

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

PETITION NO. 125/ MP/2011

Coram:

Dr. Pramod Deo, Chairperson

Shri S. Jayaraman, Member

Shri V.S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 26.06.2012

Date of Order : 26.04.2013

In the matter of

Conduct of NTPC Limited during October 2010 and 05.01.2011 in rushing to sign Power Purchase Agreements for supply of 37000 MW of electricity abusing its dominant position, thereby causing adverse effect on competition in electricity industry

And in the matter of

Association of Power Producers, New Delhi

Petitioner

Vs

1. NTPC Ltd, New Delhi
 2. Power Development Department Govt. of J&K, Jammu
 3. Himachal Pradesh State Electricity Board Limited, Shimla
 4. Punjab State Power Corporation Limited, Patiala
 5. Haryana Power Purchase Centre, Panchkula
 6. Power Department, Union Territory of Chandigarh, Chandigarh
 7. Uttaranchal Power Corporation Limited, Dehradun
 8. BSES Rajdhani Power Limited, New Delhi
 9. North Delhi Power Company, Delhi
 10. Uttar Pradesh Power Corporation Limited, Lucknow
 11. Jaipur Vidyut Vitran Nigam Ltd, Jaipur
 12. Ajmer Vidyut Vitran Nigam Ltd, Ajmer
 13. Jodhpur Vidyut Vitran Nigam Ltd, Jodhpur
 14. Madhya Pradesh Power Trading Company Ltd, Jabalpur
 15. Maharashtra State Electricity Distribution Company Ltd, Mumbai
 16. Gujarat Urja Vikas Nigam Ltd, Baroda
 17. Chhattisgarh State Electricity Distribution Company Ltd, Raipur
 18. Andhra Pradesh Central Power Distribution Company Ltd., Hyderabad
 19. Andhra Pradesh North Power Distribution Company Ltd., Warangal
 20. Andhra Pradesh South Power Distribution Company Ltd., Tirupathi
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21. Andhra Pradesh Eastern Power Distribution Company Ltd., Visakhapatnam
22. Bangalore Electricity Supply Company Ltd., Bangalore
23. Mangalore Electricity Supply Company Ltd., Mangalore
24. Chamundeshwari Electricity Supply Company Ltd., Mysore
25. Gulbarga Electricity Supply Company Ltd., Gulbarga
26. Hubli Electricity Supply Company Ltd., Hubli
27. Tamil Nadu Generation and Distribution Corporation Ltd., Chennai
28. Kerala State Electricity Board, Thiruvanthapuram
29. Electricity Department, Govt of Pudducherry. Punducherry
30. Electricity Department, Govt of Goa, Goa
31. Electricity Department, Administration of Daman & Diu, Daman
32. Electricity Department, Administration of Dadra & Nagar Haveli, Silvassa
33. GRIDCO Ltd., Bhubaneswar
34. West Bengal State Electricity Distribution Company Ltd., Kolkata
35. Bihar State Electricity Board, Patna
36. Jharkhand State Electricity Board, Ranchi
37. Electricity Department, Govt of Sikkim, Sikkim
38. Damodar Valley Corporation, Kolkata

Respondents

Present

Shri Amit Kapur, Advocate, APP
Shri A.Jain, Advocate, APP
Shri S.K.Sharma, APP
Shri M.G.Ramachandran, Advocate, NTPC
Shri C.K.Mondal, NTPC
Shri A.Dua, NTPC
Shri A.Basu Roy, NTPC
Shri Rohit Chabra, NTPC
Shri R.B.Sharma, Advocate, BSEB
Shri K.K.Agrawal, MPPMCL

ORDER

The petitioner, Association of Power Producers, has filed the present petition under Sections 60 and 66 of the Electricity Act, 2003 alleging abuse of dominant position by NTPC Ltd for having signed Power Purchase Agreements (PPAs) for supply of 37000 MW of electricity during the period from 1.10.2010 to 5.1.2011. The reliefs claimed by the petitioner are as under:

- “i) Invoke its authority under sections 60 and 66 of EA03 and direct NTPC not to execute/ implement the contracts;*
- ii) Declare PPAs entered into/ executed by NTPC between 01.10.2010 until 05.01.2011 as being null and void;*
- iii) Direct NTPC to discontinue such abuse of dominant position and not to enter in anti-competitive agreements in future;*
- iv) Refer to the Competition Commission of India for its opinion on NTPC enjoying dominant position.*
- v) Pass such other order / directions as this Hon’ble Commission deems fit and appropriate under the circumstances of the case and in the interest of justice.”*

2. The petitioner claims to be the representative body of private power developers who together are engaged in developing and/or operating power projects with an aggregate installed capacity of 1,20,000 MW. The petitioner claims to have been formed “with the objective of becoming a neutral platform for the private power developers to discuss and seek resolution of significant barriers and discriminatory conditions faced by them due to prevalent policy and regulatory environment, which directly impact the sector and frustrate the legislative objectives underlying the Electricity Act, 2003”.

Background Facts

3. Section 3 of the Electricity Act, 2003 provides that the Central Government shall, from time to time, prepare the National Electricity Policy and Tariff Policy, in consultation with the State Governments and the Central Electricity Authority for development of the power system based on the optimal utilization of resources such as coal, natural gas, nuclear substances or minerals, hydro and renewable sources of energy. In furtherance of the said mandate, the Central Government notified the National Electricity Policy vide Notification dated 12.2.2005. One of the objectives of the National electricity Policy is to

make available reliable and quality power at competitive rates while safeguarding the interest of consumers. The Central Government in exercise of its powers under Section 3 of the Act notified the Tariff Policy on 6.1.2006. The Tariff Policy through its various provisions seeks to promote competition in the electricity industry, to ensure financial viability of the sector and attract investment in the electricity sector. The Tariff Policy made provisions for competitive bidding for sale of power by the generating companies to the distribution licensees. The relevant part of the Tariff Policy notified vide Notification dated 6.1.2006 is extracted hereunder:

“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 for medium or long-term period vide gazette notification dated 19th January, 2005.

All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.

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.”

4. Thus the Tariff Policy exempted the public sector projects from competitive bidding for a period of five years, that is, up to 5.1.2011 or when the appropriate Regulatory Commission is satisfied that the situation is ripe to introduce such competition. Before expiry of the period of exemption, Ministry of Power, Government of India on a proposal by NTPC for amendment in Tariff Policy to permit cost-plus tariff

structure for public sector undertakings beyond 5.1.2011 made a reference to this Commission for its advice under sub-section (2) of Section 79 of the Act. This Commission on receipt of the reference from the Ministry of Power carried out an internal study for comparing the tariffs obtained through competitive bidding route with those allowed under cost-plus tariff structure. The result of the analysis indicated that the levelised tariffs obtained through competitive bidding were lower than the levelised tariff under the cost-plus regime. This Commission through statutory advices dated 1.6.2010 and 16.9.2010 advised the Ministry of Power, Government of India that “the deadline of January 2011 for completing the transition to procurement of power through tariff based competitive bidding even from State/Government owned entities should not be extended any further....”. On 9.12.2010, Ministry of Power, Government of India issued clarification regarding clause 5.1 and 7.1 of the Tariff Policy which stated that in view of the decision taken in the meeting of the Group of Ministers on Power Sector held on 29.10,2010, generation (excluding hydro) projects of PSUs/CPSUs for which PPAs have been signed on or before 5.1.2011 are exempted from the tariff based competitive bidding route.

