

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
NEW DELHI
(APPELLATE JURISDICTION)**

**APPEAL NO.307 OF 2018
AND
APPEAL NO.275 OF 2019**

Dated: 28.11.2022

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

In the matter of:

APPEAL NO.307 OF 2018

**M/S ADANI GREEN ENERGY
(UTTAR PRADESH) LTD**

Through its Authorized Signatory,

Mr. Rakesh Shah

Achairaj Opp. Mayor Bungalow, Law Garden,
Ahmedabad-380 006

.... Appellant(s)

VERSUS

**1. UTTAR PRADESH ELECTRICITY
REGULATORY COMMISSION**

Through its Secretary,

2nd floor, Kisan Mandi Bhawan,

Vibhuti Khand, Gomti Nagar,

Lucknow – 226001

**2. UTTAR PRADESH POWER CORPORATION
LTD. (UPPCL)**

Through its Chairman,

Shakti Bhawan, 14, Ashok Marg

Lucknow - 226001

**3. UTTAR PRADESH NEW & RENEWABLE
ENERGY DEVELOPMENT AGENCY (UPNEDA)**

Through its Director,

Vibhuti Khand, Gomti Nagar,

Lucknow - 226001

4. UTTAR PRADESH POWER TRANSMISSION CORPORATION LTD. (UPPTCL)

Through its Chairman,

Shakti Bhawan, Ashok Marg
Lucknow - 226001

Respondent(s)

....

Counsel for the Appellant(s) : Mr. Snajay Sen, Sr. Adv.
Mr. Amit Kapur
Mr. Akshat Jain
Mr. Avdesh Mandloi
Ms. Ruth Elwin
Mr. Raunak Jain

Counsel for the Respondent(s) : Mr. C K Rai
Mr. Sumit Panwar for R-1

Mr. Raghvendra Singh, Sr. Adv.
Mr. Altaf Mansoor for R-2

Mr. Amitav Singh
Mr. Jagannath Nanda for R-3

Mr. Puneet Chandra for R-4

APPEAL NO.275 OF 2019

M/S SAHASRADHARA ENERGY PRIVATE LTD

New No. 25, Old No. 10,
Sir Madhavan Nair Road,
Mahalingapuram, Nungambakkam,
Chennai – 600034

....

Appellant(s)

VERSUS

1. UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

2nd floor, Kisan Mandi Bhawan,
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**3. UTTAR PRADESH NEW & RENEWABLE
ENERGY DEVELOPMENT AGENCY**

Vibhuti Khand, Gomti Nagar,
Lucknow - 226001

.... Respondent(s)

Counsel for the Appellant(s) : Mr. Anand K. Ganewan
Ms. Swapna Seshadri
Ms. Ashabari Basu Thakur

Counsel for the Respondent(s) : Mr. C K Rai
Mr. Sumit Panwar for R-1

Mr. Basava Prabhu Patil, Sr. Adv.
Mr. Aashish Gupta
Ms. Sadhika Gulati
Mr. Geet Ahuja
Mr. Rajarishi Roy for R-2

J U D G M E N T

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

1. The claim for parity in tariff vis-à-vis other selectees in the same competitive bidding process for procurement of power within the circumspection of Section 63 of the Electricity Act is pressed for consideration through the appeals at hand.

2. The appellants in the captioned appeals, along with similarly placed other entities, had participated in a tariff based competitive bidding process initiated by respondent *Uttar Pradesh New & Renewable Development Agency* ("UPNEDA") through *Request for Proposal* ("RfP") published on 31.01.2015, as amended on 24.04.2015, for procurement of 215 MW power from Grid Connected Solar PV Power Projects, pursuant to *Uttar Pradesh Solar Power Policy, 2013*, adopted and promulgated on

23.01.2015 by the Government of Uttar Pradesh, for promotion and establishment of solar energy based power projects, both grid connected and off-grid type, it envisaging certain incentives to be available for specified regions in the matter of expenditure on construction of transmission line and sub-station.

3. Indisputably, the tariff based competitive bidding process is regulated by the provision contained in section 63 of the Electricity Act, 2003. Fifteen bidding companies were selected, on the recommendations of Bid Evaluation Committee, for various capacities offered, the tariff quoted by them, for a period of 12 years, having ranged from the lowest of Rs.7.02/kWh (of M/s Essel Infra Projects Ltd., Mumbai) to the highest of Rs.8.60/kWh (of M/s Sree Radhey-Radhey Ispal Pvt. Ltd., Kanpur).

4. The matter was taken, by a formal petition (no.1110/2016), to respondent *Uttar Pradesh Electricity Regulatory Commission* (“the State Commission”) by UPNEDA and another respondent *Uttar Pradesh Power Corporation Limited* (“UPPCL”), the procurer, with request for adoption of the bid discovered tariff in terms of section 63. The case arising out of the said petition for adoption resulted in a series of orders passed by the State Commission including order dated 21.11.2017 whereby tariff of Rs.7.02/kWh (the lowest quoted bid price) was adopted for nine of the bidder companies (i.e. companies other than the appellants herein).

5. By a subsequent order passed on 12.02.2018, a lower tariff of Rs.5.07 per unit was adopted by the State Commission and made applicable to the two appellants, and four others, for a period of 12 years, it being also observed that the *Average Power Purchase Cost* (“APPC”) with a ceiling of Rs.5.07 per unit will be applicable for the remaining 13 years of the *Power Purchase Agreements* (“PPAs”), which had been signed earlier after the issuance of *Letter of Award* (“LoA”).

