

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Appeal No. 82 of 2011

Dated: 16th December, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam,
Chairperson
Hon'ble Mr. V J Talwar, Technical Member

In The Matter Of

Essar Power Limited
11, K.K. Marg, Mahalaxmi,
Mumbai-400 034

... Appellant(s)

Versus

1. Uttar Pradesh Electricity Regulatory Commission
II Floor, Kisan Mandi Bhawan
Gomti Nagar, Vibhuti Khand
Lucknow-220 010

2. Noida Power Company Limited
Commercial Complex
H Block, Alpha II Sector,
Greater Noida-201 308

....Respondent(s)

Counsel for Appellant(s):

Ms. Amit Kapur
Mr. Vishal Anand
Mr. Mansoor Ali

Counsel for Respondent(s):

Mr.ATM Rangaramanujam,Sr Adv
Mr. Kunal Verma for R-1

Mr. M G Ramachandran
Mr. Vishal Gupta
Ms. Ranjitha Ramachandran
Mr. Mayank Mishra
Mr. Sanjeev Kapoor for R-2.

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Essar Power Limited is the Appellant herein.
2. Aggrieved by the Order dated 30.5.2011 passed by the Uttar Pradesh Electricity Regulatory Commission giving a direction in favour of the Noida Power Company, the second Respondent, instead of adopting tariff quoted by the Appellant under Section 63 of the Electricity Act, 2003, the Appellant has filed this Appeal.
3. 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.

- (b) To promote competitive procurement of electricity by distribution licensee and to facilitate transparency, fairness and level playing field in procurement process, the Central Government on 19.1.2005 framed and issued Guidelines under Section 63 of the 2003 Act.
- (c) On 25.3.2009 the Noida Power the (R-2), filed a petition seeking approval of State Commission of the bidding documents including the Request for Proposal (RFP) for procurement of 500 MW power through competitive bidding process under the said Section 63 read with Guidelines issued by the Central Government.
- (d) On 8.10.2009 the State Commission approved the bidding process along with bidding documents proposed by Noida Power (R-2) with the direction to Noida Power (R-2) to approach the Commission if any deviation other than that was allowed in this petition is made from the Standard RFP documents during the pre-bid meetings.
- (e) On 11.10.2010, the Noida Power Company(R-2) initiated the process of procurement 200 MW (\pm 20%) of power under Section 63 of the Act, 2003 on long term basis under tariff based Case-1 competitive bidding process as per

Government of India guidelines and issued standard Request for Proposal (RFP) duly approved by the State Commission.

- (f) Accordingly, the six bidders participated in this case – I bidding process. Essar Power Limited, the Appellant was one among them.
- (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.

- (j) On coming to know of the pendency of the main petition and the interim application, the Appellant through its representative appeared before the State Commission on 20.5.2011 and represented to the State Commission opposing the move for 3rd party negotiation and requesting for an opportunity of hearing to the Appellant before any Order is passed in the matter. In addition to the said oral request, the Appellant also filed an application seeking for its impleadment as a Respondent in the said pending proceedings.
- (k) However, without hearing the Appellant, on 30.5.2011, the State Commission passed the impugned Order permitting the Noida Power Company (R-2) to take necessary steps as per the provisions under clause 2.5 (b) (iii) of the Standard Documents of **Request for Proposal (RFP)** approved by the State Commission for procurement of power.

- (l) On the strength of the said impugned Order dated 30.5.2011, passed by the State Commission, the Noida Power (R-2) sent a letter dated 9.6.2011 to the Appellant and other bidders informing about the Order of the State Commission dated 30.5.2011 and calling upon them to submit the revised financial bid to match or offer the lower tariff than the levelised tariff of Rs.3.667 per unit quoted by the 3rd party Company.
 - (m) Aggrieved by this, the Appellant has filed this Appeal challenging the legality of the impugned Order dated 30.5.2011 passed by the State Commission and the consequent letter dated 9.6.2011 sent by the Noida Power (R-2) to the Appellant.
4. The Learned Counsel for the Appellant has made the following submissions assailing the impugned Order dated 30.5.2011:
- (a) The Competitive Bidding Process initiated in accordance with Section 63 of the Electricity Act, 2003 and guidelines issued by the Central Government there under are statutory in character. Noida Power Company (R-2) having elected to go through the said process under Section 63 of the Act, it should have followed the steps as provided in the guidelines to get the approval of the State Commission leading to signing of the PPA with the Appellant being the

lowest bidder. This has been violated through the impugned Order.

- (b) Once the Appellant is declared as the lowest bidder in the competitive bidding process, the concluded contract has come into existence between the Essar Power (Appellant) and the Noida Power Company (R-2). On the basis of the Evaluation Committee's report that the Appellant's bid price of Rs.4.0868 per unit is comparable to the prevailing market rate, the Noida Power (R-2) had filed a petition on 7.4.2011 before the State Commission praying for adoption of the said tariff. This must lead to either adoption of tariff by the State Commission or rejection of the same. This has not been done in this case.
- (c) The Noida Power(R-2) while adopting the competitive bidding process cannot be permitted to negotiate with the 3rd party which did not participate in the bid. Such a process is outside the scope of the Section 63 of the Electricity Act, 2003.
- (d) The Appellant had furnished a bank guarantee, as per the bid condition and it had kept available a capacity of 240 MW during the bidding process. Due to the deviation of bid process, the Appellant has suffered a serious prejudice. The objective of the Electricity Act, 2003 is not only to

protect the interest of the consumers but also to protect the interest of the Generating Company i.e. the Appellant.

(e) The conduct of the Noida Power Company in attempting to negotiate with the 3rd party after the bid process is over, is unjust, inequitable and contrary to the objective of the guidelines notified by the Central Government. Hence, the impugned Order is liable to be set-aside.

5. The Learned Counsel for the Appellant has cited number of authorities in support of the various propositions relied upon by him. In order to show that the Noida Power cannot seek to adopt any procedure which is not consistent with the mandatory procedure prescribed and when the party accepts the benefit of their documents, it must adopt the whole contents of the instrument, conforming to all of its provisions, following authorities have been cited:

(a) Karam Kapahi Vs Lal Chand Public Charitable Trust
(2010) 4 SCC 753

(b) Shyam Telelinks Ltd Vs Union of India(2010) 10 SCC 165

(c) Mumbai International Airport Ltd. Vs Golden Chariot Airport
(2010) 10 SCC 422

6. He has cited the following authorities in order to substantiate his plea that the State Commission, while exercising the powers under Section 63 of the Act, can not issue directions which

would virtually negate the bidding process after the process has been concluded by allowing the procurer to introduce the extraneous bilateral negotiations with the 3rd party and that when a statute vests power in a Authority, to exercise that power in a particular manner, then that Authority has to exercise the said powers only in that manner and not in any other manner:

- (a) Gujarat Urja Vikas Nigam Ltd Vs Essar Power Ltd : (2008) 4 SCC 755
- (b) Chandra Kishore Jha Vs Mahavir Prasad: (1999) 8 SCC 266: and
- (c) C.I.T Mumbai Vs Anjum M.H. Ghaswala and Ors: (2002) 1 SCC 633

7. The Learned Counsel for the Appellant has cited two judgements given by this Tribunal in which it is held that the State Commission while exercising the powers under Section 63 of the Act has to merely verify whether the bidding process was transparent and the same had been carried out in accordance with the guidelines issued by the Central Government under Section 63 of the Act and that if these requirements are met with, then the State Commission shall adopt the tariff recommended by the Evaluation Committee. The decisions are:

- (a) Lanco Infratech Ltd. Vs PSERC: 2009 ELR (APTEL) 745

(b) Judgement in Appeal No.44 of 2010 ELR (APTEL) 634
Madhya Pradesh Power Trading Co. Ltd. Vs MPERC

8. The Learned Counsel for the Appellant has cited following authorities to show that the State Commission can not exceed its jurisdiction while issuing interim directions in the proceedings under Section 63 of the Act so as to alter the bidding process by taking into account the subsequent events especially when the interim direction is not ancillary to the main relief prayed for by the Noida Power. Those decisions are as follows:

(a) Suresh Jindal Vs BSES Rajdhani Power Ltd: (2008) 1 SCC 341

(b) Hindustan Times Vs State of UP: (2003) 1 SCC 591

(c) Chockalingam Vs Seethai Ache: AIR 1927 PC 252

(d) State of Orissa Vs Madan Gopal Rungta: AIR 1952 SC 12

(e) Andhra Bank Vs Official Liquidator: (2005) 5 SCC 75

(f) BCCI Vs Netaji Cricket Club: (2005) 4 SCC 741

(g) Om Prakash Gupta Vs Ranbir Goyal (2002) 2 SCC 256

(h) Munilal Vs Oriental Fire & General Insurance Co. Ltd
(1996) 1 SCC 90

9. To substantiate the plea that upon adoption of the tariff, the execution of the PPA and other documents between the Noida

Power and Essar Power is a mere formality and ministerial Act, he has cited the following authorities:

- (a) Sagar Mahila Vidyalaya, Sagar Vs Pandit Sadashiv Rao Harshe: (1991) 3 SCC 588
- (b) Edukanti Kistamma (dead) through LRs Vs. S Venkatareddy (dead) through LRs: (2010) 1 SCC 756

10. In order to show that the RFP documents have to be read as a whole in order to ascertain the true meaning of its clauses and any clause of the RFP has to be interpreted harmoniously with other clauses, he has cited the following judgements:

- (a) 20th Century Finance Corpn Ltd. Vs State of Maharashtra: (2000) 6 SCC 12
- (b) Smt Chand Rani Vs Kamal Rani: (1993) 1 SCC 519
- (c) Super Poly Fabriks Lts. Vs Commissioner of Income Tax: (2008) 11 SCC 398
- (d) Modi & Co. Vs UOI: AIR 1969 SC 9
- (e) Bihar State Electricity Board Vs Green Rubber Industries: (1990) 1 SCC 731
- (f) Polymat India (P) Ltd. Vs National Insurance Co. Ltd.(2005) 9 SCC 174
- (g) Bank of India Vs Mohandas (2009) 5 SCC 313

11. In order to show that the sanctity and integrity has to be maintained for the competitive bidding process, he has cited the following authorities:

- (a) West Bengal State Electricity Board Vs. patel Engineering Co. Ltd: (2001) 2 SCC 451
 - (b) Sorath Builders Vs Shreejkrupa Buildcon Ltd: (2009) 11 SCC 9
 - (c) Glodyne Technoserve Ltd Vs State of MP: (2011) 5 SCC 103
 - (d) Larsen & Turbo Ltd. Vs Union of Inida (2011) 5 SCC 430
12. With regard to violation of principle of natural justice for having passed the Orders without hearing the Appellant who is the interested party, he has cited the following decision:
- (a) Sahara India (Firm) Lucknow Vs Commissioner of Income Tax reported in (2008) 14 SCC 151
13. With reference to the meaning of the term “communication” indicating that when the party coming to knowledge about the acceptance, it is deemed to be communicated, he has cited the following authorities:
- (a) Jai Narain Parasrampuriah Vs Pushpa Devi Saraf (2006) 7 SCC 756
 - (b) Bhagwati Prasad pawan Kumar Vs Union of India (2006) 5 SCC 311
 - (c) Damodaran Pillai Vs South Indian Bank: (2005) 7 SCC 300
 - (d) Hindustan Co-operative Insurance Society Vs Shyam Sunder: AIR `1952 Calcutta 691
 - (e) Chhattisgarh State Electricity Board Vs CERC: (2010) 5 SCC 23
 - (f) Jai Prakash Vs State: (1991) 2 SCC 32

(g) Steel Authority of India Vs Gupta Brothers Steel Tubes Ltd
(2009) 10 SCC 63

14. He has cited following two judgements to show with reference to the method of interpretation of the contents of the documents:

(a) Steel Authority of India Vs Gupta Brothers Steel Tubes Ltd
(2009) 10 SCC 63

(b) Polymat India (P) Ltd Vs National Insurance Co. Ltd:
(2005) 9 SCC 174

15. He has cited the following authorities to show that 2.5 (b) (iii) or RFP cannot over ride the other clauses of the RFP:

(a) Citibank N.A. Vs TLC Marketing PLC: (2008) 1 SCC 481
(Para 51,52)

(b) Rajgopal Pillai Vs Pakkiam Ammal (1976) 1 SCC 299

16. He has cited following decisions to show that there cannot be any justification in support of the illegal act:

(a) Suresh Jindal Vs BSES Rajdhani Power Lted (2008) 1
SCC 341

(b) Hindustan Times Vs State of UP : (2003) 1 SCC 591

17. In Order to support his plea that the relief in regard to the tariff on the basis of the subsequent happenings should not be granted so as to affect the right of the other party, he has cited following judgements:

- (a) Om Prakash Gupta Vs Ranbir Goyal (2002) 2 SCC 256
- (b) Munilal Vs Oriental Fire & General Insurance Co. Ltd (1996) 1 SCC 90
- (c) 2010 ELR (APTEL) 404 BSES Rajdhani Power Ltd Vs DERC

18. He has cited the following authorities to show that the judgments cannot be relied upon when the factual foundations in those judgements are different from the case on hand:

- (a) Sarv Shramik Sanghatana Vs State of Maharashtra (2008) 1 SCC 494
- (b) Shahbad Co-op Sugar Mills Ltd Vs Secretary to Government of Haryana Corporation (2006) 12 SCC 404

19. He has cited the following two authorities to show that the Government guidelines are mandatory in nature:

- (i) Church of North India Vs Lavajibhai Ratanjibhai (2005) 10 SCC 760.
- (ii) 2011 ELR (APTEL) 686 Noida Power Company Limited Vs Paschimanchal Vidyut Vitran Nigam Limited.,

20. With regard to the principle that interim relief sought for, shall be ancillary to the main relief, he has cited the judgement in State of Orissa Vs Madan Gopal Rungta: AIR 1952 SC 12.

21. In order to show that Section 86 (1) of the Act cannot be invoked to override other provisions of the Act, he has cited the judgement in Tata Power Co Ltd Vs MERC (2006) 9 SCC 659.

22. In Order to support his plea that Section 86 (3) of the Act mandates to ensure transparency while passing any Order detrimental to the other party and in those matters, the notice to be given to the party, he has cited the judgement in Sahara India (Firm) Lucknow Vs Commissioner of Income Tax reported in (2008) 14 SCC 151.
23. In reply to the above grounds, the Learned Counsel for the Noida Power Company Ltd (R-2) has made the following submissions:
- (a) The agreements or the contracts proposed in pursuant to Competitive bidding process(in accordance with the Guide Lines issued by the Central Government under Section 63 of the Act) are not statutory contracts. These are all commercial contracts. There is no statutory mandate under the Electricity Act, 2003 on the part of the procurer to enter into PPA in pursuance to the bidding process. The procurer has the discretion to decide whether to enter into the contract or not.
 - (b) No contract can be said to have come into existence till the offer of the Appellant is accepted by the Noida Power Company Limited (R-2), and duly communicated to the Appellant. In the absence of the said acceptance of the offer and communication of the same to the Appellant, the decision taken by the Evaluation Committee and the filing

of the petition before the State Commission cannot be construed to be the acceptance of the offer or the communication of its acceptance to the Appellant. These are only preliminary steps which would not bring the contract concluded.

- (c) Merely because the Appellant is declared as a lowest bidder, it cannot have any right to get the contract from the Noida Power Company Limited concluded. The Noida Power Company at any stage till the acceptance of the offer and till the communication of such acceptance is made to the Appellant can reject the said offer. In this case there is neither acceptance nor the communication.
- (d) The scope of Section 63 is limited to adoption of tariff. Section 63 does not deal with the approval or conclusion of the PPA. Section 63 is alternative only to Section 62 which also deals with the determination of tariff. In other words, neither Section 62 nor Section 63 has anything to do with the finalization and execution of the PPA or the issue of letter of intent.
- (e) Section 86 (1) (b) of the Act is a provision dealing with the functions of the State Commission to regulate the power purchase and procurement arrangements of the distribution licensee. The tariff determination under Section 62 and tariff adoption under Section 63 do not lead to

conclusion that the PPA should be mandatorily signed. The price discovery mechanism provided under section 63 is meant only for reduction in price of the power purchase in larger interest of the consumers. Once this objective has been achieved and the price discovery has taken place under Section 63, it is open to the procurer to reject the said lowest bid and to finalize the agreement with 3rd party if that party offers the price which is lower than the price offered by the lowest bidder.

- (f) When the State Commission considers that it would be appropriate to permit the procurer to take the necessary steps to be taken for reduction in tariff in the larger interest of the consumers, it can in a pending proceedings under Section 63, may pass interim Orders giving directions in aid of making efforts for such reduction in tariff.
- (g) The provisions of clause 2.5 (b) (iii) read with clause 2.15 of the Request for Proposal, expressly provide the right to the procurer to reject the bids and then to proceed to initiate negotiation with 3rd party for procurement of power when such action results in substantial reduction in cost of power for the benefit of the consumers.
- (h) Clause 2.5 (b) (iii) of the standard Request for Proposal provides for the procurer to take such other efforts as an alternative to the annulment of the bidding process. This

shows that instead of annulling the bidding process, the procurer can adopt other measures without terminating the bidding process. The Central Government thus recognized the rights of procurer to proceed with the negotiation with the 3rd party. Such a negotiation of finalization is envisaged as a part of the process provided in the Request for Proposal.

- (i) There is no violation of the guidelines on the part of the Noida Power (R-2) in approaching the State Commission for adoption of the tariff before signing of the PPA. The action taken by the Noida Power Company is consistent with the deviation specified by the State Commission in its Order dated 8.10.2009. Thus, the conduct of the Noida Power is most transparent, just and fair.

24. The Learned Counsel for the Respondent-2 (Noida Power) has cited the following authorities in support of his contentions:

25. In support of his contention that the bids and the RFP documents, the guidelines and Regulations relating to the approval of the State Commission are only commercial agreements and contractual arrangements and therefore the same are not statutory in character, he has cited following three authorities:

- a) India Thermal Power Ltd V State of Madhya Pradesh and Others (2000) 3 SCC 379

- b) Kerala State Electricity Board v Kurein E Kalathil and Others (2000) 6 SCC 293
- (b) P.T. Rajan Vs T.P.M Sahir (2003) 8 SCC 498

26. He has cited the following five authorities to establish that there is no concluded agreement if there is no acceptance or the communication of the said acceptance to the opposite party. For this proposition he has cited the following authorities:

- (a) (1973) 3 SCC 889, Haridwar Singh V Bagun Sumbrui and Ors
- (b) (1999) 3 SCC 172, Delhi Development Authority V Ravindra Mohan Aggarwal and Anr
- (c) AIR 1977 Alld.494, UPSEB V Goel Electric Stores
- (d) AIR 1990 Orissa 26, Executive Engineer, Sundargarh V. Mohan Prasad Sahu
- (e) AIR 1982 Goa 9, Alcon Constructions V Board of Trustees of the port of Mormugao

27. He has cited the following authorities to substantiate his plea that the procurer has the right to reject and cancel the bid at any time even without adducing any reasons.

