Counter affidavit filed by M/s KSEB Ltd, reply affidavit filed by the Petitioner and the provisions of the Electricity Act, 2003, Indian Contract Act, 1872 guidelines issued by the MoP, deliberations of both the petitioner and the respondent and settled legal position in detail.

48. The petitioner's main contention is that the arbitrary action on the part of the respondent KSEB Ltd in not signing the final PPA, after initialling the PPA, and re negotiation of the respondent to reduce the determined tariff already adopted by the Commission is arbitrary and is liable to be interfered by the Commission. Hence in this case, the following questions would arise for consideration before the Commission:

1. Whether the attempt on the part of the KSEB Ltd to renegotiate with M/s NTPC Ltd for reducing the determined tariff after initialling the PPA and issuing Letter of Award (LoA) is legally in order?

2. Whether the Commission is competent enough to issue direction to the KSEB Ltd for specific performance ie to sign the formal PPA in view of the settled legal position?

3. Whether the relief sought by the petitioner has to be allowed and What will be the remedy available to the respondent KSEB Ltd to reduce the determined price to safeguard the consumer interest?

49. Since the above-mentioned 1st and 2nd questions are inter related, it shall be examined together. It is to be noted that the action taken by the respondent to negotiate for reducing the adopted tariff by KSEB Ltd after issuing the LoA and initialing the PPA is not in order and is liable to be interfered by this Commission in view of the settled legal position and the reasons mentioned below:

50. In this case, the Kerala State Electricity Board Limited (KSEB Ltd.) filed a petition on 25.11.2020, before this Commission, for adoption of tariff under section 63 of the Electricity Act, 2003, praying that this Commission may adopt the Tariff @ Rs. 2.97 per unit for the procurement of 90 MW of solar power from M/s NTPC Ltd. and also 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 admitted the petition as O.P. No. 39/2020 and in view of the facts, deliberations and clarifications given during the hearing, issued following directions as per Order dated 18.12.2020:

(1) The Tariff of Rs. 2.97 per unit (kWh) for the procurement of 90 MW of solar power from M/s NTPC Ltd. and 110 MW of solar power from M/s Tata Power Company Ltd.; discovered by KSEB Ltd. through the competitive bidding process as per the bidding guidelines notified by the Central Government is adopted under Section 63 of the Electricity Act, 2003.

(2) KSEB Ltd shall finalize and initial the PPAs 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. The formal approval of the PPAs by this Commission is a condition precedent and the PPAs shall come into effect only after this.

51. In pursuance of the above Order, M/s KSEB Ltd filed a petition on 08.02.2021, before the Commission with the following payers:

(1) To grant formal approval for the initialled Power Purchase agreements (PPAs) with M/s NTPC Ltd and M/s. Tata Power Company Limited under Section 86(1)(b) of the Electricity Act, 2003, for the procurement of 90MW of Solar power from M/s. NTPC Ltd. and 110 MW of Solar power from M/s. Tata Power Company Ltd. at the adopted tariff of ₹ 2.97 per unit.

(2) Permit the execution of PPA with M/s. T P Saurya Ltd., a wholly owned subsidiary of the successful bidder M/s Tata Power Company Ltd.

52. The Commission after examining the petition for the approval of the initialled Power Purchase Agreement (PPA) with NTPC as per the provisions of the Electricity Act, 2003 and KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2018, on 21.06.2021, in OP No. 11/2021 (Part-1) issued the following orders:

(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.

53. Hence in this case, this Commission had granted approval to the respondent Board for inviting bids on reverse e-bidding process for procuring 200MW Solar Power, based on guidelines issued by the Ministry of Power, Government of India, as per resolution dated 3rd August, 2017 vide Order dated 19.11.2018 in O.P. No. 56/2018. Thereafter, modification of the Standard bid documents was granted to the respondent KSEB Ltd and granted approval for inviting bids as per Order dated 25.08.2020 in O.P. No. 09/2020. The tariff was adopted by this Commission under section 63 of the Electricity Act, 2003 based on the petition

filed by the respondent as per Order of this Commission in OP No. 39/2020 dated 18.12.2020. This Commission has also approved the initialled Power Purchase Agreement with NTPC Ltd for procurement of 90MW Solar Power @Rs 2.97/unit and issued directions to submit a copy of final PPA signed with NTPC Ltd before the Commission for information and record, based on the petition filed by KSEB Ltd for approval as per Order (Part-I) dated 21.06.2021 in O.P. No. 11/2021.

