

KERALA STATE ELECTRICITY REGULATORY COMMISSION

THIRUVANANTHAPURAM

Present: **Shri. T. K. Jose, Chairman**
Adv. A. J. Wilson Member (Law)

OP No. 05/2021

In the matter of: Petition under Section 86(1) (b) and Section 63 of the Electricity Act, 2003 seeking final orders with respect to drawal of 350 MW of contracted power under DBFOO from Bid-2 (from Jindal Power Limited – 150 MW, Jhabua Power Limited -100 MW, and Jindal India thermal Power Limited -100 MW) and final orders with respect to drawal of 115 MW of power from Jhabua Power Ltd (Bid-1) - reg

Petitioner: Kerala State Electricity Board Limited,
Vydhuyuthi Bhavanam, Pattom, Thiruvananthapuram

Respondents: 1. Jhabua Power Limited
Unit No.307, Third Floor, ABW Tower, M.G Road,
Gurugram, Haryana- 122 002
2. Jindal India Thermal Power Limited
Plot No.2, Pocket-C, Second Floor, Nelson Mandela Road,
Vasanth Kunj, New Delhi-110 070
3. Jindal Power Limited,
Jindal Centre,
12, Bhikaji Cama Place, New Delhi 110 066.

Additional respondents impleaded during the proceedings:

1. The Kerala High Tension & Extra High Tension Industrial Electricity Consumer Association, Productivity House, HMT Road, Kalamassery, Cochin-683104
(Additional Respondent- No.1-IA No. 4/2021)
2. Shri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum, Kodimatha, Kottayam.
(Additional Respondent-No.2- IA No. 7/2021)

Date of hearing :1. 09-02-2021 at Ernakulam (Public hearing)
2. 28.03.2023 at Kozhikode (Public hearing)
3. 29.03.2023 at Ernakulam (Public hearing)
4. 11.04.2023 at Thiruvananthapuram (Public hearing)

Order dated 10.05.2023

1. The petitioner KSEB Ltd filed this petition on 12.11.2020 before this Commission for adoption of tariff of the PSAs signed by them, seeking final orders with respect to drawal of 350MW of power (Jindal Power Ltd-150MW, Jhabua Power Ltd.-100MW and Jindal India Thermal Power Ltd – 100MW) contracted by the Petitioner through the second bid invited under DBFOO Guidelines-2013, during 2014 in the light of various orders issued by this Commission. (Order dated 30-8-2016 in petition OP No. 13/2015, Order dated 8-7-2019 in OA No. 15/2018, Order dated 14-2-2020 in OA No. 29/2019, Order dated 27-4-2020 in OA No. 2/2020, Order dated.14-8-2020 in RP No. 2/2020 & RP No. 4/2020 and directions contained in the letter dated 22.12.2017).
2. The petitioner also filed an additional submission as IA No.5/2023 dated 22.03.2023 amending the prayer seeking final orders for drawal of 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the orders on approval of ARR, ERC and tariff of KSEB Ltd for the control period 2022-23 to 2026-27 in O.P. No.11/2022 dated 25.06.2022 of the Commission.
3. In the light of the above submissions, the petitioner KSEB Ltd requested before the Commission to issue final orders with respect to drawal of power from the following PSAs:
 1. 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
 2. 150 MW of power from Jindal Power Ltd (Bid-2)
 3. 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
 4. 100 MW of power from Jhabua Power Ltd (Bid-2)
4. The Hon'ble Supreme Court in Civil Appeal No. 41/2021 filed by this Commission on 10.02.2023 has issued a direction to the Commission that the Commission will take a call and decide O.A. No. 5 of 2021 (OP No.5/2021) as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A. It was also clarified that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter. It was also directed that the parties shall appear before the Commission on 20.02.2023 at 10.30 a.m. The relevant portion of the Order issued by the Hon'ble Supreme Court is extracted hereunder:

When the matter was taken up for hearing, a consensus has been arrived at between the parties that the interim order if decided by this Court either way is not going to ultimately decide the fate of O.A. No. 5 of 2021 pending before the Commission, which has to be independently decided on its own merits in accordance with law and interim orders always merge after the final decision is taken by the Commission.

In the given facts and circumstances, we consider appropriate to observe that the mechanism, which is in place after passing of the interim order of this Court dated 27.01.2021, shall continue and the electricity may be supplied by the respondents herein in terms of Power Supply Agreement on the same terms and conditions, which may be subject of the outcome of the pending O.A. No. 5 of 2021.

We expect that the Commission will take a call and decide O.A. No. 5 of 2021 as expeditiously as possible but in no case later than three months and both the parties shall cooperate in getting expeditious disposal of the pending O.A. We further make it clear that the present interim arrangement shall continue up to the date of the disposal of O.A. No. 5 of 2021 and for a further period of two weeks thereafter.

We direct the parties to appear before the Commission on 20.02.2023 at 10.30 a.m. The present appeal stands disposed of in the above terms.

We have not expressed any opinion on merits of the case and the Commission may decide the pending O.A. on its own merits in accordance with law.

5. Brief history with background of the issues involved in the OP No. 5/2021 is as follows:

(1) The Ministry of Power, Government of India, vide Resolution No. 23/17/2011/R&R/Vol-V dated 09.11.2013 notified the guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis and also issued model documents comprising the Model Request for Qualification (MRFQ), the Model Request for Proposal (MRFP) and the Model Power Supply Agreement (MPSA) which are collectively known as the Standard Bidding Documents (SBD) which is to be adopted by the distribution licensee for procurement of electricity from power producers through a process of open and transparent competitive bidding under Section 63 of the Electricity Act, 2003, based on the offer of the lowest tariff. Clause 4 of the said guidelines is given below:

4. Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government

(2) According to the petitioner, considering the energy shortage anticipated from the year 2016-2017 and also considering the risk of bearing the 50% of the fixed charges in the event of non-availability of transmission system, KSEB Ltd decided to invite two separate bids for procurement of power, on DBFOO basis as detailed below:

- (i) For procuring 450MW power from December-2016 onwards for 25 years, and,
- (ii) For procuring 400MW power from October-2017 onwards for 25 years.

(3) The said Bid invitations were made by the petitioner deviating from the SBD guidelines issued by the MoP dated 08.11.2013 (Clause 3.3.1 of Request for Proposal (RFP) which stipulate the selection of one bidder, and without obtaining the prior approval of the Central Government.

(4) Accordingly, the first bid was invited on 05.03.2014 and the second bid was invited on 25.04.2014. Thereafter, supposedly completing all the procedural formalities as required under the SBD guidelines of 2013 of Govt of India, the financial bids received in Bid-1 was opened on 31.10.2014. It is seen that ten bidders had submitted their bids. **(Table-1)** Further, the L1 bidder in Bid-1, offered only 200 MW. Hence, KSEB Ltd requested the bidders L2 to L4 to match their tariff to L1. But, apparently, none of the bidders were willing to match their rates with that of L1. The Bid-2 was opened on 14-11-2014. Eleven bidders participated in the bid. **(Table-2)** M/s. BALCO, the lowest bidder in Bid-2, offered to supply 100 MW only as against 400 MW by KSEB Ltd. Hence, KSEB Ltd requested the bidders L2 to L6 to match the quoted tariff with that of the L1 bidder. The bidders L2 to L5 in the Bid-2 offered their willingness to match their tariffs quoted by the L1 bidder. **(Table-3)**

Table-1

Details of bids received through Bid-1 opened on 31.10.2014

	Name of Bidder	Quantum, MW	Quoted Tariff, Rs.			Location of Power Station	Rank
		Offered	Fixed charge	Variable charge	Tariff		
1	Jindal Power Limited, New Delhi.	200	2.74	0.86	3.60	Chhattisgarh	L1
2	Jhabua Power Limited, Gurgaon.	115	2.39	1.76	4.15	Seoni, MP	L2
3	Bharat Aluminium Co. Ltd., Chhattisgarh.	115	3.25	1.04	4.29	Chhattisgarh	L3
4	Jindal India Thermal Power Limited, New Delhi.	200	3.64	0.75	4.39	Angul, Odisha	L4
5	R. K. M. Power gen Pvt. Ltd., Chennai.	150	3.24	1.96	5.20	Chhattisgarh	L5
6	Adani Power Ltd., Gujarat.	300	3.85	1.69	5.54	Kutch, Gujarat	L6
7	Lanco Power Ltd., Gurgaon.	450	3.43	2.19	5.62	Lanco Vidarbha Thermal Power Ltd	L7
8	Vandana Vidyut Ltd., Raipur.	114	4.70	1.48	6.18	Chhattisgarh	L8
9	Thermal Powertech Corporation India Ltd., Hyderabad.	120	4.93	2.07	7.00	Nellore, Andhra Pradesh	L9
10	Indiabulls Power Limited, Gurgaon.	450	5.15	2.14	7.29	Nashik Thermal Power Station	L10

Table-2

Details of bids received through Bid-2 opened on 14.11.2014

Sl.No	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)			Rank
			Fixed charge	Fuel Charge	Tariff	
1	Bharat Aluminium Co Ltd, Chhattisgarh 495684	100	3.25	1.04	4.29	L1

2	Jindal India Thermal Power limited, New Delhi 110066.	100	3.62	0.75	4.37	L2
3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	L3
4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	L4
5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	L5
6	Monnet Power Company Limited, New Delhi	100	3.61	0.88	4.49	L6
7	SKS Power Generation (Chhattisgarh)Ltd.	122	3.96	0.87	4.83	L7
8	Lanco Power Limited, Gurgaon, 122016	400	3.67	1.52	5.19	L8
9	Adani Power Limited; Gujarat 380009	300	3.95	1.69	5.64	L9
10	M B Power (Madhya Pradesh) Limited; New Delhi 110020	374.15	3.50	2.43	5.93	L10
11	NCC Power Projects Limited, Andhra Pradesh 500082.	100	3.88	2.07	5.95	L11

Table-3

Details of the tariff matched by L2 to L5 in the Bid-2 with that of L1

Rank	Name of Bidder	Quantum Offered MW	Quoted Tariff (Rs.Ps)/kwh			Matched tariff (Rs.Ps)/kwh		
			Fixed charge	Fuel Charge	Tariff	Fixed charge	Fuel Charge	Tariff
L1	BALCO Ltd, Chhattisgarh	100	3.25	1.04	4.29			
L2	Jindal India Thermal Power limited, New Delhi 110066.	100	3.62	0.75	4.37	3.54	0.75	4.29
L3	Jhabua Power Limited, Gurgaon-122001	100	2.65	1.76	4.41	2.97	1.32	4.29
L4	Jindal Power Limited, New Delhi	150	3.57	0.86	4.43	3.43	0.86	4.29
L5	East Coast Energy Private Limited, Andhra Pradesh	100	2.95	1.5	4.45	3.14	1.15	4.29
	Total	550						4.29

(5) Considering both the Bids, KSEB Ltd had in principle decided as follows.

