



## **Delhi Electricity Regulatory Commission**

**Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.**

No. F.11(2120)/DERC/2023-24/7821

### **Petition No. 32/2023**

**In the matter of :** Petition under Sections 63 and 86(1)(b) and other applicable provisions of the Electricity Act, 2003 for approval of the Notice inviting tender and the bidding process to be initiated under the request for proposal for “setting up of Municipal Solid Waste (MSW) to energy facility at Ghazipur, East Delhi” by Municipal Corporation of Delhi.

**Municipal Corporation of Delhi**

**.... Petitioner**

**Vs.**

**BSES Rajdhani Power Ltd. & Ors.**

**... Respondents**

### **Coram:**

**Justice Umesh Kumar, Former Judge, Chairman, DERC**

**Sh. Ram Naresh Singh, Member**

**Sh. Surender Babbar, Member**

### **Appearance:**

- 1. Ms. Swapna Seshadri, Ld. Counsel for Petitioner**
- 2. Mr. Utkarsh Singh, Ld. Counsel for Petitioner**
- 3. Mr. Buddy A Ranganadhan, Sr. Advocate for Respondent**
- 4. Mr. Dushyant Manocha, Ld. Counsel for Respondent**
- 5. Ms. Mrinalini Mishra, Ld. Counsel for Respondent/BRPL and BYPL**
- 6. Mr. Shivam Sinha, Ld. Counsel for Respondent/TPDDL**
- 7. Mr. Ravi Nair, Ld. Counsel for Respondent/TPDDL**

### **ORDER**

(Date of Order: 06.06.2025)

- 1.** The instant Petition has been filed by Municipal Corporation of Delhi (MCD) for approval of the Notice inviting tender and the bidding process to be initiated under the request for proposal for “setting up of Municipal Solid Waste (MSW) to energy facility at Ghazipur, East Delhi” by Municipal Corporation of Delhi.
- 2.** The Petitioner has made the following prayers:
  - (a)** To approve the Notice Inviting Tender and the Bidding Process under the draft Request for Proposal to be issued by MCD for setting up of Municipal Solid Waste to Energy Facility at Ghazipur, East Delhi of 2000 TPD ( $\pm$  20%) to 25 MW power generation capacity;
  - (b)** To adopt the Tariff which will be discovered in the proposed Bidding Process to be conducted under the guidance of the Commission.

### **Petitioner's Submissions**

3. The Petitioner has submitted the following:
- i. The Petitioner ('MCD') is a statutory body constituted under the Delhi Municipal Act, 1957 and having its head office at SP Mukherjee Civic Center, JLN Marg, New Delhi- 110002 and is responsible for providing municipal and civic services to the citizens of the area of Delhi State under its jurisdiction, including collection, transportation and disposal of Municipal Solid Waste ('MSW') generated within their jurisdiction. For the certain period between 2012 to 2022, the operations of the MCD were being performed by NDMC, SDMC & EDMC. However, effective 22.05.2022, all three Corporations again stand merged as MCD (the Petitioner).
  - ii. The Government of India through the Ministry of Environment, Forest and Climate Change ('MOEFCC') on 08.04.2016 has formulated Solid Waste Management Rules 2016 ("SWM Rules 2016"), which inter-alia imposes certain obligations on MCD to adopt suitable process for processing and disposal of Municipal Solid Waste.
  - iii. The National Tariff Policy, 2016 ('NTP') notified by the Ministry of Power, Government of India also mandates the purchase of power by the Distribution Licensees ("DISCOMS") from the power generated from Municipal Waste.
  - iv. The Ministry of New and Renewable Energy ("MNRE") has issued the Twentieth (20th) Standing Committee Report on Power from Municipal waste in August 2016 wherein it has enumerated the role of municipal authorities in Solid Waste Management. In the said Report, it is stipulated that one of the functions of the Municipal authorities is to make adequate provision of funds for capital investments as well as operation and maintenance of solid waste management services in the annual budget.
  - v. In furtherance of its functions and pursuant to the above-mentioned Rules, Policy and Report, MCD is desirous of augmenting its waste management capability and expanding its waste processing, management and disposal capabilities. In this regard and in order to ensure that the target of 100% waste processing and its scientific disposal is met, MCD has proposed to structure a Waste to Energy ("WTE") Project at Ghazipur site. For this purpose, MCD has decided to select an entity for development, operation and maintenance of WTE processing facility of 2000 TPD ( $\pm$  20%) to 25 MW power generation capacity, as per SWM Rules 2016, at Ghazipur, East Delhi("Project") through Public-Private Partnership ("PPP") on Design, Build, Finance, Operate and Transfer ("DBFOT") basis. The MCD shall handover a land parcel of approximately 15 acres at existing Ghazipur landfill ("Project Land"), for setting up the proposed facility.

- vi. The Selected Bidder (single entity or consortium of entities) shall form a Special Purpose Vehicle ("Concessionaire"), immediately after receiving the Letter of Award ("LOA") from MCD to execute the Concession Agreement. In this regard, following are relevant:
- (a) The Concessionaire shall be responsible for designing, engineering, financing, procurement, construction, operation and maintenance of the Project upon the Project Land, which shall be conveyed to the Concessionaire by the Authority under and in accordance with the provisions of a long-term concession agreement (the "Concession Agreement") to be entered into between the Concessionaire and the Authority and;
  - (b) The Power Purchase Agreement ("PPA") has to be entered into between the Concessionaire and the Delhi DISCOMs in the form provided by the Authority as part of the Bidding Documents pursuant hereto.
- vii. The proposed project has been designed to accept the waste up to 2000 TPD, MSW and therefore, considering additional quantities, power generation may go up to 25 MW. The capacity can be allocated in the appropriate ratio to be decided by the Commission to the DISCOMs in terms of their allocation and requirement.
- viii. In March 2023, the Regional Centre for Urban & Environmental Studies ("RCUES"), Lucknow had prepared and submitted a Techno-Economic Feasibility Report to MCD as transaction advisory service for setting up the WTE facility at Ghazipur East Delhi for 2000 TPD WTE Facility. The report contains guidelines for solid waste management, principles for Solid Waste Processing, as-is assessment of SWM in MCD, proposed plan for SWM project, cost estimates, project structuring, financial feasibility and bidding strategy, risks and mitigation measures and environmental management plan.
- ix. The Instant Petition is being filed by the Petitioner to seek an approval from the Commission for the Notice Inviting Tender and the Bidding Process to be initiated under Section 63 mechanism by the Petitioner for setting up the Project at the Ghazipur location. Ordinarily and in earlier cases, the petitions have been filed by MCD after issuing the NIT. However, certain frivolous objections were raised by third parties without any locus which delayed the entire approval process in the earlier rounds.
- x. Therefore, by way of abundant caution, MCD is approaching the Commission at the time of initiation of the Bidding itself, with the draft RFP and the Notice Inviting Tender for setting up the Project.
- xi. Further, certain objections have also been raised regarding the jurisdiction of MCD to float the tenders and the bidding process under the Section 63 route during the approval and adoption for tariff for previous Narela Bawana Project- WTE processing facility of 3000 ( $\pm$  20%) TPD to 28 MW by MCD. The

said objections have been categorically rejected by the Commission in the Order dated 06.03.2023 in Petition No. 65 of 2022. One such objector, Mr. Gagan Narang has challenged the aforesaid Order dated 06.03.2023 in Petition No. 65 of 2022 before the Hon'ble Appellate Tribunal, however, there is no stay order passed by the Hon'ble Appellate Tribunal for Electricity in the said Appeal.

