CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 128/MP/2016

Coram:

Shri Gireesh B. Pradhan, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member

Date of Order: **12th October, 2017**

In the matter of

Petition under Section 79 of the Electricity Act, 2003 seeking direction to U.P. Jal Vidyut Nigam Limited for filing ARR and Petition for determination of O & M charges in respect of Rihand Hydel Power Station and Matatila Hydel Power Station from 1.4.2008

And

In the matter of

M.P. Power Management Company Limited
Shakti Bhawan, Rampur
Jabalpur **……..Petitioner**

Vs

1. UP Jal Vidyut Nigam Limited
Shakti Bhawan, 14, Ashok Marg,
Lucknow- 226001

2. Energy Department
Government of Uttar Pradesh,
Bapu Bhawan, Lucknow- 226001

3. U.P Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg,
Lucknow- 226001 **…… Respondents**

Parties present:

Shri G. Umapathy, Advocate, MPPMCL
Shri Dilip Singh, MPPMCL
Shri Sanjay Singh, Advocate, UPJVNL
Shri Ritudeep Maurya, UPJVNL
Shri Atul Kumar, UPJVNL

ORDER

The Petitioner, M.P. Power Management Company Limited (*erstwhile MP Tradeco)* has filed this petition seeking the following reliefs:

(i) Direct the 1st Respondent to file petition and ARR for determination of O & M expenses of 'the generating stations' HPS for the period from 1.4.2008 onwards under section 64(1) to (4) and 79 (1) (b) of the Electricity Act, 2003 and as per CERC's Regulations prescribed from time to time;

(ii) Direct the 1st Respondent to raise the bills of supply of MP's share of power from 'the generating stations' HPS, at the O & M expenditure indicated in the tariff orders of UPERC, on provisional basis till final determination of same by this Commission;

(iii) Declare that the bill towards surcharge is illegal and in the alternative, direct the 1st Respondent not to raise surcharge bill till adjudication on the claim of 1st Respondent of O & M charges;

(iv) Restrain the 1st Respondent from giving any threat towards discontinuance of supply of MP's share of power from 'the generating stations' HPS; and

(v) Pass such further or other orders as this Commission may deem fit and proper in the facts and circumstances of the case.

2. The Petitioner herein is a Government owned company regulated by transfer and vesting of all functions, properties, interest, rights and obligations of the erstwhile MP State Electricity Board ('MPSEB') relating to, inter-alia, bulk purchase and bulk supply of electricity along with the related agreements and arrangements in the State Government and re-transfer and re-vesting thereof by the State Government in MP Power Trading Company Limited in accordance with the Government of Madhya Pradesh extraordinary Notification dated 3.6.2006 and subsequent amendment dated 29.3.2012. Further, the name of MP Power Trading Company Ltd. ('MP Tradeco') has been changed to MP Power Management Company Limited (MPPMCL) vide Registrar of Companies, Ministry of Corporate Affairs, Government of India's certificate dated 20.4.2012.

3. The Uttar Pradesh State Electricity Board ('UPSEB'), constituted under section-5 of the Electricity (Supply) Act, 1948, was restructured into three companies,

namely, Uttar Pradesh Power Corporation Limited (hereinafter referred to as 'UPPCL'), Uttar Pradesh Rajya Vidyut Utpadan Nigam Limited ('UPRVUNL') and Uttar Pradesh Jal Vidyut Nigam Limited ('UPJVNL') vide Government of Uttar Pradesh's notification dated14.01.2000 and 25.01.2001. It has been specified under Schedule-'C' part-I of the notification dated 25.01.2001 that all the properties belonging to the Uttar Pradesh State Electricity Board, other than those included in Schedule-'A' as UPRVUNL and Schedule-'B' as UPJVNL or such other properties, liabilities and proceeding as specified by the State Government under clause 4(1) and including but not limited as given in Schedule-'C' of the notification, are vested with Uttar Pradesh Power Corporation Ltd. (UPPCL).

Background

4. The State Government of Uttar Pradesh developed Rihand Hydel Power Project **(**Rihand HPP) (300 MW) and Matatila Hydel Power Project (Matatila HPP) (30 MW), hereinafter collectively referred to as "the generating stations". The salient features of the generating stations as extracted from the application are given hereunder:

	Salient Features	**Rihand HPP**	**Matatila HPP**
A	Location (1) State (2) District (3) River	 Uttar Pradesh Mlrzapur Rihand	 Uttar Pradesh Lalltpur Betwa
B	Capacity and Allocation (1) (a) Installed capacity (b) MP's share (2) Year of Commissioning:	 300 MW 45 MW (15%) 5x50 MW March, 1962 1 x 50 MW March. 1966	 30 MW 10 MW 1965
C	Hvdroloqv (1) Total catchment area (a) Catchment area In UP (b) Catchment area In MP (2) (a) Total submergence In UP (b) Total submergence In MP (3) Number of villages submerged	5148 Sq. miles 525 Sq. miles (10-1%) 4623 Sq. miles (99.9%) 40 Sq. miles (22.2%) 140 Sq. mires (77.8%) MP 44 UP 108	8000 Sq. miles 720 Sq. miles (9%) 72B0Sq. miles (91%) 9000 Acres (28%) 23320 Acres (72%) MP 18 UP 15