6. The first captioned appellant – *M/s Adani Green Energy (Uttar Pradesh) Limited* (for short “AGEUPL”) - had quoted the tariff in its bid at Rs.8.44/kWh for 12 years for 50MW capacity. The second captioned appellant – *M/s Sahasradhara Energy Private Limited* (for short “Sahasradhara”) - had quoted the tariff of Rs.8.37/kWh for the period of 12 years for capacity of 5MW only.

7. The order dated 12.02.2018 determining Rs.5.07/kWh as the tariff applicable for 12 years was challenged both by AGEUPL and Sahasradhara by appeal no.307/2018 (i.e. the first captioned appeal herein) and appeal no.176/2018 respectively. The appeal of Sahasradhara (no.176/2018) came up for consideration before a co-ordinate bench of this tribunal on 07.03.2019 when it was observed that the matter (in relation to Sahasradhara) required reconsideration, the contentions of the said entity being that reduction of the tariff to Rs.5.07 per unit was incorrect, unfair and contrary to the applicable law, as also on

facts, in as much as the Commission had failed to consider that it (Sahasradhara) had incurred capital expenditure of Rs.37.06 crore as on 04.01.2018 which would be Rs.6.23 crore per MW, contrary to the assumption of Rs.4.65 crore as the capital cost, on which basis the tariff of Rs.7.02 per unit (as was the quoted bid price) had been denied.

8. The State Commission, by its order dated 12.06.2019, passed in the remand proceedings has rejected the contentions of Sahasradhara reiterating its earlier view expressed in order dated 12.02.2018 fixing the tariff of Rs.5.07 per unit. That subsequent order is assailed by Sahasradhara by second-captioned appeal.

9. The two appeals challenge the above dispensation by the State Commission arguing that in the regime of competitive bidding process, governed by the provision of section 63 of Electricity Act, it was not permissible for the State Commission to determine the tariff on considerations that are applicable to the route of section 62, the tests to be applied for adopting the bid discovered price being restricted to due compliance with the guidelines issued by the Central Government and it being ensured that the process undertaken was transparent.

10. The reliefs sought by the appeal (no.307 of 2018) of AGEUPL are as under:

“(a) Allow the Appeal and set-aside the impugned Order dated 12.02.2018 in P.No.1110/2016, in so far as the State Commission has wrongly prescribed the tariff of Rs.5.07/kWh, instead of the discovered

tariff under competitive bidding under Section 63 of the Act, i.e. Rs.8.444/kWh;

If this Hon'ble Tribunal were pleased not to grant prayer (a), then this Hon'ble Tribunal may be pleased to consider prayer (b);

(b) Grant the tariff of Rs.7.02/kWh as in the case of other 9 bidders to maintain parity as per the interim order dated 21.11.2017 in P.No.1110/2016 under the same bidding process; and

(c) Pass such other or such further order / orders / directions which the Hon'ble Tribunal may deem fit in the facts and circumstances of the case."

11. Similarly, Sahasradhara has presented its appeal (no.275 of 2019) praying for the following reliefs to be granted:

"(a) Allow the appeal and set aside the Order dated 12/06/2019 passed by the State Commission in Petition No. 1110/2016 to the extent challenged in the present appeal.

(b) Hold and direct that the Appellant ought to be entitled to the tariff of Rs. 7.02/unit for the power project of the Appellant;

(c) In the alternative, consider the costs incurred by the Appellant and determine a project specific tariff for the Appellant;

(b) Pass such other Order(s) and this Hon'ble Tribunal may deem just and proper."

12. At the hearing, we were informed that there are certain other appeals presented by entities included amongst those nine bidding companies as were granted the tariff of Rs.7.02 per kWh by the State Commission's order dated 21.11.2017, such other appeals including appeal no.88/2018 of *M/s Sukhbir Agro Energy Limited v. Uttar Pradesh Electricity Regulatory Commission & Ors.*, the contentions raised therein essentially being founded on the scope of intervention in the bid quoted tariff by the Regulatory Commission in the *adoption proceedings* under section 63 of

Electricity Act, 2003. Conscious as they are that the said nine other generators (suppliers) have been availing of the tariff of Rs.7.02/kWh uniformly applied to them, upon their selection having been approved, in proceedings arising out of the same matter (case no.1110/2016) taken out under section 63 of Electricity Act by the procurers (UPPCL and UPNEDA), the appellants in the two captioned matters at hand, though contending that the tweaking of the bid quoted price by the Commission was inappropriate and incorrect, submitted through their respective counsel that they would press presently only for parity, reserving their right to press for parity by adoption of bid quoted price in the event the appeals of the other entities covered by the order dated 21.11.2017 were to succeed.

13. The appeals at hand have been heard accordingly against above backdrop.

14. A brief narration of the relevant facts would be in order.

15. The RfP issued on 31.05.2015, as amended on 24.04.2015 contained, *inter alia*, the following clauses:

“2.7.5. For the projects coming in Bundelkhand region and Purvanchal region (Mandals – Azamgarh, Basti, Gorakhpur, Varanasi, Devipatan and Faizabad) (As per Planning Commission of Purvanchal Region under Purvanchal Vikas Nidhi) of the state of Uttar Pradesh, expenditure on the construction of transmission line and substation at the Transco / Discom end will be borne by Government of Uttar Pradesh as mentioned in the Solar Policy of Uttar Pradesh 2013”

Clause 3.1.4.

...

VII. There shall be no negotiation on the Single Quoted Tariff between UPNEDA / Procurer and the Bidder(s) during the process of evaluation

...