5. As submitted by NTPC in its affidavit dated 2.6.2011, it has signed PPAs in respect of 21 projects with 37 beneficiaries during the period 1.10.2010 till 5.1.2011. Being aggrieved by the action of NTPC for entering into such large number of PPAs with the distribution companies and State Electricity Boards within a period of little over three months, the petitioner association has filed the present petition under section 60 and 66 of the Act.

Case of the Petitioner

6. The petitioner has alleged that NTPC undertook a massive exercise of signing Power Purchase Agreements with the State distribution companies and State Electricity Boards with a clear intention of bypassing the impending competitive bidding requirements during the period from 1.10.2010 to 5.1.2011 and signed the PPAs for supply of more than 37000 MW of power. The petitioner has submitted that NTPC had already signed PPAs for supply of 9000 MW of electricity between 1.4.2010 and 30.9.2010, thus making the PPAs signed during 2010-11(upto 5.1.2011) for supply of about 47000 MW of power which is in sharp contrast to its signing of PPAs during 2008-09 and 2009-10 which were only for 5820 MW and 8442 MW respectively.

7. The petitioner has submitted that the reason for the signing spree on the part of NTPC is its constant failures in the competitive biddings. In this connection, the petitioner has compared the levelised tariff quoted by NTPC for Sasan UMPP and Tilaiya UMPP with that of the L-1 bidders in those projects and has submitted that had these projects been awarded to NTPC based on its bids, the consumers would have been made to pay thousands of crores of rupees extra in tariff. It has been submitted that for Sasan UMPP, NTPC as the L-8 bidder had quoted the levelised tariff of Rs.2.12/kWh as against the L-1 bidder's quotation of Rs.1.19/kWh. By working out the difference between the levelised tariff of Rs. 2.12/kWh and Rs.1.19/kWh over a period of 25 years, the petitioner has submitted that NTPC would have charged excess tariff of Rs.544,773 crore over 25 years, had the project been awarded to NTPC. In case of Tilaiya UMPP, it has been submitted that NTPC as the L-2 bidder had quoted a

levelised tariff of Rs.2.39/kWh as against the quote of Rs.1.77/kWh by the L-1 bidder. Again, by working out the difference between the levelised tariff of Rs.2.39/kWh and Rs.1.77/kWh, the petitioner has submitted that had the project been awarded to NTPC, the consumers would have been made to pay an excess amount of Rs. 414,097 crore over a period of 25 years. Based on the above comparative analysis, the petitioner has contended that cost-plus tariff which shall be charged by NTPC for supply of power from the projects proposed to be executed on the basis of the PPAs entered between 1.10.2010 to 5.1.2011 would be prejudicial to the interest of the consumers.

8. The petitioner has further alleged that NTPC has a history of poor project implementation which has resulted in its failure to meet its targets and long delays in completion of the projects. In that connection, the petitioner has cited certain data pertaining to the project implementation by NTPC during the 11th Plan in respect of 20 projects of NTPC. The petitioner has submitted that in case of Case 1 bidding, the bidder is required to submit alongwith its bid documents the proof of having undertaken specific actions for the project preparatory activities in respect of land, fuel, water, environmental clearance and forest clearance etc. In this connection, the petitioner has cited certain data regarding the preparedness of NTPC in respect of 15 projects of NTPC for supply of 16660 MW of power for which PPAs have been signed and has submitted that there are significant gaps in consents and clearances for these projects which would have severe negative consequences at the time of project implementation. The petitioner has submitted that considering the past track record of NTPC, it is

unlikely for NTPC to meet its commitment to supply more than 37000 MW of electricity set through the PPAs during the Twelfth Five Year Plan.

9. The petitioner has alleged that NTPC is a dominant enterprise in the electricity industry and more specifically in the industry for generation of power by thermal plants. Based on the data for thermal generation for the month of February 2011 published by CEA, the petitioner has submitted that NTPC produced approximately 31.65% of the total thermal power generated in the country during this month, followed by Mahagenco with approximately 6.91% and further followed by Neyveli Lignite Corporation with 2.94% and therefore, NTPC is far bigger a generator than its nearest competitor. It has been submitted that NTPC plants are located in the States of Uttar Pradesh, Chhattisgarh, Madhya Pradesh, Bihar, Odisha, Andhra Pradesh, West Bengal and NCR Delhi, and the shares of NTPC in thermal power generation in these States vis a vis the State generating companies shows that NTPC enjoys a position of dominance in these States. The petitioner has relied upon the CEA data of February 2011 in support of its contention which are tabulated as under:

State	Generation by NTPC (in MW)	State Generating companies(in MW)	Generation by other Central Generating companies (in MW)	NTPC's market share in %
Delhi	404	376.75	0	52%
Uttar Pradesh	5564.98	1797.19	0	76%
Chhattisgarh	2071.94	1155.49	349.72	58%
Madhya Pradesh	2209.13	1454.47	0	60%
Andhra Pradesh	2430.61	2981.30	0	45%
Bihar	1097.77	22.54	0	98%
Odisha	1828.51	257.50	0	88%
West Bengal	915.19	1954.76	839.63	25%

10. According to the petitioner, the Tariff Policy allowing exemption to the State owned generating companies from the competitive bidding for a period of five years till 5.1.2011 has resulted in segmentation of market into two clear-cut well defined markets such as (i) market for electricity only open to State generating companies and (ii) market for electricity open to all both state generating companies and private sector players. Based on the data quoted in the preceding para, the petitioner has contended that on an average, NTPC's market share in the market segments only open to State generating companies is approximately 63% in most of the States in which it operates. It has been further submitted that though NTPC is dominant in these States, it has been abusing its dominant position in other States where it has committed to supply power through the PPAs. The petitioner has further submitted that NTPC as a single entity is a giant in power generation in India and all other generators, whether Central/State Generating companies or Private Generating companies are far smaller in comparison. The petitioner has submitted that NTPC has dominant position in the market for thermal power generation in each State of origin where its plants are located.

11. The petitioner has alleged that NTPC has been using its dominance to foreclose the market for its present and potential competitors in the following areas:

(a) Foreclosure of upstream market for coal: The petitioner has submitted that the country is facing acute supply constraints for coal and as per the Planning Commission's report, the country's coal shortage will be about 200 Million Tonnes by 2017. On account of the signing of the PPAs by NTPC between 1.10.2010 and 5.1.2011, the incremental coal requirement of NTPC will be an additional 168 MMTPA of coal by the year 2018-19. However, on account of the Government

policy to give preference to Central Power Sector Undertakings for coal linkages, NTPC's PPA will ensure that none of its competitors would have access to coal required for its thermal generating station. In this connection, the petitioner has relied upon the Coal Linkage Policy for 12th Plan Projects dated 21.10.2009 and Mines and Minerals (Development and Regulations) Amendment, Act, 2010. It has been submitted that by signing contracts for sale of power, NTPC is blocking upstream market for supply of coal and as a result, Independent Power Producers who are competitors of NTPC, would find it extremely difficult to start new projects for the next five years. The petitioner has pleaded that NTPC's PPAs are anti-competitive and amount to abuse of dominance.

