

**IN THE SUPREME COURT OF INDIA  
CIVIL APPELLATE JURISDICTION**

**Civil Appeal No 3992 of 2019**

**Adani Gas Limited**

**...Appellant**

**Versus**

**Petroleum and Natural Gas Regulatory Board & Ors.**

**...Respondents**

**With**

**Civil Appeal Nos 3234-3235 of 2019**

**With**

**Civil Appeal Nos 3247-3248 of 2019**

**With**

**Civil Appeal No 3289 of 2019**

**With**

**Civil Appeal No 4527 of 2019**

**With**

**T.C. (C) No 27 of 2019**

**With**

**T.C. (C) No 26 of 2019**

**And With**

**Civil Appeal No 106 of 2020**

## J U D G M E N T

### Dr Dhananjaya Y Chandrachud J

1. In 2018 the Petroleum and Natural Gas Regulatory Board<sup>1</sup> conducted the ninth round of bidding for City or Local Natural Gas Distribution Networks<sup>2</sup>. On 14 September 2018, a press release was placed on the Board's website notifying details of the successful bidders in various Geographical Areas<sup>3</sup>. The contest in the present batch of appeals has arisen over the grant of authorisation for laying, building, operating or expanding CGD networks in the following GAs:

- (i) GA 51 - Puducherry District;
- (ii) GA 61 - Kanchipuram District; and
- (iii) GA 62 – Chennai & Tiruvallur Districts.

2. The Appellate Tribunal for Electricity<sup>4</sup> was seized of two appeals – Appeal No 292 of 2018, instituted by Adani Gas Limited and Appeal No 323 of 2018, instituted by IMC Limited. These appeals were instituted before the APTEL under Section 30(1) of the Petroleum and Natural Gas Regulatory Board Act 2006<sup>5</sup>. By their separate judgments dated 28 February 2019, the Chairperson and Member Technical (Petroleum and Natural Gas) rendered divergent findings, following which the Chairperson directed that the proceedings in the two appeals be placed before the judicial member. The judicial member recused from hearing the

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<sup>1</sup> "the Board"

<sup>2</sup> "CGD Networks"

<sup>3</sup> "GAs"

<sup>4</sup> "APTEL" or "Tribunal"

<sup>5</sup> "PNGRB Act"

appeals on 7 March 2019. This led to the institution of the present appeals before this Court. Noting that no other judicial member was available in the APTEL to conduct the hearing, this Court by its order dated 1 April 2019 admitted the appeals and issued directions in exercise of its powers under Article 142 of the Constitution for the transfer of the proceedings before the APTEL to this Court in order to bring finality to the present dispute. In assessing the merits, the Court has had the benefit of appraising the differing views which have been expressed by the Chairperson and by the Member Technical (Petroleum and Natural Gas).

3. The APTEL has been constituted in terms of sub-Section (1) of Section 30 of the PNGRB Act which is extracted below:

**“30. Appellate Tribunal.** (1) Subject to the provisions of this Act, the Appellate Tribunal established under section 110 of the Electricity Act, 2003 (36 of 2003) shall be the Appellate Tribunal for the purposes of this Act and the said Appellate Tribunal shall exercise the jurisdiction, powers and authority conferred on it by or under this Act:

Provided that the Technical Member of the Appellate Tribunal for the purposes of this Act shall be called the Technical Member (Petroleum and Natural Gas) and shall have the qualifications specified in sub-section (2) of section 31.”

Section 33 stipulates that any person aggrieved by an order or decision of the Board has recourse to an appeal to the Tribunal. The jurisdiction of the APTEL while hearing an appeal is spelt out in sub-Section (6) of Section 33 in the following terms:

“33.(6) The Appellate Tribunal may, for the purpose of examining the legality or propriety or correctness of any order or decision of the Board referred to in the appeal filed under sub-section (1), either on its own motion or otherwise, call for the records relevant to disposing of such appeal and make such orders as it thinks fit.”

An appeal lies to this Court against an order of the APTEL, other than an interlocutory order, under Section 37 on the grounds set out in Section 100 of the Code of Civil Procedure 1908. With this background, we now turn to the PNGRB Act under the aegis of which the ninth round of CGD bidding occurred.

### **PNGRB Act and regulations**

4. The content of the PNGRB Act is summarised by its long title as:

“An Act to provide for the establishment of Petroleum and Natural Gas Regulatory Board to regulate the refining, processing, storage, transportation, distribution, marketing and sale of petroleum, petroleum products and natural gas excluding production of crude oil and natural gas so as to protect the interests of consumers and entities engaged in specified activities relating to petroleum, petroleum products and natural gas and to ensure uninterrupted and adequate supply of petroleum, petroleum products and natural gas in all parts of the country and to promote competitive markets and for matters connected therewith or incidental thereto.”

The PNGRB Act came into force, in terms of the provisions contained in Section 1(3) on 1 October 2007, save and except for Section 16. Section 16 which provides for the authorisation for building or expanding CGD Networks, came into force on 15 July 2010. Section 16, insofar as is material contains the following stipulations:

“**16. Authorisation.**—No entity shall—  
(a) lay, build, operate or expand any pipeline as a common carrier or contract carrier,  
(b) lay, build, operate or expand any city or local natural gas distribution network, without obtaining authorisation under this Act: ... ”

Under Section 19 of the PNGRB Act, the Board may grant an authorisation for a city or local natural gas distribution network either on the basis of an application

or *suo moto*. Before it does so in a specified GA, the Board is under a mandate to give wide publicity of its intent to do so. Upon inviting applications from interested parties, the Board may select an entity “in an objective and transparent manner as specified by regulations for such activities”.

5. On 19 March 2008, the Petroleum and Natural Gas Regulatory Board (Authorizing Entities to Lay, Build, Operate or Expand City or Local Natural Gas Distribution Networks) Regulations 2008<sup>6</sup> were notified. The CGD Authorisation Regulations were amended on 21 June 2013, 7 April 2014 and 6 April 2018. The CGD Authorisation Regulations, as amended in 2018, substituted new criteria for bidding which applied to the ninth round of bidding with which the present batch of appeals is concerned.

6. Regulation 6 of the CGD Authorisation Regulations provides for the invitation by the Board for laying, building, operating or expanding of a CGD network in a specific city or GA. The procedure stipulated in Regulation 5 is to apply, except for those aspects relating to expressions of interest. Under Regulation 5(6), the Board can scrutinise only those bids which are received in response to an advertisement and from entities which fulfil certain minimum eligibility criteria. Regulation 5(6)(b) spells out the criteria, which are designed to ensure that the entity bidding is technically capable of *laying and building* a CGD network in the relevant city or GA. Regulation 5(6)(c) enunciates criteria which ensure that the entity is technically capable of *operating and maintaining* a CGD

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<sup>6</sup> “CGD Authorisation Regulations”

network. Besides the technical criteria, the Regulations also spell out certain financial criteria which potential bidders must satisfy. Regulation 5(6)(e) provides:

“(6) The Board shall scrutinise the bids received in response to the advertisement in respect of only those entities which fulfil the following minimum eligibility criteria, namely:-

...

(e) the entity has adequate financial strength to execute the proposed project, operate and maintain the same in the authorised area and shall meet the following financial criterion to qualify for bidding for a single CGD network namely:-

<b>Population in the geographical area as per 2011 Census of India</b>	<b>Minimum net worth of the bidder entity</b>
(1)	(2)
5 million or more	Rs. 1,500 million for a population of 5 million, plus additional Rs. 300 million for each 1 million of population or part thereof, in excess of 5 million (refer Note-3)
2 million or more but less than 5 million	Rs.1,000 million
1 million or more but less than 2 million	Rs. 750 million
0.5 million or more but less than 1 million	Rs. 500 million
0.25 million or more but less than 0.50 million	Rs. 250 million
0.1 million or more but less than 0.25 million	Rs. 100 million
Less than 0.1 million	Rs. 50 million

”

The minimum net-worth of the bidding entity is thus linked to the population of the GA the entity is bidding for, as set out in 2011 Census data.

7. Regulation 7 of the CGD Authorisation Regulations provides the criteria for determining how the Board should evaluate rival bids for the same GA. Regulation 7 is quoted below, in its entirety:

“7. Bidding criteria.

1(a) The Board, while considering the proposal for authorisation, shall tabulate and compare all financial bids meeting the minimum eligibility criteria, as per the bidding criteria specified below, namely:-

Sl. No	Bidding Criteria	Weightage %	Explanation
1	Lowness of transportation rate for CGD – in rupees per million British Thermal Unit (Rs./MMBTU)	10	Bidder is required to quote transportation rate for CGD only for the first contract year which shall not be less than Rs.30/MMBTU. Rates for the subsequent contract years shall be derived considering the quoted rate and escalation as per Note.
2	Lowness of transportation rate for CNG – in rupees per kilo gram (Rs./kg)	10	Bidder is required to quote transportation rate for CNG only for the first contract year which shall not be less than Rs.2/kg. Rates for the subsequent contract years shall be derived considering the quoted rate and escalation as per Note.
3	Highness of number of <b>CNG stations</b> (online and daughter booster stations) to be installed within 8 contract years from the date of <b>authorisation</b>	<b>20</b>	-
4	Highness of number of domestic piped natural gas connections to be achieved within 8 contract years from the date of authorisation	<b>50</b>	-
5	Highness of inch-kilometre of steel pipeline (including sub-transmission steel pipelines) to be laid within 8 contract years from the date of authorisation	<b>10</b>	-
<p>Note – Annual escalation shall be considered from the second contract year and onwards based on the “Wholesale Price Index (WPI) Data (2011-12 =100)” for “All Group/ Commodity”, as normally available on the website of the Office of the Economic Adviser, Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (DIPP) on the link “<a href="http://eaindustry.nic.in/home.asp">http://eaindustry.nic.in/home.asp</a>.”</p>			

Provided that in the case of the geographical areas of (i) Bilaspur, Hamirpur and Una Districts; (ii) Panchkula (Except area already authorised), Shimla, Solan and Sirmour Districts and (iii) Barmer, Jaisalmer and Jodhpur Districts, it is not mandatory to supply natural gas through steel-pipes. However natural gas has to reach in all charge areas. The bidding parameters and their respective weightage will, accordingly, be as under:-