[Emphasis supplied]

16. As mentioned earlier, both appellants and other interested companies, participated in the bid process, fifteen entities having been eventually shortlisted, upon evaluation of their financial bids they having been found to qualify, the Bid Evaluation Committee in its meeting held on 12.06.2015 having recommended the approval of fixed tariff quoted by them for 12 years, such recommendation having been approved by the Empowered Committee on 04.07.2015, and finally by the State Government on 07.09.2015. The fixed tariff of successful bidders so approved was noted by the State Commission in (Para 14 of) its order dated 22.02.2017 in the adoption proceedings arising out of petition no.1110/2016 as under:

“

Sl. No.	Name of the Bidding Company	Capacity Quoted in MW	Tariff for 12 Yrs in Rs./Kwh
1.	M/s Essel Infra Projects Ltd., Mumbai	50	7.02
2.	M/s Surana Telecom and Power Ltd., Secunderabad	5	7.40
3.	M/s Sudhakara Infratech Pvt. Ltd., Hyderabad	5	7.68
4.	M/s Lohia Developers India Pvt. Ltd., New Delhi	5	7.95
5.	M/s Ferromar Shipping P. Ltd., Goa	5	8.09
6.	M/s Sukhbir Agro Energy Ltd., New Delhi	20	8.23
7.	M/s Technical Associates, Lucknow	10	8.33
8.	M/s Sahasradhara Energy P. Ltd., Chennai	5	8.37
9.	M/s Sukhbir Agro Energy Ltd., New Delhi	20	8.43
10.	M/s Avadh Rubber Prop Madras Elastomers Ltd., New Delhi	5	8.44

Sl. No.	Name of the Bidding Company	Capacity Quoted in MW	Tariff for 12 Yrs in Rs./Kwh
11.	M/s Adani Green Energy Ltd., Gujarat	50	8.444
12.	M/s. Pinnacle Air Pvt. Ltd., New Delhi	5	8.48
13.	M/s. NP Agro India Industries Ltd., Bareilly	5	8.496
14.	M/s Sukhbir Agro Energy Ltd., New Delhi	Quoted Capacity: 20MW Allocated Capacity: 10MW	8.60
15.	M/s Shree Radhey Radhey Ispat Pvt. Ltd. Kanpur	Quoted Capacity: 25MW Allocated Capacity: 15MW	8.60

17. It may be noted that the appellant in first captioned matter figures at Sl. no.11 and the appellant in second captioned matter appears at Sl. no.8 in the above tabulation.

18. Letters of Intent (“Lols”) were issued by UPNEDA in favour of the two appellants herein, as indeed to others, on 09.09.2015 for the capacity offered at the tariff quoted in their respective bids. Pertinent to quote, for illustration, the following part of the Lol dated 09.09.2015 issued to AGEUPL:

“This has reference to your response to Request for Proposal (RfP) in respect of “Procurement of 215MW power from Grid Connected Solar PV projects through Tariff based competitive bidding Process”. The offer received from your firm M/s Adani Green Energy Limited was scrutinized by this office. We are happy to inform you that your bid has been found responsive, and you have been allotted a capacity of 50 MW at quoted tariff of 8.444 Rs/kWh as in the proposal submitted by you and opened on 18 May, 2015.”

[Emphasis supplied]

19. Indisputably, the parties i.e. UPPCL (the procurer) and the appellants herein (AGEUPL and Sahasradhara) entered into *Power*

Purchase Agreements (“PPAs”), in terms of the Lols for supply of the capacity offered from their respective Solar PV Power Plants for 12 years at the bid quoted price, on 01.12.2015 and 11.12.2015 respectively. It may be noted that the PPA of AGEUPL contained the following clause:

“4.3.7 For the projects coming in Bundelkhand region and Purvanchal region (Mandals – Azamgarh, Basti, Gorakhpur, Varanasi, Devipatan and Faizabad) of the state of Uttar Pradesh, expenditure on the construction of transmission line and substation at the Transco / Discom end will be borne by Government of Uttar Pradesh as mentioned in the Solar Policy of Uttar Pradesh 2013.”

20. AGEUPL applied to the fourth respondent – *Uttar Pradesh Power Transmission Corporation Limited* (“UPPTCL”) – on 04.12.2015 for grid connectivity for its 50 MW Solar Power Plant at Badanpur Village, Jhansi, Uttar Pradesh, *inter alia*, stating as under:

“ ... has already identified 250 acres land in Badanpur Village, of Jhansi District for setting up this prestigious project. As stipulated in the RFP the proposed solar PV Plant would be connected with the nearest UPPTCL substation for evacuation of solar power. We understand that UPPTCL Dunara substations are nearest ones. We request you to kindly provide the Grid feasibility and Connectivity at Dunara or any substation nearby to our land identified for our project.”

21. AGEUPL entered into a transmission agreement with UPPTCL on 01.06.2016, the contract envisaging completion of the transmission line and bay by UPPTCL within 7 and 5 months respectively from the date of receipt of necessary payments from UPNEDA and complied with the requisite *conditions subsequent* under the PPA on 28.06.2016, submitted documentary evidence of ownership rights of the land, achievement of Financial Closure, as indeed the transmission agreement with UPPTCL to

UPNEDA. The grant of connectivity pursuant to the request made on 04.12.2015 was given by UPPTCL on 17.05.2016 leading to execution of the transmission agreement on 01.06.2016 but since there was delay in sanction of funds for establishment of transmission line and associated work by UPPTCL, there being no likelihood of it to be allocated before September, 2016, AGEUPL requested, by a formal communication dated 03.12.2016 to UPNEDA, for extension of *Scheduled Commissioning Date* ("SCOD") by six months i.e. from 01.06.2016 to 01.12.2017. This request was reiterated by another communication of AGEUPL submitted to UPNEDA on 30.12.2016 referring, *inter alia*, to delays in approval of grid connectivity and sanction of funds by UPNEDA to UPPTCL and non-release of work order for setting up of transmission line by UPPTCL as indeed the time required for laying such transmission line. The request for extension of SCOD was pressed by two further communications dated 09.03.2017 and 21.04.2017.