(b) Foreclosure of upstream market for finance: The petitioner has submitted that the Reserve Bank of India vide its Master Circular on Exposure Norms dated 1.7.2010 has imposed a credit exposure limit as a result of which banks have limitations on the amount of credit that can be given to the power sector projects. The petitioner has submitted that NTPC's PPAs allow it to capture the credit linkages in India, leaving the existing and potential competitors without the financial means to venture into new projects.

(c) Foreclosure of downstream markets: The petitioner has argued that NTPC with the intention of blocking the complete market has signed PPAs for more than 37000 MW with different distribution companies and State Electricity Boards and therefore, It is not possible for the distribution companies and the State Electricity boards to enter into PPAs or contracts for supply of power with any other

generating companies over and above the anticipated demand for which they have entered into PPAs with NTPC.

12. The petitioner has pleaded that through the combined result of foreclosure of the upstream markets for coal and capital and downstream market of distribution companies and State Electricity Boards, NTPC has succeeded in achieving near absolute horizontal foreclosure for new players to enter into the market. Relying on the judgement of the Circuit Court of Appeals in the case of United States vs Aluminium Co. of America et al {148 F.2d 416}, the petitioner has submitted that NTPC's proposed expansion plan is meant to block the market and hence to adversely affect competition in the relevant market. It has been further pleaded that NTPC's PPAs which are based on cost plus tariff would harm the consumer interests by increasing the price of electricity. The petitioner has further submitted that NTPC's action in signing the PPAs amounts to restraints in trade which makes the PPAs null and void under section 27 of the Indian Contract Act, 1872 which holds the agreements in restraint of trades as void.

13. The petitioner has submitted that the Electricity Act, 2003 recognises the importance of competition in the market and authorizes the Commission to intervene if a licensee or generating company enters into any agreement or abuses its dominant position leading to adverse effect on competition in electricity industry. Moreover, section 66 of the makes the Commission responsible to promote development of the market. Accordingly, the petitioner has sought the intervention of the Commission under

section 60 and 66 of the Act to issue directions to NTPC not to execute/implement the PPAs and other consequential directions.

14. During the hearing of the petition on 19.5.2011, the Commission directed the petitioner to implead all beneficiaries as respondents who have signed the PPAs with NTPC between 1.10.2010 and 5.1.2011. The petitioner by its affidavit dated 13.6.2011 has amended the memo of parties to include 38 beneficiaries as respondents who had signed the PPAs with NTPC during the said period. NTPC in its affidavit dated 26.7.2011 has placed on record the details of the PPAs signed by it during the period between 5.1.2006 and 5.1.2011. Replies to the petition have been filed by NTPC Ltd, Gujarat Urja Vikas Nigam Ltd and Madhya Pradesh Power Trading Corporation Limited.

Reply of NTPC (Respondent No.1)

15. NTPC vide its affidavit dated 24.10.2011 has refuted the allegations of the petitioner. The submissions of NTPC in brief are as under:

(a) It was a conscious policy decision of the Central Government in 2006 to allow Public Sector Undertakings (PSUs) to continue to conclude PPAs through negotiated route till 5.1.2011 while providing for future procurement of power by distribution companies through competitive bidding routes from the private generating companies. None of the members of the petitioner's association or any other generating company has challenged the Policy of the Government at any point of time. All PPAs entered into by NTPC are fully consistent with the policy of the Government.

(b) The allegation of competitive bidding price being lower than the price determined for NTPC on cost plus basis has been refuted by NTPC on the following grounds:

(i) Many of the competitive bidding projects where tariff was quoted at a price less than the cost plus tariff are found to be speculative and in some cases bidders have been demanding a revision in tariff contrary to bid terms and conditions;

(ii) The cost plus tariff determined by the Commission cannot be termed as high or unreasonable as it is being determined in accordance with norms and parameters specified and after carrying out prudence check.

(c) NTPC has signed PPAs for a total installed capacity of 52605 MW during the period 5.1.2005 to 5.1.2011. NTPC has submitted that based on the information available the website of CEA, websites of individual generating companies, status of connectivity and LTA applications as mentioned in the website of PGCIL, the total capacity which is under different stages of development/planning including commissioned and under construction projects by the private generators is nearly 1,05,324 MW during the corresponding period. NTPC has submitted that its capacity addition is less than half of the capacity of total projects being developed by the Independent Power Producers.

(d) NTPC has denied that it had rushed to sign the PPAs during the period from 1.10.2010 and 5.1.2011. It has been pleaded that the PPAs have been signed as a

result of negotiation, deliberation and discussion over a period of time before the cutoff date permitted by the Central Government which have also been approved by the State Governments and the distribution companies have taken steps with the State Commissions for approval for purchase of power under the PPAs. According to NTPC, the PPAs signed pursuant to the conscious policy decision of the Central Government in accordance with the tariff policy which provided for the facility to the distribution companies to continue to procure power on negotiated basis under long-term arrangement from the public sector undertakings and within the timeframe allowed by the tariff policy cannot be faulted or construed to be having adverse effect on competition in the electricity sector. NTPC has further submitted that Central Government has allocated 50% of power from these projects to home states and allocation of remaining 50% has been approved by the Union Cabinet.

(e) On the allegation concerning coal supply, NTPC has submitted that coal for its power stations is allocated by Ministry of Coal based on which the coal companies make the coal available and therefore, there is no scope for NTPC to abuse its position in any manner in coal allocation or to act in a manner contrary to the competition in the electricity industry.

(f) On the specific allegation of blocking of upstream and downstream markets, NTPC has submitted that the IPPs have signed PPAs for supply of 1,05,324 MW of power which is double of the capacity of 52605 MW for which PPAs have been signed by NTPC between 5.1.2006 and 5.1.2011. According to NTPC, the total

quantum of peaking power required in the country as per the Twelfth Five Year Plan is 2,18,208 MW which provides sufficient opportunity to the IPPs to enter the market.

(g) During the period 1.10.2010 till 5.1.2011, NTPC has signed PPAs for 40840 MW, out of which NTPC has commissioned 1000 MW, formalized investment approval for 4740 MW, initiated bidding for 7440 MW and bidding is likely to start for 7100 MW. As regards execution of projects for the remaining contracted capacity, NTPC has submitted that it will proceed immediately upon grant of the necessary clearances.

(h) On its past record of execution of the projects, NTPC has stated that it has commissioned a total capacity of 9610 MW during the Eleventh Five Year Plan including 2490 MW and 2820 MW in the years 2010-11 and 2011-12 respectively. NTPC has also pointed out the delays in execution of the power projects by the IPPs and has submitted that on account of failure of the IPPs to provide the contracted power, the distribution companies have reposed faith in NTPC and have entered into the PPAs with it.

(i) The members of the petitioner's Association had initiated legal proceedings before the State Commission and Appellate Tribunal for Electricity and obtained orders that the provisions of section 62 and 63 are independent and procurement of power under competitive bidding envisaged in section 63 of the Act does not prevent the State Commission to consider and allow procurement of power

through negotiated basis [BSES Rajdhani Power Limited v Delhi Electricity Regulatory Commission and Others, [2010 ELR (APTEL) 404]. NTPC has submitted that having proceeded on the above basis, it is not open to the petitioner to challenge the PPAs entered into by NTPC with the distribution companies on negotiated basis on the ground that PPAs were not entered into in pursuance of the competitive bidding process.

