

**Central Electricity Regulatory Commission  
New Delhi**

**Petition No. 274/2010**

**Coram:**

Dr. Pramod Deo, Chairperson  
Shri V.S.Verma, Member  
Shri M.Deena Dayalan, Member

**Date of Hearing: 16.5.2013**

**Date of Order: 8.6.2013**

**In the matter of**

Approval of capital cost and determination of generation tariff of 2 x 525 MW generating units of Maithon Power Limited, for the period from the anticipated date of commercial operation of Unit-I and Unit-II to 31.3.2014.

**And**

**In the matter of**

Maithon Power Ltd, Noida

.....**Petitioner**

Vs

- (1) North Delhi Power Ltd, New Delhi
- (2) Damodar Valley Corporation, Kolkata
- (3) West Bengal State Electricity Distribution Company Ltd, Kolkata
- (4) Punjab State Electricity Board, Patiala
- (5) Tata Power Trading Company Ltd, Mumbai

.....**Respondents**

**Parties Present:**

Shri Amit Kapur, Advocate, MPL  
Shri Aveek Chatterjee, MPL

**ORDER**

This petition has been filed by Maithon Power Ltd (MPL) for approval of capital cost and determination of generation tariff of Maithon Right Bank Thermal Power Plant (Units-I and II) (2

x 525 MW) (hereinafter referred to as "the generating station") for the period from the anticipated date of commercial operation of Unit-I i.e. 25.12.2010 and Unit-II (25.4.2011) till 31.3.2014, based on the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 ('the 2009 Tariff Regulations').

2. The Maithon Right Bank Power Project is situated in Dhanbad District of the State of Jharkhand. The project is envisaged as a Mega Power Project in terms of Ministry of Finance's Notification No. 63/99 dated 13.5.1999 and 100/99-Customs dated 28.7.1999.

3. The petitioner is a public limited company incorporated on 26.7.2000 under the provisions of the Companies Act, 1956. MPL is a joint venture between Tata Power Trading Company Ltd. (TPTCL) having an equity participation of 74% and Damodar Valley Corporation (DVC) having an equity participation of the remaining 26%.

4. The petitioner had filed Petition No.112/2006 before this Commission seeking exemption from the requirement of competitive bidding for procurement of power under Clause 5.1 of the National Tariff Policy (NTP) on the ground that it was a State controlled entity. The Commission by its order dated 17.1.2007 disposed of the said petition by observing that the adjudication of the petition was without any *lis* and was beyond the scope of Section 79(1) of the Electricity Act, 2003 (the Act) and the exemption under clause 5.1 of the Tariff Policy could be sought from the Ministry of Power, Government of India.

4. The petitioner entered into Power Purchase Agreement (PPA) with DVC on 28.9.2006 for sale of 300 MW of power on round the clock basis for a period of 30 years. The petitioner also entered into PPA with NDPL on 28.3.2008 for sale of 300 MW power from the project. Subsequently, based on the PPA dated 23.4.2008 between MPL and TPTCL for sale of 750

MW power from the project, Power Supply Agreements (PSA) were entered into by TPTCL for sale of power to the following distribution licensees as detailed under:

<b>Distribution licensee</b>	<b>MW</b>	<b>Date of Agreement</b>
WBSEDCL	150	PSA dated 24.12.2008
PSEB	300	PSA dated 26.2.2009
NDPL	300	TPA dated 10.9.2009

5. While so, Petition No. 60/2008 was filed by NDPL before the Delhi Electricity Regulatory Commission (DERC) for approval of long term PPA dated 28.3.2008 with MPL and on 30.4.2009, the PPA was approved by DERC subject to the approval of tariff by this Commission. Against this order dated 30.4.2009 some of the other distribution companies, namely, BRPL and BYPL filed appeals before the Appellate Tribunal for Electricity ('the Appellate Tribunal') bearing Appeal Nos. 106 and 107 of 2009 on the ground that the approval of PPA dated 28.3.2008 was against the provisions of Section 62 and 63 of the Act, the Tariff Policy dated 6.1.2006, the guidelines for competitive bidding for procurement of power dated 19.1.2005 and also on the ground that the order of DERC dated 30.4.2009 suffered from want of jurisdiction as the Central Commission only had the jurisdiction to approve tariff. Thereafter, the Appellate Tribunal by its judgment dated 31.3.2010 in Appeal Nos.106 and 107/2009 dismissed the above said appeals. Against this judgment, the Union of India and the respondents namely, BRPL and BYPL, have filed appeals before the Hon'ble Supreme Court of India and the same are pending.