54. Further, KSEB Ltd issued LoA on 06.01.2021. Thereafter, M/s NTPC has acknowledged and accepted the LOA as per their letter dated 12.01.2021. The petitioner and respondent initialled the draft PPA on 05.02.2021. At Page (5) of the draft initialled PPA (signed by both parties) dated 05.02.2021, it is specifically mentioned that M/s NTPC has acknowledged and accepted the LoA dated 6-1-2021 as per their letter dated 12.01.2021. This shows that the respondent KSEB Ltd has acknowledged the consent issued by the petitioner. Further, the KSEB Ltd issued a letter dated 30.06.2021 to the petitioner requesting to forward the documents in original for record and to proceed with signing of the Power Purchase Agreement. The said letter also proved that the LoA was accepted by the KSEB Ltd unconditionally without any objection. Finally, the KSEB Ltd issued a letter dated 07.10.2021 (Annexure-XII) to the petitioner informing that KSEB Ltd 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. Since the bidding process has already been completed and both the parties initialled the draft PPA, the question of cancellation of the PPA does not arise. Further, Annexure XII would prove that the respondent has blatantly violated the contractual obligations created under the provisions of the Indian Contract Act, 1872 as discussed below:

55. As per Section 2(h) of the Indian Contract act, 1872, *an agreement enforceable by law is a contract*. The terms proposal, promisor and promisee, communication, acceptance and revocation of proposals etc are defined thus:

In this Act the following words and expressions are used in the following senses, unless a contrary intention appears from the context:—

(a) When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;

(b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;

(c) The person making the proposal is called the "promisor", and the person accepting the proposal is called the "promisee";

Section 3 - Communication, acceptance and revocation of proposals

The communication of proposals, the acceptance of proposals, and the revocation of proposals and acceptances, respectively, are deemed to be made by any act or omission of the party proposing, accepting or revoking, by which he intends to communicate such proposal, acceptance or revocation, or which has the effect of communicating it.

Section 4 - Communication when complete

The communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

The communication of an acceptance is complete,—

as against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor;

as against the acceptor, when it comes to the knowledge of the proposer.

The communication of a revocation is complete,—

as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

Section 37 - Obligations of parties to contracts

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

56. It is a well settled legal position that a **proposal may be revoked at any time before the communication of its acceptance is complete.** In this case acceptance was completed and hence a contractual obligation has been created on the part of the parties. Certain decisions of the Hon'ble Supreme Court and Hon'ble APTEL are extracted hereunder:

....In the above view of the matter, we are of the view, that the obligations between the parties in furtherance of the tender notice came to be crystallized, when the formal acceptance letter was issued by the Respondent to the Appellant.

(S.R. Ghosh vs. Union of India (UOI) (03.08.2017 - SC) : MANU/SC/1399/2017)

The proposition that Courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores and Ors. v. Surat People's Co-operative Bank (supra), cited by Ms. Divya Anand. This appeal is an attempt to renegotiate the terms of the PPA, as argued by Ms. Divya Anand as also other Counsel. It is well settled that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties, as held by this Court in Nabha Power Ltd. (NPL) v. Punjab State Power Corporation Ltd. (supra) cited by Ms. Anand.

(Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission and Ors. (08.10.2021 - SC): MANU/SC/0835/2021)

57. Further, decisions of the Hon'ble APTEL quoted by the petitioner in **Lanco Kondapalli Power Pvt Ltd. v Haryana Electricity Regulatory Commission (2010 ELR(APTEL)0036)** and **Essar Power Ltd (Mumbai) v Uttar Pradesh Electricity Regulatory Commission (2012 ELR (APTEL) 182)** are squarely applicable to the present case. Relying on the above decision (2010 ELR(APTEL)0036), the Hon'ble APTEL in a recent decision in **Haryana Power Purchase Centre vs. Haryana Electricity Regulatory Commission and Ors. (28.01.2021 - APTEL)** observed thus:

161. Reference may be made to a decision of this tribunal in the matter of Lanco Kondapalli Power Pvt. Ltd. & Anr. vs. Haryana Electricity Regulatory Commission & Anr., (Appeal no. 156 of 2009) decided on 20.01.2010. In the said case, it was held that acceptance of a Letter of Intent (LoI) was adequate for creating a jural / contractual relationship and that execution of a power purchase agreement was only a ministerial act, the relevant observations being:

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

(I) It is the duty of the court to study the entire correspondence exchanged between the parties, with a view to arrive at a conclusion whether there was any meeting of the minds between the parties which could create a binding contract between them.