Replies of other Respondents

16. GUVNL in its reply has submitted that it has signed the PPA with NTPC based on sustained discussions, deliberations and negotiation after considering its future requirements of power and not in a hurry as stated by the petitioner. GUVNL has submitted that since the State Utilities/distribution companies have universal obligations to supply power to their consumers and in order to meet the future demand, power supply by/to be supplied by NTPC in respect of the concluded PPAs shall ensure firm supply of electricity to the consumers at large in the State of Gujarat when many of the IPPs are trying to terminate the concluded PPAs through competitive bidding route.

17. Madhya Pradesh Power Trading Corporation Limited (MPPTCL) in its reply has opposed the petition on the ground of *locus standi* of the petitioner association to file the present petition. According to MPPTCL, the petitioner association is an unregistered association and the petitioner has not disclosed that the all its members have authorized the association to file the present petition to protect their legal rights. It has been submitted that provisions of section 63 are in alternative to section 62 of the Act and MMPTCL has exercised its options by procuring power through tariff determination as

per section 62 of the Act in most of the cases. MPPTCL has submitted that it has signed PPA with NTPC based on sustained discussions, deliberation and negotiation.

Analysis and Decision

18. The Commission in the Record of Proceedings dated 7.7.2011 had directed NTPC to file the information regarding (i) the dates of signing of the PPAs/MoUs with the beneficiaries; (ii) capacity contracted in the PPAs/MoUs; and (iii) time frame/duration of completion of the projects during the period 5.1.2006 to 5.1.2011. NTPC in its affidavit dated 26.7.2011 has submitted the information in respect of (i) and (ii) for 33 projects for which it has entered into PPAs between 5.1.2006 and 5.1.2011 and in respect of (iii), it has been submitted that the tentative time frames/duration of completion of the projects is as per the provisions of the Tariff Regulations of the Commission. Further, the Commission in its Record of Proceedings dated 3.11.2011 had directed both petitioner and NTPC to file the date of investment approval with the details of the projects and the timeframe for completion of projects for commercial operation. NTPC has filed the information vide its affidavit dated 14.12.2011. The petitioner has also filed its reply vide affidavit dated 16.12.2011 stating that the information regarding the dates of investment approval with project details is not applicable in case of the members of the petitioner association.

19. The information furnished by NTPC in respect of 33 projects for which it has signed the PPAs during 5.1.2006 to 5.1.2011 is tabulated as under:

Ser No.	Name of the Project	Total Capacity in MW	Beneficiaries of the project	Date of PPA	Date of Investment Approval	Schedule of Project Completion
1	Unchahar TPS Stage	210	Uttarkhand	28.6.2006	Not furnished	COD:

	III		Rajasthan	24.7.2006		September 2006
			Delhi	19.4.2006		
			Haryana	28.4.2006		
2.	Barh Stage I	1980	Uttar Pradesh	21.11.2007	February 2005	Under construction. First Unit likely to be commissioned in 2013-15
			Uttarkhand	19.8.2006		
			Delhi	19.4.2006		
			Haryana	31.1.2006		
			Maharashtra	9.3.2006		
			Chhatisgarh	7.7.2006		
			West Bengal	22.1.2007		
			Odisha	11.8.2006		
			Sikkim	19.7.2006		
			Jharkhand	31.7.2006		
3.	Barh stage II	1320	Uttar Pradesh	20.11.2007	February 2008	Under construction. First Unit likely to be commissioned in 2013-15
			Uttarkhand	3.1.2008		
			Rajasthan	28.12.2007		
			Delhi	9.7.2009		
			Punjab	24.1.2008		
			Haryana	31.12.2007		
			Himachal Pradesh	29.1.2008		
			Jammu & Kashmir	23.1.2008		
			Chandigarh	9.1.2008		
			Odisha	24.6.2008		
			Sikkim	25.9.2007		
			Madhya Pradesh	22.6.2007		
			Maharashtra	12.7.2007		
			Gujarat	6.11.2008		
			Daman & Diu	9.8.2007		
			Dadra & Nagar Haveli	9.8.2007		
			Goa	12.7.2007		
			Chhatisgarh	18.5.2007		
			West Bengal	29.2.2008		
			Bihar	23.10.2007		
			Jharkhand	2.8.2007		
4.	Simhadri stage II	1000	Andhra Pradesh	3.2.2007	March 2007	COD: March 2011 & March 2012
			Karnataka	22.2.2007		
			Kerala	14.9.2007		
			Tamil Nadu	28.2.2007		
			Puducherry	16.10.2007		
5.	N.C.T.P.S.Dadri Stage II	980	Uttar Pradesh	20.11.2007	Not furnished	COD: January 2010 & July 2010
			Delhi	21.3.2007		
6.	Bongaigaon	750	Assam	30.5.2007	January 2008	Under construction. First unit likely to be commissioned in 2013-14
			Manipur	29.9.2007		
			Meghalaya	13.7.2007		
			Ngaland	10.7.2007		
			Tripura	28.9.2007		
			Arunachal Pradesh	13.7.2007		
			Mizoram	1.10.2007		
7.	Mouda Stage I	1000	Gujarat	6.11.2008	November 2007	Under Construction
			Maharashtra	7.12.2007		
			Madhya Pradesh	24.12.2007		
			Chhatisgarh	14.12.2007		
			Goa	4.12.2007		

			Daman & Diu	29.11.2007		
			Dadra & Nagar Haveli	29.11.2007		
8.	Rihand Stage III	1000	Uttar Pradesh	27.3.2009	January 2009	Under Construction. Likely to be commissioned in 2012-14
			Uttarkhand	3.9.2008		
			Rajasthan	23.10.2008		
			Delhi	3.11.2008		
			Punjab	23.10.2008		
			Haryana	8.9.2008		
			Himachal Pradesh	18.3.2009		
			Jammu & Kashmir	30.10.2008		
			Chandigarh	10.10.2008		
9.	Vindhyachal Stage IV	1000	Gujarat	6.11.2008	January 2009	Under Construction. Likely to be commissioned in 2012-14
			Maharashtra	18.10.2008		
			Madhya Pradesh	12.9.2008		
			Chhattisgarh	16.9.2008		
			Goa	29.9.2008		
			Daman & Diu	20.9.2008		
			Dadra & Nagar Haveli	20.9.2008		
10.	Badarpur	705	NDMC	6.5.2008	Not furnished	Under commercial Operation
			BRPL	5.6.2008		
			BYPL	5.6.2008		
			MES	31.7.2008		
			NDPL	18.5.2008		
11.	Solapur	1320	Maharashtra	19.7.2010	19.3.2012	Under construction. 2015-16
			Madhya Pradesh	24.4.2010		
			Chhattisgarh	11.3.2010		
			Goa	15.4.2010		
			Daman & Diu	30.3.2010		
			Dadra & Nagar Haveli	30.3.2010		
12.	Korba Stage III	500	Gujarat	23.12.2010	Not furnished	COD:21.3.2011
			Maharashtra	5.1.2011		
			Madhya Pradesh	20.12.2010		
			Chhattisgarh	22.8.2009		
			Goa	29.12.2010		
			Daman & Diu	21.12.2010		
			Dadra & Nagar Haveli	21.12.2010		
13.	Mouda Stage II	1320	Gujarat	24.9.2010	March 2012	2015-16
			Maharashtra	14.10.2010		
			Madhya Pradesh	23.8.2010		
			Chhattisgarh	13.8.2010		
			Goa	19.8.2010		
			Daman & Diu	22.9.2010		
			Dadra & Nagar Haveli	22.9.2010		
14.	Vindhyachal Stage V	500	Maharashtra	27.11.2007	May 2012	2015-16
			Gujarat	24.9.2010		
			Madhya Pradesh	9.10.2010		
			Chhattisgarh	11.10.2010		
			Goa	27.10.2010		
			Daman & Diu	12.10.2010		
			Dadra & Nagar Haveli	7.10.2010		
15.	Farakka Stage III	500	West Bengal	13.11.2010	Not furnished	COD:4.4.2012
			Bihar	31.12.2010		

