

Reportable

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

Civil Appeal No. 1933 of 2022

The TATA Power Company Limited Transmission

.... Appellant

Versus

Maharashtra Electricity Regulatory Commission & Ors.

.... Respondents

J U D G M E N T

Dr Dhananjaya Y Chandrachud, CJI

A glossary of defined terms used in the judgment has been provided below:

Glossary of Terms	
Defined Term	Definition
Act	Electricity Act, 2003
AEMIL/ second respondent	Adani Electricity Mumbai Infra Limited
AEML-T third respondent	Adani Electricity Mumbai Limited – Transmission
APTEL	Appellate Tribunal for Electricity
CEA	Central Electricity Authority
Development Guidelines	Guidelines for encouraging Competition in Development of Transmission Projects
DPR	Detailed Progress Report
EC/ fifth respondent	Empowered Committee
FoR	Forum of Regulators
GoM's GR	Government of Maharashtra's, Government Resolution dated 04.01.2019
HVDC	High Voltage Direct Current
HVDC Project	1000 MW HVDC (VSC based) link between 400 kV MSETCL Kudus & 220 kV AEML Aarey EHV Station
MERC/ first respondent	Maharashtra Electricity Regulatory Commission
MERC MYT Regulations	Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations 2019
MERC MYT Amendment	Maharashtra Electricity Regulatory

Regulations	Commission (Multi Year Tariff) (First Amendment) Regulations 2022
MoP	Ministry of Power
MSETCL / fourth respondent	Maharashtra State Electricity Regulatory Commission
NEP	National Electricity Policy
NTP 2006	National Tariff Policy 2006
NTP 2016	National Tariff Policy 2016
REL	Reliance Energy Ltd.
RInfra	Reliance Infrastructure Limited
RTM	Regulated Tariff Mechanism
STU	State Transmission Utility
TBCB	Tariff Based Competitive Bidding
TBCB Guidelines	Tariff Based Competitive Bidding Guidelines for Transmission Service issued by the MoP dated 13.04.2006
TPC-T/ appellant	Tata Power Company Limited Transmission
VSC	Voltage Source Converter

This judgment has been divided into the following sections to facilitate analysis:

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1. APTEL, by its judgment dated 18 February 2022, dismissed an appeal under Section 111 of the Act instituted by the appellant against a decision of MERC dated 21 March 2021.
2. On 21 March 2021, MERC granted a transmission licence to AEMIL under Sections 14 and 15 of the Act for setting up a 1000 MW HVDC (VSC based) link between 400 kV MSETCL Kudus and 220 kV AEMIL Aarey EHV Station.
3. The appellant challenged MERC's order before APTEL, inter alia, on the ground that the grant of the licence was not preceded by a TBCB process. TPC-T contended that the failure to adhere to a TBCB process pursuant to Section 63 was contrary to public interest and statutory mandate. APTEL dismissed the appeal. This has given rise to a statutory appeal under Section 125 of the Act.

A. The Facts

4. On 12 November 2007, MSETCL issued a communication to CEA stating, inter alia, that it was difficult to lay overhead AC lines to bring power from the new 400kV sub-station, which was required to meet Mumbai's growing demand of power, to Mumbai's load centres due to constraints. Hence, it was proposed that VSC based HVDC technology may be utilised to connect the new sub-station with major load centres in Mumbai through DC cables. In that context, the letter stated:

"M/s. Reliance energy (REL) and M/s. TATA Power Co. Ltd. (TPC) has carried out necessary survey and accordingly M/s. REL has proposed to connect Mumbai new location to Ghodbunder partly by overhead line and partly by underground cables. **Further, M/s. REL also proposed to connect Mumbai New Location to Aarey by HVDC (VSC based technology).**

M/s. TPC has planned to establish a 220 kV substation at Vikhroli and have existing Salset, Dharavi and Trombay

substations. These substations will be fed from 400 kV proposed substation at Ghatkopar.

Thus the major load centres in Mumbai will be fed as below.

Colaba area will be fed by 220KV Dharavi S/S (Tata)
Andheri area will be fed by 220KV Versova & Aarey S/S (REL)
Bandra area will be fed by 220KV Aarey S/S

Maharashtra State Transmission Company Ltd. (MSETCL) has also proposed to connect 400KV Mumbai New Location with 400KV New Mumbai (Panvel) for system strengthening.

State Transmission Utility (STU) office would appoint a Consultant who is having sufficient knowledge in VSC based HVDC technology for finalizing the scheme, subject to M/s REL agreeing to bear the cost of the same.”

(emphasis supplied)

REL envisaged a transmission project by deploying HVDC (VSC) based technology, where the load/evacuation point for the power to be received into Mumbai city was at Aarey. Both REL and TPC-T were to participate in identifiable segments for bringing power to Mumbai's load centres.

5. On 5 May 2009, MSETCL notified a five-year plan for the period 2009-10 to 2013-14. The plan included the Nagothane-Aarey HVDC link. Likewise, details of the on-going and new schemes of TPC-T were also provided. In terms of the plan, REL was to execute the Nagothane - Aarey transmission project.

6. In November 2010, Mumbai experienced a partial grid disturbance. A Committee chaired by Professor Dr SA Khaparde of IIT Mumbai was constituted to study the situation. The Committee recommended adopting the HVDC technology as a long-term solution for ensuring the reliability of power supply for Mumbai for the proposed transmission project with a 2 x 350 MW HVDC voltage

source converter based transmission link for Mumbai. This was identified as a critical bulk power injection scheme.

7. On 13 May 2011, RInfra submitted an application under the provisions of Section 14 and 15 of the Act for the grant of a transmission licence for the entire State of Maharashtra. By an order dated 11 August 2011, MERC observed that R-Infra cannot be granted a transmission licence for the entire State of Maharashtra as paragraph 5.1 read with 7.1.6 of NTP 2016 mandated TBCB for transmission services. Instead, MERC granted RInfra a transmission licence to establish and operate specific transmission lines for a period of twenty-five years. The transmission lines in respect of which the licence was granted to R-Infra were specified in the communication dated 11 August 2011.

8. On 2 November 2012, the report of the HVDC sub-committee for finalization of the consultant noted the reasons for adopting HVDC (VSC) based technology to meet the power demand for Mumbai. The following extract indicates that after exploring various operations it was found that connectivity at Nagothane was suitable. On the other hand, Aarey being a major load centre was a “suitable sink point for connection”:

“The First Meeting of the Sub-Committee was held on 28.08.2012, where in following as discussed and agreed upon

Following requirements were discussed & considered:

- i. Classic HVDC has limited capability of Active / Reactive Power control, whereas VSC HVDC has dynamic control of Active & Reactive Power Control
- ii. Classic HVDC has no Blackstart facility; whereas VSC HVDC has blackstart facility which can be a major support to revive Grid failures.
- iii. Classic HVDC requires more footprints. VSC HVDC being compact and modular in design hence it requires only 30% footprint area to setup a converter station

iv. Short Circuit levels are increasing, hence HVDC link to Mumbai shall be ideal

To meet the above, it is concluded that, 2x500 MW HVDC Voltage Source Converter (VSC) based technology for Mumbai is essential.

For connectivity with the grid, various options were explored and it is concluded that electrical connectivity at Nagothane is suitable. Similarly Aarey, being the major load centre, it is concluded that Aarey is the suitable sink point for connection.”

9. On 1 February 2013, RInfra submitted a DPR to MERC for the appointment of a consultant for its proposed 2 x 500 MW HVDC (VSC) based transmission line from MSETCL’s 400 kV Nagothane station to the 220 kV Aarey sub-station.
10. On 5 April 2013, MERC addressed a letter to R-Infra, granting it in-principle clearance for hiring a consultant for the Nagothane-Aarey HVDC Scheme to study the system and assist in the selection and design of the technology and bidding process of the DPR. However, it was noted that the ‘in-principle’ clearance should not be construed as a final approval for the purposes of the Annual Recurring Revenue and the scheme would be open to scrutiny during the tariff determination process, particularly in the context of actual cost incurred, scope and objective achieved. MERC approved the hiring of the consultant for the implementation of R-Infra’s transmission projects. R-Infra was directed to submit quarterly progress reports on the transmission projects based on HVDC technology.
11. The five-year plan is submitted by MSETCL in terms of Section 39 of the Act and Regulation 8 of the MERC (State Grid Code) Regulations 2006. On 7 March 2013, MSETCL in a communication to MERC confirmed that the following

scheme was being considered in the five-year plan for 2013-14 to 2017-18 for the Mumbai Metropolitan region:

S. No.	Name of Scheme	Year of Commissioning	Remarks
1.	2x500 MW HVDC IGBT (VSC) based Aarey – Nagothane Link (120 Ckt km) with Bays.	2016-17	Implementation utility RInfra-T

12. On 19 March 2013, RInfra submitted an application to MSETCL seeking grid connectivity for the Nagothane-Aarey HVDC Scheme. This was allowed on 21 August 2013 by MSETCL. The letter detailed out the scope of the work to be carried out by R-Infra and specified the conditions for compliance.

13. On 20 November 2013, a meeting was held between MSETCL and R-Infra to discuss and review the HVDC connectivity to the Aarey sub-station. In the meeting, MSETCL proposed availing of connectivity from the 400kV Kudus substation instead of the 400kV substation at Nagothane. The reason for the change in the point of connectivity being sought from Nagothane as originally envisaged to Kudus was as follows:

“

- Director (Operations) suggested that R-Infra can avail connectivity from 400 KV Kudus (MSETCL) Substation which is much near to Aarey Substation (R-Infra) as compared to 400 KV Nagothane (MSETCL) substation (125 km). Proposed 400 KV Kudus (MSETCL) Substation will be commissioned within 2 years. 400 KV Kudus S/S will have strong source of 765 KV Kudus (PG) and other 400 KV network from Vapl(PG) 400 Bubheswar MSETCL), 400 KV Nashik (MSETCL) 400 KV Padgha (MSETCL) 400 KV Bolsar (PG) compared to 400 KV Nagothane (MSETCL) S/S. Therefore 400 KV Kudus Substation is a better option for HVDC connectivity. The route cable linkage cost will be considerably lower.

- Chief Engineer (STU) submitted that when original plan was made for R-Infra HVDC project, the 400 KV Kudus s/s (MSETCL) was not in the STU plan but now it has been included I STU plan. Therefore it should be examined positively for HVDC connection with Aarey. The cost of the project will be reduced considerably.”

Evidently, R-Infra had reservations about revising the point for HVDC connectivity from Nagothane to Kudus. The Minutes of the Meeting of 20 November 2013 indicate those concerns:

“R-infra expressed their concern to consider the revision of scope of connectivity which was decided by standing committee. R-infra already initiated procurement of land near Nagothane (MSETCL) and detail survey. All required clearance proposals are initiated by R-Infra for which approvals are in a pipeline and at this stage it is very difficult to consider the new proposal.”

The Director (Operations) of MSETCL advised R-Infra, while agreeing to its concerns, to nonetheless examine the suggested proposal and submit its comments.

14. On 14 February 2014, R-Infra submitted a DPR for the transmission link between Nagothane and Aarey under the HVDC (VSC) project. On 10 April 2014, MERC granted in-principle clearance to R-Infra for the Nagothane-Aarey HVDC Scheme. R-Infra was intimated that the in-principle approval was subject to it filing a petition for the amendment of its transmission licence. It was also mentioned that the in-principle clearance should not be construed as a final approval for Annual Recurring Revenue purposes and that the scheme will be open for scrutiny during tariff determination:

“5. Please note that this in-principle clearance should not be construed as final approval for ARR purpose and the scheme will be open for scrutiny during tariff determination process/ARR review, particularly in the

context of actual cost incurred, scope and objective achieved etc. ex-post after implementation of the scheme. R-Infra-T will be required to submit the status of implementation of the scheme with cost incurred till date along with their ARR Petition or during the tariff determination process at the appropriate time.

[..]

7. Immediately after the completion/commissioning of the scheme, R-Infra-T should communicate to the Commission, the date of completion of the scheme, actual cost incurred, escalation in cost, if any with reasons, the scope and objectives of the scheme and to what extent they have been achieved, etc. so as to facilitate a comparison between the in-principle clearance and the actual.”

15. On 5 January 2015, MSETCL proposed a revised scheme for strengthening Mumbai’s transmission system to MERC. MSETCL proposed that it would establish a 400kV Kudus – Aarey HVAC scheme. The reason for substituting the HVDC project to be executed by R-Infra with MSETCL’s HVAC transmission link from Kudus to Aarey was clarified in paragraph 9 of the letter which has been extracted below:

“9) In view of above, the HVDC project of R-Infra T is reviewed considering uncertainties in source generation and upcoming strong source of 400 KV Kudus at much shorter distance (approx. 80km) than 400 KV Nagothane S/s. Therefore, considering the above changes in network configuration, it is proposed to establish 400 KV substation in Mumbai for the enhancement of Transmission corridor capacity to Mumbai system through 400 KV D/C Quad line from 400 KV Kudus (MSETCL) substation. This will enhance the transmission capacity by 1500-2000 MW.”

The scope of the scheme proposed by MSETCL was delineated in paragraph 11 of the communication which is extracted below:

“11) The scope of proposed scheme for above purpose is as given below:

- i) 400 KV Kudus (MSETCL)-400 KV Aarey (MSETCL) D/C quad line-80 km.
- ii) 400/200 KV, 2x500 MVA ICTs.

- iii) 200 KV Interconnection between 400/220 KV Aarey and proposed 200 KV Goregaon Film city with bays.
- iv) 6x200 KV bays for 220 KV interconnection with TPC and R Infra (T) lines.
- v) 400 KV spare bays for interconnection with 400 KV Vikhroli (TPC).
- vi) 400/220 KV, 2x500 MVA ICTS for future expansion.

The scheme of establishment of 400 KV Aarey (MSETCL) Mumbai will be included in five year STU Pan 2015-16 to 2019-20 for commissioning during 2017-18. The HVDC project stands cancelled for the reasons as mentioned above. Necessary DPR of the scheme will be submitted to Hon'ble Commission in due course of time for in-principle clearance.”

In other words, instead of R-Infra developing a transmission link between Nagothane and Aarey using the HVDC technology, MSETCL proposed to establish the link between Kudus and Aarey itself using HVAC technology by including it in the five-year plan for 2015-16 to 2019-20.

16. On 23 January 2015, R-Infra addressed a communication to MSETCL responding to the communication dated 5 January 2015. R-Infra responded to the proposal of the substitution of the HVDC (VSC based) scheme from Nagothane to Aarey with an overhead transmission line from Kudus to Aarey to be executed by MSETCL. The letter noted that:

- (i) The approved HVDC Scheme had been recommended by the Standing committee appointed by MERC;
- (ii) The HVDC project which was envisaged with VSC based technology had significant technological advantages over the HVAC technology proposed by MSETCL; and
- (iii) In the past, Power Grid Corporation of India Limited and MSETCL had cancelled proposed HVAC transmission lines for bringing power into

Mumbai or terminated them outside Mumbai on account of severe right-of-way constraints in and around Mumbai.

R-Infra therefore reiterated that the HVDC – VSC based scheme as approved should be continued. However, R-Infra indicated that the injection point could be relocated to Kudus while retaining the HVDC Scheme for bulk power injection to Mumbai.

17. On 2 May 2016, MERC cancelled the in-principle approval accorded to R-Infra's HVDC Scheme. The letter of cancellation is extracted below:

“This has reference to review report of approved capex Schemes submitted by RInfra-T vide letter dated 5 April 2016;

- 1) RInfra – T has submitted the review of 7 schemes, as inspite of having been approved by the Commission long back, the work against the schemes are yet to be initiated for various reasons.
- 2) R-Infra-T has submitted as follows;
 - a) 3 Schemes (EHV Scheme for 220KV Golibar S/s, 220 kV Dahisar Housing S/s & 220 kV Airport S/s) amounting to Rs.600.51 Crore will be submitted for revised approval after allocation of land.
 - b) 2 Schemes (HVDC Consultancy, 2x500 MW HVDC Scheme) amounting to Rs.7103.99 Crore are kept on hold as the STU reply is awaited.**
 - c) 1 Scheme (Land DPR) amounting to Rs.232.55 Crore is withdrawn as the approved land cost is already considered in the respective DPR schemes.
 - d) Regarding the Scheme of establishment of Nagri-Niwara substation amounting to Rs.460.59 Crore, RInfra has submitted that it has executed a part, i.e., the cable laying portion between RInfra Aarey and MSETCL Borivali stations, as MSETCL has proposed EHV station in the same area catering to RInfra-D & MSEDCL load and the substation portion is proposed for withdrawal.
- 3) Due to change in scope of work of RInfra-T (i.e. establishing cable connectivity between RInfra-T Aarey & MSETCL Borivali without installing Nagri-Niwara substation), RInfra-T is required to take revised approval of the scheme along with STU recommendation for such change.