- (a) (1997) 1 SCC 738, Asia Foundation & Construction Ltd V Trafalgar House Construction (I) Ltd & Others
- (b) (2001) 8 SCC 491, Union of India & Ors Vs Dinesh Engineering Corporation & Anr

- (c) 2000 (Supp) Arb LR 639 (Patna),Cairo Impex Pvt Ltd V Bharat Coking Coal Ltd
- (d) 2009 (6) SCC 171, Meerut Development Authority V Association of Management Studies and Anr
- (e) AIR 1990 Orissa 26, Executive Engineer, Sundargarh V Mohan Prasad Sahu
- (f) 2006 (6) SCC 293 State Bank of India and Another Vs Mula Sahakari Sakhar Karkhana Ltd

28. He has cited the following authorities to show that the State Authorities should take into consideration larger public interest regarding the right of the parties to enter into the agreement with non bidders:

- a) UPPCL Vs NTPC Limited (2009) 6 SCC 235
- (b) CA No.4767/2011 of 24.5.2011 in the Case of Shradhha Aromatics Private Ltd V Official Liquidator
- (c) Air India Limited V Cochin International Airport Ltd (2000) 2 SCC 617
- (d) 1969 (3) SCC 537 Navalakha & Sons V Sri Ramanya Das
- (e) (2000) 6 SCC 69 Divya Manufacturing Co Ltd V Union Bank of India
- (f) (2008) 10 SCC 440 FCS Software Solutions Ltd V LA Medical Devices Ltd & Ors
- (g) Judgement in Appeal No.36 of 2010 dated 2.8.2010 : MP Power Trading Company Limited & Ors Vs MERC

29. In the light of the above rival contentions, the following questions may arise for consideration:

- (a) What is the scope of power to be exercised and what is the procedure to be followed by the State Commission under Section 63 of the Act, 2003 while dealing with the petition filed by the Noida Power, the Procurer (R-2) seeking for adoption of tariff of Essar Power Limited (Appellant) which was declared as the successful bidder by the Evaluation Committee upon finding that the levelised tariff quoted by the Essar Power (Appellant) is aligned to market conditions?
- (b) Having elected to procure power through the competitive bidding route under Section 63 of the Act and after declaring Essar Power Limited as a successful bidder and having filed the petition before the State Commission seeking for the adoption of the tariff quoted by Essar Power Limited (Appellant), whether the procurer (R-2) could be permitted to file an interim application seeking for the direction to go for 3rd party negotiation and whether the State Commission is empowered to give such a relief through interim direction in the pending proceedings, even though the same is contrary to the main prayer made in the petition?
- (c) Whether Noida Power Company can seek to initiate negotiation with a 3rd party which did not participate in the competitive bidding process and which had not tendered technically qualified bidding submissions in duly filled-up formats as per approved standard Request for Proposal to the Procurer?

- (d) Whether the Noida Power could seek for the revised financial bids through the letter dated 9.6.2011 when the contract between the Noida Power Company (R-2) and the Essar Power Limited (Appellant) is concluded in as much as the Noida Power had accepted the bid of the Appellant as a successful bidder and communicated the same to the Appellant?
- (e) Whether clause 2.5 (b) (iii) of the Request for Proposal is at all applicable in the facts and circumstances of the present case when admittedly none of the pre-conditions specified under the above said clause are not met ?

30. On these questions, we have heard the Learned Counsel for both the parties who argued at length and have given our careful consideration to their strenuous submissions. We have also gone through the authorities cited by them.

31. This case relates to the grievance of the Appellant that it has been deprived of the contract for supply of 200 MW Power to the Noida Power (R-2) in spite of being found to be the successful bidder in a transparent and competitive bidding process for procurement of power by Noida Power (R-2) under Section 63 of the Act.

32. In this Appeal, the Appellant is aggrieved over the two actions of the State Commission(R1) as well as the Noida Power(R2). They are as follows:

- (a) Noida Power filed a Petition before the State Commission with a sole prayer to adopt the tariff quoted by Essar Power Limited, the Appellant. But the State Commission instead of passing Order regarding the adoption of tariff in the main petition, simply passed the impugned Order in the interim application stating that the procurer Noida Power (R-2) is authorized to take such measures in its sole discretion as deemed fit under clause 2.5 (b) (iii) of the Standard document of Request for Proposal for negotiating with the 3rd party Company even though this relief is not aligned with the main relief sought for in the main petition.
- (b) Letter dated 9.6.2011 had been sent by Noida Power (R-2) in pursuance of the above impugned Order dated 30.5.2011 calling upon all the bidders including the Appellant who participated in the bid to submit revised financial bids either to match or to quote lesser than the levelised tariff offered by the 3rd party with a warning that failing which it would reject all the bids and adopt the offer of the 3rd party, thereby nullifying the effect of concluded competitive process.

33. Before dealing with the grievance of the Appellant over these aspects, it would be desirable to recall the detailed and broad facts for the better understanding of the background of the case. They are enumerated as below:

- (a) The Central Government framed guidelines under Section 63 of the Act on 19.1.2005 to promote competitive procurement of power by distribution licensees and to facilitate transparency, fairness and level playing field in procurement process.
- (b) In accordance with the said guidelines the Noida Power (R-2), a distribution licensee supplying power in Greater Noida area, filed a petition on 25.3.2009 before the State Commission seeking for the approval of the bidding documents for procurement of 500 MW of power by competitive bidding under Section 63 read with the said guidelines.
- (c) Accordingly, the State Commission on 8.10.2009 approved the bidding process proposed by the Noida Power Company Ltd but directed the Noida Power to approach the State Commission if any deviation other than that was allowed from Standard document of Request for Proposal during the pre bid meetings. In addition to that, the State Commission directed the Noida Power to keep the State Commission informed about the each stage of the bid process.
- (d) On 11.10.2010, the Noida Power initiated a competitive bid process and invited bids to procure 200 MW ($\pm 20\%$) on Long Term Basis under Case-1 tariff based on competitive

bidding process. Accordingly six bidders, including the Appellant, participated in the bid process and submitted their bids.

- (e) On 3.2.2011 all the Bidders were found to be technically qualified bidders.
- (f) On 19.2.2011, the Financial Bids were evaluated by the Evaluation Committee set up by the Noida Power (R-2) in accordance with the Central Government's Guidelines. In that process, the Appellant emerged as a lowest bidder offering their lowest livelised tariff of Rs.4.0868 per unit for 240 MW of power.
- (g) On 5.4.2011, the Evaluation Committee submitted its report recommending the bid of the Appellant being a successful bidder, to be accepted stating that the tariff quoted by the Appellant was in line with the prevailing market conditions. The Evaluation Committee further certified that the bid Evaluation has been done in a transparent manner and in conformity with the Government of India's Guidelines.
- (h) The Noida Power (R-2) accepting such recommendations of the Bid Evaluation Committee filed a Petition on 7.4.2011 before the State Commission under Section 63 of the Act praying for adoption of tariff quoted by the

Appellant being the lowest bidder. Along with the petition, the Noida Power filed all the documents including the Evaluation Committee Report and approved PPA, pre-initialed by the Appellant, before the State Commission. This Petition was entertained by the State Commission in Petition No.741/2011.

- (i) While the proceedings on this petition, were pending before the State Commission, the Noida Power (R-2) received a letter dated 13.4.2011 from M/s. Athena Power Limited, a 3rd party, which did not participate in the bidding process, stating that their Company was ready to offer power to Noida Power on Long Term Basis at a rate lesser than the tariff quoted by the lowest bidder. On receipt of this letter, there were some discussions between the Noida Power (R-2) and Athena Power (the third party). Athena Power again on 16.4.2011 sent another letter confirming that they are willing to supply power from April, 2014 at a levelised tariff of Rs.3.667 per unit, strictly in accordance with the terms and conditions specified in the bidding documents. When this was placed before the Evaluation Committee, the External Member of the Evaluation Committee refused to entertain the offer of the Athena Power stating that they cannot consider the said offer since it was made subsequent to the submissions of the bid Evaluation Report dated 5.4.2011 placed before the

State Commission, unless it is directed by the State Commission to do so.

- (j) Thereafter, in pursuance of the same, the Noida Power (R-2) on 27.4.2010 filed an interim application pending the main Petition No. 741 of 2011 before the State Commission submitting that subsequent to the filing of the main petition, the Noida Power(R-2) received a letter from Athena Power (3rd party) proposing to supply power to Noida Power on Long Term basis at levelised tariff rate of Rs. 3.667 i.e. well below the tariff quoted by the Appellant Essar Power Limited and requesting the Commission to pass suitable Orders taking note of the subsequent developments.
- (k) Admittedly, in both, the Petition as well as the interim Application, the Essar Power Limited, the Appellant was not made a party before the State Commission. The Appellant on coming to know of the pendency of the Petition and the interim Application through the State Commission's Website on 18.5.2011 sent its representative to attend the hearing of this application on 20.5.2011 and make submission on their behalf.
- (l) Accordingly, on 20.5.2011, when the matter was taken up for the hearing, the representative of the Appellant specifically made a oral submission opposing the move for

3rd party negotiation with a specific request not to pass any Order in this matter without hearing the Essar Power Limited being the successful bidder as declared by the Evaluation Committee. He specifically pleaded before the State Commission that the competitive bidding has been provided to ascertain the power through a reasonable price through a transparent process and any deviation from the Government of India's Guidelines, by allowing the 3rd party negotiation, would destroy very concept of this process. In addition to the said oral objections, the Appellant also filed an application in the said proceedings on 25.5.2011 praying for its impleadment as a party to the proceedings and seeking for the opportunity of hearing to the Appellant before passing any Order in the matter.

(m) Even though such an application for impleadment filed by the Appellant was entertained, the State Commission did not chose to give the opportunity of hearing to the Appellant, but straight away passed the impugned Order dated 30.5.2011 holding that the Noida Power (R-2) is fully authorized to take such measures in its sole discretion as per the provisions contained in clause 2.5 (b) (iii) of the Standard Document of Request for Proposal for procurement of power through case-1 bidding as per Guide Lines of Government of India.

(n) On the strength of this impugned Order, the Noida Power (R-2) sent a letter dated 9.6.2011 to all the bidders including the Essar Power Limited (the Appellant) and asked them to file their respective revised financial bids to match or offer a lower tariff than the levelised tariff of Rs.3.667 offered by the Athena Power, the 3rd party with a warning that if such a revised offer is not matching to the levelised tariff offered by the Athena Power, the Noida Power will reject all the bids and accept the bid of Athena Power, the 3rd party. Since this letter reflected a threat to the Appellant, who had been declared as a successful bidder, the Essar Power, the Appellant, filed an application on 13.6.2011 with the State Commission to recall the directions given in the Impugned Order dated 30.5.2011 as it was passed without hearing the Appellant. However, the State Commission did not list the application for hearing in spite of Appellant's best efforts. Hence, the Appellant filed the present Appeal as against the Order dated 30.5.2011 passed by the State Commission and consequent letter dated 9.6.2011 sent by Noida Power to the Appellant.

34. From the events enumerated above, two factors would emerge:

(a) After accepting the recommendations of the Evaluation Committee dated 5.4.2011 declaring the Essar Power (Appellant) as a lowest bidder and its bid may be

accepted, the Noida Power (R-2) approached the State Commission by filing the Petition on 7.4.2011 for adoption and approval of the tariff quoted by the Appellant. Thus, the original stand taken by the Noida Power (R-2), was to accept the offer of the Appellant, being the lowest bidder on the recommendations of the Evaluation Committee and to request the State Commission for adoption and approval of the said tariff. This is their initial stand.

- (b) Having filed the said petition in Petition No.741 of 2011 on 7.4.2011 before the State Commission, praying for adoption of the said tariff and when the said proceedings were pending before the Commission, the Noida Power (R-2) chose to entertain the letter dated 13.4.2011 from M/s. Athena Power (3rd party) offering for the lesser Tariff. On the basis of this letter, it had discussions and negotiations with the said 3rd party, although it did not participate in the bid process. That apart, Noida Power (R-2) received another letter dated 16.4.2011 from Athena Power (3rd party) stating that they are willing to offer the power at a rate of Rs.3.667 per unit which is lesser than the price quoted by the lowest bidder i.e. the Appellant. Then Noida Power approached the Evaluation Committee to consider the said offer but the Committee refused to entertain the same. Only thereafter, the Noida Power filed an application before the State Commission, pending main petition No.

741 of 2011 indicating that it would be desirable to accept the offer of Athena Power for supply of power at lesser price and praying for the suitable Orders on that. This is their second stand. Thus, the Noida Power has taken a different stand on the basis of which, different relief was sought through the interim application.

35. In the light of the above factors, the Appellant submitted that the prayer made by the Noida Power (R-2) in the interim application on the basis of the subsequent developments by which the Athena Power was willing to supply power for a lesser rate seeking for suitable interim orders for the same is not only contrary to their earlier stand but also is quite destructive to the prayer made in the main petition filed by Noida Power seeking for the adoption of the tariff quoted by the Appellant. According to the Appellant, the impugned direction issued by the State Commission permitting Noida Power for the 3rd party negotiation through the impugned Order dated 30.5.2011 which would amount to reopening of the concluded bid process in terms of Government of India guidelines, is beyond the jurisdiction of the State Commission.
36. While considering the merits of this submission made by the Appellant, it would be appropriate to deal with the scope of Competitive Bidding under Section 63 of the Electricity Act 2003.

37. The present case involves interpretation of a “Statutory Framework” governing procurement of power by transparent competitive bidding process under the Act, comprising:-
- (a) Section 63 of the Act;
 - (b) Government of India’s Guidelines notified under Section 63 for Determination of Tariff by Bidding Process for procurement of power by Distribution Licensees;
 - (c) The Standard documents for Request for Proposal the PPA notified by the Central Government and adopted by the Noida Power without any modification.
38. The Electricity Act, 2003 is a special legislation enacted to consolidate all laws applicable to the electricity industry in India with a view to attain the stated objectives of the law being **“to consolidate all the laws relating to generation, transmission, distribution, trading and use of electricity and for taking measures conducive to development of electricity industry, promoting competition therein, protecting interest of consumers and supply of electricity to all areas, rationalization of electricity tariff”** for which purpose the Regulatory Commissions have been constituted and given a well defined role to discharge the functions in furtherance of the said objectives.
39. With respect to fixation of tariff, the applicable framework is provided in Section 61 to Section 66 of the Act:

- (i) The principles set out in Section 61 require all the Regulatory Commissions to adopt a balanced approach for fixation of tariff. These principles are:
 - (a) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
 - (b) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
 - (c) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner

- (ii) Two alternative routes are available to distribution licensee for procurement of power. The licensee has to elect any one of these two routes. They are as follows:
 - (a) Through bilateral/negotiated PPAs, where the agreement is subject to prudence check and regulatory approval of tariff under Section 62 and procurement under Section 86 (1) (b); This is MoU Route.

 - (b) Through transparent process of competitive bidding conducted in accordance with Central Government's Bidding Guidelines, where the Appropriate commission is obliged to adopt the tariff discovered under Section 63. This is Bidding Route.

40. 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.
41. The competitive bidding process under Section 63 is regulated in various aspects by the Statutory Framework. To promote competitive procurement of electricity by distribution licensees with transparency, fairness and level playing field, the Central Government has framed the Bidding Guidelines to achieve the following objectives:
- (a) To promote competitive procurement of electricity by the distribution licensees;
 - (b) To facilitate transparency and fairness in procurement processes;

- (c) To facilitate reduction of information asymmetries for various bidders;
- (d) To protect consumer interests by facilitating competitive conditions in procurement of electricity;
- (e) To enhance standardization and reduce ambiguity and for materialization of projects;
- (f) To provide flexibility to suppliers on internal operations while ensuring certainty on availability of power and tariffs for buyers”

42. It is important to note that one of the important objectives of Central Government’s Guidelines mentioned above is to facilitate reduction of information asymmetries for various bidders. Accordingly, the Central Government had also notified Standard Bidding Document in the form of Request for Proposal and also model PPA. Any deviation from these standard documents is required to be approved by the State Commission. Admittedly, in the present case, the Noida Power (R-2) had adopted these documents verbatim and the State Commission had also approved the same.

43. Besides these objectives outlined above, the stage wise process of election to be exercised by the procurer under the above statutory scheme crystallizing its commitments and rights of the parties concerned is also to be noted in this context. Let

us now see various stages which crystallize the commitments and rights of the parties concerned:

- (a) The Procurer has the choice of process for procurement of power either through bilateral PPA with tariff determined by the Appropriate Commission under Section 62 of the Act or tariff discovered through a transparent process of competitive bidding in accordance with the Central Government's Guidelines under Section 63 of the Act ;
- (b) After electing 2nd route i.e. procurement of power through competitive bidding process, the procurer has to finalize the complete bidding process including finalization of RFP and other related documents with the approval of the State Commission at least 45 days before the bid submission date. In this case, admittedly, the procurer i.e. Noida Power electing the 2nd route had adopted standard bidding documents (RFP and PPA) notified by the Central Government and the State Commission had approved the same.
- (c) Short listing of qualified bidders on the basis of evaluation of non-financial bids;
- (d) Evaluation of financial component of the bids to determine the levelised tariff and evaluate whether such levelised tariff is aligned to the prevailing market prices. It is clearly

stipulated that there shall be no negotiation on the bid and the quoted tariff, once the evaluation process commences;

- (e) The bidder who has quoted lowest levelised tariff to be declared as successful bidder. Acceptance of the outcome of the bid evaluation resulting issuance of Letter of Intent (LoI) in favour of successful bidder and signing of PPA.
- (f) Followed by filing of the Petition for adoption of the tariff of the successful bidder by the Appropriate Commission under Section 63;
- (g) The adoption of such tariff discovered by the competitive bidding governed by Section 63 is the statutory duty of the Appropriate Commission with no discretion in the matter;

44. The above aspects would indicate that the bidding process shall be conducted strictly under the provisions of the Act as well as the Government of India guidelines and as such it has got the sanctity. In this case, the Noida Power Company, as indicated above, elected to procure power under the bidding frame work. During the competitive bidding process, Noida Power could seek for deviations in time only in line with the RFP process from the State Commission.

45. Fundamental feature found in the present case, as stated by the Appellant is that the procurer i.e. R2 is seeking to evolve its own procurement process which is contrary to both Section 62

(MoU route) and Section 63 (Bidding route) and the Statutory Framework.

46. According to the Appellant, once Noida Power (R-2) elected to procure 240 MW power through competitive bidding route under the Statutory Framework, the choices available to the procurer are limited to:

(a) Rejecting all the bids upon finding that bids were not aligned to prevailing market conditions.

Or

(b) Accepting the lowest bid and declaring the lowest bidder as successful bidder.