(II) The court is required to review what the parties wrote and how they acted and from that material to infer whether the intention as expressed in the correspondence was to bring into existence a mutually binding contract. The intention of the parties is to be gathered only from the expressions used in the correspondence and the meaning it conveys and in case it shows there had been meeting of minds between the parties and they had acted to reach an agreement upon all material terms then it can be said that a binding contract was capable of being spelt out from the correspondence.

(III) The contract is a bilateral transaction between the two parties. Every contract has to pass through several stages beginning with the stage of negotiation resulting finally in the acceptance of the proposal. The proposal, when accepted, gives rise to an agreement. It is at this stage that the agreement is reduced in writing and formal document is executed.

(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.

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.**"*

(emphasis supplied)

162. The letter of discontinuance of power supply dated 23.07.2020 attempted to take a completely different view of the arrangement that was executed and acted upon by the parties, it being based on a wrong premise contrary to the letter and spirit of the LoI read with the PPA, including the Effective Date clause, the justifications given therein being specious. The said letter is, in fact, contrary to the settled legal position that execution of a PPA is a ministerial act and as such, the formation of contract is not entirely dependent on execution of such PPA (see Lanco).

58. It is to be noted that the Government of India, ministry of Power vide Lr no. 23/5/2022-R&R dated 1st May, 2022 has issued a circular to all ACS/Pr Secretaries, State Governments, SERCs etc to maintain the sanctity of the Power Purchase Agreements which is extracted below:

The Parliament enacted the Electricity Act, 2003 ("the Act") with the aim of taking measures conducive to development of electricity industry and promoting competition therein. De-regulation of the generation sector with the objective of mitigating regulatory uncertainty and attracting investment in the electricity industry was one of the main objects of the Act.

2. In the recent years, it has been observed that certain Distribution Companies (DISCOMs") Have indulged in the practice of re-opening the concluded contracts/PPAs thereby compromising the sanctity of the Power Purchase Agreements ("PPAs") and creating uncertainty in the minds of the investors and lenders. There have been some instances of SERCs initiating process to alter the agreed terms of the PPA. This is reprehensible and against the law.

3. Efforts at meddling with concluded contracts/PPAs have been struck down by the Hon 'ble Courts repeatedly. In the latest instance, the Hon 'ble High Court of Andhra Pradesh in W.A.383 of 2019 and batch ("AP HC

Judgement”) quoting judgements of the Hon’ble Supreme Court of India has again ruled that the terms of the PPAs cannot be altered either by the Commission or by the State Governments or the courts.The relevant extract of the Judgment is as follows:

23. It is also settled by the Hon’ble Supreme Court in **Gujarat Urja Vikas Nigam Limited V. Solar Semi-Conductor Power Co (India) Pvt. Limited**, that terms and provisions of the PPA executed between the parties cannot be re-written or amended by Court or the adjudicating authorities. Paragraphs 60,65 and 68 read thus:

65.....Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission to extend the earlier control period beyond its expiry date... Terms of PPA are binding on both the parties equally.

24...Similarly, the term of PPAs cannot be altered either by the parties or by the Court and further, financial difficulty of Government of DISCOM is no ground to permit avoiding the contract or reducing the tariff.....

4. From the above quoted legal position, it is evident that the Distribution Licensee’s actions to alter the concluded contracts has been judicially found to be unsustainable. In fact, in the Hon’ble A.P.High Court Judgement it has been categorically held that neither the Distribution Company nor the State Commission can unilaterally seek a modification/alteration in the Tariff or other parameters that have been determined by the State Commission and are the basis on which PPAs have been executed. The Hon’ble High Court further held that as the PPAs have been entered into by parties by mutual consent the PPA cannot be allowed to be breached by either party and that terms of the PPA are binding on both the parties equally.

5. In view of the settled position of law, it is evident that once a binding contract has been entered, neither party can resile from the same nor the Hon’ble Court can alter any of the terms of the contract that has been mutually agreed upon by inter se the parties.