- 4) In view of the above, I am directed to communicate that in principle approvals given to DPRs submitted by R Infra-T for EHV Scheme for 220 kV Golibar S/s, 220kV Dahisar Housing S/s, 220 kV Airport S/s, Land DPR, **HVDC consultancy, HVDC Line & substation portion of Nagri-Niwara scheme stand cancelled.**”

(emphasis supplied)

18. On 22 December 2016, MSETCL submitted its five-year plan for FY 2016-17 to 2021-22 wherein the HVDC Scheme was removed. The HVDC Scheme was not included in the 5-year plan submitted for the FY 2017-18 to 2022-23. On 29 August 2018, AEML acquired R-Infra.

19. At this stage, it is material to note that the appellant, TPC-T, had submitted a DPR for commissioning a 400kV receiving station at Vikhroli which was approved by MERC on 2 June 2011 with a capital cost of Rs 846.19 crores. In terms of the DPR, the work was to be completed in March 2015. TPC-T proposed revised timelines for the completion of the scheme in financial year 2017-18 on the ground that the approval required for it including clearances from Ministry of Environment, Forest and Climate Change and the Airport Authority of India were at various stages and the land required was in the final stage of being taken into possession. By its order dated 12 September 2018, MERC noted that TPC-T has submitted a revised DPR twice, pursuant to which it had approved the extension of the target plan date to March 2017 and later, March 2019. TPC-T proposed a revised completion date of March 2022. Noting the absence of any progress in the scheme of TPC-T, MERC closed the scheme. It observed:

“7.12.1 As regards, 400 kV Receiving station at Vikhroli, the Commission notes that TPC-T had submitted its DPR for commissioning of 400 kV Receiving Station at Vikhroli and the Commission has approved the same on 2 June, 2011 with capital cost of Rs. 846.19 Cr. In the DPR, TPC-T had submitted that the work shall be completed in March, 2015.”

“7.12.8 Based on TPC-T's submissions in the present Petition, the Commission further notes, TPC-T had envisaged imminent load requirement and exponential increase in the power requirement due to large scale development in residential and commercial properties (especially in Godrej area) at Vikhroli and around area. In actual, the predicted load growth has not come up in the area.”

“7.12.9 Considering above, the Commission noted that STU has observed that there is an inordinate delay in completion of this scheme and suggested to take up this scheme under Tariff Based Competitive Bidding (TBCB) route. The Commission is concerned about the approach adopted by TPC-T for execution of the scheme. This scheme is being treated as deemed closed by the Commission and the Commission directs STU to take a review of such critical schemes and propose a way forward. STU is directed to submit its report to the Commission on review of TPC-T's proposed 400 kV Vikhroli Receiving Station within a month.”

The Vikhroli transmission scheme which envisaged the setting up of a 400kV receiving station by the appellant was hence deemed to be closed by MERC on the ground of TPC-Ts inordinate delay in completion. The project was instead suggested to be allotted through the TBCB route.

20. On 23 November 2018, AEML submitted a proposal to MSETCL indicating that in view of the severe constraints on the construction of overhead lines in and around Mumbai, the 400kV Aarey – Kudus overhead transmission scheme of MSETCL “never took off”. Hence AEML proposed the development of a 2 x 500 MW HVDC (VSC) based link between Kudus and Aarey and the inclusion of the project in the transmission licence of AEML. AEML submitted a revised ‘connection application’ for carrying bulk power from the state grid to Mumbai; an amendment to the earlier application over which grid connectivity for the Nagothane-Aarey HVDC project was granted by MSETCL on 21 August 2013;

and for the grant of connectivity and implementation of the 2 x 500 MW HVDC (VSC) link.

21. TPC-T sought a review of the order dated 12 September 2018 by MERC cancelling its licence for the Vikhroli transmission scheme. On 29 January 2019, the review petition was dismissed by MERC reiterating its earlier reasoning that TPC-T had substantially delayed the project and noting that there was no defect or error apparent on the face of the record.
22. On 28 May 2019, MSETCL submitted its five-year plan for 2018-19 to 2023-24 to MERC under which the HVDC Scheme was included as an additional scheme within the scope of AEML-T. The plan included the Aarey-Kudus HVDC Scheme by AEML-T and was made available on the website of MSETCL.
23. AEML-T sought the suggestion of CEA on a VSC based underground cable system for bulk power injection into the existing network of Mumbai. CEA in its communication dated 13 June 2019 stated that it had held meetings on 8 May 2019 and 31 May 2019 with MSETCL, AEML-T and TPC-T besides the central transmission utility. The communication noted that in those meetings there was a consensus for planning a transmission scheme of feeding power to the Mumbai region in the time frame of 2025-26 and 2030 based on studies. AEML-T and TPC-T were requested to provide substation wise load data with any additional transmission element which was planned in the above time frames. In response, both AEML-T and TPC-T furnished sub-station wise load for 2024-25 and details of the transmission schemes planned during 2024-25. Load flow studies were also carried out for 2024-25 conditions considering all schemes planned by

AEML-T and TPC-T till 2024-25 and schemes of the STU until 2021-22. The primary findings which were recorded by the CEA were in the following terms:

- “1.0 Transmission elements which are not N-1 compliant
 - i) Borivali – Array 220 kV D/c line (caters to MMR load)
 - ii) Kalwa – Mulund 220 kV S/c line (2 ckts) (caters to load of Mulund and Bhandup which are outside MMR)
- 2.0 High loadings on transmission elements (400/220 kV ICTs and 220 kV lines) with N-1 contingency criteria
 - i) 400/220 kV ICTs at Kalwa S/s
 - ii) 400/220 kV ICTs at boisar (PG) S/s
- 3.0 Loading above 300 MW on 220 kV substations
 - i) 220 kV Array S/s
 - ii) 220 kV Dharavi S/s
- iii) 220 kV Carnac S/s
- iv) 220 kV Varsosa S/s (AEML)
- 4.0 With provision of 1000 MW feed from Kudus to Array it is observed that
 - i) All transmission elements are N-I compliant (except for Kalwa-Mulund 220 kV S/C lines – 2nos. This can be overcome by LILO of either Kalwa-Trombay 220kV S/C line or Kalwa-Borivali 220 kV S/C line at Mulund or by shifting of LILO at Bhandup from Mulund – Borivali 220 kV line to Kalwa-Borivali 220 kV line
 - ii) The loadings on transmission elements are reduced.”

24. CEA, in view of above findings found that the Kudus-Aarey 1000MW HVDC link will provide ‘in feed’ to Mumbai and increase reliability. Moreover, since the link was based on VSC technology it would help in voltage regulation. Keeping the power requirements in consideration, CEA proposed that the possibility for another 1000 MW may be explored along with the Kudus to Aarey HVDC link. Based on the study report of CEA, MSETCL by a letter dated 27 June 2019 confirmed that the Kudus-Aarey 1000MW HVDC link may be required for pushing additional power into Mumbai as the link creates a separate and additional transmission corridor.

25. On 28 June 2019, MERC issued a letter to MSETCL directing it to take necessary steps for the expeditious execution of Kudus-Aarey 1000 MW HVDC

link by AEML-T according to the five-year transmission plan of the STU dated 28 May 2019. MERC's letter took note of the fact that based on the study report of CEA which recommended the Kudus-Aarey 1000MW HVDC based transmission project for increasing reliability and voltage regulation, MSETCL would take necessary steps for expeditious execution of the project in terms of the five-year transmission plan:

"5. Considering the STU Plan of incorporating 2 x 500 MW Kudus-Aarey HVDC link, CEA's load flow study recommending 1000 MW Kudus-Aarey HVDC link for Mumbai region, and STU's confirmation vide its letter dated 27.06.2019, the Commission directs MSETCL/STU to take all necessary steps for expeditious execution of Kudus-Aarey 1000 MW HVDC link by AEML-T as per 5 Year Transmission Plan of STU dated 28.05.2019 communicated to Commission. The Commission further directs MSETCL/STU to take similar steps for expeditious execution of the other Mumbai Transmission schemes proposed in its STU plan with the likely modifications as referred in the letter of STU dated 27 June 2019 under reference at sl.no. 7 above."

26. On 23 September 2019, TPC-T instituted an appeal before APTEL against MERC's order dated 12 September 2018 providing for a deemed closure of its Vikhroli scheme. In its order dated 23 September 2019, APTEL noted that there was an inordinate delay of eight years on the part of TPC-T as a consequence of which the project was directed to be placed under the TBCB route. APTEL held that TPC-T had not taken adequate steps since 2011 to ensure the completion of the project, which was envisaged in the interest of the consumers of Mumbai:

"77. The contention of the Appellant that if the implementation of scheme under TBCB is allowed, it would further delay the scheme in question is not acceptable to us, since in the TBCB process the scheme has to be executed on timely basis, which also optimises the cost of the project

thereby reducing the financial burden on the consumers. The Appellant, right from 2011 till date, has not taken any active steps to achieve the completion of the project, which helps the consumers of Mumbai. Now, at this stage, the Appellant claims that it has put in lot of efforts and is ready to complete the project. The Appellant was also permitted to participate in the TBCB process. Therefore, the observation of the Commission pertaining to delay in implementing the scheme in question by 8 years cannot be found fault with. In the above paragraphs several observations on facts are made how the Appellant moved at snail's pace to start and implement the project. The TBCB process is in conformity with the tariff policy notified by the Ministry of Power, Government of India. As far as the so called efforts and the expenditure made, if any, by the Appellant, the Respondent-Commission has made observations that 'the said amount spent/claimed by the Appellant has to be refunded to the Appellant since it is part of conditions of the bid in question.'

27. On 2 December 2019, AEML-T filed a petition seeking to amend its licence so as to include the HVDC project since the licence issued to AEML-T was line specific, which means that it authorized AEML-T to create, operate and maintain assets that were specifically identified in the license. TPC-T filed its objections in response to a public notice issued by AEML-T, on the ground that the HVDC Scheme should be executed under the TBCB route in terms of GoM's GR dated 4 January 2019. On 15 January 2020, MERC sought the recommendations of the STU on the amendment application made by AEML-T. On 22 January 2020, the STU indicated that the HVDC project was proposed in the agenda in a forthcoming EC meeting for being considered under the TBCB route.

28. On 30 March 2020, MERC issued its multi-year tariff order in case No 297 of 2019 filed by AEML-T stating that:

- (i) The HVDC project was referred to the EC whose decision was awaited;

(ii) The decision on implementing the HVDC project was to be taken in the amendment application or in any other proceedings. The relevant observations are extracted below:

“2.1.21 Further, AEML-T has already filed its Petition in Case No. 195 of 2019 seeking of its Transmission Licence which also includes the proposed HVDC scheme. The Petition for Transmission Licence amendment is under consideration with the Commission.

2.1.22 As regards the project to be undertaken under TBCB, the STU vide its letter dated 22 January, 2020 has submitted that the 1000 MW HVDC Kudus-Aarey schemes has been referred to the Empowered Committee formed by the Govt. of Maharashtra and the decision of Empowered Committee is awaited.

2.1.23 In view of the above, the Commission will decide regarding the HVDC scheme during proposed Transmission Licence Amendment of AEML-T in Case No. 195 of 2019 or any other proceedings as deemed appropriate.”

29. In paragraph 5.3.12 of its order, MERC noted that the HVDC Scheme was critical for strengthening the Mumbai transmission corridor and observed:

“5.3.12 In continuation to the above, the Commission, as discussed in Paras 2.1.19 to 2.1.23 of this Order considers the timely implementation of the schemes pertaining to the strengthening of the Mumbai transmission corridor viz. Interconnection Point at Vikhroli and HVDC scheme, as very critical. The HVDC scheme is already part of the STU Five Year Plan (FY 2018-19 to FY 2023-24) and as per the plan, the scheme is envisaged to be executed by AEML-T in the year 2023-24. In this regard, AEML-T has already approached the Commission with a Petition to amend its existing Transmission License in Case No. 195 of 2019 to include the proposed HVDC scheme along with other proposed amendments which is under consideration with the Commission. Also, in order to assess its reasonability of the cost, AEML-T has recently submitted its DPR for in-principle approval of the Commission. Considering the critical nature of these schemes and time required for obtaining the necessary regulatory approvals, the Commission directs the STU and AEML-T to initiate all the necessary steps for implementing the critical schemes within the timeframe envisaged in the STU Five Year Plan.

However, the implementation of the scheme would be subject to necessary Regulatory approvals.”

30. On 30 May 2020, the EC of GoM conducted its fourth meeting at which it opined that the HVDC Scheme which was a part of the earlier five-year plan for 2018-19 to 2023-24 was not a part of the plan for 2019-20 to 2024-25. The members of the EC opined that the HVDC Scheme, not being a part of the five-year plan, need not be considered for TBCB at that point and deferred the decision. The STU was directed to send its plan for 2019-20 to 2024-25 to MERC.

31. On 3 September 2020, MSETCL submitted its five-year plan for financial years 2019-20 to 2024-25 before MERC. The plan included the HVDC project in FY 2024-25, subject to comments from CEA. The plan envisaged 1000 MW HVDC terminal stations at Kudus to Aarey for 2024-25. The note appended to the foot of the tabulated statement is in the following terms:

Note:
** 1000 MW HVDC Terminal Stations at Kudus & Aarey and HVDC Link
Two HVDC schemes were part of STU plan 2018-19 to 2023-24 with a note that consolidated detail study will be carried out considering all Mumbai related schemes separately. Subsequent STU study indicated that with inclusion of 400kV Velgaon, 400 kV Kalwa Switching, 400 kV Kalwa-Padghe M/Cline ect., these HVDC schemes will not be required. However, in view of earlier CEA study in this regard and as HVAS schemes were not referred to CEA, the STU study including these HVDC schemes has been referred to CEA for their comments. Hence 1000 MW Kudus-Aarey HVDC link is included in the year 2024-25 of this STU five year plan (2019-20 to 2024-25) is subject to averse comments if any by CEA in the matter may lead to deletion of the scheme from STU five year plan.

32. On 21 September 2020, AEMIL-T filed an application in Case 195 of 2019 before MERC proposing to amend its licence and sought permission to delete the HVDC Scheme in its entirety from the scheme proposed in the petition on the ground that the scheme is proposed to be executed by its subsidiary company, AEMIL. On the same day, AEMIL and AEMIL-T filed a joint petition bearing Case No 190 of 2020 before MERC for a line specific transmission licence for the

proposed HVDC project in the name of AEMIL. AEMIL and AEML-T stated that in view of the transmission constraints and time period involved in the commissioning of bulk power schemes, the need for an HVDC Scheme was discussed during the first meeting of the Standing Committee chaired by the Secretary, Energy, GoM on 29 January 2018 for strengthening the electricity supply system to Mumbai city. Moreover, the HVAC scheme which was proposed by MSETCL had not progressed beyond the stage of a route survey despite the passage of three years. The above amendment, this Court is informed, was in order to drop the transmission project which was based on HVDC technology from AEML -T's scope of work. Instead, a fresh transmission licence was sought in the name of AEML-T's subsidiary, AEMIL. It was stated that the amendment was necessitated because:

- (i) With a four to five year execution period, the scheme was capital intensive, requiring finance from multiple financial institutions;
- (ii) In view of the substantial financial investment which was required, financial institutions required identified target funds which could be strictly monitored and controlled; and
- (iii) There was a need to ensure timely inclusion and financial closure.

33. On 12 October 2020, MSETCL filed its reply stating that it does not recommend the grant of a transmission licence for the HVDC project to AEMIL on the grounds that: (a) In the transmission licence granted to AEML-T on 11 August 2011 to R-Infra, there is no mention of transfer of a part of the licence to another company; (b) AEMIL is a separate legal entity and would have to make a fresh application to MERC for a transmission licence under Sections 14 and 15 of the

Act; and (c) If AEMIL satisfies the requirements under Section 14 and 15 of the Act, the licence shall be granted at the discretion of MERC.