- xii. It is submitted that as per the Solid Waste Management Rules, 2016, the Petitioner is performing its statutory function which inter-alia include being authorised to invite tariff-based bids.
- xiii. Further, the Petitioner submits that there is no prohibition on a plain reading of Section 63 of the Electricity Act, 2003 as to the entity which can approach the Commission for approval and adoption of a tariff discovered through a transparent process of bidding. On a harmonious reading of the SWM Rules 2016 and the Electricity Act, 2003, it is construed that MCD is entitled to maintain the instant petition before the Commission.
- xiv. In fact, in the previous Narela Bawana Project, prior to calling for bids to set up the WTE power plant, MCD had held a discussion with the distribution companies in Delhi as well as the other stake holders on 14.05.2022 recorded in the Minutes of Meeting dated 30.05.2022.
- xv. The representatives of the DISCOMs themselves suggested to adopt tariff-based bidding model for the proposed plant and the sale of power to be distributed amongst the DISCOMs as per their Renewable Purchase Obligation ("RPO").
- xvi. There was also an objection raised that Competitive Bidding is impermissible in case of WTE Power Procurement process. In this regard, there is no mandate in the National Tariff Policy, 2016 that the WTE plant cannot be setup through a competitive bidding route under Section 63 of the Electricity Act, 2003. There is no compulsion or mandate under the National Tariff Policy, 2016 that the WTE projects should only come up under Section 62 route.
- xvii. In regard to the above, reliance is placed on the Order dated 07.03.2023 in Petition No. 72 of 2022 issued by the Commission wherein the Commission held as under:

*43. The National Tariff Policy mandates that the entire power generated by Waste to Energy projects should be procured. The purpose of Waste to energy is to dispose off the waste and divert from dump with the objective of protecting environment. The plant is also "Must Run" and deemed to be scheduled. Ministry of Power vide press release dated 20.01.2016 had stated that in order to give boost to Swachh Bharat Mission, Government of India has made amendments to National Tariff Policy directing that the DISCOMs shall mandatorily procure 100% power produced from Waste-to-Energy plants and has excluded waste to energy from competitive bidding process and these amendments will benefit power consumers in multiple ways. Such plants would also aid the objectives of Swachh Bharat Mission as well as Namami Gange Mission through conversion of waste to energy, usage of sewage water for generation and in turn ensure that clean water is available for drinking and irrigation. The PPA also stipulates that 100% of power is to be procured*

*by DISCOMs and that the respective obligations of the parties will commence even to the extent of partial COD. Since 100% power is to be procured by DISCOMs therefore the capacity of project is whether 28MW or 36MW is irrelevant.*

- xviii. In regard to the above, reliance is placed on the Hon'ble Supreme Court's Judgment passed in *Energy Watchdog v CERC (2017) 14 SCC 80 in Para 20*, wherein it has been held that if the Central Government has not framed the Guidelines under Section 63 or if the Guidelines framed are silent on any aspect, the general regulatory power of the Electricity Regulatory Commissions can be used. Therefore, merely because there are no Guidelines does not mean that competitive bidding cannot be conducted. There is no unambiguous view of the Central Government to exclude waste-to-energy plants from the competitive bidding rule. Thus, in terms of the Energy Watchdog Judgment, even in the absence of the Guidelines, the competitive bidding can be conducted with the permission of the Commission.
- xix. Therefore, MCD has approached the Commission for approval of the aforementioned Notice Inviting Tender and bidding process to be initiated under the Request for Proposal for the Project prior to the floating of the tender. This has been done primarily to remove any ambiguity and to mitigate the delay in adoption of the tariff process due to unscrupulous and meritless objections raised by the Objectors in the past for the WTE projects initiated by the Petitioner.

### **Respondent's Submissions**

#### **Reply on Behalf of Respondent No. 1 and 2/BRPL and BYPL**

4. The Respondents have submitted the following:
- I. Respondent No. 1, BSES Rajdhani Power Ltd and Respondent No. 2, BSES Yamuna Power Ltd (collectively "Answering Respondents") are filing the present common Reply pursuant to Orders of this Commission directing the Respondents to submit their responses.
  - II. Municipal Corporation of Delhi ("Petitioner") has filed the present Petition seeking inter alia (i) approval of this Commission of the Notice Inviting Tender ("NIT") and bidding process under the draft Request for Proposal ("RFP") to be issued by the Petitioner for setting up of its 2000 TPD (+/- 20%) to 25 MW power generation capacity Municipal Solid Waste ("MSW") to energy processing facility at Ghazipur, New Delhi ("Project"); and (ii) adoption of tariff which will be discovered in the bidding process. Notedly, the Respondents including the Answering Respondents, are DISCOMs who will avail the power generated from the Project.
  - III. During the hearing held on 21.05.2024, the Petitioner submitted before this Commission that it is merely pressing Prayer (b) (i.e., approval of the NIT and the bidding process) as the same is within the ambit of Section 63 of

Electricity Act, 2003 ("Act"). The relevant portion of the Order is extracted below for the convenience of this Commission:

*"2. Learned Counsel for the Petitioner, hence, presses only prayer (b) of the petition as it is urged that the same is within the ambit of Section 63 of the Electricity Act, 2003..."*

- IV. As such, the present reply is limited to the submissions in connection with Prayer (b). The Answering Respondents respectfully crave liberty from this Commission to submit a further response in case the Petitioner seeks to press other reliefs prayed for in its Petition.
- V. The Answering Respondents have the following preliminary submissions for the kind consideration of this Commission:
  - a. Admittedly, Clause 6.4(1)(ii) of the National Tariff Policy, 2016 ("NTP 2016") obligates distribution licensees to compulsorily procure 100% power produced from all the Waste-to-Energy plants in the State, in the ratio of their procurement of power from all sources including their own. However, the Answering Respondents submit that procurement of power from Waste-to-Energy should be cost effective and aimed towards maximum optimization in the interests of consumers.
  - b. It is submitted that the above-mentioned approach has been captured in the NTP 2016 itself. The reference of this Commission is invited to Clause 8.3 of NTP 2016 (@ Pg. 71 of the Petition) which suggests that '*rational and economic pricing of electricity*' is one of the major tools for energy conservation and sustainable use of resources. Therefore, NTP 2016 which forms the basis for procurement of power from WTE plants, promotes a cost-effective approach.
  - c. While relying upon Section 61(g) of the Act, NTP 2016 also mentions that the Appropriate Commission is to be guided by the objective that the tariff progressively reflects the efficient and prudent cost of supply of electricity.
  - d. In addition to the above, the Petitioner has also placed on record the Techno-Economic Feasibility Report ("TEFR") prepared by Regional Centre for Urban & Environmental Studies, Lucknow (enclosed as Annexure-G). The said report provides a transactional advisory to the Petitioner for setting up the WTE facility. A perusal of the report also indicates that the ultimate objective of Solid Waste Management is cost effectiveness.
  - e. Even though NTP 2016 along with the TEFR report suggests a cost-effective approach for procurement of power, it has been observed by the Answering Respondents that the procurement of power from WTE plants is expensive. As per the past records, a comparison between procurement of power through competitive bidding and from WTE plants reflects a substantial difference, with former emerging as a more economically viable option.