47. But in this case, it is pointed out by the Appellant, that the Noida Power chose to side-step the entire statutory framework including the Section III of the RFP dealing with Evaluation Criteria, by introducing an unqualified and a non participant third party that too after discovery of lowest bidder and after seeking adoption under Section 63 of the Act.

48. In the light of the above submissions made by the Appellant, it is appropriate to refer to the bid process under Section 63 of the Act which has been invoked by the Noida Power. The Bid process under Section 63 of the Act is different from normal procurement of goods. Unlike the stated objectives of Section 63 of the Electricity Act 2003 and the objectives of the

Government of India guidelines, all the other non statutory procurement process are driven to a sole objective of:

- (a) In cases of public sector or state procuring supply of goods or services from the private sector, securing lowest possible price from a credible party;
- (b) In case of auction of public assets in most of the cases securing maximum price for such sale. In some cases, some social objectives like coverage and roll out obligations may be the objective.
- (c) The Government of India has framed guidelines under Section 63 of the Act to comply with the principles specified in Section 61 of the Act. The Government of India guidelines contain the mandate to safeguard consumer interest as well as to encourage competition, efficiency, economical use of the resources. The stated objectives of the Government of India guidelines to strike a balance between transparency, fairness, consumer interest and viability.

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

- (a) Competitive bidding process under Section 63 must be consistent with the Government of India guidelines. Any deviation from the standard Request for Proposal

(RFP) and model PPA notified by the Government of India must be approved by the State Commission.

- (b) This process must discover competitive tariff in accordance with market conditions from the successful bid- consistent with the guiding principles under section 61 of the Act.
- (c) If the deviations are permitted by failing to safeguard the consumer interests as well as to promote competition to ensure efficiency, it will destroy the basic structure of the guidelines.

50. In the present case, the bid documents under Government of India guidelines adopted in the Request for Proposal (RFP) documents were filed before the State Commission and on the basis of those documents, the State Commission approved the bidding process. There were some stages creating/exhausting certain rights of both the procurer and bidders which have been established in this case. These stages in this case are as follows:

- (a) Electing the route of the competitive bidding process for procurement of power under Section 63 of the Act, the Noida Power filed RFP document and the draft PPA and obtained the approval of the State Commission.
- (b) Technically qualified bidders were shortlisted for the bid process on 3.2.2011.

- (c) The materials have been placed before the Evaluation Committee for its report. After evaluation the Committee forwarded its Report dated 5.4.2011, recommending the tariff quoted by the Appellant.
- (d) After accepting the Report of Evaluation Committee dated 5.4.2011, the Noida Power filed the petition on 7.4.2011 before the State Commission for adoption of the tariff quoted by the Appellant being the successful bidder.
- (e) The last stage is that such tariff discovered by competitive bid process under Section 63 must be adopted by the State Commission except when there is a sole bidder or when the evaluation of financial bid was not as per the prevailing market prices.

51. The important stage of the process is the selection of successful bidder from among the six qualified bidders. Clause 3.5.3 and 3.5.8 of the Request for Proposal (RFP) provide that the bidder quoting the lowest levelised tariff must be declared as successful bidder and the letter of intent has to be issued to the said bidder. The only exception to this mandate is that the procurer can reject all the bids, if the quoted tariff is not aligned to prevailing market prices.

52. In the light of the above factors, we have to analyse the issue.

53. The original stand taken by the Noida Power as mentioned earlier as referred to in its pleadings in the Petition filed before

the State Commission is praying for the adoption of the tariff quoted the Appellant on the basis of the valid reasons mentioned therein. The relevant extract of the pleadings in the Petition 741 of 2011 filed by Noida Power are as follows:

“11. The Evaluation Committee has submitted its report recommending the tariff given by the bidder, Essar Power Limited as being aligned to the market conditions. A copy of the Evaluation Committee report is attached hereto and marked as Annexure B.

12. In terms of the above bidding process, Essar Power Limited is the L-1 bidder which had offered to sell 200 MW (+20%) i.e. 240 MW to the Applicant at the levellised rate of Rs.4.0868/kWh at the delivery point. The tariff quoted by Essar Power Limited needs to be adopted in terms of Section 63 of the Electricity Act, 2003. The Applicant and Essar Power Limited will be executing the relevant documents upon adoption of the tariff by the Hon'ble Commission. The documents to be executed includes the Power Purchase Agreement to be signed between the Applicant and Essar Power Ltd, setting out the tariff and other terms and conditions strictly as per the bidding documents without any deviation. A copy of the Power Purchase Agreement to be executed between the Applicant and Essar Power Limited upon adoption of tariff is attached hereto and marked as Annexure ‘C’.....

“15. In the facts and circumstances mentioned above, the Applicant respectfully prays that this Hon'ble Commission may be pleased to:

(a) adopt the tariff of Essar Power Limited under Section 63 of the Electricity Act, 2003 to enable the Applicant to finalise and complete the Power Purchase Agreement with Essar Power for

purchase of 200 MW (+20%) i.e. 240 MW power effective April, 2014 on the terms and conditions of the bidding documents and as incorporated in the Power Purchase Agreement to be executed between the parties as per the approved bidding documents,”. {emphasis added}

54. This pleading as well as the prayer as referred to above would clearly indicate that specific stand taken by the Noida Power (R-2) was that the tariff quoted by Essar Power (Appellant) needs to be adopted in terms of Section 63 of the Act, since the said bidder has been declared as a successful bidder by Evaluation Committee and the tariff quoted by it is aligned to the market rate as certified by the Evaluation Committee.
55. The question arises now is this “whether the Noida Power could seek for interim directions through their interim Application from the State Commission to enable it to invite revised financial bids in exercise of the power under any of the clauses of the Request for Proposal (RFP) including 2.5 (b) (iii) to adopt the procedure which is not consistent with the Central Government’s guidelines even though Noida Power took a specific stand in their main pending petition that the tariff quoted by the Essar Power needs to be approved?”
56. To deal with this question, the developments which took place after filing of Petition 741 of 2011 dated 7.4.2011 by the Noida Power creating cause of action for the Noida Power to file the interim Application seeking for permission for deviating from the

process under Section 63 and for adopting the procedure which is not consistent with the Government of India guidelines have to be taken note of. The details of the said developments are found place in the interim application filed by Noida Power(R-2) on 27.4.2011. We will now refer to the relevant pleadings of the Noida Power in the said application showing the said developments :

“11. Subsequent to the filing of the Petition, the Applicant received a letter No.ACPL/NOIDA/114 dated 13th April, 2011 from Messrs Athena Chhattisgarh Power Limited (M/s. ACPL) proposing to supply power to the Applicant on long term basis.

12. Thereafter, the representatives of M/s. ACPL had spoken to Mr. R.C. Agarwala, the Chief Executive Officer of the Applicant herein when M/s. ACPL was advised that the procurement of electricity being under a Competitive Bidding Process, M/s. ACPL having not participated in the competitive bidding process, the Applicant was unable to discuss the matter with M/s. ACPL.

13. Thereafter, by letter No.ACPL/NOIDA/118 dated 16th April, 2011, M/s. ACPL had informed the Applicant that the delivery of power supply would commence from April, 2014.

14. In terms of the above letter, M/s. ACPL had offered to supply power to the Applicant on the identical terms and conditions as contained in the bidding documents pursuant to which Essar Power Limited and the other six bidders had submitted their respective bids, but at a price of Rs.3.667 per unit, which is well below the rate discovered through competitive bidding. M/s. ACPL had also agreed to all the terms and conditions as per the bidding documents.

....

....

16 (d) The offer received from M/s. ACPL was discussed with the Bid Evaluation Committee members. However, Shri. R.K Sharma, External Member of the Bid Evaluation Committee, stated that since, the aforesaid offer is an event subsequent to submission of the Bid Evaluation Report dated 05.04.2011, the Committee cannot consider the same, unless directed by the State Regulatory Commission to do so.

16 (e) The applicant is, therefore, placing the offer received from M/s. ACPL before the Hon'ble Commission for consideration in the larger consumer interest;"

57. The crux of the developments quoted in the interim Application is as follows:

- (j) After filing the main petition on 7.4.2011, Noida Power received a letter dated 13.4.2011 from Athena Power (3rd party) proposing to supply power for lesser price, there were some discussions between the Noida Power and 3rd party as indicated by this letter.
- (ii) On 16.4.2011, Athena Power, 3rd party sent another letter offering to supply power at the rate of Rs.3.667 per unit, which is lesser than the price quoted by the successful bidder. There were further discussions on this matter.
- (iii) Noida Power referred this to the External Member of the Evaluation Committee who did not incline to entertain the same stating that it is not advisable to consider the same, unless directed by the State Commission.

- iv) Hence, Noida Power filed the application dated 27.4.2011 before the State Commission to issue necessary directions on the strength of the offer for lesser price by 3rd party.

58. The above factors would reveal that the Noida Power had attempted by seeking for the above directions from the State Commission to subvert the entire competitive bidding process under Section 63 ignoring the various procedures contemplated in the the Government of India's guidelines and Request for Proposal (RFP). The following factors would be relevant for consideration of this aspect:

- (a) On 11.10.2010, Noida Power after obtaining the approval of the Request for Proposal (RFP), elected to procure power by resorting to competitive bidding process in accordance with the statutory Framework. Clause 2.5 (g), 2.9.2 and 3.5.9 of the Request for Proposal (RFP) ruled out any negotiation with any 3rd party who did not participate in the bidding process. Thus Noida Power foreclosed its rights to make negotiations with other parties.
- (b) Admittedly, Athena Power, the 3rd Party did not participate in the competitive bidding process. By the interim application dated 27.4.2011 before the State Commission, the Noida Power introduced an unqualified extraneous 3rd

party in the competitive bidding process envisaged under Section 63 of the Act read with Central Government's Guidelines ignoring the various clauses of Request for Proposal (RFP). It is noteworthy to refer to the following clauses:

- (i) Clause 2.1.2.4 of the Request for Proposal provides that the bidder shall not submit more than one bid.
- (ii) Clause 5.15 of the Guidelines provides that the bidder who quoted the lowest levelised tariff shall be considered for award.
- (iii) Clause 3.5.3 of Request for Proposal provides that the bidder with lowest tariff shall be declared as successful bidder
- (iv) Clause 3.5.8 Request for Proposal envisages that the letter of intent shall be issued to such a successful bidder.

59. When Noida Power chose to file its petition on 7.4.2011 seeking for the adoption of the tariff quoted by the Appellant, after accepting the Evaluation Committee's report certifying the Essar Power as a successful bidder under clause 3.5.3 of the Request for Proposal (RFP), the Noida Power cannot be

permitted to act in any manner other than clause 3.5.8 to issue letter of intent to Essar Power. As mentioned earlier, the only exception available to the Noida Power (R-2) under clause 3.5.12 of RFP was that it could have rejected the bid of the quoted tariff if it was found to be not aligned with the market conditions. In the present case, the same had not been done in view of the fact that the Evaluation Committee declared that the rate quoted by the Essar power was aligned with the market rates.

60. Having declared on oath through the affidavit filed before the State Commission that the Essar Power was a successful bidder and sought its adoption by the State Commission, the Noida Power was obliged by its commitment i.e. to procure power from the successful bidder at the rate discovered through the competitive bidding process under the Central Government's Guidelines.
61. Having not exercised that power under clause 3.5.12 of the Request for Proposal (RFP) and having exhausted the right of rejection of all the bids under clause 3.5 (b) and 2.15 of the Request for Proposal (RFP), the said power or right cannot now be exercised after the said stage is over.
62. The said stage had crossed when the bid Evaluation Committee found Appellant's bid a successful bid which is aligned to the market price on 5.4.2011 and when the Noida power accepted the said recommendation by the Committee and filed a Petition

on 7.4.2011 seeking adoption of tariff under Section 63 of the Act.

63. Having taken such a final and definite stand, the Noida Power cannot now exercise its right to negotiate with another party by way of deviation. In fact, Noida Power in the Petition No.741 of 2011 categorically declared and prayed in the petition that the tariff quoted by Essar Power needs to be adopted and gave the undertaking that it will be ready to execute the necessary documents after adoption of tariff by the State Commission.
64. As indicated above, on 27.4.2011, the Noida Power filed an interim application before the State Commission seeking direction with regard to the subsequent offer received from Athena Power, 3rd party during the pendency of the proceedings in Petition No.741 of 2011. Admittedly, this interim application was filed without informing the six bidders including the Appellant.
65. It has to be stated in this context, that the introduction of Athena Power, 3rd party for fresh negotiation , during the pendency of the proceeding under Section 63 of the Act, is not permissible as it is outside the scope of competitive bidding process under Section 63 of the Act. As a matter of fact, no clause in the Request for Proposal (RFP) or in the Government of India guidelines permits the same. It is noticed that the materials available on record would indicate that there were in

fact negotiations between the Noida Power and 3rd party, subsequent to the filing of Petition No.741 of 2011 before the State Commission and the negotiations held between them through the letters sent by the Athena Power to Noida Power on 13.4.2011 and 16.4.2011 in which Athena Power had specifically stated that it had learnt that the prices discovered by the bidding process in the competitive bidding process was nearly Rs. 4 per unit and Athena Power propose to supply power to Noida Power on Long Term Basis on a lesser price of Rs.3.667 per unit. On this basis, there were some discussions and then the Noida Power again approached the Evaluation Committee for approval of the same.

66. We are at a loss to understand as to how this sort of negotiation could take place between the Noida Power and Athena Power during the pendency of the proceedings filed by the Noida Power praying for the adoption of the tariff quoted by the Appellant even without any intimation to the State Commission. There can not be an answer for the question as to who has authorized to have such negotiation with the 3rd party. Virtually by way of interim application filed by the Noida Power as part of the proceedings for adopting Essar Power bidding under Section 63, an attempt has been made by the Noida Power to reopen the concluded bid process.
67. Any negotiation under statutory competitive bidding process can take place only prior to the Noida Power declaring Essar

Power as a successful bidder by filing petition under Section 63 of the Act. Once a petition has been filed on the recommendation of the Evaluation Committee, it is not open for the Noida Power to enter into any negotiation with the 3rd party to reduce the tariff which has been done in this case in deviation of the bid process. As a matter of fact clause 2.5 (g), 2.9.2 and 3.5.9 of the Request for Proposal (RFP) specifically lay down that the tariff quoted by the bidders cannot be altered or negotiated.

68. When such being a case, it is quite strange on the part of the Noida Power after filing the Petition seeking for adoption of tariff in the competitive bidding process, to choose another route by resorting to negotiate with the 3rd party, and in the said negotiation, the 3rd party assured that it would supply power on Long Term basis for a lesser rate than the rate quoted by the successful bidder particularly when the State Commission has seized of the matter regarding the adoption of the said tariff.
69. Now the Noida Power (R-2) relies upon the negotiated price quoted by Athena Power, a non participant in the bid process to seek for approval of the same from the State Commission that too under Section 63 of the Act.
70. The following questions would arise in this context.
 - (a) Can this be done under section 63 of the Act?
 - (b) If this can not be done under Section 63 of the Act, how can the Noida Power adopt this illegal procedure?

(c) If this is the illegal procedure, how can the State Commission permit them to adopt this procedure?

71. The Appellant has challenged the impugned Order dated 30.5.2011 on the basis of the main ground relating to the sanctity and confidentiality of the bidding process which reached the final stage of filing a Petition by the Noida Power (R-2) in Petition No.741 of 2011 after accepting the final opinion and recommendation of Evaluation Committee. Those specific opinions and recommendations given by the Evaluation Committee in its report are as follows:

- (a) The Bid process was competitive with six bidders;
- (b) The price is discovered by the Evaluation Committee through the transparent process of bidding in accordance with the guidelines of the Central Government.
- (c) This price is aligned to the market price.
- (d) Essar Power is declared as a lowest, levelised bidder and it is recommended that its rate may be accepted as the Essar Power is the successful bidder.

72. The Government of India guidelines would not allow introduction of any 3rd party in competitive bidding process who did not participate in the bidding process. The Noida Power having elected to procure power under Section 63 read with

Government of India guidelines and having filed a petition for adoption of tariff after declaring Essar Power, the Appellant as a successful bidder on the basis of the Evaluation Committee's recommendations, it is not open for the Noida Power to introduce extraneous party namely Athena Power into the competitive bidding process proceedings in contravention of the Government of India guidelines as well as the Request for Proposal (RFP). In the absence of any valid reason to reject the bid quoted by the Appellant or in the absence of any valid ground to reject the petition filed by Noida power seeking for the prayer of adopting the tariff of the Essar Power after declaring that its bid price is aligned to the market price, the Noida power cannot be permitted to adopt a different route which is not contemplated under section 63 of the Act.

73. It is relevant to point out in this context that the Noida Power has already filed the draft PPA initialled by the Appellant as an Annexure to the Petition No.741 of 2011, in which Noida Power gave the undertaking that it will be executing the relevant documents after adoption of the tariff by the State Commission in favour of Essar Power.
74. Admittedly, Athena Power, being a 3rd party, cannot be considered to be a qualified bidder especially when it did not participate in the bidding process. As such, the Athena Power is outside the zone of the consideration. As a matter of fact, the

Appellant through its representative before the impugned Order was passed, appeared and raised the objection before the State Commission for the prayer of Noida power (R-2) for negotiating with the 3rd party who quoted the price lower than the bid by Essar Power and for using its rate for predatory pricing.

75. According to the Appellant, if this is to be permitted, the bidding process which had already completed, must be scrapped and thereafter the proposal of Athena Power may be considered as part of the bilateral PPA which will be subject to tariff determination by the State Commission under Section 62 and in that event it cannot be construed to be the determination of tariff under Section 63 of the Act.
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 PetitionNo.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. In view of the fact that the bid documents and the Request for Proposal documents on the basis of the Government guidelines as well as the bid process had already been approved by the State Commission before inviting the bids and since Evaluation Committee had already concluded the bid process by declaring the Essar Power as a successful bidder and in view of the fact that on that basis, the Noida Power filed a Petition before the State Commission for adoption of said tariff, the above process

has established certain rights of the parties. Those rights are these:

- (a) The procurer has a right to claim for adoption of the tariff discovered through the competitive bidding process under Section 63 of the Act by the State Commission.
- (b) Once qualified bidders were short listed on the basis of non-financial component of the bids by the bidders, no new participants could be introduced.
- (c) The process should have been culminated into the signing of the PPA when the evaluation of the financial bid by the Evaluation Committee had shown that bid of lowest bidder was as per the prevailing market prices.
- (d) Unless the said bidding process is scrapped, the Noida Power (R-2) cannot go for bilateral PPA.

80. On the above aspects, we would now refer to relevant clauses of Request for Proposal. Clause 3.5.1 of the Request for Proposal would provide as follows:

“3.5.1 Bids qualifying in Step III shall only be evaluated in this Stage”.

