INTRODUCTION

It has become trend for every state commission to not adopt tariff discovered through competitive bidding process and either reject it or direct distribution companies to renegotiate it on the pretext of consumer interest. It is widely known fact that there are no bidding guidelines for procurement of energy from solar energy sources. Every distribution companies are conducting bidding placing reliance upon draft bidding guidelines.

Haryana, UP and Delhi State Commissions are few examples wherein either Section 63 bidding process have been scrapped or Hon’ble Commissions have directed DISCOM to enter into further negotiation with selected bidders.

Recently Hon’ble Supreme Court in the matter titled “Energy Watchdog &Ors. Vs. CERC& Ors.” (“Energy Watchdog”) vide its order dated 11.04.2017 made certain relevant observations concerning Section 63 of the Electricity Act, 2003 (“Act”). Ratio in this case is related to applicability of force majeure of change in law concerning change in any policies of any foreign jurisdiction. However, we will limit analysis of Energy Watchdog Judgment to observations of Supreme Court concerning Section 63 of the Act. We will try to study whether this judgment has any impact on the existing conditions or will this judgment bring any certainty for completion of the bid process.

STATUTORY PROVISIONS

There are two provisions in the Act which govern the determination of tariff by the Commission, i.e. Section 62 and Section 63.

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Before we dwell further upon the impact of Energy Watchdog judgment on Section 63 of the Act, we would like to analyze the statutory provisions.

Section 62 of the Act reads as below:

"62. Determination of Tariff –
(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –
(a) supply of electricity by a generating company to a distribution licensee:
Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.
(b) transmission of electricity;
(d) retail sale of electricity:
Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2)………………………………………….

And section 63 of the Act reads as below:

"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."

Therefore, it can be stated that the above provision make it clear that the Commission shall adopt a tariff accepted by the procurer if such a tariff has been determined through the (i) transparent process of bidding and (ii) in accordance with the guidelines issued by the Government of India.
The case of “MP Power Trading Company Limited Vs MPERC and Ors.” (Appeal No. 44 of 2010) was in relation to adoption of tariff by State Commission discovered under Section 63 Competitive bidding process. Hon’ble Tribunal has held that as per Section 63 of the Act, the duty is enjoined upon the State Commission to adopt and approve the Tariff finalised by the procurer through the competitive bidding process once it is established that the said bid process was carried out in a transparent manner and in accordance with the guidelines framed by the Central Government. In the instant case the Tribunal was of the view that the procurer has a right to negotiate the price for power with the bidder, and it also opined that there is no explicit embargo/restriction imposed on the procurer from having rounds of negotiations with the bidders for reduction of the prices so as to make an attempt to convince them to agree to the reduced price, which is in alignment with the market prices in the interest of the consumers at large. In this judgment Tribunal has quoted a relevant para from Supreme Court judgment in “Food Corporation of India v. Kamdhenu Cattle Feed” (1993) 1 SCC 71 which is reproduced herein for ease of reference:

“10. From the above, it is clear that even though the highest tender can claim no right to have his tender accepted, there being a power while inviting tenders to reject all the tenders, yet the power to reject all the tenders cannot be exercised arbitrarily and must depend for its validity on the existence of cogent reasons for such action. The object of inviting tenders for disposal of a commodity is to procure the highest price while giving equal opportunity to all the intending bidders to compete. Procuring the highest price for the commodity is undoubtedly in public interest since the amount so collected goes to the public fund. Accordingly, inadequacy of the price offered in the highest tender would be a cogent ground for negotiating with the tenderers giving them equal opportunity to revise their bids with a view to obtain the highest available price. The inadequacy may be for several reasons known in the commercial field. Inadequacy of the price quoted in the highest tender would be a question of fact in each case.
Retaining the option to accept the highest tender, in case the negotiations do not yield a significantly higher offer would be fair to the tenderers besides protecting the public interest. A procedure wherein resort is had to negotiations with the tenderers for obtaining a significantly higher bid during the period when the offers in the tenders remain open for acceptance and rejection of the tenders only in the event of a significant higher bid being obtained during negotiations would ordinarily satisfy this requirement. This procedure involves giving due weight to the legitimate expectation of the highest bidder to have his tender accepted unless outbid by a higher offer, in which case acceptance of the highest offer within the time the offers remain open would be a reasonable exercise of power for public good.”