- f. In view of the above, the Answering Respondents pray that the cost of procuring power should be minimal.
  - g. Apart from the cost of procurement of power, the Petitioner should also take positive steps towards ensuring that the project cost is also minimal so that the ultimate consumers are not impacted by higher tariff rates.
- VI. At Para 7 of the Petition, the capacity of plant would be between 2000 TPD MSW to 25 MW which is required to be appropriately distributed between the DISCOMs of Delhi. With regards to allocation of power amongst the DISCOMs, it is submitted that other distribution licensees including Railways, MES and NDMC and large Open Access consumers like DIAL and DMRC should also be considered for the same. In fact, in Order dated 07.03.2023 passed by this Commission in Petition No. 72 of 2023, a direction was given to other distribution licensees as well to procure power from the concerned WTE plant.
- VII. In the Petition, the Petitioner has also enclosed a copy of draft Power Purchase Agreement ("PPA") (*enclosed as Annexure-F*) which will be required to be executed between the Concessionaire (i.e. Special Purpose Vehicle) and the distribution companies. At this juncture, the Petitioner has not prayed for approval of the same. In fact, the same can only be entered into subject to the orders passed by this Commission, approving the bidding process.
- VIII. Without prejudice to the above, insofar as the draft PPA is concerned, the Answering Respondents make the below mentioned preliminary suggestions to be incorporated before execution of the same. It is submitted that the Answering Respondents reserve their rights to submit detailed at the appropriate stage before the execution of the draft PPA:
  - a) Article 8 of the draft PPA pertaining to applicable Tariff, does not provide for a year wise scheduled tariff. Additionally, the provision is silent about the assumed installation capacity for the purpose of charging tariff.
  - b) The draft PPA is silent about the provision for supply of 'infirm power' in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019.
  - c) The draft PPA does not provide for a clause which prescribes the penalty in case the Seller fails to provide the power on the date of commercial operation.
  - d) The draft PPA does not contain any clause for penalty in case the Seller fails to commission the project within the approved timelines. Therefore, a penalty clause may be added in case the COD is not achieved within the approved timelines. Similarly, compensation is to be provided to the beneficiaries in case of non-compliance of Renewable Purchase Obligation (RPO) on account of delay in commissioning of the project or less generation than the normative generation by the Seller.

- e) The charges for deviation should be in accordance with Regulation 8 of the Central Electricity Regulatory Commission (Deviation Settlement Mechanism and Related Matters) Regulations, 2022.
  - f) Clause 8.1 of the draft PPA states that Seller should be entitled to collect tariff for the supply of electricity. However, in the Answering Respondent's view, this clause should clarify that full tariff would be charged only when the Supplier's Plant is able to achieve maximum COD. Until then, partial / concessional tariff should be levied.
  - g) The provision for incentives, as stated under Clause 8.3 of the draft PPA, should be provided to the Supplier only after approval from this Commission.
  - h) The DISCOMs, including the Answering Respondents should be provided with monetary compensation in case there is any delay in commissioning of the Project or the Supplier generates less electricity than the normative generation.
  - i) Article 11 which covers the force majeure events should also include pandemic (like COVID-19) and requisite relief should be provided to the affected Party.
- IX. In any event, the Answering Respondents pray that once tariff is discovered and PPA is to be entered into between the generator and the DISCOMs, the DISCOMs be permitted the option to negotiate their PPAs.

**Reply on Behalf of Respondent No. 3/ TPDDL**

5. The Respondent has submitted the following:
- I. The present Reply is being filed on behalf of the Respondent No. 3 – Tata Power Delhi Distribution Limited ("Answering Respondent"/ "TPDDL"/ "Respondent No. 3") to the Petition filed by Municipal Corporation of Delhi ("Petitioner"/ "MCD") under Section(s) 63 and 86(1)(b) and other applicable provisions of the Electricity Act, 2003 ("Act") for approval of the Notice Inviting Tender and the bidding process to be initiated under the request for proposal for "*setting up of municipal solid waste to energy facility at Ghazipur, East Delhi*" by the Petitioner.
  - II. The Answering Respondent at the outset denies and disputes all the averments made by the Petitioner in its Petition to the extent same are not specifically admitted herein. Any omission on part of the Respondent to deal with any specific averment of the Petitioner in the present Reply should not be construed as an admission/ acceptance thereof.
  - III. The present Petition was listed before this Commission on 21.05.2024, wherein the Ld. Counsel for the Petitioner pressed only prayer (b) of the Petition and urged that the same is within the ambit of Section 63 of the Electricity Act. Accordingly, this Commission was pleased to issue notice on prayer (b) of the Petition to the Respondents. For ease of reference, prayer (b) of the Petition is reproduced herein below:



*"23. In the facts and submissions made above, it is respectfully prayed before this Commission may be pleased to direct:*

*...*

*(b) Approve the Notice Inviting Tender and the Bidding Process under the draft Request for Proposal to be issued by MCD for setting up of Municipal Solid Waste to Energy Facility at Ghazipur, East Delhi of 2000 TPD ( $\pm 20\%$ ) to 25 MW power generation capacity;*

*..."*

- IV. It is therefore submitted that the present Reply is being restricted to the above-mentioned limited issue. Therefore, the Answering Respondent most humbly reserves its right to file additional reply on other issues, as and when the notice is issued by this Commission on other prayers of the Petitioner.

**PRELIMINARY SUBMISSIONS/ OBJECTIONS**

The Respondent raises the following preliminary submissions/ objections in response to the Petition filed by the Petitioner, which may be considered by this Commission.

A. **TARIFF OF WASTE TO ENERGY PLANT IS TO BE DETERMINED UNDER SECTION 62 OF THE ACT**

- V. It is submitted that the Petitioner herein has sought approval of Notice Inviting Tender and the Bidding Process under the draft Request for Proposal to be issued by the Petitioner for setting up of Municipal Solid Waste to Energy Facility at Ghazipur, East Delhi of 2000 TPD ( $\pm 20\%$ ) to 25 MW power generation capacity. Thus, the Petitioner has sought approval for calling bids for setting up of Waste to Energy plant under Section 63 of the Act.

- VI. In this regard, it is relevant to mention that as per the National Tariff Policy, 2016, Distribution Licensee(s) are under obligation to procure 100% power produced from all the Waste to Energy plants in the State, in the appropriate ratio, at the tariff determined by the appropriate Commission under Section 62 of the Act. The relevant portion of the National Tariff Policy is reproduced herein below for easy reference:

*"6.0 GENERATION*

*...*

*6.4 Renewable sources of energy generation including Co-generation from renewable energy sources:*

*(1) ...*

*...*

*(ii) Distribution Licensee(s) shall compulsorily procure 100% power produced from all the Waste-to-Energy plants in the State, in the ratio of their procurement of power from all sources including their own, at the tariff determined by the Appropriate Commission under Section 62 of the Act.*

*...*

*(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. ..."*

- VII. Thus, in view of the above, it is submitted that the present Petition is ex-facie against the National Tariff Policy, 2016. The present Petition is liable to be dismissed on this ground alone.