81. In the present case, the bid qualification evaluation process was over on 3.2.2011. The next stage of the process under exclusive control of the procurer is the selection of successful bidder from amongst the six qualified bidders. The Request for

Proposal (RFP) requires that the lowest levelised bidder must be declared as a successful bidder. The letter of intent must be issued to the said successful bidder. Relevant clause of clause 3.5.3 and 3.5.8 of the RFP are reproduced below:

“3.5.3 The Bidder with the lowest levelized Tariff shall be declared as the successful bidder for the quantum of power (in MW) offered by such Bidder in its Financial Bid.

3.5.8 The Letter(s) of Intent shall be issued to all such Successful Bidder(s) selected as per the provisions of this Clause”

82. At this stage, the successful bidder must have been declared and the letters of intent should have been issued to the successful bidder. The only exception to this mandate is that the procurer i.e. Noida power could have rejected all bids if the tariff quoted by all of them was not aligned to the prevailing market prices.
83. This stage had been crossed on 5.4.2011 itself when the Bid Evaluation Committee found the Appellant as a successful bidder whose bid was comparable to the prevailing market rates. In addition to this, the next stage has come when the Noida power filed a Petition on 7.4.2011 declaring the Essar Power as a successful bidder on the strength of the Evaluation Committee recommendations seeking adoption of its bid under Section 63 of the Act. At this stage i.e. after filing of petition before the State Commission for adoption of tariff, the exception

available to procurer in the form of rejection of bids had also been exhausted.

84. As indicated above, the said petition had been filed along with the enclosure containing the Draft PPA indicating “ready to sign” to be executed pursuant to the tariff determined through a transparent and international competitive bidding. In other words by filing the Petition No.741 of 2011, the Noida Power on oath declared the Essar Power, the Appellant as a successful bidder.
85. Having crossed these stages, taking a final leap, the Noida Power cannot thereafter reject the bid of successful bidder in accordance with clause 3.5.12 of the Request for Proposal (RFP). In other words, the Noida Power foreclosed its right to reject the said bid to enable the Noida Power to negotiate with any 3rd party. In this case, the Noida Power categorically stated in the Petition that the tariff quoted by Essar Power needs to be adopted and it will be executing the relevant documents after adoption of tariff by the State Commission. Therefore, the said bid cannot be rejected at this stage. Rightly so, the power to reject the bids had not been exercised by the Noida Power Limited (R-2).
86. On the other hand, the Noida Power filed an interim application on 27.04.2011 during the pendency of the main petition for consideration of the adoption of tariff in favour of Essar Power

before the State Commission through this interim application the Noida Power (R-2) had sought for fresh consideration of the offer received from Athena Power in the proceedings in Petition No.741 of 2011. This introduction of Athena Power, as a 3rd party, is not permissible within the Section 63 of competitive bidding process. Similarly, neither the Request for Proposal (RFP) nor the Government of India guidelines permits the same. By way of interim application filed by Noida Power as a part of the proceedings for adopting Essar Power bid under Section 63, the Noida Power has now sought to re-open the concluded bid process. Any negotiation under a statutory competitive bidding process must be done only prior to the declaration of Essar Power as a successful bidder. Once a Petition had been filed before the State Commission taking a definite stand on the recommendations of the Evaluation Committee, it is not open for the Noida Power to enter into any negotiation with the 3rd party being non participant in the bidding process under the garb of reducing the tariff. That apart, clause 2.5 (g), 2.9.2 and 3.5.9 of the Request for Proposal (RFP) specifically lay down that the tariff quoted by the bidders cannot be altered or negotiated. These clauses are as under:

“Clause 2.5 (g) : The Procurer may, at its sole discretion, ask for additional information/ document and/ or seek clarifications from a Bidder after the Bid Deadline, inter-alia, for the purposes of removal of inconsistencies or infirmities

in its Bid. However, no change in the substance of the Quoted Tariff shall be sought or permitted by the Procurer.

“Clause 2.9.2 : *The Procurer may solicit the Bidders’ consent for an extension of the period of validity of the Bid. The request and the response in this regard shall be in writing. In the event any Bidder refuses to extend its Bid validity as requested by the procurer, the Procurer shall not be entitled to invoke the Bid Bond. A Bidder accepting the Procurer request for validity extension shall not be permitted to modify its Bid and such Bidder shall, accordingly, extend the validity of the Bid Bond as requested by the procurer and further undertake not to participate in any bid process as per Clause 2.1.2.4 within seven (7) days of such request, failing which the Bid shall not be considered as valid.*

“Clause 3.5.9 : *There shall be no negotiation on the Quoted Tariff between the Authorized Representative/Procurer and the Bidder (s) during the process of evaluation.*

87. Admittedly, the Athena Power had not participated in the bidding process there by it has not become qualified bidder as on 3.2.2011 and it has not become technically qualified till now as the relevant details of the information required to evaluate Athena Power’s offer and capability to supply power have not been furnished. Let us now quote the required details and the documents to be furnished as per the RFP. These are:

- (a) The details of location of the project
- (b) The details of the land
- (c) The number of existing/proposed units and installed capacity

- (d) The nature of primary fuel
- (e) The details of Fuel supply Agreements
- (f) The information as to whether the Fuel available is sufficient to meet the requirement of the plant
- (g) Water requirements of the project
- (i) Environmental and Forest Clearance status
- (j) Net worth of the Bidding Company's financial capacities
- (k) Escalable and Non escalable capacity charges
- (l) Escalable and Non-escalable energy charges
- (m) Escalable and Non-escalable inland charges
- (n) Escalable Transmission charges
- (o) Interconnection Point,
- (p) Injection Point and
- (q) State Transmission Utility (STU) charges

88. Admittedly, these details have not been furnished by Athena Power. This fact which has been brought to our notice by the Appellant has not been disputed by the Noida Power (R-2). On the other hand, the Noida Power (R-2) submits that Athena Power had qualified in the competitive bidding process held by the Uttar Pradesh Power Corporation Limited (UPPCL). This plea is quite strange as this is not material fact which can be considered to evaluate the Athena's capability to supply power which is quite extraneous to the present bid process.

89. Further it is noticed that in the letter sent by the Athena Power dated 13.4.2011, to the Noida Power, the Athena Power has specifically mentioned that Power will be supplied to Noida Power from the Coal obtained through coal linkage sanctioned by Ministry of Coal. Contrary to this, the Athena Power was supplying power to Uttar Pradesh Power Corporation (UPPCL) from the coal available from the captive coal mines. The disclosure of this fact, which is not disputed, would belie the claim of the Noida Power that the technical parameters of Athena Power are the same as its bid in UPPCL's Case-1 bidding and therefore it could be considered as qualified bidder.
90. During the hearings, the Noida Power (R-2) has submitted that the escalable and non escalable components are not necessary for comparing the bids. This statement of Noida Power is totally misconceived. As a matter of fact, the Government of India guidelines which mandate various components and each of the components would establish that the variations in such components are material in the bid evaluation process.
91. Let us now refer to the relevant clause of Government of India guidelines. As per clause 4.1 of the guidelines, the separate capacity of energy components of tariff shall be tendered in the bid which is as follows:

“4.1 : For procurement of electricity under these guidelines, tariff shall be paid and settled for each payment period (not

exceeding one month). A multi-part tariff structure featuring separate capacity and energy components of tariff shall ordinarily form the basis for bidding. However, for medium term procurement the procurer may, at his option, permit bids on a single part basis, and the same shall be clearly specified in the Request for Qualification (RFQ/Request for Proposal (RFP))”.

92. The clause relating to capacity charges indicates the feature separate non escalable and escalable components. Clause 4.4 would provide as under:

“Capacity Charges -4.4 : *Capacity charge shall be paid based on actual availability in kwh, as per charges quoted in Rs/kwh and shall be limited to the normative availability (or normative capacity index for hydro electric stations). The normative availability shall be aligned to the level specified in the tariff regulations of the Central Electricity Regulatory Commission (CERC) prevailing at the time of the bid process, and shall be computed on annual basis. The capacity component of tariffs may feature separate non-escalable (fixed) and escalable (indexed) components. This indices to be adopted for escalation of the escalable component shall only be Wholesale Price Index (WPI) or Consumer Price Index (CPI) and the Base year shall be specified in the bid document”.*

93. In the bid evaluation, ration of maximum and minimum capacity charges including the escalable and non-escalable component shall not be less than 0.7. This is provided under clause 4.8 of the guidelines which is as follows:

“Clause 4.8 : *Ratio of minimum and maximum capacity charge for any year shall not be less than 0.7 to avoid*

excessive front loading or back loading during the period of contract”.

94. Where energy charge is payable it will be related on base energy charge specified in the bid with suitable provisions of escalation. This is provided in clause 4.11 of the guidelines as under:

“Energy Chares: 4.11 : *Where applicable, the energy charges payable during the operation of the contract shall be related on the base energy charges specified in the bid with suitable provision for escalation. In case the bidder provides firm energy charge rates for each of the years of the contract term, the same shall be permitted in the tariffs. In other cases, the energy charges shall be payable in accordance with fuel escalation index used for evaluation of the bid. In case of bids based on net heat rate, the price of fuel shall be taken as stipulated under para 4.2. However, the fuel escalation will be subject to any administered price mechanism of Government or independent regulatory price fixation in case of fuel produced within the country. The applicable indices for various fuels shall be identified in the RFP documents”*

95. The rate for discounting the combination of fixed and variable charges for computing the levelised tariff shall be as notified by the Central Commission (CERC) keeping in view prevailing rate of 10 years Government of India securities. This rate is to be specified in the Request for Proposal (RFP). The relevant clause 5.6 (iv) of the Government of India guidelines which is reproduced below:

“Clause 5.6 (iv) Bid Evaluation methodology to be adopted by the procurer including the discount rates for evaluating the bids :

The bids shall be evaluated for the composite levelised tariffs combining the capacity and energy components of the tariff quoted by the bidder. In case of assorted enquiry for procurement of base load, peak load and seasonal power, the bid evaluation for each type of requirement shall be carried out separately. The capacity component of tariffs may feature non-escalable (fixed) and escalable (indexed) components. The index to be adopted for escalation of escalable component shall be specified in the RFP. For the purpose of bid evaluation, median escalation rate of the relevant fuel index in the international market for the last 30 years for coal and 15 years for gas/LNG (as per CERC’s notification in (vi) below) shall be used for escalating the energy charge quoted by the bidder. However, this shall not apply for cases where the bidder quotes firm energy charges for each of the years of proposed supply, and in such case the energy charges proposed by the bidder shall be adopted for bid evaluation. The rate for discounting the combination of fixed and variable charges for computing the levelised tariff shall be the prevailing rate for 10 year GOI securities”

96. The above details would indicate that the Athena Power should have submitted its bid along with other bidders giving all the details to the Noida Power to qualify itself to participate in the bidding process but admittedly these details have not been furnished. In fact, with these letters dated 13.4.2011 and 16.4.2011, sent by Athena Power, the Noida Power approached the Evaluation Committee for the evaluation of Athena Power’s rate but Evaluation Committee rightly refused to entertain the

said request mainly on the reason that the Petition filed by Noida Power praying for the adoption of the tariff quoted by Essar Power was pending before the State Commission. Having failed in their attempt to get the approval of the Evaluation Committee, the Noida Power approached the Commission and filed an interim application on 27.4.2011 seeking for the different relief.

97. This issue can be looked at from yet another angle. To deal with this issue, we have to ask a pertinent question which is as follows:

Whether the Athena Power, who had not participated in the bid process, had now submitted as a bid, along with other bidders, exactly the same details as given in its letters dated 13.4.2011 and 16.4.2011 to Noida Power, and whether the said 'bid' could have been considered as sufficient material so as to treat it as responsive bid and technically qualified by the Evaluation Committee? The emphatic answer would be "NO". Having not furnished the details as required in the bid process, the Evaluation Committee would have rejected the Athena's 'bid' as technically not qualified and unresponsive. If this offer containing the insufficient particulars was liable to be rejected by the Evaluation Committee at the initial stage itself then it cannot be accepted at a final stage as well.

98. Further, we are at loss to understand as to how the State Commission, while it is in the process of considering the question of adoption of tariff quoted by the Essar Power as

prayed by the Noida Power (R-2) in its main petition, could entertain such an interim application virtually praying for the deviation from the bidding process already completed in order to have negotiation with the parties on the basis of the rate quoted by the 3rd party. The State Commission should have dismissed the interim application either on the ground that the prayer in the application is not in aide of the prayer in the main petition or on the ground that the State Commission cannot entertain the said application when the State Commission was already in the process of deciding the merits of the main prayer in the main petition under Section 63 of the Act. This procedure has not been adopted by the State Commission.

99. The main thrust of the argument advanced by the Appellant is with reference to the sanctity attached to bid process. We will now deal with the same in detail. While evaluating the financial bid of the six bidders who participated in the competitive bidding process initiated by Noida Power under the bidding guidelines in this case, the following steps were taken:
- (a) Bid Evaluation Committee verified the bid security or bid bond submitted by each of the six bidders on 3.2.2011.
 - (b) Bids were checked for compliance of the requirements as contained in Request for Proposal to qualify the bidders for financial evaluation.

- (c) The qualification requirements of all six bidders in respect of land, Fuel and Water were evaluated on 17.2.2011 to qualify for financial evaluation.
- (d) The outcome of this qualification process was that all six bidders were declared as technically qualified during the financial bid opening on 18.2.2011.
- (e) Thereupon, the Evaluation Committee having evaluated the bids of all the six bidders on the basis of levelised tariff, determined considering the escalable and non-escalable parameters given in the respective bids and Escalations Factors for the relevant time frame notified by the Central Commission and declared the Appellant as successful bidder having quoted the lowest levelised tariff. On the basis of this conclusion, the Evaluation Committee sent its report dated 5.4.2011. In this report, the Evaluation Committee has made the following recommendations:
 - (i) Essar Power has offered 240 MW including plus 20% of the capacity requisitioned by Noida Power at the lowest levelised tariff or Rs.4.0868 per unit at the delivery point.
 - (ii) Noida Power is required to accept the offer for the quantity offered by the successful bidder without making any adjustments
 - (iii) Essar Power with the lowest levelised tariff is declared as a successful bidder as per clause 3.5.3

of the Request for Proposal. Therefore, the offer of Essar Power Limited to Noida Power may be accepted.

(iv) It is certified that the bid evaluation has been done in conformity with the provisions of the Request for Proposal (RPF) and the requirements specified under the Government of India guidelines.

(f) Based on the report of the Evaluation Committee which declared the Essar Power as a successful bidder, the Noida Power filed petition before the State Commission on 7.4.2011 for adoption of the tariff quoted by the Essar Power.

100. As indicated above, the levelised tariff has been calculated by the Evaluation Committee for comparing the bids of all the qualified six bidders after taking into consideration the escalable and non-escalable parameters as submitted by the bidders in the format prescribed by the procurer after subjecting these parameters to the Escalation Factors for relevant time frame as notified by the Central Commission.

101. We have already indicated that, the Athena Power failed to provide information as per the requirements under Bid documents. As such, the financial bid of Essar Power cannot be compared with the levelised tariff quoted by Athena Power as Athena Power had not submitted escalable and non-escalable

factors necessary for evaluating and calculating the levelised tariff of the bids as per the format prescribed in the RFP by Noida Power. Further the letters dated 13.4.2011 and 16.4.2011 submitted by the Athena Power also did not contain any information with regard to availability of land, water and coal forest clearances etc. In the absence of these details, the offer of Athena Power could not have been considered as responsive by the Evaluation Committee and would have been rejected at 1st Stage of Technical Evaluation itself.

102. Thus, the bid of Athena Power cannot be accepted or considered as a qualified bidder on account of the following:

- (a) The zone of consideration was foreclosed to all entities including Athena Power who chose not to participate in the bidding process initiated by Noida Power on 11.10.2010.
- (b) Noida Power cannot negotiate with the third party, after filing petition No.741 of 2011 on 7.4.2011 for adoption of tariff submitted by successful bidder i.e Essar Power.
- (c) Even assuming that the offer of Athena Power can be considered at this stage, the same is liable to be rejected as being non-responsive on the basis of the following factors:

- (i) Athena Power has failed to furnish technical details in order to qualify for evaluation of financial bid i.e. Format 4.1 to 4.12 of the RFP.
- (ii) The offer of Athena Power does not specify escalable and non-escalable factors which were necessary for evaluating the levelised tariff by the Evaluation Committee.

103. As mentioned above, when the Athena Power proposal was sent to the Evaluation Committee for its opinion, the Evaluation Committee rightly refused to entertain the offer of Athena Power in the light of the fact that the Petition for adoption of tariff had already been filed and had been pending before the State Commission. Only thereafter, the Noida Power filed the application terming the application as interim application pending consideration of main Petition in 741 of 2011.

104. This interim application filed by the Noida Power is virtually an attempt to re-open the already completed bid process by introducing an extraneous 3rd party after evaluation of financial bids and declaration of the successful bidder. It is strenuously contended that it ought to have been rejected since the effect of the said interim application would amount to :

- (a) Render the competitive bidding process which is already completed, nugatory and

- (b) Permit a party, which chose not to participate in bidding, to resort to predatory pricing and under bid all other bidders, vitiating the transparent competitive bidding enshrined in the Bidding guidelines which was already completed.

105. The Learned Counsel for Appellant contended that once it has been selected as successful bidder and the same had been communicated to it, the contract for supply of power is concluded and the signing of PPA became a mere ministerial formality.

106. On the other hand, it is contended by Noida Power (R-2) that as there was no communication to the Essar Power by the Noida Power about its acceptance of the offer made by Essar Power, the contract could not be construed to be concluded contract and therefore, the Noida Power has got a right to have negotiations with any other party with reference to lesser prize quoted by the 3rd party and seek for revised bids after getting the suitable directions from the State Commission. This contention, on this aspect, in our view is not tenable in view of the factual background of this case.

107. Before proceeding into the factual background of the case in respect of this aspect, let us now refer to the meaning of the term “communication” as provided in the Indian Contract Act. Section 3 of the Indian Contract Act, 1872 is relevant in this

regard. It provides that acceptance of the proposal can be communicated by way of an act or omission or conduct by a party by following methods:

- (a) Either intended to communicate the acceptance;
- (b) Or having the effect of communicating the acceptance;

108. Section 3 of the Indian Contract Act, 1872 is reproduced below:

“3. Communication, acceptance and revocation of proposals:

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.

109. In the light of the above meaning as contemplated under Section 3 of the Contract Act, let us now see the factual background:

- (a) Acceptance of the bid of Essar Power is completed once Noida Power filed the petition under Section 63 of the Act on 7.4.2011 before the State Commission.
- (b) Even though in this petition under Section 63 of the Act, no notice was issued to the Essar Power, it is not disputed that the Petition which was entertained on 7.4.2011 by the State

Commission was placed on the website of the State Commission for the perusal of the public. Thus the petition filed by the Noida Power for acceptance of tariff was put in the 'public domain'.