22. As already mentioned, on the basis of recommendations of the Bid Evaluation Committee, which had received approval from the Empowered Committee and imprimatur of the State Government, the petition for adoption of the bid discovered tariff was submitted in terms of section 63 of the Electricity Act by UPPTCL and UPNEDA, on 04.05.2016, it having been registered as petition no.1110/2016. It is pointed out by the appellants that there was inordinate delay in such move by the procurers,

the petition having been presented for adoption of the bid discovered tariff four and a half months after the signing of the PPAs. We may add that no reasons, explanation or justification for such delay has been offered by the respondents at any stage including in the proceedings arising out of the appeals at hand.

23. The adoption petition (no.1110/2016) was considered by the State Commission on 29.11.2016 leading to first order of some import having been passed on 22.02.2017. It may be mentioned here that in the views of the State Commission, as indicated in the said order dated 22.02.2017, the bid discovered price was high and there was a need for UPPCL and UPNEDA to engage the selected entities in negotiations over the applicable tariff. Referring to its obligation under section 61 of the Electricity Act for *“safeguarding of consumers’ interest and at the same time, recovery of the cost of electricity in a reasonable manner”*, the procedure for determination of tariff as set out in section 62, and decision of this tribunal, by judgment dated 16.12.2011, in the case of *Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission and Anr.* (Appeal no.82/2011), the State Commission, *inter alia*, observed as under:

“28. After hearing all the parties and on the perusal of the record, the Commission is of the view that before we go in length examining compliance of bidding process for determination of tariff as required u/s 63 of the Act, we need to settle the very important issue that whether we could look into reasonability of discovered tariff in a bidding process under section 63 of the Electricity Act. The representatives of consumer organizations have vehemently argued that tariff discovered in this bid is extremely high as compared to

prevailing market rates and if accepted it would gravely jeopardize the interest of the consumers and the interest of state.

...

33. *The powers of State Commission under section 63 have been clarified by Hon'ble APTEL in its order dated 16.12.2011 in petition no. 82 of 2011 (Essar Power Ltd. vs UPERC and NPCL) as follows:*

“ 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.”

However, Hon'ble APTEL in the same order, further adds:

“ 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.”

Thus Hon'ble APTEL even though recognizing limited powers of the Commission in a bidding process, underlines consumer interest and need to discover a tariff consistent with market condition...

...

36. *The petitioners have failed to come up with tenable argument to vindicate the reasonability of the discovered tariff and reason for such a huge variation in tariff within same bidding process. Thus, making it even more incumbent on the Commission to closely scrutinize the reasonability of the tariff before passing it on to consumer to protect consumer interest.*

...

38. *Considering all the above facts and arguments, the Commission reaches the conclusion that under the guiding principles of the Electricity Act, 2003 and the provisions of its section 61, in larger public interest, the Commission can, and should, look into the reasonability of the tariff discovered through bidding route under section 63 or otherwise.*

...

49. *Hon'ble APTEL has maintained in this above quoted case that negotiations can be carried out even when there is no explicit provision in RfP since the procurer has the right to reject in case discovered rates are not aligned with market rates. It is interesting to note that in this instant case as quoted above the RfP has provision to reject the bid without assigning any reason unlike other case where condition of non-alignment with market rate could be the reason for rejection of a bid. Thus in instant case the procurer has firmer ground to negotiate with the bidders in the interest of the consumer and public.*

...

51. *Considering the entire circumstances of the case, the legislative intent of the statute, the law laid down by Hon'ble Supreme Court and Hon'ble APTEL, we are of the considered opinion that matter should be reconsidered and the petitioner should take appropriate decision in the background of the law laid down by the authorities, the then prevailing and also the present market rate for solar energy. However, at present we do not express any finding approving of disapproving the rates.*

52. *The next hearing in the matter shall be held subsequent to the actions taken on the basis of above mentioned directions."*

24. Statedly because the procurers were procrastinating, AGEUPL was constrained to approach the State Commission by a petition (no.1194/2017) impleading UPPCL, UPNEDA and UPPTCL as party

respondents, praying for extension of SCOD due to delay in completion of the transmission infrastructure by UPPTCL, the reliefs claimed being set out as under:

“In view of above, it is most respectfully prayed that the Hon’ble Commission may be pleased to:-

(a) Admit the Present Petition;

(b) Declare that the delay in SCoD is for the reason of delay in construction of transmission line by Government of Uttar Pradesh and Respondent No2 & 3 and the delay is not attributable to Petitioner.

(c) Extend the Scheduled commissioning Date of Petitioner’s solar power project by 6 months from the existing date of commissioning i.e. 01.06.2017 to 01.12.2017.

(d) Extend the Expiry Date for the purchases of this Agreement based on newly determined Scheduled Commissioning Date as under Article 4.7.6.

(e) Direct Respondent No.1, not to impose any penalty on the Petitioner if Schedule Delivery Date gets delayed due to construction of transmission line by Government of Uttar Pradesh and Respondent No 2 &3 ...”