B. **PETITIONER DOES NOT HAVE AUTHORITY TO ISSUE REQUEST FOR PROPOSAL**

- VIII. Without prejudice to the above submission, it is submitted that even assuming for the sake of arguments that a bid can be issued under Section 63 of the Act for waste to energy plant, the Petitioner is nevertheless not authorised to call for such bids. The Petitioner is neither a licensee within the meaning of the Act, nor is authorised to procure electricity on behalf of the distribution licensee whether by the distribution licensee or by the appropriate authority.
- IX. It is submitted that the above issue was raised by the Answering Respondent in Petition No. 72 of 2022 before this Commission, wherein similar prayers had been sought by the Petitioner. In this regard, this Commission vide Order dated 07.03.2023 in Petition No. 72 of 2022, was pleased to hold that the Petitioner being a statutory body is mandated under the Solid Waste Management Rules, 2016 ("**SWM Rules, 2016**") to facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure. Thus, the above objection raised by the Answering Respondent was held to be invalid.
- X. The above Order dated 07.03.2023 passed by this Commission in Petition No. 72 of 2022 was challenged before the Hon'ble Appellate Tribunal for Electricity ("**APTEL**") in Mr. Gagan Narang v. Delhi Electricity Regulatory Commission & Ors. (DFR No. 245 of 2023), wherein vide Order dated 31.08.2023, the Hon'ble APTEL held:
- "30. **Rule 15(v) of the MSW Rules, 2016**, (on which reliance was placed by the DERC while passing the impugned Order), **merely provided that the local authorities and panchayats shall facilitate construction, operation and maintenance of solid waste processing facilities and associated infrastructure on their own or with private sector participation or through any agency for optimum utilization of various component of solid waste adopting suitable technology. The obligation placed, by Rule 15(v) of the 2016 MSW Rules, on the MCD was only to facilitate, construct, operate and maintain a solid waste processing facility and nothing more. The said Rule would neither enable nor justify the MCD filing a petition before the DERC for adoption of tariff.**"*
- Empasis Supplied**
- XI. It is relevant to mention that the Hon'ble APTEL did not deal with the specific issue as has been raised herein. In this regard, the Hon'ble APTEL held:
- "75. Since the jurisdiction of the DERC, to entertain a petition filed by the 2nd Respondent-MCD is alone being examined in the present proceedings, **we see no reason to undertake an enquiry as to whether or not the MCD was justified in inviting bids for power procurement by the distribution licensee, more so in the light of their submission that other local bodies have undertaken such an exercise. ...**"*
- XII. It is most humbly submitted that the above judgment of the Hon'ble APTEL has been challenged before the Hon'ble Supreme Court of India in *Municipal Corporation of Delhi v. Gagan Narnag & Ors.* (Civil Appeal No. 7463-7464 of 2023). However, no stay has been granted by the Hon'ble Supreme Court of India, as on the date of filing the present reply. The Answering Respondent submits that the orders passed in the present Petition may be subject to the outcome of the appeal pending before the Hon'ble Supreme Court of India.

- XIII. In view of the above, the Petitioner most humbly submits that no authority has been granted to the Petitioner to invite bids for procurement of power on behalf of the distribution licensees whether under the Act or under the SWM Rules, 2016.
- XIV. The present Petition has been filed under Section 63 of the Act. Furthermore, National Tariff Policy, 2016 further provides that states shall endeavour to procure power from renewable energy sources through competitive bidding to keep the tariff low, **except from the waste to energy plants.**
- XV. It is submitted that the Order dated 07.03.2023 in Petition No. 72 of 2022 has been set aside by the Hon'ble APTEL in Appeal No. 245 of 2023. Therefore, the reliance placed on the said order is incorrect. It is further submitted that the findings of the Hon'ble Supreme Court in *Energy Watchdog v. CERC* (2017) 14 SCC 80 are not applicable in the present case.
- XVI. It is submitted that the scope of Section 86(1)(b) was expounded by the Hon'ble APTEL in *Punjab State Power Corporation Ltd. v. Everest Power Private Limited and Ors.* [MANU/ET/0092/2018] wherein this Hon'ble Tribunal held:  
"20.24 ... Reading of Section 86(1)(b) makes it clear that this is a provision of regulating purchase of electricity and the procurement process of distribution licensee. Section 86(1)(b) not only provides to regulate electricity purchase and procurement process of distribution licensees but also the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements. It is well settled that as part of the Regulation, it can also adjudicate if any dispute arises between the licensees and generating companies with regard to the implementation, application or interpretation of the provisions of the PPA."  
 ("Emphasis Supplied")
- XVII. Thus, it is apparent that the functions of this Commission under Section 86(1)(b) of the Act are limited to adjudication of disputes between licensees and generating companies and cannot be exercised for adjudication of issues brought by an entity which is neither procuring nor supplying electricity.
- XVIII. Further, the Hon'ble Supreme Court of India examined the scope of Section 86 of the Act for adjudication of disputes between a licensee and a consumer in *Hindustan Zinc Limited v. Ajmer Vidyut Vit* [(2019) 17 SCC 82]. The Hon'ble Supreme Court held that Section 86 of the Act is only for adjudication of disputes between licensees and generating companies and that being the case, the award passed by the Arbitrator appointed by the State Commission under Section 86 of the Act would be *non est* in law. The relevant portion of the above judgment has been reproduced herein below:  
"19. Coming now to Section 86 of the Act, it is clear that the adjudication upon disputes can only be between licensees and generating companies and not between licensees and consumers, which is provided for in an open access situation by Section 42.  
 ...  
 22. What becomes clear on a reading of this judgment is that the expression 'and' occurring in Section 86(1)(f) must be read as 'or'. But this is only because,

as has been pointed out in the judgment, the State Commission cannot both decide the dispute itself and also refer it to an Arbitrator. Otherwise also, reference of any dispute for arbitration can only be between the licensees and generating companies and not otherwise.

23. This being the case, the High Court is right in stating that the Arbitrator could not, in law, have been appointed by the State Commission Under Section 86 of the Electricity Act. The Award based on such appointment would be non est in law."

("Emphasis Supplied")

XIX. In fact, this Commission has itself held previously that it is only the Licensee/ Generating Companies who can approach the commission for adjudication of disputes and no one else. This Commission in *Single Point Agency Holder Association v. BSES Rajdhani Power Limited & Ors.* [Petition No. 36 of 2008; dated 22.08.2008] held:

"10. The Commission has considered the rival contentions of the parties and is of the considered view that the present petitions of SPD contractors are not maintainable before this Commission as the Petitioners are not the licensees under the Electricity Act, 2003 nor under the previous Electricity laws enforceable at the relevant time. The Petitioners were assigned the business of distribution of electricity for specific areas by separate commercial agreements and to enforce these commercial contacts/agreements, is outside the purview of the Commission.