This goes on to establish that the bidding process as mentioned in Section 63, is to be construed in consonance with the benefit of public at large, and not otherwise.

The case of “Essar Power Limited Vs UPERC and Anr.” (Appeal No. 82 of 2011) was in relation to direction passed in favour of the Noida Power Company, by the UPERC which was not in consonance with the principles laid down under the Act. Essar Power Limited therefore, appealed against the order in the form of the present appeal. In this case while directing UPERC to adopt tariff discovered under Section 63, APTEL made important observations concerning Section 63. Hon’ble Tribunal in this Judgment held that while invoking Section 63, the State Commission has the two recourses:

“(a) The State Commission is only to verify, under Section 63 of the Act, as to whether the bidding process has been held in a transparent manner and in accordance with the Government of India guidelines or not. If this is not found to be complied with, then State Commission shall reject the petition for the approval of the tariff.

(b) Once the process of the bidding is completed strictly in accordance with the bidding guidelines issued by the Central Government in a transparent manner, then the State Commission shall adopt the said tariff since it is binding on the Commission.
OBSERVATIONS FROM CASE LAWS TILL ESSAR

Cases up till Essar reflect that the powers of the 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.

In MP Power trading case (cited above) Hon’ble Tribunal in very strong words held that the State Commission should act within the ambit laid down under Section 63 of the Act and should not go beyond that as it is neither an Enquiry Commission nor a Vigilance Commission.

However, interestingly, the MP Power trading case has allowed negotiation with bidder by the Procurer post completion of the bidding process.

ENERGY WATCHDOG

The Adani group in July 2012 filed a petition before the Central Electricity Regulatory Commission under Section 79 seeking relief, because of the changes in the Indonesian Regulations that affected the price of exported coal from Indonesia that had otherwise remained the same during the last 40 years. The relief sought was in the form of either discharge from the performance of the PPA or alternatively, evolve a mechanism to restore the Adani Group to the same economic condition prior to occurrence of the change in law. In the instant case, Supreme Court held that change in Indonesian law would not qualify as a change in law under the guidelines read with the PPA, however, a change in Indian law certainly would.

In this Case, Supreme Court gave important findings about the role of Commission in Section 63. This can be considered as one of the first case wherein any judicial forum has discussed applicability of Section 63 in cases wherein there are no bidding guidelines. It is relevant to note here that the Central Government has not till date notified bidding guidelines for the solar sector, all guidelines presently are in draft stages. In this instant case Supreme Court held that Commission can use
its general regulatory power as outlined in (Section 86 (1) (b) or Section 79 (1) (b), as the case may be) while exercising its jurisdiction under Section 63 of the Commission. Relevant para of this case are reproduced herein below:

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

19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government’s guidelines. For
another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission’s power to “regulate” tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections must be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. **It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission’s general regulatory powers under Section 79(1)(b) can then be used.**
CONCLUSION

Hon'ble Supreme Court in very clear terms held that the Commission can exercise its regulatory power even under Section 63 bidding proceeding and it will not be a mere post office. However, Supreme Court has further opined that Commission should exercise its regulatory power within the framework of bidding guidelines, if bidding guidelines exist, however in those cases wherein there are no bidding guidelines, Commission should exercise its general regulatory power.

Before dwelling upon implication of the regulatory power in competitive bidding process, let’s dwell upon few legal principles/precedents concerning use of the word “Regulate”:

i. The word “regulate” has a wide ambit/scope of interpretation. If the word “Regulate” does not include the power to revise/amend/ alter or change the tariff then it could be argued that the appropriate Commission will not be able to effectively discharge its functions under the Electricity Act, 2003.