34. On 23 October 2020, a communication was addressed by CEA to MSETCL recording that:

“iii. It may be noted that considering the need for availability of power supply in the Mumbai area and ROW problem in constructing overhead transmission lines to Mumbai, CEA on the request of AEMIL has already suggested a scheme for bulk power injection to Mumbai i.e. 1000 MW VSC based HVDC from Kudus to Array along with future for another 1000 MW. This suggestion was made based on the studies carried out for 2024-25 conditions. Requisite land provision in AEMIL S/S at Kudus and Array is available for construction of the VSC HVDC S/S. This system would provide the required reliability of additional independent feed to Mumbai area when the generation sources in TATA system is likely to do down.”

The need for implementing the HVDC Scheme as proposed was highlighted in the following extracts of the letter:

“iv. Recent blackout incidence (12.10.2020) of Mumbai also the need for immediate implementation of the 1000 MW VSC based HVDC from Kudus to Aaray system so that the increasing load of MMR can be met reliably. The multiple feeding points i.e. Kudus Aaray VSC link and under implementation Phadge-New Mumbai-Khargar 400 kV link would provide additional feeding point and enhance the reliability of Mumbai system.

v. Considering the fact that the present power demand of Mumbai to be around 3700-3800 MW and the maximum embedded generation available in TATA area is about 1349 MW against generation capacity of 1627 MW. In Adani area generation about 350 MW against 500 MW is available. So presently under best generation availability condition, more than 50% power demand of MMR is required to be imported from 400 kV Pune, Phadge, Boiser link. Since the link from Pune and Phadge are old and with moose conductor so in case of outage of any link serious transmission constraint for import of power into Mumbai area is observed. This further get aggravated when the generation in TATA system is low. It is also a known fact that the machines in TATA and Adani

area are going to be phased out gradually. Under that circumstances the whole of power demand of MMR has to be met through import only.”

In this backdrop, the letter stated that an additional infeed to the Mumbai area from sources such as the 1000MV VSC based HVDC from Kudus to Aarey as suggested by CEA was required to be implemented on a priority basis.

35. On 24 December 2020, the EC conducted its fifth meeting. In Agenda item 3 pertaining to the threshold limit (according to NTP 2016) for development of intra state transmission projects through the TBCB route, the EC decided that:

- (i) All projects in the STU plan costing Rs 500 crore or more would be referred to the EC for execution under the TBCB route;
- (ii) If the STU proposed a project costing over 500 crore would not be taken under the TBCB route “for reasons peculiar to the project” and would be executed under any other mechanism, the justification would be placed before the EC for its consideration”;
- (iii) The threshold limit of Rs 500 crore would be reviewed annually; and
- (iv) Once the EC decides to recommend the project under TBCB route or otherwise, the STU is to petition MERC for final approval “of fresh transmission licence or for extending existing transmission licence by following due process of law”.

Apart from the above decisions, the applicability of the limit of Rs 500 crore to “new / old projects” was discussed and it was decided that:

“i. All the projects that are already part of license of a licensee as decided by MERC and MERC has already allotted the work for execution to the licensee, will not be forwarded for further consideration to the committee.

ii. Projects that are under active consideration of MERC where STU has already recommended execution under a particular mechanism and where MERC has initiated substantially the process of inclusion of the project in scope of any existing or new transmission license on the basis of this recommendation, may not be put to committee for fresh consideration. Any further recommendation, if asked of STU by MERC or any other legal forum, STU may agitate the committee for the same as per the threshold limit decided above.”

36. Agenda Item No 4 of the same meeting dealt with the 1000MW HVDC Kudus- Aarey project. On this aspect, it was decided that STU must place its recommendation on the tariff determination of the 1000MW HVDC Kudus- Aarey project based on the decision in Agenda 3. The relevant extract from the Minutes of the Meeting is extracted below:

“**Agenda Item 4:** Appraisal of inclusion of 1000 MW HVDC Kudus-Aarey project in the STU five Year plan (2019-20 – 2024-25) referred to Empowered Committee in last meeting.

The Agenda “1000 MW HVDC project of Kudus – Aarey to be taken under TBCB” was discussed in 4th Empowered Committee meeting on 30th May 2020.”

At that time the HVDC project was not part of STU five-year plan.

Hence the agenda item was deferred. Now the Empowered Committee has been apprised about inclusion of 1000 MW HVDC project of Kudus – Aarey in the STU Five-year plan. Post appraisal of inclusion, the Committee informed STU that they should proceed as per the decision given by the Empowered Committee vide Agenda No.3.”

37. On 29 December 2020, the appellant filed objections before MERC objecting to the transmission application filed by AEMIL and AEML-T. In their response dated 31 December 2020, AEMIL and AEML-T stated that the approval of the DPR was cancelled by MERC only due to the proposal of MSETCL that the technology be altered from HVDC to HVAC. However, the overhead HVAC scheme which was proposed by MSETCL was not implemented. Hence, the

HVDC Scheme as a bulk power injection scheme for Mumbai was deliberated which resulted in reconsideration of the transmission project based on HVDC technology which had already been approved earlier.

38. In its additional submission dated 20 January 2021 filed before MERC, MSETCL adverted to the CEA report and stated that it would proceed in accordance with the decision of the EC. On 27 January 2021, MSETCL filed submissions indicating that:

- (i) A 1000MW HVDC link between Kudus and Aarey for which a licence had been sought was part of the five-year transmission plan prepared by the STU;
- (ii) The HVDC Scheme was under consideration for several years and was recommended by several committees;
- (iii) The bulk power transmission scheme was essential for meeting the requirement of Mumbai's transmission system;
- (iv) While other alternatives had been explored including HVAC technology, the HVDC Scheme was found to be more reliable by the CEA in its letter dated 23 October 2020 which emphasised the need to implement it on a priority basis;
- (v) The HVDC project is an old project; and
- (vi) The threshold limit which was decided by the EC on 24 December 2020 is yet to be approved by MERC.

In this backdrop, MSETCL stated that following the TBCB route would take between one to two years as was the experience in other MERC projects.

However, it was indicated that MERC may suggest a suitable strategy for cost competitiveness which would benefit the consumers in Maharashtra.

B. Proceedings before MERC and APTEL

39. On 21 March 2021, MERC issued an order granting AEMIL the transmission licence to develop the Aarey-Kudus transmission project based on HVDC technology where tariff was to be determined through the RTM approach under Section 62 of the Act. The Commission observed that:

- (i) The Kudus-Aarey project is essential for strengthening Mumbai's transmission system, and should be undertaken for execution on an immediate basis as planned by STU;
- (ii) The Supreme Court in **Energy Watchdog v. Central Electricity Regulatory Commission**¹ held that NTP 2016 is a 'statutory policy' and has the 'effect of law'. NTP 2016 mandates that the State Commissions' must notify a threshold limit to determine the projects that will have to be taken through the TBCB route. MERC has not notified the threshold yet;
- (iii) GoM's GR is an executive decision under Section 63 and not subordinate legislation under Section 180 of the Act. The relevant date for determining if a project is a 'new' or an 'existing' project under the GR is 4 January 2019, that is the date of notification of the GR forming the EC. As on 4 January 2019, the HVDC project was an 'existing' project for the following reasons:

¹ (2017) 14 SCC 80

PART B

- (a) The cancellation of the DPR by the Commission in May 2016 was specific to the 'technology'. The need for the bulk power injection for Mumbai was never cancelled or withdrawn. The scope of the old approved HVDC Scheme was changed by STU and not by AEML-T ; and
- (b) Once the approval of a scheme is cancelled, it ceases to exist for consideration. However, the Kudus- Aarey HVDC Scheme was proposed in November 2018, before the GoM's GR was notified. Planning and preparatory work such as technical studies, cost estimation, identification of land, and preparation of DPR had also been initiated.
- (iv) Multiple transmission licenses in the State of Maharashtra have been granted under capital expenditure schemes under Section 62 of the Act after the NTP 2016 was notified. If the argument that projects cannot be undertaken under the Section 62 route after the GR is notified is accepted, it would mean that none of the other projects could have been notified through the RTM route as well.
- (v) Even if the GR is held to be applicable which would give the EC statutory force for identification of projects under the TBCB route, the HVDC Kudus-Aarey project is still not mandated to be allotted through the TBCB route since:
- (a) Merely because STU has listed the HVDC Scheme in the agenda for the EC Meeting, it does not mean that the scheme has been chosen for TBCB. STU has only sought the opinion of the EC.

Further, the EC has not recommended that the HVDC Scheme is to be undertaken under the TBCB route;

- (b) The EC in its meeting held on 24 December 2020 recommended that all the projects in the STU plan that cost more than 500 Crore must be referred to EC for consideration for execution under the TBCB route. However, it was decided that it would only be applicable to new projects. It was recommended that projects that are under active consideration of MERC where the STU has already recommended execution under a certain mechanism and where MERC has substantially initiated the process of inclusion of the project in the scope of any existing or new transmission licensee on the basis of its recommendation shall not be put to the EC for fresh consideration. The HVDC project is under active consideration of MERC as the project has been included in STU's five-year plan and the project has been allotted to AEML-T. Since the HVDC project falls under the exception, the EC has not recommended that the HVDC Scheme must be allotted through the TBCB route since it is an existing project and not a 'new' project.
- (vi) The GoM's GR is not applicable to the Aarey-Kudus HVDC project, and even if applicable, it does not qualify as a 'new' project in view of the exceptions laid down by the EC. Thus, MERC has the discretion to choose from either the Section 62 or the Section 63 route. MERC must choose the most appropriate route for undertaking the project, considering the need for the scheme, the urgency associated with the

scheme, the historical background, and the peculiarities of the scheme.

The HVDC Scheme according to the STU Plan 2019-20 to 2024-25

should be undertaken under Section 62 because:

- (a) The cost- benefits of the project if awarded under the TBCB route cannot be assessed since there is no precedent of a completed HVDC Scheme being awarded through the TBCB route;
- (b) HVDC Scheme is a high-cost project with high end technology with limited international suppliers. It has relatively limited scope for cost reduction when compared to HVAC schemes;
- (c) AEMIL has already taken steps to procure land at Aarey and Kudus for the HVDC Scheme. It will facilitate the timely completion of the project;
- (d) STU has expressed reservations regarding undertaking the HVDC Scheme through the competitive bidding route since the competitive bidding process would take an additional two years for completion. Two transmission projects that were decided to be undertaken under the TBCB route have still not seen any progress even after the completion of almost 3 years; and
- (e) Projects undertaken under Section 62 of the Act can be more closely monitored on aspects such as timely execution and cost escalation.

40. The summary of the conclusions drawn in the order of the MERC are extracted below:

“38.61 In summary:

- a) There is no right or wrong approach for undertaking this HVDC Bulk Power Injection Scheme for Mumbai, in terms of whether the Scheme is decided to be undertaken under Section 62 (RTM) or Section 63 (TBCB) route, as both RTM and TBCB route can be justified for its implementation;
- b) This is a case where the most appropriate route for undertaking the Project has to be selected, considering the need for this Scheme, the urgency associated with the Scheme, the historical background, and the peculiarities of this Scheme;
- c) This Project is being considered by the Commission because it is part of the STU Plan FY 2019-20 to FY 2024-25, wherein this Scheme is allocated to AEML;
- d) The cost benefits in case the Project is awarded under the TBCB route cannot be assessed, as there is no precedent of any completed HVDC Scheme with UG cabling being awarded through the TBCB route;
- e) HVDC Scheme is a high-cost project with high-end technology with limited international suppliers, and hence, has relatively limited scope for cost reduction as compared to HVAC schemes;
- f) Steps already taken by the Petitioners for procuring land at Aarey and Kudus for HVDC terminal station will facilitate timely completion of the Project;
- g) The Commission has asked IIT Bombay to evaluate the Scope, design aspects, reasonability of cost, alternatives, etc., of the Scheme to ensure a technically appropriate and cost-effective solution for mitigating Mumbai's transmission constraints;
- h) The contracting for the Project would be through international competitive bidding as a pre-condition of the Licence, and hence, the least cost is likely to be achieved. Further, the cost incurred on the Scheme could be verified through experts after completion of the Scheme before allowing recovery through ARR;
- i) The Commission allows recovery of capital cost for Section 62 Projects only after prudence check based on detailed scrutiny, so that only justified and reasonable cost is recovered through tariff;
- j) The STU has expressed reservations regarding undertaking the HVDC Scheme through the competitive bidding route, and has stated that additional time of 1-2 years may be required for completion of the competitive bidding process;
- k) The two Transmission Schemes in Maharashtra that have been decided to be undertaken under TBCB route, other than Kharghar Vikhroli Transmission Project, have not seen any progress at all, even after passage of almost 3 years in one case;

- l) It will be in no one's interest if the Scheme is awarded under TBCB route especially when the planning and feasibility of the Scheme is at final stage, even if it is at a lower cost than that estimated by AEMIL, if it either does not come up at all or does not come up within the desired timelines;
- m) The rationale adopted at the Central level to undertake HVDC Projects on RTM basis despite the high cost of such Schemes, has been the intention of compressing the execution time schedule, which is equally applicable to the present Mumbai transmission system;
- n) Section 62 Projects can be closely and regularly monitored by the Commission for aspects such as timely execution, cost escalation, etc., unlike Section 63 Projects where the Bidders are bound by the conditions and responsibilities stipulated in the TSA, and on which the Commission has a limited regulatory oversight;
- o) The Commission has already constituted the Maharashtra Transmission Committee (MTC) in accordance with the MEGC, under the aegis of the Grid Coordination Committee (GCC), which shall be responsible for planning and monitoring timely execution of transmission projects in Maharashtra including Mumbai area. Considering the importance of HVDC Scheme for strengthening the Mumbai Transmission system, the Commission will separately notify a Committee for closely monitoring the progress of this Project to ensure strict adherence to the planned timelines for its identified milestones;
- p) The Scheme has to be undertaken at the earliest in a time-bound manner in the interest of strengthening Mumbai's transmission system, especially since almost 10 years have passed since the HVDC Bulk Power Injection Scheme was first proposed for Mumbai;
- q) The early and timely completion of the HVDC Bulk Power Injection Scheme for Mumbai will provide access to alternative power procurement sources as compared to the embedded generating units; while there is no guarantee that power procurement through competitive bidding will discover rates lower than that of the embedded generating units, at least the option will be available to the Mumbai Distribution Licensees and Commission's approval, and the lower power procurement costs can be passed on to the consumers through reduction in tariff;
- r) Considering the expected retirement of the embedded generation capacity and Transmission constraints, import of potentially cheaper power into Mumbai through competitive bidding will be facilitated by implementation of the HVDC Scheme, which is likely to reduce the cost of power for the end-consumers."

MERC therefore concluded that the HVDC Scheme in terms of the STU plan for 2019-20 to 2024-25 would be undertaken by AEMIL under Section 62 with the safeguards stipulated in the order.

41. The appellant instituted proceedings under Article 226 of the Constitution before the High Court of Judicature at Bombay. However, it withdrew those proceedings with liberty to move APTEL under Section 111 of the Act. TPC-T filed an appeal under Section 111 of the Act before APTEL. APTEL, by its order dated 18 February 2022 dismissed the appeal with the following findings:

- (i) The argument that the TBCB route under Section 63 is the dominant route is premised on a flawed reading of the Act. RTM under Section 62 is recognized under the Act and it cannot be considered to be in a position subservient or inferior to the TBCB route;
- (ii) There was no infirmity in MERC's order granting a transmission licence as the HVDC Project was an old/existing project in terms of the GoM's GR dated 1 January 2019. The earlier cancellation by MERC of the in-principle approval did not render the project a new scheme since the STU changed its stance due to its objections on the technology. The change in route from Nagothane to Kudus was similar to modifications that are common to all transmission projects and the project cannot be considered as a new project merely due to change of connection point;
- (iii) That while the change of stance of the STU is not proper and a decisive and timely approach is instead expected, the same cannot be a ground to vitiate the decision taken by MERC;

- (iv) That the grant of licence was not contrary to Section 15 which requires the publication of a notice for suggestions and objections before granting a licence. MERC had issued a public notice and the proceedings under Section 15 cannot be conducted *de hors* the entity which has to implement the project; and
- (v) That even though there may be reasons justifying the adoption of the option under Section 63, this is not reason enough for the Tribunal to sit in appeal and supplant the views of the Commission. Furthermore, in light of the criticality of the project for the region, interference by the tribunal would be improper, considering the progress that has already been made.