11. The Commission vide its Order dated 14.08.2008 in 17 cases titled *United Electricals Engineering Company and others versus BSES Rajdhani Power Ltd.* (Petition No. 33 to 51 of 2008) held that the Petitioners are not the Licensees, therefore, not entitled to maintain the Petitions before the Commission as under Section 158 of the Electricity Act, 2003, it is only the Licensee/Generating Companies who can approach this Commission for the adjudication of disputes and none else (The order dated 14.08.2008 is available on the Commission's Website [www.derc.gov.in](http://www.derc.gov.in)). Further, Section 86(1)(f) clarifies that only the disputes between the Licensees and the generating companies can be referred for arbitration. In the present cases there is a clear provision in the bipartite agreements that either the owner or his nominee would have to work as a sole Arbitrator. Further Sh. Mansoor Ali, Counsel for the BRPL has brought to the notice of the Commission that in number of cases already the arbitrator has been appointed for adjudication of disputes and in some of the cases even awards have been passed. The present Petition, therefore, cannot be entertained by the Commission for lack of jurisdiction."

("Emphasis Supplied")

#### **Reply on Behalf of Respondent No. 6/ DTL**

6. The Respondent has submitted the following:

- I. The Respondent No. 6/Delhi Transco Limited is a company incorporated under the provisions of the Companies Act, 1956 as the State Transmissions Utility in the NCT of Delhi and is wholly owned undertaking of the Government of National Territory of Delhi to perform the functions as defined under the Notification No. F.11(99)/2001-Power /6910 dated 21.03.2003.
- II. Further in terms of Letter No. F.11(24)/2005/Power/Vol.II/1532 dated 28.06.2006, w.e.f. 01.04.2007 the answering Respondent is discharging the function of Intra-state transmission of electricity in NCT of Delhi and as such engaged only in the Wheeling of Power as per mandate of GNCTD and the responsibility of Bulk Power Purchase and Wheeling of Power at inter-state level has been taken up by the DISCOMS functioning in the NCT of Delhi.

- III. That consequent to the directions issued vide letter dated 28.06.2006, the Power Purchase Agreements/ Contracts signed by the Answering Respondent prior to 01.04.2007 were in terms of provisions of the DERA, Electricity Act, 2003 and the directions issued by GNCTD from time to time prior to 01.04.2007 and the Answering Respondent was acting only as nodal agency to purchase power for the DISCOMS i.e. BRPL, BYPL and NDPL, etc. which were the actual beneficiaries. After 01.04.2007, the Power Purchase Agreements were directed to be re-assigned to the concerned DISCOMS functioning in the NCT of Delhi and consequently the DISCOMS are directly taking part in the related proceedings. Therefore, the answering Respondent is not liable in any manner whatsoever either in case of Power Purchase Agreements prior to 01.04.2007 or after 01.04.2007. The present Petition does not pertain to the answering Respondent.
- IV. The power purchase responsibility has already been transferred to Distribution Companies of Delhi w.e.f. 01.04.2007 and they are doing the same. It is further that whatever will be the effect of the decision of the Commission will directly pass on to the Distribution Licensees of Delhi, hence the replying Respondent is not even a necessary party and be deleted from array of parties.
- V. Since Respondent No. 06/DTL have already been relieved of its power purchase responsibilities, there is no cause of action in favour of the Petitioner as regards Respondent No. 06/DTL.
- VI. The Distribution Licensees/ DISCOMS in Delhi viz. BSES Rajdhani Power Limited (BRPL), BSES Yamuna Power limited (BYPL), Tata Power-Delhi Distribution Limited (TPDDL), New Delhi Municipal Council (NDMC), and Military Engineering Services (MES) have already been impleaded as Respondent Nos. 1, 2, 3, 4 and respectively.
- VII. Any directions passed by the Commission, if any would be squarely pass on to the Delhi DISCOMS i.e. Respondent No. 1 to 5.
- VIII. Thus, Respondent No. 06/Delhi Transco Limited is neither a necessary or proper party in the present proceedings and ought to be deleted from the array of parties.
- IX. It is respectfully submitted that in view of the above, nothing survives in the Petition as against Respondent No. 06/ Delhi Transco Limited and therefore, it is prayed that the Commission may be pleased to dismiss the present petition as against Respondent No. 06/Delhi Transco Limited and may also be pleased to delete Respondent No. 06/ Delhi Transco Limited from array of parties.

**Reply on Behalf of Respondent No. 7/ SLDC**

7. The Respondent has submitted the following:
  - I. The petitioner has made no averments against Delhi SLDC and prayed for approval of NIT & RFQ to set up a solid Waste to Energy Facility at Ghazipur,

East Delhi of 25 MW by MCD and further for adoption of tariff for the same through competitive bidding process.

- II. That as per section 32 of the Electricity Act, 2003, the State Load Despatch Centre (SLDC) is required to ensure integrated operation of power system in the state. Accordingly, SLDC exercise supervision and control over the inter-state transmission system. SLDC is responsible for carrying out real-time operations for grid control and scheduling & despatch of electricity within the state through secure and economic operation of the state grid in accordance with the grid standards and the grid code. Further, SLDC keeps account of the quantity of electricity transmitted through the State Grid. The relevant part of the Electricity act 2003, is reproduced as under-

*"Section 32. (Functions of State Load Despatch Centers): --(i) The State Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in a State.*

*(2) The State Load Despatch Centre shall -*

- (a) be responsible for optimum scheduling and despatch of electricity within a State, in accordance with the contracts entered into with the licensees or the generating companies operating in that State;*
- (b) monitor grid operations;*
- (c) keep accounts of the quantity of electricity transmitted through the State grid;*
- (d) exercise supervision and control over the intra-State transmission system; and*
- (e) be responsible for carrying out real time operations for grid control and despatch of electricity within the State through secure and economic operation of the State grid in accordance with the Grid Standards and the State Grid Code.*

*(3) The State Load Despatch Centre may levy and collect such fee and charges from the generating companies and licensees engaged in intra-State transmission of electricity as may be specified by the State Commission."*

- III. SLDC has no role in the approval NIT & RFQ for setting up of WTE plant and adoption of tariff through Bidding process of same.

- IV. As per power purchase agreement attached at Annexure 'F' in the above petition at 'Article 5: Scheduling and Dispatch' it is mentioned that the intended WTE plant is exempted from commercial/financial exemption in case of deviation from schedule. The relevant part is reproduced as under-

*"Article 5: SCHEDULING and DISPATCH*

*Scheduling and Dispatch*

*5.1.1 The Power Project shall comply with all the applicable Laws including but not limited to the Grid Code.*

*Further, Hon'ble Commission vide order dated 02/11/2018, in the matter of:*

*"Petition under Section 86(1)(b) and other provisions of the Electricity Act, 2003 for approval of bidding, adoption of tariff of Municipal Waste plant and approval of draft PPA", directed as under-*

*For a period of maximum 2 (two) year from the date of the Commissioning of the project there shall be no commercial/financial implication in the case*

of deviation from the scheduled power and the actual generation shall be treated as scheduled generation".