25. In the wake of the directions in the interim order dated 22.02.2017 of the State Commission, the concerned authority in the State Government invited the selected bidding companies for negotiations over the tariff. Some meetings in this regard were held by the Empowered Committee during the period May to September, 2017. Admittedly, in the course of the said deliberations, AGEUPL submitted its consent on 06.07.2017 for tariff of Rs.7.02 per unit to be adopted, it being the lowest quoted price,

such tariff having been found by the Empowered Committee in the meeting held on 26.05.2017 to be below the prevailing *CERC Benchmark Tariff* of Rs.7.06 per unit for FY 2015-2016. It may be mentioned here itself that 09 out of the total 15 selected bidding companies which had entered into formal contractual arrangements in the nature of PPAs, pursuant to Lols that had been issued, had completed setting up their respective projects by November, 2017. By its order dated 21.11.2017, passed in the adoption proceedings (no.1110/2016), the State Commission adopted the tariff of Rs.7.02/kWh in their favour.

26. It is not in dispute that there was delay in achievement of commercial operation in respect of the power projects of the appellants herein. Certain facts in that context need notice.

27. On 24.07.2017, UPPCL sent a preliminary default notice to AGEUPL seeking to terminate the PPA, invoking its article 13.1 on account of failure on the part of AGEUPL to commence the supply of power to the procurers up to the contracted capacity to the extent specified. UPNEDA, on its part, also sent a notice to AGEUPL on 25.07.2017 demanding payment of liquidated damages @Rs.50,000/- per MW per day for delay in commissioning of the project beyond the commissioning period of 18 months. We may recall that AGEUPL had already approached the State Commission by petition no.1194/2017 on 24.04.2017 requesting for extension of SCOD pointing out the delay in construction of transmission

line by the authorities of the State Government to be the reason, said petition being pending all along. In the wake of notices issued by UPPCL and UPNEDA on 24.07.2017 and 25.07.2017, while seeking early hearing, AGEUPL also sent replies on 31.01.2017 to UPPCL and UPNEDA in answer to their respective notices pointing out the delay in commencement in supply of power or SCOD to be on account of delay in construction of transmission lines by the said entities themselves. Reliance, in this context, is also placed on clarification issued on 28.07.2017 by *Ministry of New and Renewable Energy Sources* ("MNRE") to the following effect:

"Ministry had requested not to give time extension if all the obligations are fulfilled by the concerned State Government Authorities/PSUs etc. in a project. However, if there are delays of any kind on the part of the State Government Authorities/PSUs like land allotment, transmission/evacuation facilities, connectivity permission or force majeure, the competent authority in the State/SECI/NTPC etc. may consider providing extension of the time duration strictly as per the Contractual Agreement."

28. The request of AGEUPL for withdrawal of preliminary termination notices having not been acceded to, there having been delay on the part of the State Commission in dealing with the request (on petition no.1194/2017) for extension of SCOD, AGEUPL approached the High Court of Allahabad, invoking its writ jurisdiction (by Misc. Bench no.23551/2017). By order dated 29.02.2017 the State Commission was called upon to consider and decide the said pending petition expeditiously.

The prayer of AGEUPL in petition no.1194/2017 received attention of the State Commission on 13.10.2017 when the following order was recorded:

“7. After hearing the arguments of both sides the Commission directed UPPCL and UPNEDA to convey their decision regarding the above named six petitioners within 15 days with a copy to the above named six petitioners. The above named six petitioners would submit their rejoinder in another 15 days time after which the matter will be considered by the Commission after giving proper notices of hearing to the concerned parties. The Commission also directed that UPPCL and UPNEDA will not take any unilateral action without the concurrence of the Commission regarding above named six petitioners.”

29. In the meantime, UPPTCL and UPPCL had engaged the AGEUPL in certain parleys over the issue of construction of transmission system.

30. On 30.10.2017 AGEUPL filed an application in pending petition no.1194/2017 seeking a direction to UPPTCL to start the construction of the transmission line (i.e. 132 kV S/C transmission line) from the project to UPPTCL, 220/132 kV Dunara sub-station and complete the same in a time bound manner.

31. As already noted, the petition of UPPTCL and UPPCL for adoption of the bid discovered tariff (no.1110/2016) was taken up by the State Commission on 21.11.2017 and while adopting the tariff of Rs.7.02/kWh for the nine bidders which had completed their respective projects, the Commission directed that the PPA termination notices in respect of the remaining six bidders, including the two appellants herein, whose projects

had not been commissioned by them, were under consideration and would be decided accordingly.

32. The proceedings arising out of the prayer for adoption of bid discovered price by petition no.1110/2016 and petition of AGEUPL for extension of time vide no.1194/2017 were taken up on 23.01.2018. The submissions of the appellants vis-à-vis their petitions against pre-termination notices were captured in the order dated 23.01.2018 by the State Commission (in para 11) as under:

“ ...

M/s Sahasradhara Energy Pvt. Ltd. Chennai

The above named Company filed a Petition No.1157/2016 for extension of time for completing the project on the ground that the completion of the project is delayed in the absence of finalization of tariff and consequent delay in financial closure. They have filed submission dated 24.8.2017 in which the pre termination notice dated 24.7.2017 has been challenged. In their subsequent submission they have intimated that they have completed about 80% of the work on the site and they are willing to complete the project within one month of adoption of tariff. In the hearing on 12.01.2018, the petitioner has informed that they have already given their consent to accept the lowest tariff of Rs.7.02/unit and 95% work is complete on site. They have requested that there is no justification for termination of their PPA as they have almost completed the project. They have assured the Commission that once the tariff is adopted they will complete the project in next one month.”

...