Sl. No	Bidding Criteria	Weightage %	Explanation
1	Lowness of transportation rate for CGD – in rupees per million British Thermal Unit (Rs./MMBTU)	10	Bidder is required to quote transportation rate for CGD only for the first contract year which shall not be less than Rs.30/MMBTU. Rates for the subsequent contract years shall be derived considering the quoted rate and escalation as per Note.
2	Lowness of transportation rate for CNG – in rupees per kilo gram (Rs./kg)	10	Bidder is required to quote transportation rate for CNG only for the first contract year which shall into be less than Rs.2/kg. Rates for the subsequent contract years shall be derived considering the quoted rate and escalation as per Note.
3	Highness of number of <b>CNG stations</b> (online and daughter booster stations) to be installed within 8 contract years from the date of authorisation	<b>25</b>	-
4	Highness of number of domestic piped natural gas connections to be achieved within 8 contract years from the date of authorisation	55	-
<p>Note: Annual escalation shall be considered from the second contract year and onwards based on the “Wholesale Price Index (WPI) Data (2011-12=100)” for “All Group / Commodity”, as normally available on the website of the Office of the Economic Adviser, Government of India, Ministry of Commerce and Industry, Department of Industrial Policy and Promotion (DIPP) on the link “<a href="http://eaindustry.nic.in/home.asp">http://eaindustry.nic.in/home.asp</a>.”</p>			

1(b) Successful bidder shall be required to achieve the year-wise work programme within 8 contract years as per details given below, namely:-

<b>PNG Connections (cumulative)</b>		<b>CNG stations (cumulative)</b>		<b>Inch-km of steel pipeline (cumulative)</b>	
By the end of contract year	% of work programme	By the end of contract year	% of work programme	By the end of contract year	% of work programme
1 <sup>st</sup>	Nil	1 <sup>st</sup>	Nil	1 <sup>st</sup>	5
2 <sup>nd</sup>	10	2 <sup>nd</sup>	15	2 <sup>nd</sup>	20
3 <sup>rd</sup>	20	3 <sup>rd</sup>	30	3 <sup>rd</sup>	40
4 <sup>th</sup>	30	4 <sup>th</sup>	45	4 <sup>th</sup>	60
5 <sup>th</sup>	40	5 <sup>th</sup>	60	5 <sup>th</sup>	70
6 <sup>th</sup>	60	6 <sup>th</sup>	75	6 <sup>th</sup>	80
7 <sup>th</sup>	80	7 <sup>th</sup>	90	7 <sup>th</sup>	90
8 <sup>th</sup>	100	8 <sup>th</sup>	100	8 <sup>th</sup>	100

Note:- In case derived numbers are in fraction, the same shall be rounded off to the nearest whole number and fraction 0.5 shall be rounded off to next higher whole number.

Provided that in the case of the geographical areas of (i) Bilaspur, Hamirpur and Una Districts; (ii) Panchkula (Except area already authorised), Shimla, Solan and Sirmaur Districts and (iii) Barmer, Jaisalmer and Jodhpur Districts, successful bidder shall be required to achieve the year-wise work programme within 10 contract years as per details given below, namely:-

<b>PNG Connections (cumulative)</b>		<b>CNG stations (cumulative)</b>	
By the end of contract year	% of work programme	By the end of contract year	% of work programme
1 <sup>st</sup>	Nil	1 <sup>st</sup>	Nil
2 <sup>nd</sup>	10	2 <sup>nd</sup>	10
3 <sup>rd</sup>	20	3 <sup>rd</sup>	20
4 <sup>th</sup>	30	4 <sup>th</sup>	30
5 <sup>th</sup>	40	5 <sup>th</sup>	40
6 <sup>th</sup>	50	6 <sup>th</sup>	50
7 <sup>th</sup>	60	7 <sup>th</sup>	60
8 <sup>th</sup>	70	8 <sup>th</sup>	70
9 <sup>th</sup>	80	9 <sup>th</sup>	80
10 <sup>th</sup>	100	10 <sup>th</sup>	100

Note – In case derived numbers are in fraction, the same shall be rounded off to the nearest whole number and fraction 0.5 shall be rounded off to next higher whole number.

(2) \*\*\*\*\*

(3) Bidder entity with the highest composite score, considering the criteria under sub-regulation (1) and as illustrated in Schedule C (1), shall be declared as successful bidder.

Provided that in case of tie in the evaluated composite score, the successful bidder shall be decided based on the highness of numbers of PNG connections among the tied bidding entities. In case there is tie on number of PNG connections also, highness of inch-kilometer steel pipeline shall be considered and thereafter in case of tie in inch-kilometer as well, highness of numbers of **CNG stations** shall be considered;”

Under Regulation 7, the Board while considering proposals for authorisation, shall tabulate and compare all financial bids which meet the minimum eligibility criteria in accordance with the bidding criteria set out as enunciated. The table set out in Regulation 7(1)(a) provides for the tabulation of all eligible financial bids on the basis of five parameters. The table enunciates the five bidding criteria and the weightage which is to be ascribed to each of them. The criteria are as follows:

- (i) The first criterion is the ‘lowness’ of the transportation rate for CGD computed in rupees per million for a British Thermal Unit. The weightage ascribed to this criterion is 10 per cent. The explanation stipulates that a bidder is required to quote the transportation rate for CGD only for the first contract year at a rate not less than Rs 30 per MMBTU;
- (ii) The second criterion is the ‘lowness’ of the transportation rate for CNG expressed in rupees per kilogram. The weightage ascribed to this criterion is 10 per cent. The bidder is required to quote the transportation rate only for the first contract year at a rate of not less than Rs 2 per kilogram;

- (iii) The third criterion is the 'highness' of the number of CNG stations to be installed within eight contract years from the date of authorisation. The weightage ascribed to this parameter is 20 per cent;
- (iv) The fourth criterion is the 'highness' of the number of domestic piped natural gas connections to be achieved within eight contract years from the date of authorisation. The weightage ascribed to this criterion is 50 per cent; and
- (v) The fifth criterion is the 'highness' of the inch-kilometre of steel pipeline to be laid within eight contract years from the date of authorisation. The weightage ascribed to this parameter is 10 per cent.

Regulation 7(1)(b) sets out a year-wise work programme indicating the progress which must be achieved by the successful bidder every year during the course of eight contract years from the date of authorisation. Under Regulation 7(3), a bidding entity with the highest composite score, in terms of the criteria contained in sub-regulation (1), is to be declared as the successful bidder. This is illustrated in Schedule C(1) of the CGD Authorisation Regulations. Schedule C(1) contains the following illustration of the manner in which the weightage for PNG connections is to be ascribed:

**“(E) Number of PNG domestic connections**

**Let,**

**P1 = Number of PNG domestic connections by the 1<sup>st</sup> entity**

**P2 = Number of the PNG domestic connections by the 2<sup>nd</sup> entity**

**P3 = Number of the PNG domestic connections by the 3<sup>rd</sup> entity**

**Assume P1 is higher than P2 and P2 is higher than P3.;**

The highest number of PNG domestic connections bid (HP1) shall be given a score of 100% and the number of the other PNG domestic connections bids shall be given a score in relation to HP1 on a pro-rata basis as under :-

HP1	=	100%
HP2	=	100 % x (P2 ÷ P1)
HP3	=	100 % x (P3 ÷ P1)

This illustration shows that the entity which has quoted the highest number of PNG domestic connections to be achieved is allotted a score of 100 per cent. The entities below the highest will be assigned a score in relation to the first entity on a proportionate basis.

8. Under Regulation 9, the grant of an authorisation is to be issued to a successful entity after it furnishes a performance bond. The quantum of the performance bond is based on the population of the GA as determined with reference to the census data of 2011. Regulation 9 states:

**“9. Performance bond.**

(1) Grant of authorisation shall be issued to the successful entity after it furnishes the performance bond in the form of demand draft or pay order or bank guarantee from any scheduled bank for the amount as per details given below, namely:-

Serial	Population	in	the	Amount	of
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Number	Geographical Area, as pre 2011 Census of India	Performance Bond (Rupees)
1	5 million or more	500 million
2	2 million or more but less than 5 million	330 million
3	1 million or more but less than 2 million	250 million
4	0.5 million or more but less than 1 million	150 million
5	0.25 million or more but less than 0.50 million	80 million
6	0.1 million or more but less than 0.25 million	30 million
7	<b>Less than 0.1 million</b>	<b>15 million</b>

Under Regulation 10, the successful entity is to be issued a letter of intent<sup>7</sup> upon the finalisation of the bid. Under the CGD Authorisation Regulations, the authorised entity must also obtain financial closure for the project from a bank or financial institution within 270 days of authorisation.

9. The period of implementation of the project under the ninth round of CGD bidding is 2018 to 2026. The period for commercial operation is between 2018 and 2043.

10. From an analysis of the CGD Authorisation Regulations, it becomes evident that the 2011 census figures have been utilised to peg the net-worth requirement in Regulation 5(6)(e) and the value of the performance bond to be submitted to the Board post authorisation in Regulation 9. Significantly, Regulation 7, which provides a table specifying the five bidding criteria to

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<sup>7</sup> "LOI"

evaluate competing bids, does not link the said criteria with the census figures of 2011.

### **Facts of the present appeals**

11. On 12 April 2018, the Board initiated the bidding process for authorising entities to lay, build, operate or expand CGD networks for the ninth round. The bids were invited by means of an application-cum-bid-document for each GA.<sup>8</sup> The bidding process covered various GAs, including those of (i) GA 51 - Puducherry District; (ii) GA – 61 Kanchipuram District; and (iii) GA 62 -Chennai-Tiruvallur.