- (c) According to the Appellant on 18.5.2011, the Appellant on perusal of the Website of the State Commission came to know about the filing of the petition by Noida Power for acceptance of the tariff quoted by the Essar Power on 7.4.2011. When it learnt about the filing of the another interim application, the Appellant appeared before the Commission through its representative on 20.5.2011 and objected to the prayer made by the Noida Power in the interim application filed on 27.4.2011 seeking for the introduction of the 3rd party. In addition to that, the Appellant also filed a petition on 25.5.2011 for impleading itself as a Respondent in these proceedings to enable it to oppose the prayer in the interim application by filing counter affidavit. This is also not disputed.

110. It is also not disputed that till the date of the said interim application dated 27.4.2011, the Noida Power has not revoked its acceptance of the offer by Essar Power. Thus, the acceptance is clearly established. In the light of the above factual background, we have to now see whether the said acceptance of the offer of the Essar Power has been communicated to the Essar Power or not? It is note worthy at this stage to quote all the relevant provisions dealing with this

aspect. They are the section 3, 4 and 8 of Indian Contract Act 1872 which are relevant. We will again quote Section 3 along with section 4 and 8 of the Act:

“3. Communication, acceptance and revocation of proposals:

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. Communication when Complete: *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;

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; as against the person to whom it is made, when it comes to his knowledge.

Section 8: Acceptance by performing conditions, or receiving consideration:

Performance of the conditions of proposal, for the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal”

111. The perusal of these Sections would indicate that by the conduct of the parties, we can find out whether the Appellant has been communicated or the Appellant is deemed to have been communicated of the acceptance of the offer. Let us now see the aspect of the conduct of the parties.
112. In the present case, the Appellant claims that it came to know of the acceptance of the offer by the Noida Power after they filed the petition praying for the adoption. According to the Appellant, the pendency of the said petition filed by Noida power before the Commission came to be known to it on 18.5.2011 when it happened to see the Website of the State Commission. That apart, the Appellant appeared before the State Commission on 20.5.2011 and made representation with regard to the petition as well as the application filed by Noida power in the said proceedings only after it had known about the acceptance of the Noida Power through the petition filed before the State Commission, That apart, the Appellant filed its impleading petition and opposed the move of the Noida Power attempting to go back from the acceptance.
113. In view of the above, there is no substance in the contention of the Noida Power that there was no communication of the acceptance made by the Appellant.

114. Let us now refer to the relevant extract of the directions given by the State Commission in the impugned Order dated 30.5.2011 which is said to be in favour of the Noida Power in respect of the introduction of 3rd party:

“11. Shri M G Ramchandran, Advocate of the Petitioner stated that as per the Contract Act, 1872, the contract comes into existence only after the acceptance of the offer and in this case as the acceptance has not been given so far, there would not be any consequence under the Contract Act. Regarding the CVC guidelines, he submitted that negotiations have been permitted but only with L-1 bidder.

12. The CVC guidelines are required to be examined further. For this purpose the details of CVC Order dated 25.10.2005 is reproduced below:

(i) There should not be any negotiations. Negotiations if at all shall be an exception and only in the case of proprietary items or in the case of items with limited source of supply. Negotiations shall be held with L-1 only. Counter offers tantamount to negotiations and should be treated at par with negotiation.

(ii) Negotiations can be recommended in exceptional circumstances only after due application of mind and recording valid, logical reasons justifying negotiations. In case of inability to obtain the desired results by way of reduction in rates and negotiations prove infructuous, satisfactory explanations are required to be recorded by the Committee who recommended the negotiations. The Committee shall be responsible for lack of application of

mind in case its negotiations have only unnecessarily delayed the award of work/contract”.

13. In a scenario as mentioned above, The Commission contemplates that the Procurer is fully authorized to take any such measure in his sole discretion as may be deemed fit as per the provision made under clause 2.5 (b) (iii) of the standard document of Request of Proposal (RFP) for procurement of power through Case 1 bidding as per guidelines of Government of India. In view of this, the Commission directs the Petitioner to take necessary measures in this regard as per the provision made under afore mentioned clause 2.5 (b) (iii) of the standard document of Request of Proposal (RFP)”. {emphasis added}

115. Perusal of the above observations and directions made and issued by the State Commission to the Noida Power would indicate that some of the important aspects have not been taken into account of the State Commission. They are as follows:

- (a) The State Commission in the impugned Order has not made any reference to the pending main petition No.741 of 2011 for adoption of the tariff quoted by the Appellant and while ignoring the same, this direction had been issued in the impugned Order dated 30.5.2011.
- (b) The directions issued to the Noida Power to take necessary measures as per the provisions in clause 2.5 (b) (iii) of the Standard Document of Request for Proposal (RFP) to enable the party to have fresh negotiation with the parties on the basis of the tariff quoted by the 3rd party would nullify the effect of the main prayer for adoption of tariff quoted by the Appellant made in the main petition No.741 of 2011.

- (c) In the impugned Order, the State Commission did not consider the question as to whether 2.5 (b) (iii) of the Request for Proposal would at all apply at the last stage of this case when the petition for adoption of the tariff quoted by the Appellant was pending under Section 63 of the Act before it.

116. In Order to get a clarification on the above infirmities, we have asked the State Commission to file their reply. Accordingly, they filed the reply in the form of written submission. The shocking feature is that the State Commission in its reply filed on 14.10.2010 created further confusion in the matter instead of giving clarifications on the above aspects. In its written submissions, the State Commission has stated as follows:

- (a) Through the impugned order, it has not issued any interim direction as claimed by the Appellant;
- (b) It has not permitted Noida power for any deviation from the bid process;
- (c) It has not directed the adoption of the tariff.

117. The wordings contained in the written submission filed by the State Commission would reveal that the stand of the State Commission is that it had not passed any interim direction as claimed by Respondent as well as the Appellant, but passed the final Order both in the Main Petition No. 741 filed on 7.4.2011 as well as in the interim application dated 27.4.2011.

This is quite contrary to the plea taken by the Noida Power. According to the Noida Power, the State Commission permitted and directed it to get revised quotes from other parties, with reference to the rates quoted by Athena Power and that thereafter it could approach the Commission to adopt the tariff of the person who has offered to supply under a levelised lower tariff. But, the State Commission denies this statement stating that it has never given such a direction. However, the fact remains that an impression had been created in the minds of the Noida Power that such permission had been granted and only on that basis, they issued letter dated 9.6.2011. According to the State Commission, Noida power has not understood the Order correctly. This appears to be strange. If no such direction has been given in the impugned Order, as claimed by the State Commission, it is not clarified as to why the State Commission has to direct and observe that the Noida Power could invoke the powers under Section 2.5 (b) (iii) of the RFP which is contrary to the main prayer in Petition No. 741 of 2011 filed for adoption of Tariff under Section 63 of the Act.

118. The State Commission is required to act consistent with the scheme and objective of the Section 63 as well as other provisions of the Act, 2003. It is settled law that when a statute vests power in the authority to be exercised in a particular manner, then the said authority has to exercise it only in that manner provided in the Statute and not otherwise. The State

Commission has thus acted beyond its jurisdiction in issuing the directions in the Order dated 30.5.2011.

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.

120. This Tribunal has already held in the decisions referred to above that while invoking the Section 63, the State Commission has only following two courses to follow:

(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.

121. Instead of adopting either of these two courses, the State Commission has resorted to follow another course by passing an Order directing the Noida Power to adopt the measures as it may deem fit as contemplated under clause 2.5 (b) (iii).

122. Yet another aspect has to be referred to at this juncture. The State Commission, while directing the Noida Power to adopt the measures contemplated under clause 2.5 (b) (iii) of the Request for Proposal, it has failed to consider the question as to whether such a course could be adopted by the State Commission to direct the Noida Power to invoke the powers under clause 2.5 (b) (iii) in this case at this stage. On going through the Request for Proposal document as a whole, it is evident that Noida power can be directed to exercise option under Clause 2.5 (b) of the RFP only in the following two circumstances:

(a) Where the bid of the successful bidder is rejected

Or

(b) Letter of Intent issued to such successful bidder is cancelled.

123. Admittedly, both these situations have not arisen in the present case. Without considering this question with regard to the applicability of clause 2.5 (b) in the present case, the State Commission has blindly directed the Noida Power to take necessary measures under clause 2.5 (b) (iii) of the Request for

Proposal. Let us reiterate the relevant portion of the said directions in the impugned Order:

“In a scenario as mentioned above, The Commission contemplates that the Procurer is fully authorized to take any such measure in his sole discretion as may be deemed fit as per the provision made under clause 2.5 (b) (iii) of the standard document of Request of Proposal (RFP) for procurement of power through Case 1 bidding as per guidelines of Government of India. In view of this, the Commission directs the Petitioner to take necessary measures in this regard as per the provision made under afore mentioned clause 2.5 (b) (iii) of the standard document of Request of Proposal (RFP)”.

124. The State Commission in the impugned Order has not considered as to whether these two circumstances mentioned above were present or not. When the two circumstances referred to in the above paragraphs are absent, the State Commission cannot direct the Noida Power to invoke Clause 2.5 (b) (iii) as it may deem fit in its sole discretion as the same is against the spirit of the provisions of the Request for Proposal documents.

125. The RFP document has to be read as a whole in order to ascertain true meaning of its process. The whole context shall be considered to ascertain the intention of the parties. Each clause of the RFP has to be interpreted harmoniously with other clauses of the RFP. Clause 2.5 (b) (iii) of the RFP cannot be given an interpretation whereby the Noida Power can

completely ignore the spirit of Section 63 read with Government of India guidelines and clauses 2.5 (a), 2.5 (g), 2.9.2, 3.5.2, 3.5.3, 3.5.8, 3.5.9 and 3.5.12 of the RFP.

126. In other words, the clause 2.5 (b) (iii) which is couched as a general term cannot override the other clauses of RFP mentioned above. These clauses of the Request for Proposal (RFP) are reproduced below:

“2.5 The Bidder should note that:

2.5 (a) If any Bidder conceals any material information or makes a wrong statement or misrepresents facts or makes a misleading statement in its Bid, in any manner whatsoever in order to create circumstances for the acceptance of its Bid, the Procurer/Authorized Representative reserves the right to reject such Bid or cancel the Letter of Intent, if issued. If such event is discovered after the Effective Date, consequences specified in the PPA shall apply.

2.5 (g) The Procurer/Authorized Representative may, at its sole discretion, ask for additional information/document and / or seek clarifications from a Bidder after the Bid Deadline, inter alia, for the purposes of removal of inconsistencies or infirmities in its Bid. However, no change in the substance of the Quoted Tariff shall be sought or permitted by the Procurer/Authorized Representative.

2.9.2 The Procurer/ Authorized Representative may solicit the Bidders' consent for an extension of the period of validity of the Bid. The request and the response in this regard shall be in writing. In the event any Bidder refuses to extend its Bid validity as requested by the Procurer/ Authorized Representative, the Procurer/ Authorized

Representative shall not be entitled to invoke the Bid Bond. A Bidder accepting the Procurer/ Authorized Representative request for validity extension shall not be permitted to modify its Bid and such Bidder shall, accordingly, extend the validity of the Bid Bond as requested by the Procurer/ Authorized Representative and further undertake not to participate in any bid process as per Clause within seven (7) days of such request, failing which the Bid shall not be considered as valid.

3.5.2 *The levelized Tariff calculated as per Clause for all Financial Bids of Qualified Bidders shall be ranked from the lowest to the highest.*

3.5.3 *The Bidder with the lowest levelized tariff shall be declared as the Successful Bidder for the quantum of power (in MW) offered by such Bidder in its Financial Bid.*

3.5.8 *The Letter(s) of Intent shall be issued to all successful Bidder(s) selected as per the provisions of this Clause.*

3.5.9 *There shall be no negotiation on the Quoted Tariff between the authorized representative/ Procurer and the Bidder (s) during the process of evaluation.*

3.5.12 *The Procurer/ Authorized Representative, in its own discretion has the right to reject all Bids if the Quoted tariff is not aligned to the prevailing market prices.*

127. The reading of the above clauses would indicate that the procurer Noida Power has the right to reject all the bids only when the quoted tariff is not aligned to prevailing market price. But in this case, the Noida Power itself has relied upon the Evaluation Committee Report stating that the rates quoted by the Appellant is aligned to market prevailing prices and on that

basis prayed the State Commission to adopt and approve the said tariff.. When such being the case, how could the question of invoking clause 2.5 (b) (iii) would arise?

128. Let us now deal with the powers of the State Commission which are limited under Section 63 of the Act. The State Commission while dealing with the petition under Section 63 could pass any of the following Orders as indicated earlier:

(a) Either reject the petition if it finds that the bidding was not as per the statutory framework;

Or

(b) Adopt the tariff if it is discovered by a transparent process conducted as per Government of India guidelines.

129. Thus, it is clear that the direction issued by the State Commission in the interim application pending the main petition permitting the Noida Power to invoke clause 2.5 (b) (iii) is not legally valid.

130. There is yet another aspect of the matter. As pointed out by the Learned Counsel for the Appellant, the interim application cannot be entertained by the State Commission as the relief sought for in the interim application is neither in aid nor ancillary to the main relief sought for in the Petition No.741 of 2011. It is true that under Section 63, the State Commission has got the powers to pass interim Orders and directions pending final

decision for the adoption or non adoption of the tariff only when the interim prayer and the interim direction sought for are in aid of main relief. Otherwise it cannot. The entire process of competitive bidding is to discover the tariff in accordance with the market conditions and formulate the competitive bidding in accordance with the finalized PPA. The State Commission under Section 63 of the Act cannot bring peculiar procedure through the back door over the area where explicitly the said procedure has been excluded.

131. Let us now deal with the each of the propositions projected by the Learned Counsel for the Noida Power opposing the grounds of the Appeal raised by the Appellant as against the impugned Order.
132. The **first proposition** is this. According to the Noida Power (R-2), the competitive bidding process and the PPA proposed to be executed pursuant to such process do not constitute a statutory contract; they are merely commercial agreements as such, there is no statutory mandate under the Electricity Act, 2003 to enter into the PPA with the Appellant in pursuance of the bidding process initiated under Section 63 of the Act and that the procurer (Noida Power) has discretion to decide at whether to enter into the contract or not at any stage.
133. In support of this proposition, he has cited following authorities:

- a) India Thermal Power Ltd V State of Madhya Pradesh and Others (2000) 3 SCC 379
- b) Kerala State Electricity Board v Kurein E Kalathil and Others (2000) 6 SCC 293
- (c) P.T. Rajan Vs T.P.M Sahir (2003) 8 SCC 498

134. On the other hand, the Appellant has cited 3 decisions to show that the authorities who accepts the benefit of the document must adopt the whole contents of the instruments confirming to all its clauses and provisions. These are as under:

(a) Karam Kapahi Vs Lal Chand Public Charitable Trust (2010) 4 SCC 753

(b) Shyam Telelinks Ltd Vs Union of India(2010) 10 SCC 165

(a) Mumbai International Airport Ltd. Vs Golden Chariot Airport (2010) 10 SCC 422

135. On going through these decisions cited by both, we are of the view that this proposition projected by the Noida Power is not tenable in view of the fact that the power procurement pursuant to the statutory framework constitutes a statutory contract in terms of the pre approved and finalized PPA governed by the provisions of the Act as well as the guidelines. There are specific clauses which require certain acts have to be performed mandatorily making the contract statutory.

136. Let us see those Clauses. According to clause 3.5.3 of RFP, the bidder with the lowest tariff shall be declared as a

successful bidder. As per clause 3.5.8, the letter of intent shall be issued to (all) the successful bidder(s). As per Clause 3.5.9, there shall be no negotiation on the quoted tariff. Under clause 3.5.12 the right to reject is confined to only situation where quoted tariff is not aligned to prevailing market conditions. After entering into a contract containing these mandatory terms and conditions, the said contract becomes statutory contract. Section 63 of the Act relates to procurement of the power where tariff is discovered through competitive bidding process in terms of the provisions of the Act and Government of India guidelines. Central Government has also notified Standard Request for Proposal and PPA. Any deviation from these is required to be approved by the State Commission. In this case, the said approval for the RFP and the PPA format were obtained from the State Commission with the condition that there would not be any deviation. When the PPA format was approved by the State commission then such PPA becomes a statutory contract. Hence the submission made by the Noida Power that PPA is simply commercial contract is baseless.

137. Authorities cited by the Noida Power (R-2) are not applicable to the present case as this case relates to the procurement of power process under Section 63 of the Act and the tariff is discovered through the competitive bidding process in terms of the provisions of the Act and the statutory bidding guidelines which shall be adopted without any deviation. Therefore, the

authorities cited by the Noida Power which have not dealt with this issue, would not be of any help to the Respondent.

138. The **Second proposition** projected by the R-2 Noida Power is as follows: *“There was no concluded agreement between the parties in this case as there is no communication of acceptance to that effect to the Appellant. The mere filing of the petition for adoption of the tariff of the Appellant under Section 63 does not amount to acceptance of the offer of the Appellant and the communication of the same to the Appellant. Therefore, in the absence of the acceptance which is duly communicated to the Appellant, the agreement cannot be said to have concluded agreement”*.
139. According to Noida Power(R2), though the decision to accept the offer was taken by the Noida Power on the basis of the recommendations of the Evaluation Committee and was placed before the Commission for its consideration, the same was not communicated to the Appellant, and therefore no right would accrue to the Appellant.
140. In support of this proposition, the Respondent has cited the following decisions:
- (a) (1973) 3 SCC 889, Haridwar Singh V Bagun Sumbrui and Ors
 - (b) (1999) 3 SCC 172, Delhi Development Authority

V Ravindra Mohan Aggarwal and Anr

(c) AIR 1977 All. 494, UPSEB V Goel Electric Stores

(d) AIR 1990 Orissa 26, Executive Engineer, Sundargarh V. Mohan Prasad Sahu

(e) AIR 1982 Goa 9, Alcon Constructions V Board of Trustees of the port of Mormugao.

141. Per contra, it was pointed out by the Learned Counsel for the Appellant that the judgments cannot be read upon without disclosing factual situation and every observation of the court cannot be taken as a ratio or as a statute when they have taken out of their context as held by the following decisions:

(a) Sarv Shramik Sanghatana Vs State of Maharashtra (2008) 1 SCC 494

(b) Shahbad Co-op Sugar Mills Ltd Vs Secretary to Government of Haryana Corporation (2006) 12 SCC 404

142. Let us now examine as to whether the facts of judgment referred to by the learned counsel of the Noida Power are *pari-materia* with present case.

143. The facts in (1973) 3 SCC 889 Haridwar Singh V Bagun Sumbrui and Ors case is completely different from this case as the said judgement was premised on the tender conditions in the said case which are materially different from the tender

conditions in the present case and therefore, the judgement cannot be relied upon. Similarly, (1999) 3 SCC 172 Delhi Development Authority V Ravindra Mohan Aggarwal and Anr case, the Supreme Court rendered the judgement in the light of the peculiar facts indicating that the sale was not finalized as the sale was stayed by the High Court in a public interest litigation and the acceptance of the bid was never communicated by the DDA to the Respondent. So, the facts in the present case is entirely different.