- (a) The tariff offered by the L1 bidder in the Bid-1 is @ Rs 3.60 per unit for supplying 200 MW from December-2016 onwards for 25 years. Since the tariff appeared to be very competitive, KSEB Ltd issued LoA with the 'L1' bidder, M/s Jindal Power Limited, New Delhi for procuring 200 MW from December-2016 onwards for '25' years.
- (b) The tariff offered by L2 bidder in the Bid-1 is @ Rs 4.15 per unit for supplying 115 MW from December-2016 onwards for 25 years. However, though L2 bidder of Bid-1 had refused to match the L1 bidder's tariff, KSEB Ltd in deviation to its own offer, accepted the quoted tariff of 4.15 per unit. KSEB Ltd tried to justify this exception on the grounds that the tariff offered by L2 bidder of Bid-1 is less than the tariff quoted by L1 bidder in the Bid-2 and the tariff "seems to be competitive when compared to the cost-plus tariff of recently commissioned NTPC projects,". Though it was contrary to KSEB Ltd.'s offer to match the tariff of the L1 bidder in Bid-1, KSEB Ltd based on this justification issued LoA to the 'L2' bidder of the Bid-1, M/s Jhabua Power Limited Gurgaon for procuring 115 MW from December-2016 onwards for '25' years @ Rs 4.15 per unit.
- (c) Since the tariff quoted by the remaining bidders (Other than L1 and L2) in the Bid-1 is equal to or more than the tariff derived in the Bid-2, KSEB Ltd did not consider the remaining offers from the Bid-1. Thus, in Bid-1, out of the tendered quantity of 450 MW, KSEB Ltd issued LoA for 315 MW (200 MW +115 MW) to the L1 and L2 bidders.
- (d) In so far as the Bid-2 is concerned, against a tendered quantity of 400 MW, KSEB Ltd in violation of the tendered quantity issued LOA for 550 MW from the L2, L3, L4 and L5 bidders @ Rs 4.29 per unit for 25 years from October-2017. KSEB Ltd thereafter tried to justify this on the ground that the tariff offered 'appeared to be competitive' when compared to the present cost-plus tariff of the recently commissioned stations of NTPC Ltd and considering the competitive tariff of Rs 4.29 per unit derived through the Bid-2, and also duly considering the likely power shortages in the forthcoming years. Hence, KSEB Ltd decided to procure 550MW through Bid-2, @4.29 per unit for twenty-five years from October-2017 onwards.
- (6) Government of Kerala has accorded sanction for procuring 865 MW on DBFOO basis vide G.O(MS) No.45/2014/PD dated 20.12.2014.
- (7) Subsequently, KSEBL entered into Power Supply Agreements for the long-term procurement of 865 MW electricity for a period of 25 years from 1st December 2016 and 1st October 2017 with the L-1 and L-2 bidders of Bid-1 and L-1 to L-5 bidders of bid-2 respectively as given below:

Table-4

Sl No.	Power Supplier	Region	Power MW	Tariff (Rs. /kWh)	PSA Date	To be supplied from
1	Jindal Power Limited	WR	200	3.60	29-12-2014	Dec-16
2	Jhabua Power Limited	WR	115	4.15	31-12-2014	Dec-16
3	Bharat Aluminium Co. Ltd	WR	100	4.29	26-12-2014	Oct-17
4	Jindal India Thermal Power Ltd	ER	100	4.29	29-12-2014	Oct-17
5	Jhabua Power Limited	WR	100	4.29	26-12-2014	Oct-17
6	Jindal Power Limited	WR	150	4.29	29-12-2014	Oct-17
7	East Coast Energy Private Ltd	SR	100	4.29	02-02-2015	Oct-17
	Total		865			

- (8) Hence, KSEB Ltd. has filed a petition before the Commission on 21.04.2015, requesting to adopt the tariff as per Section 63 of the Electricity Act, 2003 for the 865 MW of power tied with various generators as per the tariff as detailed in the petition.
- (9) The Commission examined the petition and the report furnished by the KSEB Ltd in detail and found out certain irregularities/ deviations in the bidding guidelines and also found out that the petitioner has not obtained prior approval of the Commission and Central Government in the matter of PSAs and the deviations from the guidelines. In response to the clarification sought by the Commission vide letter dated 07.12.2015, the petitioner submitted a reply dated 27.01.2016. However, no request has been made by the petitioner before the Commission for a hearing/ public hearing. The important deviations noted by the Commission at Para 32 of the Order dated 30.08.2016 in OP No.13/2015 is extracted below:

“32. KSEB Ltd has stated that it has not deviated from the guidelines issued by Government of India. But it is found that KSEB Ltd has deviated from the procedures prescribed by the guidelines issued by Government of India, when the bids were processed by it. The Commission has also noted that KSEB Ltd has deviated from the procedure specified in Tariff Regulations, 2014. The Commission has noted the following deviations from the standard bidding documents and guidelines issued by Government of India on 08.11.2013 and 09.11.2013 and from the provisions in the Tariff Regulations, 2014 issued by the Commission,-

- (i) *KSEB Ltd has awarded power purchase contract to the second lower bidder at its quoted rate of Rs.4.15 / kWh which is higher than the lowest rate of Rs.3.60 / kWh in Bid-1, whereas the guidelines issued by the Government of India are only for the selection of the lowest bidder.*
- (ii) *KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extend their respective bid security and to match their rates with that of L1.*
- (iii) *KSEB Ltd has purchased 550 MW of power in Bid-2 as against the tendered quantity of 400 MW.*

- (iv) *KSEB Ltd has obtained only 200 MW from the lowest bidder in Bid-1 at a rate of Rs.3.60 / kWh. Thereafter 115 MW power from L2 has also been purchased at a higher rate of Rs.4.15 / kWh. Thus a total quantity of 315 MW was purchased as against the tendered quantity of 450 MW leaving a balance of 135 MW. KSEB Ltd has purchased more quantity of power than the tendered quantity in Bid-2 stating the reason that it could not get the full tendered quantity in Bid-1. Such purchase of more than the tendered quantity is not in accordance with the general principles of tender process.*
 - (v) *Even if the above 135 MW is considered for procurement from Bid-2, the total quantity that can be purchased is only 535 MW (400 MW + 135 MW). However, KSEB Ltd has purchased 550 MW deviating from the conditions prescribed by Government of India in the para 3.3.3 in the guidelines notified by Government of India on 5th May 2015, which has been relied upon by KSEB Ltd to justify award of power purchase contracts to bidders other than the lowest bidder in Bid-2.*
 - (vi) *KSEB Ltd has not obtained prior approval from Government of India for the deviations from the standard bidding documents and the guidelines.*
 - (vii) *KSEB Ltd has not obtained approval from the Commission before executing the power purchase agreements.*
 - (viii) *KSEB Ltd has not included any clause in the impugned PPAs to the effect that the PPA shall have the effect only with the approval by the Commission as specified in sub-regulation (1) of regulation 78 of the Tariff Regulations, 2014”.*
- (10) Hence the Commission considering the facts, documents and legal position has disposed of the Petition OP No.13/2015 vide Order dated 30-08-2016. The relevant portion of the said Order dated 30.08.2016 is extracted hereunder:

“Order of the Commission

40. In view of the facts, circumstances and legal provisions explained above the Commission hereby issues the following orders, -

- (1) *The purchase of 200 MW of power by KSEB Ltd from M/s Jindal Power Ltd, New Delhi at the rate of Rs.3.60 / kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014, is approved.*
- (2) *The purchase of 100 MW of power by KSEB Ltd from M/s Bharat Aluminium Company Ltd, Chhattisgarh at the rate of Rs.4.29/ kWh as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014, is approved.*
- (3) *The approval of the following purchases of power by KSEB Ltd from the bidders other than the lowest bidder (L1) will be considered on getting the approval from Government of India for the deviations from the guidelines and on getting the views from Government of Kerala on the issues raised in paragraphs 34 and 38 of this order.*

(a)	The purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd, Gurgaon at the rate of Rs.4.15/ kWh as per the Bid -1 dated 05.03.2014 which was opened on 31.10.2014.
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(b)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal India Thermal Power Ltd, New Delhi (L2) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.</i>
(C)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jhabua Power Limited, Gurgaon (L3) as per the Bid -2dated 25.05.2014 which was opened on 14.11.2014</i>
(d)	<i>The purchase of 150 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s Jindal Power Limited, New Delhi (L4) as per the Bid -2dated 25.05.2014 which was opened on 14.11.2014.</i>
(e)	<i>The purchase of 100 MW of power at the rate of Rs.4.29/ kWh by KSEB Ltd from M/s East Coast Energy Private Limited, Andhra Pradesh (L5) as per the Bid -2 dated 25.05.2014 which was opened on 14.11.2014.</i>

- (4) *A copy of this order will be submitted to Government of Kerala with request to communicate their views after duly considering the relevant facts and legal provisions in view of the Government Order GO (MS) No. 45/2014/PD dated 20.12.2014 sanctioning the purchase of 865 MW of power by KSEB Ltd on DBFOO basis*
- (5) *KSEB Ltd is directed to follow up the matter in Government of India and in Government of Kerala and to submit the results to the Commission as early as possible, considering the fact that the power purchases as per Bid-1 will have to commence with effect from December, 2016.*
- (6) *All the orders above are subject to the final decisions of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014."*

- (11) The Government of Kerala vide letter No. CA-DBFOO/KSERC/2016/PD dated 15-09-2016 addressed to the Govt. of India, sought for clarification/decision on the matter of long-term procurement for 865 MW power, in view of the observation made by the Commission in the Order dated 30-8-2016 in OP No.13/2015. In response to the above letter, Govt of India furnished their views vide letter dated 18.11.2016. The relevant portions of the said Govt of India letter dated 18-11-2016 is extracted below:

"4. The deviations as pointed out by KSERC would have been got vetted and approved by the Central Government before issuance of RFQ, RFP&PSA & not at this stage". As per the guidelines, deviation on the provision of the bidding documents is approved, if necessary, and not the action taken by utility as per the practice or precedent.

5. In view of the above, Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC".

- (12) The petitioner vide letter No. KSEB/TRAC/Power Purchase/2016-17/3384 dated 15.11.2016, has submitted to the Commission as follows:

14. In view of the above it is submitted that the purchase of 115 MW power from M/s Jhabua Power Ltd, is inevitable and it is humbly requested the Hon'ble Commission may kindly accord approval for scheduling the power from M/s Jhabua Power Ltd from December, 2016 It is also submitted that KSEBL shall approach the Commission with the approval from Ministry of Power once the same is received.

But the Commission, as per letter No. 1893/DD (T)/Jhabua/2016/ KSERC dated 28.11.2016 directed the KSEB Ltd to submit approval from both Government of India and Government of Kerala. But no reply was received from the petitioner, instead the petitioner submitted a copy of GO (Rt) No.238/2016/PD dated 30.11.2016 issued by the Government of Kerala which granted permission to the KSEB Ltd to procure 115 MW from M/s Jhabua Power Ltd from 01.12.2016. The petitioner has further submitted that no formal communication has been received in respect of approval of Government of India.

- (13) In the circumstances and urgency explained by KSEB Ltd and in view of the decision of Government of Kerala vide GO dated 30.11.2016, the Commission vide Order No.1893/DD/(T)/Jhabua /2016/KSERC in OP No.13/2015 dated 22.12.2016 has provisionally approved the purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd at the rate of Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India. Relevant portion of the said Order is extracted hereunder:

8. In view of the facts, circumstances and urgency explained by KSEB Ltd and in view of the decision of Government of Kerala in GO (Rt) No.238/2016/PD dated 31.11.2016, the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd from M/s Jhabua Power Ltd at the rate of Rs.4.15 / kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from Government of India and subject to the final decision of the Hon'ble High Court in Writ Petition No. WP (C) 33100/2014.

- (14) Thereafter, the petitioner vide letter No.KSEB/TRAC/POWER PURCHASE/2018 dated 25/10/2017 informed that KSEBL was forced to schedule the 350MW power under Bid-2 from 1-10-2017 and could not defer scheduling this power because of the precarious power scenario and in anticipation of getting approval from the Commission upon clarification/direction from the Govt. of Kerala. The petitioner also produced G.O.(Ms) No.22/2017/PD dated 21/10/2017 and also requested to the Commission for approval. As per the above G.O, the Govt has permitted the KSEBL to draw the contracted power from 1/10/2017. In the said Order, the Government of Kerala has clarified that final orders in the matter shall be issued in due course and hence the Govt order dated 21.10.2017 is not a final order.

- (15) In the circumstances mentioned above, the Commission vide its letter dated 22.12.2017 allowed KSEB Ltd to schedule 100 MW power from Jindal India Thermal Power Ltd, 100 MW from M/s Jhabua power limited and 150 MW from M/s Jindal Power Limited in view of the G.O (M.S) No. 22/2017/PD dated 21.10.2017. In the said letter, the Commission pointed out that *the G.O. dated 21/10/2017 is only an interim measure and final orders are yet to be issued. Since the Government is yet to give its final decision, it is informed that, the Commission may approve the power purchase proposal including the rate for the pending approvals only after the State Government accords the final approval for the entire power purchase under DBFOO.*

- (16) The petitioner vide letters dated 20/7/2019 and 2/8/2019, has requested the Commission that in order to avoid the denial of purchase of power from exchanges and the stoppage of supply of 350 MW power by RLDCS and the consequent adverse impact on the state power system, due to the non-establishment of LC as PSM for the DBFOO contracts under Bid-2, the final approval of PSA's may be granted. The Commission declined the petitioner's requests vide letter No.1146/D(T)/2019/KSERC dated 26/9/2019 as extracted here under:

KSERC is a statutory quasi-judicial body constituted under the Electricity Act, 2003. Section 94 of the Electricity Act, 2003 confers on the Commission the same power as are listed in a Civil court under the Code of civil procedure, 1908 in respect of directions, orders, reviews etc.

The Commission had vide its Order dated 30/8/2016 directed KSEB Ltd. to get the approval of the Govt. of India for the deviations in the standard bidding guidelines and in view of the G.O (Ms)No.45/2014/PD dated 20/12/2014 to obtain the views of Govt of Kerala, after duly considering the relevant facts and legal provisions. Since the above approvals are yet to be submitted before the Commission by the KSEB Ltd. the Commission cannot consider the request of KSEB Ltd to grant approvals for the PSA's entered into with L2, L3 and L4 in Bid-2 under DBFOO.