12. Clause 1.1. of the Bid Document was titled 'Geographical area and related information'. Clause 1.1.1 stipulated that the Board had identified a GA and was accordingly inviting applications-cum-bids for the grant of authorisation for developing a CGD network in the GA. Each GA was depicted in a map at Annexure-1 of the Bid Document for the relevant GA. Under Clause 1.1.3, it was the responsibility of each bidder to obtain all information related to the present gas supply availability, pipeline connectivity and information about existing customers, if any, in the specified GA. Clause 1.1.3 stated:

**"1.1.3. It is the bidder's responsibility to obtain all information related to the present gas supply availability and pipeline connectivity and also existing customers, if any, in the specified geographical area.** The bidder can also refer to list of NOCs/Permissions granted by PNGRB to various entities under the provisions of the Internal Guidelines for grant of NOC/Permission for (i) supply/distribution of CBM/natural gas through cascades; and (ii) setting up of CNG/LNG Daughter Booster Stations (DBS), in the areas where the Board has not yet authorized any entity for

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<sup>8</sup> With respect to the relevant GA, "Bid Document"

developing or operating CGD networks at <http://www.pngrb.gov.in/CGD-NOCs.html>.”

(Emphasis supplied)

The scope of work was defined in Clause 1.2 of the Bid Document:

“The entities bidding for this work shall be required to lay, build, operate or expand the CGD networks to meet requirement of natural gas in domestic, commercial and industrial segments including Natural Gas in the vehicular segment in the said geographical area to be authorized and also comply with the relevant regulations notified from time to time.

The entities shall be required to carry out the development of CGD project in line with the regulations laid down by the PNGRB.”

13. Clause 2.1.1 required the bidders to examine the contents of the Bid Document and the regulations of the Board. Clause 2.1.2 described Annexure-1 as the map depicting the GA and charge areas. Under Clause 2.2.1, any clarifications were required to be obtained from the Secretary of the Board on or before the bid closing date. Clause 4.2 stipulated that all financial bids would be tabulated and compared in accordance with the bidding criteria specified in Regulation 7 and Schedule-C(1) of the CGD Authorisation Regulations. Moreover, the bidder with the highest composite score would be declared as successful in the bid. Under Clause 4.4 of the Bid Document, the Board reserved the right to accept or reject any bid which it considered to be “unreasonably high or low”:

**“4.4 PNRGB'S RIGHT TO ACCEPT OR REJECT ANY OR ALL APPLICATION-CUM-BIDS**

4.4.1 PNRGB reserves the right to reject any Application-cum-Bid comprising quoted work programme considered by it to be unreasonably high or low.”

On 31 May 2018, Addendum-1 to the Bid Document was issued by the Board. Clause 14.2, inserted as a result of Addendum-1, contained the following clarification:

“14.2 What should be considered to be the level of "unreasonably high" or "unreasonably low" quotes shall be decided by Board at the time of bid evaluation on a case to case basis after considering the relevant factors.”

According to the above stipulation, the Board clarified that the determination of an unreasonably high or low quote would be made by the Board at the time of bid evaluation on a case to case basis after considering the relevant factors.

14. On 10 July 2018, three bid evaluation committees<sup>9</sup> were nominated by the Board for evaluating the bid documents. On 12 July 2018, a press release was issued by the Board setting out the date and time for the opening of technical bids for different GAs. The technical bids for GA 51 (Puducherry) were to be opened on 16 July 2018 at 14.00 hours; for GA 61 (Kanchipuram) on 17 July 2018 at 12.30 hours; and for GA 62 (Chennai-Tiruvallur) on 17 July 2018 at 13.30 hours. The technical bids were opened by the Board in the presence of the bidders' representatives.

15. On 23 July 2018, a note<sup>10</sup> was moved for the approval of the members of the Board with a view to encourage serious bidders and to avoid unrealistic/unreasonable bidding in terms of Clause 4.4.1 of the Bid Document. The Board Note, insofar as is material provided:

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<sup>9</sup> (“BECs”)

<sup>10</sup> “Board Note”

**“Subject: Reasonability of Bidding Parameters**

Bid evaluation for technical bid is under progress for all 86 GAs. Technical bid queries are being issued and it is expected that the Financial bid opening may be started from this week (24<sup>th</sup> July onwards) for various GAs. The bidding parameters have been completely changed in current round.

In order to promote serious bidders and to avoid any unrealistic/unreasonable bidding number committed by entity, PNGRB has included a rejection clause in Para 4.4.1 of application-cum-bid documents. The clause is reproduced below:

“PNGRB reserves the right to reject any Application-cum-Bid comprising quoted work programme considered by it to be unreasonably high or low.”

Since technical bids for some of the GAs are about to be concluded, it is essential to decide upon the reasonability of the bidding parameters which are constituting work programme. In this regard, following is proposed:

**1. No of PNG Domestic connections:**

**Lower Limit:** Ministry of Petroleum and Natural Gas (MoP&NG) vide letter No L-16021/9/2013-GP-1 (pt.) dated 16<sup>th</sup> August 2016, constituted a committee to examine the City Gas Distribution (CGD) bidding related issues. The committee in its report recommended minimum work programme (MWP) for inter-alia PNG domestic connections as 7.5% of within district headquarters/ municipal limit. Prior to 9<sup>th</sup> round, MWP for PNG domestic connections was fixed for 5 % total household. Considering above it is proposed that 2 % of total Household (Census 2011 data) may be considered as minimum.

**Maximum Limit:** In order to reach at maximum value various possibilities has been discussed in house which includes conversion of LPG to PNG, maximum penetration at present in GAs etc. It is proposed to keep maximum limit of PNG Domestic connections as 100 % of Household (Census 2011 data). Beyond 100 % household may be treated as unreasonable quote.”

The Board Note was approved by the members of the Board including the Chairperson. Between 24 July 2018 and 18 August 2018, the financial bids submitted by the bidders for various GAs were opened by the Board.

16. The Board Note of 23 July 2018 adopted the Census 2011 data on the total number of households as the basis for computing the minimum and maximum limits for the purpose of determining unreasonably low or unreasonably high quotes. The Board Note stipulated that 2 per cent of the total households in terms of the Census 2011 data would be regarded as the minimum quote. Anything below 2 per cent would be considered unreasonably low. Similarly, on the upper end of the spectrum, the Board Note proposed that 100 per cent of the total households in terms of the Census 2011 data would be regarded as the maximum. A quotation beyond this upper limit would be construed to be unreasonably high. Now, two features of the note of the Board Note dated 23 July 2018 must be noted. First, the Board Note was generated after the last date for the submission of bids. Second, the Board Note was an internal document of the Board which was not notified to the bidders.

17. The Board commenced the process of opening the financial bids on 24 July 2018. On 2 August 2018, an agenda note was prepared for the Board. The agenda note outlined that three BECs were nominated for evaluating the bids received. Technical bids submitted by the bidders were evaluated by ICF, a consultant, based on the requirements of the Regulations and the Bid Documents. A summary sheet of the technical bid evaluation was prepared and checked by the BEC. Thirty-eight entities had submitted bids against 86 GAs.

The financial bids of technically eligible bidders were recommended for opening. The agenda note dated 2 August 2018 spelt out the stipulation contained in paragraph 4.4.1 of the Bid Document, and of the previous decision of the Board, to adopt 2 per cent of the total households as the minimum and 100 per cent as the maximum, both on the basis of 2011 Census data. The agenda note contained a tabulation of the bids of technically qualified entities. The agenda note indicated that for four GAs: 35, 46, 48 and 49 where two bids had been received for each, the highest bidder had quoted an unreasonably low number of projected PNG connections at the end of eight contract years. Where the bid below 2 per cent was the sole bid for the GA, the bid was accepted as the GA would have gone 'dry' otherwise. The agenda note proposed the adoption of three courses of action with respect to the remaining bids:

- (i) Rejection of the bids received for the above four GAs as being unreasonably low;
- (ii) Acceptance of the bids for the four GAs by extending to them the same logic that was applied for single bid GAs; or
- (iii) Inviting the concerned entities with the highest scores for each of the GAs for negotiation to improve the quoted work programme.

18. The agenda note dated 2 August 2018 was presented before the Board for deliberation on 3 August 2018. In its meeting, the Board accepted the proposal for the issuance of LOIs to entities of 48 GAs mentioned in table 3 of the agenda note. The proposal to invite entities with the highest scores which had submitted unreasonably low bids for each of the GAs for negotiations and to improve the

quoted work programme was approved. Accordingly, on 3 August 2018, the Board issued a press release recording that it had approved the issuance of LOIs to 18 successful bidders for 48 GAs. The press release indicated that the remaining GAs were being evaluated and the outcome would be notified shortly.

19. On 9 August 2018, an agenda note was issued by the Board noting that in pursuance of the decisions which were taken by the Board on 3 August 2018, letters have been addressed to the entities which had obtained the highest composite score but had quoted unreasonably low PNG connections, to confirm their acceptance of the minimum requirement of 2 per cent of households as per the 2011 Census data. Table 5 to the agenda note contained a tabulation of bids which were liable to be rejected due to unreasonably high or as the case may be, unreasonably low quotes. Among these bids were the bids received from H1 bidders who had quoted unreasonably high PNG connections for the three GAs which form the subject matter of the present appeals. These were:

“Table -5

SI No	GA No.	Name of GA	Name of bidding entities	Quote	Remarks
11.	GA 61	Kanchipuram District	Consortium of AG&P LNG Marketing Pte Ltd. & Atlantic Gulf & Pacific Company of Manila Inc.	<b>114% of total HH</b>	7 other valid bids remains
12.	GA 62	Chennai & Tiruvallur Districts	Torrent Gas Private Limited	<b>157.00% of total HH</b>	9 other valid bids remains
13.	GA 63	Coimbatore District	IMC Limited	<b>107.06% of total HH</b>	12 other valid bids remains

...

From the above **Table-5**, it can be seen that in 3 GAs have unreasonably High PNG Connections quoted have been received & also happens to be H1 bidder and are liable for rejection.”

20. At this stage it may also be necessary to note that table 4 contained a tabulation of bids among them being those of bidders who were treated as not “Not-Qualified”. The agenda note recommended that in three GAs, the bids of the highest bidders were liable to be rejected since they had quoted an unreasonably high number of PNG connections to be achieved at the end of eight contract years. Consequently, the names of the entities which were to be declared as successful bidders were tabulated in table 6 of the agenda note. According to the agenda note, after the names of the entities with the highest bids were removed, IMC Limited was recommended for being declared as the successful bidder for GA 61 (Kanchipuram District). Similarly, for GA 62 (Chennai & Tiruvallur Districts), Adani Gas Limited was recommended to be the successful bidder after the highest bid was declared as “Not Qualified”. The agenda note was prepared by the Authorisation Division and records that it was concurred with by the Member (I&T) and Member (C&M) and was approved by the Chairperson “for deliberations and approval of the Board”.