- V. That CERC vide notification dated 14.03.2022 issued CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2022 which was implemented w.e.f. 05.12.2002. In these regulations, 2022, which was implemented w.e.f. 0512.2022. In these regulations, the charges for deviation for generating station was on Municipal Waste are defined as under--
- “8. Charges for Deviation
- (i) Charges for deviation in a time block by a seller shall be payable by such seller as under:

Entity	Charges for deviation payable to Deviation and Ancillary Service Pool Account	
Seller	Deviation by way of over injection	Deviation by way of under injection
For a general seller other than an RoR generating station or a generating station based on municipal solid waste	<p>(i) Zero up to [2% Deviation-general seller (in %)]:</p> <p>Provided that such seller shall be paid back for over injection @ the reference charge rate for deviation up to [2% Deviation-general seller (in %)];</p> <p>and</p> <p>(ii) @ 10% of the normal rate of charges for deviation beyond [2% Deviation-general seller (in %)].</p>	<p>(i) @ the reference charge rate up to [2% Deviation-general seller (in %)];</p> <p>(ii) @ 120% of the normal rate of charges for deviation beyond [2% Deviation-general seller (in %)] and up to [10% Deviation-general seller (in %)];</p> <p>and</p> <p>(iii) @ 150% of the normal rate of charges for deviation beyond [10% Deviation-general seller (in %)].</p>
For a general seller being an RoR generating station	<p>Zero:</p> <p>Provided that such seller shall be paid back for over injection up to [2% Deviation-general seller (in %)] @ the reference charge rate.</p>	<p>(i) @ the reference charge rate up to [2% Deviation-general seller (in %)];</p> <p>(ii) @ normal rate of charges for deviation beyond [2% Deviation-general seller (in %)] and up to [10% Deviation-general seller (in %)];</p> <p>And</p> <p>(iii) @ 110% of the normal rate of charges for deviation beyond [10% Deviation-general seller (in %)].</p>
For a general seller being a generating station based on	<p>Zero:</p> <p>Provided that such seller shall be paid back for over injection up to [20% Deviation-general seller (in %)] @ contract rate, or in the absence of a contract rate, @</p>	<p>(i) Zero up to [20% Deviation-general seller (in %)]:</p> <p>Provided that such seller shall pay back for the shortfall in energy against its schedule in any time block due to under injection up to [20% Deviation-</p>

municipal solid waste	the weighted average ACP of the Day Ahead Market segments of all Power Exchanges for the respective time block.	general seller (in %)] @ 50% of the contract rate, or in the absence of a contract rate, @ 50%of the weighted average ACP of the Day Ahead Market segments of all Power Exchanges for the respective time block; and (ii) @ normal rate of charges for deviation beyond [20% Deviation-general seller (in %)].
For WS seller	<p>Zero:</p> <p>Provided that such seller shall be paid back for over injection as under:</p> <p>(i) @ contract rate, or in the absence of a contract rate, @ the weighted average ACP of the Day Ahead Market segments of all Power Exchanges for the respective time block, up to [5% Deviation-WS seller (in %)];</p> <p>and</p> <p>(ii) @ 90% of the contract rate, or in the absence of a contract rate, @ 90% of the weighted average ACP of the Day Ahead Market segments of all Power Exchanges for the respective time block for deviation beyond [5% Deviation-WS seller (in %)] and up to [10% Deviation-WS seller (in %)].</p>	<p>(i) Zero up to [10% Deviation-WS seller (in %)];</p> <p>and</p> <p>(ii) @ 10% of the normal rate of charges for deviation beyond [10% Deviation-WS seller (in %)];</p> <p>Provided that such seller shall pay back for the total shortfall in energy against its schedule in any time block due to under injection, @ the contract rate, or in the absence of a contract rate, @ the weighted average ACP of the Day Ahead Market segments of all Power Exchanges, for the respective time block.</p>

That the above regulations were implemented at Inter-State level vide order dated 26.12.2022 issued by the Commission. Further, in the above order the Commission specified that the specific provisions of CERC DSM Regulations 2022 would be applicable to any Waste to Energy plants commissioned after issuance of this order. The relevant part is reproduced as under-

*“d) Applicability of DSM on Waste to Energy Management Plant*

*The Commission directs Delhi SLDC to implement the specific provisions of CERC (Deviation Settlement Mechanism and Related Matters) Regulations, 2022 related to Waste to Energy (WtE) Plants for those WtE Plants which are commissioned after issuance of this Order.”*



- VI Further, it is submitted that as the intended Municipal Solid Waste to Energy Facility at Gazipur, East Delhi of 25 MW will be commissioned after this order of the Commission dated 26.12.2022, hence Deviation Settlement Mechanism (DSM) will be applicable on the above stated project/plant. Accordingly, the plant will be covered under scheduling and dispatch code of the grid code, wherein the plant would be required to declare their declared capacity in 15 minutes time block wise on day ahead basis and scheduling will be done by SLDC. Any deviation from schedule will be treated under Deviation Settlement Mechanism (DSM) as provided by CERC DSM regulations, 2022.
- VII In view of the above, aforesaid facts and circumstances and in the interest of justice the Commission may graciously be pleased to:-
- (a) Discharge/delete the Answering Respondent No. 07/State Load Despatch Centre, Delhi as SLDC has no role in the approval of NIT and RFQ and adoption of tariff of the project and have no liability in the instant Petition.
  - (b) Pass such further order(s) as the Commission may deem fit and proper in the facts and circumstances to the case.

**Rejoinder on behalf of the Petitioner to the Reply filed by Respondent No. 3/TPDDL**

8. The Petitioner has submitted the following:

- I. The present rejoinder is filed to the reply of Respondent No. 3 – Tata Power Delhi Distribution Limited (“TPDDL”) in the present petition filed by the Petitioner – Municipal Corporation of Delhi (‘MCD’) *inter alia* seeking approval of the Notice Inviting Tender (“NIT”) and the bidding process under the Request for Proposal for setting up of Municipal Solid Waste (MSW) to energy facility at Ghazipur, East Delhi of 2000 TPD ( $\pm$  20%) to 25 MW power generation capacity (“Project”).
- II. During the hearing on 21.05.2024 in the present Petition, the Petitioner has pressed for issuance of notice to the Respondents on Prayer (b). The primary submissions of the Petitioner during the said hearing were that the Commission has the regulatory power under Section 86(1)(b) of the Electricity Act, 2003 to approve the NIT dated and the bidding process under the draft RFP for setting up of the project. Further, it was submitted that it is a settled law that the general regulatory power of the Commission is the source of the power to regulate, which also includes the power to determine or adopt tariff and both Section(s) 62 and 63 of the Electricity Act 2003 deal with determination" of tariff, which is part of "regulating" tariff. In this regard, Petitioner has relied on Energy Watchdog v. Central Electricity Commission, (2017) 14 Supreme Court Cases 80, wherein the Hon'ble Supreme Court has *inter alia* held as under:

“ .....

19. The construction of Section 63, when read with the other provisions of this Act, is what comes up for decision in the present appeals. It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. Thirdly, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government. Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.
20. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions dehors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading aforesaid statutory provisions. The first rule of statutory interpretation is that the statute must be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various sections must be harmonised. Considering the fact that the non obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.

- III. Further, the Petitioner also relied on *Jaipur Vidyut Vitran Nigam Ltd. and Others v. MB Power (Madhya Pradesh) Limited and Others*, 2024 SCC, wherein the Hon'ble Supreme Court has held as under:

“ .....