D	Transmission Lines for supply of share to MP	132 kV Rlharid-Morwa (MP) Line	66 kV MalaUla-Pochhore Line 11 kVHasarl(UP)-Datla(MP) 11 kV MataUla-Basal (MP)

5. On account of development of the generating stations, the land, trees and forests in the adjoining areas in the State of Madhya Pradesh were sub-merged, for which the State of Madhya Pradesh was demanding compensation in the form of supply of power from the generating stations. This issue was discussed In the sixth meeting of Central Zonal Council, headed by the Union Home Minister with Chief Ministers of the States of Uttar Pradesh and Madhya Pradesh as Members. At the instance of Chairman of the Council, it was agreed by the State Governments of Uttar Pradesh and Madhya Pradesh that 15% of power from Rihand HPP and 33% of power from Matatila HPP at the generating stations on year-to-year basis would be made available to MPEB. at cost price plus 5% thereof. The cost price was to be worked out by a Committee headed by Shri M.R. Sachdeva, the then Chairman, Central Water and Power Commission, after hearing the representatives of the two States. In its meeting held on 2nd and 3rd September 1964, the Sachdeva Committee decided that supply of power from Rihand HPP was to be @ 3.5 paise/kWh (cost of generation plus 5% thereof) and from Matatila HPP, supply was to be at the average rate of 6.5 paise/kWh (average cost of generation of available energy, both firm and secondary, plus 5% thereof). The Committee further decided that power to Madhya Pradesh from Rihand HPP was to be supplied at the border of State of Uttar Pradesh and MPEB was to bear an annual charge @ ₹1.5 lakh for the transmission line to be constructed by UPSEB for conveyance of power. This was accepted by the representatives of UPSEB and MPSEB, who were present at the meetings of the Sachdeva Committee. The rates decided by the Sachdeva Committee and agreed to by the concerned parties were subject to review after 10 years. The conclusions drawn by the Sachdeva

Committee in regard to fixation of rates for supply of power to the State of Madhya Pradesh were ratified by the Central Zonal Council in its meeting held on 19.9.1964. In this manner, the two issues relating to the quantum of supply of power from the generating stations and the rates of supply were decided. However, the arrangement could not be put into operation despite a number of subsequent meetings. In the meetings held on 7th and 8th June 1977, it was inter alia decided that in case MPSEB was not provided its entire share of power, balance units would be treated as over drawal by UPSEB and would be paid for accordingly by UPSEB. The above arrangement was accepted and acted upon by UPSEB who had supplied power at varying volumes during certain periods. A sum of ₹ 28.61 crore is stated to have been paid by the State of Uttar Pradesh from 1990-91 to 1999-2000 for non-supply of power from the generating stations to the State of Madhya Pradesh. During the period from 1962-63 to 2005-06, the State of Madhya Pradesh is stated to have received power supply of 626.84 MUs, which works out to about 12% of its total share of 5263.55 MUs, for the said period.

6. Petition No.107/2007 was filed by the Petitioner before the Central Commission praying for a direction upon the respondents, Govt. of U.P, UPPCL and UPJVNL to release MP's legitimate share of power from 'the generating stations', for payment of compensation of ₹365.704 crore (upto September, 2006) and for payment of interest at the borrowing rate of MPSEB plus 2% extra. The Commission by interim order dated 27.2.2008 held that it had the jurisdiction to hear and adjudicate the matter in terms of Section 79(1) (c) and (f) of the Electricity Act, 2003 (the 2003 Act). The Commission also directed the parties to interact with the WRLDC and NRLDC for scheduling and resuming supply of power. The relevant portion of the said order is extracted as under:

"*20. In the light of the foregoing, we have no hesitation to hold that the dispute in the instant case is in regard to a matter connected with regulation of inter-State transmission of electricity as prescribed in clause 79(1) (c) and therefore adjudication of any dispute related thereto is within the jurisdiction of this Commission under clause 79(1) (f) of the Act."*

7. Aggrieved by the said interim order dated 27.2.2008, the respondent, UPPCL filed Appeal No.35/2008 before the Appellate Tribunal for Electricity ('the Tribunal) challenging the findings of the Commission on the question of jurisdiction. By order dated 9.1.2009, the Tribunal affirmed the findings of the Commission (in order dated 27.2.2008) and held as under:

"37. As pointed out above, this is not the case of mere sale of electricity, but this is a case of share of supply of power on cost, as per the agreement between the State of UP and MP. If there is no supply of power by UP to MP of its legitimate share from the Rihand and Matitala Hydel Power Stations as per the agreement entered into between the two States, the flow of expected quantum of power through the Inter-State Transmission system will be affected.