21. On 10 August 2018, a meeting was held by the Board. The minutes of the Board meeting recorded that out of four cases where the quotes for projected PNG domestic connections were higher than 100 per cent of the households under the 2011 Census, one of the bidders for GA 63 was not under consideration as its composite score was not the highest amongst the bids received for the GA. The other three bidders who had quoted more than 100 per

cent of the households for PNG domestic connections were reflected in the following table:

“

SI No.	GA No.	GA name	Bidding Entity	Quoted for PNG Domestic connections as % of households as per 2011 census
1.	61	Kanchipuram Distt.	Consortium of AG&P LNG marketing Pte Ltd. and Atlantic Gulf & Pacific Company of Manila Inc.	114%
2.	62	Chennai & Tiruvallur Districts	Torrent Gas Pvt Ltd.	157%
3.	72	Medchal, Rangareddy & Vikarabad Districts	Torrent Gas Pvt Ltd.	220%

”

The minutes of the meeting went on to record that:

“During deliberations in the Board, the Board referred to clause 4.4.1 of ACBD which reads, “PNGRB reserves the right to reject any application cum bid comprising quoted work program considered by it to be unreasonably high or low.” In terms of this clause vide note dated 23.07.2018 (i) lower and upper limits were decided for PNG domestic connections (ii) lower limits was decided for CNG Stations and (iii) no limit (higher or lower) was decided for Inch-KM of Steel pipeline. The Board deliberated that though lower and upper households were decided, the same need not be a mechanical exercise and an opportunity be given to affected entities to explain reasonableness of their quotes.”

22. The Board thus took a decision that the disqualification of bidders on the basis of the lower and upper thresholds of 2 per cent and 100 per cent of the 2011 households which it had decided earlier “need not be a mechanical exercise”. Hence, a decision was taken to offer to the three affected entities for

GAs 61, 62 and 72, an opportunity to present their case on why their bids should not be rejected for being unreasonably high. The Board appears to have done so on the basis that the rejection of their bids, without an opportunity to present their case would not be “legally correct”. This is reflected in the following decision which was taken by the Board on 10 August 2018:

“(a) To call the bidding entities for GA- 61, GA-62 and GA-72 which quoted for PNG domestic connections higher than fixed vide note that 23.07.2018 for discussion on 14.08.2018 to present their case as to why the bids submitted by them for PNG domestic connections be not considered unreasonably high. The Board also decided that under these circumstances, it would not be legally correct to reject their bids without providing them a chance to present their case.”

23. On 10 August 2018, a press release was issued by the Board. In pursuance of the decision which was taken by the Board, on 14 August 2018 presentations were made before it by the three entities for GAs 61, 62 and 72 which had quoted more than 100 per cent of the number of 2011 households. Apart from the above three GAs, the financial bid for Puducherry (GA 51) was opened on 18 August 2018. The bidder with the highest composite score for GA 51 had also quoted more than 100 per cent of the total 2011 households and was called on 23 August 2018 for a presentation before the Board.

24. On 28 August 2018, an agenda note was prepared with respect to the Board’s decision on four GAs: 51, 61, 62 and 72. The agenda note contained a summation of the submissions made by each of the four bidders who had been called upon to explain why their bids in excess of 100 per cent of the total number of households as per 2011 Census data should not be considered unreasonably high. The agenda note contained a tabulation of the percentage of PNG

penetration in the projected households in 2026 with respect to the number of households as per the 2011 Census. The comparative table is extracted below:

<b>SI No.</b>	<b>GA ID</b>	<b>GA</b>	<b>PNG connections quoted by the bidder</b>	<b>HH as per 2011 Census i.e. Upper Limit of PNG Connections fixed by PNGRB</b>	<b>Projected HH in 2026*</b>	<b>PNG penetration in 2026 as per PNGRB upper limit</b>	<b>PNG penetration in 2026 as per H1 bidder</b>
A	B	C	D	E	F	G=(E/F) *100	H=(D/F) *100
1	51	Puducherry	2,75,000	2,31,513	3,91,852	59%	70%
2	61	Kanchipuram	11,51,111	10,06,245	20,89,765	48%	55%
3	62	Chennai		12,70,391	20,87,729		
		Tiruvallur		10,63,109	21,34,971		
		Total (Chennai & Tiruvallur)	33,00,000	23,33,500	41,87,734	56%	79%
4	72	Ranga Reddy (except authorised area) Presently, Medhchal, Rangareddy & Vikarabad Districts	10,05,300	4,56,557	10,17,097	45%	99%

25. The Board held a meeting on 29 August 2018. During the meeting, the Board approved the submission of the following three bidders who had made presentations before the Board with respect to the reasonableness of their quotes:

“GA-51: Consortium of SKN Haryana City Gas Distribution Pvt. Ltd.

GA-61: Consortium of AG&P LNG Marketing Pte Ltd. & Atlantic Gulf & Pacific Company of Manila Inc.

GA-62: Torrent Gas Private Limited.”

The Board however rejected the submission of Torrent Gas Private Limited in respect of the reasonableness of its quote for GA 72 and decided to award the LOI to Megha Engineering & Infrastructure Private Limited, the entity with the highest composite score after Torrent Gas Private Limited was disqualified. The basis of the decision of the Board is contained in the following extracts from the minutes of 29 August 2018 meeting:

“2. The Board further deliberated as under:

- (a) Following the earlier decisions, the three bidders i.e. Torrent Gas Private Limited, Consortium of AG&P LNG and SKN Haryana City Gas Private Limited were called for discussion on 14<sup>th</sup> and 23<sup>rd</sup> August 2018 to explain reasonableness of high PNG connections quoted by them for the above GAs.
- (b) The Board referred to table in Para 15 of the agenda note wherein quoted PNG domestic connections for the above four GAs were compared with the upper limit fixed vide noted dated 23.07.2018 and projected households in 2026 (considering the number of households as per 2011 Census and the historical growth rate during 2001 to 2011 as per census data of 2001 to 2011). It was observed that penetration of PNG domestic connections based upon upper limit fixed by PNGRB with reference to projected number of households in 2026 varied from 45% to 59%. However, penetration of PNG

domestic connections based upon quoted PNG connections with reference to projected number of households in 2026 varied from 55% to 99%. The variation between two sets of numbers is 7% to 54%.

- (c) The Board observed that the highest variation of 54% is in GA-72, which is based on untenable assumptions made by the bidder as described in Para 14.3 of the agenda note. Due to this, 10,05,300 PNG domestic connections quoted by the bidder are 99% of the projected households by PNGRB in 2026, which is unreasonably high. It was also observed that for the remaining 3 GAs, the variation between two sets of numbers given in para 15 of the Agenda note is 7% to 23% of projected number of households in 2026 and PNG penetration would be in the range of 55% to 79%.
- (d) The Board also referred to regulation 16(2) of CGD Authorisation Regulations, which provides for rates of pre-determined penalty for shortfall in achieving cumulative work program targets for each contract year. The entities bidding aggressive number of PNG domestic connections would be liable to pay pre-determined penalties under afore-mentioned regulation 16(2).
- (e) In view of the above, it was decided to accept the quoted PNG domestic connections and award the Chennai & Tiruvallur District GA (GA-62) to Torrent Gas Private Limited, Kanchipuram District GA (GA-61) to Consortium of AG&P LNG Marketing Pte. Ltd & Atlantic Gulf & Pacific Co. of Manila Inc. and Puducherry District GA (GA-51) to Consortium of SKN Haryana City Gas Distribution Pvt. Ltd. and Chopra Electricals to the bidders with highest composite score for respective GAs, where the variation in two sets of numbers is in the range of 7 to 23%. Regarding Medchal, Rangareddy (except area already authorised) & Vikarabad District GA (GA-72), where the variation is around 54% and the bid by Torrent Gas Pvt. Ltd. is based on untenable assumptions and incorrect map, the bid of the entity with highest composite score may be considered as unreasonably high and rejected in terms of Clause 4.4.1 of ACBD. Accordingly, the GA may be awarded to the bidder with second highest composite score and LOI may be issued to Megha Engineering & Infrastructure Pvt. Ltd. Subsequently, on receipt of PBG, authorisation letter (Schedule D) may be issued to the above entities.”

The Board issued LOIs to SKN Haryana City Gas Distribution Private Limited and Chopra Electricals<sup>11</sup>, AG & P LNG Marketing Private Limited and Atlantic Gulf & Pacific Company of Manila<sup>12</sup> and Torrent Gas Private Limited on 30 August 2018 as successful bidders for GAs 51, 61 and 62 respectively. On 6 September 2018 Adani Gas Limited wrote to the Board requesting a copy of the decision with respect to the issuance of LOIs for the above three GAs. Subsequently, the Board uploaded the details of the successful bidders under the ninth CGD round on its website on 14 September 2018.

26. On 19 September 2018, Appeal No 292 of 2018 was instituted before the APTEL by Adani Gas Limited, aggrieved by:

- (i) The decision to award LOIs, in respect of the three GAs – 51 (Puducherry District), 61 (Kanchipuram District), and 62 (Chennai & Tiruvallur Districts) on the ground that the successful bids were beyond the unreasonably high limit adopted by the Board; and
- (ii) The action of the Board in issuing the LOIs without uploading the decision on the website and without communicating it to Adani Gas Limited.

Following the institution of proceedings by Adani Gas Limited, IMC Limited also instituted proceedings before the APTEL (Appeal No 323 of 2018) challenging the grant of authorisation by the Board in respect of GA 61. The prayers in both appeals were identical and the Tribunal heard both appeals together.