- (17) The Government of Kerala vide letter dated 20.01.2018 has requested the Ministry of Power to render the advice as to whether it will be irregular to confirm the said purchase of power under PSAs executed with the bidders other than L 1 bidder under Bid 1 and Bid 2. In reply to the clarification sought by State Government, Central Government vide letter No.23/12/2018-R&R dated 11.12.2019 has clarified as follows:

"4. The matter has been further examined. The view of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are read. Deviations are pointed out by KSERC would have been got better and approved by Central Government before the issuance of RFQ, RFP and PSA and not at this stage. Government of Kerala / KSEBL may take action as appropriate in consultation with KSERC".

- (18) But neither the Government of Kerala nor KSEB Ltd has consulted the Commission as directed by the Central Government.

- (19) While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated as follows.

"Hence the Commission has considered scheduling power from the three projects of Bid-2, ie., 100 MW of power from M/s Jindal India Thermal Power Ltd, New Delhi, 100 MW of power from M/s Jhabua Power Limited and 150 MW of power from M/s Jindal Power Limited for the limited purpose of estimating the ARR&ERC for the control period. Since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from BALCO, which is the L1 of Bid 2. The Commission emphasizes that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 30-8-2016"

- (20) Similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission had considered the rate equivalent to the cost of power from BALCO for estimating the cost of power provisionally from these three generators. The Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO. With the above observation, the Commission decided the Fuel surcharge petitions OA No. 29/2019 and OA No. 02/2020 filed by the KSEB Ltd, limiting the additional cost claimed by the generators.
- (21) On 06.04.2020, KSEB Ltd wrote to Jindal India Thermal Power Ltd stating that in the absence of regulatory approval to pass the entire power procurement cost against the unapproved PSAs, KSEB Ltd would have to limit payment to the generators in accordance with the orders of the Commission.
- (22) KSEB Ltd. in the petition O.A.No.29/2019 dated 14.2.2020 filed for the approval of fuel surcharge for the period from April 2019 to June 2019, and also in petition O.A.No.02/2020 dated 27.4.2020 for the approval of fuel surcharge for the period from July 2019 to September 2019 has claimed fuel surcharge for the electricity purchased from the three unapproved DBFOO contracts in bid-2 namely (1) 100 MW power from M/s Jindal India Thermal Power Ltd ,New Delhi, (2) 100 MW from M/s Jhabua Power Ltd and (3) 150 MW from M/s Jindal Power Ltd. The Commission vide the Orders dated 14.2.2020 and 27.4.2020 has not approved the fuel surcharge claimed from the above three unapproved DBFOO contracts citing the reason that the Commission has not specifically approved the fixed charge and variable cost of these stations. Instead, the Commission directed KSEB Ltd. to limit the payment of these stations at the rate of BALCO, i.e, the L1 rate of Bid-2. KSEB Ltd filed review petition Nos. 2 of 2020 and 4 of 2020 against the orders of the Commission dated 14.02.2020 and 27.04.2020 respectively. The Commission, vide its common order dated 14.08.2020 dismissed the review petitions.
- (23) The petitioner KSEB Ltd on 08.09.2020 wrote to Jindal India Thermal Power Ltd stating that a petition for approval or otherwise of the PSAs was being filed by them before the State Commission. Relevant portion is extracted hereunder:
-Now KSERC had rejected these review petitions in the common order issued on 14.08.2020. In this order, KSERC has reiterated that the contracts do not have approval of KSERC and any amount paid above the rate applicable to L1 bidder will not be passed on. Apparently, with this order of KSERC , the conditions precedence mandated under the PSA remains unfulfilled . In these circumstances KSEBL is filing a separate petition before KSERC seeking specific order on the approval or otherwise of the respective PSA's. Meanwhile, KSEBL is constrained to limit the payment against monthly bills with respect of the power*

scheduled from your station to that of the tariff rate of BALCO, in the respective monthly bills, in compliance with the orders of the Commission....”

- (24) Aggrieved by the above, communication of KSEB Ltd M/s Jindal India Thermal Power Ltd on 07.10.2020 filed an appeal under Section 111 of the Electricity Act, 2003 before the Hon'ble Appellate Tribunal for Electricity being DFR No. 369/2020 titled *Jindal India Thermal Power Ltd. Vs. Kerala State Electricity Regulatory Commission & Ors.* In that petition, Jindal India Thermal Power Ltd prayed that the orders of the Commission passed in OA No. 29/2019 and OA No. 2 of 2020 dated 14.02.2020 and 27.04.2020 respectively are to be set aside. Additionally, it was also prayed that the procurement of power to be approved as per the tariff in the PSA signed with KSEB Ltd. The APTEL issued an interim direction to this Commission to file affidavit and posted the case to 20.11.2020.
- (25) In the meanwhile, on 12.11.2020, KSEB Ltd filed this OP No.5/2021 as fresh petition under Section 63 of the Act, for adoption of tariff of the unapproved PSAs signed by them before the Commission.
- (26) In due compliance of the interim Order dated 06.11.2020, issued by the Hon'ble APTEL, the Commission filed an affidavit stating the entire facts. But the Hon'ble APTEL issued an interim stay Order on 20.11. 2020. Relevant portion is extracted hereunder:
- During the hearing today, we were informed that the second Respondent i.e. Kerala State Electricity Board Ltd. (KSEBL) has approached the State Commission (first Respondent) by a fresh petition seeking approval for procurement of power from the Appellant and the PSA as also adoption of tariff discovered in bid process. The State Commission, we are further informed, has issued notice to the Appellant as well.*
-In the facts and circumstances and bearing in mind also the fact that the approval of the State Commission for the PSA and the prayer for tariff adoption is still awaited, we feel it just and proper to direct stay against the operation of the impugned orders dated 14.02.2020 and 27.04.2020 on subject of fuel surcharge and, in the consequence, restoring status quo ante to the dispensation prevailing immediately anterior thereto, as an ad-interim arrangement, such ad-interim order to continue till the application for stay and appeal are adjudicated upon after final hearing. ... **We clarify that the appeal and application filed therewith will be taken up for final hearing after the decision on the fresh petition for approval/adoption has been rendered by the State Commission. Ordered accordingly.***
- (27) The Commission, challenging the interim Order of the APTEL dated 20.11.2020 filed Civil Appeal No. 41/2021 before the Hon'ble Supreme Court on 04.01.2021. The bench of the Hon'ble Chief Justice of India, vide the Order dated 27.01.2021 in Civil Appeal No. 41/2021 was pleased to award stay to further proceedings in this matter in the Appellate Tribunal. However, in compliance of the Order issued by the Hon'ble APTEL dated 20.11.2020, the Commission scheduled public hearings on 09.02.2021 at Ernakulam and on 19.02.2021 at Thiruvananthapuram in OP No. 5/2021. Accordingly, a public hearing was conducted on 09.02.2021 at Ernakulam. During the hearing, the KSEB Ltd presented the case and reiterated their contentions narrated in the Original Petition. But objections were raised by the participants on the ground that the Order dated 20.11.2020 of the APTEL has been stayed by the Hon'ble Supreme Court. Since the matter is sub judice, the Commission shall not hear

the case. The Kerala High Tension & Extra High Tension Industrial Electricity Consumer Association and Shri. Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum raised strong objections and filed IAs and sought three weeks' time. Based on the objections raised by the participants in the public hearings and in view of the Interim Stay Order issued by the Hon'ble Supreme Court in Civil Appeal No. 41/2021 dated 27.01.2021, the Commission decided to wait for the final disposal of the Civil Appeal No. 41/2021.

- (28) The Petitioner vide letter No. KSEB/TRAC/CG/DBFOO/2021-22/49 dated 28/4/2022 informed the Commission that Govt. of Kerala "on 27/10/2021 vide G.O (Rt) No.163/2021/POWER dated 27/10/2021 had constituted a Committee with Additional Chief Secretary (Finance) as Chairman, Principal Secretary (Power) as Convenor and Law Secretary and CMD KSEBL as members to examine the bidding process and purchase agreements entered into by KSEBL based on the comments of the statutory agencies and the possibility of terminating/re-negotiating the power purchase agreements in the best interest of the State. It was mentioned in the said letter that the said Committee in the meeting held on 19/1/2022 recommended that the prudent course of action would be that deviations in the standard bidding process are not agreed by the Government of Kerala in respect of the following PSA's.
- i. Jhabua Power Ltd-Bid1-115 MW
 - ii. Jhabua Power Ltd-Bid2-100 MW
 - iii. Jindal India Thermal Power Ltd-Bid-2-100 MW
 - iv. Jindal Power Ltd-Bid2-150 MW
6. The Hon'ble Supreme Court disposed the Civil Appeal No.41/2021 vide Order dated 10.02.2023 as stated at pre-Para-4. In compliance of the Order dated 10.02.2023 of the Hon'ble Supreme Court, a meeting was convened at the Office of the Commission by e-hearing mode on 20.02.2023 at 10.30 a.m. During the meeting, the Commission considered and agreed to the suggestions of the parties and allowed 'Thirty days' time to all the parties to file objections and suggestions and directed to communicate the same to other parties also.
7. The Commission also considered the IA filed by the petitioner dated 22.03.2023 and allowed the application as IA No.05/2023 on 24.03.2023 seeking approval for amending the relief portion of the petition OP No. 05/2021 for final orders for drawal of power from the PSAs for 115 MW of contracted power under Bid-1 from Jhabua Power Ltd in view of the Order dated 25.06.2022 in OP No.11/2022 of the Commission.
8. Thereafter, Public hearings were conducted on 28.03.2023 at Kozhikode, 29.03.2023 at Ernakulam and on 11.04.2023 at Head Quarters, Thiruvananthapuram. Adv. Prabhas Bajaj appeared on behalf of the petitioner KSEB Ltd. Adv. Pranav Sood represented for M/s Jindal Power Ltd. Adv. Matrugupta Mishra, Shri. Pulak Srivastava, General Manager, and Shri. Sanjay Mittal, Director, JITPL represented on behalf of M/s Jindal India Thermal Power Ltd. Shri. Vinod Kumar Jain, AGM, NTPC represented for Jhabua power Ltd. Shri Nandakumar, Shri. Saji Mathew and Shri. Prabhakaran. K. V. represented on behalf of HT&EHT Association and presented the averments on behalf of HT&EHT

Association. Shri Dejo Kappen, Chairman, Democratic Human Rights & Environment Protection Forum and Shri. C.P. George, Dy. Chief Engineer, KSEB Ltd (Rtd), were also presented their arguments. Shri. M.G. Suresh Kumar, Gen Secretary, KSEB Officer's Association and Shri. Saju. A.H, KSEBWA, (CITU) were also presented their arguments and submitted their written documents.

9. During the final public hearing held on 11.04.2023, the petitioner presented the case in detail seeking final approval of the four PSAs based on the IA No.05/ 23 filed by the petitioner. The respondents (M/s jhabua Power Ltd, M/s Jindal India Thermal Power Ltd and M/s Jindal Power Ltd) have supported the petitioner and presented their arguments for final approval of the PSAs pending for approval. The additional respondents raised objections. On conclusion of the hearing, the Commission vide Daily Order dated 12.04.2023 directed the Petitioner to present their final submission with their sworn affidavit within seven days, ie, on or before 17th April, 2023, with direction to serve copies of the same to the respondents and additional respondents. The Commission also directed other respondents and stake holders who participated and presented the arguments, to submit their argument notes, objections and suggestions with duly authenticated data along with their sworn affidavit on or before 17th April, 2023 in view of the time limit fixed by the Hon'ble Supreme Court.

10. Summary of the petition filed by Petitioner (KSEB Ltd) is given below:

- (1) From 2011-12 year onwards, the petitioner had been facing huge power and energy shortage in the State. Considering this the petitioner decided to procure 850 MW of power to meet the peak demand and the energy requirement of the State, took a decision for procurement of long-term power by the petitioner on 21-2-2014 and entered into long-term Power Sale Agreements for 865 MW through two tariff based competitive bids during December, 2014 as per the tariff based competitive bidding Guidelines for procurement of electricity from Thermal Power Stations set up on DBFOO basis, notified vide Resolution No. 23/17/2011-R&R (Vol-V) dated 08-11-2013 by MoP under Section 63 of the Electricity Act, 2003.
- (2) As per the DBFOO guidelines, after entering into Power Purchase contracts, if the power could not be evacuated, the buying entity is bound to pay 50% of the fixed charges to the supplier. Since DBFOO guidelines provides for only one delivery date (CoD) to be prescribed in a bid and since two delivery dates are found to be necessary based on assessment of transmission corridor availability, it became imperative to invite two separate bids with two separate start dates. Further, it was assessed that the tender procedures would be completed before December, 2014 and LTA applications for the same could be submitted by December, 2014 so that availability of corridor can be ensured for the start dates specified in the bids. Accordingly, KSEB Ltd. decided to invite two separate bids as per DBFOO guidelines, for the procurement of RTC power from thermal power stations set up on DBFOO basis for a period of 25 years – Bid-1 for 450 MW on 5-3-2014 and Bid-2 for 400 MW on 25-4-2014.
- (3) As part of seeking guidance from MoP, the bid documents were forwarded to MoP on 30-7-2014 and had sought clarifications from MoP on 23-8-2014, on

handling a situation wherein L1 bidder did not offer entire bid quantum. MoP after vetting the entire bid documents clarified on 6-8-2014 that different sources of fuel cannot be specified in one bid. Apart from this no other deviations were pointed out by MoP. Bid documents were vetted by MoP and no deviations other than on fuel option was pointed out, which was set right subsequently while issuing RFP to qualified bidders. Thus, the impression that KSEBL has deviated from guidelines and SBDs while issuing bids is misplaced.