M/s Adani Green Energy (Uttar Pradesh) Ltd. Ahmedabad

The aforesaid company filed Petition No.1194/2017 for extension of time for completion of the project on the ground that the tariff has not been finalized till date and the procurers have not constructed the transmission lines which was their responsibility under the PPA. Later when the pre termination notice dated 24.7.2017 was issued to them they filed the fresh submissions opposing the pre termination notice

reiterating the facts that the procurers have not constructed the transmission lines and also stated that they have already purchased the required land and have achieved the financial closure of the project. They had agreed to the tariff of Rs.7.02/unit when the negotiations were carried out. In the hearing on 12.1.18 they have intimated that their plant is almost complete but the transmission line has not yet been constructed despite the fact that UPNEDA has given sufficient funds to UPPTCL. They have also intimated that they can commission the project without any further delay after the adoption of tariff.”

33. In the order that was passed on 23.01.2018, whilst proposing the tariff of Rs.5.21/kWh for the remaining six bidders (including the appellants herein), the Commission observed, *inter alia*, as under:

“ ...

In the present matter after considering the arguments and the counter arguments the Commission finds that in this case the tariff discovered was not aligned to the market rates therefore the Commission was constrained in directing UPNEDA and UPPCL to revisit the rates and file the revised recommendations at the earliest. But this process took considerable time and the above named six bidders had a genuine apprehension about the rates at which the power could be procured by UPPCL. This is also true that in the absence of finality of tariff the financial closure of the projects is difficult and the developer is also not sure about the viability of the project. Further the procurers also did not take adequate steps to lay the transmission lines required for evacuation of the power. Out of six bidders M/s Adani Green Energy (Uttar Pradesh) Ltd. Ahmedabad and M/s Sahasradhara Energy Pvt. Ltd. Chennai have almost completed their projects and rest four developers have done only part of the work but all the six bidders have shown definite inclination to complete the project after the tariff is finally adopted by the Commission. The Commission is of the view that in this case if the PPAs of the above named six bidders are allowed to be terminated then it will vitiate the atmosphere of investment in the State and also would put these bidders to financial loss. At the same time this is also true that the solar module prices have shown a downward trend after the bid and if the rates given to the earlier nine bidders are allowed to these six bidders, they will gain unwarranted financial benefit which is not in the public interest. Therefore the Commission does not accept the recommendation of UPPCL and UPNEDA to terminate the aforesaid six PPAs. To work out a

reasonable tariff for these six bidders, the Commission has carried out an exercise to find out the reasonable tariff in the given situation and also keeping in view the rates given to the nine bidders whose projects have been commissioned.

...

The Commission proposes to adopt the tariff of Rs. 5.21 for the above named six bidders for a period of 12 years and after that for next 13 the APPC will be applicable as defined in the PPA, subject to a ceiling of Rs. 5.21 per Kwh. The Commission will hold a public hearing on 31.1.2018 at 3:30 PM to hear the views of all the stakeholders before finally adopting the tariff under Section 63 of the Electricity Act 2003.

Those bidders who agree to accept the adopted tariff after the public hearing will be given 5 months time to complete the project and the procurers will also be under an obligation to complete the evacuation system within that time. If any of these bidders is not able to commission the project within the 5 months time the procurer will be at liberty to terminate the PPA and encash the performance bank guarantee.”

(Emphasis supplied)

34. The proceedings in the above-mentioned petitions eventually culminated in order being passed on 12.02.2018, the relevant part whereof may be quoted thus:

“8. The Commission has considered the cost of RS. 4.80 crore per MW while proposing the tariff of RS. 5.21 but after hearing views of the public representatives and the petitioners the Commission has re-examined the capital cost and has found that while making an estimate of capital cost the Commission has considered module cost at Rs. 2.80 crore per MW after accounting for taxes and degradation but on revisiting these rates the Commission would like to revise the module cost at Rs. 2.65 crore per MW. After considering rest of the costs as per CERC bench mark of 2016-17 the total cost works out to Rs. 4.65 crore per MW. On this cost the levelised tariff works out to Rs. 5.07 per unit.

9. In view of above the Commission adopts the tariff of Rs. 5.07 per unit for a period of 12 years and for remaining 13 years APPC with a ceiling of Rs. 5.07 will be applicable as per the terms of the PPA

already signed. The PPAs of these six bidders shall be amended to give effect to the adopted tariff. Those bidders who are not willing to accept this adopted tariff shall be allowed to quit from the PPA and their bank guarantees would be returned.

The Commission in its earlier order had allowed five months' time for Commissioning of the projects but this will be subject to completion of evacuation system by the procurers otherwise the Commissioning date will automatically be extended without any penalty."

(Emphasis supplied)

35. The appellants herein executed supplementary PPAs, on 13.03.2018 and 06.03.2018 respectively, in compliance with the above order dated 12.02.2018 but brought a challenge thereto by appeal nos.307/2018 and 176/2018 referred to earlier. As already mentioned, the appeal no.176/2018 of Sahasradhara was allowed and the matter was disposed of with direction for reconsideration in remand by the State Commission by judgment dated 07.03.2019. The said proceedings having resulted in adverse order being passed on 12.06.2019, Sahasradhara has come up by fresh appeal no.275/2019 as at hand. It may be noted that the matter arising out of the two captioned appeals and certain other similarly placed appeals was referred to mediation, the said exercise did not result in amicable resolution.