The case of “Tata Power Co vs. Reliance Energy Ltd.” –(2009) 16 SCC 659 was in relation to the power of the appropriate Commission to adjudicate upon disputes between licensees and generating companies. It was held that the power of regulation also encompasses fixation of rates.

ii. In “Jiyajee Rao Cotton Mills Ltd. v. MP Electricity Board” 1989 SCC Suppl(2) 52 it was held:

"The word 'regulate' has different shades of meaning and must take its colour from the context in which it is used having regard to the purpose and object of the relevant provisions, and the court while interpreting the expression must necessarily keep in view the object to be achieved and the mischief sought to be remedied."

iii. Also in “Shri D.K. Trivedi & Sons v. State of Gujarat “ 1986 SCC Suppl 20, the Hon'ble Supreme Court held:
"The word 'regulate' means 'to control, govern, or direct by rule or regulations; to subject to guidance or restrictions; to adapt to circumstances or surroundings.'

iv. In “V.S. Rice and Oil Mills & Others v. State of A.P.” AIR 1964 SC 1781 it was held that: "The word 'regulate' is wide enough to confer power on the State to regulate either by increasing the rate, or decreasing the rate, the test being what is it that is necessary or expedient to be done to maintain, increase, or secure supply of essential activities in question and to arrange for its equitable distribution and its availability at fair prices."

v. Further in K. Ramanathan v. State of Tamil Nadu & Anr. "(1985) SCC(2) 116" the Hon'ble Supreme Court held: "The word 'regulate is variously defined as meaning to adjust; to order or govern by rule, method or established mode. This is true in a general sense and in the sense that mere regulation is not the same as absolute prohibition. At the same time, the power to regulate carries with it full power over the thing subject to regulation and the power must be regarded as plenary. It implies the power to rule, direct and control, and involves the adoption of a rule or guiding principle to be followed".

Supreme Court has given unfettered power to the Commission in cases of procurement of power by competitive bidding from renewable energy sources. Till date there are no bidding guidelines, Commission can arbitrarily reject the tariff petition on one pretext or another even if the bidding process has been conducted in a transparent manner. However, there are judicial precedents to restrict the Commission from acting on its own terms while exercising its jurisdiction under Section 63 of the Act. The Commission can further delay the process and there may always be threat on cancellation of the bid on the pretext of the consumer interest, which is not only contrary to the principles of natural justice but also unfair to the bidder.

Supreme Court in conventional power procurement process has restricted the regulatory power of the Commission to enquire into matters of transparency or
compliance of the bidding guidelines and in cases of non-conventional power procurement process allowed the Commission to use general regulatory power (which includes but is not limited to increase/decrease the tariff, cancellation of bid process, to control/govern/amend the bidding process etc.).

Regulatory Power has been termed as an unruly horse, due to the lack of guidelines governing its use. However, the Commission while exercising its regulatory power is expected to keep in mind the object to be achieved and the mischief sought to be remedied. Consumer interest is not the sole reason behind enactment of the Act and promotion of renewable energy, generation by private players, and return of investment are other paramount considerations behind enactment of the Act and Commission is to always be guided by these principles while using its regulatory power. Therefore, it can be said the powers of the Commission have been at unrest. Due to a lack of substantiated legislation which outlines its powers, the commission has at times taken decisions mechanically. Maybe the pronouncement of this judgment would clear the grey areas hovering around this sector.

However, bidding guidelines should be promulgated by the relevant government authorities at the earliest and till date there is no bidding guidelines, Bidder should always insist procurer to initiate competitive bidding post approval of RFP and PPA documents. Post approval of these documents, Commission is bound by terms of RFP and PPA and must exercise its regulatory functions only in accordance with those guidelines.

It is to be noted that these measure are only suggested for certainty and uniformity and to avoid litigation, otherwise even in absence of bidding guidelines Commission is mandated to exercise its regulatory power in compliance of other provisions of the Act, Tariff Policy and Electricity Policy. There are various provisions in the Act and Policies which directs Commission to develop the market (Section 65 of the Act), encourage competition, efficiency, good performance and optimum investments (Section 61 (C) of the Act), promotion of generation of electricity from renewable sources of energy (Section 61 (i) and Section 86 (1) (e) of the Act).