- (4) Immediately, on completion of bid process, the petitioner communicated the bid outcome including discovered price to Govt of India. The petitioner vide letter No. 18-12-2014 had intimated the Commission about the outcome of the entire competitive bidding process. Government of Kerala vide order G. O. (Ms.) No. 45/2014/PD dated 20-12-2014 accorded sanction for the long-term power procurement. Considering the above and the approval from Govt of Kerala, petitioner entered into Power Supply Agreements as shown in Table4.
- (5) On 26-2-2015, the petitioner filed copy of PSAs executed, before the Commission. On 16-3-2015, the Commission directed the petitioner to file petition for the adoption of tariff under Section 63 of the Electricity Act, 2003. Accordingly, on 20-4-2015, the petitioner filed the petition as OP 13/2015.
- (6) In view of failure of monsoon in 2016-17 and the power shortage estimated, KSEBL sought the approval of Govt of Kerala and the Commission for scheduling 115 MW power from M/s. Jhabua Power Ltd. from December 2016. Govt of Kerala approved the procurement vide G.O (Rt) No.238/2016/PD dated 30.11.2016. Thereafter, the Commission vide Order dated 22-12-2016 gave provisional approval. Thus, DBFOO PSAs of 415 MW are approved (315 MW under Bid-1 and 100MW under Bid-2). Therefore, the balance PSAs for 350 MW in Bid-2 still awaiting approval from the Commission.
- (7) The matter of approval of the balance PSAs under Bid 2 was again taken up by the petitioner with GoK vide letters dated 10-05-2017, 03-07-2017 and 22-09-2017. Govt. of Kerala vide order dated 21-10-2017 permitted the petitioner to draw power from the entire DBFOO contracts, pending detailed consideration of the matter. Thereafter the Commission, vide the letter dated 22.12.2017 allowed the petitioner to draw the contracted power under DBFOO, in view of the order of the State Government vide GO (Ms) No. 22/2017/PD dated 21.10.2017, clarifying that Commission may approve the power purchase proposal including the rate for the pending approvals under DBFOO only after the State Government accords the final approval for the entire power purchase under DBFOO. Based on the above, the petitioner has been scheduling power from these suppliers.
- (8) The petitioner has further submitted that the alleged deviation from the standard bidding guidelines issued by are not factually correct as submitted below.
 - (i) No deviation was made by KSEBL in the standard bid documents used for both bid processes, warranting prior approval of MoP. The entire bid documents were forwarded to MoP on 30-7-2014. MoP

after vetting the entire bid documents clarified on 6-8-2014 that different sources of fuel cannot be used in one bid. Apart from this no other deviations were pointed out by MoP.

- (ii) The petitioner had approached MoP to issue clarifications regarding procedural gap in the bidding documents viz-a-viz lowest bidder not offering entire bid quantum and the process to be followed in that scenario, for tying up the required quantum of power by the Utility. MoP could come with the clarification by way of modification in guidelines only on 5-5-2015, which is substantially similar to the procedure followed by KSEBL in the second bid.
- (iii) MoP vide letter dated 11-12-2019 had clarified that no deviations were noticed by the Commission in the RFQ, RFP and PSA issued by the Petitioner while inviting offers and the deviation pointed out by the Commission were only in respect of the evaluation process that followed. Therefore, MoP advised that Govt. of Kerala/KSEB Ltd. may take action as appropriate in consultation with KSERC.
- (iv) The petitioner also submitted that the Commission may seek the views of GoK and if views are not obtained, may take appropriate action in the matter. No appeal or review was filed against the order as the order was not conclusive on the approval of the PSAs. The order never disallowed the PSAs entered by KSEBL, rather it only directed that the approval of pending PSAs shall be considered on getting approval from Government of India for the deviations from the guidelines and on getting views from Government of Kerala on the issues raised in the order.

(9) The petitioner has also submitted the following matters for the consideration of this Commission:

- 1) The approval of PPA by the Commission is a condition precedent which is to be satisfied by the Petitioner, prior to the commencement of supply.
- 2) GoK had already given in principle approval for availing the power from the above contracts and the Commission has also permitted the same.
- 3) By approving to draw power and allowing passing of bulk portion of the cost of power, the Commission has granted deemed approval for the PSAs.
- 4) The reason for slight changes in the monthly tariff payable to each generator is dependent on number of internal and external factors and is bound to change from month to month. The Commission has allowed scheduling of power. The Commission has considered the procurement of power from these sources while approving ARR&ERC for the control period 2018-22.
- 5) While procuring power as authorized by GoK and the Commission, petitioner is bound to comply with the terms and conditions specified in the executed PSAs having statutory force under Section 63 of the Electricity Act, 2003 and make monthly payments as envisaged in the PSAs. L-1 rate is already adopted by the Commission vide order dated 30-8-2016 as per Section 63 of the Electricity Act, 2003.
- 6) The quantum contracted is not in excess of the requirement of the State as is evident from the subsequent approval of the Commission to purchase another 150 MW on long term basis from 1-6-2016 onwards

from M/s Maithon Power Ltd. The fixed charge and variable charge in each PSA are linked with several external parameters. The source of fuel for the generators are different. The grade of coal linkage through CIL for the generators also differ. Further, to the above, the escalation quoted by each bidder in respect of the landed cost of and the escalation quoted against railway freight are also different. The distance from mine for each generator is different.

- 7) The standard PSA notified by MoP, GoI as per Section 63 of the Electricity Act, 2003 prescribes regulating FC based on pre-determined parameters and allow pass through of fuel cost based on actuals subject to certain parameters. As per the provisions of the Electricity Act, 2003 and the judgment of Hon'ble Supreme Court dated 11.04.2017 in CA 5399-5400 of 2016 and also as per the various orders of the Commission, the State Commission do not have jurisdiction in respect of determination or re-determination of tariff of interstate generating stations.
- 8) The Commission in OP No.12/2018 filed by M/s.Jhabua has already decided that this Commission does not hold jurisdiction to go into the provisions in the PSA for the inter-State sale of power contracted therein. The rate of power from all the DBFOO contracts are lower than most of the PPAs whose tariff is determined by CERC having similar CoD.
- 9) KSEB Ltd has not taken any deviation from the SBDs and the deviations pointed out by Commission is related to the process of selection of successful bidders. If these concluded PSAs are terminated, the Petitioner will be liable to bear the cost involved in contractual termination, litigations and relinquishment charges of LTA. The amount payable towards this cannot be estimated now, but the amount could be huge.

11. The petitioner submitted their arguments, objections and suggestions during the hearings as follows:

- (1) Under Section 63, the Commission shall only consider whether the bidding process has been carried out in a fair and transparent manner and in accordance with the guidelines laid down by the Government of India in terms of Section 63 of the Electricity Act, 2003. If any situation is found to be not covered under the guidelines of the Central Government, the Commission shall consider and examine whether in such a situation, the process adopted by the procuring entity has met with the principles of fairness and transparency, the Central Government has no role to play in this regard.
- (2) The scope and ambit of the jurisdiction exercised by the Commission under Section 63 of the 2003 Act has also been interpreted, expounded and explained by the Hon'ble Supreme Courts in a number of judgments as explained.
 1. Judgment of the Hon'ble Supreme Court in Energy Watchdog v. CERC, (2017) 14 SCC
 2. Judgment of Hon'ble Supreme Court in Tata Power Company Ltd. Transmission Vs. Maharashtra Electricity Regulatory Commission & Ors., (2022 SCC Online SC 1615)

- (3) There may be instances and / or situations which may not get covered by any provision of the tender document or the guidelines as such a situation may not have been envisaged in the said tender document or guidelines. It is the settled position of law that if the tendering authority is faced with any such situation, it shall be opened to the tendering authority to adopt any fair or transparent method to deal with such situation for proceeding further with the tender process as laid down by the Hon'ble Supreme Court in *Bharat Coking Coal Ltd. v. AMR Dev Prabha*, (2020) 16 SCC 759.
- (4) Clause 1.1.4 of Model Request for Proposal (RFP) is specifically permitting the Petitioner to adopt process of inviting other Bidders to match the L1 Bid. The process of inviting other bidders to match the L1 tariff for the balance quantum of power to be procured by the State is entirely in conformity with the requirements of fairness and transparency. Such a situation is also envisaged by the guidelines. It would be open for the concerned tendering authority to invite the other bidders to match the tariff quoted by the L1 bidder and such a process can never be termed as "negotiation" (Circular dated. 15.03.1999 and Circular dt. 03.03.2007).
- (5) With respect to the L2 Bidder in the Bid-1 process (Bid of Jhabua Power Ltd. for supplying 115 MW at the tariff of Rs. 4.15 / unit), after the tariff of Rs.4.29 per unit had been discovered in the Bid-2 process as being the lowest tariff quoted by the L1 bidder in the Bid-2 process, it was seen that the tariff quoted by the L2 bidder in the Bid1 process was even lower than this tariff of the L1 bidder discovered in Bid-2 process. In response to the clarification sought by the Commission regarding the willingness to increase the quantum in Bid-1, the Petitioner clarified the situation with relevant date as 15-11-2014, after opening of Bid-2.
- (6) On the opening of Bid-2, when it was seen that there is a possibility for the Petitioner to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the rate lesser than the lowest tariff discovered in the Bid-2 process, the Petitioner found to be in the interest of the State to procure this cheaper power and therefore, entered into the PSA with the L2 bidder in the Bid-1 process due to the reasons stated.
- (7) The petition filed by the KSEB Ltd had been kept pending and the final orders were to be passed by the Commission. The Petitioner had addressed communications to the State Government as well as Central Government, and the replies received from time to time had also been placed before the Commission, as directed by the Commission in the Order dated 30.08.2016. The issue of grant of approval has remained pending before the Commission till date.
- (8) Even the Government of India in its communication dt. 18.11.2016 has not described the process conducted by KSEBL as a "deviation", rather it has described the same as "action taken by the Utility as per practice or precedent".

- (9) In the meanwhile, Government of Kerala approved the procurement under the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. vide GO (Rt) No.238/2016/PD dated 30.11.2016. The Commission, vide order dated 22.12.2016 also gave its provisional approval for the PSA of the L2 bidder under Bid-1 i.e. 115 MW from Jhabua Power Ltd. The matter of approval of the balance PSAs under Bid 2 was again taken up by the Petitioner with the Government of Kerala vide letters dated 10.05.2017, 03.07.2017 and 22.09.2017. Government of Kerala, vide order dated 21.10.2017 permitted the petitioner to draw power and the Commission vide Order dated 22.12.2017 also allowed to draw the contracted power. The Ministry of Power (MoP), Government of India, vide its letter dated 11.12.2019, reiterated its observations earlier communicated vide its communication dated 18.11.2016.
- (10) There is no “deviation” from the guidelines of the Central Government, in the process adopted by the Petitioner. Any situation not covered by a specific provision of the guidelines, it falls squarely within the jurisdiction of the Commission to approve such a decision of the Petitioner, the same being entirely in conformity with the principles of fairness, transparency and public interest.
- (11) The tariff discovered through the said bidding process has been entirely in public interest and in the interest of the consumers of the State of Kerala due to the reasons stated in the petition and statements. The petitioner has taken steps for medium-term procurement under the SHAKTI Policy based on the observations made by the Commission it is order dated 25.06.2022 in O.P.No.11/2022. Accordingly, the tender was invited on November 21, 2022 for a supply for a period of 5 years. But subsequently, the Ministry of Power (MoP) has cancelled the tender.