			Odisha	27.12.2010				
			Sikkim	28.12.2010				
			DVC	30.12.2010				
16.	Tapovan Vishnugad	520	Uttar Pradesh	11.11.2010	November 2006	2015-16		
			Uttarakhand	16.11.2010				
			JVVNL	27.10.2010				
			AVVNL	27.10.2010				
			JDVVNL	9.11.2010				
			Delhi					
			NDPL	5.11.2010				
			BRPL	13.12.2010				
			Punjab	29.12.2010				
			Haryana	30.11.2010				
			Himachal Pradesh	28.10.2010				
			Jammu & Kashmir	27.11.2010				
			Chandigarh	8.12.2010				
17.	Singrauli stage III	500	Uttar Pradesh	20.10.2010			Under Process	40 months from Investment approval
			Uttarakhand	16.11.2010				
			JVVNL	27.10.2010				
			AVVNL	27.10.2010				
			JDVVNL	9.11.2010				
			NDPL	5.11.2010				
			BRPL	13.12.2010				
			Punjab	29.12.2010				
			Haryana	30.11.2010				
			Himachal Pradesh	28.10.2010				
			Jammu & Kashmir	27.11.2010				
			Chandigarh	8.12.2010				
18.	Tanda II Expansion	1320	Uttar Pradesh	20.10.2010	Under Process NIT issued.	48 months from the date of Investment approval		
			Uttarakhand	16.11.2010				
			JVVNL	27.10.2010				
			AVVNL	27.10.2010				
			JDVVNL	9.11.2010				
			NDPL	5.11.2010				
			BRPL	13.12.2010				
			Punjab	29.12.2010				
			Haryana	30.11.2010				
			Himachal Pradesh	28.10.2010				
			Jammu & Kashmir	27.11.2010				
			Chandigarh	8.12.2010				
19.	Lara STPS Stage I	1600	Maharashtra	9.12.2010			Under Process (Main plant award to be placed after possession of land)	50 months from the date of Investment approval
			Gujarat	16.12.2010				
			Madhya Pradesh	27.11.2010				
			Chhattisgarh	25.11.2010				
			Goa	14.12.2010				
			Daman & Diu	14.12.2010				
			Dadra & Nagar Haveli	14.12.2010				
	Lara STPS Stage II	2400	Maharashtra	9.12.2010	Under process (After obtaining all clearances)	48 months from the date of Investment approval		
			Gujarat	16.12.2010				
			Madhya Pradesh	27.11.2010				
			Chhattisgarh	25.11.2010				
			Goa	14.12.2010				
			Daman & Diu	14.12.2010				

			Dadra & Nagar Haveli	14.12.2010			
20.	Dariapalli Stage I	STPS	1600	West Bengal	13.11.2010	Under process (Main plant award to be placed after possession of land)	50 months from the date of Investment approval
				Bihar	4.11.2010		
				Jharkhand	19.11.2010		
				Odisha	27.12.2010		
				Sikkim	21.10.2010		
	Dariapalli Stage I	STPS	1600	West Bengal	13.11.2010	Under process (After obtaining all clearances)	48 months from the date of Investment approval
				Bihar	4.11.2010		
				Jharkhand	19.11.2010		
				Odisha	27.12.2010		
				Sikkim	4.1.2011		
21.	Gajmara Stage I	STPS	1600	West Bengal	13.11.2010	Under process (Main plant award to be placed after possession of land)	50 months from the date of Investment approval
				Bihar	4.11.2010		
				Jharkhand	19.11.2010		
				Odisha	4.1.2011		
				Sikkim	21.10.2010		
				West Bengal	13.11.2010	Under process (After obtaining all clearances)	48 months from the date of Investment approval
				Bihar	4.11.2010		
				Jharkhand	5.1.2011		
				Odisha	4.1.2011		
				Sikkim	4.1.2011		
22.	Kudgi Stage I		2400	Kerala	3.11.2010	December 2011	2015-16
				Tamil Nadu	20.12.2010		
				Karnataka	4.11.2010		
				Andhra Pradesh	23.9.2010		
	Kudgi stage II		1600	Tamil Nadu	20.12.2010	December 2011	2015-16
				Karnataka	4.11.2010		
				Andhra Pradesh	3.12.2010		
23.	TTPS II Expansion		1320	West Bengal	13.11.2010	Under process (After obtaining all clearances)	48 months from the date of Investment approval
				Bihar	4.11.2010		
				Jharkhand	19.11.2010		
				Odisha	27.12.2010		
				Sikkim	13.11.2010		
24.	Barethi STPS		3960	Madhya Pradesh	27.11.2010	Under Process (After obtaining all clearances)	50 months from the date of Investment approval
				Uttar Pradesh	29.12.2010		
25.	Gidderbaha STPS		2640	Uttar Pradesh	29.12.2010	Under Process (After obtaining all clearances)	50 months from the date of Investment approval
				Uttarakhand	16.12.2010		
				JVVNL	21.12.2010		
				AVVNL	28.12.2010		
				JDVVNL	28.12.2010		
				NDPL	28.12.2010		
				BRPL	4.1.2011		
				Punjab	11.12.2010		
				Haryana	29.12.2010		
				Himachal Pradesh	20.12.2010		
				Jammu & Kashmir	29.12.2010		
26..	Katwa		1600	West Bengal	13.12.2010	Under process (After	50 months from the date of Investment
				Bihar	31.12.2010		
				Jharkhand	5.1..2011		