6. On 16.2.2010, the West Bengal Electricity Regulatory Commission (WBERC) approved the PSA dated 24.12.2008 executed between TPTCL and WBSEDCL for supply of 150 MW of power from the generating station.

7. In the above background, the present petition has been filed by the petitioner for determining the tariff for the generating station from the date of commercial operation of the units till 31.3.2014.

8. During the pendency of the petition, the petitioner filed Interlocutory Application (IA No. 11/2011) and revised the expected date of commercial operation of Unit-I as 15.6.2011 along with a prayer for determination of provisional tariff from 15.6.2011 to 31.3.2012 in terms of Regulation 5(4) of the 2009 Tariff Regulations for supply of 150 MW power from Unit-I to the respondent No. 2, DVC. The petition was heard on 24.5.2011 and the Commission after hearing the parties directed the petitioner to submit additional information and listed the matter for further hearing on 21.7.2011. Thereafter, on 22.6.2011 the petitioner filed another Interlocutory Application (IA No. 14/2011) and submitted that Unit-I was expected to achieve commercial operation from 23.6.2011 and Unit-II from 23.12.2011. In the said application, the petitioner also prayed for grant of provisional tariff for Unit-I and II from their anticipated dates of commercial operation upto 31.3.2014 and also for determination of appropriate fuel price adjustment mechanism in terms of Regulation 5(4) of the 2009 Tariff Regulations.

9. The matter was heard on 21.7.2011 on the issue of jurisdiction of this Commission to determine the tariff of the generating station under Section 62 read with Section 79(1)(b) of the Act for sale of 750 MW of power from the generating station to the respondent Nos. 1, 3 and 4 through the respondent No. 5, TPTCL. The Commission after hearing the parties reserved its order on the issue. While so, the petitioner by its letter dated 9.9.2011 submitted that Unit-I of the generating station has been declared under commercial operation on 1.9.2011 and prayed that provisional tariff for supply of power to the respondent No. 2, DVC may be granted from that the said date of commercial operation. Pending decision of the Commission on the issue of jurisdiction to determine tariff for supply of power to the respondent No.5, TPTCL for further sale to the respondent Nos. 1, 3 and 4 herein, the Commission by its order dated 11.11.2011 disposed of the Interlocutory Application Nos.11 and 14/2011 and allowed provisional tariff for supply of 150 MW of power from the Unit-I of the generating station to the respondent No. 2,

DVC for the period from 1.9.2011 to 31.3.2012 based on the capital cost of `203063 lakh as claimed by the petitioner.

10. Thereafter, the petitioner filed Interlocutory Application (I.A No. 20/2012) stating that it has been granted Long Term Open Access (LTOA) by PGCIL on 29.3.2012 and based on the PPA, the sale of power to the respondents under LTOA in respect of shares in the generation capacity has commenced from Unit-I of the generating station from 1.4.2012. Accordingly, the petitioner prayed that the provisional tariff granted in respect of Unit-I for the period from 1.9.2011 to 31.3.2012 by order dated 11.11.2011 may be further extended from 1.4.2012 till the final disposal of the petition. It was also submitted by the petitioner that Unit-II of the generating station was likely to achieve commercial operation by 1.7.2012. Thereafter, the petitioner also filed Interlocutory Application (I.A.No.21/2012) for amendment of the petition taking into consideration the revised capital cost from the date of commercial operation of Unit-I (1.9.2011) and the anticipated date of commercial operation of Unit-II (from 1.7.2012) and accordingly prayed, amongst others, for determination of tariff of the generating station upto 31.3.2014.