36. It is the contention of the appellants that the role of the regulatory Commission in proceedings arising out of the petition for adoption of the bid discovered tariff under section 63 of Electricity Act is distinct from the process based on *cost-plus* approach under Section 62. The appellants

submit that the State Commission fell in error by its first order dated 22.02.2017 assuming for itself a role not permitted by law to direct the concerned authorities in the State Government to re-negotiate the tariff with the selected bidder companies, such error having continued in the subsequent order dated 21.11.2017 when, by negotiations, the lowest quoted bid of Rs.7.02 per unit was adopted and enforced in favour of nine of the selected bidders. At the same time, it is further argued that it was improper in the part of the State Commission to segregate the case of remaining six bidders by treating them differently, failing to take into account the reasons of delay in completion of their respective projects, this having brought in the vice of arbitrariness, particularly in the case of the two appellants herein, when seen in light of findings having been recorded that they had made substantial investments and progress in achieving the SCOD within time. The appellants submit that participation in negotiations and execution of supplementary PPAs in the wake of the final adoption order dated 12.02.2018 were under duress and subject to the right to pursue such legal remedies as are available and, therefore, it is incorrect on the part of the respondents to take plea of acquiescence or estoppel. The appellants question the propriety of the process before the State Commission arising out of the adoption petition (vide no.1110/2016) presented by UPPTCL and UPNEDA contending that the piece-meal adjudication by series of orders, spread over almost two years, causing

inordinate delay and consequentially creating uncertainty was unfair, this having misled and misdirected the State Commission to assume that the bid discovered tariff required to be aligned to the market price prevailing at the time of final disposition making it unjust and unrealistic.

37. *Per contra*, the respondents argued that the orders dated 22.02.2017, 21.11.2017 and 23.01.2018 having not been challenged, have attained finality and applying the rule of *res judicata*, the appeals at hand can not be entertained. It is argued that the State Commission has the power and the responsibility to look after the larger consumer interests and, thus, requisite jurisdiction to examine the reasonability of the bid discovered price and take measures to align it with the prevailing market conditions. It has been submitted that the appellants having signed the supplementary PPAs pursuant to the final order dated 12.02.2018, it is not open to them to make an about turn to question the tariff which is now a condition of the contracts duly executed. It is the argument of the respondents that there was no coercion exercised at any stage, the delay on the part of UPPCL being inconsequential, the appellants herein being not similarly situate as the nine bidders which were granted the negotiated tariff of Rs.7.02 by order dated 21.11.2017.

38. As noted in the early part of this judgment, the larger issue of the scope of intervention with the bid discovered price in proceedings under section 63 of Electricity Act concerns the interim orders earlier passed by

the State Commission on 22.02.2017 and 21.11.2017. Though the appellants in the matters at hand also raise such issues, presently they press only for parity with the nine bidders who are beneficiary of the order dated 21.11.2017, they having reserved the right to seek proper parity on the basis of the bid quoted price should the challenge to the order dated 21.11.2017 by the said nine bidders, it being subject matter of other pending appeals, succeed.

39. In the above circumstances, we are not called upon to go into the propriety, legality, fairness or justness of the process of negotiation which was undertaken, it having resulted in the price of Rs.7.02 being agreed upon and approved by the State Commission, by order dated 21.11.2017. We only note that under the RE Competitive Bidding Guidelines, Bid Evaluation Committee was constituted by the procurers (clause 6.3) which had the authority to reject all price bids if the rates quoted were not aligned to prevailing market rates (clause 6.8), the said Bid Evaluation Committee having confirmed in its recommendations that the bidding process had abided by the RE Guidelines and the terms of RfP, it being a transparent process, such views having been recorded by the State Commission in its order dated 22.02.2017. We also note that State Commission was conscious of the observations of Hon'ble Supreme Court in *Energy Watchdog v. CERC* (2017) 14 SCC 80, to the effect that it is not within the powers of the regulatory commissions to go behind the reasonability or

viability of tariff discovered in a transparent bidding process, this view having also been expressed by this tribunal in judgment dated 16.12.2011 in the case of *Essar Power Limited v. Uttar Pradesh Electricity Regulatory Commission and Anr.* (supra), the options available to the Commission being to either adopt or reject the tariff depending upon the answer to the issue as to whether bid process was in accord with the bid guidelines, transparent and as per the statutory framework. We wish to say no more at this stage in the present proceedings since the scope and width of the power of the regulatory commission to tinker with the bid discovered tariff under section 63 of Electricity Act, will have to be examined in the direct challenge to the order dated 21.11.2017 in proceedings arising out of other pending appeals.

40. We do not find any merit in the objection based on rule of *res judicata*. The orders dated 22.02.2017, 21.11.2017 and 23.01.2018 were interlocutory orders passed in the proceedings arising out of the adoption petition (no.1110/2016) of UPPCL and UPNEDA. Though some issues were decided and arguably may appear to be conclusive in nature, it cannot be said that the same not having been challenged by appeal would become binding and be beyond reproach after the culmination of proceedings, eventually by order dated 12.02.2018, in which such previous interlocutory orders in the same proceedings would have merged. We take this view also for the reason that the State Commission,

by its order dated 22.02.2017, had itself observed (in para 51) that it was only asking the parties to reconsider (the issue of tariff), no finding being returned at that stage to the effect of approving or disapproving the rates that had been quoted, the issue of applicable tariff not having been determined. In this view of the matter, it can not be said that it was an order that was conclusive or would attain finality, if not challenged, appeal against such inchoate dispensation not even being available.

41. Similarly, the decision by order dated 21.11.2017 had kept the cases of six bidders whose projects were yet to be completed out of purview, the decision being restricted to nine other bidders. The objections of the six bidders were considered by orders dated 23.01.2018 and 12.02.2018, the former (23.01.2018) only proposing further reduction of tariff to Rs.5.21/kWh and the latter (12.02.2018) adopting even lower tariff of Rs.5.07/kWh, the first of them (i.e. 23.01.2018) being only in the nature of a proposal had not decided the claim. The decision was rendered qua the appellants (and four others) only on 12.02.2018. Thus, it cannot be said that the orders preceding 12.02.2018 not having been challenged, appeal would not lie on principles of *res judicata* against order dated 12.02.2018.