6. Accordingly, it is hereby requested that the Appropriate Commission should strictly adhere to and ensure compliance of the above settled principles to ensue sanctity of concluded contracts/PPAs, which essentially, is the foundation for ensuring the growth of Indian electricity sector.

Yours Faithfully,

Sd/-

(Ghanshyam Prasad) Joint Secretary to the Government of India

59. The observation made by this Commission in its order in OP No. 56/18 dated 19.11.2018 that “Letter of Award (LoA) cannot be treated as a legally valid contract” is not legally binding in view of the judgments of the Hon’ble APTEL in *Lanco Kondapalli Power Pvt Ltd. v Haryana Electricity Regulatory Commission (2010 ELR(APTEL)0036)* and above settled legal position *Haryana Power Purchase Centre vs. Haryana Electricity Regulatory Commission and Ors. (28.01.2021 - APTEL)*. Further, the decision of the Hon’ble Supreme Court in *Namit Sharma vs. Union of India (UOI) (13.09.2012 - SC) : (MANU/SC/0744/2012)* as extracted below is relevant in this case also:

In order to maintain judicial discipline and consistency in the functioning of the Commission, we direct that the Commission shall give appropriate attention to the doctrine of precedence and shall not overlook the judgments of the courts dealing with the subject and principles applicable, in a given case.

In view of the above settled position this Commission is of the considered view that the attempt on the part of the KSEB Ltd to renegotiate with M/s NTPC Ltd for reducing the determined tariff after initialling the draft PPA and issuing Letter of Award (LoA) without mutual consent is not legally in order and this Commission is competent enough to issue direction to the KSEB Ltd for specific performance ie to sign the formal PPA. Hence the above-mentioned 1st and 2nd questions are answered accordingly.

60. As far as 3rd question is concerned, it is to be noted that in this case, LoA was issued by the respondent KSEB Ltd after a transparent bidding process and after initialling the draft PPA. This statutory process was completed after obtaining approval of the Commission for adoption of tariff and unconditional acceptance by the petitioner and the respondents. As mentioned in previous paragraphs, the LoA was attracted by the provisions of the Indian Contract Act, 1872. Hence the tariff determined and adopted by the Commission consequent to mutual consent of parties can be amended by the Commission only with the consent of both parties.

61. The Commission examined the Order issued by the Commission in OP No. 03/2022 dated 28.01.2022 which is produced by the respondent as additional document in detail. The said petition is filed by the respondent KSEB Ltd to adopt the reduced tariff @ Rs 2.44/unit for the procurement of 110MW Solar Power from M/s TP Saurya Ltd (100% subsidiary of M/s TATA Power Company

Ltd), and to ratify the action of executing the PPA with them, as per the provisions of the Electricity Act, 2003 and other Rules and Regulations in force. In the said petition, the Commission noted the fact that the **Solar Power Generator M/s TP Saurya Ltd had agreed to KSEB Ltd.'s request to reduce the adopted tariff @Rs 2.97/unit to Rs 2.44/unit for the entire term of the PPA of 25 years and the procurer M/s KSEB Ltd accepted the offer of reduced rate.** The reduced tariff @Rs 2.44/unit offered by the SPG and the same accepted by KSEB Ltd is beneficial to the ultimate consumers of the State, the Commission approved the action of KSEB Ltd to accept the reduced tariff @Rs 2.44 per unit instead of Rs 2.97/unit adopted earlier. Accordingly, the Commission issued the following orders:

- (1) Approve the reduced tariff @Rs 2.44/unit for the procurement of 110MW of Solar Power for 25 years from the Scheduled Commissioning Date from M/s TP Saurya Ltd (100% subsidiary of M/s TATA Power Company Ltd).
- (2) Ratify the action of KSEB Ltd in executing the agreement with M/s TP Saurya Ltd, strictly in conformity with the approved initialled PPA vide the Order dated 23.06.2021 except the change in tariff.

62. In the above-mentioned petition, KSEB Ltd had made a request before the Solar Power Generator M/s TP Saurya Ltd to reduce the adopted tariff @Rs 2.97/unit to Rs 2.44/unit for the entire term of the PPA of 25 years and the procurer and M/s TP Saurya Ltd had agreed to KSEB Ltd.'s request. Hence the Commission adopted the reduced tariff @ Rs.2. 44/- per unit.

63. As held by the Hon'ble Supreme Court, a mutually agreed contract can only be amended with the mutual consent of parties.