11. Taking into consideration the submissions of the petitioner, the Commission by its order dated 15.5.2012 extended the provisional tariff granted for Unit-I by order dated 11.11.2012 in respect of 150 MW supply of power to the respondent No. 2 DVC from 1.4.2012 to 31.3.2014 or till the final disposal of the petition whichever was earlier. Accordingly, the Interlocutory Applications (I.A. Nos. 20 & 21/2012) were disposed of. As regards the question of the jurisdiction of the Commission to determine the tariff of the generating station for sale of 750 MW of power to the respondent Nos. 1, 3 and 4 through the respondent No. 5, TPTCL, the same was kept pending as the Commission was considering a similar question of law in Petition No.184/2009 in respect of Talcher TPS.

12. By letter dated 22.8.2012, the petitioner was advised to file Interlocutory Application giving details of the revised capital cost as per COD of Unit-II of the generating station i.e. 24.7.2012, with copies to the beneficiaries. In compliance with this, the petitioner has filed Interlocutory Application No. 4/2013 seeking approval of capital cost of the project and generation tariff for Unit I and II of the generating station.

13. As regards the sale of power to PSPCL (erstwhile PSEB) vide PSA dated 26.2.2009, the petitioner in its interlocutory application has submitted that the Punjab State Electricity Regulatory Commission (PSERC) vide its order dated 19.1.2011 had advised PSPCL to initiate competitive bidding process in order to procure the required power and thereafter approach the Commission for approval of PSA. Accordingly, the petitioner has submitted that in the absence of approval of PSA by PSERC, the PSA dated 26.2.2009 could not come into force and as such, sale of power to PSPCL could not be started. The petitioner has further submitted that in order to tie up this balance capacity of 300 MW with long term beneficiaries, it has signed a supplementary PPA with TPTCL for sale of additional 150 MW capacity to WBSEDCL, based on which TPTCL has signed supplementary PSA with WBSEDCL for sale of additional capacity of 150 MW with effect from 1.4.2013. The petitioner has also submitted that the contracted capacity with WBSEDCL has been augmented from 150 MW to 300 MW with effect from 1.4.2013 and the said agreements shall be submitted to this Commission after regulatory approval is obtained from WBSERC. It has further added that for tying up the balance 150 MW capacity, the petitioner and TPTCL are negotiating with potential long term beneficiaries/ discoms of various states and the same shall be intimated to this course in due course of time. Based on the submissions of the petitioner, the prayer is allowed and the I.A is taken on record.

14. As one of the Members of this Commission had demitted office before the passing of orders in the matter, the petition was again listed for hearing on 16.5.2013. During the hearing,

the learned counsel for the petitioner submitted that the Commission may pass orders in the matter after taking into consideration the submissions of the parties and the documents available on record. We now proceed to examine the issue of jurisdiction of the Commission to determine the tariff for supply of power from the generating station to the respondent Nos. 1, 3 and 4 through the respondent No.5, TPTCL, a trader.

### **Jurisdiction**

15. As stated, the total capacity of the generating station is 1050 MW and the petitioner has entered into long term arrangements for supply of 300 MW to respondent No.2, DVC, 300 MW each to the respondents, NDPL and WBSEDCL through the respondent, TPTCL and the balance 150 MW is yet to be tied up with any long term beneficiary. The Commission has already decided the question of jurisdiction in so far as supply of 300 MW to the respondent, DVC is concerned, while granting the provisional tariff to the petitioner. In this order, the Commission is dealing with the question of its jurisdiction to determine the tariff for 600 MW capacity of the generating station which is being supplied to WBSEDCL and NDPL through TPTCL, which is an inter-State trading licensee.