144. The next case is AIR 1977 All.494, UPSEB V Goel Electric Stores. The facts of the case pointed out that the letter on which reliance was placed by the bidder was issued at the time when tender was processed and deficiencies were found. So the facts of the present case is entirely different.

145. The next case is AIR 1990 Orissa 26, Executive Engineer, Sundargarh V. Mohan Prasad Sahu . This case also cannot be relied upon as in that case there was no acceptance of offer submitted by highest bidder as such there is no similarity in the facts of the present case.

146. As explained earlier, as per Section 4 of the Contract Act, communication of acceptance is complete when it is put into course of transmission to him so as to be out of the power of the Acceptor and as against the acceptor, when it comes to knowledge of any proposer. Further Section 8 of the Contract

Act provides that acceptance of a proposal can also be by the conduct or by performance of the condition by the Acceptor. These provisions would indicate that the aspect of the acceptance can be found out from the conduct of the parties. It is noticed that the Appellant admittedly appeared before the State Commission on 20.5.2011 and represented in the proceedings relating to the main petition as well as the interim application filed by the Noida Power. This is not disputed. That apart, the Appellant has specifically stated that on 18.5.2011, the Appellant came to know about the pendency of the petition filed by the Noida Power accepting the offer of the Appellant before the Commission while scanning the website of the State Commission. This statement also has not been disputed.

147. If this is the undisputed fact situation, then the contention urged by the Learned Counsel for the Noida Power (R-2) that there is neither acceptance nor communication of the same to the Appellant is not tenable. When Noida Power has declared Essar Power as a successful bidder, and sought approval of its rate before the State Commission, the following consequences would follow in law:

- (a) Once Noida Power has filed the petition under Section 63 of the Act, accepting the tariff quoted by the Essar Power in the light of the recommendation of the

Evaluation Committee, the same cannot be revoked or cancelled without any legally valid reasons.

- (b) Noida Power is under statutory obligation to procure power only from the Appellant on the tariff determined and discovered in the competitive bidding process subject to the approval of the State Commission.
- (c) If State Commission does not find any violation of the Statutory framework, then the State Commission ought to adopt the Appellant's bid. On the basis of the said adoption, the PPA already finalized, has to be signed by the parties without further negotiations.

148. As per Section 5 of the Contract Act, the proposal cannot be revoked at any time after communication of the acceptance is completed as we have observed earlier.

149. The Learned Counsel for the Appellant has cited the following decisions to show that communication of the acceptance can be established by the conduct of the parties also:

- (a) Jai Narain Parasrampuriah Vs Pushpa Devi Saraf (2006) 7 SCC 756
- (b) Bhagwati Prasad Pawan Kumar Vs Union of India (2006) 5 SCC 311
- (c) Damodaran Pillai Vs South Indian Bank: (2005) 7 SCC 300

- (d) Hindustan Co-operative Insurance Society Vs Shyam Sunder: AIR `1952 Calcutta 691
- (e) Chhattisgarh State Electricity Board Vs CERC: (2010) 5 SCC 23
- (f) Jai Prakash Vs State: (1991) 2 SCC 32
- (g) Steel Authority of India Vs Gupta Brothers Steel Tubes Ltd (2009) 10 SCC 63

150. In the light of these decisions, it can be held that in this case communication is established through the conduct of the parties as narrated above. Hence, this proposition is also liable to be rejected.

151. The Third **preposition** submitted by the Noida Power (R-2) is as follows:

“The Appellant as lowest bidder does not have the vested rights to get the contract or agreement from Noida Power. The right of the bidder is restricted to be treated fairly. The Noida Power (R-2) will have a complete discretion to reject any or all of the bids whatsoever as per clause 2.15 of the Request for Proposal at any stage”.

152. In support of its plea, the Respondent has cited the following judgements:

- (a) (1997) 1 SCC 738, Asia Foundation & Construction Ltd V Trafalgar House Construction (I) Ltd & Others
- (b) (2001) 8 SCC 491, Union of India & Ors Vs Dinesh Engineering Corporation & Anr

- (c) 2000 (Supp) Arb LR 639 (Patna),Cairo Impex Pvt Ltd V Bharat Coking Coal Ltd
- (d) 2009 (6) SCC 171, Meerut Development Authority V Association of Management Studies and Anr
- (e) AIR 1990 Orissa 26, Executive Engineer, Sundargarh V Mohan Prasad Sahu
- (f) 2006 (6) SCC 293 State Bank of India and Another Vs Mula Sahakari Sakhar Karkhana Ltd

153. In the present case, the Essar Power, the Appellant is not claiming any right merely because it was the lowest bidder. The Appellant claims right on the basis of the clause 3.5.3, 3.5.8 and 3.5.12 of the Request for Proposal. As we have already discussed, clause 3.5.3 provides that the bidder with the lowest tariff shall be declared as a successful bidder. The Appellant admittedly has been declared as a successful bidder by the Evaluation Committee which has been accepted by the Noida Power (R-2). Clause 3.5.8 mandates that the letters of intent shall be issued to the successful bidder. Clause 3.5.12 provides that procurer can reject the bids only when the quoted tariff are not aligned to the prevailing market prices. That is not the case here. Noida Power can exercise its powers under clause 2.15 of the Request for Proposal only before it has accepted the bid of the successful bidder, and the same can be exercised only after rejection of the said bid. The said power cannot be exercised after filing the petition before the State Commission for adoption of tariff under Section 63. This is clear from the reading of the clauses contained in the Request for Proposal document as mentioned above.

154. Once the State Commission has entertained the petition filed by the Noida Power under Section 63 of the Act and thereby seized of the matter, then the Noida Power is subjected to the jurisdiction of the State Commission to decide about the further course of action. In other words, when the petition seeking for adoption of the tariff quoted by the Appellant is pending before the State Commission, Noida Power cannot exercise its powers under the Request for Proposal (RFP) to withdraw the acceptance or reject any or all the bids. The Request for Proposal document has to be read in accordance with the provision of the Act as well as the Government of India guidelines. When the Evaluation Committee declared the Appellant as a successful bidder and recommended to accept the bid as its bid is aligned to the prevalent market conditions and when the Noida power has filed a petition before the State Commission seeking for the adoption of the Appellant's bid, and the same has been entertained by the State Commission, the Noida Power at that stage cannot reject the bid. The filing of the interim application would amount to nullifying the guidelines and making the bid process redundant thereby affecting the rights of the Appellant.
155. Further, the authorities cited by the Respondent-2, Noida Power is of no use to the Respondent in view of the fact that the Appellant has not claimed any right merely on the basis of the lowest bid but on the basis of the various clauses of the RFP

and under Section 63 of the Act. Once the State Commission has been seized of the matter under Section 63 of the Act, the Noida Power cannot exercise its powers under RFP to reject the bid.

156. Therefore, the contention of the Appellant that the Appellant has no vested rights and the procurer has the right to reject the bid at any stage is liable to be rejected.

157. The Fourth **preposition** submitted by Noida power is this *“There is no bar for filing the petition for adoption of tariff without signing the PPA since clause 6 of the guidelines does not restrict the Noida Power in any manner from approaching the State Commission for adoption of tariff before execution of the PPA and as such there has been no violation of the guidelines”*.

158. According to the Appellant, the draft PPA was approved by the State Commission by its Order as early as on 8.10.2009 and therefore there was no necessity for a separate approval required for the approval of the PPA. In the present case, it is not disputed that the draft PPA had already been approved by the State Commission and only after the approval of the said draft PPA, bidding process has to begin and in that process, the tariff has to be determined through the competitive bidding process. The fact that the tariff was discovered in a transparent manner by following the guidelines issued by the Central Government is evident from the report of the Evaluation

Committee dated 5.4.2011. Only on the basis of this report, Noida Power filed petition before the State Commission for adoption of the tariff quoted by the Appellant before signing of the PPA. Once tariff has been discovered through the transparent process of competitive bidding and the same has been accepted by the Noida Power, the only ministerial job of signing the PPA has to be left to the parties after the approval of the State Commission. Para 2.3 of the guidelines provides that the guidelines shall be binding on the procurer. Therefore, the mandatory nature of the guidelines cannot be questioned by the parties. Any deviation to the bidding documents or the guidelines can be permitted only by the State Commission that too before the bidding process was over. In the present case, the bidding process was over and after it was over, the Noida Power decided to accept the offer as recommended by the Evaluation Committee and accordingly filed a petition for approval of the said tariff under Section 63 of the Act. Thus, once the Noida Power filed the petition for the approval, the bid process got concluded. Thereafter, jurisdiction of the State Commission under Section 63 is limited to find out only two aspects:

- (a) To verify as to whether the tariff has been adopted through transparent bidding process;
- (b) Whether the bidding process has been in accordance with the guidelines issued by the Central Government.

159. If the State Commission is satisfied on the above aspects, it has to mandatorily adopt the tariff determined through the competitive bidding accepted by the procurer. Therefore, it has to be held that mere failure to sign the PPA would not make the proceedings invalid before the State Commission and the same can be done after the adoption of tariff as it is a mere Ministerial job.

160. The Fifth **preposition** made by the Noida Power (R-2) is as follows:

“The Scope of Section 63 is limited to adoption of tariff. Section 63 does not deal with the approval or conclusion of the PPA. Section 63 is alternative only to Section 62 which deals with the determination of the tariff. The State Commission has got the powers to regulate the power purchase and procurement arrangements of the distribution licensee under Section 86 (1)(b) of the Act. Section 86 (1) (b) applies to both Section 62 and Sec 63 of the Act. Therefore, the State Commission can exercise regulatory control in the matter relating to power purchase procurement process including the tariff in larger public interest. Therefore, there can be negotiation of the bidding price with bidders even after the Evaluation process is over subject to deviation permitted by the State Commission under Section 86 (1) (b).”

161. In support of this proposition, he has cited the following judgements:

(a) UPPCL Vs NTPC Limited (2009) 6 SCC 235

(b) Judgement in Appeal No.44 of 2010 ELR (APTEL) 634.

162. This preposition in our view does not deserve acceptance. As mentioned above, the draft PPA and other terms and conditions of the contract have already been approved by the State Commission. Thus, the bidding process has already started. Thereafter, only tariff has to be discovered in accordance with the guidelines. This process was already over as indicated earlier.
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.
164. The reliance by the Noida Power in Appeal No.44 of 2010 ELR (APTEL) 634 to argue that there can be negotiation in

above case would be of no use as the facts are different from the facts of the present case. The contention of the Noida Power that under Section 63 of the Act it can negotiate with the 3rd party and enter into an agreement with the approval of the Commission is without any basis as it is contrary to the provisions of the Act and the bidding guidelines. Admittedly, the scope of Section 63 is limited to adoption of the tariff. In fact, the following observations made by this Tribunal in Appeal No.44 of 2010 are relevant in this context:

“69. As indicated above, the State Commission has to verify merely whether the bid process has been done in a transparent manner and in accordance with the guidelines framed by the Central Government and if that is complied with, the State Commission shall give approval and adopt the tariff recommended by the Evaluation Committee.

70. As indicated above, the wordings contained in section 63 of the Electricity Act, 2003 would make it clear that the power of scrutiny by the State Commission is so limited. When it is found that the bid process was done in a transparent manner as per the guidelines and when the certificate is issued by Evaluation Committee recommending the reduced prices through negotiations, it is the duty of the State Commission to give approval without raising any hyper technical objection. To put it shortly, the Commission as per section 63 of the Electricity Act, 2003 having only limited jurisdiction has to satisfy with reference to the compliance of the requirement of Section 63 and cannot indulge itself to conduct a roving enquiry. In other words, the State Commission should act within the ambit of Section 63 of the Act and should not go beyond that as it is neither an Enquiry Commission nor a Vigilance Commission”

165. So, as we observed in the judgement referred to above, the State Commission cannot allow Noida Power to enter into negotiation with the 3rd party to reduce the tariff while it has already seized of the matter by entertaining the petition to adopt the tariff quoted by the Appellant accepted by the Noida Power.
166. That apart, as indicated above, clause 2.5 (g), 2.9.2 and 3.5.9 of the RFP provide that the tariff quoted by the bidders cannot be altered or negotiated. Guidelines prescribed under Section 63 contain the mandate to safeguard the consumer interest as well as to ensure competition among the Utilities. 86 (1) (b) cannot be invoked to defeat the objectives of Section 63 and the RFP as well as the Guidelines. Therefore, this preposition is liable to be rejected as it has no merits.
167. The Sixth **preposition** placed before this Tribunal by the Noida Power is as follows:

“The negotiation with the 3rd party, even though the 3rd party is a non bidder is permissible under clause 2.5 (b) (iii) of the RFP read with Section 63 as well as the guidelines. Noida Power is entitled to adopt at any stage to conclude contract with any 3rd party in the interest of the consumer at large. The State Commission in the proceedings under Section 63 could pass interim Orders or give directions to all in making efforts for the reduction in the tariff by permitting the procurer to have a negotiation with the 3rd party and in such cases, the proceedings under Section 63 continues and the State Commission thereafter would decide on the adoption or non adoption of the tariff quoted by all others including the 3rd party”.

168. In support of this proposition, the Respondent has cited the following decisions:

- (a) CA No.4767/2011 of 24.5.2011 in the Case of Shradhha Aromatics Private Ltd V Official Liquidator
- (b) Air India Limited V Cochin International Airport Ltd (2000) 2 SCC 617
- (c) 1969 (3) SCC 537 Navalakha & Sons V Sri Ramanya Das
- (d) (2000) 6 SCC 69 Divya Manufacturing Co Ltd V Union Bank of India
- (e) (2008) 10 SCC 440 FCS Software Solutions Ltd V LA Medical Devices Ltd & Ors

169. For considering the merits of this Proposition, we have to evaluate the guidelines as well as the RFP clauses to find out whether such a dealing with 3rd party is permitted. The analysis of the various clauses is given as under:

- (a) Clause 3.2 of the RFP provides that non financial bid submitted by the bidders shall be scrutinized to establish responsiveness to the requirements laid down in the RFP.
- (b) Clause 3.4.1 of the RFP provides that the financial bids of the qualified bidders shall be opened.
- (c) Clause 3.5.2 of the RFP provides that the levelised tariff calculated as per clause 3.4.7 for all financial bids of qualified bidders shall be ranked from the lowest to the highest.

- (d) Clause 3.5.3 of the RFP provides that the bidders with the lowest levelised tariff shall be declared as a successful bidder for the quantum of the power offered by such bidders in its financial bid.
- (e) Clause 3.5.8 of the RFP envisages that the letters of intent shall be issued to all such successful bidders as per the provisions of the Clause 3.5.
- (f) Clause 3.5.12 of the RFP provides that the procurer in its own discretion has the right to reject all bids if the quoted tariff are not aligned to the prevailing market prices.

170. So these relevant clauses do not give any scope for negotiation with the 3rd party who did not participate in the bidding process.

171. In the above context, we have to interpret clause 2.5 (b) (iii). The RFP document has to be read as a whole in Order to ascertain the true meaning of its clauses. Then only we can ascertain the intention of the parties. Each clause of the RFP has to be interpreted harmoniously with the other clauses of the RFP. Clause 2.5 (b) (iii) of the RFP cannot be read independent of other clauses.

172. As indicated above, the clause 2.5 (b) (iii) which is referred to as a general term in the RFP document cannot override the specific provisions of the other clauses of the RFP documents namely 2.5 (g), 2.9.2, 3.5.2, 3.5.3 , 3.5.8, 3.5.9 and 3.5.12.

173. The objective of the competitive bidding is to protect and balance the interest of all the parties concerned i.e. the distribution licensee, the bidder and the consumers. In other words, the entire competitive bidding process is not only to discover the tariff but also to discover the supplier who would be able and efficient to supply the required quantum of power to the procurer in timely manner. Only in order to ascertain the above aspects, the financial and non financial bids are being invited from all the bidders. Only after verification of the non-financial bids, they are declared as technically qualified. Therefore, clause 2.5 (b) (iii) would not give any separate powers to the Noida Power to have a 3rd party negotiation which would defeat the purpose of the proceedings under Section 63. Therefore, the interim application filed by the Noida Power seeking to re-open the concluded bid process in Order to introduce the extraneous bidder after opening the financial bid is not maintainable.

174. The authorities cited by the Respondent do not decide the issue raised in this case. That apart, in these cases, the conclusions were arrived on the basis of the different facts which are not pari-materia of the present case especially when these decisions related to auction by official liquidator in following the procedure which are not at all comparable to the facts of the present case.

175. The next **proposition** advanced by the Noida Power is that there is no violation of clause 3.5.9 of the RFP. According to the Noida Power clause 3.5.9 of the RFP restricts the negotiation only upto the closure of the Evaluation Process and not thereafter and as such once the Evaluation Process is over, there is no restriction on the Noida Power to have the negotiation with 3rd party.
176. This contention of the 2nd Respondent is misplaced. Clause 2.5 (g) and 2.9.2 of RFP clearly provide that there should be no change in substance of the quoted tariff. Clause 3.5.9 of the RFP lays down that there should not be any negotiation on the quoted tariff. The conjoint reading of these clauses as well as the other clauses of RFP makes it abundantly clear that the negotiations are not permitted on the quoted tariff either before or after evaluation of the bidding. Therefore, this contention would also fail.
177. The **next proposition** by the Noida Power is that the Appellant has not suffered any prejudice due to the action of the Noida power in making the effort to negotiate with the 3rd party for reduction of tariff to the tune of Rs.2,200 Crores in the larger interest of the consumers.
178. As stated above, the Noida Power has foreclosed its right to reject the bids once it declared the Essar Power as a successful bidder and filed a petition for the adoption of tariff before the

State Commission. In other words, the moment the Essar Power has been declared as a successful bidder, vested rights are created in favour of the Essar Power. Thereafter if any action is taken by the Noida Power to unsettle the said right of the Essar Power, certainly it will cause irreparable loss and injury to the Essar Power. Hence, there is no merit in this proposition as well.

179. The **next proposition** by the Noida Power is that Athena Power's fulfillment of qualification and other conditions is within the State Commission's purview. According to Noida Power, Athena power's technical qualification has already been established in the bidding process of UPPCL and in any event as and when the Noida Power goes back to the State Commission after the negotiation as permitted by the State Commission for adoption of tariff with Athena is over, the State Commission will look into the aspect of compliance of all technical and financial conditions of the Athena and decide about the required qualification of Athena.