110. It could thus be seen that it has been held by this Court that unlike Section 62 read with Sections 61 and 64, under the provisions of Section 63 of the Electricity Act, the appropriate Commission does not "determine" tariff but only "adopts" tariff already determined under Section 63. It has further been held that, such "adoption" is only if such tariff has been determined through a transparent process of bidding, and that, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. It was sought to be contended before this Court in the said case that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. However, rejecting the said contention, this Court observed that the appropriate Commission does not act as a mere post office under Section 63. It has been observed that, Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.
111. This Court in the said case, in paragraph 20, further observed that the entire Act shall be read as a whole. It has been held that, all the discordant notes struck by the various sections must be harmonized. It has been held that, considering the fact that the non obstante clause advisedly restricts itself to Section 62, there is no reason to put Section 79 out of the way altogether. It has been held that, either under Section 62, or under Section 63, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. It has been held that, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. It has further been held that, in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. It has further been held that, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can be used.
112. The aforesaid view of this Court in the case of *Energy Watchdog supra*), which is a judgment delivered by two Judge Bench, has been approved by three Judge Bench of this Court in the case of *Tata Power Company Limited Transmission supra*).
113. We have already referred to Section 86(1)(b) of the Electricity Act, which is analogous to Section 79 of the Electricity Act. Section 79 determines the functions of Central Commission, whereas Section 86 provides for the functions of the State Commission. Section 86 of the Electricity Act empowers the State Commission to 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.

114. It can thus be seen that Section 86(1)(b) of the Electricity Act gives ample power on the State Commission to regulate electricity purchase and procurement process of distribution licensees. It also empowers the State Commission to regulate the matters including the price at which electricity shall be procured from the generating companies, etc."

[Emphasis Supplied]

RE: A. TARIFF OF WASTE TO ENERGY PLANT IS TO BE DETERMINED UNDER SECTION 62 OF THE ACT

- IV. The contents of present Petition are in terms of the National Tariff Policy, 2016 and the Petitioner has issued the RFP in terms of the statutory functions under the SWM Rules 2016 [Rule 15(v)]. The present Petition is in line with the tenets of the National Tariff Policy of 2016 as the Present Petition aims to process the solid waste in a judicious manner and has accordingly proposed for setting up of the Project. The National Tariff Policy 2016 mandates the purchase of power by the Distribution Licensee from the power generated from Municipal Waste. It cannot be said that the present Petition is in contravention to the provisions of National Tariff Policy 2016. The submissions of TPDDL to the contrary are wrong and denied.

RE: B. PETITIONER DOES NOT HAVE AUTHORITY TO ISSUE REQUEST FOR PROPOSAL

- V. It is submitted that there is no prohibition on a plain reading of Section 63 of the Electricity Act, 2003 as to the entity which can approach this Commission for approval and adoption of a tariff discovered through a transparent process of bidding. On a harmonious reading of the SWM Rules 2016 and the Electricity Act, 2003, it is construed that the Petitioner is entitled to maintain the instant petition before this Commission. Rule 15(v) (a) and (b) of the SWM Rules 2016 specifically require the Petitioner to dispose of the waste by setting up the Waste to Energy ("WTE") Projects.
- VI. TPDDL ought to appreciate that the Commission is the Statutory Authority that is created under the Electricity Act, 2003 which can approve the bidding process under the mandate of Section 63 of the Electricity Act 2003. This is primarily to ensure the protection of consumer interest in as much as the tariff adopted is passed on to the consumers since the Distribution Licensees are mandated to purchase any electricity generated from WTE Projects.
- VII. Further, Section 63 does not place any restriction or embargo as to which "Entity/Authority" can file a Petition to approve the tariff discovered under the Competitive Bidding process. It is the primary submissions of the Petitioner that there is no such restriction in terms of Section 86(1)(b) of the Electricity Act, as to who would file a Petition under the same. It is well settled that what is not prohibited is deemed to be permitted. In fact, the Electricity Act 2003 has recognised only the Commission to adopt tariffs discovered through a

bidding process and not any other statutory body under the Electricity Act 2003.

- VIII. It is the case of the Petitioner that merely because there are no guidelines does not mean that competitive bidding cannot be conducted. TPDDL ought to appreciate that the Hon'ble Supreme Court in Energy Watchdog(supra) has categorically held that when there are no Guidelines that does not mean that competitive bidding cannot be conducted and if the Central Government has not framed the Guidelines under Section 63 or if the Guidelines framed are silent on any aspect, the general regulatory power of the Electricity Regulatory Commissions/the Commission under Section 86(1)(b) can be exercised. Moreover, the issue of the whether the Petitioner can approach the Commission for adoption of tariff under Section 63 is now pending adjudication before the Hon'ble Supreme Court in the Civil Appeal No. 7463-7464 of 2023 in the Appeal filed by the Petitioner.
- IX. The findings of the Hon'ble Supreme Court in *Energy Watchdog (supra)* are squarely applicable to the present facts and circumstances of the present case. It is categorically held in the said judgment that the general regulatory power of the commission is the source of the power to regulate, which includes the power to determine or adopt tariff. Further in the absence of the guidelines, or where the guidelines do not deal with the given situation then the general regulatory power of the Commission can be used.
- X. It is submitted that TPDDL is raising frivolous, baseless and unwarranted objections to somehow stall the process involved in setting up of the present Project and as a consequence the Petitioner is not able to perform its function by not being able to dispose the municipal waste and contribute towards the protection of the environment under the SWM Rules 2016. TPDDL is failing to recognize the statutory duty of the Petitioner under the SWM Rules 2016 to set up the Waste to Energy WTE Project.
- XI. TPDDL failed to appreciate that the National Green Tribunal in the Order dated 11.10.2022 in O.A. No.- 300 of 2022 has directed the Petitioner to comply with the SWM Rules, 2016 for handling the waste dump and has in fact penalised the Petitioner and made liable to pay Environmental Compensation of Rs. 900 Crores having regard to the quantity of undisposed waste. Copy of the Order dated 11.10.2022 passed by NGT (Principal Bench) in O.A. No. 300 of 2022 is annexed as Annexure B. Further, the reliance on the Judgment passed in *Punjab State Power Corporation Ltd. vs Everest Power Private Limited and Ors.*, is misplaced, as the findings of the judgement as quoted by TDPPL are in support of the Petitioner in the present case as the Commission has the power to regulate the purchase of electricity and the procurement process of the distribution licensee and hence, has the jurisdiction to pass the Orders in the present petition.
- XII. It is submitted that the present project against which the frivolous, and baseless objections have been raised by TPDDL is not just stalling the project

but also adversely affecting the environment in a hazardous manner. In fact, the Hon'ble Supreme Court in its recent Order dated 13.05.2024 in W.P. (C) 13029 of 1985 has noted the urgent need for treatment and disposal of solid waste by the Petitioner, as under:

“.....

SOLID WASTE DISPOSAL

6. *It is an admitted position by all concerned that within the limits of Municipal Corporation of Delhi (MCD) every day there is a generation of 3800 tonnes of solid waste which cannot be treated in the sense that the existing plants do not have the capacity to treat the same. This is a very sorry state of affairs in the capital city of Delhi.*

7. *Now, we are told across the Bar by the learned senior counsel representing the MCD that only by June, 2027, a facility will come into existence which will be able to deal with excess quantity of 3800 tonnes of solid waste which means that for a period of more than 3 years from now, Delhi will have minimum 3800 tonnes of untreated solid waste accumulating in some place every day. This figure is likely to increase, as noted in the earlier order. This poses a great danger to the environment of the capital city.*

.....