42. There is merit in the argument of duress having been exercised in the negotiations and particularly in the wake of order dated 12.02.2018. The communication dated 29.06.2017 asking the participating entities to come for the deliberations, described as negotiation, ready with letter-

heads, stamps etc. and to submit negotiated rates in front of the committee of the government is indeed jarring. Though we would deal with the issue of delay on the part of UPPTCL to develop the evacuation system a little later, for the present we must observe that the issuance of termination notices and demand of liquidated damages by UPPCL and UPNEDA on account of delay in commencement of supply was part of the overall scenario of duress only. The Commission has, by subsequent order, rejected the move for termination, finding it inappropriate for certain other reasons, it cannot be ignored that the Commission has itself acknowledged by its order that substantial progress had been made by the appellants.

43. What is crucial to note, however, is the fact that the delay of five months in the commissioning of projects having been condoned by earlier orders, it was clearly ruled on 12.02.2018 (para 10 – not numbered) that the dispensation was *“subject to completion of evacuation system by the procurers, otherwise the commissioning date will automatically be extended without any penalty”*. If it were so, it must naturally follow that the appellants cannot be visited with any consequences for delay in commencement of the supply or attainment of the SCOD, the petition for enlargement of time having also been disposed of simultaneously by order dated 12.02.2018. Thus, the issuance of notices of termination and

demand of liquidated damages are rendered bad in law and a pressure tactic.

44. There can be no dispute as to the fact that regulatory authorities under the Electricity Act are bound to bear in mind the larger consumer interest, but, at the same time, it is also their onus to ensure that the tariff determination exercise results in recovery of cost of electricity in reasonable manner. We assume for present discussion that negotiation post-bidding is permissible in law. But negotiations having resulted in the tariff of Rs.7.02 (lowest bid quoted price) which had already been adopted by order dated 21.11.2017, the further exercise of examining its reasonableness on the touch-stone of principles set out in section 62 of Electricity Act is questionable. As already observed, the two routes are entirely different. The tariff has to be reasonable and it may be said that it should be aligned with the market conditions but, for such purposes, the market conditions prevailing at the time of the bid are to be kept in mind and not what may have been the position much later. The tariff adoption petition (no.1110/2016) was filed by UPPCL and UPNEDA on 04.05.2016. It was finally decided twenty months thereafter on 12.02.2018. The delay on the part of the Commission is inordinate. The acts of omission of the statutory body – lack of promptitude on the part of the regulatory authority here - cannot cause prejudice to the interests of the stakeholders looking up to them for fair dispensation. Over the period, market conditions were

bound to change. The sanctity of the bidding process has to be protected. For aligning the bid price with the market conditions, the prevailing price at the time of bidding only could have been kept in mind. In this context, we may refer to such view taken by this tribunal in judgment dated 07.12.2018 in *M/s Shalivahana Green Energy Ltd. v. Madhya Pradesh Electricity Regulatory Commission & Ors.* (appeal no.229/2016).

45. The core error committed by the State Commission in its proposal order dated 23.01.2018 finding Rs.5.21/kWh to be realistic tariff and further/tariff of Rs.5.07 as eventually adopted by final order dated 12.02.2018 lies in the fact that such determination is on principles governing the route of section 62 which were wholly inapplicable.

46. We do not accept the submissions of the respondents that delay in providing evacuation system particularly in the case of AGEUPL is inconsequential. On the contrary, there was no obligation on the part of the said appellant to commence supply till the evacuation system had been readied and made available. The respondent UPPCS and UPPTCL have not offered any explanation whatsoever, for delay in development of the evacuation system on their part. They seem to be reaping undue benefit on account of such delay by having persuaded the State Commission to slash the tariff to the extent of Rs.5.07/kWh, which is unfair and unjust.

47. As already observed, the order dated 12.02.2018 itself ordained that there was no occasion for any penal measure to be adopted for the delay beyond the five months delay which had already been condoned by previous orders, the prayer for enlargement of time (by petition no.1194/2017) having also been resultantly treated as disposed of. In this view, the parity with nine others who had completed their projects earlier cannot be denied. To put it simply, the element of delay stands effaced and, thus, the appellants herein stand at same footing as the nine bidders in whose case the negotiated tariff of Rs.7.02/kWh was adopted and enforced by order dated 21.11.2017. There being no other reason to discriminate, the further reduction to Rs.5.07 is rendered arbitrary, unjust and unlawful.

48. For the foregoing reasons, and in the circumstances, these appeals must succeed. Subject to their claim for bid quoted price on the basis of arguments vis-à-vis contours of the jurisdiction of regulatory Commission under section 63 of Electricity Act, contingent upon the result of pending appeals challenging the order dated 21.11.2017, we hold that the appellants herein are entitled to seek parity and, thus, must be allowed the negotiated tariff of Rs.7.02/kWh as applied to the nine other bidders which had participated in and selected by the same competitive bidding process.

49. The impugned orders are modified accordingly. The supplementary PPAs executed by the appellants pursuant to the order dated 12.02.2018

shall be appropriately amended in terms of the above decision. The State Commission shall ensure due compliance by passing all such consequential orders as may be necessary.

50. The appeals are disposed of in above terms.

Pronounced in open court on this 28th Day of November, 2022.

(Sandesh Kumar Sharma)
Technical Member

(Justice R.K. Gauba)
Officiating Chairperson

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