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<sup>11</sup> "SKN Haryana"

<sup>12</sup> "AG & P LNG"

27. During the pendency of the appeal, by an order dated 11 October 2018 the APTEL directed the Board to file an affidavit explaining its decision taken on 23 July 2018 and the reasons on the basis of which bids were rejected, including on the ground of high and low quotes. In pursuance of the above order, the Board filed an affidavit by which it disclosed the Board Note dated 23 July 2018 together with a compilation of documents containing board agenda notes, minutes of meetings and press releases. On a perusal of the documents submitted by the Board, the competing standing of the various bidders is summarised below for convenience:

<b>GA No</b>	<b>Area</b>	<b>H1 Bidder</b>	<b>H2 Bidder</b>
51	Puducherry	SKN Haryana	Torrent Gas Private Limited
61	Kanchipuram	AG & P LNG	IMC Limited
62	Chennai – Tiruvallur	Torrent Gas Private Limited	Adani Gas Limited

In GA 51, Adani Gas Limited was the sixth highest bidder and in GA 61 Adani Gas Limited was the third highest bidder. In Appeal No 292 of 2018 Adani Gas Limited challenged the grant of authorisation in GAs 51, 61 and 62 and in Appeal No 323 of 2018 IMC Limited challenged the grant of authorisation in GA 61.

28. On 28 February 2019, the APTEL pronounced a split decision. While the Chairperson allowed the appeals filed by Adani Gas Limited and IMC Limited, the Member Technical (Petroleum and Natural Gas) dismissed the appeals. In view of the divergence of opinion between the Chairperson and Member Technical

(Petroleum and Natural Gas), the appeals were referred to the Judicial Member of the APTEL. The Judicial Member recused from hearing the appeal on 7 March 2019, as a result of which proceedings were instituted before this Court. As noted earlier, the appeals pending before the APTEL have been transferred to this Court.

## **Analysis**

29. Having set out the facts, we now turn to the issues raised by the present dispute before this Court. The first aspect which forms the subject matter of the controversy is the relevance of the 2011 Census data in the bidding process. The primary plank on which the appellants contend that the 2011 Census data was relevant to the bidding process was the reference to population/household figures derived from 2011 Census data in the map annexed to the Bid Document.

30. Dr A M Singhvi, learned Senior Counsel appearing on behalf of Adani Gas Limited, submitted that:

- (i) The map which was attached to the Bid Document did not only describe the land area but also the population and households comprised in it;
- (ii) The rationale for this was that the authorisation is to lay the CGD network in a defined land area and to service the defined households in that area;
- (iii) The figures for population and number of households in the map attached to the Bid Document were drawn from the 2011 Census;

- (iv) In several areas out of the 86 GAs which were a part of the ninth round of bidding, certain parts of the GAs were excluded from the zone of authorisation;
- (v) Whenever certain parts of the GAs were excluded from the zone of authorisation, the population/household number was proportionally reduced to reflect the population/households as per the reduced area. Examples of the above are Surendranagar (GA-8); and Medchal-Ranga Reddy (GA-72).
- (vi) In GA 72, Medchal-Ranga Reddy:
  - (a) The original map attached to the Bid Document showed the entire district with a corresponding number of households of 13,47,118 according to the 2011 Census;
  - (b) The Bid Document was amended to exclude the area in which an existing entity was already laying a CGD network as a result of which not only was the land area reduced but even the number of households was reduced to 4,56,557;
  - (c) Torrent Gas Limited Private Limited, which was the highest bidder for the reduced area had bid 10,05,300 PNG connections, which worked out to 74.6 per cent of the original number of households (13,47,118) and 220 per cent of the reduced number of households (4,56,557);
  - (d) The Board, at its meeting on 29 August 2018 rejected the H1 bidder for GA 72 on the ground that the bid of 220 per cent of the households was unreasonably high; and

- (e) The bid of the H1 bidder for GA 72 was in fact 99 per cent of the estimated households for 2026 but was yet rejected as the 'unreasonably high' norm was with reference to the 2011 census and not 100 per cent of the 2026 estimate because if it was the latter, the H1 bidder would have been declared to be successful.
  
- (vii) The map annexed to the Bid Document depicted not only the land area but also the population/number of households which were intrinsically intertwined in the bid parameters;
  
- (viii) Clause 1.1.3 of the Bid Document mandated bidders to look at the "existing population". Hence, it is incorrect to suggest that the bidders had to keep in mind the population in the GAs in 2018. On the contrary, Clause 1.1.1 required bidders to bear in mind the population/households as given in the map annexed to the Bid Document; and
  
- (ix) The reference to 'charge areas' in Clause 1.1.2 of the Bid Document means designated sub-areas which are part of the authorised GAs. The designation of 'charge areas' is only to facilitate the Board in determining whether the authorised entity has created its network in all the GAs for which it is authorised.

31. Opposing the above submissions, Mr Paras Kuhad, learned Senior Counsel appearing on behalf of the Board submitted a written note, explaining

the amendments that were made to the CGD Authorisation Regulations after they were notified initially on 19 March 2008:

**(A) 2008 CGD Authorisation Regulations:**

Regulation 7 of the 2008 CGD Authorisation Regulations prescribed a four-fold criterion for bidding:

- (i) Criteria (a) was the lowness of the present value of the overall unit network tariff with a weightage of 40 per cent;
- (ii) Criteria (b) prescribed the lowness of the present value of the compression charge for CNG for dispensing in the CNG stations with a weightage of 10 per cent;
- (iii) Criteria (c) prescribed the highness of the present value of the inch-kilometre of steel pipelines proposed to be laid in the CGD network during the period of exclusivity with a weightage of 20 per cent; and
- (iv) Criteria (d) prescribed the highness of the present value of the number of domestic customers proposed to be connected by PNG with a weightage of 30 per cent.

Under the Regulations, no upper or lower ceiling was provided for bidding in respect of the Criteria (a) to (d) of Regulation 7.

**(B) 2013 Amendment to the CGD Authorisation Regulations<sup>13</sup>:**

- (i) The 2013 amendment amended criteria (a) and (b) and substituted bidding criteria (c) and (d) with criteria (c);

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<sup>13</sup> 21 June 2013

- (ii) The successful bidder was required to achieve a Minimum Work Programme<sup>14</sup> in respect of the PNG domestic connections and inch-kilometres of steel pipeline;
- (iii) The minimum number of PNG domestic connections to be achieved within the first five years of authorisation was to be worked out by the Board. This was based on the total number of households to be calculated as per the basic data sheet of the respective districts of the GA and the population according to the latest census data;
- (iv) The weightage of bidding was shifted to 70 per cent for criteria (a) and 30 per cent for criteria (b). No weightage was given to PNG domestic connections and inch-kilometres of pipeline; and
- (v) The successful bidder was to achieve a target of 15 per cent by the second year, 50 per cent by the third year, seventy per cent by the fourth year and 100 per cent by the fifth year.

**(C) 2014 Amendment to the CGD Authorisation Regulations<sup>15</sup>:**

- (i) The 2014 amendment substituted criteria (c) once again;
- (ii) Under the 2014 amendment, the Board was to work out the target for infrastructure for PNG domestic connections as 5 per cent of the households of the respective GAs to be achieved by the successful bidder during the first five years from the grant of authorisation; and
- (iii) No weightage was given to criteria (c) – PNG domestic connections and inch-kilometres.

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<sup>14</sup> "MWP"

<sup>15</sup> 7 April 2014

**(D)** On 16 August 2016, the Ministry of Petroleum and Natural Gas constituted a committee to examine alternative models for the bidding criteria to grant authorisation for CGD networks. The committee in its report recommended a MWP for PNG domestic connections at 7.5 per cent, within district headquarters/municipal limits. Prior to the ninth round, the MWP was fixed at 5 per cent of the total households.

**(E) 2018 Amendment to the CGD Authorisation Regulations<sup>16</sup>:**

- (i) The 2018 amendment substituted new criteria for bidding applicable to the ninth round. The present batch of appeals deals with the ninth round of bidding; and
- (ii) Under the new criteria applicable to the ninth round of CGD bidding, 50 per cent weightage was given to PNG domestic connections. Moreover, no minimum or maximum limits were set for PNG domestic connections in the 2018 amendment.

Responding to the appellant's submissions on the binding nature of the Board Note dated 23 July 2018 and the legality of the Board's decision to hear only the highest bidder, Mr Paras Kuhad urged that:

- (i) The agenda note dated 9 August 2018 is not binding on the Board as it clearly states that the contents of the agenda note are subject to the deliberations and approval of the Board;
- (ii) Regulation 7 sets out five parameters on which the bids are to be evaluated. Once a bidder fulfils the criteria set out in Regulations 5

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<sup>16</sup> 6 April 2018

and 7 and emerges as the highest bidder, they have a statutory right to be selected;

- (iii) The CGD Authorisation Regulations do not set out criteria for determining “unreasonably high or low” bids and no such criteria can be read into the Regulations and enforced on the Board;
- (iv) Clause 4.4.1 read with Addendum 1 explicitly states that the Board’s power to determine “unreasonably high or low” bids would be exercised on a “case to case basis after considering the relevant factors”;
- (v) The challenge made by the appellants is an adversarial challenge and not a Public Interest Litigation. The appellants cannot try and advance their case by relying on decisions taken in relation to separate GAs which are not presently under challenge; and
- (vi) The calculations made by the appellants with respect to the growth rate and projected number of households are based on irrelevant factors.

32. Mr Gopal Subramaniam, learned Senior Counsel appearing on behalf of Torrent Gas Private Limited, supported the arguments urged by the Board and further submitted that:

- (i) Torrent Gas Limited has attended the hearing before the Board, explained its methodology in calculating its quoted number of PNG connections, and the quoted figure has been accepted by the Board as reasonable;

- (ii) The Board Note dated 23 July 2018 had been formulated subsequent to the submission of bids. At the time of submitting its bid, the only criteria known to Torrent Gas Private Limited were those specified in Regulation 7 and the Bid Document, which did not prescribe a maximum number of PNG connections; and
- (iii) There is no condition in either the CGD Authorisation Regulations or the Bid Document which require the quoted number of PNG connections to be calculated on the basis of 2011 Census data.