42. The appeal has been instituted under Section 125 of the Act for challenging the judgment of APTEL.

C. The Submissions

43. Mr Shyam Divan, learned senior counsel appearing on behalf of the appellants has urged the following submissions:

- (i) For all transmission projects, the rule for the award of transmission licences is competitive bidding, subject to certain exceptions;
- (ii) The rule of competitive bidding is based on statute, statutory policy, and guidelines of the and State Governments ;
- (iii) Two methods have been statutorily prescribed for tariff determination in Sections 62 and 63. However, in the facts and circumstances, the TBCB route under Section 63 of the Act was required to be followed;

- (iv) There were no exceptional circumstances warranting a departure from the TBCB route;
- (v) The present project must be considered as a new project, adopting 4 January 2019 the date on which the government of Maharashtra issued a GR in consonance with the NTP 2016 as the cut-off date for determining as to whether the project in question is old or new; and
- (vi) APTEL has misconstrued the scope of Section 110 by disregarding the legal position that the provision envisages a full appeal on facts and law to a specialised body.

44. On the other hand, Dr Abhishek Manu Singhvi and Mr Vikas Singh, learned senior counsel appearing on behalf of the AEML-T and AEMIL have urged the following submissions:

- (i) On a proper construction of the provisions of Sections 61, 62 and 63, the legal position is that Sections 62 and 63 stand on an equal footing and it would be incorrect to postulate that Section 63 has a dominant character;
- (ii) The concepts of the historicity of a project, the criticality of a scheme and its urgency are factors that are embodied in Section 61;
- (iii) Irrespective of the interpretation of Sections 62 and 63, the application of the above test must render the award of the contract to AEML-T valid;
- (iv) MERC was correct in entering a finding of fact that the appellant is only interested in delaying the project. The Vikhroli transmission project was abandoned by the appellant and was eventually secured by the second

respondent. The award of the HVDC project would inject much needed power to Mumbai;

- (v) TPC-T has not challenged the multi-year tariff order dated 30 March 2020 issued by MERC which was a product of a detailed consideration where considering the critical nature of the schemes and the time required for obtaining regulatory approvals, MERC directed STU and AEML-T to initiate the necessary steps to implement the scheme. The impugned order granting a transmission licence is only consequential;
- (vi) It was envisaged that from 2007 that AEML-T would obtain the HVDC line. The HVDC project was delayed only because MSETCL proposed that it would implement an overhead transmission project from Kudus to Aarey, which never took off. Between 2007 and 2019 there was no objection to the project which was envisaged to be executed by R-infra and later by AEML-T;
- (vii) Even as of date, no threshold limit has been prescribed by MERC for adopting the TBCB route for the award of a licence for an intra-state transmission project; and
- (viii) Both MERC and APTEL are statutory expert bodies at the primary and appellate level and have taken a concurrent view. Save and except in the case of perversity, the interference of this Court is not warranted.

D. Regulatory Framework

45. Before proceeding to analyse the issues that fall for determination, it is important that we lay out the regulatory framework on determination of tariff with reference to the provisions of the Electricity Act, and the policies framed by the Central Government and the State of Maharashtra under the provisions of the Act.

D. 1 Electricity Act 2003

46. Before the enactment of the Electricity Act 2003, the Indian electricity sector was governed by the Indian Electricity Act 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commission Act 1998. The Indian Electricity Act 1910 created a basic framework for the electricity supply industry in India. The Electricity (Supply) Act 1948 mandated the creation of State Electricity Boards, which had the responsibility of facilitating supply of electricity within the State. However, the State Electricity Boards were unable to use their power to fix tariffs judiciously. It was noted that the State Governments were in practice fixing tariffs. To distance the State Governments from the exercise of tariff fixation, the Electricity Regulatory Commissions Act 1998 was enacted.

47. Parliament enacted the Electricity Act 2003 to consolidate the laws relating to generation, transmission, distribution, trading and use of electricity; to develop the electricity industry; and to promote competition. The Electricity Act 2003 was enacted with the objective of encouraging the participation of the private sector in the generation, transmission, and distribution of electricity, and to harmonise and consolidate the provisions into a self-contained code:

“With the policy of encouraging private sector participation in generation, transmission and distribution and the objectives of distancing the regulatory responsibilities from the Government to the Regulatory Commissions, the need for harmonising and rationalising the provisions of the Electricity Act 1910, the Electricity (Supply) Act 1948 and the Electricity Regulatory Commissions Act 1948 in a new self-contained comprehensive legislation arose.”

48. The long title to the Act indicates that its object is to consolidate the laws relating to generation, transmission, distribution, trading, and use of electricity and to take measures conducive to the development of the electricity industry; promote competition and protect the interest of consumers; ensure the supply of electricity to all areas; rationalise electricity tariffs and ensure transparent policies. The Statement of Objects and Reasons of the Act states that “it gives the States enough flexibility to develop their power sector in the manner they consider appropriate.”

49. Section 3 provides for the formulation of a National Electricity Policy and National Tariff Policy:

“Section 3. (National Electricity Policy and Plan) --- (1)

The Central Government shall, from time to time, prepare the National Electricity Policy and tariff policy, in consultation with the State Governments and the Authority for development of the power system based on optimal utilisation of resources such as coal, natural gas, nuclear substances or materials, hydro and renewable sources of energy.

(2) The Central Government shall publish National Electricity Policy and tariff policy from time to time.

(3) The Central Government may, from time to time, in consultation with the State Governments and the Authority, review or revise, the National Electricity Policy and tariff policy referred to in sub-section (1) .

(4) The Authority shall prepare a National Electricity Plan in accordance with the National Electricity Policy and notify such plan once in five years:

Provided that the Authority while preparing the National Electricity Plan shall publish the draft National Electricity Plan

and invite suggestions and objections thereon from licensees, generating companies and the public within such time as may be prescribed:

Provided further that the Authority shall - (a) notify the plan after obtaining the approval of the Central Government; (b) revise the plan incorporating therein the directions, if any, given by the Central Government while granting approval under clause (a).

(5) The Authority may review or revise the National Electricity Plan in accordance with the National Electricity Policy.”

In terms of the above provision, the Union Government has to formulate the NEP and NTP in consultation with the State Governments and the CEA.

50. Part III of the Act deals with the generation of the electricity; Part IV deals with licensing; Part V with transmission; Part VI with distribution and Part VII with tariff.

51. Section 38 provides that the Central Government may notify any government company as the CTU. The CTU is statutorily empowered to undertake the transmission of electricity through inter-state transmission systems. The CTU has to also discharge functions of planning and coordination relating to inter-state transmission systems. For this purpose, the CTU is required to coordinate with the STU, Central and State Governments, generating companies, authorities and licensees.

52. Section 39 stipulates that the State Government may notify the Board or any government company as the STU. The STU shall undertake transmission of electricity through the intra-state transmission system and discharge functions relating to the planning and coordination of the intra-state transmission system. While discharging its functions, the STU is required to reflect the planning initiatives of intra-state transmission system by publishing a five-year plan periodically.

53. Sections 76 and 82 constitute the Central Regulatory Commission and State Regulatory Commissions respectively. The Central and State Regulatory Commissions shall among other functions, determine and regulate the tariff for inter-state transmission of electricity and intra-state transmission of electricity respectively. Sections 79(3) and 86(3) stipulate that the Central and State Commissions shall while discharging their functions ensure transparency, and 'shall be guided' by the NEP, NTP and National Electricity Plan. The Central and the State Commissions also discharge advisory functions, where they shall advise the Central Government and State Government respectively on, *inter alia*, promotion of competition in activities related to the electricity industry and in matters concerning generation, transmission, and distribution of electricity. Section 25 states that the Central Government may make a region-wise demarcation of the country for the purpose of integrated transmission of electricity to facilitate inter-state, regional and inter-regional transmission of electricity. Section 30 provides that the State Commission shall facilitate and promote transmission, wheeling, and inter-connection arrangements within its territorial jurisdiction for the transmission of electricity.

54. Section 14 envisages that the Appropriate Commission, defined in Section 2(4) to mean the Central or as the case may be the State Regulatory Commission, may grant a licence to any person:

- (a) To transmit electricity as a transmission licensee;
- (b) To distribute electricity as a distribution licensee; and
- (c) To undertake trading and electricity in any area specified in the licence.

55. Section 15 prescribes the procedure to be followed for the grant of licences. The application for a licence under Section 14 has to be filed in the manner prescribed by the Appropriate Commission. The person who has applied for the grant of a licence must publish a notice of the application. The licence shall not be granted by the Appropriate Commission until the objection(s), if any received, are considered by the Commission. The application shall also be forwarded to the CTU or the STU, as the case may be. The CTU or STU must send its recommendation to the Appropriate Commission. The recommendation of the CTU or the STU is however, not binding on the Commission. The Appropriate Commission is also required to publish a notice of the application if it proposes to issue the licence. The Commission has to consider the objections and the recommendations of the Transmission Utility before granting the licence.

56. In enacting the above provisions of law, Parliament has made a clear demarcation between intra-state and inter-state transmission of electricity. While the CTU, Central Government and the Central Regulatory Commission are responsible for the facilitation of inter-state transmission of electricity, the State Commission and the STU have been granted full autonomy with respect to intra-state transmission of electricity.

57. Part VII deals with tariffs. Part VII comprises of Section 61(tariff regulations), Section 62 (determination of tariff), Section 63 (determination of tariff by bidding process), Section 64 (procedure for tariff order), Section 65 (provision of subsidy by the state government) and Section 66 (development of market). In terms of Section 61, the Appropriate Commission is entrusted, subject to the provisions of the Act, to specify the terms and conditions for the

determination of tariffs. While specifying the terms and conditions, the Appropriate Commission shall be guided by the requirements specified in clauses (a) to (i). Amongst them, in clause (i) is the NEP and tariff policy, while clause (c) emphasizes the need to encourage competition, efficiency, economical use of resources, good performance and optimum investment. Section 62(1) empowers the Appropriate Commission to determine the tariff “in accordance with the provisions of this Act” for :

- a. Supply of electricity by a generating company to a distributing licensee;
- b. Transmission of electricity;
- c. Wheeling of electricity; and
- d. Retail sale of electricity.

Section 63 provides that notwithstanding the provisions of Section 62, the Commission shall adopt the tariff determined through the bidding process if the tariff has been determined through a transparent process in accordance with the guidelines issued by the Central Government.

D.2 Policy framework

58. The Central Government has under the provisions of the Act issued resolutions and framed policies. In order for us to understand the gamut of the issues before us, it is necessary that we refer to the policies notified by the Central Government and the State Government of Maharashtra.

D. 2.1 Central Policies

59. On 6 January 2006, the Ministry of Power notified the NTP 2006 in exercise of its power under Section 3 of the Act. The NTP 2006, *inter alia*, emphasizes the need for transparency and competition in the power sector and the need to ensure the availability of electricity to consumers at reasonable and competitive rates.

60. Clause 5.1 states that one of the key features of the Act is that it introduced competition in different segments of the electricity industry. The policy deals with transmission in clause 7. Clause 7.1(6) deals with transmission pricing where it is emphasised that “investment of transmission developer other than CTU/STU would be invited through competitive bids”. Clause 7.1(6) *inter alia* provides as follows:

“(6) Investment by transmission developer other than CTU-STU would be invited through competitive bids. The Central Government will issue guidelines in three months for bidding process for developing transmission capacities. The tariff of the projects to be developed by CTU-STU after the period of five years or when the Regulatory Commission is satisfied that the situation is right to introduce such competition (as referred to in para 5.1) would also be determined on the basis of competitive bidding.”

61. Clause 7.1(7) stipulates that after implementing the framework for inter-state transmission, a similar approach shall be implemented by SERCs for intra-state transmission within two years after considering factors like voltage, distance, direction and quantum of flow. However, Clause 5.1 dealing with the General Approach to Tariff notes that even for public sector projects, tariff for new projects must be determined through the TBCB route after five years or when the Regulatory Commission deems it fit. The relevant clause is extracted below:

“5.1 [...] Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.”

62. On 13 April 2006, the Union MoP notified Tariff Based Competitive Guidelines for Transmission Services under Section 63 of the Act to promote competitive procurement of transmission services and encourage private investment in the development of transmission lines. The objects for making the guidelines are:

- “
- Promote competitive procurement of transmission services.
 - Encourage private investment in transmission lines.
 - Facilitate transparency and fairness in procurement processes.
 - Facilitate reduction of information asymmetries for various bidders.
 - Protect consumer interests by facilitating competitive conditions in procurement of transmission services of electricity.
 - Enhance standardization and reduce ambiguity and hence time for materialization of projects;
 - Ensure compliance with standards, norms and codes for transmission lines while allowing flexibility in operation to the transmission service providers.”

63. On 13 April 2006, the MoP notified Guidelines for Encouraging Competition in Development of Transmission Projects. In terms of Clause 13, an Empowered Committee was constituted to identify projects to be developed under the scheme. In terms of Clause 19, the selection of the developer for identified projects would be through TBCB for transmission services according to the guidelines issued by the MoP under Section 63. However, for intra-state projects the guidelines provide that the States shall have the discretion to adopt the guidelines. Clause 24 noted as follows:

24. As far as intra state projects are concerned the state governments may adopt these guidelines and may constitute similar committees for facilitation of transmission projects within the state.

64. On 28 January 2016, MoP issued the NTP 2016. Paragraph 5 of the policy spells out the “general approach to tariff”. Paragraph 5.1 indicates:

“5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees.”

In a similar vein, paragraph 5.3 specifies that:

“5.3 The tariff of all new generation and transmission projects of company owned or controlled by the Central Government shall continue to be determined on the basis of competitive bidding as per the Tariff Policy notified on 6th January, 2006 unless otherwise specified by the Central Government on case-to-case basis.

Further, intra-state transmission projects shall be developed by State Government through competitive bidding process for projects costing above a threshold limit which shall be decided by the SERCs.”

65. Paragraph 5.3 which has been extracted above envisages that a competitive bidding process should be followed for intra-state transmission projects developed by the State government where the project cost is above a threshold limit that is to be prescribed by the SERCs.

66. On 22 September 2017, the Forum of Regulators in its 61st Meeting, while reiterating the NTP 2016, urged all members to determine the threshold limits for their respective intra-state transmission projects above which the TBCB route would be followed. The relevant portion of the Minutes of Meeting is extracted below:

“Agenda Item No. 5 (i) Action to be taken by States to define a framework (including setting a threshold limit) for developing intra-State transmission projects on competitive basis.

The FoR Secretariat updated the Forum that as per provisions of the revised Tariff Policy notified by the Central Government, development of intra-State transmission projects is to be carried out by the State Government through competitive bidding process for projects costing above a threshold limit decided by the SERCs. In this regard, it was placed before the Forum that in some States, development of State-level transmission projects was carried out through tariff based competitive bidding (TBCB) route and in some States, the conventional route of EPC based contracting is reportedly followed. Further, SERCs have not determined the threshold limit of the projects to be considered under TBCB route.

The Forum observed that in order to encourage transparency and efficiency in project costs, threshold limit for intra-State transmission projects is required to be determined by the SERCs as provided for in the Tariff Policy. Therefore, the Forum urged the Members to determine the threshold limit for their respective State-level transmission projects, while taking all relevant parameters of their State into consideration.”

67. On 15 March 2021, the MoP addressed a communication to the States and Union Territories recording that the NEP 2005 and the NTP 2006 had laid down the framework for ensuring optimal development of transmission networks to promote efficient utilisation of generation and transmission assets, attract investment in the transmission sector and provide adequate returns. It noted that this had resulted in

- (i) A lower tariff as compared to cost plus; and
- (ii) Risk sharing.

In the above backdrop, the communication stated that:

“7. As intra-state transmission system has major share in the transmission sector in the country, adoption of Tariff Based Competitive Bidding (TBCB) in development of intra-state transmission system can effectively reduce burden on State Governments’ finances as well as reduce tariff of intra-State transmission system leading to consumers’ benefit. The matter was also discussed in a meeting taken by Hon’ble Union Minister of State (Independent Charge) for Power and New and Renewable Energy on 03.02.2021 and **it was decided to request the State/UT Governments to adopt TBCB in development of intra-State transmission system.**”

(emphasis supplied)

The communication urged that in the larger interest of consumers, it was strongly recommended that TBCB may be adopted also for the development of the intra-state transmission system.