			Odisha	27.12.2010	obtaining all clearances)	approval
			Sikkim	4.1.2011		
27.	Pudimadka	4000	Kerala	31.12.2010	Under process (After obtaining all clearances)	50 months from the date of Investment approval
			Tamil Nadu	5.1.2011		
			Karnataka	4.1.2011		
			Andhra Pradesh	30.12.2010		
			Puducherry	5.1.2011		
28.	Khargone STPS	1320	Gujarat	23.12.2010	Under Process NIT issued	50 months from the date of Investment approval
			Madhya Pradesh	24.12.2010		
			Chhattisgarh	28.12.2010		
			Goa	29.12.2010		
			Daman & Diu	28.12.2010		
			Dadra & Nagar Haveli	28.12.2010		
			Maharashtra	5.1.2011		
29.	Gadarwara STPS Stage I	1320	Gujarat	23.12.2010	Under Process (After obtaining all clearances)	50 months from the date of Investment approval
			Madhya Pradesh	24.12.2010		
			Chhattisgarh	28.12.2010		
			Goa	29.12.2010		
			Daman & Diu	28.12.2010		
			Dadra & Nagar Haveli	28.12.2010		
			Maharashtra	5.1.2011		
	Gadarwara STPS Stage II	1320	Gujarat	23.12.2010	Under Process (After obtaining all clearances)	48 months from the date of Investment approval
			Madhya Pradesh	24.12.2010		
			Chhattisgarh	28.12.2010		
			Goa	29.12.2010		
			Daman & Diu	28.12.2010		
			Dadra & Nagar Haveli	28.12.2010		
			Maharashtra	5.1.2011		
30.	Bilhour	1320	Uttar Pradesh	31.12.2010	Under Process (After obtaining all clearances)	50 months from the date of Investment approval
			Uttarakhand	31.12.2010		
			JVVNL	4.1.2011		
			AVVNL	5.1.2011		
			JDVVNL	5.1.2011		
			NDPL	28.12.2010		
			BRPL	4.1.2011		
			Punjab	5.1.2011		
			Himachal Pradesh	1.1.2011		
			Jammu & Kashmir	29.12.2010		
31.	Dhuvaran STPS Stage I	1320	Gujarat	23.12.2010	Under Process (After obtaining all clearances)	50 months from the date of Investment approval
			Madhya Pradesh	24.12.2010		
			Chhattisgarh	28.12.2010		
			Goa	29.12.2010		
			Daman & Diu	28.12.2010		
			Dadra & Nagar Haveli	28.12.2010		
			Maharashtra	5.1.2011		
	Dhuvaran STPS Stage II	660	Gujarat	23.12.2010	Under Process (After obtaining all clearances)	48 months from the date of Investment approval
			Madhya Pradesh	24.12.2010		
			Chhattisgarh	28.12.2010		
			Goa	29.12.2010		
			Daman & Diu	28.12.2010		
			Dadra & Nagar Haveli	28.12.2010		
			Maharashtra	5.1.2011		
32.	Unchahar Stage IV	500	Uttar Pradesh	5.1.2011	Under	Extension

					Process	Project
33.	Kathua (Jammu & Kashmir)	500	Jammu & Kashmir	5.1.2011	Under Process (After obtaining all clearances)	42 months from the date of Investment approval

17. From the above it emerges that during the period 6.1.2006 to 5.1.2011, NTPC has entered into PPAs with the distribution companies and State Electricity Boards for 33 projects for a total capacity of 52605 MW. The PPAs for the projects mentioned at Ser. Nos. 1 to 11 for a capacity of 11265 MW were signed prior to 1.10.2010. Out of the above, capacity of 2190 MW (Ser. Nos. 1, 4 & 5) have been commissioned. In respect of capacity of 705 MW of Badarpur TPS (Ser. No.10), PPAs have been signed due to its transfer from Government of India to NTPC. Therefore, in respect of PPAs entered prior to 1.10.2010, a capacity of 8370 MW (Ser. Nos. 2, 3, 6, 7, 8, 9 &11) is yet to be commissioned. All these projects are in the advance stage of implementation and are likely to be commissioned during the 12th Plan as per the Report of the Working Group for the 12th Plan of MoP.

18. In respect of projects at Ser. Nos.12, 13 & 14, some PPAs were signed prior to 1.10.2010 but PPAs with majority of the States were signed after 1.10.2010. In respect of projects from Ser Nos.15 to 33, all PPAs have been signed after 1.10.2010. NTPC in its affidavits dated 2.6.2011 and 16.7.2012 has given a list of 21 projects for a total capacity of 40840 MW for which the PPAs were signed from 1.10.2010 till 5.1.2011 (Ser Nos.12 to 33 of the table except Ser No.32). After taking into account 500 MW Unchahar Stage V (Ser No.32), the total capacity for which PPAs have been signed

comes to 41340 MW. Out of 41,340 MW, a capacity 1000 MW (Ser Nos.12 & 15) has been commissioned. As per the Report of the working group on Power for 12th Plan Period, 520 MW Tapovan Vishnugad (Ser. No.16) is likely to be commissioned during 12th Plan. NTPC in its affidavit dated 16.7.2012 has indicated that a capacity of 4220 MW consisting of Mouda II (Ser. No. 13), Vindiyachal Stage V (Ser No.14) and Kudgi stage I(Ser. No.22) is expected to be commissioned during the 12th Plan. Thus a capacity of 35600 MW {41340 – (1000+520+4220)} for which PPAs were signed during 1.10.2010 to 5.1.2011 will not materialize during the 12th Plan and will spill over to the 13th Plan. NTPC in its affidavit dated 16.7.2012 has submitted that 5 projects with capacity of 13040 MW (Ser. Nos. 18, 19, 20, 21 & 28) are under advance stages of investment approval. In respect of 12 projects for capacity of 22560 MW (Ser. Nos. 17, 22, 23, 24, 25, 26, 27, 29, 30, 31, 32 & 33), investment approval is under process. In respect of the projects for 35600 MW, NTPC has placed on record the status of the various approvals required for the projects before the investment approval is accorded, namely, land availability, water allocation, environment clearance, forest clearance, NIT, connectivity/LTA etc. It is noticed that the approvals are in various stages of processing and these 17 projects are unlikely to be commissioned during the 12th Plan.

19. NTPC was directed to place on record the copies of the PPAs entered into by it with the distribution companies and State Electricity Boards. NTPC has placed on record copy of the PPA dated 25.11.2010 entered with Chhattisgarh State Power Distribution Company for Lara STPS and has submitted that other PPAs are on the similar lines. One of the provisions of the PPA is that power will be allocated by

Government of India. The other provision is that the tariff of the generating station will be determined by this Commission. The petitioner has placed on record the copies of the allocations made by Government of India to different States in respect of 9 projects and 50% power to the home States in respect of 13 projects.

20. From the above discussion it emerges that while all projects for which PPAs were signed prior to 1.10.2010 are likely to be executed during the 12th Plan, out of the projects for which PPAs were signed by NTPC between 1.10.2010 to 5.1.2011, capacity of 1000 MW has already been commissioned and only 4740 MW are likely to be commissioned during the 12th Plan. About capacity of 35600 MW will spill over to the 13th Plan and beyond.

21. We next proceed to examine whether any case has been made out by the petitioner under Sections 60 and 66 of the Act against NTPC in respect of the PPAs entered into between 1.10.2010 till 5.1.2011. Both these Sections are extracted below:-

“Market Domination

60. The Appropriate Commission may such issue directions as it considers appropriate to a licensee or a generating company if such licensee or generating company enters into any agreement or abuses its dominant position or enters into a combination which is likely to cause or causes an adverse effect on competition in electricity industry.”

“Development of market.

66. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in section 3 in this regard.”