33. Mr Gopal Sankaranarayanan, learned Senior Counsel appearing on behalf of SKN Haryana, urged that:

- (i) Adani Gas Limited was neither the second nor third placed bidder in GA 51 on the basis of the composite score, and therefore has no standing to challenge the LOI granted to SKN Haryana for GA 51;
- (ii) Clause 14.2 of the First Addendum makes it clear that there were no fixed parameters on which an “unreasonably high or low” bid would be determined, and specified that such determination would take place on a case to case basis; and
- (iii) According to the calculation of composite scores in Schedule C(1), the bidder with the highest number of PNG connections is at 100% and all other bidders are reduced in proportion to the highest bidder’s score. If 100% of the 2011 Census data was a ‘hard upper limit’ on the quoted number of PNG connections, the calculation in Schedule C(1) would be rendered redundant.

34. Mr Kapil Sibal, learned Senior Counsel appearing on behalf of AG & P LNG, submitted as follows:

- (i) AG & P had quoted a figure of 11.51 lakh in its bid for GA 61. According to the 2011 Census figures, the number of households in GA 61 was only 10.06 lakhs. However, the Tamil Nadu Generation & Distribution Corporation Limited (the state electricity board) noted that as of 2018, there existed 15.91 lakh households in GA 61;
- (ii) In GA 37, Indian Oil Corporation had quoted a number of PNG connections below the 2% threshold and was the highest bidder. The Board awarded the GA to Bharat Gas Resource Limited, which had quoted above the 2% threshold. However, Indian Oil Corporation has not challenged this decision of the Board before the APTEL or any court, therefore the appellants cannot rely on the case of GA 37; and
- (iii) Each GA is a separate tender having its own unique geographical and socio-economic factors. Therefore, one cannot compare cases of other GAs with the GA of Kanchipuram where AG & P LNG has been awarded the authorisation.

35. The submission which has been urged on behalf of the appellants in regard to the relevance of the 2011 census data must first and foremost be assessed in the context of the CGD Authorisation Regulations as amended on 6 April 2018. The Regulations postulate that bidders must submit both technical and financial bids. The procedure specified in Regulation 5 applies to an invitation by the Board for laying, building, operating or expanding a CDG

network. Regulation 5(6) requires the fulfilment of minimum eligibility criteria. For a technical bid to pass muster, the minimum eligibility criteria require the bidder to be qualified both with reference to technical and financial parameters. This is evident from Regulation 5(6) under which the Board is to scrutinise the bids of only those entities which fulfil the minimum eligibility criteria. The minimum eligibility criteria include the technical capability of the bidding entity to (i) lay and build; and (ii) operate and maintain a CGD network. Both of them are defined with reference to qualifying criteria. Besides the technical criteria, the minimum eligibility requirements under Regulation 5(6)(e) incorporate the financial ability to execute the project and to operate and maintain it in the authorised area. The financial criteria are defined with reference to the minimum net-worth of the bidding entity. The net-worth required is dependent on the population of the GA under the 2011 Census. The minimum net-worth required is specifically defined with reference to the 2011 census figures of population for the GA. The bidding entity is also required to submit a bid bond in the form of a performance bond guarantee. The quantum of the guarantee is dependent on the population of the GA.

36. Regulation 7 requires the Board to tabulate all financial bids which meet the minimum eligibility criteria, in accordance with the bidding criteria specified in the table. The Table incorporated in the Regulation provides five-fold criteria for the tabulation and comparison of financial bids. The five criteria are:

- (i) 'Lowness' of transportation rate for CGD;
- (ii) 'Lowness' for transportation rate for CNG;

- (iii) 'Highness' of the number of CNG stations to be installed in eight years from authorisation;
- (iv) 'Highness' of the number of domestic PNG connections to be achieved within eight years of authorisation; and
- (v) 'Highness' of inch-kilometre of steel pipeline to be laid within eight years of authorisation.

The third and fourth criteria together account for 70 per cent of the total composite score. Among them, the fourth criterion – 'highness' of the number of domestic PNG connections accounts for 50 per cent of the total composite score. Significantly, the bidding criteria in Regulation 7 are not linked to the 2011 Census figures. There are two significant facets of Regulation 7:

- (i) The absence of a linkage of the projected number of domestic PNG connections with the 2011 Census data; and
- (ii) The absence of a cap or ceiling on the 'highness' norm both in relation to the third and the fourth criteria (iii and iv above).

37. Regulation 7 (1)(b) requires the successful bidder to achieve the target in terms of an annual work programme within eight contract years. The programme is distributed between the first and eighth years for PNG connections', CNG stations' and Inch-kilometres of steel pipelines. For PNG connections, the successful bidder must complete 10 per cent of the work programme at the end of the second year, 20 per cent at the end of the third year, 30 per cent at the end of fourth year, 40 per cent at the end of the fifth year, 60 per cent at the end of the sixth year, 80 per cent at the end of the seventh year and 100 per cent at

the end of the eighth year. Under Regulation 7(3), a bidding entity with the highest composite score in terms of the criteria specified in sub-regulation (1) of Regulation 7 is to be declared as the successful bidder.

38. The provisions contained in the 2008 CGD Authorisation Regulations, as amended on 6 April 2018, indicate that where a specific linkage was sought with reference to the 2011 Census data, a clear and categorical provision was made to that effect. Such provisions are found in regard to the financial capability of a bidder as part of the minimum eligibility criteria in Regulation 5(6)(e) and the extent of the performance bond in Regulation 5(6)(h).

39. Absent a condition in Regulation 7 linking the 'highness' of the number of PNG connections to be achieved within eight years from the date of authorisation with the 2011 Census data, it would be contrary to basic principles of interpretation to read such a restriction into the CGD Authorisation Regulations. A conditionality which has not been incorporated in Regulation 7 cannot be introduced as a matter of construction. The court must first and foremost read the Regulation in accordance with its plain and natural meaning. There is evidently a reason why Regulation 7 did not introduce a ceiling or provide for a linkage with the Census data of 2011. Consumers or users, as the case may be, in a CGD network broadly comprise of four categories namely:

- (i) Domestic;
- (ii) Commercial;
- (iii) Industrial; and
- (iv) Vehicular.

40. The Board has submitted with justification that in a model of cross/subsidisation, the viability of the project has to be perceived from a twenty-five-year perspective. Gains in one category of users can offset the losses in another category. The CGD Authorisation Regulations are intended to subserve the object of establishing the infrastructure necessary for setting up an operational CGD network. In creating the infrastructure, the successful entity is contractually bound to set up a project for the future. The infrastructure so created would be of service to consumers or, as the case may be, users. Infrastructural projects cater to future needs and can legitimately be forward looking. It is from this perspective that except for the tariff in the first two bidding criteria of Regulation 7 (the transportation rates for CGD and CNG), no ceiling was provided by the Board for the criteria set out in Regulation 7. More particularly, Regulation 7(3) provided for a mandate to tabulate and compare the bids of all entities which had met the minimum eligibility criteria upon their qualifying in a competitive bidding process. The Regulations did not contemplate the disqualification of a bidder with reference to a norm which would limit a bid to 100 per cent of the population figures provided by the 2011 Census data. For the Board to stipulate an absolute norm to that effect, when it has not been specifically incorporated in the Regulations would have rendered the decision making process vulnerable to a challenge on the ground that it was not consistent with Regulation 7.

41. Now it is in this background, that it becomes necessary to evaluate the Bid Document. Clause 1.1.1 incorporates a reference to the GA as depicted in the map set out in Annexure-1, for which the Board was inviting bids for the grant of

an authorisation to develop a CGD network. The main plank of the submissions of the appellants is that the map contained a reference to population and household figures on the basis of the 2011 Census. Clause 1.1.3 places the responsibility on the bidder to obtain information about the present gas supply availability, the pipeline connectivity and the existing customers in the GA. Significantly, the scope of work in Clause 1.2 required bidding entities “to lay, build, operate or expand the CDG networks” to meet the requirement of natural gas “in domestic, commercial and industrial segments including natural gas in the vehicular segment in the said Geographical Area to be authorised.” Bidders are required under Clause 2.1.1 to examine the contents of the Bid Document including instructions, terms and conditions and regulations of the Board. The bidder was required to carefully study the GA and the charge area before submitting the bid. In other words, bidders were on notice of the actions required to be taken to implement the Regulations. The Bid Document necessarily had to be in conformity with the CGD Authorisation Regulations. The map, at best was a compendium of the latest official record of the GA. The map did not dictate how the number of domestic PNG connections was to be calculated. There is no such indication particularly in Clause 1 of the Bid Document where the map is referenced. The mere attachment of a map to the Bid Document would not result in the imposition of conditions of eligibility or qualification. These have been provided in the Regulations which have a statutory character. The depiction of the GA in a map attached to the bid document does not over-ride the specific requirements of the bidding criteria as defined in Regulation 7.

42. The next basis of the challenge by the appellants is that the decision which was taken in the form of the Board Note dated 23 July 2018 had categorically stipulated a range of 2 per cent to 100 per cent of the number of households as per the 2011 Census as the minimum/maximum thresholds to judge the reasonableness of the bids. It has been urged that despite this, the decision of the Board dated 10 August 2018 virtually reversed the earlier decision recorded in the Board Note of 23 July 2018, thereby tainting the decision-making process with arbitrariness. The nuances to this challenge have been brought out in the submissions of Dr AM Singhvi, Mr Vikas Singh, learned Senior Counsel on behalf of Adani Gas Limited and Mr KV Vishwanathan and Mr Buddy Ranganathan, learned Senior Counsel on behalf of IMC Limited and can broadly be catalogued in the form of the following points:

- (i) The 2 - 100 per cent criterion based on the 2011 Census data is the basis on which the bids for 79 out of 86 GAs were evaluated;
- (ii) In respect of the bids for four GAs (out of the remaining seven GAs) where the highest bidder had bid a number of PNG connections below 2 per cent of the number provided by the 2011 Census, those four bidders were furnished with an opportunity to improve their bids and match the 2 per cent threshold;
- (iii) It is only for the three bidders with the highest composite scores in GAs 51, 61 and 62 that the bids were evaluated with reference to the projected number of households in 2026;
- (iv) For example, in GA-62 (Chennai-Tiruvallur), there were ten bidders of whom the bids of nine were evaluated with reference to the 2011