180. As explained above, the technical parameters submitted by Athena Power for the bidding process for UPPCL are entirely different from the technical details submitted by the Athena Power through its letters in the present case. In the letter dated 13.4.2011, the Athena Power has pointed out that the power will be supplied to Noida Power from the Coal obtained through

the coal linkage sanctioned by the Ministry of Coal. But in the case of UPPCL, it has been supplying power from the coal available from the captive coal mines. Thus, technical parameters of Athena Power for UPPCL bid is entirely different and as such the same cannot be relied upon by the Noida Power in the present case. Further, as brought out in the earlier paragraphs, the details submitted by Athena Power (3rd Party) vide its letters dated 13.4.2011 and 16.4.2011 would have been considered insufficient by the Evaluation committee and its offer would have been rejected as non-responsive. An offer which would have been rejected at initial stage by the Evaluation Committee as non-responsive, cannot be accepted by the State Commission at the final stage of the bidding process.

181. 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 nullify the sanctity of the bidding process which will make the proceedings under Section 63 of the Act, 2003 nugatory.
182. According to the Noida Power, the Order dated 30.5.2011 is only an interim Order in the application filed on 27.4.2011 pending the main application filed on 7.4.2011 in which the main Order has to be passed for adoption or non adoption of tariff after negotiation with the 3rd party at a later stage. In short, the case of the Noida Power, pending finalization of the issue in

the petition filed on 7.4.2011 in Petition No.741 of 2011, the Noida power has been permitted by the State Commission under clause 2.1.5 (b) (iii) or RFP to take further steps by keeping the proceedings pending in the State Commission to enable the Noida Power to have a further negotiation with all the parties including the 3rd party to find out whether the tariff may be further reduced and after the said negotiation is over, the State Commission will finally decide in the proceedings under Section 63 by passing suitable Orders in the main petition taking into consideration of all the further developments.

183. The above statement makes it clear that the stand of the Noida power is that the State Commission had not disposed of the main petition yet, and only passed an interim direction to the Noida Power, permitting it to have a further discussion with all the parties including 3rd party for the further reduction of tariff and as such, the Noida Power is entitled to negotiate further under clause 2.5 (b) (iii) and go back to the Commission for passing further Orders in the main petition. But this is not reflected in the impugned Order dated 30.5.2011 passed by the State Commission. In this context, it would be worth while to refer to the observations made by the State Commission in the impugned Order with reference to the above aspect which are as under:

“2. The Petitioner has submitted that, with information to the Commission, a fresh bidding process was initiated by

them. This time six bidders namely, M/s. Visa Power Ltd., M/s. Essar Power Ltd., M/s. Adani Power Ltd., M/s. Jaiprakash Power Ventures Ltd., M/s. Dans Energy Private Ltd and M/s. National Energy & Trading Services Ltd., have responded and have qualified. Amongst them, M/s. Essar Power Ltd. has been identified as L-1 bidder for supply of total 240 MW for 25 years commencing from April, 2014 as recommended by the Evaluation committee constituted for this purpose. The offers are stated to be valid up to 02.06.2011. The Petition was submitted with the request for adoption of L-1 tariff recommended by the evaluation committee.

3. In the mean while, an application has been filed by the Petitioner in the matter of above petition on dated 27.4.2011. In this application, the Petitioner has submitted that subsequent to the filing of the petition, they received letter from a Company (herein after referred as the Company) proposing to supply power to them on long term basis at a levelized tariff well below the tariff quoted by L-1 bidder. As there is no such recognized scenario in the standard bidding document and the offer from the Company is an event subsequent to submission of the Bid Evaluation Committee's report, the Petitioner has approached the Commission for directions.

7. During the hearing, Shri M.G. Ramchandran, Advocate of the Petitioner, submitted that the earlier two bidding processes conducted by them were unsuccessful. So, they are very eager to complete the process so that the required power may be made available from the prescribed date and therefore, they do not have any difficulty in accepting the tariff quoted by the L-1 in this third bidding process with the approval of the Commission. Nevertheless, in view of a new offer made by the Company who had not participated in the bidding process, the decision making by the Petitioner has become difficult. The subsequent offer received from the

Company is for the supply of power on the same terms and conditions as contained in the bid documents but at a lower tariff giving an advantage to the consumers of the Petitioner. The difference is very substantial and works out to a huge saving in 25 years contract period as compared to the levelized tariff of the L-1 bidder.

13. In a scenario as mentioned above, the Commission contemplates that the procurer is fully authorized to take any such measure in his sole discretion as may be deemed fit as per the provision made under clause 2.5 (b) (iii) of the standard document of Request for Proposal (RFP) for procurement of power through Case 1 bidding as per guidelines of Government of India. In view of this, the Commission directs the Petitioner to take necessary measures in this regard as per the provision made under afore mentioned clause 2.5 (b) (iii) of the standard document of Request for Proposal (RFP)”.

184. The reading of the Order in its entirety would show that the Order has been passed mentioning the Number as Petition No.741 of 2011. There is no separate number given to the interim application. Admittedly, there is no finding with reference to the main prayer made in the main petition filed on 7.4.2011. The State Commission considering the developments subsequent to the filing of the main petition simply observed that Noida Power, the procurer is fully authorized to take any measures in its sole discretion as may be deemed fit as per clause 2.5 (b) (iii) of the RFP and gave a direction accordingly. It does not indicate that permission has been granted to Noida Power to have negotiation with 3rd party and that thereafter, they can come back to the State Commission with the particulars so that final

Order could be passed by the State Commission under Section 63 of the Act in the main petition No.741 of 2011. However, the Noida Power had the impression that such a permission had been granted in favour of Noida Power to have further discussion pending the main petition before the State Commission. Only on that impression, Noida Power sent a letter to the Appellant Essar Power on 9.6.2011 quoting the above Order dated 30.5.2011 passed by the State Commission asking the Appellant to submit the revised financial bids to match or offer a lower tariff than the levelised tariff of Rs.3.667 per unit offered by Athena Power. In the said letter, Noida Power gave a warning that if such a revised bid equal to or less than the said tariff of Rs.3.667 per unit has not been sent by any of the bidders including the Appellant, the Noida Power will have the rights to reject all the bids and go back to the Commission for acceptance of the offer from Athena Power for the levelised tariff of Rs. 3.667 per unit. Let us see the letter dated 9.6.2011 sent by Noida Power to Essar Power. The letter is as follows:

*“As already informed vide our above mentioned letter, the Company had filed a petition (No.741 of 2011) before the Hon’ble Uttar Pradesh Electricity Regulatory Commission (**Hon’ble Commission**) on 07.04.2011 for adoption of the lowest tariff discovered during the bidding process. After the filing the above petition, the Company received a proposal from a ‘Project Developer ‘who did not participate in the above Competitive Bidding but had offered to supply*

200 MW power strictly on the identical terms and conditions at a levelised tariff of Rs.3.667 per unit for 25 years and specifically called upon the Company to place the same before the Hon'ble Commission. Accordingly, the Company on 27.04.2011 submitted the said proposal before the Hon'ble Commission for issuing appropriate directions.

The Hon'ble Commission heard the matter on 20.5.2011 and vide its Order dated 30.5.2011, inter-alia, has issued the following direction:

13. In a scenario as mentioned above, the Commission contemplates that the procurer is fully authorized to take any such measure in his sole discretion as may be deemed fit as the provision made under clause 2.5 (b) iii of the standard document of request of Proposal (RFP) for procurement of power through case 1 bidding as per guidelines of Government of India. In view of this, the Commission directs the petitioner to take necessary measures in this regard as per the provision made under afore mentioned clause 2.5 (b) iii of the Standard document of request of proposal (RFP).

Pursuant to the above order, we hereby give an opportunity to you to match or offer a lower tariff than the above levelised tariff of Rs.3.667 per unit for 25 years offered by the said Project Developer for 200 (+/-20%) power by submitting a revised Financial Bid in a sealed envelope latest by 3.00 pm on 21st June, 2011 at our Office. Please note that all such Financial Bids will be opened in the presence of the bidders at 3.30 pm on 21st June, 2011 itself at our Office.

You may please note that a similar letter is being sent to all the other bidders who had participated in the Technical Bid held on 3rd February, 2011 and the Financial Bid held on 19th February, 2011. The selection of the bidders

quoting a tariff equal to or less than the above levelised tariff will be based on the revised Financial Bids received an in case two or more bidders quote the same lowest tariff, selection will be done in accordance with the rankings as per Financial Bids opened on 3rd February, 2011.

The above process is being adopted in the larger consumer interest because of substantial price reduction available from the offer received from the 'Project Developer'. If no bidder in the revised Financial Bid quote equal to or less than the levelised tariff of Rs.3.667 per unit, the Company reserves the right to reject all the bids and approach the Hon'ble Commission for acceptance of the offer from the 'Project Developer' willing to supply power at the aforesaid levelised tariff of Rs.3.667 per unit".

185. The above letter would clearly reveal that the Noida Power sought for the revised bids from technically qualified bidders including the Appellant asking them to submit the bids quoting the tariff equal or less than the levelised tariff of Rs.3.667 per unit quoted by the Athena Power claiming that it has been permitted by the State Commission to ask the bidders for submitting the revised rates.

186. But the stand taken by the State Commission on the above aspect is completely different from that of stand taken by the Noida Power (R-2). The State Commission in its written submission dated 14.10.2010 has clarified two aspects:

(a) The petition under Section 63 has been filed by Noida Power. The Noida Power has neither filed the PPA with

signature of the parties nor filed the certification from the Evaluation Committee as required by the Government of India guidelines. Therefore, the Commission cannot exercise its jurisdiction under Section 63 of the Act in this application

- (b) Through the application, Noida power sought a direction to consider the proposal of Athena Power and to seek a deviation from the process of bidding for adoption of the tariff of Athena though the said Company did not participate in the bidding process. However, the State Commission neither issued any such direction to the Committee to consider the proposal of 3rd party nor allowed Noida Power for deviation from the bidding process in the impugned Order by permitting the Noida Power to have further negotiation. Relevant portion of the reply of the State Commission dated 14.10.2011 is as follows:

“7. That, in the present case, without signing of the PPA and without the certification as required by Para 6.11 and 6.12 of the Guidelines, the Respondent No.2 has filed the under Section 63 of the Electricity Act, 2003 on 7.4.2011, which was registered as Petition No.741 of 2011.

Further, in the said Petition No.741 of 2011, the Respondent No.2 filed an application on 27.4.2011, wherein, for the first time, it introduced the proposal of M/s. Athena Chhattisgarh Power Ltd. Though, in the prayer clause of the said Application the Respondent no.2 only prays for taking the proposal on record and for early disposal of the matter, however, a complete

reading of the Application would show that the Respondent No.2 has filed the Application for following reasons:

(a) to seek a direction to the Committee to consider the proposal of M/s. Athena Chhattisgarh Power Ltd;

(b) to seek deviation from the process of bidding as contained in the bid documents; or

(c) for adoption of the tariff of M/s Athena Chhattisgarh Power Ltd.

8. However, as already stated above, the occasion for the Commission to exercise its power under Section 63 for adoption of tariff of the Appellant arises only after the PPA has been signed between the parties and the certification has been issued by the Committee. Since the PPA between the parties had not been signed between the parties, the Commission could not exercise its jurisdiction under Section 63 of the Act.

9. So far as the question of issuing direction to the Committee or allowing deviation from the bid process is concerned, a bare perusal of the Order dated 30.5.2011 would show that the Commission has not granted either of the reliefs to the Respondent No.2”.

187. So, this statement of the State Commission would make it evident that the stand taken by the Noida Power that it has initiated fresh process to have a further negotiation with the bidders as per the Orders of the State Commission is factually incorrect. If such directions have

been given by the State Commission in favour of the Noida Power through the impugned Order dated 30.5.2011, then issuance of a letter dated 9.6.2011 asking the bidders including the Appellant to send the revised bids in the light of the lesser price offered by Athena has no legal basis.

188. Now let us deal with the stand of the State Commission as stated in its reply to the effect that the powers under Section 63 of the Act of the Commission could not be exercised in view of the fact that the PPA had not been signed by the parties and conformity certificate issued by the Evaluation Committee has not been enclosed.

189. Before proceeding further, let us examine the correctness of the claim of the State Commission referred to in its reply that conformity certificate issued by the Evaluation Committee had not been submitted by the Noida Power (R-2). Requirement of submission of conformity certificate emanates from clause 6 of the Central Government's guidelines which is reproduced below:

“6.12. Consequent to the signing of the PPA between the parties, the evaluation committee shall provide appropriate certification on adherence to these guidelines and to the bid process established by the procurer.”

190. The State Commission's findings in this connection is also reproduced below:

“6. At the outset, it was also found that the conformity certificate in respect to the conclusion of bid process as per standard guidelines provided by the Government of India was not submitted by the Petitioner. The Commission, during the hearing, directed the Petitioner for submission of the same.”

191. It is clear from the above observations of the State Commission that the Commission was aware of non-submission of conformity certificate and had recorded the same and had directed the Noida Power during the hearing held on 20.5.2011 to submit the same. However, the State Commission did not mention about non-submission of signed PPA in the impugned Order. During one of the hearings it was submitted by the learned counsel for Noida Power(R-2) that conformity certificate from the Evaluation Committee had been submitted to the State Commission along with the Report of the Evaluation Committee. He further informed this Tribunal that during the hearing of 20.5.2011, the State Commission had directed to submit the conformity certificate from Chief Executive Officer of the Company and the same had been submitted to the Commission vide its letter dated 27.5.2011, copy of which was also furnished to this Tribunal during the proceedings. The relevant portion of this letter is reproduced below:

“ This is in reference to the International Competitive Bidding undertaken by M/s Noida Power Company limited vide RFP dated 11.10.2010 for procurement of 200 MW (±

20%) power under Case – I and hearing held before the Hon'ble Commission on 20.5.2011, where in the conformity certificate from Chief Executive Officer was desired.

Accordingly, please find attached herewith a certificate dt 27.5.2011, duly signed by the Chief Executive Officer of the Company, on the conformity of the bid process to the ' Guidelines for determination of tariff by bidding process for procurement of Power by Distribution Licensee' issued by the Ministry of Power....”

192. Perusal of above letter would reveal that the Commission had desired a conformity certificate from the CEO of the Company. This requirement was not as per the Guidelines and, therefore, is not mandatory. Evaluation Committee had already provided the requisite conformity certificate in its report which was submitted to the State Commission along with the main petition no. 741 of 2011. With regard to non-submission of signed PPA, it has been brought out in the earlier paragraphs that the pre-finalised PPA duly approved by the State Commission and initialed by the Appellant had already been submitted to the State Commission. The Noida Power had also submitted that the approved PPA shall be signed by the parties after adoption of tariff quoted by the Appellant. Thus signing of PPA was merely a ministerial act. Further, the stand taken by the State Commission in its reply before this Tribunal, relating to its inability to exercise the power under Section 63 due to non-submission of these two documents has not been referred to in the impugned Order. On the other hand, the State Commission gave direction to submit conformity certificate

during the hearing on 20.5.2011 and without waiting for the same, chose to give some directions with reference to clause 2.5 (b) (iii) in the impugned order dated 31.5.2011. **This only shows that the stand taken by the State Commission in its reply before this Tribunal is nothing but a fresh plea with a lame excuse probably to make an attempt to wriggle out from the mess it has created. The contention of the State Commission that they could not exercise the powers under Section 63 due to the non compliance of the requirements, is therefore not tenable and is liable to be rejected.**

193. Further, if this was the stand of the State Commission that they could not exercise the powers under Section 63 due to the non compliance of the requirement, then they should have simply returned the papers to Noida power asking them to present the same after complying with the said requirements. On the contrary, the State Commission has passed Orders observing that the Noida Power can invoke 2.5 (b) (iii) which gave an impression to the Noida Power as if permission had been granted to Noida Power to seek for revised bids from the bidders and then come back to the Commission for getting final Orders in the main Petition under Section 63 of the Act. But the present stand of the State Commission through its reply is that they could not exercise the powers under Section 63 and have not given any such direction. In that case where was the necessity for the Commission to give a direction to the Noida

Power with reference to its rights to take necessary measures for procurement of power as provisions of clause 2.5 (b) (iii) of the RFP?. This is not a proper approach on the part of the State Commission.

194. The adoption of such a tariff discovered by the competitive bidding process by the Evaluation Committee governed by Section 63 is a statutory duty of the appropriate Commission with no discretion in the matter as held by this Tribunal in its earlier judgements. So, the State Commission ought to have considered the petition on merits having entertained the said petition by listing the matter in No.741 of 2011. As stated earlier, the State Commission either ought to have asked Noida Power to comply with the requirements and after compliance, it ought to have passed a final Order in that petition under Section 63 deciding the issue or ought to have passed the appropriate orders after verifying as to whether the said tariff had been determined through transparent process of bidding and in accordance with the guidelines issued by the Central Government and thereafter directed them to execute the PPA as it is a consequential Ministerial act. But this has not been done by the State Commission.

195. At the end, we cannot but express our displeasure over the procedural lapses committed in plenty by the State Commission. In fact, on noticing the same, we have asked the

Learned Senior Counsel appearing for the State Commission for the clarification on those various lapses.

196. The Noida Power filed petition under Section 63 for adoption of the tariff for purchase of electricity from Essar Power pursuant to tariff discovered through a transparent competitive bidding process and in accordance with the guidelines issued by the Central Government. The prayer in the said petition No.741/2011 is as follows:

“The Hon’ble Commission may be pleased to adopt the tariff of Essar Power Limited under Section 63 of the Electricity Act, 2003 to enable the Applicant to finalise and complete the Power Purchase Agreement with Essar Power Limited for purchase of 200 MW (+20%) i.e. 240 MW Power effective April, 2014 on the terms and conditions of the bidding documents and as incorporated in the Power Purchase Agreement to be executed between the parties as per the approved bidding documents; and”

In this Petition it is mentioned that the bids given by the bidders were evaluated by the Evaluation Committee and the Evaluation Committee after discovering the levelised tariff had submitted its report recommending the tariff given by the Essar Power Limited as being aligned to the market conditions. In this petition, the Noida Power also gave an undertaking to provide such details as the Commission may call for with regard to adoption of tariff in accordance with Section 63 of the Electricity Act. When such an undertaking had been given by the Noida

Power, then the duty of the State Commission to call for the details from Noida Power in order to verify as to whether the tariff determined through the transparent process and the said process was conducted as per the bidding guidelines. If the State Commission had found that bidding was not as per the statutory frame work, then the State Commission could have rejected the petition. On the contrary, if the tariff is discovered through the transparent competitive process as per the bidding guidelines, then the State Commission should have adopted the said tariff. It is settled law that the scope of Sec 63 is so limited, and once it is found that the competitive bidding process was transparent and has been conducted in terms of the guidelines framed by the Central Government, the State Commission has no option but to adopt the said tariff as it is binding on the State Commissions. In the present case, the State Commission did not make any attempt to verify those facts and nor asked for the particulars with regard to the compliance of the procedure from the Noida Power even though the undertaking was given by the Noida Power to the State Commission that it would furnish all the particulars as required by the State Commission.