D. 2.2 State Policies

68. On 4 January 2019, the GoM notified a government resolution with the object of setting up new transmission projects through TBCB in line with MoP’s guidelines dated 13 April 2006, as subsequently modified. While notifying the guidelines, the object of the GR was spelt out in the following terms:

“It would be possible to use state-of-the-art technology for transmission projects if Tariff Based Competitive Bidding is adopted for transmission projects in the state. Since this process is transparent, it will help in improving the standard and efficiency of the project. Thus, transmission projects can be established quickly. Since investment for establishing these projects is to be done by the developers on external basis, it will ease the financial burden on the state. Therefore, the government was considering constitution of committees like Empowered Committee, Bid Evaluation committee in accordance with the above-mentioned guidelines of Central government for undertaking transmission projects in the state through Tariff Based Competitive Bidding.”

The GR notes that:

“For establishing new Transmission Projects, after considering the guidelines issued by the Central Government the State Government has decided to implement Tariff Based Competitive Bidding-TBCB process for new Projects....”

In terms of the GR, an Empowered Committee was to be set up to undertake transmission projects in accordance with the guidelines of the Central Government. The functions of the Committee were:

- “
- A) To provide impetus to new transmission projects in the state through this plan.
 - B) Selection of transmission projects according to recommendations of State Transmission Undertaking.
 - C) Helping in evaluation of received tenders as well as formation of Bid Empowered Committee.”

The Empowered Committee was required to appoint a Bid Process Coordinator in terms of paragraph 3 of the GR to co-ordinate the bidding process as per Central Government’s guidelines. The GR also envisaged setting up of a Bid Empowerment Committee *inter alia* for the examination of technical bids and the fulfilment of the technical criteria prescribed in bid documents. We have already laid out the decisions of the said Empowered Committee relevant to the current proceedings in the earlier section.

E. The Analysis

69. In the backdrop of the factual narration, the essential aspect that falls for consideration is whether the decision of MERC to allow the joint licence petition submitted by AEML-T and AEMIL, granting a transmission licence for the 1000MW Aarey- Kudus HVDC project is vitiated by the failure to follow the TBCB

route (the Section 63 route). In the course of answering this question, the following issues fall for consideration:

- (i) Whether the Electricity Act 2003 envisages the TBCB route under Section 63 as the dominant method to determine tariff;
- (ii) Whether the NTP framed under Section 3 of the Act is binding on the State Regulatory Commissions, particularly in view of the observations made by this Court in **Energy Watchdog** (supra);
- (iii) Whether the Regulatory Commissions have the power to prescribe the modalities to determine the tariff under the provisions of the Electricity Act 2003 (and the regulations framed under it);
- (iv) Whether MERC was bound to decide the tariff for the HVDC Project through TBCB under Section 63 in view of Government of Maharashtra's Resolution dated 04 January 2019 notifying the decision to allocate new intra-state transmission projects through TBCB route and setting up an Empowered Committee; and
- (v) Whether MSETCL's decision to not refer the HVDC Project to the Empowered Committee for holding bidding under the TBCB route is in breach of the GR.

E. 1 Section 63: The dominant route or the alternative route

70. Section 61 grants the Appropriate Commission the power, subject to the provisions of the Act, to specify the terms and conditions for the determination of tariff. The provision stipulates that in specifying the terms, the Commission shall be guided by principles that are listed in the nine clauses of the provision. Of particular importance are clauses (a), (c), and (i). Clause (a) provides that the

Appropriate Commission shall be guided by the principles and methodologies specified by the Central Commission for determination of transmission tariff. Clause (c) states that the factors that would encourage competition and efficiency must be followed. Clause (i) provides that the Commission shall be guided by the NEP and NTP. Section 61 reads as follows:

“Section 61. (Tariff regulations):

The Appropriate Commission shall, subject to the provisions of this Act, **specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following**, namely:-

- (a) **the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;**
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) **the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;**
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) the principles rewarding efficiency in performance;
- (f) multi year tariff principles;
- (g) that the tariff progressively reflects the cost of supply of electricity and also, reduces cross-subsidies in the manner specified by the Appropriate Commission;]
- (h) the promotion of co-generation and generation of electricity from renewable sources of energy;
- (i) **the National Electricity Policy and tariff policy:**

Provided that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commission Act, 1998 and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier.”

(emphasis supplied)

71. Section 62 grants the Appropriate Commission the power to determine the tariff for the (i) supply of electricity by a generating company to a distribution

licensee; (ii) transmission of electricity; (iii) wheeling of electricity; and (iv) retail sale of electricity. While Section 61 stipulates the principles that shall guide the determination of tariff, Section 62 grants the Commission the discretion to determine the tariff. Clause (3) of Section 62 fetters the discretion of the Commission in determining tariff. Section 62(3) provides that the Commission while exercising its discretion to determine the tariff, shall not ‘show undue preference to any customer of electricity but may differentiate according to the customer’s load factor, power factor, voltage....’. Section 62(3) reads as follows:

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

This method of tariff determination is commonly referred to as the Regulated Tariff Mechanism.

72. Section 63 provides that notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff determined through bidding:

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

73. Section 63 has five significant features: (i) Section 63 begins with a non-obstante clause. The non-obstante provision overrides Section 62 alone and not all the provisions of the Act; (ii) as opposed to Section 62 where the Commission is granted the power to determine the tariff, under the Section 63 route, the bidding process determines the tariff; (iii) the Commission is mandated to adopt

such tariff that is determined by the bidding process; (iv) the Commission has the discretion to not adopt the tariff determined through the bidding process only if the twin conditions as mentioned in the provision are not fulfilled; and (v) the twin conditions are that (a) the bidding process must have been transparent; (b) the bidding process must have complied with the guidelines issued by the Central Government.

74. Section 63 indicates that the provision would be invoked *after* the tariff has been determined by the bidding process. There is nothing in Sections 62 or 63 that could lead us to interpret that Section 63 is the dominant route for determination of tariff. Both the provisions provide alternative modalities through which tariff can be determined. The non-obstante clause in Section 63 must be read in the context of Sections 61 and 62. Section 62 bestows the Commission with wide discretion to determine tariff. Section 63 seeks to curtail this discretion where a bidding process for tariff determination has already been conducted. Section 63 contemplates that in such situations where the tariff has been determined through the bidding process, the Commission cannot by falling back on the discretion provided under Section 62 negate the tariff determined through bidding. This interpretation of Section 63 is fortified by the use of the phrase 'such' in Section 63 - the Commission is bound to 'adopt' 'such' tariff determined through bidding.

75. The Commission under Section 61 of the Act must frame guidelines for deciding the modality to determine tariff. This is evidenced from a reading of Section 61(a) which provides that the Appropriate Commission while specifying the terms and conditions for the determination of tariff shall be guided by the

principles and ‘methodologies’ specified by the Central Commission for the determination of tariff applicable to transmission licensees.

76. In this backdrop, it is necessary to advert to the judgment of this Court in **Energy Watchdog** (supra). A two-Judge Bench of this Court analysed the provisions of Section 63 and its interplay with Section 62. The relevant observations are extracted below.

“19.... It may be noticed that Section 63 begins with a non obstante clause, but it is a non obstante clause covering only Section 62. Secondly, unlike Section 62 read with Sections 61 and 64, the appropriate Commission does not “determine” tariff but only “adopts” tariff already determined under Section 63. Thirdly, such “adoption” is only if such tariff has been determined through a transparent process of bidding, and, fourthly, this transparent process of bidding must be in accordance with the guidelines issued by the Central Government. What has been argued before us is that Section 63 is a standalone provision and has to be construed on its own terms, and that, therefore, in the case of transparent bidding nothing can be looked at except the bid itself which must accord with guidelines issued by the Central Government. **One thing is immediately clear, that the appropriate Commission does not act as a mere post office under Section 63. It must adopt the tariff which has been determined through a transparent process of bidding, but this can only be done in accordance with the guidelines issued by the Central Government.** Guidelines have been issued under this section on 19-1-2005, which guidelines have been amended from time to time. Clause 4, in particular, deals with tariff and the appropriate Commission certainly has the jurisdiction to look into whether the tariff determined through the process of bidding accords with Clause 4.”

(emphasis supplied)

The observations of this Court in **Energy Watchdog** (supra) are summarised below:

- (i) The Appropriate Commission while ‘adopting’ the tariff determined through bidding is not a mere ‘post office’; and
- (ii) The Commission is mandated by Section 63 to adopt the tariff determined through bidding only if the bidding process was transparent, and such a

process has been held in accordance with the guidelines issued by the Central Government under Section 63. If the bidding process does not satisfy the two checks, then the Commission shall determine the tariff through the RTM route under Section 62.

77. Thus, the Appropriate Commission is not mandated to adopt the tariff determined through the bidding process irrespective of the fulfilment of the statutory requirements. The Commission can reject the tariff determined through the bid if the tariff process is not (i) transparent; and (ii) in accordance with the guidelines issued by the Central Government. Thus, if the Commission does not adopt the tariff determined through bidding, and if the decision is challenged, the bidding process can be reviewed substantively (on the ground of transparency) and procedurally (on the ground of compliance with Central Government guidelines) to determine if the Commission could have exercised its discretion to determine the tariff under Section 62 while rejecting the tariff determined under Section 63. Therefore, Section 63 can only be invoked *after* the tariff has been determined through bidding. The terms and conditions notified by the Appropriate Commission under Section 61 will have to be referred for the purpose of choosing the modality of tariff determination that the Commission should undertake. In view of the above discussion, the argument of the appellant that a reading of Section 61, 62 and 63 indicates that the TBCB route is the dominant route of tariff determination does not hold merit.

E. 1.1. The value of TBCB Guidelines prescribed under Section 63

78. Section 63 of the Act does not prescribe bidding as the dominant route of tariff determination. The Guidelines framed by the Central Government under

Section 63 prescribe the mechanism and procedure for bidding. The Guidelines framed under Section 63 of the Act cannot be used to determine whether the RTM route or the TBCB route ought to be followed.

79. On 13 April 2006, the MoP framed the TBCB Guidelines under Section 63 of the Act. Clause 2.2 of the Guidelines states that it shall apply for the procurement of transmission services through competitive bidding according to the mechanism described in the notification. The clause reads as follows:

“2.2. The guidelines shall apply for procurement of transmission services for transmission of electricity through tariff based competitive bidding, through the **mechanism described in this notification** and to **select transmission service provider for a new transmission line** and to build, own, maintain and operate the specified transmission system elements.”

(emphasis supplied)

Clause 2.4 states that the procurement of transmission services would include HVDC terminal stations and HVDC transmission lines:

“2.4 Procurement of transmission services would include all activities related to survey, detailed project report formulation [...] and/or HVDC links including terminal stations and HVDC transmission line [...]”

80. A reading of the above clauses indicates that the TBCB Guidelines shall apply for (i) procurement of transmission services, which would include HVDC links; and (ii) selecting the transmission provider for a new transmission line. The TBCB Guidelines also advert to the appointment of a Bid Process Coordinator who would be responsible for coordinating the bid process for procurement of required transmission services. The TBCB Guidelines prescribe the procedure for conducting bids for procurement of, among other services, transmission services.

Clause 3.3 states that for the procurement of transmission services required for intra-state transmission, the State Government may notify the organisation or the State Public Sector Undertaking to be the Bid Process Coordinator. A reading of clauses 2.2 and 2.4 does not indicate that that the tariff for all new transmission projects shall be determined by competitive bidding. It notifies the procedural mechanism for competitive bidding. As observed earlier, the reference in Section 63 to the Guidelines framed by the Central Government is made to the limited extent of determining whether the procedure of bidding was in accordance to the Guidelines framed thereunder, which is the TBCB Guidelines.

E. 2 General Regulatory Power of the Appropriate Commission

81. Since the guidelines framed under Section 63 only prescribe the procedure for conducting the bidding, reference has to be made to the general regulatory power of the Appropriate Commission under the provisions of the Act.

82. Section 181 of the Act stipulates that the State Commission(s) may by notification, make regulations consistent with the Act and the rules framed by the State Government under Section 180 of the Act to carry out the provisions of the Act. Clause (zd) of Section 181 stipulates that the State Commission may make regulations on the 'terms and conditions for determination of tariff under Section 61.' The relevant portion of Section 181 is extracted below:

“181. Powers of State Commissions to make regulations.- (1) The State Commissions may, by notification, make regulations consistent with this Act and rules generally to carry out the provisions of this Act.
(2) In particular and without prejudice to the generality of the power contained in sub-section (1), such regulations may provide for all or any of the following matters, namely:-
(a) [...]

[...]
(zc) the terms and conditions for determination of tariff under section 61;”

However, as on the date when MERC granted AEMIL the licence for the HVDC project from Kudus- Aarey, MERC had not framed any regulation under Section 181(zc) of the Act for the determination of Tariff.

83. At this juncture, it is necessary to refer to Section 86 of the Act. Section 86 lists the functions of the State Commission. Section 86(a) states that the State Commission shall discharge the function of determining the tariff for transmission. Section 86(c) stipulates that the State Commissions shall facilitate intra-state transmission of electricity. Section 86(4) provides that in the discharge of its functions, which includes the determination of tariff for the transmission of electricity under clause (a), the State Commission shall be guided by the NEP, National Electricity Plan and NTP notified under Section 3 of the Act. The relevant portion of Section 86 is extracted below:

“86. Functions of State Commission - (1) The State Commission shall discharge the following functions, namely:-
(a) Determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State.
[...]
(c) facilitate intra-State transmission and wheeling of electricity
[...]
(3) The State Commission shall ensure transparency while exercising its powers and discharging its functions.
(4) In discharge of its functions, the State Commission shall be guided by the National Electricity Policy, National Electricity Plan and Tariff Policy published under section 3.”

84. In **Energy Watchdog** (supra), this Court opined that the Central Commission shall determine the tariff under the guidelines issued by the Central Government under Section 63 of the Act. It is only in a situation where no

guidelines are framed or where the guidelines do not address a specific situation that the Central Commission's repository of power under Section 79 is invoked.

The relevant observations of the judgment are extracted below:

“20... The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways — either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with “determination” of tariff, which is part of “regulating” tariff. Whereas “determining” tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to “regulate” tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and must exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used.”

85. Thus, in the case of intra-state transmission of electricity, the State Commission would be bound by the guidelines issued under Section 63. In addition to the guidelines under Section 63 of the Act, the State Commission shall also be bound by the regulations framed by it under Section 181(zd) read with Section 61 while it discharges its function of determining the tariff under Section 86 of the Act. However, if the guidelines issued under Section 63 or the regulations framed under Section 181(zd) of the Act have not been notified or if the guidelines do not deal with a given situation, then the Commission shall

exercise its general regulatory power under Section 86(1)(a) of the Act to regulate tariff.

86. In **PTC India Ltd. v. Central Electricity Regulatory Commission**,² a Constitution Bench of this Court referred to Section 79 and observed that the Appropriate Commission is both a regulation-making authority and a decision-making authority. It was observed that the Regulatory Commission while exercising its functions must conform to the regulations that the Commission has formulated under Section 178 (the corresponding provision for the State Commission's power to frame Regulations in Section 181). However, it was held that the Commission would not be precluded from exercising its function under Section 79 merely because there is no regulation framed by the Commission. In the context of tariff determination, it was observed that even in the absence of Tariff Regulations, it would be open to the Commission to frame the terms and conditions of tariff determination under Section 61 of the Act:

53. Applying the abovementioned tests to the scheme of the 2003 Act, we find that under the Act, **the Central Commission is a decision-making as well as regulation-making authority, simultaneously.** Section 79 delineates the functions of the Central Commission broadly into two categories —mandatory functions and advisory functions. Tariff regulation, licensing (including inter-State trading licensing), adjudication upon disputes involving generating companies or transmission licensees fall under the head “mandatory functions” whereas advising the Central Government on formulation of National Electricity Policy and tariff policy would fall under the head “advisory functions”. In this sense, the Central Commission is the decision-making authority. Such decision-making under Section 79(1) is not dependent upon making of regulations under Section 178 by the Central Commission. Therefore, functions of the Central Commission enumerated in Section 79 are separate and

² (2010) 4 SCC 603

distinct from functions of the Central Commission under Section 178. The former are administrative/adjudicatory functions whereas the latter are legislative.