13. *We hope and trust that all the authorities will take the issue with the seriousness it deserves as prima facie impression which we gather is that none of the authorities have bothered to consider the drastic consequences of not having adequate capacity to deal with solid waste generated every day.*

14. *We may add here that generation of untreated solid waste in such huge quantity destroys the environment which directly affects the fundamental rights of the citizens guaranteed under Article 21 of the Constitution of India to live in a pollution free environment."*

A copy of the Order dated 13.05.2024 passed by the Hon'ble Supreme Court in W.P. (C) 13029 of 1985 is annexed as Annexure C.

- XIII. the present case, the Petitioner is not seeking any disputes *inter-se* parties and is merely seeking for the approval of the Notice Inviting Tender and the Bidding Process under Section 86(1)(b) of the Electricity Act, 2003 at this stage.
- XIV. It is re-iterated that Section 63 does not place any restriction or embargo as to which "Entity/Authority" can file a Petition to approve the tariff discovered under the Competitive Bidding process. The reliance of TPDDL on the Order passed in *Single Point Agency Holder Association v. BSES Rajdhani Power Limited & Ors* is misplaced to the facts and circumstances in the present case, as in the Order, Petition was moved by the SPD Contractors however the present Petition has been filed by the Petitioner under the statutory mandate of the SWM Rules 2016. It is submitted that when it comes to either the determination of tariff under Section 62 or the adoption of tariff under Section 63 of the Electricity Act, the Commission/State Commission under Section 86(1)(b) of the Electricity Act, 2003 is the only authority which has been conferred the jurisdiction to oversee both processes. Section 63

does not prohibit the Petitioner to seek adoption of tariff, especially this exercise by the transparent process of Bidding.

### **Commission's Analysis**

9. The instant Petition has been filed by Municipal Corporation of Delhi seeking approval of Notice Inviting tender (NIT) and the bidding process under the request for Proposal for setting up of Municipal Solid Waste to Energy (WTE) facility at Ghazipur, East Delhi of 2000 TPD (+20%) to 25 MW power generation capacity.
10. The Petitioner had earlier approached this Commission in Petition no. 72 of 2022 for approval of bidding process of Municipal Waste based plant at Narela- Bawana, adoption of Tariff and approved of Draft PPA. The Commission vide its Order dated 07.03.2023 and on examination of the documents containing final evaluation report and certificate on conformity to the bidding process adopted the tariff of Rs. 7.38/kWh in respect of Municipal Waste based plant at Narela-Bawana.
11. The Order dated 07.03.20223 was challenged before the Hon'ble APTEL vide DFR No. 245&247 of 2023. The Hon'ble APTEL vide common judgement dated 31.08.2023 had held inter alia that only a Distribution Company can file a Petition for adoption of tariff under Section 63 of the Electricity Act, 2003. This common judgement was further challenged before the Hon'ble Supreme Court of India vide Civil Appeal No. 7463-7464 of 2023 in the matter of MCD Vs. Gagan Narang & Ors.
12. The Hon'ble Supreme Court of India vide its judgement dated 02.01.2025 in the matter of MCD Vs. Gagan Narang & Ors., has upheld the Orders passed by the Commission in Petition No. 72 of 2022. The relevant paras of Judgement are as follows:

*"18. It is further to be noted that the following provision has been made in SWM Rules 2016:*

***"9. Duties of the Ministry of Power: -** The Ministry of Power through appropriate mechanisms shall, -*

*(a) decide tariff or charges for the power generated from the waste to energy plants based on solid waste.*

*(b) compulsory purchase power generated from such waste to energy plants by distribution company."*

*....*

*20. Thus, it is to be noted that the Project, for which bids were invited by the Appellant-MCD, was proposed to be set up by the Appellant-MCD in pursuance of its statutory obligations under the SWM Rule 2016.*

*....*

*24. Insofar as the petition of the WTERT is concerned, the DERC specifically rejected the contention of the WTERT to the effect that since the Appellant-MCD was not an authorized distribution licensee, it cannot float the impugned tender. It was further sought to be argued that the Bidding procurement under Section 63 of the Act was impermissible in case of 'waste to energy' power.*

*25. The DERC relying on the provisions of Rule 15 of the SWM Rules 2016 specifically rejected the said contention and held that the Appellant-MCD was performing its statutory obligations.*

....

28. It could thus be seen that under Section 63 of the Act, the Appropriate Commission is entitled to adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government. It could be seen that a plain reading of Section 63 of the Act would reveal that it does not restrict invoking of the provisions of Section 63 only to Discoms or generating companies.

29. It could be seen that a plain reading of Section 63 of the Act would reveal that it does not restrict invoking of the provisions of Section 63 only to Discoms or generating companies.

...

32. It can thus be seen that the intention of the legislature is to empower the Appropriate Commission to adopt the tariff if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

33. The legislative purpose appears to be that when the power is being produced through a process of bidding it has to be done in a transparent manner. Another requirement is that the same must be done in accordance with the guidelines issued by the Central Government.

34. This Court in the case of *Energy Watchdog (supra)* has held that when there are no guidelines, then the Central Commission can exercise power under Section 79(1)(b) of the Act. The provisions of Section 86(1)(b) of the Act are analogous with Section 79(1)(b) of the said Act.

...

37. ....

The provisions of Section 63 will have to be read in harmony with the provisions of Section 86(1)(b) of the Act.

....

48. In our view, there is no inconsistency between the provisions of Section 63 of the Act and Rule 15 of the SWM Rules 2016. The provisions of Rule 15 of the SWM Rules 2016, which are enacted under the Environment (Protection) Act, 1986, mandate the appellant to undertake WTE project(s).

49. It can thus be seen that insofar as the WTE projects are concerned, the provisions under the Act will have to be read in addition to the provisions under Rule 15 of the SWM Rules 2016 and not in derogation thereof.

....

52. It can thus be seen that the provisions of Section 86(1)(e) of the Act read with Rule 6.4 of the Tariff Policy provide for promoting cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee.

...

54. .... The plain reading of Section 63 of the Act would reveal that the Appropriate Commission has to adopt the tariff only after being satisfied that such a tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Government.

....."

13. Having heard the parties and upon careful perusal of the material on record, the Petitioner/Municipal Corporation of Delhi is permitted, to proceed with the transparent bidding process as per the laid down guidelines referred in Section 63 of the Electricity Act, 2003, in view of the Judgement passed by the Hon'ble



Supreme Court of India in C.A. Nos. 7463-7464 of 2023, for the purpose of setting up of 2000 TPD (+20%) to 25 MW power generation capacity Municipal Solid Waste to Energy (WtE) facility at Ghazipur, East Delhi. Upon completion of the bidding process, the Petitioner shall approach the Commission for adoption of Tariff and approval of draft Power Purchase Agreement (PPA) under Section 63 of the Electricity Act, 2003. Further, the Petitioner shall also submit, for approval by the Commission, the Financial Evaluation Report prepared by the Bidding Evaluation Committee and a Certificate on the conformity that the bidding process has been completed in line with the transparent bidding process as per the laid down guidelines referred in Section 63 of the Electricity Act, 2003.

14. Ordered accordingly.

**Sd/-**  
**(Surender Babbar)**  
**Member**

**Sd/-**  
**(Ram Naresh Singh)**  
**Member**

**Sd/-**  
**(Justice Umesh Kumar)**  
**Former Judge**  
**Chairman DERC**