16. By letter dated 18.2.2011, the petitioner was directed to clarify as to how its prayer in the petition for determination of tariff for supply of power from the generation station to the distribution licensees through TPTCL, a trader, in terms of the long term PPAs is maintainable in terms of Section 62(1)(a) of the Act. In response, the petitioner vide its affidavit dated 8.3.2011 has clarified as under:

(a) Section 62 read with Section 79(1)(b) of the Act vest the power in this Commission to regulate the tariff of a generating company other than those owned or controlled by the Central Government if such generating companies have entered into or otherwise have a composite scheme for generation and sale of electricity in more than one state. After the

enactment of the Act, the power and jurisdiction for determining tariff under the said Act has been exclusively vested in the hands of the appropriate Commission, in this case the Central Commission. Reliance has been placed on the judgements of the Hon'ble Supreme Court in Badri Kedar Paper Pvt. Ltd. Vs UPERC and others [(2009) 3 SCC 754] and PTC India Ltd. Vs CERC [(2010) 4 SCC 603].

(b) The petitioner being a generating company not owned or controlled by the Central Government and having a composite scheme for generation and sale of electricity in more than one state is covered by Section 79(1)(b) of the Act. The respective State Commissions for Delhi and West Bengal while approving the arrangements for supply of power by the petitioner through TPTCL have observed that as per the PPA, tariff as fixed by this Commission shall be the tariff for sale of electricity.

(c) At the time of inception of the project it was decided that a part of the capacity from the project will be sold to DVC. Since DVC is also a distribution utility engaged in the supply of retail electricity to two states i.e. Jharkhand and West Bengal, the project fulfills the condition of composite scheme. In this connection, reliance has been placed on the observations of the Commission regarding 'composite scheme' in order dated 29.3.2006 in Petition No.103/2005 (UJVNL Ltd. Vs UPCL).

(d) This Commission has approved the tariff of SUGEN Power Plant (1147.5 MW) of Torrent Power Ltd. for the period from its COD up to 31.3.2014 by order dated 11.1.2010 in Petition No.109/2009 wherein power from the project is being sold to more than two states, and in case of one State through a trading licensee.

(e) The petitioner has entered into a PPA with TPTCL who in turn has entered into a PSA for supply of 300 MW of power to NDPL for a term of 30 years and the DERC had granted



approval to the power procurement transactions between NDPL, TPTCL and MPL vide its order dated 30.4.2009. The appeals filed by BRPL and BYPL (Appeal No. 106 and 107 of 2009) have been dismissed by the Appellant Tribunal by its order dated 31.3.2010.

(f) The Appellate Tribunal by its judgment dated 22.12.2006 in Petition No.1/2005 (Gajendra Haldea Vs CERC and Ors.) has held that the generator may have free relationship with the trader or any consumer it wishes to sell power. The relevant portion of the judgment is extracted as under:

"54...In this view of the matter, we hold that the appropriate Commission under Section 62(1)(a) read with Sections 79(1)(a) & (b) and Section 86(1)(a) of the Act has been empowered to determine tariff for sale of electricity by a generating company to a distributor and it does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediary or on the trader to sell electricity to any person. This leaves the generator free to have a direct commercial relationship with a trader or an intermediary, a vital factor for encouraging competition, which is extremely important for securing power for the consumers at reasonable rates....."

In terms of the above, freedom has been given to the generating company to make or not to make an application to the Appropriate Commission for determination of tariff for sale to the trader and the choice is not available to the Appropriate Commission to determine or not to determine the tariff. Since this Commission has the jurisdiction to determine the tariff for the project, the petition is maintainable on this ground.

(g) Section 62(1)(a) of the Act provides that "the appropriate Commission shall determine the tariff in accordance with provisions of this Act for supply of electricity by a generating company to a distribution licensee." Since the generating station is supplying power under long term arrangement to DVC, WBSEDCL and NDPL, it meets the requirements of section 62(1)(a) of the Act.