The following observations were made on the general regulatory power of the Regulatory Commission:

54. [...] On reading Sections 76(1) and 79(1) one finds that the Central Commission is empowered to take measures/steps in discharge of the functions enumerated in Section 79(1) like to regulate the tariff of generating companies, to regulate the inter-State transmission of electricity, to determine tariff for inter-State transmission of electricity, to issue licences, to adjudicate upon disputes, to levy fees, to specify the Grid Code, to fix the trading margin in inter-State trading of electricity, if considered necessary, etc. **These measures, which the Central Commission is empowered to take, have got to be in conformity with the regulations under Section 178, wherever such regulations are applicable. Measures under Section 79(1), therefore, have got to be in conformity with the regulations under Section 178.**

55. To regulate is an exercise which is different from making of the regulations. **However, making of a regulation under Section 178 is not a precondition to the Central Commission taking any steps/measures under Section 79(1).** As stated, if there is a regulation, then the measure under Section 79(1) has to be in conformity with such regulation under Section 178. This principle flows from various judgments of this Court which we have discussed hereinafter. For example, under Section 79(1)(g) the Central Commission is required to levy fees for the purpose of the 2003 Act. An order imposing regulatory fees could be passed even in the absence of a regulation under Section 178. If the levy is unreasonable, it could be the subject-matter of challenge before the appellate authority under Section 111 as the levy is imposed by an order/decision-making process. **Making of a regulation under Section 178 is not a precondition to passing of an order levying a regulatory fee under Section 79(1)(g). However, if there is a regulation under Section 178 in that regard then the order levying fees under Section 79(1)(g) has to be in consonance with such regulation.**

56. Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. **It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section**

178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulations under Section 178.

(emphasis supplied)

87. The TBCB Guidelines issued by the Central Government under Section 63 of the Act prescribe the mechanism of the bidding process and do not lay down the criteria or guidelines for choosing between the alternative routes under Section 62 and 63 of the Act. MERC has neither notified any Regulations under Section 181 nor has it notified the terms and conditions under Section 61 of the Act. That being the case, the Commission could choose the modality of tariff determination by taking recourse to the general regulatory power under Section 86.

E.2.1 The nature of NTP- binding or a material consideration

88. Even in the absence of guidelines under Section 61 or Regulations under Section 181 (zd), the Commission does not possess unbridled power or discretion while choosing the modality to determine tariff. Sub-Sections (3) and (4) of Section 86 provide that the State Commission while discharging its functions must ensure transparency and 'shall be guided' by the NTP and NEP.

89. Before proceeding to interpret the phrase 'shall be guided', it is necessary that we refer to the prominent features of the NTP 2006 and NTP 2016 vis-à-vis modalities of tariff determination. A comparative chart of the relevant provisions of NTP 2006 and NTP 2016 is set out below:

NTP 2006	NTP 2016
<p>I Tariff must be determined through bidding for all new projects. All future requirement of power must be procured competitively. (Paragraph 5.1)</p>	<p>I Tariff must be determined through bidding for all new projects. All future requirement of power should continue to be procured competitively. (Paragraph 5.2)</p>
<p>II Bidding route is not compulsorily applicable to public sector projects The tariff for public sector projects need not be determined by bidding. However, it must be decided in five years or when the Regulatory Commission is satisfied that the situation is ripe for competition to be introduced. (Paragraph 5.1 and 7.6)</p>	<p>II Bidding route is applicable to government owned projects Tariff for projects owned or controlled by the Central Government shall be determined by bidding, unless otherwise specified by the Central Government on a case to case basis. (Paragraph 5.3)</p>
<p>III Timeline for implementation by State Commissions After the implementation of the framework for inter-state transmission, a similar approach should be implemented by State Commissions in the next two years for Intra-State transmission. (Paragraph 7.7)</p>	<p>III Implementation by State Commissions A similar approach shall be implemented by State Commissions. (Paragraph 7(8) Intra-State transmission projects shall be developed by State Governments through competitive bidding <u>for projects costing above a threshold limit. The threshold limit shall be determined by SERCs</u>. (Paragraph 5.3)</p>

90. Both NTP 2006 and NTP 2016 as a general rule prescribe competitive bidding for determination of tariff for all 'new projects'. There are two prominent differences between NTP 2006 and NTP 2016. *Firstly*, the projects owned or controlled by the Government were exempted from bidding under NTP 2006. However, according to NTP 2016, the tariff for government owned projects is also to be determined by bidding, unless otherwise specified. *Secondly*, NTP 2016

introduced the threshold limit rule. State Commissions are required to notify the threshold limit. If the cost of the project exceeds the threshold limit, then the Commission is mandated to follow the bidding process for the determination of tariff.

91. NTP 2016, by providing that state owned projects are not exempted from the TBCB process, has implemented the object of the Act, which is to create a fine balance between promoting competition and protecting the interests of the consumers. NTP 2006 was formulated with the objective of enhancing the participation of private players in the generation, transmission and distribution of electricity. The Central Government adopted a policy decision to introduce the bidding process for the determination of the tariff for all new transmission projects in 2006 but excluded its application to State projects. However, the distinction between State and private parties for the purpose of tariff determination through bidding was removed in NTP 2016. This transition between NTP 2006 and NTP 2016 depicts the intention of the Government to rationalise the tariff policy and to transfer the benefits of the rationalised tariff to the consumers.

92. According to NTP 2016, the tariff for all new electricity transmission projects that cost above the threshold amount notified by the State Commission shall be determined through bidding. However, the MERC had not notified the threshold limit as on the date when it passed the order granting transmission licence to AEML-T. MERC notified the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) Regulations 2019 under Section 181 of the Act. The MERC MYT Regulations does not provide the guidelines or the criteria for the choosing the modality of tariff determination. The guidelines for choosing the

modalities are sought to be introduced by the Maharashtra Electricity Regulatory Commission (Multi Year Tariff) (First Amendment) Regulations 2022. MERC circulated the draft of the MERC MYT Amendment Regulations on 19 August 2022 for comments, suggestions and objections. The preamble of the MERC MYT Amendment Regulations reads as follows:

“The State Electricity Regulatory Commission has been vested with the responsibility to determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State under Section 86 of the Electricity Act 2003. The tariff for intra-State Transmission System can be decided under Section 62 or Section 63 of the Electricity Act, 2003. Section 63 provides for adoption of the tariff determined through transparent process of bidding. Clause 5.3 of the Tariff Policy 2016 as regards development of intra-State Transmission System stipulates that the same shall be executed through competitive bidding route provided for projects costing above a threshold limit, which shall be decided by the State Electricity regulatory Commission. The Maharashtra Electricity Regulatory Commission (Multi Year Tariff) (First Amendment) Regulations 2022 specifies such threshold limit and other conditions for intra-State Transmission Projects to be developed through a Tariff Based Competitive Bidding.”

The MERC MYT Amendment Regulations seeks to amend Regulation 56 of the MERC MYT Regulations by adding Regulation 56.3. Regulation 56.3 states that ‘all new’ intra-state transmission systems costing above a threshold limit shall be developed through the Section 63 route, provided all other conditions stipulated in Annexure IV are also fulfilled. Regulation 56.3 reads as follows:

“56.3 All the new intra-State transmission systems costing above a Threshold Limit and meeting other conditions as laid down in Annexure IV, shall be developed through Tariff Based Competitive Bidding in accordance with the guidelines issued by the Central Government under Section 63 of the Act.”

According to Annexure IV, which is proposed to be added to the MERC MYT Regulations, the threshold was determined at 200 Crores. The relevant extract of the MERC MYT Amendment Regulations is as follows:

- “1. The Commission hereby determines the Threshold Limit of Rupees Two Hundred (200) Crore.
2. All new Intra-State Transmission Systems costing Rupees Two Hundred (200) Crore or more shall be implemented by STU through Tariff Based Competitive Bidding in accordance with the competitive bidding guidelines notified by the Central Government from time to time.”

The Annexure also states that the threshold limit shall be applied to all new Intra-State Transmission projects for which approval is yet to be accorded by the Commission or where the Commission’s approval is not valid or where the approval has been cancelled. The relevant portion is extracted below:

- “3. This Threshold Limit shall be applicable for all new Intra-State Transmission Systems (Projects) for which approval is yet to be accorded by the Commission (excluding the projects for which application for in-principle approval is already submitted to the Commission and the same is under consideration by the Commission) or Commission’s approval is not valid or approval cancelled by the Commission as the case may be.”

93. However, the MERC MYT Amendment Regulations are yet to be notified. When the application seeking licence for the HVDC Kudus- Aarey transmission project was filed, and when it was granted by MERC, the threshold limit as required to be provided by NTP 2016 was not notified by MERC. Thus, the question is whether in the absence of any notification of the threshold by MERC, would MERC still be mandated to determine tariff for the transmission project through the TBCB route in view of NTP 2016.

94. The answer to this question turns on the interpretation of the phrase ‘shall be guided’ in Section 86(3) of the Act. This Court has previously had the opportunity to interpret the phrase ‘shall be guided by’ as it finds place in the Act. A two-Judge Bench of this Court in **Reliance Infrastructure Limited v. State of Maharashtra**³ interpreted the phrase with reference to Section 61 of the Act. This Court observed that ‘shall be guided by’ comprises of two elements, ‘shall’ and ‘guided’ which would mean that the guiding factors provide considerations which are material to the determination of tariffs by the appropriate Commission:

“29. Section 181 empowers the State Commissions to make regulations consistent with the Act and the Rules to carry out the provisions of the Act. Among the matters for which the regulations may provide are “the terms and conditions for the determination of tariff under Section 61” [Section 181(2)(zd)] . In specifying the terms and conditions for the determination of tariff, the appropriate Commission (as Section 61 provides) “shall be guided” by the factors which are set out in clauses (a) to (i). The expression “shall be guided” comprises of two elements : the “shall” and, the “guidance”. Clauses (a) to (i) provide guidance to the Commission in specifying the terms and conditions for the determination of tariff. The expression “shall” indicates that the factors which are specified in clauses (a) to (i) have to be borne in mind by the appropriate Commission. **As guiding factors, they provide considerations which are material to the determination of tariffs by the appropriate Commission.** [...]

32. The Tariff Policy provides guidance to the appropriate Commission when it frames regulations. The power to frame regulations is legislative in nature. It is conferred upon the appropriate Commission. The Commission weighs numerous factors. Its discretion in carrying out a complex exercise cannot be constrained. **The delegate of the legislature is therefore under a mandate to bring about a fair and equitable balance between competing considerations. Standing at the forefront of those considerations is above all the need to ensure efficiency and to protect the interests of consumers.** The submission which has been urged on behalf of the appellant would reduce tariff fixation to a rather simplistic process of

³ (2019) 3 SCC 352

bringing about equality between generating units which have the same design and manufacturing origin. Such an approach overlooks the complex factors which have to be borne in mind in the determination of tariffs.

(emphasis supplied)

This Court held that the principles prescribed in Section 61 are all material considerations that must guide the Appropriate Commission while it prescribes the terms and conditions for determining the tariff. It was held that it was the responsibility of the Commission to ensure a delicate balance of the principles prescribed under Section 61. Thus, while the NTP which is prescribed as one of the principles under Section 61 shall be a material consideration, it cannot be interpreted to mean that it is the 'only' material consideration. This interpretation of 'shall be guided' is equally applicable to the use of the phrase in Section 86(3).

95. The counsel for the appellants has relied on observations made by a two-Judge Bench of this Court in **Energy Watchdog** (supra) that the NTP 2016 is a 'statutory document being issued under Section 3 of the Act and has the force of law' to argue that the NTP is binding on the Commission. In **Energy Watchdog** (supra), Adani Enterprises Consortium submitted its bid for the proposed project and it was selected as the successful bidder. However, the law in Indonesia had changed in 2010 and 2011 which aligned the export price of coal from Indonesia to international market prices instead of the price that was prevalent in the last forty years. Adani Power filed a petition before CERC seeking relief due to the impact of the Indonesian Regulation to either discharge them from the performance of the Power Purchase Agreement on account of frustration, or to evolve a mechanism to restore the petitioners to the same economic condition prior to the occurrence of the change in law. Clause 4.7 of the Guidelines for

determination of Tariff by Bidding Process which was included through an amendment stipulates that:

“any change in law impacting cost or revenue from the business of selling electricity to the procurer with respect to the law applicable on the date which is 7 days before the last date for bid submission shall be adjusted separately. In case of any dispute regarding the impact of any change in law, the decision of the appropriate Commission shall apply.”

In this context, this Court held that ‘law’ means all laws including electricity laws in force in India, and that electricity laws means the Electricity Act, rules and regulations made thereunder and ‘any other law’ pertaining to electricity. It was in this context that it was observed that the NTP is ‘law’. However, to understand the context of the observations, a brief historical background of the amendment to the guidelines will have to be noted. CERC issued a statutory advice under Section 79(2) of the Act to the Central Government on the impact of domestic coal non-availability and the additional cost of imported coal on tariff. CERC advised that suitable amendments would have to be made to the TBCB Guidelines that were issued under Section 63, the NEP, and NTP. The amendments allow the Appropriate Commissions to take care of the situations arising out of the ‘change in policy of the Sovereign Government.’ In view of the advice of CERC under Section 79(2), the MoP issued an advisory on 31 July 2013 stating that in view of the shortfall of domestic supply of coal, the cost of imported coal shall be considered for being made a pass through by the Appropriate Commission. Subsequently, in pursuance of the advisory issued by the MoP, the NTP 2016 was amended to include Clause 6.1 providing relief as mentioned in the advisory. The relevant extract is as under:

“6.1 Procurement of power

As stipulated in Para 5.1, power procurement for future requirements should be through a transparent competitive bidding mechanism using the guidelines issued by the Central Government from time to time. These guidelines provide for procurement of electricity separately for base load requirements and for peak load requirements. This would facilitate setting up of generation capacities specifically for meeting such requirements.

However, some of the competitively bid projects as per the guidelines dated 19-1-2005 have experienced difficulties in getting the required quantity of coal from Coal India Limited (CIL). In case of reduced quantity of domestic coal supplied by CIL, vis-à-vis the assured quantity or quantity indicated in letter of assurance/FSA the cost of imported market based e-auction coal procured for making up the shortfall, shall be considered for being made a pass through by appropriate Commission on a case-to-case basis, as per advisory issued by Ministry of Power vide OM No. FU-12/2011-IPC (Vol-III) dated 31-7-2013.”

96. It is pertinent to note that this Court in **Energy Watchdog** (supra) did not interpret the phrase ‘shall be guided’ as it finds place in the Act. This Court dealt with the interpretation of the phrase ‘change in law’. It was held that the amendment in the NTP 2016 taking cognizance of the domestic coal shortage was a ‘change in law’ since it is a statutory policy. There is no doubt that NEP and NTP are statutory policies since they were framed under the provisions of the Act. However, the observation in **Energy Watchdog** (supra) that the NTP is ‘law’ cannot be held to bind the interpretation of the phrase ‘shall be guided’. Further, it must also be noted that this Court in **Energy Watchdog** (supra) was dealing specifically with changes due to coal procurement and the amendments in the policies were recommended to be made by the Central Regulatory Commission.

97. A reading of the judgment of this Court in **PTC India** (supra) and the provisions of the Act indicates that the determination of tariff and framing regulations for the determination of tariff fall within the exclusive domain of the

Appropriate Commission. Section 61 stipulates that the Appropriate Commission shall 'specify the terms and conditions' for the determination of tariff. Section 86 provides that one of the functions of the State Commission is to determine tariff for transmission. Section 181 states that the Commission shall make regulations on the terms and conditions for the determination of tariff. Thus, the regulation and determination of tariff is the function of the Appropriate Commission.

98. While the determination and regulation of tariff falls within the exclusive domain of the Regulatory Commission, it is crucial to note that Sections 61 and 86 stipulate that the Commission shall be guided by the NTP while specifying terms and conditions for determining tariff. The State Commission while exercising its power to make regulations under Section 181(2)(zd) on the terms and conditions for determination of tariff under Section 61 must conform to the provisions of the Act. Thus, while framing regulations under Section 181(2)(zd), the Commission must be guided by the principles mentioned in Section 61, which includes the NEP and NTP.

99. This Court in **Reliance Infrastructure** (supra) has already held that the NTP is one of the material considerations. The NTP is one of the many guidelines that the Commission must necessarily consider while regulating tariff. The State and the Central Government only have an advisory role in the regulation of tariff. The Electricity Regulatory Commissions Act 1998, which was consolidated with other statutes on electricity while enacting the Electricity Act 2003, was enacted to distance the governments from the determination of tariffs. Further, the Act does not seek to centralise the power to regulate tariff with the Centre. One of the objectives of the Act was to provide the "states enough flexibility to develop their

power sector in the manner they consider appropriate.” Thus, since the Appropriate Commissions possess full autonomy in the determination and regulation of tariff, and the States have been provided flexibility to develop their power systems for intra-state transmission of electricity, the NTP 2016 shall be one of the material considerations. Further, even in the letter dated 15 March 2021, the MoP only ‘strongly recommended’ that the states adopt TBCB for the development of intra-state transmission systems.