Sanctity of PPA entered into between the parties by mutual consent cannot be allowed to be breached by a decision of the State Commission Terms of PPA are binding on both the parties equally.

*There is substance in Ms. Anand's argument that the Appellant is obliged to seek amendment of the provisions of the Power Purchase Agreement only in accordance with the agreed procedure for amendment of the terms thereof. The agreed rate of Late Payment Surcharge can only be amended in the absence of SBI PLR and that too **with the mutual consent of the parties to the Power Purchase Agreement.** (Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission and Ors. (08.10.2021 SC): (MANU/SC/0835/2021)*

64. During the 2nd hearing held on 10.06.2022 the respondent KSEB Ltd has informed before this Commission that they have requested to the petitioner

NTPC Ltd to reduce the tariff rate of 110 MW solar power from Rs.2.97/- per unit to @ Rs. 2.44/- per unit in tune with the reduced tariff in respect of M/s TP Saurya Ltd as issued by this Commission. Further, the respondent KSEB Ltd vide letter 16.06.2022 has informed this Commission that the petitioner NTPC has requested to them to obtain consent from the Commission to grant them 5 more days for submitting their reply as they need to take higher management approval for the rate reduction.

65. In the meantime, the KSEB Ltd vide Letter No. KSEB/TRAC/G/SOLAR/2021-22 dated 30.06.2022 has informed this Commission on 03.07.2022 that in response to their letter dated 10.06.2022, the petitioner M/s NTPC Ltd., vide letter No.CC:CD: Solar: KSEBL/90 MW PPA dated 21.06.2022 has offered a reduced tariff of Rs.2.77/unit for 90 MW solar power from their Anta Solar PV project. The respondent KSEB Ltd has also filed an additional submission before this Commission for a favourable decision. In the additional submission dated 30.06.2022, the respondent KSEB Ltd has submitted before the Commission that M/s NTPC Ltd. on 21.06.2022 has furnished their response and offered a revised tariff of **Rs.2.77/unit** for 90MW from their Anta Solar PV project. The firm also intimated that *as per provisions of initialled PPA any implication on account of occurrence of any change in law event post last date of bid submission i.e. 16.10.2020 shall be payable additionally by KSEBL to M/s. NTPC. The proposed offer is firm and final and available for one time only. M/s NTPC has also requested to give the consent within next 10 days for signing of PPA for 90 MW of solar power at a tariff of Rs.2.77/kWh* ". The respondent KSEB Ltd further submitted that the financial benefit on account of proposed reduced tariff proposed by M/s. NTPC (Rs.2.77/unit) over the adopted tariff for M/s. NTPC Ltd (Rs.2.97/unit), for 90MW solar power for 25 years alone will be Rs. 98.56 Cr. Also, as per the order of Ministry of power, there will be waiver on transmission charges and losses for the projects commissioned before 30.06.2025. This benefit can be availed, if it is commissioned as per the schedule. Also, tying of a solar PV project of 90 MW capacity will abet KSEB Ltd. in meeting the Solar power obligation for the FY 2023-24. As already submitted by KSEB Ltd in the Counter Affidavit, the actions initiated by KSEBL being a public sector utility to explore the possibility of reduced rates is in good faith in consideration of the drastic reduction in RE Solar power cost in the Country and to alleviate the additional burden on the general public in the State. It is further submitted before this Commission that having considered the additional benefit on account of a reduced rate proposed and in the best interest of KSEB Ltd and the general public in the state, the offer of M/s. NTPC in supplying solar power

to the tune of 90MW from their Anta solar PV project at a reduced rate of Rs. 2.77/Unit may be considered and favourable decision on the matter.