22. The section heading of Section 60 refers to “Market Domination”. However, the section provides that the Commission may issue directions as it may consider appropriate to a licensee or a generating company if such licensee or generating company (i) enters into any agreement; or (ii) abuses its dominant position; or (iii) enters into combination, if such activity causes or is likely to cause any adverse effect on competition in electricity industry. The word ‘industry’ has not been defined in the Act. Therefore, to understand the import of the words ‘electricity industry’ in the context of competition, we have to take the help of section heading. In the case of Raichurmatham Prabhakar & Another Vs Rawatmal Dugar {(2004) 4 SCC 766}, Hon’ble Supreme Court has held as under:

“It is permissible to assign the heading or title of a section a limited role to play in the construction of the statutes. They may be taken as the very broad and general indicators of the nature of the subject matter dealt with thereunder. The heading or title may be taken as the condensed name assigned to indicate collectively the characteristics of the subject matter dealt with by the enactment underneath; though the name would always be brief having its own limitations. In case of conflict between the plain language of the provision and the meaning of the heading or title would not control the meaning which is clearly and plainly discernible from the language of the provision thereunder.”

Section 60 speaks about the competition in electricity industry and the section heading speaks about ‘market domination’. In the light of the above judgement, the term ‘electricity industry’ in all fairness will refer to the market for electricity. Therefore, if a generating company enters into an agreement or abuses its dominant position or enters into any combination which causes or is likely to cause any adverse effect on competition in the market for electricity, the Commission can issue appropriate directions to such generating company to maintain competition in the market for electricity. The term ‘market’ has not been defined in the Act. We have to

consider the meaning of the term market in the light of the case law on the subject.

Hon'ble Supreme Court in Waverly Jute Mills Co. Ltd. v. Raymon and Co. (India)

Pvt. Ltd. [AIR 1963 SC 90] has held thus -

“10.Market no doubt ordinarily means a place where business is being transacted. That was probably all that meant at a time when trade was not developed and when transactions took place at specified places. But with the development of commerce, bargains came to be concluded more often than not through correspondence and the connotation of the word 'Market' underwent a corresponding expansion. In modern parlance the word 'market' has come to mean business as well as the place where business is carried on. Labour Market for example, is not a place where labourers are recruited but the conditions of the business of labour. The word 'market' being thus capable of signifying both business and the place where the business is carried on, the question in what sense it is used in a particular statute must be decided on a consideration of the context of that statute.....”

Therefore in the light of the above judgement, market in electricity would mean not only the business in electricity but also the place where business in electricity is carried on.

In this background, the business in electricity would imply the business of generation of electricity as well as supply of electricity for its consumption. Section 7 of the Act provides that any generating company may establish, operate and maintain a generating station without obtaining a licence. Section 10(2) of the act provides that “a generating company may supply electricity to any licensee in accordance with the Act or rules or regulations framed thereunder and may, subject to the regulations made under sub-section (2) of section 42, supply electricity to any consumer. Sections 38, 39 and 40 of the Act enjoin upon the Central Transmission Utility, State Transmission Utility and Transmission licensee to provide non-discriminatory open access to any generating company or licensee. These provisions amply testify that the Act envisages freedom to a generating company to sell electricity to any licensee or consumer. Therefore, in our

view, market in electricity is the entire country as the generator enjoys freedom of choice under the Act to sell electricity to anybody. It will not be out of place to mention that the Competition Commission of India in its opinion dated 14.3.2011 in Reference No.1/2011 in response to the reference by Maharashtra Electricity Regulatory Commission has opined as under:

“The Commission taking into consideration the current organizational structure of electricity markets and the extant regulatory framework, defines the relevant product market as ‘generation and wholesale supply of electricity market’. Further, with the advent of power trading, robust inter-State transmission system and statistics corroborating actual inter-State transactions in the wholesale market for electricity, the Commission concludes that the geographic scope for “Electricity generating/wholesale electricity market” is national or Pan India.”

In the light of the above opinion of the Competition Commission of India, we are of the view that the geographic scope of electricity generation market is the entire country and not any particular State or region.

23. The entire argument of the petitioner is based on the pleas that NTPC has foreclosed the upstream market for coal and finance and the downstream market for sale of electricity by entering into the PPAs between 1.10.2010 and 5.1.2011. It has been argued that being a Public Sector undertaking it enjoys the preference in allocation of coal and contracting finance and by entering into a number of PPAs, NTPC would corner the market for coal and finance. In our view, these are surmises only without being supported by hard evidence that but for the allocation of coal to NTPC or sanction of finance by the financial institutions on account of the PPAs, the members of the petitioner association have been deprived of either coal or finance. As regards coal, there is shortage of domestic coal which Coal India is making efforts to meet.

Moreover, many of the members of the petitioner's Association have been allotted captive mines. As regards the institutional finance, it is available for infrastructural projects. With 100% FDI in power sector, the members of the petitioner's association have ample opportunity to raise finance from domestic and international market. As regards the downstream market for sale of electricity, it is on record that during the period 5.1.2006 to 5.1.2011, the members of petitioner's association have contracted 1,05,324 MW of electricity as against 52,605 MW contracted by NTPC during the corresponding period. Therefore, it cannot be said that the signing of the PPAs by NTPC has resulted in adverse impact on competition in the electricity market.

24. The petitioner has alleged that NTPC has abused its dominant position and entered into PPAs with the distribution companies or State Electricity Boards. The petitioner has highlighted that NTPC generated about 31.65% of the total thermal power generated in the month of February 2011. However, as stated earlier, the business in the present context of market includes the business of generation of electricity comprising of the total power generated from all the resources including thermal generation. If we take the entire generation in the country during the month of February 2011, NTPC generated approximately 26.85% of the total power generated during the month. As regards the market share in terms of installed capacity, we find that the total installed capacity of NTPC is approximately 41000 MW which is approximately 19.5% of the total installed capacity. Therefore, NTPC cannot be said to be a dominant player in the market with only 19.5% of the total installed capacity in the country. The present

status of installed generation capacity in the country and the share of different sectors as on 31.1.2013 is as under:

Installed Capacity as on 31.1.2013 as per the Website of CEA

Ownership Sector	Thermal				Nuclear	Hydro	Renewable	Grand Total
	Coal	Gas	Diesel	Total				
State	49560.50	5215.32	602.61	55378.43	0.00	27395.00	3569.92	86343.35
Private	29995.38	6985.50	597.14	37578.02	0.00	2595.00	22286.22	62459.24
Central	42055.00	6702.23	0.00	48757.23	4780.00	9426.40	0.00	62963.63
Total	121610.88	18903.05	1199.75	141713.68	4780.00	39416.40	25856.14	211766.22

It is apparent from the above figures that the share of State sector in the total generation is the highest followed by the Private sector and further followed by Central sector. Therefore, private sector has a sizeable market presence and it cannot be said that on account of the PPAs by NTPC, the market for private sector has been foreclosed. As the period of exemption under the tariff policy has already expired, IPPs and the power sector undertakings in public sector will be treated at par in the process of bid evaluation in the bids invited by the distribution companies in future. Therefore, IPPs shall have the opportunity to participate in the competitive bidding process as and when the bids are invited by the distribution companies. Accordingly, the allegation of capture of the downstream market by NTPC is held to be without any firm basis.