100. In view of the above discussion, merely because the threshold limit is not notified, it would not mean that MERC only had to determine tariff through the RTM route. It is open to MERC to determine the tariff through either the Section 63 or the Section 62 route. When MERC is exercising its general regulatory power under Section 86 to determine tariff, the NTP is a material consideration. Thus, the absence of a threshold limit would not affect the power that MERC holds to determine tariff (and its modalities). Since MERC has the power to regulate and determine tariff for the intra-state transmission of electricity, the guidelines and regulations issued by MERC, if any, must be analysed to determine if MERC was mandated to choose one of the two routes for the determination of tariff or whether it could exercise its discretion to choose the modality.

101. As already noted above, on the date when MERC determined the tariff for the HVDC transmission project, it had neither notified Regulations under Section 181(2)(zd) nor the terms and conditions under Section 61 of the Act. On 4 January 2019, the Government of Maharashtra passed a resolution ‘Regarding Adoption of new Tariff Based Competitive Bidding Process in the State’. The

resolution states that it has been issued in pursuance of the guidelines on competitive bidding that were issued by the MoP by Gazette Notification No. 11/5/2005-PG(I) dated 13 April 2006 which indicated that the ‘State Government may adopt these guidelines for intra-state transmission projects or having considered these guiding principles may constitute similar committees for facilitating establishment of state transmission projects in the State.’” The resolution further notes that the Government has decided to constitute committees such as the Empowered Committee and Bid Evaluation Committee for undertaking transmission projects through TBCB. The resolution notes that the State Government has decided to implement TBCB for new intra-state projects. The constitution of the Empowered Committee and Bid Evaluation Committee are traced to the constitution of similar committees under the TBCB Guidelines and Development Guidelines. The resolution notes that the Empowered Committee is being constituted in accordance with the Central Government’s guidelines. Paragraph 3 of the notification notes that the Bid Process Coordinator will be appointed by the Empowered Committee to coordinate the bid process and that the functions of the Bid Process Coordinator would be according to the Central Government’s guidelines.

E. 3 Value of GoM GR

102. The GoM’s GR raises two separate issues for consideration:
- a) the relevance of the GoM’s GR for MERC’s decision on the application for licence filed by AEML-T; and

b) the relevance of the GoM's GR in terms of the decision of the MSETCL to not hold bidding for the HVDC project.

103. However, before venturing into these two issues, it would be important to discuss the applicability of the GoM GR to the HVDC project. The GoM GR was notified on 4 January 2019. The GR mandates that tariff shall be determined through the TBCB route under Section 63 for all 'new projects'. Therefore, we need to analyse whether as on 4 January 2019, the HVDC Kudus-Aarey project could be considered as a 'new project'.

E. 3.1 The New - Old Conundrum

104. The GoM's GR does not provide any clarity on the term 'new' project leaving it open to MERC to interpret the phrase. MERC by its order dated 21 March 2021 granted a licence for the HVDC Kudus-Aarey transmission project under Section 62 of the Act to AEML-T holding that it was an 'existing' project as on the date the GoM's GR was notified, that is 4 January 2019. For arriving at this conclusion, MERC referred to the application for grid connectivity for the Kudus- Aarey HVDC project filed by AEML-T on 23 November 2018. By its letter dated 23 November 2018, AEML-T sought an amendment to the letter issued by MERC granting grid connectivity to the 2 x 500 HVDC (VSC based) scheme from Nagothane to Aarey. The amendment sought by AEML-T to the letter issued by MERC must be read in the context of a meeting that was held between MSETCL and AEML-T where MSETCL suggested that the HVDC project be considered from Kudus substation as opposed to Nagothane substation since it is closer to the Aarey substation. However, MSETCL did a turn-around and on 5 January 2015 cancelled the Nagothane- Aarey project of R-Infra and instead proposed a

Kudus-Aarey HVAC project by itself. By the proposal dated 5 January 2015, MSETCL altered the point from Nagothane to Kudus, and the technology from HVDC to HVAC. Accordingly, MERC cancelled the in-principle approval granted to AEML-T for the HVDC Nagothane - Aarey scheme. However, due to right of way issues in the construction of the overhead line, the 400KV Aarey to Kudus HVAC scheme never took off.

105. MERC held that the cancellation of the in-principle approval would *generally* amount to closure of the project. However, MERC took into account the unique historical background of the HVDC project when the Kudus-Aarey project was proposed by AEML-T in November 2018. The relevant extract from the order of MERC is set out below:

However, the proposed HVDC Scheme, with the same configuration, has historical background from November 2018. The 1000 MW HVDC VSC based link between MSETCL Kudus and AEML Aarey was proposed by AEML-T, vide its application for grid connectivity, on 23 November, 2018. The said application thus, pre-dates the GoM GR dated 4 January, 2019. Certain planning and preparatory work such as technical studies, cost estimation, cable route survey, identification of land, preparation of DPR along with feasibility studies were also initiated. This fresh Connectivity Application also addresses TPC-T's contention that a fresh Connectivity Application has to be made when there is a change in the network configuration. Hence, the proposed HVDC Scheme is a new Scheme qua the earlier approved Scheme, but the fresh Connectivity Application for this HVDC Scheme was filed before the notification of the GoM GR dated 4 January, 2019.

In its judgment dismissing the appeal against the order of MERC, APTEL concurred with the observation made by MERC that the HVDC Scheme is an 'existing scheme'. APTEL observed that the cancellation of the in-principle

approval cannot render it a new scheme since it was the STU which took an about-turn on its objections to the HVDC technology:

“149. The cancellation of the in-principle approval earlier accorded cannot render it a new scheme since the STU itself later took an about-turn on its objections as to the technology for which reason the cancellation had been earlier commended and so acted upon by the Commission. The scheme has remained the same, the prime change being with regard to modified route (to save distance and costs) the HVDC technology being the one initially proposed and now eventually accepted by the STU upon endorsement by CEA. The effect of the confusion caused by the flip-flop or re-think more than once by the STU is being discussed by us in the section that follows (under the caption “*Shifting stand of STU on HVDC project*”) and dwelling upon it here will make the discourse repetitive. **Suffice it to say here that such confusion for reasons attributable to the indecisiveness of the STU cannot divest the scheme of its “old” character because, with some hiatus (again on account of doubts over HVDC as compared to HVAC), the Scheme has consistently and throughout remained, since FY 2013-14, part of the five- year plans of the STU, as a project entrusted to the proponent R-Infra (now AEML-T or its SPV), the GR of GoM having come in much later in the day.**

150. We, thus, do not find any error, infirmity or impropriety in the conclusions reached by the Commission on the captioned issue. The arguments of the appellant to the contrary are rejected.”

[...]

“159. [...] There was virtually no resistance on the suggestion for change of route (Kudus rather than Nagothane being one end) as the proponent readily agreed to it. The flip-flop vis-à-vis the appropriate technology (HVDC versus HVAC) is where the progress came stuck for a prolonged period. We do not find merit in the explanation of STU about exclusion from its published plans for a few years in-between. [...] The temporary uncertainty in the mind of the STU, which had only a recommendatory role, has only delayed the decision-making process. **It, however, cannot vitiate the decision taken by MERC in whose hands the jurisdiction is placed by the law to take a call on grant of license.**”

(emphasis supplied)

106. In view of the above discussion, the 1000MW Aarey-Kudus HVDC project by AEMIL is an 'existing' or an 'old' project with reference to the GoM GR for the following reasons:

106.1 *Firstly*, the GR does not provide or explain the meaning of the phrase 'new' projects. Hence, MERC has the discretion to formulate its understanding of the phrase 'new' projects so long as it is reasonable and does not rely on factors extraneous to the decision making process. In view of the decisions of this Court discussed above and the provisions of the Act, MERC has the power to regulate tariff determination. MERC has not defined the phrase 'new' projects through the regulations. In this situation, MERC has the discretion to interpret the phrase 'new' projects which it did in the course of its judgment granting AEMIL the transmission license. MERC held that generally the cancellation of approval would amount to the closure of the project, unless the peculiar nature of the facts leads to an alternative conclusion (as in this case);

106.2 *Secondly*, on applying the facts to the interpretation of the phrase 'new' project, MERC observed that the HVDC Kudus-Aarey project is not a new project. APTEL, on appeal, upheld the observations of MERC that it is an 'existing project'. The appeal against the judgment of APTEL before this Court under Section 125 of the Act can only be on the grounds mentioned in Section 100 of CPC. Section 125 reads as under:

"125. Any person aggrieved by any decision or order of the Appellate Tribunal, may, file an appeal to the Supreme Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal, to him, **on any one or more of the grounds specified in section 100 of the Code of Civil Procedure,1908.**

Provided that the Supreme Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days.”

(emphasis supplied)

Section 100 of the Code of Civil Procedure 1908 stipulates that a second appeal shall lie only if the court (in this case the Supreme Court) is satisfied that the case involves a substantial question of law. It is settled law that concurrent findings of fact recorded by the fora below (MERC and APTEL) cannot be interfered with by this Court. In **DSR (Steel) Pvt. Ltd. v. State of Rajasthan**⁴, a two Judge Bench of this Court observed that findings of fact by the Regulatory Commission and the Tribunal cannot be reopened by this Court on appeal under Section 125 of the Act. The court held:

14. An appeal under Section 125 of the Electricity Act, 2003 is maintainable before this Court only on the grounds specified in Section 100 of the Code of Civil Procedure. Section 100 CPC in turn permits filing of an appeal only if the case involves a substantial question of law. **Findings of fact recorded by the courts below, which would in the present case, imply the Regulatory Commission as the court of first instance and the Appellate Tribunal as the court hearing the first appeal, cannot be reopened before this Court in an appeal under Section 125 of the Electricity Act, 2003.** Just as the High Court cannot interfere with the concurrent findings of fact recorded by the courts below in a second appeal under Section 100 of the Code of Civil Procedure, so also this Court would be loath to entertain any challenge to the concurrent findings of fact recorded by the Regulatory Commission and the Appellate Tribunal. The decisions of this Court on the point are a legion. Reference to *Govindaraju v. Mariamma* [(2005) 2 SCC 500 : AIR 2005 SC 1008] , *Hari Singh v. Kanhaiya Lal* [(1999) 7 SCC 288 : AIR 1999 SC 3325] , *Ramaswamy Kalingaryar v. Mathayan Padayachi* [1992 Supp (1) SCC 712 : AIR 1992 SC 115] , *Kehar Singh v. Yash Pal* [AIR 1990 SC 2212] and *Bismillah Begum v. Rahmatullah Khan* [(1998) 2 SCC 226 : AIR 1998 SC 970] should, however, suffice.

(emphasis supplied)

⁴ (2012) 6 SCC 782

Since both APTEL and MERC have recorded concurrent findings that the HVDC Aarey- Kudus project is an existing project, it would not be open to this Court in an appeal under Section 125 of the Act to reopen the findings..

Thirdly, even otherwise, we are in agreement with the findings of MERC and APTEL that the 1000MV HVDC Scheme from Aarey to Kudus is an old project considering the following factual position:

106.2.1 On 12 November 2007, MSETCL issued a communication to CEA setting out the steps proposed to meet the growing demand of power for Mumbai's load centres. The communication stated that TPC had proposed the setting up of overhead lines and underground cables while REL had proposed connections to Aarey by using the HVDC (VSC based) technology. MSETCL notified a five-year plan for 2009-10 to 2013-14 envisaging the use of the HVDC technology. The plan specifically provided for the ongoing schemes of R-infra together with new schemes including the HVDC based link between Nagothane and Aarey. Similar details were provided in relation to TPC's ongoing and new schemes. Both TPC and R-infra were in the fray from the inception. While TPC was primarily in the overhead transmission line segment, R-infra had proposed the setting up of transmission lines on the HVDC technology.

106.2.2 The criticality of the HVDC technology assumes importance after the grid failure which Mumbai experienced in November 2010. The committee chaired by a Professor of IIT recommended the HVDC technology as a long-term solution for ensuring reliability of power supply for Mumbai. MERC granted a transmission licence to R-infra on 11 August 2011. R-

infra submitted a DPR to MERC for the appointment of a consultant for the transmission line from Nagothane to Aarey on 1 February 2013. On 7 March 2013, MSETCL confirmed that the Nagothane -Aarey project was a part of the STU five-year plan for FY 2013-14 to 2017-18. MERC approved the hiring of the consultant on 5 April 2013. The application for the grant of grid connectivity for the proposed HVDC project was allowed on 21 August 2013. When matters were thus progressing, in November 2013 MSETCL had in a meeting with R-Infra proposed that R-Infra can avail of connectivity from the Kudus sub-station which was closer to the Aarey sub-station as compared to the sub-station at Nagothane. R-infra expressed its concern over the proposed revision on the point of connectivity. On 10 April 2014, MERC granted an in-principle clearance for the HVDC Scheme. In January 2015, MSETCL proposed a revised scheme for where the 400KV Kudus-Aarey HVAC scheme was proposed by MSETCL. On 2 May 2016, the in-principle clearance granted to the Nagothane-Aarey HVDC Scheme was cancelled by MERC.

106.2.3 However, since the HVAC scheme of MSETCL did not take off, AEML-T submitted an application for HVDC Scheme between Aarey to Kudus on 23 November 2018 where an amendment to the letter issued by MERC granting grid connectivity to the 2 x 500 HVDC (VSC based) scheme from Nagothane to Aarey was sought.

106.2.4 The narration of facts indicates that AEML-T (or its predecessor in interest) has been involved in the execution of the HVDC Scheme since the inception of the scheme. The cancellation of the in-principle approval

accorded to AEML-T by MERC cannot be held to terminate the project in view of the peculiar background of this case. It is due to the indecisiveness of MSETCL on the HVDC and HVAC technologies that AEML-T's clearance was cancelled. The HVDC Scheme was attributed to R-Infra or, as the case may be, AEML-T since 2009. In the electricity regulatory sector, where the State Regulatory Commissions and STUs' have been functioning in an *ad-hoc* manner running in many loops, the question of whether the project is an old or a new project must be determined through a holistic purview of the factual background. In view of the above factual narration, it is evident that the HVDC Scheme is an old project and the change in the location of the injection point from Nagothane to Kudus would not lead to the closure of the old project.

107. Regardless, we deem it appropriate to also decide upon the issues before us for consideration in terms of the relevance of the GoM GR in the decision making of MERC and holding of the bidding process by MSETCL.

E.3.2 Relevance of GoM GR for MERC's Decision

108. The GR does not carry any reference to the provision of the Act under which it was notified. The introduction of the resolution states the following:

“With the objective of setting up New Transmission Projects with Tariff Based Competitive Bidding, the Ministry of Power, Government of India has issued guidelines vide Gazette Notification No. 11/5/2005-PG(I) dated 13.04.2006. In addition, modifications were made vide Gazette Notifications on 04.07.2007 and 10.10.2008. Additionally, the revised directives dated 02.05.2012 indicate, that the State Government may adopt these guidelines for intra-state transmission projects or having considered these guiding principles may constitute similar committees for facilitating establishment of state transmission projects in the State.

[...]

Therefore, the government was considering constitution of committees like Empowered Committees, Bid Evaluation Committee in accordance with the above-mentioned guidelines of central government for undertaking transmission projects in the state through Tariff Based Competitive Bidding. The government has, after thorough discussion, taken the following decision in this regard.”

The GoI Guidelines referred to above are the TBCB Guidelines and the Development Guidelines. Paragraph 3.3 of the TBCB Guidelines states that for the procurement of transmission services for intra-state transmission, the appropriate State Government may notify any organization or state public sector undertaking especially engaged for bidding to be the Bidding Process Coordinator. Paragraph 24 of the Development Guidelines stipulates that the State Governments may adopt these guidelines and may constitute similar committees for facilitation of intra-state transmission projects. The Guidelines stipulate that the States ‘may’ adopt these guidelines for intra-state projects.

109. While the State Government has used the central guidelines to formulate its own guidelines on competitive bidding, it does note that the Empowered Committee being constituted will undertake transmission projects “in accordance with Central Government’s guidelines”. Therefore, to the extent that the GoM GR deals with setting up of certain bodies for conducting bidding to allocate projects under the TBCB route in line with the Central Government’s TBCB Guidelines, it can be said to be in furtherance of the guidelines referred under Section 63 of the Act. However, the same is limited to committees being set up for the procedural aspects of the bidding process dealt by the Central Government’s guidelines.