- 66.** The Commission also examined the letter dated 21.06.2022 of the petitioner addressed to the respondent. In the said letter, petitioner has informed that “*as KSEB Ltd is one of the valued customers of NTPC and keeping in view of recent developments we have reviewed KSEB Ltd.’s request and propose to offer a revised tariff of Rs.2.77/Unit for 90 MW from their Anta Solar PV project. However, as per provisions of initialed PPA, any implication on account of occurrence of any change in law event post last date of bid submission ie.,16.10.2020 shall be payable additionally by KSEB Ltd to NTPC. This proposed offer is firm & final and available for one time only.*”
- 67.** The Commission vide Order dated 21.06.2021 in Petition OP No. 11/2021 (Part-I) had approved the draft initialled PPA between M/s NTPC Ltd and KSEB Ltd for procuring 90 MW Solar Power. The Commission also examined the letter dated 21.06.2022 of the petitioner addressed to the respondent. In the said letter, petitioner has informed that they have reviewed KSEB Ltd.’s request and propose to offer a revised tariff of Rs.2.77/Unit for 90 MW from their Anta Solar PV project.
- 68.** In view of the mutual consensus made by the petitioner and the respondent the Commission examined the consent letter dated 21.06.2022 of the petitioner and the additional submission made by the respondent KSEB Ltd dated 30.06.2022 in detail. Though the Commission, had earlier adopted the tariff @Rs 2.97/unit for procuring 90 MW of Solar Power from M/s NTPC Ltd, and also approved the draft initialled PPA between the parties, the Commission noted the fact that the Solar Power Generator M/s NTPC Ltd had agreed to KSEB Ltd.’s request to reduce the adopted tariff @Rs 2.97/unit to Rs 2.77/unit for the entire term of the PPA of 25 years and the procurer M/s KSEB Ltd accepted the offer.
- 69.** The Commission examined the Article 9 of the draft initialled PPA dated 5th February, 2021 entered in to between KSEB Ltd and M/s NTPC Ltd and noted that approval has to be given to amend the Tariff Fixed and agreed by both parties from Rs. 2.97/Unit to Rs. 2.77/Unit in tune with the mutual consent made by both parties which is beneficial to the ultimate consumers of the State. Since the reduced tariff @Rs 2.77/unit offered by the SPG and the same accepted by KSEB Ltd is beneficial to the ultimate consumers of the State, this Commission is of the considered view that approval may be given to both parties to sign the final

PPA by amending Clause 9.1 of the draft initialled PPA, instead of Rs 2.97/unit adopted earlier.

70. The Commission also examined Article 12- Change in Law, and its definition specified in Article 12.1.1. and the relief for change in Law specified in Article 12.2 of the draft initialled PPA. As per the said Clause, the quantum and mechanism of compensation payment shall be determined and shall be effective from such date as may be decided by the KSERC. Further, the decision of the appropriate Commission shall be final and governing on both parties. As such any implication on account of occurrence of any events specified in Clause 12.1.1 relating to “Change in Law” of the draft initialled PPA shall be decided by the Commission and the decision of the Commission shall be final and governing on both the parties.

In view of the mutual consent made by both parties to reduce the tariff to Rs. 2.77/kWh for 90 MW power, tariff determined in Article 9.1 of the draft initialled PPA dated 05.02.2021 has to be amended from Rs.2.97/Unit to Rs. 2.77/Unit as agreed by both parties, the question of granting the relief sought by the petitioner NTPC does not arise. Instead, approval may be given to both parties to sign the final PPA amending the applicable tariff at Clause 9.1 in the draft initialled PPA as Rs.2.77/Unit and consequential changes have to be made in the final PPA. The 3rd question mentioned above is answered accordingly.

Orders of the Commission

71. The Commission, after examining the petition filed by NTPC Ltd to issue a direction to 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 and the consensus made by both the parties to reduce the tariff to Rs. 2.77/Unit and the acceptance of the respondent KSEB Ltd on the offer made by the petitioner and in view of the provisions of the Electricity Act, 2003, and Indian Contract Act, 1872 and the settled legal position, hereby orders the following:

- (1) Approve the reduced tariff @ Rs 2.77/unit by amending Clause 9.1 of the draft initialled PPA, for the procurement of 90 MW of Solar Power for 25 years from the Scheduled Commissioning Date from M/s NTPC Ltd.

(2) Any implication on account of occurrence of any Change in Law event as specified in Article 12 of the draft initialled PPA shall be decided by this Commission and the decision of this Commission therein shall be final and binding.

(3) The KSEB Ltd shall finalise the Power Purchase Agreement for procurement of 90 MW Solar Power at the rate of Rs.2.77/unit, in terms of the reduced price agreed by both the parties expeditiously and submit a copy of the final PPA before the Commission within one month from the date of signing of the Final PPA.

The petition disposed off. Ordered accordingly.

Sd/-
Adv. A. J. Wilson
Member (Law)

Sd/-
Preman Dinaraj
Chairman

Approved for issue
Sd/-
C. R. Satheesh Chandran
Secretary