25. Now, we will consider whether NTPC has abused the market by executing PPAs for the capacity of 40840 MW in about three months immediately preceding the cut-off date for exemption, that is, between 1.10.2010 to 5.1.2011. NTPC is an undertaking owned and controlled by the Central Government and is therefore guided by the policies

of that Government. The PPAs were signed by NTPC on or before the cut-off date specified under the tariff policy which is in the nature of subordinate legislation, after Ministry of Power clarified that such PPAs were within the framework of the tariff policy. Therefore, the conduct of NTPC on this count cannot be termed as abuse of the position or anti-competitive. It may also be pointed out that under para 5.1 of the tariff policy the distribution licensees are required to procure power by following the competitive bidding route to meet the requirement of power. The Appellate Tribunal in BSES Rajdhani Power Limited v Delhi Electricity Regulatory Commission and Others, [2010 ELR (APTEL) 404] has held that the route Section 63 of the Electricity Act, that is, the competitive bidding route, is optional for procurement of power by a distribution licensee and when the competitive bidding route is followed, the Appropriate Commission is required to adopt the tariff discovered. The Appellate Tribunal further held that para 5.1 of the tariff policy cannot control or override Section 62 of the Electricity Act, 2003 and when the provisions of the tariff policy cannot be reconciled with Section 62, Section 62 alone must prevail. The Central Government has filed appeal before the Hon'ble Supreme Court. However, so long as the matter is not finally decided by the Hon'ble Supreme court, the judgment of the Appellate Tribunal prevails. Given the above position of law and policy, the discretion of a generating company and distribution company to sign PPA cannot be circumscribed.

26. The petitioner has laid a lot of emphasis on the consumer interest. The petitioner has argued that the cost-plus tariff which NTPC would be permitted would be more than the tariff discovered through the competitive bidding process and thus it would be

prejudicial to the consumers' interest. The petitioner has further alleged that NTPC by rushing to sign the PPAs has attempted to escape regulatory oversight. These arguments cannot be countenanced. Though the studies by this Commission has found that the levelised tariff on cost-plus basis generally exceeds the competitively bid tariff, yet NTPC cannot be said to have the uncontrolled or unrestrained power to charge the tariff. The tariff for NTPC projects is determined by this Commission in accordance with the terms and conditions of tariff specified under Section 61 of the Act. While laying down the terms and conditions, this Commission, among other things, is guided by the consumers' interest. This Commission while specifying the terms and conditions in future will be required to take into consideration various factors, including the prevailing market conditions. Therefore, the allegation of escape of regulatory control or oversight of this Commission in the matter of tariff charged or chargeable by NTPC cannot be sustained.

27. NTPC in its submission dated 13.7.2012 has indicated the status of projects with capacity of 35600 MW for which the PPAs have been executed by NTPC but which are unlikely to be taken up during the 12th Plan as the investment approvals are still under process. The status of these projects is given as under:

Ser No	Project	Capacity	Status				
			Land availability	Water allocation	Environment clearance	Forest clearance	Coal linkage
1.	Lara -I	1600	Land Acquisition processed (Was expected by Aug 12)	Commitment available from State Govt.	Was expected by Aug 12	In advanced stage	Linked to Talapalli mines
2.	Lara -II	2400	Commitment from State Govt. available	Commitment awaited	Application to MOEF after coal linkage		Applied

3.	Darlipalli –I*	1600	Land Acquisition processed	Commitment from State Govt. available	In process	In process	Linked to Dulanga mines
4.	Darlipalli –II*	1600	Commitment from State Govt. available	Commitment from State Govt. available	Application to MOEF after coal linkage granted		Applied and recommended by CEA.
5.	Gajmara –I*	1600	Land Acquisition processed	Commitment from State Govt. available	In process	In process	In principle approval accorded by MoC for captive block allocation
6.	Gajmara –II*	1600	Commitment from State Govt. available	Commitment from State Govt. available.			Applied; recommended by MoP to MoC
7.	Khargone*	1320	Land Acquisition processed	Commitment from State Govt. available	SPCB public hearing held	In process	Applied; recommended by MoP to MoC
8.	Tanda-II Exp	1320	Land Acquisition in progress (compensation rate approved)	Commitment from State Govt. available	Available	NA	Linked to captive mine (CB, KD mines)
9.	Singrauli-III	500	Available	Available	SPCB public hearing held for UP, to be held for MP	NA	Applied; recommended by MoP to MoC
10.	TTPS-II Exp*	1320	Available	Commitment from State Govt. available	SPCB public hearing held; application to MOEF after coal linkage	NA	Applied; recommended by MoP to MoC
11.	Gidderbaha*	2640	Land Acquisition processed	Commitment from State Govt. available	SPCB public hearing held; application to MOEF after coal linkage	NA	Applied; recommended by MoP to MoC
12.	Gadarwara –I*	1320	Land Acquisition processed	Commitment from State Govt. available	SPCB public hearing held; application to MOEF after coal linkage	NA	Applied; recommended by MoP to MoC
13.	Gadarwara –II*	1320	Commitment from State Govt. available	Commitment from State Govt. available		NA	Applied, recommended by CEA.
14.	Bilhaur*	1320	Land Acquisition processed	Commitment from State Govt. available	EIA completed	NA	Applied, not recommended by CEA.

15.	Barethi STPP	3960	Land Acquisition processed	Confirmation awaited	MOEF application submitted; not considered due to non-availability of firm coal block	NA	In principle approval accorded by MoC for captive block allocation
16.	Kudgi II	1600	Available	Commitment from State Govt. available		NA	Applied; recommended by MoP to MoC
17.	Katwa	1600	Land available with WBPDC; to be transferred to NTPC	Commitment from State Govt. available	EIA in process	NA	Applied and recommended by CEA.
18.	Pudimadka	4000	Firm commitment from State Govt. awaited	Sea water envisaged, sweet water commitment awaited		NA	To be applied
19.	Dhuvaran -I	1320	Commitment from State Govt. available.	Commitment from State Govt. available.	TOR cleared	NA	Applied and recommended by CEA.
20.	Unchahar IV	500					Expansion Project
21.	Dhuvaran -II	660					To be applied
22.	Kathua	500	Alternative site suggested				
	Total	35600					

* 50% allocation made by Ministry of Power to the respective home State vide letter 17.1.2011 while retaining 15% at its own disposal as unallocated quota and the balance 35% power is proposed to be allocated to the States other than home State in accordance with the extant policy of the Central Government on allocation of power.

28. As these projects are unlikely to be commissioned by NTPC in the Twelfth Plan Period, these projects will not impact the capacity addition plan for the Twelfth Plan. Consequently, there is sufficient time frame available for the stakeholders to adjust long term plan for capacity addition, transmission planning and fuel requirement. We are aware that the projects are periodically monitored by CEA and Ministry of Power. However, it needs to be emphasized that the distribution companies and State

Electricity Boards who have signed the PPAs with NTPC have planned their future requirement of power accordingly. It is therefore in the interest of consumers that these projects are implemented in a time bound manner. We expect NTPC to take expeditious action to complete all projects for which PPAs have been signed within the 13th Five Year Plan period.

29. In view of the above, we hold that the PPAs signed by NTPC are within the framework and the time permitted under the Tariff Policy and therefore, no direction is called for under section 60 of the Act. The petitioner has requested to refer the matter to the Competition Commission of India under section 21 of the Competition Act, 2002. In view of our finding hereinabove, we do not consider it necessary to refer the matter to the Competition Commission of India for its opinion.

30. The petition is disposed of in terms of the above.

sd/-
(M Deena Dayalan)
Member

sd/-
(V. S. Verma)
Member

sd/-
(S. Jayaraman)
Member

sd/-
(Dr. Pramod Deo)
Chairperson