Census data on the number of households, whereas the bid of one bidder (Torrent Gas Private Limited) has been evaluated with reference to the number of projected households in 2026;

- (v) The agenda note dated 9 August 2018 which was approved by three out of the four Board members recommended that Torrent Gas Private Limited was not qualified and Adani Gas Limited be declared as the successful bidder. Yet on 10 August 2018, the four Board members including the three who had approved the Board Note concluded that, though the lower and upper thresholds were decided “the same need not be a mechanical exercise”;
- (vi) Neither the Bid Document nor the CGD Authorisation Regulations contain any provision allowing the Board to call upon bidders to improve their bids;
- (vii) The Board Note dated 23 July 2018 which defined the minimum and maximum threshold (2-100 per cent of the number of households as per the 2011 Census) without any caveat or provision for relaxation has been virtually reversed on 10 August 2018, thereby upsetting the level playing field between bidders;
- (viii) The only reason for the reversal of the decision, which is that the criterion need not be a mechanical exercise is not supported by reasons and this *volte face* introduced un-canalized subjectivity in the process which was earlier considered to be objective and definite;

- (ix) The Board decision dated 28 August 2018 wrongly adopts the 2011 Census number as 23,33,500 whereas in the Board Note, the number of households as per the 2011 census is 21,01,931;
- (x) There has been a breach of the principles of natural justice for the following reasons:
  - (a) In the Board decision dated 10 August 2018, it was decided to give a hearing to all affected parties;
  - (b) The Board undertook the exercise of hearing only Torrent Gas Limited, AG & P LNG and SKN Haryana; and
  - (c) The violation of natural justice lies in the fact that these “not-qualified” bidders were heard on why their bids were reasonable despite being above 100 per cent of the 2011 Census household data. Neither Adani Gas Limited nor any of the other unsuccessful bidders were heard on why the bids of the “not-qualified” bidders were actually unreasonable.
- (xi) This Court is justified in reviewing the process adopted by the Board in evaluating the bids for the ninth round of CGD bidding. It is well settled that judicial review cannot be denied even in contractual matters to prevent arbitrariness.

43. Our analysis of the CGD Authorisation Regulations, as amended on 6 April 2018, as explained earlier, reveals that the Regulations did not contain any stipulation determining a range of 2 to 100 per cent of the number of households under the 2011 Census as the criterion to evaluate bids. The Regulations in fact do not link the ‘highness’ factor of domestic PNG connections to the 2011

Census data. In Clause 4.4.1 of the Bid Document, the Board reserved to itself the right to reject any unreasonably high or low bid. In Addendum-1 to the Bid Document, the Board clarified to all prospective bidders that the evaluation of whether a bid was unreasonably low or high would be conducted on a case to case basis at the time of bid evaluation.

44. It is in the above background that the Board Note dated 23 July 2018 must be assessed. The Board Note was formulated after the last date for the submission of bids. The criterion which the Board Note proposed had not been notified to bidders. Bidders were not on notice that this would be the basis on which their bid would be evaluated. The Board Note took notice of Clause 4.4.1 of the Bid Document and stipulated that since technical bids for some GAs were about to be evaluated, it was necessary to decide upon the reasonableness of the bidding parameters which constituted the work programme. It was in this background that the Board Note proposed that; "...2 per cent of total households (as per the 2011 Census data) **may be** considered as minimum". As regards the maximum, the Board note proposed that:

"beyond 100 per cent households **may be** treated as unreasonably quote"

(Emphasis supplied)

The terminology adopted by the Board Note indicates that the 2-100 per cent range was not laid down as an absolute or inflexible basis for disqualifying bids below the minimum or in excess of the maximum. On the contrary, the use of the expression "may be" is one indicator that a bid which was below 2 per cent or in excess of 100 per cent may trigger the exercise of the power which the Board

had reserved to itself in clause 4.4.1 of the Bid Document. On its plain terms, the Board Note cannot be construed to have laid down an absolute norm by which bids quoting below the minimum of 2 per cent or above the ceiling of 100 per cent of the number of households under the 2011 Census data would automatically be rejected as unreasonable.

45. If the Board Note of 23 July 2018 were to be construed in the manner in which the learned Senior Counsel for the appellants urged, the automatic disqualification of bidders based on a criterion introduced by the Board Note would raise serious doubts about its fairness and legality. This is because the Board Note was not notified to bidders as a basis for the evaluation of bids before the date for the submission of the bids had closed. To disqualify a bidder on the basis of a criterion which was not notified and of which bidders had no knowledge would be arbitrary and would constitute an infraction of Article 14. The Board was thus correct in determining that the automatic disqualification of a bid on the basis of a criterion specified in the Board Note (which was never notified to the bidders) would not be “legally correct”. Hence, it would be reasonable to interpret the Board Note dated 23 July 2018 as being the formulation of a guideline for the Board. As a guideline in the process of evaluation, the decision taken by the Board on 23 July 2018 was not to the effect that every bid below 2 per cent or above 100 per cent would necessarily stand disqualified. Consistently with the use of the word ‘may be’, as already noticed, the decision of the Board meant that the power which the Board reserved to itself in Clause 4.4.1 could be invoked if it came to the conclusion that the bid had not been justified to be reasonable. In other words, the breaching of the range of 2-100 per cent was a

trigger for the Board to scrutinise the bid and determine whether the power under Clause 4.4.1 should be invoked. Hence, the course of action which the Board followed of calling upon the bidders with the highest composite scores in GAs 51, 61 and 62 to justify their bids in terms of their reasonableness cannot be faulted. On the contrary, if the Board had rejected these bids solely on the ground that they were above the limit of 100 per cent of households under the 2011 Census data, the decision would have been seriously flawed for having applied a criterion which was not a part of the Regulations, was not embodied in the Bid Document and in any event, was not notified to bidders before they had submitted their bids.

46. Another limb of the submission is that, with respect to GA 62, three out of the four members of the Board had in the Board agenda dated 9 August 2018 recommended that Torrent Gas Private Limited was not qualified and that Adani Gas Limited be declared as the successful bidder. This, in our view, is an incorrect reading of the agenda note. What this submission misses is the last paragraph of the Board agenda note which states:

**“20. This Agenda note has been prepared** by Authorization Division, concurred by Member (I&T) & Member (C&M) and approved by Chairperson **for deliberations and approval of the Board.”**

(Emphasis supplied)

The agenda note dated 9 August 2018 was a recommendation which was prepared on the basis of the 2–100 per cent criterion contained in the Board Note dated 23 July 2018. Obviously in the light of that decision, a recommendation was made which was still to be deliberated upon by the Board as a body. When the Board met on 10 August 2018, it correctly came to the conclusion that the

lower and upper thresholds were not to be applied mechanically to disqualify bidders. This decision, as we have indicated earlier, was justified not only by the terms of the Board Note dated 23 July 2018 but was intrinsic to a fair exercise of power by the Board. The Board decided that it would call the bidders with the highest composite score to explain the reasonableness of their bids. This was a fair opportunity which was granted to the bidders who had the highest composite score to justify the basis of their computation of projected households over the eight-contract years.

47. There is no merit in the submission that there was a breach of the principles of natural justice in calling only the bidders with the highest composite score to explain the reasonableness of their bids. None of these bidders was being called upon to revise or improve their bids. In terms of the CGD Authorisation Regulations, the bidder with the highest composite score has to be declared as the successful bidder. If despite having the highest composite score, a bidder was being considered for rejection by the Board, it was that bidder who was justifiably called to explain the reasonableness of the bid. The other bidders had no locus to participate in the process. It is a settled principle of law that the rules of natural justice are attracted where a decision affects a right of a party against whom the decision has to be made. After the composite score of all bidders is calculated, the second highest bidder has no rights vis-à-vis the highest bidder or the Board unless the method of calculating the highest composite score itself is impugned. Calling upon the bidders with the highest composite score to explain the reasonableness of their bid did not alter the composite score of the H1 bidders or any other bidder for the same GA. The

question of hearing any other bidder would have arisen only if the H1 bidder stood disqualified, and the bidder with the next highest composite score also breached the 2-100 per cent range, thereby warranting scrutiny from the Board. In the present situation, when the Board decided to call the bidders with the highest composite score in order to allow them an opportunity to explain reasonableness of their bid, the administrative decision taken by the Board cannot be faulted as being in violation of the principles of natural justice.

48. At the 82<sup>nd</sup> meeting of the Board, which was held on 29 August 2018, the reasonableness of the bids submitted for GAs 51, 61, 62 and 72 came up for consideration. In GA 62 (Chennai-Tiruvallur) Torrent Gas Private Limited, relied on the current LPG domestic connections (41,73,073) according to the statistics of the Tamil Nadu government. This was extrapolated until 2026 taking the growth rate at 5 per cent per annum. On this basis, Torrent Gas Private Limited as the H1 bidder justified before the Board its quoted figure of PNG connections of thirty-three lakhs. For GA 61 (Kanchipuram), AG & P LNG explained that its computation was based on:

- (i) The urbanisation rates in the Kanchipuram district;
- (ii) Extrapolations of the number of households based on historical growth rates;
- (iii) The twin city status of Chennai and Kanchipuram; and
- (iv) The *per capita* income growth in Kanchipuram district.

On this basis, AG & P LNG justified its number for projected PNG connections. For GA-51 (Puducherry), SKN Haryana based its computation on the compound

yearly growth of households in the previous twenty years. Based on this growth rate, the bidder calculated the projected households till 2026 and accordingly presented this computation to the Board when called upon.