12. The respondents (M/s jhabua Power Ltd, M/s Jindal India Thermal Power Ltd and M/s Jindal Power Ltd) attended the hearings and supported the arguments of the petitioner and filed their reply/submissions. The contentions raised by the Respondent No.1 Jhabua power Limited are summarized below:

1. M/s Jhabua Power Ltd operates a 600 MW coal -based power plant at Barela-Gorakhpur, Dist.Seoni, Madhya Pradesh. Power is supplying from this 600MW generating unit., M/s Jhabua Power Ltd had entered into the following power purchase agreements with the KSEB Ltd:
 1. Bid 1-for drawal of 115 MW of contracted power as per the PSA signed on 31.12.2014 for 25 years supplying power since 22.12.2016 onwards;
 2. Bid 2-for drawal of 100 MW of contracted power as per the PSA signed on 26.12.2014 for 25 years supplying power since 01.10.2017 onwards;
2. M/s Jhabua Power Ltd has a limited role to play in so far as the present proceedings are concerned. There is no requirement of a public hearing in a Section 63 proceedings. The Commission is bound to adopt the tariff if such tariff has been discovered through a transparent process of bidding. M/s Jhabua Power Ltd supports the Petitioner and requests Hon’ble Commission to adopt the tariff in an expeditious manner.

13. M/s Jindal India Thermal Power Ltd (R-2) also supported the arguments of the petitioner and filed their reply/submissions in the following lines:

1. This 2nd respondent reduced the fixed rate by 8 paise (fixed charges from Rs.3.62/kWh to Rs.3.54/kWh) without asking for any variations in other aspects. The petitioner is continuously purchasing power 100 MW since October, 2017. Pursuant to Execution of the PSA, the answering respondent applied to Power Grid Corporation of India Limited for grant of long-term access (LTA) of 95 MW for the purposes of evacuation of power from its project to beneficiary in the State of Kerala. Thereafter, on 01.10.2015, PGCIL granted LTA of 95 MW for evacuation of power from its project to KSEB Ltd.
2. This 2nd Respondent has made a commitment to supply power at Rs.4.29/ Unit for a period of 25 years. Denying approval of the PPA at this point of time would infuse distrust and illegality amongst the generators and the same would amount to an outrageous violation of the provisions of the Electricity Act, 2003. It will be against the sanctity of the agreement reached in pursuance to a competitive bid process and sanctity of procuring power from the Respondent. Based on the permission of the State Government and the Commission's letter dated 22.12.2017 the supply has been initiated in October, 2017 and is continuing till date.
3. It is a settled principle of law that the issues in a suit shall have to be adjudicated as its stood on the day of institution of the suit. Hence, while considering the petition, situation at that time shall also be taken into consideration. JITPL is continuously supplying power to the State of Kerala since 01.10.2017. The letter dated 06.05.2021 issued by KSEBL clearly demonstrates as to how JITPL was asked to extend its complete co-operation to its fullest during the PANDEMIC Covid-19 period of 2020-2021-2022 and kept on generating and supplying power to the petitioner/KSEBL in such toughest time ever.
4. The tendered quantum under Bid-1 was 450 MW. The petitioner requested the bidders L-2 to L-4 to match their bid tariff to L-1, however, none of the bidders agreed to match their rate with L-1. But M/s JITPL could not match the L-1 bid as there was a huge rate difference of Rs.0.79 per kWh which is actually 18% of the bid price quoted. Further, M/s JITPL reduced its fixed cost by Rs.0.08 per unit to match L-1 rate duly following the terms of the bid documents.

14. M/s Jindal Power Ltd (R-3) furnished their reply submission and pleaded as follows:

- (1) The Respondent/JPL is supporting the petitioner's prayer for grant of approval for procurement of power from JPL. The Respondent participated in both the bids and offered the quantum of 200 MW and 150 MW of power for Bid-I and Bid-II respectively.
- (2) KSEB Ltd vide letter dated 19.11.2014 asked the Respondent/JPL's willingness (L-4) to match the quoted tariff by L-1 to which JPL vide letter dated 21.11.2014,

gave its concurrence and offered 150 MW power at INR 4.29/kWh (fixed charge of INR 3.43/kWh and a fuel charge of INR 0.86/kWh). On 04.12.2014, KSEB Ltd issued a Letter of Award for supply of 150 MW at a tariff of INR 4.29/kWh comprising of a fixed charge of INR 3.43/kWh and a fuel charge of INR 0.86/kWh.

- (3) The Government of Kerala issued GO(MS)No.45/2014/PD dated 20/12/2014 sanctioning the purchase of 865 MW (315 MW and 550 MW of Bid-I&II) by KSEB Ltd including the 550 MW of power from L-1 to L-4 bidders of Bid-II at INR 4.29/kWh. This Order which was akin to a Section 108 of Electricity Act, 2003 direction, as the same was in the public interest.
- (4) The Commission vide the MYT Order dated 08.07.2019 permitted scheduling of power from the said PSAs for control period of FY 2018-19 to 2021-22, at the rate to be paid to L-1 bidder of Bid-II (BALCO). On 25.06.2022, this Commission passed the Order in the afore said MYT petition vide the said order, this Commission held as follows:

“6.112 In view of the foregoing facts and developments the Commission cannot permit KSEB Ltd to continue scheduling of power from the following four provisionally approved/unapproved contracts (i) Purchase of 115 MW of Power from Jhabua Power Ltd of L2 of Bid-1 (ii) 150MW from Jindal Power Ltd of Bid-2 (iii) 100MW from Jindal India Power Ltd and (iv) 100 MW of power from Jhabua Power Ltd of Bid-2
KSEB Ltd to make necessary arrangements for procuring 465 MW of equivalent power on medium term basis through competitive bidding as per Section 63 of the Electricity Act,2003. Alternatively, KSEB Ltd may make necessary arrangements for procuring 465 MW from power plants through competitive bidding route who have assigned coal linkage as per the SHAKTI policy of the Central Government.

- (5) The Commission vide the Order dated 25.06.2022 also estimated the single rate of power procurement from L2 to L4 bidders as INR 4.00/kWh for the year 2022-23 with an escalation of 2% for the subsequent years of the MYT period. Being aggrieved by the Order dated 25.06.2022 JPL has approached the Hon'ble APTEL by way of filing an appeal being DFR No.56 of 2023 interalia seeking directions upon KSEB to continue the procurement of power from JPL. The respondent added that the present petition filed by the Petitioner/KSEB Ltd be allowed taking into account the following salient aspects which invariably establish that the PSAs of L-2 to L-4 including the Respondent, are already deemed to be approved by the State Government as well as by this Commission in the public interest, from time to time since 01.10.2017 when the procurement of power was commenced. The Respondent has also cited following decisions to substantiate their arguments:

- a. Energy Watchdog v. CERC, reported in (2017)*
- b. Judgment dated 16.12.2011 passed by the Hon'ble APTEL in Appeal No.82 of 2011.*
- c. In Appeal No.106 of 2011, the Hon'ble APTEL vide judgment dated 17.02.2012.*
- d. Judgment Dated 03.02.2020 passed by the Hon'ble APTEL in Appeal No.224 of 2019.*

- (6) JPL has changed its position to its detriment by obtaining coal linkage vide FSA dated 28.08.2013 and 29.08.2013 and by obtaining LTA dated 01.10.2015 for

a quantum of 142.5 MW from CTUIL and that huge penalties are likely to be imposed upon JPL in the event the said agreements are surrendered. In view of the above facts and circumstances the Commission ought to allow the present petition.

15. The 1st Addl Respondent, HT & EHT INDUSTRIAL ELECTRICITY CONSUMERS' ASSOCIATION attended the hearings and raised objections against the petition in the following lines:

- (1) The Orders of the Commission dated 30.08.2016 in OP No. 13/2015 is binding on KSEB Ltd. The KSEB Ltd filed the petition before the Commission for getting approval of PPAs belatedly by 7 months from the date of tendering and by four months from the date of execution of the tender. PPA signed with adherence to Section 63 of Electricity Act, 2003 cannot be a claim for deemed approval. Prior approval from Govt. of India is required as per the Resolution dated 9.11.2013 of Ministry of Power, Govt. of India. As this condition was not adhered to, Commission had not approved the PPA. It is relevant that the Hon'ble Supreme Court has directed the KSERC to take a decision on the issue but not directed KSERC to accord approval to PPA.
- (2) The Commission had vide Order dated 22/12/2016, granted provisional approval only subject to submission of approval of Govt. of India. The KSEB Ltd. has again approached KSERC vide petition 05/ 2021 on same issue of approval of PPA. This is legally not valid or tenable. It is also submitted that the growth projections of demand and availability of energy during 2016-2021 by KSEB Ltd is a gross over estimation and need correction. The unrealistic over estimate by KSEB Ltd has led to unnecessary investment in high-cost LT Power sourcing agreement and this will result in passing on this unjustified heavy cost burden to the consumers.
- (3) The DBFOO Guidelines, even after amendment does not permit post regularization of a deviation in the tendering and bidding process. It only confers powers to the State Commission for according approval of deviation from MoP's DBFOO guidelines. But KSEBL did not approach the Commission for any prior approval for deviation before execution of the PPA with L2 to L5 bidders. Hence, the grounds for approval based on revised MoP guidelines are not applicable. It is also submitted that the Commission has already heard and disposed of the petition for PPA approvals as per Order dated 30.08.2016. Hence, only a Review Petition is admissible. However, since there is no fresh evidence or matter has been submitted as required for a Revision Petition, the admissibility of this petition even as a Review Petition also does not arise. Hence, the Commission shall reject the petition.

16. The 2nd Addl Respondent Shri. Dejo Kappan, Chairman, Democratic Human Rights & Environment Protection Forum attended the hearings and filed statements and submitted his objections in the following lines:

- (1) The reason stated by KSEB Ltd for calling two tenders is non availability of 'Transmission Corridor' for drawing of 850 MW. This argument is completely wrong because the Central Transmission Utility (PowerGrid) is responsible for

obtaining the necessary 'Transmission Corridor' for entities entering into long-term contracts to purchase power. KSEBL has not submitted any document to prove that the corridor will be available only if two tenders are made for 450MW & 400MW. If L1 bidder is unable to supply electricity as required, the remaining power can be purchased from the L2 bidder only at the same amount quoted by L1. According to this condition, the decision taken to purchase electricity from M/s. Jhabua Power Limited at the rate of Rs 4.15/- is considered as illegal.

- (2) M/s.Jhabua Power Limited has signed the first bid agreement on 31-12-2014 @ Rs 4.15/-. The same company has come as L3 bidder in the second bid also. A supply contract of 100MW was signed on 29-12-2014 @ Rs.4.29/- per unit. It is to be examined as to how can there be a difference of 58 paise in the price of power from Madhya Pradesh plant in FC within two days. In the Bid-1 (450MW) L2 was not brought to the lower amount of L1 rate. M/s. Jindal Power Limited which participated in bid-2 has quoted Fixed Charge in Bid-1 as Rs. 2.74/- but in Bid-2, F. C has been quoted as Rs. 3.43/-. How does FC come up with a difference of 69 paisa for electricity generated from the Chhattisgarh Plant and supplied to Kerala in an agreement signed on the same day? If the bid was invited and awarded to a bidder in a single tender, this same company would have provided 150 MW of power quote the tender at the same rate of 200 MW of electricity quoted at in bid 1 @ Rs. 3.60/-per unit.
- (3) There are guidelines for peak power purchase issued by the Central Government. The KSEB Ltd has taken the decision to sign the PPA during 2014 without conducting detailed study but only with the intention of helping the generators. There are instances like even in peak time, electricity from central pool was surrendered or sold at a huge loss. If the agreement continues for 25 years, customers will have to bear a heavy monetary liability of Rs. 66,250 crores. The government have appointed a committee consisting of 'Addl. Chief Secretary' as Chairman, 'Power principal secretary' as convener and 'Law secretary & KSEBL Chairman' as members to look into the steps taken by KSEBL to purchase 850 MW of power, without the prior permission of the Regulatory Commission. (G.O.(Rt) No 163/2021/POWER Tvm dated 27-10-2021). Hence it is requested that The Commission should examine this report also before taking a decision.

17. Shri. C. P GEORGE, Deputy Chief Engineer (Retd), KSEB LTD and other stake holders made their submissions in the following lines:

The quantum of electricity to be purchased per annum by KSEB Ltd. as per the impugned power purchase agreements is about 6440MU which costs approximately Rs.2650 crore at a weighted average of Rs.4.11 per unit. The amount needed for 25 years contract would be to the tune of Rs.66225 crore and the amounts projected above are likely to increase further over the contract period. Though DBFOO Power purchase was based on the 18th Electric Power Survey by Central Electricity Authority, the data used by CEA is supplied by KSEBL only. It is only a macro & generic report to spread awareness about the Indian power scenario and not to be taken as a recommendation for procurement of RTC power through DBFOO mode. He added that when comparing the Long Term RTC (LTA) & Short-Term purchases (STOA) for 100 MW for 100 hrs. in a year, it can be seen

that Long Term RTC Purchase would fetch Rs.233.52 while the Short-Term Purchase would fetch Rs.20 crore only. The decision to procure RTC power through LTA at a high rate was taken in a hurry without conducting enough study and discussion and without complying rules, regulations & procedures when the power market is getting stabilized. And the motive behind such a decision is under cloud due to lack of transparency, non-compliance of procedures and excess payment made without proper scrutiny of PSA provisions and KSERC directions.