17. During the hearing of the petition, the learned counsel for the petitioner relied upon the judgment of the Appellant Tribunal in Appeal No. 127/2007 (UPPCL Vs NOIDA Power Company Ltd. and Ors.) in support of its contention that this Commission has the jurisdiction to determine the tariff of the generating station since the power is supplied by the petitioner ultimately to the distribution companies in the States of West Bengal and Delhi through TPTCL.

18. We have examined the submissions of the petitioner and have gone through the available documents on records. The following issues arise for our consideration:

(a) Whether the Commission has the jurisdiction to determine tariff of a generating station under section 62(1)(a) of the Act when there is no direct commercial relationship between the generating station and the distribution companies and the power is supplied through a trader?

(b) If the answer to the above question is in positive, whether the Commission can determine tariff of the generating station for supply of power through MoU route to the discoms of West Bengal and Delhi through a trading licensee based on the PPAs entered into after 30.9.2006 which violates the provisions of Para 5.1 of the Tariff Policy?

**Regulation of tariff by this Commission for supply to distribution companies qua the trading licensees**

19. This Commission has been vested with the power to regulate the tariff of generating stations under section 79(1)(a) and (b) of the Act which is extracted as under:

“79 (1) The Central commission shall discharge the following functions, namely,

(a) to regulate the tariff of generating companies owned or controlled by the Central Government

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;”

20. Since the generating station in the present petition is not owned or controlled by the Central Government, we are concerned with the composite scheme for generation and supply in more than one state under Section 79(1)(b) of the Act. The generating station is supplying to DVC directly and to WBSEDCL and NDPL through TPTCL which is an inter-State trading licensee. It has been argued by the petitioner that since the arrangement for supply of power to more than one State, the generating station fulfills the conditions of a composite scheme. In this connection, the petitioner has relied upon our decision in Petition No. 103/2005 dated 29.3.2006 which is extracted as under:

"28. A regards the interpretation of the expression "composite scheme" as provided in clause (b) of sub-section 1 of section 79 of the Electricity Act, 2003, although the expression has not been defined in the Act, the Commission is of the view that 'composite scheme' is one in which a generating station is originally conceived for the purpose of meeting the power requirements of more than one state. The generating station could be set up in one State but the beneficiaries would be pre-identified and be in more than one State. Traditionally the central generating stations have been set up as 'composite scheme'. Such generating stations had, at their very inception, inter-State beneficiaries identified and consequently the sale from such stations involved more than one State".

Though this interpretation emphasized about the existence of a scheme for generation and sale of power in more than one State at the very inception of the project, by a subsequent order dated 16.10.2012 in Petition No.155/2012, this Commission has interpreted that a composite scheme can also emerge if by subsequent agreements, the generating station starts supplying power to more than one State. The relevant extract of the said order is as under:

"23. \*\*\*\*\*Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of subsection (1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Adani as a generating company is within the jurisdiction of this Commission."

21. In the light of the above decision, we may consider the case of the generating station. The petitioner entered into an agreement with DVC on 28.9.2006 for supply of 300 MW of power. Subsequently, the petitioner entered into PPA with TPTCL for supply of 750 MW power. Afterwards, TPTCL entered into PSA with WBSEDCL on 24.12.2008 for sale of 150 MW power, PSA with NDPL on 10.9.2009 for 300 MW power and PSA with PSEB on 26.2.2009 for supply of 300 MW power. However, the sale of power to PSPCL could not be effected in the absence of approval of PSA by PSERC, as elaborated in para 13 above. Thus, the supply of electricity from the petitioner to the distribution companies in West Bengal and Delhi has been secured through back to back arrangements. Since the power from the generating station is ultimately supplied to more than one State, the generating station fulfills the requirement of section 79(1)(b) of the Act.

22. Though the Commission has the power to regulate tariff of a generating company supplying electricity to more than one State, section 62(1)(a) of the Act restricts the power of tariff determination by the Commission only when the power is supplied to distribution licensee.

Section 62(1)(a) provides as under:

“(a) The appropriate Commission shall determine the tariff in accordance with the provisions of this Act for (a) supply of electricity by a generating company to a distribution licensee.”