49. In its minutes dated 29 August 2018, the Board noted that the four GAs: 51, 61, 62 and 72 were compared with the upper limit fixed by the agenda note dated 23 July 2018 and projected households in 2026. The penetration of PNG domestic connections based on the upper limit fixed by the Board with reference to the projected number of households in 2026 varied from 45 per cent to 59 per cent. However, the penetration of PNG domestic connections based on quoted PNG connections with reference to the projected number of households in 2026 varied from 55 per cent to 99 per cent. The variation between the two sets of numbers was between 7 per cent to 54 per cent. The Board noted that it was in GA 72 where the highest variation of 54 per cent took place. The bid submitted by Torrent Gas Private Limited for GA 72 was consequently rejected. The Board observed that the computation for GA 72 by Torrent Gas Private Limited was based on untenable assumptions as described in para 14.3 of the agenda note. According to these assumptions, the PNG domestic connections quoted by the Torrent Gas Private Limited was 99 per cent of the projected households by 2026 which was taken as an unreasonably high penetration figure. However, for the remaining three GAs, the variation was between 7 per cent to 23 per cent of the projected households in 2026, and PNG penetration would be in the range of 55 per cent to 79 per cent. This exercise was carried out by the Board to enable it to consider the reasonableness of the bids. Torrent Gas Limited, whose bid was accepted for GA 62, was however not considered for acceptance for GA 72 since

its computation of the number of projected households and penetration rate was deemed unreasonable. In our view, the Board has certainly given a possible basis for coming to the conclusion that the bids submitted by the bidders with the highest composite score for GAs 51, 61 and 62 were reasonable and ought not to be rejected.

50. The agenda note dated 9 August 2018 merely tabled discussion on the disputed GAs. The highest bidders for GAs 61 and 62 were heard by the Board on 14 August 2018. The highest bidder for GA 51 was heard by the Board on 23 August 2018. The final decision to award authorisation in GAs 51, 61 and 62 to AG & P LNG, Torrent Gas Private Limited and SKN Haryana (the highest bidders) respectively was finally taken by the Board in its meeting on 29 August 2018. This decision was taken after hearing the bidders on whether their bids were reasonable or not. The Board did not reject all other bidders or presumptively announce these entities as successful bidders before making a determination as to the reasonableness of their bids. In light of this chronology of events, at no point did the Board reverse its decision with respect to the GAs in question.

51. The appeals before APTEL pertained to GAs 51, 61 and 62. The present proceedings were not in the nature of a public interest litigation instituted under Article 226 of the Constitution before a High Court challenging the entirety of the tendering process. Both before this Court and APTEL, it was contended that the Board had rejected bids in other GAs which were not-qualified on the ground that they were either below 2 per cent or above 100 per cent of the number of

households as per the 2011 Census figures. The Member Technical (Petroleum and Natural Gas) at APTEL examined the submission in paragraph 60 of the decision and held:

“60. Though the appeal pertains to only GAs, 51,61 & 62, the Appellant also submits that the Board rejected 37 numbers of bids which were not qualified because their bids were below 2% and higher than 100% of 2011 census figures as per the Board’s Press Release dated 10.08.2018 uploaded in its website. Though, the instant appeal also strictly pertains to only highness of PNG domestic connections, still for the sake of completeness, let me understand the status of these bids. On clarification, the Board has stated that there were only 9 bids with H-1 bidders quoting below 2% and above 100% limits of 2011 census. These 9 bids were accordingly highlighted to the Board, and final decisions were taken on these 9 bids by the Board after proper application of mind, hearing the parties and taking an objective decision. Out of 9 bids, 4 bids having lower than 2% connections were accepted after raising their bids through discussions with the bidders, otherwise, these GAs would have gone dry. In GA-37, IOC’s bid was rejected because of lower than 2% quote, but this decision of the Board has not been challenged by IOC. Out of the remaining 4 GAs where H-1 bidders quoted more than 100% of PNG connections of 2011 census household numbers for 3 GAs (51, 61 & 62), H-1 bidders were declared successful bidders after hearing them on their reasonableness of quotes. For the 4th GA (GA No. 72), the bid of the H-1 bidder who is the R-2 in the instant case was rejected having found its bid unreasonable and the GA was awarded to the next highest bidder and the H-1 bidder has not challenged this decision.”

This clarification by the Board as well as the findings which have been recorded by the Member Technical (Petroleum and Natural Gas) commends itself for acceptance.

52. In addition to their submissions with respect to the binding nature of the 2 – 100 per cent range set out in the Board Note dated 23 July 2018, the appellants

also argued that the Compounded Annual Growth Rate<sup>17</sup> considered by the Board for the period between 2001 and 2011 was higher than the actual annual growth rate, leading the Board to project a higher number of households for 2026 than may actually exist. It was alleged that the Board used the figure of 23,33,500 as the number of households existing in 2011 instead of 21,01,931 in calculating the growth rate, resulting in an inflated growth rate. This high growth rate, according to the appellants, led the Board to accept the submissions made by Torrent Gas Private Limited in justifying an “unreasonably high” quote for the number of households for the year 2026.

53. In his judgement, the Member Technical noted that the appellant had in fact calculated the CAGR using overall population growth instead of using household growth. Evidently, for the purpose of projecting the number of PNG connections within a GA, it is the number of households and not the overall population that is relevant as each household is unlikely to have more than one PNG connection. Moreover, as neither the CGD Regulations nor the Bid Document required the number of projected households to be calculated on the basis of 2011 Census data, the decision of the Board to accept the justification provided by the bidders cannot be attacked on the ground that the figures provided did not strictly match the numbers extrapolated from the 2011 Census data. Lastly, the Member Technical (Petroleum and Natural Gas) observed:

“51. ... Moreover, the calculations have been done by an expert body (the Board) which has been constituted as per Statutory Act. In addition, **the estimates on future PNG domestic connections made by the 3 bidders based on various parameters are only estimates. These are not meant to be arrived at by any specified formula or direct**

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<sup>17</sup> “CAGR”

**mathematical precision. The power to weed out unreasonably high or low quote is only an enabling power and not a yardstick or parameter for evaluation.”**

(Emphasis supplied)

The power granted to the Board under Clause 14.2 of the Bid Document is an enabling clause that allows the Board to apply its mind to a quote and determine its reasonableness. The quotes submitted by all bidders with respect to the projected number of households in 2026 are admittedly estimates. Similarly, the Board's own determination of a baseline for comparing the reasonableness of various quotes is also an estimate. Therefore, the Board's use of the baseline figure and its consequent acceptance of the reasonability of a quote cannot be faulted because it did not strictly adhere to one particular methodology of arriving at a number of projected households unless the methodology used is arbitrary, having no correlation with the result sought to be achieved. We therefore approve of the finding of the Member Technical with respect to the calculation of the number of households.

54. The present batch of appeals arises from two divergent opinions of the Chairperson and the Member Technical (Petroleum and Natural Gas) of the APTEL. Several arguments urged by the appellants before us find voice in the opinion of the Chairperson. Therefore, for the sake of completeness it is necessary to briefly advert to the opinion of the Chairperson allowing the appeals.

The Chairperson observed as follows:

“136. ... On 23.07.2018 certain criteria/parameters were indicated by this so called Evaluation Committee in the Agenda Note. ... This indicates that the exercise so far as criteria/ parameters was uniform for all the bids. .... **The report on Agenda Note dated 09.08.2018, in fact, recommended that the highest bidders of GA 51, 61, and**

**62 were disqualified** since their quote of PNG connections were beyond 100% of the total households of 2011 census. ... However, the Minutes of the Board dated 10.08.2018 indicate that the four members of the Board out of which three had approved Agenda Note, changed their opinion so far as disqualification of highest bidder of these three GAs 51, 61 and 62. It's also noticed from the affidavit of the Board filed 09.11.2018 that **the Board has correctly applied the unreasonable low criteria to all the bidders whose bid was below 2%, but surprisingly the bids which were beyond the limit of 100% of 2011 census, the Board thought it fit to relax the criteria** by calling the high bidders for negotiation. **If the Board thought it fit to hear the affected parties, then it ought to have invited all the affected parties of the said GA i.e., all the bidders who stand to lose the bid,** since such procedure was exercised so far as unreasonably low criteria to all bidders who quoted below 2% of 2011 census. **Assessment of reasonability of a bid cannot be equated with the concept of rejection of a bid as not qualified for a particular criteria.** Reasonability of a bid has reference to subjective assessment/satisfaction. The assessment of a bid based on the available material would amount to objective assessment.”

(Emphasis supplied)

It is evident from the above extract that the Chairperson's findings are based on three key assumptions:

- (i) The Board Note dated 23 July 2018 was binding on the Board and the agenda note dated 9 August 2018 was evidence of the Board Note's binding nature;
- (ii) Because the Board disqualified certain other bidders by applying the 2 – 100 per cent range, it was bound to do so against the successful bidders in GAs 51, 61 and 52; and
- (iii) Because the assessment of reasonability was a “subjective assessment”, the Board was obligated to hear other bidders in the disputed GAs before declaring successful bidders.

55. As noted previously, on a bare construction of the Board Note dated 23 July 2018 and the fact that the Board Note was formulated after the last date for

the submission of bids, the Board Note did not set out absolute criteria for disqualification of bids. The agenda note dated 9 August merely tabled a proposal to apply the criteria of 2-100 per cent range but the Board did not subsequently adopt this course of action, a decision within its power and indeed necessary to preserve the integrity of the bidding process. Having established that the Board Note was not an absolute binding criteria, and the Tribunal was approached only with respect to GAs 51, 61 and 62, the Board's treatment of other GAs cannot be decisive in determining the legality of the authorisations granted in GAs 51, 61 and 62, especially where the Board's actions in respect of these other GAs have not been independently challenged. Lastly, the Chairperson has construed the assessment of the reasonability of the highest bidder's quote as a decision affecting the rights and liabilities of all other bidders for the GAs, thus requiring them to be heard. As noted previously, the assessment of the reasonability of the bid was a matter solely between the highest bidder and the Board. Such an assessment would not alter the scores of the highest bidder *vis-à-vis* the scores of the other bidders. The sole question was whether the highest bidder's quote was reasonable, and the power to determine such reasonability resided solely with the Board by virtue of Clause 14.2 of the Bid Document. Thus, the presence and hearing of other bidders was not necessary.

56. For the above reasons, we disagree with the opinion of the Chairperson and concur with the view which was taken by the Member Technical (Petroleum and Natural Gas) to dismiss the appeals. The Appeals are accordingly dismissed.

Transferred Cases Nos 27 of 2019 and 26 of 2019 are disposed of. There shall no order as to costs.

57. Pending application(s), if any, shall stand disposed of.

.....J.  
[DR DHANANJAYA Y CHANDRACHUD]

.....J.  
[HEMANT GUPTA]

New Delhi;  
February 17, 2020.