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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Decided on: 10th December, 2018

\+ **<u>W.P.(C) 700/2018 & CM APPL. 3010-3011/2018</u>**

INDIAN WIND POWER ASSOCIATION ..... Petitioner

Through: Mr. Sandeep Grover, Mr. Mohit Chadha, Ms. Pankhuri Bhardwaj, Advocates.

versus

UNION OF INDIA THROUGH SECRETARY, MINISTRY OF POWER AND ORS. ..... Respondents

Through: Mr. Dev P. Bhardwaj, CGSC with Ms. Anubha Bhardwaj, Advocate for R-1 & 2.
Ms. Ranjita Ramchandran, Mr.Pulkit Agarwal & Ms. Anushree Bardhan, Advocates for R-5.
Ms. Kritika Shukla, Ms. Soumya Priyadarshinee, Advocates for R-6.

CORAM:
HON'BLE MR. JUSTICE S. RAVINDRA BHAT
HON'BLE MR. JUSTICE PRATEEK JALAN

<u>PRATEEK JALAN, J (ORAL)</u>

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1. The petitioner is an association of generators of wind power. It has filed this writ petition challenging the bidding processes initiated by several of the respondents for procurement of wind energy. Although several different tender processes, issued by different entities in various parts of the country have been challenged in the petition, the common ground urged by

the petitioner is that the respondent/Union of India (hereinafter, “UOI”) ought to have insisted upon procuring entities proceeding on a localized basis, whether by state or by zone, based upon wind intensity, and not on all India basis.

2. Learned counsel for the petitioner has supported this contention by reference to Paragraph 6.4(2) of the National Tariff Policy dated 28.01.2016 framed by the UOI; the scientific study undertaken by the National Institute of Wind Energy (hereinafter, “NIWE”), classifying the country into four different "wind zones"; and Regulation 26(1) of the Central Electricity Regulatory Commission (Terms and Conditions for Tariff Determination from Renewable Energy Sources) Regulations 2017 (hereinafter, “the Regulations”). He also placed the Guidelines for Tariff Based Competitive Bidding Process for Procurement of Power from Grid Connected Wind Power Projects issued by the UOI on 08.12.2017 (hereinafter, “the Guidelines”), and submitted that, at the time draft Guidelines were issued by the UOI, the petitioners made detailed representations to the UOI which have not been adequately addressed. Learned counsel for the UOI argued that the policy decisions of the UOI had resulted in greater competition in the bidding process, and also informed us that the impugned tenders have already been awarded.

3. Sections 62 and 63 of the Electricity Act, 2003 (hereinafter referred to as "the Act") are relevant for the adjudication of this petition. They provide as follows:

> *“**62. Determination of tariff -** (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –*

(a) supply of electricity by a generating company to a distribution licensee: Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;

(b) transmission of electricity;

(c) wheeling of electricity;

(d) retail sale of electricity:

Provided that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.

(2) The Appropriate Commission may require a licensee or a generating company to furnish separate details, as may be specified in respect of generation, transmission and distribution for determination of tariff.

(3) The Appropriate Commission shall not, while determining the tariff under this Act, show undue preference to any consumer of electricity but may differentiate according to the consumer's load factor, power factor, voltage, total consumption of electricity during any specified period or the time at which the supply is required or the geographical position of any area, the nature of supply and the purpose for which the supply is required.

(4) No tariff or part of any tariff may ordinarily be amended, more frequently than once in any financial year, except in respect of any changes expressly permitted under the terms of any fuel surcharge formula as may be specified.

(5) The Commission may require a licensee or a generating company to comply with such procedures as may be specified for calculating the expected revenues from the tariff and charges which he or it is permitted to recover.

(6) If any licensee or a generating company recovers a price or charge exceeding the tariff determined under this section, the excess amount shall be recoverable by the person who has paid such price or charge along with interest equivalent to the bank rate without prejudice to any other liability incurred by the licensee.

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."*

The impugned tenders have been initiated under Section 63 of the Act.

4. The National Tariff Policy dated 28.01.2016 (hereinafter, "NTP"), was published by the UOI under Section 3 of the Act. Paragraph 6.4(2) thereof, which was relied upon by the petitioner, reads as follows:

> *"(2) States shall endeavor to procure power from renewable energy sources through competitive bidding to keep the tariff low, except" from the waste to energy plants. Procurement of power by Distribution Licensee from renewable energy sources from projects above the notified capacity, shall be done through competitive bidding process, from the date to be notified by the Central Government.*
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> *However, till such notification, any such procurement of power from renewable energy sources projects, may be done under Section 62 of the Electricity Act, 2003. While determining the tariff from such sources, the Appropriate Commission shall take into account the solar radiation and wind intensity which may differ from area to area to ensure that the benefits are passed on to the consumers."*

5. The UOI thereafter issued the Guidelines on 08.12.2017. The Guidelines were specifically referable to procurement under Section 63 of the Act. The following clauses thereof are significant:

> *"1.5 One of the key objectives of the Electricity Act, 2003 is promotion of competition in the electricity sector. Section 63 of the Act provides for adoption of the tariff by the Appropriate Commission if the same has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. The National Electricity Policy, 2005 also provides for competition in the renewable energy sector to reduce the cost. The National Tariff Policy notified on 28 January 2016 also provides for encouraging procurement of renewable power through competitive bidding to reduce the tariff.*
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> *1.6 These Guidelines have been formulated for procurement of wind power through transparent process of bidding under Section 63 of the Act."*
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> *xxxx*
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> *"2.1 The objective of these Guidelines is to provide a framework for procurement of wind power through a transparent process of bidding including standardization of the process and defining of roles and responsibilities of various stakeholders. These Guidelines aim to enable the Distribution Licensees to procure wind power at competitive rates in a cost effective manner."*

6. The petitioner challenged the Guidelines in this Court in WP (C) No. 125 of 2018, which was disposed of on 09.01.2018, with the following order:

> *"We have heard learned counsel for the petitioner and the learned counsel for the respondents, who is present on*

advance notice, with Mr.Hari Bhaskaran, Scientist 'C' with Ministry of New and Renewable Energy, the second respondent.