However similar provision does not exist when the power is supplied to a trading licensee or a consumer. In fact, Section 10(2) of the Act provides that “a generating company may supply electricity to an licensee in accordance with the Act and rules and regulations made there under and may, subject to regulations made under Section 42(2) of the Act, supply electricity to any consumer.” In the absence of provisions similar to section 62(1)(a) for supply of electricity to a trading licensee or a consumer, it can be concluded that when the electricity is supplied by a

generating company to a trading licensee or a consumer, tariff of such generating company shall not be determined by the appropriate Commission.

23. The issue whether the appropriate Commission would determine the tariff when the power is supplied by a generating company to a trading licensee has received judicial attention in a number of cases. They are discussed as under:

(a) In Petition No.1/2005 (Gajendra Haldea v Central Electricity Regulatory Commission and others) filed by Shri Gajendra Haldea under Section 121 of the Act, the Appellate Tribunal considered the scope of section 62(1)(a), section 79(1)(a)(b) and section 86(1)(a) and framed the issue whether Electricity Regulatory Commissions can fix tariff for sale of electricity by ; (i) a generator to a trader or an intermediary; (ii) a distributor to a trader, and (iii) by a trader to any other person. The Appellate Tribunal after examining the various provisions of the Act came to the following conclusion in its judgment dated 22.12.2006:

"34. It appears to us that the general words in Sections 79 (1) (a) & (b) and 86(1) (a) must take colour from the words used in Section 62 (1), particularly Section 62 (1) (a). Otherwise, it is not possible to reconcile the provisions of Section 62(1) on the one hand and Section 79 (1) (a) & (b) and Section 86(1) (a) on the other. It is well established principle of construction of statutes that as far as possible the provisions of a statute on the same subject must be harmonized. Sections 79(1) (a) & (b) require regulation of tariff for generation. They must be construed in the context of Section 62(1) (a), which provides for determination of tariff by the Appropriate Commission for supply of electricity by a generating company to a distribution licensee...."

Further, the Appellate Tribunal concluded as under:

"In this view of the matter, we hold that the Appropriate Commission under Section 62 (1) (a) read with Sections 79 (1) (a) & (b) and Section 86 (1) (a) of the Act has been empowered to determine tariff for sale of electricity by a generating company to a distributor and it does not impose any restriction of tariff on the generating company or the distribution licensee to sell electricity to a trader or an intermediary or on the trader to sell electricity to any person. This leaves the generator free to have a direct commercial relationship with a trader or an intermediary, a vital factor for encouraging competition, which is extremely important for securing power for the consumers at reasonable rates."

24. The above judgment of the Appellate Tribunal was set aside by the Hon'ble Supreme Court on 9.4.2009 in Civil appeal No. 2050 of 2007 on the ground that Gajendra Haldea did not

have *locus standi* to file petition before the Appellate Tribunal under Section 121 of the Act. The Hon'ble Supreme Court did not consider on merit the judgment of the Appellate Tribunal.

(b) In Appeal No.71/2008 (Lanco Amarkantak Power Private Ltd v Madhya Pradesh Electricity Regulatory Commission), the order of the Madhya Pradesh Electricity Regulatory Commission was challenged whereunder Lanco was directed to file tariff petition on the basis of the PPA of Lanco with PTC Ltd, a trading licensee. The Appellate Tribunal in its judgment dated 21.10.2008 placing reliance on its earlier judgment dated 22.12.2006 in Petition No.1/2005 came to the conclusion that the Commission had exceeded its jurisdiction in asking Lanco to submit to its jurisdiction for the purpose of determination of tariff under the PPA and to file a tariff petition. The judgment has also been challenged by MPPTCL before Supreme Court in Civil Appeal No. 6676 of 2008 which has been admitted but prayer for interim relief has been rejected. The said judgment has also been challenged by MPERC in the Supreme Court in Civil Appeal No. 1335 of 2009 which has been admitted.