- 18.** The procurement of excess power through LTA without real time demand shall end up in the surrender of procured power with financial liability of at least the specified fixed charge and also less operation of hydro machines which leads to excess storage in the reservoir at the end of the water year and results in spillage during next monsoon. When evaluating the DBFOO bids and PSAs, it can be seen that the difference in rate quoted by M/s Jindal Power Limited in Bid-1 & bid -2 is against the basic principles DBFOO tariff and is without any logic. As far as Jindal Power Ltd is concerned, both the bids were offered from the same plant and same generating machines with same heat rate and infrastructure investment requirement. KSEB Ltd is seen to have admitted this manipulation without evaluating its long-term financial implications and consequences. In view of the above the PSA may be rejected and the licensee may be directed to cancel the PSA and may be directed to take steps to recover the excess payment made to the generators.
- 19.** The KSEB Officer's Association has submitted that from 2011-12 year onwards, Kerala had been facing huge power and energy shortage in the State and hence imposed load shedding during peak and off-peak hours. At that time liquid fuel sources cost high and short-term transaction were very costly ie. up to Rs.7.45 per unit. Transmission Congestion was experienced early in 2014. As per CERC Regulation, transmission corridor priority is for LTA followed by MTOA and less priority is for STOA. The Commission in its various orders on ARR&ERC for the year 2012-2015 insisted that the KSEB Ltd shall immediately assess the long-term deficit in availability of power and contract for long term power purchase through case -1 bidding process. The PSAs executed by KSEBL under Bid-1 & Bid-2 of DBFOO contracts, KSEB Ltd was with the object to avoid costlier plants such as Judger (231 MW), BSES, KDPP, BDPP, Kayamkulam and reduce the dependence on the expensive short term power purchases. With the relinquishment of DBFOO contracts, the Load Generation balance during 2023-24, 2024-25 and 2025-26 will be expectedly affected by a deficit of 890 MW, 1064 MW and 1497 MW respectively. Another important aspect is that DBFOO contracted power is cheaper when compared to the other available similar sources. The present market rate is also higher than that of the DBFOO contracted power. A decision may be taken considering the fact that the power obtained through the said contract is highly necessary for the State and electricity obtained under this agreement helped Kerala to avoid loadshedding and to provide electricity at a cheaper cost to the people of Kerala.
- 20.** The KSEB Worker's Association also has submitted that since the KSEB Ltd. had decided to invite tender for procuring power under the Long-Term Power Purchase Agreements during the period 2014-15, the Commission has to decide the matter whether to give approval or not to the PPAs only after considering the then

prevailing circumstances. The Association reiterated the arguments of the petitioner.

Analysis and Decision of the Commission

21. The Commission examined the Petition (OP No. 5/2021) filed by the KSEB Ltd, Order dated 30.08.2016 issued by this Commission in OP No.13/2015 along with the documents furnished by the petitioner and the respondents in the present petition, their arguments, documents, rival contentions, objections and suggestions in detail, and decided as follows;

22. The OP No. 05/2021 is filed by KSEB Ltd under sections 86(1)(b) and 63 of the Electricity Act, 2003 for final approval of the following PSAs in OP No.13/2015 dated 30.08.2016, which was not approved for want of final approval of the deviations from the State Government and Central Government.

- i) 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
- ii) 150 MW of power from Jindal Power Ltd (Bid-2)
- iii) 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
- iv) 100 MW of power from Jhabua Power Ltd (Bid-2).

23. In view of directions issued to this Commission by the Hon'ble Supreme Court in Civil Appeal No. 41/2021 dated 10.02.2023, the Commission has examined the issues involved in the present petition in detail in the light of the rival contentions and documentary evidences furnished by the petitioner, respondents, additional respondents, stake holders and general public. Based on the deliberations of the subject matter, the Commission has to mainly examine the following issues:

- 1. Whether the tariff has been determined as per the guidelines issued by the Central Government through competitive bidding in a fair and transparent and equitable process under Section 63 of the Electricity Act, 2003 or not?**
- 2. Whether any deviations were made in the bidding process from the guidelines dated 09.11.2013 and if so, whether the deviations are fair and transparent and to protect the public interest? What are the deviations and its long-term financial implications?**
- 3. Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?**

24. Since the issues referred as 1st and 2nd above being interconnected and inter related it can be considered together. For this purpose, the Commission has to examine the relevant Bidding guidelines, statutory provisions and settled legal position in detail and also whether tariff adopted by the petitioner is strictly in a fair and transparent and equitable process of bidding under Section 63 of the Electricity Act, 2003.

- (1) This petition is filed for final approval of the PSAs due to the reasons stated in the petition. Hence the Commission has to verify as to whether the tariff has been determined strictly in a transparent and objective process of bidding in accordance with the guidelines dated 9.11.2013 issued by the Central Government under DBFOO Scheme. Section 63 of the Act is extracted herewith:

Section 63: Determination of tariff by bidding process

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.

Section 86 (1) (b): Functions of State Commission

(1) The State Commission shall discharge the following functions, namely:

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(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

(2) The KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 came into force with effect from 14.11.2014. Regulation 78 of the said regulations is extracted hereunder, -

“78. Approval of power purchase agreement /arrangement – (1) *Every agreement for procurement of power by the distribution business / licensee from the generating business/company or licensee or from other source of supply entered into after the date of coming into effect of these regulations shall come into effect only with the approval of the Commission:*

Provided that the approval of the Commission shall be required in accordance with this regulation in respect of any agreement or arrangement for power procurement by the distribution licensee from the generating business / company or licensee or from any other source of supply on a standby basis:

Provided further that the approval of the Commission shall also be required in accordance with this regulation for any change to an existing agreement or arrangement for power procurement, whether or not such existing agreement or arrangement was approved by the Commission.

(2) *The Commission shall examine an application for approval of power purchase agreement/arrangement having regard to the approved power procurement plan of the distribution business/licensee and the following factors:-*

(a) *requirement of power under the approved power procurement plan;*

(b) *adherence to a transparent process of bidding in accordance with guidelines issued by the Central Government under Section 63 of the Act;*

(c) *adherence to the terms and conditions for determination of tariff specified under chapter VI of these Regulations where the process specified in clause (b) above has not been adopted;*

(d) *availability (or expected availability) of capacity in the intra-State transmission system for evacuation and supply of power procured under the agreement/arrangement; and*

(e) *need to promote co-generation and generation of electricity from renewable sources of energy.*

(3) *Where the terms and conditions specified under chapter VI of these Regulations are proposed to be adopted, the approval of the power purchase agreement/arrangement between the generating business/company and the distribution business/licensee for supply of electricity from a new generating station may comprise of the following two steps, at the discretion of the applicant:*

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(a) approval of a provisional tariff, on the basis of an application made to the Commission at any time prior to the application made under clause (b) below; and

(b) approval of the final tariff, on the basis of an application made not later than three months from the cut-off date.”

- (3) The Hon’ble Supreme Court in *Energy Watchdog and Ors. vs. Central Electricity Regulatory Commission and Ors.* (11.04.2017 - SC) and in various judgments observed that ...” **the appropriate Commission does not act as a mere post office Under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government”.**
- (4) The Hon’ble Supreme Court in its judgment in *The TATA Power Company Limited Transmission vs. Maharashtra Electricity Regulatory Commission and Ors.* (23.11.2022 - SC): MANU/SC/1536/2022) clarified that the tariff determined through the bidding process may not be adopted by the **Appropriate Commission if the bidding process was not transparent (undertaking a substantive review) or the procedure prescribed by the Central Government guidelines Under Section 63 was not followed.**
- (5) As observed by the Hon’ble APTEL, **Competitive bidding process under Section 63 must be consistent with the Government of India guidelines.** (*Essar Power Limited vs. Uttar Pradesh Electricity Regulatory Commission and Ors.* (16.12.2011 - APTEL): MANU/ET/0177/2011).
- (6) Government of India had, vide Resolution No. 23/17/2011 – R&R (Vol V) dated 09.11.2013 published in the Gazette of India dated 09.11.2013, notified the guidelines for procurement of electricity from thermal power stations set up on design, build, financed, own and operate (DBFOO) basis (hereinafter referred to as the Guidelines, 2013). The said guidelines are quoted hereunder, -

No. 23/17/2011-R&R(Vol-V). -Whereas the Central Government is engaged in creating an enabling policy and regulatory environment for the orderly growth of generation of electricity in accordance with the provisions of the Electricity Act, 2003 (the “Act”);

Whereas it is incumbent upon the Central Government, State Governments, Electricity Regulatory Commissions and the distribution licensees to promote competition in the procurement of electricity through competitive and transparent processes;

Whereas the Central Government has, after extensive consultations with various stakeholders and experts, evolved a model contractual framework for procurement of electricity by the distribution licensees from power producers who agree to construct and operate thermal power generating stations on a ‘Design, Build, Finance, Own and Operate (“DBFOO”) basis; Whereas, the Central Government has, vide its letter No. 23/17/2011R&R(Vol-V) dated 8th November, 2013, issued the model documents comprising the Model Request for Qualification

(the “**MRFQ**”), the Model Request for Proposals (the “**MRFP**”) and the Model Power Supply Agreement (the “**MPSA**”) (collectively, the “**Standard Bidding Documents**”) to be adopted by distribution licensees for procurement of electricity from the aforesaid power producers through a process of open and transparent competitive bidding based on offer of the lowest tariff from thermal power generating stations constructed and operated on DBFOO basis;

Now, therefore, in exercise of the powers conferred under section 63 of the Electricity Act, 2003, the Central Government notifies these guidelines to be known as the ‘Guidelines for Procurement of Electricity from Thermal Power Stations set up on DBFOO Basis’ (the “**Guidelines**”).

These Guidelines shall come into effect from the date hereof subject to the following terms and conditions:

1. The terms and conditions specified in the Standard Bidding Documents referred to hereinabove shall, by reference, form part of these Guidelines and shall be treated as such.
2. The application of these Guidelines shall be restricted to projects constructed and operated in accordance with a Power Supply Agreement signed for a period of about 25 years including construction period with provision of extension of 5 years at the option of either party.
3. The tariff determined through the bidding process based on these Guidelines comprising the Standard Bidding Documents shall be adopted by the Appropriate Commission in pursuance of the provisions of section 63 of the Act.
4. **Any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government.**

Provided, however, that any project specific modifications expressly permitted in the Standard Bidding Documents shall not be construed as deviations from the Standard Bidding Documents.

5. The ‘Guidelines for Determination of Tariff by Bidding Process for Procurement of Power by Distribution Licensees’ issued on 19th January, 2005, as amended from time to time, including the standard bidding documents issued in 2009 and amended from time to time thereunder, are hereby repealed insofar as they relate to long-term procurement of electricity where the location, technology, or fuel is not specified by the procurer referred to therein as Case 1 projects. Provided, however, that any agreements signed or actions taken prior to the date hereof shall not be affected by such repeal of the said guidelines of 2005 and shall continue to be governed by the guidelines repealed hereunder.

- (7) As stipulated in the above Resolution dated 9.11.2013, the Central Government had issued the bidding guidelines for long term power procurement under DBFOO Scheme. The procedure for adoption of tariff

has been well explained in the SBD guidelines published on 8.11.2013. The General terms of bidding and Procedure for selection of Bidder is well explained in RFP in Clause 2.1 and Clause 3.3. respectively. Relevant portion is extracted hereunder:

21. General terms of bidding

2.1.1 No bidder shall submit more than one Bid Project. A Bidder bidding individually or as a member of a consortium shall not be entitled to submit another bid either individually or as a member of consortium, as the case may be.

“3.3 Selection of Bidder

3.3.1 Subject to the provisions of Clause 2.16.1, the Bidder whose Bid is adjudged as responsive in terms of Clause 3.2.1 and who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be declared as the selected Bidder (the “Selected Bidder”). In the event that the Utility rejects or annuls all the Bids, it may, in its discretion, invite all eligible Bidders to submit fresh Bids hereunder.

3.3.2 In the event that two or more Bidders quote the same amount of Tariff (the “**Tie Bidders**”), the Utility shall identify the Selected Bidder by draw of lots, which shall be conducted, with prior notice, in the presence of the Tie Bidders who choose to attend.

3.3.3 In the event that the Lowest Bidder withdraws or is not selected for any reason in the first instance (the “**first round of bidding**”), the Utility may invite all the remaining Bidders to revalidate or extend their respective Bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder (the “**second round of bidding**”). If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. If two or more Bidders match the said Lowest Bidder in the second round of bidding, then the Bidder whose Bid was lower as compared to other Bidder(s) in the first round of bidding shall be the Selected Bidder. For example, if the third and fifth lowest Bidders in the first round of bidding offer to match the said Lowest Bidder in the second round of bidding, the said third lowest Bidder shall be the Selected Bidder.