At the outset, learned counsel for the respondents states that the writ petition is premature and is based on assumption that the State Government, while floating tenders, would not take into consideration the velocity zones and other aspects. It is pointed out by the respondents that, it is for the State Government to adopt and apply the aforesaid guidelines while floating tenders.

In view of the statement made by the respondents, learned counsel for the petitioner seeks permission to withdraw the writ petition and states that, if any anomaly or defect arises after tenders are floated, they would approach the Court for appropriate relief.

The writ petition is accordingly dismissed as withdrawn, with liberty as prayed. The pending applications are also dismissed as withdrawn."

The present petition has thus been filed against specific tenders issued by the procuring agencies.

7. The question which arises for determination is whether the pan-India procurement process adopted by the respondents is violative of the petitioner's constitutional rights, or otherwise contrary to the statute, or the Regulations and guidelines issued thereunder.

8. The first contention of the petitioner is based upon Clause 6.4(2) of the NIT. However, in our view, the actions of the respondents do not contradict the NTP in any manner. A complete reading of the clause (which is set out above) makes it clear that the mandate of the policy is to take into account local conditions of wind intensity in the event power is being procured under Section 62 of the Act, and even then, this is in order to ensure that the benefits are passed on to the consumers. This provision is *ex*

facie not applicable to the bidding process contemplated by Section 63 of the Act.

9. The petitioner's reliance upon the Regulations is also misplaced for the same reason. Regulation 26(1) does prescribe different norms of capital utilization factor dependent upon the annual mean wind power density, but Regulation 3 expressly states that the Regulations are applicable in cases where tariff is to be determined under Section 62 of the Act.

10. Sections 62 and 63 of the Act provide distinct methods of tariff determination under the Act, as held by the Supreme Court in *Energy Watchdog vs. Central Electricity Regulatory Commission* (2017) 14 SCC 80 (paragraphs 19, 20). The factors which are relevant under the two provisions are also different, and the regulations/ guidelines issued under one of them cannot automatically be imported into the other. The scientific study of the type undertaken by NIWE may be relevant in a determination under Section 62, but does not in any way preclude a Section 63 determination on an all-India basis.

11. On an interpretation of Section 63 of the Act, we are of the view that the relief sought by the petitioner cannot be granted. The differences in wind intensity emphasized by the petitioner ultimately constitute one of the variables which an intending supplier must take into account in formulating its bid. This Court cannot mandate that a transparent bidding process, which is open to all suppliers of wind energy, must be replaced by a specially designed regime intended to factor in the differing availability of resources, and costs of various intending bidders. This may also be counter-productive to the objective of securing the most competitive rates, which in turn would ultimately enure to the benefit of the consumer. If producers who operate in areas with more favourable wind intensity are able to supply electricity at

better rates, such a result cannot be regarded as depriving producers in other areas of their legal rights. Further, other participants in the tender process may be incurring higher costs for some other resource, natural or otherwise. The petitioners' claim in these proceedings is tantamount to placing one resource in a special category, differences in the cost of which have to be factored in prior to the initiation of a bidding process under Section 63. The provision does not, in our view, admit of such an interpretation. Consistent with the objective of a transparent bidding process, the NTP and the Guidelines also reveal a preference for promotion of competition and efficiency amongst suppliers, in the ultimate interest of the consumer. Such policy decisions of the respondents, which in turn have been reflected in the tenders issued by various procuring agencies, are not arbitrary or irrational, and thus cannot be interdicted under Article 226 of the Constitution.

12. The aforesaid conclusion is also consistent with the Division Bench judgment dated 14.11.2017 of the Gujarat High Court in LPA No 1914 of 2017, affirming the judgment dated 23.10.2017 rendered by a Single Judge. These proceedings were in respect of a Request for Selection dated 15.6.2017, issued by the Gujarat Urja Vikas Nigam Limited (Respondent no. 5 herein), which is also in issue in the present proceedings. The challenge in that case was based principally upon the fact that the bidding process had been initiated under Section 63 of the Act, even prior to the formulation of relevant guidelines by the UOI. The petition came to be dismissed by the Single Judge, which was upheld on appeal by the Division Bench. The matter was carried to the Supreme Court in Civil Appeal No. 20922 of 2017 in which the petitioner herein was also granted the opportunity to intervene. By an order dated 08.01.2018, the Supreme Court

disposed of the appeal as infructuous in view of the pendency of the challenge to the Guidelines in this Court.

13. For the reasons aforesaid, the writ petition is dismissed. No orders as to costs.

PRATEEK JALAN, J.

S. RAVINDRA BHAT, J.

DECEMBER 10, 2018
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