(c) In Appeal No.121/2007 (Uttar Pradesh Power Corporation Ltd. is NOIDA Power Company and another), the Appellate Tribunal in its judgment dated 15.12.2010 has decided that the Uttar Pradesh Electricity Regulatory Commission is empowered to determine the bulk supply tariff for supply of power by Uttar Pradesh Power Corporation Ltd. (UPPCL) to the distribution licensees of Uttar Pradesh. The relevant portions of the judgment are re-produced below:

“18. Learned Counsel for Appellant has argued that the State Commission does not have jurisdiction to determine the tariff of a trader, which is the present status of the Appellant. It is true that Section 86 (1) (j) empowers the State Commission to fix the trading margin, if considered necessary. The Tariff Policy in Section 9.0 stipulates that the Appropriate Commission should monitor the trading transaction continuously and ensure that electricity traders do not indulge in profiteering in situation of power shortage and fixing of trading margin should be resorted to for achieving this objective. Thus, a trader is also not free to sell power at any rate as its trading margin may be fixed by the Appropriate Commission. However, this is not a case of promotion of market

development in the state or procurement of power by the Respondent Company from a trading licensee through competitive bidding. The power is being supplied by the Appellant to the Respondent as a successor of UPSEB against the Power Purchase Agreement with the Respondent distribution licensee. Admittedly, the procedure for determination of tariff has not been specified in the agreement. According to the PPA, the tariff is to be determined by an independent authority. The Hon'ble High Court had directed the State Commission to determine the tariff and since then the State Commission has been determining the tariff.

19. As stated above, the power supply by the Appellant to the Respondent distribution licensee cannot be categorized as a trading transaction. The supply by the Appellant is against the PPA as successor of UPSEB having control over all the PPAs with central and state sector generating companies and others. The State Commission has not determined the purchase price of the Appellant and has ensured that the full cost of the Appellant is recovered. As stated above, the Appellant is aggregating the requirements of the distribution companies and procuring power on their behalf against the PPAs of central and state sector power stations resting with it as a successor of UPSEB. Thus the bulk supply tariff of the supply to the Respondent distribution licensee has to be regulated and determined by the State Commission under Section 86(1) (a) & (b) of the Electricity Act, 2003.”

(d) In Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission), Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Appellate Tribunal after considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a

plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.”

The above judgment was followed in Appeal No.52/2011 (Chhatisgarh State Power Trading Corporation Limited v Haryana Electricity Regulatory Commission) by the Appellate Tribunal

(e) In PTC India Limited v Jaiprakash Power Ventures Limited (OMP No.677/2011), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jai Prakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under:

“(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary.

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.”

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity



from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79(1)(f) read with Section 62 of the Act.”

In Jaiprakash Power Venture Pvt Limited v PTC India Limited (FAO (OS) No. 244/2012), the above judgment dated 15.5.2012 has been challenged before the Division Bench of the Delhi High Court. The appeal is still under consideration of the High Court and no stay has been granted in the matter.

25. Thus, the issue of jurisdiction of the Commission to determine the tariff of the generating companies for supply of power to the traders and from the traders to the distribution licensees has received judicial attention from time to time as noted above. The Appellate Tribunal in Noida Power Company Ltd v Uttar Pradesh Power Corporation Ltd and in Lanco Power Ltd v Haryana Electricity Regulatory Commission has taken the view that when power is supplied to a trading licensee which has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the tariff. The High Court of Delhi in PTC India Ltd v Jai Prakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. The appeal against the said judgment is pending and therefore, the issue has not

attained finality. The ratio of the said judgments is that when power is supplied by a generating company to a trading licensee which is meant for supply to the distribution licensees to be eventually supplied to the consumers, the tariff will be determined by the appropriate Commission. In the present case, power is being supplied by the petitioner to WBSEB and NDPL through TPTCL, a trading licensee, based on back to back agreements entered into as stated earlier. Keeping in view the judgment of the Delhi High Court in PTC India Limited supra and the available judicial interpretation on the issue, we are inclined to conclude that the jurisdiction of this Commission to determine the tariff of the generating station can be invoked only when the power is supplied by the generating company to the distribution licensees through the traders for ultimate consumption of the said power by the consumers of the distribution companies. Applying the above principle in the instant case, we are of the considered view that this Commission has the jurisdiction to determine the tariff of the generating station for supply of power by the petitioner to the distribution licensees in the States of West Bengal and Delhi, through TPTCL which is a trading licensee.