3.3.4 In the event that no Bidder offers to match the Lowest Bidder in the second round of bidding as specified in Clause 3.3.3, the Utility may, in its discretion, invite fresh Bids (the “**third round of bidding**”) from all Bidders except the Lowest Bidder of the first round of bidding, or annul the Bidding Process, as the case may be. In case the Bidders are invited in the third round of bidding to revalidate or extend their Bid Security, as necessary, and offer fresh Bids, they shall be eligible for submission of fresh Bids provided, however, that in such third round of bidding only such Bids shall be eligible for consideration which are lower than the Bid of the second lowest Bidder in the first round of bidding.

3.3.5 After selection, a Letter of Award (the “**LOA**”) shall be issued, in duplicate, by the Utility to the Selected Bidder and the Selected Bidder shall, within 7 (seven) days of the receipt of the LOA, sign and return the duplicate copy of the LOA in acknowledgement thereof. In the event the duplicate copy of the LOA duly signed by the Selected Bidder is not received by the stipulated date, the Utility may, unless it consents to extension of time for submission thereof, appropriate the Bid Security of such Bidder as Damages on account of failure of the Selected Bidder to acknowledge the LOA, and the next eligible Bidder may be considered.

3.3.6 After acknowledgement of the LOA as aforesaid by the Selected Bidder, it shall cause the Supplier to execute the PSA within the period prescribed in Clause 1.3. The Selected Bidder shall not be entitled to seek any deviation, modification or amendment in the PSA.

25. The Commission vide Order dated 30/8/2016 in petition O.P No.13/2015 had observed the following deviations in the DBFOO bidding process done by KSEB Ltd.

- (1) KSEB Ltd had followed the procedures stipulated in the repealed RFP guidelines notified by Ministry of Power Govt. of India dated 22/7/2010 while selecting the bidders other than L1.
- (2) KSEB Ltd. has selected L2 bidder in Bid-1 namely M/s Jhabua Power Ltd for supply of 115 MW of power @4.15/kWh which is higher than the L1 tariff rate @Rs.3.60/unit. The selection of bidders at a tariff higher than the L1 rate is not stipulated in the SBD dated 8/11/2013.
- (3) In the bidding process KSEB Ltd has accepted bid capacity higher than the bid quantum in bid-2. In the bid-2 the quantity of power requirement of KSEB Ltd was 400 MW only. However, KSEB Ltd. has accepted the bid quantity of 550 MW. Accepting the quantum higher than the bid quantum was not stipulated in the bidding guidelines.
- (4) While matching the rate with lower tariff in bid-2, KSEB Ltd. has allowed the bidders other than L1 to enhance the fixed charges. In bid-2, the bidder L3 has enhanced the fixed charges from Rs.2.65/kWh to Rs.2.97/kWh. Similarly, the bidder L5 in bid-2 has enhanced the fixed charges from Rs.2.95/kWh to Rs.3.14/kWh while matching with L1 tariff of bid-2.
- (5) In the bidding process KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extent their respective bid security and to match their rate with that of L1. KSEB Ltd. not obtained prior approval from the Govt. of India for the deviations from the SBD as stipulated in the guidelines dated 8/11/2013.
- (6) As per the Regulation 78 of the Tariff Regulation 2014, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEB Ltd under Section 86(1)(b) of the Electricity Act, 2003. However prior approval of the commission was not obtained before entering into PPA with generators in the DBFOO contract.

26. In view of the above stated statutory provisions, this Commission has examined the documents and the evidences produced by the petitioner and the rival contentions raised by the parties in detail and analyzed as to whether the petitioner has deviated from the guidelines/procedure stipulated in the Standard Bidding Guidelines, 2013.

27. Based on the demand forecast and power shortage estimated by KSEB Ltd, the petitioner, decided to procure 850 MW of power for a period of 25 years through open tender, as per the DBFOO Guidelines issued by the Ministry of Power on 08-11-2013 and notified by Government of India on 9-11-2013 in two bids. The 1st tender was floated on 5.3.2014 and the 2nd tender was floated on 25.04.2014. The first delivery of 450 MW was to commence in December, 2016 and the balance

400 MW in October, 2017. Instead of inviting single tender, the petitioner decided to split the procurement tenders and floated 2 separate tenders within a span of 50 days. The reason stated by the petitioner for the splitting of bids are that DBFOO guidelines provides for only one delivery date and two delivery dates are necessary.

28. The Commission noted the following important deviations in tendering process, selection process, L1 matching, enhancement in fixed charges etc. from the bidding guidelines in the present power purchase under DBFOO Scheme:

(1) Deviation in tendering process:

There is no provision in bidding guidelines, 2013 issued by the Ministry of Power for splitting up of the bids. Without prior approval of the Central Government and without obtaining the prior permission from the Commission, the petitioner decided to invite two bids for the procurement of 850 MW. The petitioner has intimated this decision to the Commission only on 18.12.2014, after the completion of bidding process. It was also informed to the Commission that the petitioner shall file formal petition for adoption of tariff under Section 63 of the Electricity Act, 2003 once KSEB Ltd entered into Power Supply Agreement. The splitting up of tenders enabled the same bidders to participate and to submit two separate bids quoting two different tariff rates in two tenders for power generated from the same plant to the procurer. Thus, the generators could quote different tariff in the two tenders and to attain additional financial benefit which ultimately resulted huge loss to the petitioner.

The reasons stated by the petitioner for these deviations are transmission corridor availability, anticipated variations in electricity demand etc. are not convincing and acceptable. Further, the petitioner could not produce sufficient and convincing documents to prove their arguments. If the petitioner floated one tender instead of splitting in to two, the bidders should lose their chance to submit two separate bids quoting two different tariffs from the same plant. Further, the petitioner may not lose the chance to get 850 MW of power @ Rs. 3.60 per kWh for the entire period of 25 years. Hence this significant deviation made by the petitioner to bypass the Bidding guidelines created huge financial implications on the State and the general public.

(2) Deviations in selection process (Selection of lowest bidder):

Clause 3.3 of Request for Proposal (RFP), stipulates the provision for selection of Bidder. As per the said clause, the bidder, who quotes the lowest Tariff offered to the Utility in conformity with the provisions of Clause 3.5 shall be the "Selected Bidder". Further, as per the guidelines, if two or more bidders quote the same tariff, the bidder is to be selected through draw of lots. Thus, only one bidder can be selected in this process. But the petitioner selected L1 bidder in Bid -1 and also selected L2 bidder in addition to L1 and also five bidders in Bid-2 thereby violated the guidelines issued by the MoP and entered into PSAs, without the approval of the State Commission.

(3) Deviations in L1 matching

As per Clause 3.3.3. of RFP guidelines, L1 matching is provided only in the event that the Lowest Bidder withdraws or is not selected. For this purpose, Utility may invite all the remaining bidders to revalidate or extend their respective bid Security, as necessary, and match the Bid of the aforesaid Lowest Bidder. If in the second round of bidding, only one Bidder matches the Lowest Bidder, it shall be the Selected Bidder. But the petitioner, in addition to selecting the L1 bidder in Bid-1, also selected the L2 bidder and entered into Power Sale Agreement (PSA) with the L2 Bidder and that too without matching the L1 tariff. The petitioner agreed to pay a higher tariff of Rs. 4.15 for kWh in Bid-1 which is higher than the L1 rate of Rs. 3.60/ kWh by for Rs.0.55/unit in this bid. This irregular decision was taken by the petitioner stating that the L2 tariff of Bid-1 at Rs. 4.15/kWh was lower than L1 tariff of Bid-2 (Rs.4.29/kWh). The monetary loss sustained to the consumers for the purchase of 115 MW is estimated at Rs 59.08 crore per annum and Rs 1477 crore for 25 years.

In addition to the above, in Bid-1, the petitioner instead of inviting all the remaining bidders to revalidate or extend their bid security as specified in paragraph 3.3.3 of the RFP document for fresh bids, selectively invited L2 to L4 bidders only. In Bid -2 also, after selecting the L1 bidder (Rs.4.29/kWh), the petitioner instead of inviting all the bidders, selectively invited bidders L2 to L5 to match the L1bid tariff. This was in violation of para 3.3.3 of RFP.

(4) Changes made in purchase of bid quantity:

As stated in the preceding paragraphs, mentioned above, the petitioner invited two bids for the purchase of 450 MW and 400 MW respectively. Instead of contracting the bid quantity as mentioned in the bid, the petitioner contracted 315 MW in Bid-1 and 550 MW in the tendered quantity of Bid-2. This deviation was made by the petitioner on the reasoning that the petitioner could procure 315 MW only in Bid-1. The petitioner contracted for the purchase of additional tendered quantity of 150 MW at higher rate of Rs. 4.29 per kWh instead of exploring the possibility to get power @ Rs. 3.60 per kWh in Bid-1. This deviation also created additional liability of about Rs 77.06 crore per annum and Rs 1926.5 crore for 25 years on the consumers.

(5) Enhancement in fixed charge:

i. In Bid-1, M/s Jhabua Power Ltd, Gurgaon has quoted Rs.2.39/kWh as fixed charge and Rs. 1.76/kWh as variable charge, whereas, in Bid-2 M/s Jhabua Power Ltd increased the fixed charge from the quoted fixed charge of Rs.2.65/kWh to Rs.2.97/kWh during the L1 matching i.e., increased the fixed charge by Rs 0.32/unit in Bid-2. This deviation/irregular action created huge monetary loss to the KSEB Ltd and consumers of the State, estimated at Rs 23.83 crore per annum and Rs 595.75 crore for 25 years. The petitioner or the generator could not

explain satisfactorily the reason for such an increase in the tariff during the L1 matching.

ii. Like so, M/s Jindal power Ltd who is the L-1 bidder in Bid -1 has quoted the tariff @Rs.3.60/kWh comprising of fixed charge @Rs.2.74/kWh and variable charge @ Rs.0.86 per unit. The same M/s Jindal Power Ltd has also offered to supply 150 MW @ Rs.4.29/kWh comprising fixed charge @ Rs.3.43/kWh and variable charge @ Rs.0.86/kWh. The Commission also noted that in both bids M/s. Jindal Power Ltd. offered to supply power from the same plant but quoted different fixed charges i.e., Rs.2.74/kWh in bid-1 whereas fixed charges quoted in bid-2 was @Rs.3.43/unit. The Commission could not understand what is the reason for quoting the higher fixed charge of Rs.3.43/kWh per unit in bid-2, ie. Rs. 0.69/kWh than the quoted amount of Rs.2.74/kWh in Bid-1. The bidder offered to supply power from the same plant, same location and using same machinery. If the bidder M/s Jindal Power Ltd. offered to supply power from bid-2 also at the same fixed charge of Rs.2.74/unit quoted in bid-1, KSEB Ltd. could have annual savings of Rs.77.1 crore and the savings for the entire period of 25 years would be Rs.1927.5 crores.

The petitioner being well aware of the fact that since the fuel charge is determined by the coal price determined by Ministry of Coal and coal transportation cost through rail fixed by Ministry of Railways and have to be paid at these rates depending upon various factors, the petitioner should not have permitted the “matched bidders” to enhance their fixed charge.

(6) Additional quantity of power procurement:

The petitioner proceeded to purchase additional quantity (865 MW) of power in excess of the tendered quantity (850). There is no provision in the MoP guidelines,2013 for the purchase of additional quantity of power in excess of the tendered quantity. This is also a deviation from the MoP guidelines.

(7) KSEB had followed the procedures stipulated in the repealed RFP guidelines notified by Ministry of Power, Govt. of India dated 22/7/2010 while selecting the bidders other than L1.

(8) In the bidding process KSEB Ltd has not invited all the remaining bidders other than L1 to revalidate or extent their respective bid security and to match their rate with that of L1.

(9) As per the Regulation 78 of the Tariff Regulation 2014, prior approval of the commission is mandatory for entering into PPA with generators by the distribution licensee including KSEBL under Section 86(1)(b) of the EA 2003. However prior approval of the commission was not obtained before entering into PPA with generators in the DBFOO contract.