110. Another contentious aspect of the GoM GR is the portion wherein it notified that the State Government “has decided to implement Tariff Based Competitive

Bidding-TBCB process for new Projects.” The GR did not define the term ‘new projects.’ The appellant has argued that the GR notified by the State Government being binding on MERC, MERC had no option but to determine tariff through the bidding process for all ‘new’ projects, and if the HVDC project is a ‘new project’ then tariff could not have been determined through the Section 62 route. While we have already held that the HVDC project was an existing project in terms of the GoM GR, we also clarify the aspect of the binding value of GoM GR upon MERC.

111. As discussed above, the fixation of tariff falls within the independent statutory domain of the Regulatory Commission. The State Government has the power to issue directions to the State Commission in matters of ‘policy involving public interest’ under Section 108 of the Act. While stating that the State Government may issue directions in matters of policy involving public interest, Section 108(2) states that if any question arises as to whether such direction relates to matters of policy involving public interest, the decision of the State Government on it shall be final. The provision further states that the State Commission shall be guided by the directions of the State Government in discharge of its functions. Section 108 is extracted below:

“108. **Direction by State Government.**- (1) In the discharge of its functions, the State Commission shall be guided by such directions in matters of policy involving public interest as the State Government may give to it in writing.

(2) If any question arises as to whether any such direction related to a matter of policy involving public interest, the decision of the State Government thereon shall be final.”

112. Section 108 deals with “directions in matters of policy involving public interest as the State Government may **give to it** in writing.” In the provision, the

term 'it' refers to the State Commission. The GoM's GR does not mention the State Commission and has not been issued as a direction to the MERC as envisaged in Section 108. Therefore, the HVDC Project is, *firstly*, an existing project in terms of the GoM GR, and *secondly*, the GoM GR has not been issued in terms of Section 108 as a direction to the State Commission.

E.3.3 Relevance of GoM GR vis-à-vis MSETCL's decision

113. The GoM GR provides that all new projects would be allotted under the TBCB route. Accordingly, the question arises whether MSETCL was bound to refer the HVDC Project to the Empowered Committee for the bidding to be held and the tariff determined through bidding to be thereafter referred to MERC under Section 63.

114. MSETCL or any STU performs the following functions in terms of Section 39 of the Electricity Act:

- “(2) The functions of the State Transmission Utility shall be—
- (a) to undertake transmission of electricity through intra-State transmission system;
- (b) to discharge all functions of planning and co-ordination relating to intra-State transmission system with—
 - (i) Central Transmission Utility;
 - (ii) State Governments;
 - (iii) generating companies;
 - (iv) Regional Power Committees;
 - (v) Authority;
 - (vi) licensees;
 - (vii) any other person notified by the State Government in this behalf;
- (c) to ensure development of an efficient, co-ordinated and economical system of intra-State transmission lines for smooth flow of electricity from a generating station to the load centers;”

115. The Act clearly lays out the importance of the STU's role in terms of planning, development and co-ordination of intra-state transmission systems of any State. This role is carried out in co-ordination with the other stakeholders listed in sub-clause (b) of Section 39(2). In Maharashtra, MSETCL has been notifying five-year plans which reflect the upcoming projects and planning initiatives regarding intra-state transmission system. The requirement for MSETCL to publish the five-year plans has also been captured in the MERC Gride Code 2006.

116. Paragraph 24 of the Development Guidelines allows the State Governments to adopt the guidelines and constitute similar committees for facilitation of intra-state transmission projects. In terms of the Development Guidelines, the Empowered Committee has been set up which will perform its functions in line with the Guidelines. The GoM's GR has also notified that the Empowered Committee shall appoint the Bid Process Coordinator and the Bid Empowerment Committee.

117. The functions of the Empowered Committee include "*to identify projects to be developed under this Scheme.*" Further, it is this Empowered Committee which facilitates preparation of bid documents, evaluation of bids as well as finalization of Transmission Service Agreements between the developer and the concerned utilities.

118. Some of the relevant provisions of the Development Guidelines, including the functions to be performed by the Empowered Committee, are reproduced below:

"14. The functions of the Empowered Committee will be the following:

- a) To identify projects to be developed under this Scheme.
- b) To facilitate preparation of bid documents and invitation of bid through a suitable agency.
- c) To facilitate evaluation of bids.
- d) To facilitate finalization and signing of Transmission Service Agreement (TSA) between the developer and the concerned utilities.
- e) To facilitate development of projects under this Scheme.

[...]

PROJECT FORMULATION

17. Once the Perspective Plan, covering three five year plans, the Short Term Plan and the Network Plan have been prepared; some of these projects will be identified as projects to be covered under this Scheme for competitive bidding. In order to attract private investment in the transmission sector it is very important to be able to make available all the information to the stakeholders, regarding new projects and their technical and other specifications. These identified projects would then need to be formulated with adequate details to enable competitive bidding to take place. Detailed Project Report (DPR) for these projects shall be prepared....

[...]

SELECTION OF DEVELOPER

19. The selection of developer for identified projects would be through tariff based bidding for transmission services according to the guidelines issued by the Ministry Of Power under section 63 of the Electricity Act, 2003. CTU/STUs and Joint Venture Companies will also be eligible to bid, so that there is sufficient competition among the bidders.

LICENSE FOR TRANSMISSION

20. Along with the recommendation of selection by the Empowered Committee, the selected developer shall approach the Appropriate Commission, within a period of 30 days, for grant of transmission license. If it fails to apply for license within thirty days then it will be liable for cancellation of its selection. Cancellation of selection as provided above will be done by the Empowered Committee only after giving the selected private company an opportunity to be heard.

(emphasis supplied)

119. In line with paragraph 17 of the Development Guidelines, it shall be the Empowered Committee which shall identify projects from the transmission utility's network plan for being covered under the competitive bidding process. In terms of paragraph 19 of the Development Guidelines, the relevant STU will itself be eligible to be a participant in the bid.

120. Accordingly, it is clear from a reading of these Development Guidelines read with the functions of the State Utility in terms of Section 39(2) of the Act that while the State Transmission Utility shall be the apex authority for planning of intra-state transmission projects, the Empowered Committee is to identify projects to be undertaken under the TBCB route.

121. However, as we have already noted above, the HVDC Project was an existing/old project in terms of the GoM's GR. Furthermore, this is also brought out in terms of the Empowered Committee's deliberations recorded in its Minutes of Meetings.

122. Once the Empowered Committee was constituted, MSETCL referred the HVDC Project to it in terms of the GoM's GR. The Minutes of the 4th Empowered Committee Meeting dated 30 May 2020, record Agenda No. 3 as the HVDC Project. The Empowered Committee was apprised of the developments regarding this as well as the objection from TPC that it should be allotted through TBCB. The Empowered Committee did not take a decision in the said meeting.

123. In the 5th Empowered Committee meeting held on 24 December 2020, both the issue of the threshold limit for development of intra-state transmission projects through TBCB as well as the HVDC Project were once again discussed.

124. The Empowered Committee laid out the limit of Rs 500 crores as the threshold and decided upon the issue of "new/old" projects under Agenda Item 3. Further, it once again took into consideration the HVDC Project and decided that MSETCL shall proceed with the project in terms of the recommendation in Agenda Item 3:

"Agenda Item 4: Appraisal of inclusion of 1000 MW HVDC
Kudus-Aarey project in the STU five Year plan

(2019-20 – 2024-25) referred to Empowered Committee in last meeting.

The Agenda “1000 MW HVDC project of Kudus – Aarey to be taken under TBCB” was discussed in 4th Empowered Committee meeting on 30th May 2020.”

At that time the HVDC project was not part of STU five-year plan.

Hence the agenda item was deferred. Now the Empowered Committee has been apprised about inclusion of 1000 MW HVDC project of Kudus – Aarey in the STU Five-year plan. Post appraisal of inclusion, the Committee informed STU that they should proceed as per the decision given by the Empowered Committee vide Agenda No.3.”

125. Based on the above decision, in its additional submission dated 20 January 2021 filed before MERC, MSETCL after adverting to the aforementioned minutes of meeting of the EC stated that it would proceed in accordance with the decision of the EC. Clarifying the same in its written submission dated 08 February 2021 filed before the MERC, it stated that this implied that the HVDC Project being an old project, it would not be required to go through the TBCB route:

9. It is submitted that present HVDC Scheme was informed to Empowered Committee Members during 4th Empowered Committee meeting (as also recorded in MoM dated 30.05.2020) in line with the Government of Maharashtra GR dt. 04.01.2019. Earlier Nagothane-Aarey HVDC project was submitted by erstwhile Rinfra-T and was included in STU plan 2014-15 to 2018-19. This project was approved by Hon'ble MERC to be implemented by Rinfra-T. Subsequently HVAC Kudus - Aarey scheme was submitted by MSETCL and was included in STU plan of 2015-16 to 2019-20. This project was approved by Hon'ble Commission to be implemented by MSETCL. However this HVAC project was subsequently cancelled. Further, M/s. AEML-T has again submitted VSC based 1000 MW Kudus to Aarey HVDC Scheme to STU on dated 23/11/2018 and the same was included in STU five-year plan of 2018-19 to 2022-23 but later it was deleted as other HVAC schemes viz 400 kV Velgaon, 400 kV Kalwa 11 & 400 kV Kalwa - Padghe M/C

line were explored as alternative to HVDC Scheme. Subsequently after CEA recommendation the scheme was again reinstated as submitted by AEML-T in STU plan of 2019-20 to 2024-25. Hence it is seen that the said HVDC project is old project.

10. One of the most critical factors for timely execution of a Transmission scheme is the availability of land for substations. AEML EHV substation land utilization at Aarey can be optimized to house the Inverter Terminal of the HVDC Scheme.

11. It is further submitted that in the 5th Empowered Committee meeting, Empowered Committee decided the threshold to be applied to the new schemes that can be referred to Empowered Committee. HVDC being the scheme perceived since many years; already recommended as submitted by AEML-T and also directed by Hon'ble MERC to STU and AEML to implement the scheme expeditiously.

12. As is seen from above deliberations it is seen that HVDC project is old project. Moreover, the threshold limit as decided by Empowered Committee in its meeting dated 24/12/2020 has not yet been approved by Hon'ble Commission. However as per Clause 6 (ii) this HVDC project can be considered as old project and where MERC has initiated substantially the process of inclusion of this project in scope of petitioner.

(emphasis supplied)

Notably, the EC too did not raise any objections to MSETCL's interpretation.

126. Furthermore, it is also important to note that the threshold limit which was mentioned by the EC was merely a recommendation in response to the request of MERC so it could accordingly notify the limit in line with the NTP 2016. The threshold limit has not yet been notified by MERC.

127. Accordingly, it is clear that the MSETCL's decision regarding the HVDC Project not being referred under the TBCB route was in line with the Empowered Committee's directions which have been set up in terms of the GoM GR and which has been granted the power to select projects to be taken up under the TBCB route.

F. Conclusion

128. Based on the above discussion, we have reached the following conclusions:

- (i) The Electricity Act 2003 provides the States sufficient flexibility to regulate the intra-state transmission systems, wherein the Appropriate State Commissions possess the power to determine and regulate tariff. The Electricity Act 2003 seeks to distance the State Governments from the determination and regulation of tariff, placing such power completely within the ambit of the Appropriate Commissions;
- (ii) The provisions of the Electricity Act 2003 do not prescribe one dominant method to determine tariff. Section 63 operates *after* the bidding process has been conducted. Where the tariff has already been determined through bidding, the Appropriate Commission has to *adopt such* tariff that has been determined. The Appropriate Commission cannot negate such tariff determined through bidding by using its powers under Section 62. The tariff determined through the bidding process may not be adopted by the Appropriate Commission only if the bidding process was not transparent (undertaking a substantive review) or the procedure prescribed by the Central Government guidelines under Section 63 was not followed (undertaking a procedural review);
- (iii) Sections 62 and 63 stipulate the modalities of tariff determination. The non-obstante clause in Section 63 cannot be interpreted to mean that Section 63 would take precedence over Section 62 at the stage of choosing the modality to determine tariff. The criteria or guidelines for the

determination of the modality of tariff determination ought to be notified by the Appropriate State Commission either through regulations under Section 181 of the Act or guidelines under Section 61 of the Act;

(iv) MERC has neither framed regulations nor notified guidelines prescribing the criteria or guidelines for choosing the modalities to determine tariff. Thus, MERC shall determine the tariff by exercising its general regulatory powers under Section 86(1)(a) of the Act;

(v) MERC while exercising its general regulatory powers under Section 86(1)(a) shall be guided by the NTP 2016, which shall be a material consideration. Accordingly, while NTP 2016 requires intra-state transmission projects above the threshold limit to be allotted through TBCB route, this constitutes a material consideration to be taken into account. The threshold value in the case of Maharashtra has not yet been notified by MERC;

(vi) The threshold limit not having been notified by MERC, it was open to MERC to allot the HVDC project either under the RTM or the TBCB route;

(vii) MERC and APTEL have arrived at concurrent findings that the 1000MW HVDC Aarey-Kudus project is an 'existing project' for the purpose of the applicability of the GoM's GR 2019. This Court deciding a statutory appeal under Section 125 of the Act cannot interfere with the concurrent findings on a question of fact. Nonetheless, even on an independent assessment of the facts, the HVDC project is an existing project;

(viii) Even if the HVDC Project were to be considered a 'new project' in terms of the GoM's GR, the same not having been issued in terms of Section 108 as

a direction to the State Commission, MERC's decision cannot be challenged for failing to comply with the same as MERC is an independent body with statutory powers to determine and regulate tariff; and

(ix) MSETCL has acted in terms of the GoM's GR as it has referred the HVDC project to the Empowered Committee and the decision to not refer the HVDC project under the TBCB route was in line with the Empowered Committee's directions. The Empowered Committee has the power to select projects to be taken up under the TBCB route under the GoM's GR.

129. The Electricity Act 2003 or the policy framework, particularly NTP 2016 read with the GoM GR dated 4 January 2019, did not make it binding upon MERC to allot the HVDC project only through the TBCB route. For the reasons mentioned above, the Regulatory Commission's decision to grant the HVDC project under Section 62 was within a reasonable exercise of its powers.

130. This case has brought the ad-hoc nature of the functioning of the STU to the notice of this Court. MSETCL has been changing its stance on the HVDC technology without following any due procedure. The flip-flops by MSETCL have led to the loss of time and investment while the demand in the electricity sector has been increasing exponentially. We are cognizant of the fact that in matters dealing with electricity regulation, the regulatory commissions and the transmission utilities are usually bogged down by factors such as technological uncertainty, requirement of heavy investment and issues of right of way. The ad-hoc functioning of the transmission utilities is also attributable to the lacunae in the regulations guiding the exercise of their functions. The Electricity Act 2003 was enacted with the objective of providing the States with sufficient flexibility to

regulate the intra-state electricity system and simultaneously provided the regulatory commissions with the power to determine tariffs. Though the Government, both at the Centre and in the States, have framed statutory policies and guidelines regulating the electricity sector, we have noticed that the Regulatory Commissions have not framed the necessary regulations to put into effect the principles prescribed under the Act.

131. We direct all State Regulatory Commissions to frame Regulations under Section 181 of the Act on the terms and conditions for determination of tariff within three months from the date of this judgment. While framing these guidelines on determination of tariff, the Appropriate Commission shall be guided by the principles prescribed in Section 61, which also includes the NEP and NTP. Where the Appropriate Commission(s) has already framed regulations, they shall be amended to include provisions on the criteria for choosing the modalities to determine the tariff, in case they have not been already included. The Commissions while being guided by the principles contained in Section 61 shall effectuate a balance that would create a sustainable model of electricity regulation in the States. The Regulatory Commission shall curate to the specific needs of the State while framing these regulations. Further, the regulations framed must be in consonance with the objective of the Electricity Act 2003, which is to enhance the investment of private stakeholders in the electricity regulatory sector so as to create a sustainable and effective system of tariff determination that is cost efficient so that such benefits percolate to the end consumers.

132. For the reasons mentioned above, the appeal is dismissed.

133. Pending application(s), if any, are disposed of.

.....CJI.
[Dr Dhananjaya Y Chandrachud]

.....J.
[AS Bopanna]

.....J.
[J.B. Pardiwala]

**New Delhi;
November 23, 2022**