197. Instead of scrutinizing the said petition on the above aspects, the State Commission simply kept it pending from 7.4.2011 without passing any Orders in regard to the compliance of the requirements and without calling for further particulars from Noida Power. Only at a later stage, the Noida Power filed a

interim application i.e. on 27.4.2010 bringing to the notice of the State Commission with regard to further developments by which the Noida Power was approached by Athena power and seeking for the directions on the said aspect.

198. In this context, we have raised the following questions to the State Commission:

- (a) “If the main petition filed by the Noida Power praying for the adoption of the tariff quoted by the Appellant as recommended by the Evaluation Committee has been entertained and the same is pending, why the State Commission has entertained interim application dated 24.7.2011 seeking for the prayer with reference to the 3rd party negotiation which is different from the main petition?
- (b) When it is the stand of the State Commission as stated in their reply in written submission that it could not exercise the powers under Section 63, where was the necessity to give any direction in favour of the Noida Power ?”

199. As indicated above, the main prayer made by the Noida Power in the petition No.741 of 2011 filed on 7.4.2011 is to adopt the tariff of Essar Power Limited under Section 63 of the Act as recommended by the Evaluation Committee. Contrary to the said prayer, the Noida Power have filed an application in the same case No.741 of 2011 for placing on record subsequent developments and for giving directions on the basis of the decision to be taken either to accept the bid of Essar Power or accept offer of the Athena Power. The prayer is as follows:

“16(d) The offer received from M/s. ACPL was discussed with the Bid Evaluation Committee members. However, Shri. R.K Sharma, External Member of the Bid Evaluation Committee, stated that since, the aforesaid offer is an event subsequent to submission of the Bid Evaluation Report dated 05.04.2011, the Committee cannot consider the same, unless directed by the State Regulatory Commission to do so.

16(e) The Applicant is, therefore, placing the offer received from M/s.ACPL before the Hon’ble Commission for consideration in the larger consumer interest;

18. Before the above date, a decision need to be taken on either the acceptance of the bid of Essar Power at a levelized tariff or Rs.4.0868 per unit or the offer of M/s. ACPL at a levelized tariff of Rs.3.667 per unit in the overall interest of the consumers.

19. It is respectfully prayed that this Hon’ble Commission may be pleased to:

(a) take on record the documents filed along with this application;

(b) decide the matter on an urgent basis as may be deemed fit;

(c) pass such Order or Orders as this Hon’ble Commission may deem just and proper in the circumstances of the case”.

200. The reading of the entire interim application would indicate as pointed out by the State Commission in its reply that Noida Power approached the State Commission for seeking a direction to the Evaluation Committee to consider the proposal

of M/s. Athena Power after permission for deviation from the process of bidding and then adoption of tariff of Athena Power. Thus, the prayer in the main petition filed on 7.4.2010 is totally different from the prayer made by Noida Power in the application filed on 27.4.2011. In that context, it is pointed out that it is the duty of the State Commission before entertaining the said interim application pending in the main petition to verify whether it is ancillary or is connected with the prayer in the main petition No.741 of 2011. It cannot be debated that the prayer made in the application dated 27.4.2011 is neither in aid nor it is ancillary to the main relief as prayed by Noida Power in the impugned petition No.741 of 2011. When that be the case, there is no reason as to why the State Commission did not apply its mind before entertaining the said application to find out whether the prayer made in the interim application is related to the main prayer in the main petition.

201. Of course, under Section 63, the State Commission has got the powers to pass interim Orders and other directions pending decision of adoption or non adoption of tariff. However, such directions must be in aid or ancillary to the main prayer i.e. on the tariff to be adopted. Admittedly, the State Commission has not gone into the above questions. There is no answer for these questions either in the impugned Order or in its written submissions. This shows that the State Commission did not apply its judicial mind to the above legal aspect.

202. The **next question is** why the State Commission had not issued notice to the Essar Power to give opportunity to it before passing any directions in interim application when the prayer sought for by Noida Power would affect the interest of the Essar Power, being a successful bidder?

203. The State Commission is mandated to ensure transparency while exercising its power and discharging its functions under Section 86 (3) of the Act. The concept of transparency and principle of natural justice mandates that the State Commission should grant opportunity of hearing to other party before passing any Order detrimental to the said party. It would be pertinent to mention that Regulation 42 of the State Commission's Conduct of Business Regulations provide for opportunity of being heard to all interested parties. Regulation 42 of Conduct of Business Regulations is reproduced below:

“42. If the Commission admits the petitions, it may give such orders and directions, as may be deemed necessary, for service of notices to the respondent and other affected or interested parties, for the filing of replies and rejoinder in opposition or in support of the Petition in such form as the Commission may direct. The notice to the respondent shall be issued within fifteen (15) days of the petition being admitted and the petitioner shall take steps to serve notices on all parties to the petition.

204. In this case the State Commission, not only, wrongly entertained the interim application with a prayer not connected with the main prayer but also passed Orders giving some

directions without giving opportunity of hearing to the Essar Power being the necessary party, in violation of its own Conduct of Business Regulations and the principle of natural justice. There is no clarification for the question as to why the State Commission has hurriedly passed the interim Order in violation of the principles of Natural Justice.

205. According to the Appellant, even though the notice was not ordered, both in the petition No.741 of 2011 filed on 7.4.2011 and in the interim application filed for interim direction on 27.4.2011, the Appellant came to know about the pendency of these petition as well as application before the State Commission through website on 18.5.2011 and after coming to know of the same, the Appellant through its representative appeared before the State Commission and opposed the move of the Noida Power to seek for deviation in the bidding process by allowing the Noida Power to have a further negotiation with the parties with regard to reduction of the tariff. This fact has not been disputed either by the Noida Power or by the State Commission. In fact, the State Commission referred to the objections in the impugned Order dated 30.5.2011. The relevant portion of the observations is as follows:

“Shri Abhayjit Sinha, Essar Power, stated that the competitive bidding has been provided to ascertain the power at the most reasonable price through a transparent process and any deviation from the standard guidelines would destroy this concept”.

206. Having recorded this objection, the State Commission has not chosen to deal with the said objection and to give a finding on that. That apart, the Appellant filed the impleading application before the State Commission raising the same objection on 25.5.2011 which is as follows:-

“8. It is evident from the sequence of events noted above, that once the Appellant has been declared as lowest L1 Bidder, there is no provision for the Procurer to entertain/accept any price bid/offer from any other party which originally did not even participate in the bidding process. In this context, it is submitted that by doing so, the Petitioner has:

(a) Violated the sanctity of the competitive bidding process, thereby making a mockery of the entire case 1 bidding process.

(b) Acted in violation of the provisions of Clause 3.5.9 of RfP which clearly provides that:-

“There shall be no negotiation on the Quoted Tariff between the Authorized Representative/ Procurer and the Bidder(s) during the process of evaluation”.

(c) Acted against the settled position of law which provides that the award of a contract is a commercial transaction and parties are bound by the terms on which the contract is awarded. Parties cannot depart from the contractual documents arbitrarily.

(d) Acted against the ‘doctrine of election’ i.e. having chosen the route of competitive bidding for procurement of power, the Petitioner now cannot depart from the bidding process.

9. It is submitted that in case the contention of the Petitioner is accepted, the same will obliterate the entire process of Case-1 bidding and also contravene the provisions of RfP. This would be treated as a wrong precedent by many prospective bidders in future. Once the price is discovered by following the transparent bidding process, there cannot be any interference with the price and the Appropriate Commission is mandated to adopt the tariff under Section 63 of the Electricity Act, 2003”.

207. The perusal of the impleadment petition also would clearly indicate that the Appellant made a specific plea and raised an objection before the State Commission that if the contention of the Noida Power is accepted, the same would obliterate the entire process of case-I bidding and contravene the provisions of Request for Proposal and therefore, the Appellant has to be heard before passing final Order. This impleadment petition has also been entertained by the State Commission which has also been referred to in the impugned Order. Having recorded the objection raised by the Appellant in the interim Order and having entertained the impleadment petition filed by the Appellant, why the State Commission did not deal with the said objection and gave a finding on that? No answer for this question.

208. Another question also would arise in this context as to why the State Commission having entertained the impleadment petition on 25.5.2011 filed by the Essar Power seeking for the opportunity to make its submissions has not chosen to give the said opportunity of hearing to the Appellant. There is also no

reason as to why the Appellant has not been impleaded in the proceedings before passing an Order in the interim application filed by the Noida Power. For these questions, there is no answer either in its reply nor in the oral submissions made by the State Commission. This shows that the State Commission has not followed the procedure while dealing with the matter which is quasi- judicial proceedings.

209. The main petition had been filed on 7.4.2011. The interim application had been filed on 27.4.2011. Hearing was held on 20.5.2011. As mentioned earlier, the Appellant through its representative appeared voluntarily and made an objection on 20.5.2011. That apart, the Appellant filed the impleading application on 25.5.2011. When such being the case, why the State Commission has hurriedly passed the Order dated 30.5.2011 without hearing the necessary party namely the Appellant on the basis of the impleadment petition and without meeting the point of objection raised by the Appellant during the hearing on 20.5.2011 and 25.5.2011?. For this question also, there is no answer.

210. Thus, the State Commission without application of judicial mind and without adopting the judicial approach, has hastened to pass the impugned Order dated 30.5.2011 without any clarity and without dealing with any issues by giving valid reasons.

211. But, one thing is clear. The State Commission in its reply has clarified that in its Order dated 30.5.2011 the State Commission had not issued any directions through the impugned order with reference to deviation to enable the Noida Power to have negotiations with the 3rd parties so as to consider the tariff quoted by the Athena Power who was not a participant in the bidding process. If this is the stand taken by the State Commission through its clarification, then it goes without saying that the letter issued by the Noida Power on 9.6.2011 is not a valid one since it is not in conformity with the Order passed by the State Commission on 30.5.2011. Thus, the stand of the Noida Power is belied by the stand of the State Commission.

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.

The Appellant admittedly in this case has been declared as a successful bidder by the Evaluation Committee which has been accepted by the Noida Power (R-2). Clause 3.5.8 mandates that the letters of intent shall be issued to the successful bidder. Clause 3.5.12 provides that procurer can reject the bids only when the quoted tariff are not aligned to the prevailing market prices. That is not the case here. Noida Power can exercise its powers under clause 2.15 of the Request for Proposal only before it has accepted the bid of the successful bidder, the same can be exercised only after rejection of the said bid. The said power cannot be exercised after filing the petition before the State Commission for adoption of tariff under Section 63. This is clear from the reading of the clauses contained in the Request for Proposal document. Once the State Commission has entertained the petition filed by the Noida Power under Section 63 of the Act and thereby seized of the matter, then the Noida Power is subjected to the jurisdiction of

the State Commission to decide about the further course of action. In other words, when the petition seeking for adoption of the tariff quoted by the Appellant is pending before the State Commission, Noida Power cannot exercise its powers under the Request for Proposal (RFP) to withdraw the acceptance or reject any or all the bids. The Request for Proposal document has to be read in accordance with the provision of the Act as well as the Government of India guidelines. When the Evaluation Committee declared the Appellant as a successful bidder and recommended to accept the bid as its bid is aligned to the prevalent market conditions and when the Noida power has filed a petition before the State Commission seeking for the adoption of the Appellant's bid, and the same has been entertained by the State Commission, the Noida Power at that stage cannot reject the bid. The filing of the interim application would amount to nullifying the guidelines and making the bid process redundant thereby affecting the rights of the Appellant.

As pointed out by the Learned Counsel for the Appellant, the interim application cannot be entertained by the State Commission as the relief sought for in the interim application is neither in aid nor ancillary to the main relief

sought for in the Petition No.741 of 2011. It is true that under Section 63, the State Commission has got the powers to pass interim Orders and directions pending final decision for the adoption or non adoption of the tariff only when the interim prayer and the interim direction sought for are in aid of main relief. Otherwise it cannot. The entire process of competitive bidding is to discover the tariff in accordance with the market conditions and formulate the competitive bidding in accordance with the finalized PPA. The State Commission under Section 63 of the Act cannot bring peculiar procedure through the back door over the area where explicitly the said procedure has been excluded.

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.

The objective of the competitive bidding is to protect and balance the interest of all the parties concerned i.e. the distribution licensee, the bidder and the consumer. In other words, the entire competitive bidding process is not only to discover the tariff but also to discover the supplier who would be able to supply the required quantum of power to the procurer in timely manner. Only in order to ascertain the above aspects the financial and non financial bids are being invited from all the bidders. Only after verification of the non-financial bids, they are declared as technically qualified. Therefore, clause 2.5 (b) (iii) would not give any separate powers to the Noida Power to have a 3rd party negotiation which would defeat the purpose of the proceedings under Section 63.

The technical parameters submitted by Athena Power for the bidding process for UPPCL are entirely different from the technical details submitted by the Athena Power through its letters in the present case. In the letter dated 13.4.2011, the Athena Power has pointed out that the power will be supplied to Noida Power from the Coal obtained through the coal linkage

sanctioned by the Ministry of Coal. But in the case of UPPCL, it would be supplying power from the coal available from the captive coal mines. Thus, technical parameters of Athena Power for UPPCL bid are entirely different and as such the same cannot be relied upon by the Noida Power in the present case. Further, the details submitted by Athena Power (3rd Party) vide its letters dated 13.4.2011 and 16.4.2011 would have been considered insufficient by the Evaluation committee and its offer would have been rejected as non-responsive. An offer which would have been rejected at initial stage itself by the Evaluation Committee as non-responsive, cannot be accepted by the State Commission at the final stage of the bidding process.

- (D) The next question relates to the validity of the letter dated 9.6.2011 sent by the Noida Power seeking for the revised financial bids from the bidders on the strength of impugned order dated 30.5.2011 even though Noida Power had already accepted the Appellant as a**

successful bidder and communicated the said acceptance to the Appellant.

The Appellant claims that it came to know of the acceptance of the offer by the Noida Power after they filed the petition praying for the adoption. According to the Appellant, the pendency of the said petition filed by Noida power before the Commission came to be known to it on 18.5.2011 when it happened to see the Website of the State Commission. That apart, the Appellant appeared before the State Commission on 20.5.2011 and made representation with regard to the petition as well as the application filed by Noida power in the said proceedings only after it had known about the acceptance of the Noida Power through the petition filed before the State Commission, the Appellant, filed its impleading petition and opposed the move of the Noida Power attempting to go back from the acceptance. Thus there is no substance in the contention of the Noida Power that there was no communication of the acceptance made by the Appellant.

As per Section 4 of the Contract Act, communication of acceptance is complete when it is put into course of transmission to him so as to be out

of the power of the Acceptor and as against the acceptor, when it comes to knowledge of any proposer. Further Section 8 of the Contract Act provides that acceptance of a proposal can also be by the conduct or by performance of the condition by the Acceptor. These provisions would indicate that the aspect of the acceptance can be found out from the conduct of the parties. It is noticed that the Appellant admittedly appeared before the State Commission on 20.5.2011 and represented in the proceedings relating to the main petition as well as the interim application filed by the Noida Power. This is not disputed. That apart, the Appellant has specifically stated that on 18.5.2011, the Appellant came to know about the pendency of the petition filed by the Noida Power accepting the offer of the Appellant before the Commission while scanning the website of the State Commission. This statement also has not been disputed. If this is the undisputed fact situation, then the contention urged by the Learned Counsel for the Noida Power (R-2) that there is neither acceptance nor communication of the same to the Appellant is not tenable.

- (E) The next question would relate to the applicability of the clause 2.5(b)(III) of the Request For Proposal for**

giving directions in the facts and circumstances of the present case.

The plain reading of the clauses 2.5(a), 2.5(g), 2.9.2, 3.5.2, 3.5.3, 3.5.8, 3.5.9 and 3.5.12 of RFP would indicate that the procurer Noida Power has the right to reject all the bids only when the quoted tariff is not aligned to prevailing market price. But in this case, the Noida Power (R-2) itself has relied upon the Evaluation Committee Report stating that the rates quoted by the Appellant is aligned to market prevailing prices and on that basis prayed to the State Commission to adopt and approve the levelised tariff quoted by the Appellant. When such being the case, the question of invoking clause 2.5 (b) (iii) would not arise.

The stand taken by the State Commission now is that they could not exercise the powers under Section 63 due to the non compliance of the requirement. If it is so, they should have simply returned the papers to Noida power asking them to present the same after complying with the said requirements. There was no necessity for the State Commission to give direction to the Noida Power with reference to its rights to take necessary measures for procurement of power as per provisions of clause 2.5 (b) (iii) of the RFP. This is the

improper approach on the part of the State Commission which lacks judicial application of mind. Therefore, the contention of the State Commission that they could not exercise the powers under Section 63 due to the non compliance of the requirement, is not tenable.

- (F) The next point relates to the violation of the principles of the natural justice.**

The State Commission is mandated to ensure transparency while exercising its power and discharging its functions under Section 86 (3) of the Act. The concept of transparency and principle of natural justice mandates that the State Commission should grant opportunity of hearing to other party before passing any Order detrimental to the said party. Regulation 42 of the State Commission's Conduct of Business Regulations provide for opportunity of being heard to all interested parties. In this case the State Commission, not only, wrongly entertained the interim application with a prayer not connected with the prayer in main petition but also passed Orders giving some directions without giving opportunity of hearing to the Essar Power being the necessary party, in violation of its own 'Conduct of Business Regulations'

and the principle of natural justice. There is no clarification for the question as to why the State Commission has hurriedly passed the interim Order in violation of the principles of Natural Justice.

Thus, the State Commission without application of judicial mind and without adopting the judicial approach, has hastened to pass the impugned Order dated 30.5.2011 without any clarity and without dealing with any issues by giving valid reasons.

213. In view of the summary of our findings referred to above, we are to conclude that the State Commission has passed the impugned Order dated 30.5.2011 without application of judicial mind and without adopting the judicial approach. The impugned order appears to have been passed in haste, without any clarity and without dealing with any issue by giving valid reasons. Similarly, the letter sent by Noida Power on 9.6.2011 on the basis of the impugned order is also liable to be cancelled on the above reasons.

214. Hence, the impugned Order dated 30.5.2011 is set aside and remanded back to the State Commission with the direction to dispose of the main petition no. 741 of 2011 in accordance with the law keeping in view of our observations made above as well as the judgments we

have rendered earlier on the aspect of the scope of Section 63 of the Act as expeditiously as possible, preferably, within 3 months from today.

215. Before parting with this case, we have to reiterate and record our disapproval over the improper conduct of the State Commission in not adopting the judicial approach in dealing with the legal issues. We do not want to comment further, as we fervently hope that at least in the future, the State Commission will follow the judicial principles in deciding the matter as a quasi-judicial authority.

216. The Appeal is allowed with the above directions. However, there is no order as to costs.

**(V J Talwar)
Technical Member**

**(Justice M. Karpaga Vinayagam)
Chairperson**

Dated: 16th Dec, 2011

REPORTABLE/NON-REPORTABLE