29. During the hearing, in response to the clarification sought for by the Commission regarding the date of willingness sought by the petitioner from the L1 bidder in Bid-1 for the supply of additional quantity of power, petitioner clarified that the date is 15.11,2014. The petitioner further clarified that Bid-1

was opened on **31.10.2014** and Bid-2 was opened on **14.11.2014**. But after opening the Bid-2, on **15.11.2014**, **the very next day of opening Bid-2, and after realizing the higher rates in Bid-2**, the petitioner asked L1 Bidder (Jindal Power Ltd.) to convey its willingness to increase the quantum offered by it in Bid -1, on the same tariff. But the generator not expressed their willingness to match with L1 tariff @ Rs.3.60/unit quoted by M/s Jindal Power Ltd who quoted L1 bid in Bid-1. The Commission observed that, if, the petitioner sought willingness to match L1 rate with other bidders in Bid-1 prior to the opening of Bid-2, the petitioner could get sufficient power in L1 rate. The Commission further observed that the petitioner lost their chance to secure procurement of power to the extent of 115 MW from the L2 Bidder in Bid-1, at the L1 rate of Bid-1, by disclosing the bid amount in Bid-2 in advance.

- 30.** The Commission has also examined as to whether the reasons stated by the petitioner to justify their action are in public interest and for averting any power crisis for the consumers in the State of Kerala. But the petitioner or the respondents have not submitted any factual evidences in the OP or raised any conclusive arguments during the hearings to substantiate their contentions. In this respect, the Commission observed that the above reasons stated by the petitioner are not convincing and without any substantive evidence and is liable to be rejected. In fact, public interest is violated when the petitioner selected the bidders other than L1 in bid-1 and bid-2, deviating the SBD guidelines. The deviation noted by the Commission at Paras 28 (3), (4) and (5) alone would create an additional liability of Rs.237.07 crore per annum and Rs. 5926.75 crore for 25 years.
- 31.** The Commission observed that the above-mentioned deviations are significant, the process was not fair and transparent, which require prior approval of the Central Government. It is settled legal position that under Section 63 of Electricity Act, 2003, the Commission could adopt tariff, if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The petitioner has not submitted any evidence to substantiate that the deviations noted by the Commission would come within the purview of project specific modifications expressly permitted in the SBD. But in this case, the petitioner has significantly deviated and blatantly violated the guidelines issued by the MoP, which require prior approval of the Central Government. Further, as per Section 86 (1) (b) of the Electricity Act, 2003, the State Commission is competent to regulate electricity purchase and procurement process.
- 32.** In addition to the above, the petitioner had executed the PSAs without obtaining the approval of this Commission as stipulated in Regulation 78 of the KSERC (Terms and Conditions for Determination of Tariff) Regulations, 2014 which came into force with effect from 14.11.2014. The petitioner executed the PSAs within the period from 26.12.2014 to 02.02.2015, blatantly violating the said Regulations issued by this Commission.
- 33.** The Commission has examined the judgments referred by the petitioner in support of their arguments. The settled position is that the Commission can adopt the tariff under Section 63 of the Electricity Act, 2003, only if the tariff is

adopted through a fair and transparent process of bidding in accordance with the guidelines notified by the Central Government. The observations made by the Hon'ble Supreme Court in Energy Watchdog's case, is in a different situation and factual position, which laid down that "change in law is applicable to change in domestic law, not change in foreign law. It is not applicable to imported coal/change in foreign law. (MANU/SC/0661/2020)". The deviations noted by the Commission from the bidding guidelines would clarify the lack of transparency which require prior approval of the Central Government.

34. During the hearing the petitioner attempted to justify that as per Clause 1.1.4 of the RFP, in the event the L1 Bidder does not bid for the entire quantum, it would be open to the tendering authority to invite other bidders to match the tariff quoted by the L1 Bidder. Clause 1.1.4 which is reproduced hereunder for ready reference: –

"1.1.4 Applicants may bid for the capacity specified in Clause 1.1.1, or a part thereof, not being less than 25% (twenty-five per cent) of such capacity. Provided, however, that the Utility may, in its sole discretion, accept only those Bids which match the lowest Bid."

The Commission examined the bidding guidelines in detail. Clause 1.1.4 of RFP is part of the bidding documents, which confer discretion to the bidders to bid up to 25 percent of capacity. But utility can accept only those bids which match the lowest Bid. As per this clause, the utility has the discretion to accept only those bids which match the L1 bid. Here the word accept means to receive the bids and not selection of bidder. Evaluation of bids and selection of Bidder etc. are clearly specified in Clause 3.1 and Clause 3.3 of RFP. In this regard, the Commission observed that the whole process seems to lack of transparency and objectivity and fail at the touch stone of public interest. Hence the argument of the petitioner is not legally sustainable and liable to be rejected.

35. The Commission also examined the contentions raised by the petitioner that the Central Government has ratified the deviations pointed out by the Commission considering it as petitioner's practice and precedent. Further the petitioner also contended that the deviations noted are only procedural deviations which do not require prior approval of the Central Government. The Commission examined in detail the above contentions in view of the communications received from the Central Government in this matter.

The Ministry of Power, vide its letter No.23/39/2016- dated 18.11.2016 clarified that, ***"the deviations as pointed out by the KSERC would have been got vetted and approved by Central Government, before the issuance of RFQ, RFP and PSA and not at this stage. As per the Guidelines, deviations on the provisions of the bidding documents are approved, if necessary and not the actions taken by the utility as per practice or precedent. In view of the above Government of Kerala/ KSEB Ltd may take action as appropriate in consultation with KSERC."***

In addition to the above, the Central Government vide the letter No.23/12/2018-R&R dated 11th December 2019, reiterated the same position and clarified that ***"the views of Ministry of Power as communicated earlier vide letter dated 18.11.2016 are reiterated. The deviations as pointed out by KSERC***

would have been got vetted and approved by the Central Government before issuance of RFQ, RFP and PSA and not at this stage. Government of Kerala/ KSEB Ltd may take actions as appropriate in consultation with KSERC.”

The above-mentioned replies would show that the Central Government rejected the request for approval of the deviations in the DBFOO guidelines made by KSEB Ltd. The State Government also has neither approved the deviations pointed out by the Commission nor accorded final approval to purchase of the unapproved DBFOO contracts. As per Clause 4 of the Resolution dated 9.11.2013 issued by the Central Government under Section 63, ***any deviation from the Standard Bidding Documents shall be made only with the prior approval of the Central Government.*** Hence the Central Government alone is competent to approve the deviations from the SBD guidelines. Further, the law laid by the Hon'ble Supreme Court in ***Bajaj Hindustan Ltd. vs. State of U.P. and Ors. (14.03.2016 - SC) : MANU/SC/0476/2016*** would clarify that if the words used were "with the prior approval" for getting validity of any such action takenprior approval shall be obtained and subsequent ratification is not possible.

- 36. *In view of the above observations, the Commission has come to the conclusion that in this case, the tariff determined by the petitioner KSEB Ltd in these unapproved PSAs is not in a fair, transparent and equitable process and the petitioner has grossly deviated from the guidelines issued by the MoP, Government of India vide Resolution dated 9.11.2013 issued under Section 63 of the Electricity Act, 2003. Further, the deviations made by the petitioner are against the public interest and created long term financial implications to the consumers and the State. Hence the petition filed by the KSEB Ltd for final approval of the four un approved PSAs are liable to be rejected.***

Issue No.3

Whether provisional approval given by the Commission for drawing power from the un approved PSAs amounts to deemed approval?

- 37.** The petitioner and the respondents raised their contentions that the petitioner is drawing power from these unapproved DBFOO contracts, uninterruptedly for more than last six years which amounts to deemed approval. The petitioner and the respondents have submitted that the Commission has approved to draw contracted power from these four generators and has been allowing to pass through portion of the cost of power. Through this action, the Commission has granted deemed approval for the PSAs and all the pre-requisites for conclusion of a binding contract as per the Indian Contract Act,1972 are satisfied.
- 38.** This Commission vide Order dated 22-12-2016, had provisionally approved the purchase of 115 MW of power from M/s Jabhua Power Ltd, L2 bidder of Bid 1, in view of the facts, circumstances and urgency explained by KSEB Ltd vide their letter dated 15.11.2016 and in view of the decision of Government of Kerala in GO (Rt) No.238/2016/PD dated 31.11.2016. In the said Order the Commission has specifically mentioned therein that the approval is provisional only and stated "that the Commission hereby approves provisionally the purchase of 115 MW of power by KSEB Ltd. from M/s.Jhabua Power Limited @ Rs.4.15/kWh as per the power purchase agreement dated 31.12.2014, subject to the clearance from the Government of India and subject to the final

decision of the Hon'ble High Court in WP (C) 33100/2014" and final approval is subject to the clearance from Government of India. Further the Commission vide its letter dated 22.12.2017 allowed the petitioner to draw power provisionally from three un approved PSAs of the generators namely, M/s Jindal India Thermal Power Ltd, M/s Jhabua Power Ltd and M/s Jindal Power Ltd, clarifying that, the Commission may approve the power purchase proposal including the rate for the pending approvals only after the Government accords the final approval for the entire power purchase under DBFOO.

39. Further, the Commission in response to the request of the KSEB Ltd. sought vide Letters No.KSEB/TRAC/DBFOO/2019-20/251 dated 20.07.2019 and 02.08.2019 to grant approval for the unapproved PSA's, the Commission vide letter No.1146/D(T)/2019/KSERC dated 26/08/2019 clarified as follows.

"KSERC is a statutory quasi-judicial body constituted under the Electricity Act, 2003. Section 94 of the Electricity Act, 2003 confers on the Commission the same power as are listed in a Civil Court under the Code of Civil Procedure, 1908 in respect of directions, orders, reviews etc".

"The Commission had vide its Order dated 30/8/2016 directed KSEB Ltd. to get the approval of the Govt. of India for the deviations in the standard bidding guidelines and in view of the G.O (Ms)No.45/2014/PD dated 20/12/2014 to obtain the views of Govt of Kerala, after duly considering the relevant facts and legal provisions. Since the above approvals are yet to be submitted before the Commission by the KSEB Ltd. the Commission cannot consider the request of KSEB Ltd to grant approvals for the PSA's entered into with L2, L3 and L4 in Bid-2 under DBFOO".

40. While approving the ARR, ERC and Tariff for the MYT period 2018-19 to 2021-22, the Commission stated that " ...since the required approvals from Gol and State Government is still awaited, the Commission is constrained to use the rate equivalent to the cost of power from BALCO, which is the L1 of Bid 2. The Commission emphasizes that this consideration is only for the purposes of estimating the cost of power provisionally in the ARR and shall not be construed as an approval of the power purchase, rate or of the PPA itself as per Section 63 of the Act which can be considered only after the fulfilment of conditions specified by the Commission in its order dated 30-8-2016." Similarly, while approving the ARR & ERC and tariff for the MYT period 2018-19 to 2021-22, the Commission reiterate that, during the truing up of accounts for the respective financial years, excess amount, if any, incurred for procuring power from these three generators shall not be considered, unless KSEB Ltd gets the approval of power purchase from Government of India for the deviations from the guidelines and on getting the approval of the Government of Kerala on the entire power purchase under DBFOO. Hence the arguments raised by the petitioner regarding the deemed approval are not acceptable.

41. The concept of deemed approval was explained by the Hon'ble Supreme Court in various decisions. (*Sushila Mafatlal Shah MANU/SC/0482/1988: (1988) 4*

SCC 490. *Ankit Ashok Jalan vs. Union of India (UOI) and Ors. (04.03.2020 - SC): MANU/SC/0276/2020.*) The settled position is that the principle “deemed approval” is applicable only if there is specific provision in the Act/Rules or Regulations. The petitioner has not pointed out any provision either in the Electricity Act, 2003, Rules or Regulations framed thereunder by the Commission to substantiate their contentions to that effect.

42. ***As clarified above, the Central Government has not approved the deviations made by the petitioner in the Standard Bidding Documents and guidelines issued by the MoP dated 9.11.2013, and the Commission has not yet issued final approval and also in view of the legal and statutory provisions, the contention raised by the petitioner regarding “deemed approval” is not legally sustainable and is liable to be rejected. The 3rd referred issue is answered accordingly***

Orders of the Commission

43. This Commission after examining all the averments in the petition filed by KSEB Ltd, the relief sought for, statements filed by the petitioner and respondents and rival contentions, expert opinion, and objections and suggestions of the stakeholders during the public hearings held on 28.03.2023, 29.03.2023 and 11.04.2023, the provisions of the Electricity Act, 2003, Standard bidding documents and Notifications issued by the Central Government, Regulations in force; hereby reject petition OP No.5/2021 filed by the petitioner KSEB Ltd before this Commission seeking to issue final orders with respect to drawal of power from generators of the following un approved PSAs:

1. 115 MW of power from Jhabua Power Ltd (L-2 of Bid-1)
2. 150 MW of power from Jindal Power Ltd (Bid-2)
3. 100 MW of power from Jindal India Thermal Power Ltd (Bid-2)
4. 100 MW of power from Jhabua Power Ltd (Bid-2)

Petition disposed of. Ordered Accordingly.

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

Sd/-
T. K. Jose
Chairman

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