### **Competitive Bidding or MoU route**

26. Having held that the tariff of the generating station can be determined by this Commission when the power is supplied by the generating station to the distribution licensee through traders to be ultimately consumed by the consumers of the distribution licensees, another issue which needs to be decided is whether the PPAs entered into by the petitioner with TPTCL and the back to back PSAs of TPTCL with WBSEDCL and NDPL are in accordance with the tariff policy. It is pertinent to remember that under section 79(4) of the Act, this Commission in discharge of its functions is required to be guided by the National Electricity Policy and Tariff Policy. Para 5.1 of the Tariff Policy provides that with effect from 6.1.2006, all power procurements by the distribution companies shall be through the competitive bidding. By virtue of a subsequent clarification, Ministry of Power, Government of India clarified that the provisions of para 5.1 will

not be applicable in case of generating stations who have entered into PPAs prior to 30.9.2006. From the case history of the generating station it appears that only the PPA with DVC has been signed prior to 30.9.2006. Other PPAs and back to back PSAs have been signed and approved by the respective State Commissions after 30.9.2006. The PPA between the petitioner with TPTCL and PSA of NDPL with TPTCL was opposed by BRPL and BYPL before the Delhi Electricity Regulatory Commission (DERC) on the ground that the agreements have been signed in violation of the Tariff Policy. DERC approved the PPA and PSA on the ground that section 62 of the Act cannot be superseded by the Tariff Policy. The matter was challenged in Appeal No.16& 107/2009 before the Appellate Tribunal. In its judgment dated 31.3.2010, the Appellate Tribunal upheld the order of DERC and held as under:

"(i) Section 62 and 63 of the Act provide two alternate methods/routes for power procurement by a Distribution Licensee from a Generating Company, where Section 62 is the rule and Section 63 is an exception.

(ii) Clause 5.1 of the NTP which is a subordinate legislation would not carve out the statutory powers of State Commission under Section 62(1)(a) of the Act whereas clause 5.1 of the NTP would apply only to Section 63 and not to Section 62 which is a substantive provision. Also, the clause 5.1 is a policy direction which cannot control or override the provisions of Section 62 of the Act and hence, it cannot prohibit the statutory power of State Commission of tariff determination as per Section 62(1) of the Act."

27. Thus, it emerges from the above judgment that determination of tariff under section 62 of the Act in respect of the projects for which PPAs under MoU route which have been signed after 30.9.2006 is permissible despite the provisions of Para 5.1 of the Tariff Policy. Though the judgment of the Appellate Tribunal has been challenged in the Hon'ble Supreme Court, no stay has been granted. Therefore, in view of the above judgment of the Appellate Tribunal in case of the PPA/PSA involving the generating station, the PPAs/PSAs entered into after 30.9.2006 cannot be rejected for the purpose of tariff determination on account of Para 5.1 of the Tariff Policy.

28. In view of the above discussion, we hold that the tariff of the generating station for supply of power to WBSEDCL and NDPL shall also be determined by this Commission on the basis of the judicial interpretation available at present. However, if any other judicial interpretation is available in future with regard to the jurisdiction of the Commission to determine the tariff when the power is supplied to a distribution company through a trading licensee, the Commission will be at liberty to revisit the decision in this order.

29. We direct that the petition shall be listed for hearing for determination of final tariff of the generating station for 2011-14 on 9.7.2013.

*Sd/-*  
**[M.Deena Dayalan]**  
**Member**

*Sd/-*  
**[V S Verma]**  
**Member**

*Sd/-*  
**[Dr. Pramod Deo]**  
**Chairperson**