38. Under those circumstances, it has to be safely concluded that the finding rendered by the Central Commission to the effect that the issue falls under Clause 79 (1) (c), which attracts Section 79 (1) (f) and as such the Central Commission alone has got jurisdiction to deal with the case is, in our view, perfectly justified and as such, no interference is called for."

8. Meanwhile, the Central Commission by order dated 12.11.2008, disposed of Petition No. 107/2007 by allowing the prayer of the Petitioner. In the said order, the Commission directed the following:

"54. We, therefore, direct as under:

(a) The respondents shall continue to supply power to the State of Madhya Pradesh from the generating stations in accordance with the directions contained in the order dated 27.2.2008.

(b) The undisputed amount of ₹192 crore shall be paid by the second respondent in three equal monthly installments, starting from November 2008, after adjusting the payment of ₹44.47 crore already made.

(c) The parties shall recalculate the amount of compensation from 1.9.1967 onwards and interest payable from 1.4.1982 in accordance with our decisions recorded above, by 31.3.2009, after reconciliation of the available data of energy generated and sent out to the State of Madhya Pradesh. Such reconciliation shall be completed within one month of the date of the order.

(d) RAPP rates, applicable for working out the compensation, may be obtained from Nuclear Corporation of India Ltd, if not already available with the parties.

(e)For giving credit to the second respondent, the cost of generation based on audited accounts of the generating stations or those taken into account by UPERC from the year 1999 onwards shall be considered.

(f) The amount of compensation found to be due as a result of the above exercise, and after giving adjustment for ₹192 crore payable in accordance with the direction at (b) above, along with interest shall be paid by 30.6.2009 through equal monthly installments.

(g) *In case of any differences, either of the parties is at liberty to approach the Commission for decision*."

9. Aggrieved by the Commission's order dated 12.11.2008, the respondent, UPPCL filed Appeal No.151/2008 before the Tribunal and the Tribunal by interim order dated 19.12.2008, modified the order of the Commission and directed the respondent, UPPCL to make the payment of compensation of ₹192 crore in three equal monthly installments from January, 2009, instead of November, 2008. Thereafter, the Tribunal by judgment dated 9.1.2009 dismissed the Appeal No.35/2008 holding that the Commission had the jurisdiction to adjudicate the dispute between the parties. Against this judgment, the respondent has filed Civil Appeal before the Hon'ble Supreme Court of India, which was dismissed by the Court on the ground that Appeal No.151/2008 was pending before the Tribunal and that either party had liberty to approach the Court after a decision in the said appeal.

10. Due to the non-payment of compensation by the said respondents as directed by the Commission in order dated 12.11.2008 and as per relaxation allowed by the Tribunal in order dated 19.12.2008, the Petitioner filed contempt application before the Tribunal for invocation of the provisions of Section 146 of the Act for willful disobedience of order dated 19.12.2008 of Tribunal. By interim order dated 16.3.2009, the Tribunal directed the respondent to deposit post-dated cheques of ₹142.53 crore in 6 monthly installments to the Petitioner, which was since deposited from April, 2009 to September 2009. Subsequently, Appeal No. 151/2008 filed by

respondent, UPPCL was dismissed by the Tribunal on 21.7.2011 on merits and the findings of the Commission in the order dated 12.11.2008 was upheld. Against the judgment of the Tribunal dated 21.7.2011, the respondent, UPPCL has filed Civil Appeal No. 3377-3378/2012 (UPPCL V MPPTCL) before the Hon'ble Supreme Court and the Court by order dated 26.3.2012 has admitted the appeal and passed interim directions as under:

> *"Admit.*
>
> *The appellants prayer for stay of the impugned order by which the Appellate Tribunal for Electricity dismissed the appeal preferred against the order of the Central Electricity Regulatory Commission is rejected.*
>
> *The appellant shall comply with the directions given by the Central Electricity Regulatory Commission within a period of three months.*
>
> *This will be subject to final adjudication of the appeal"*

11. The Civil Appeal is still pending. Meanwhile, in Petition No. 248/2010 filed by the Petitioner for direction to the respondent, UPPCL for payment of compensation amount to the Petitioner due to retention of MPs' share of power/non supply of it from 'the generating stations' to MPSEB and resumption of MPs share of power from 'the generating stations', the Commission by order dated 20.2.2014 decided the issue of the rate of compensation payable by the respondent and observed as under:-

> "*17. There is no dispute between the parties as regards the petitioner's claim for ₹139.925 crore. The petitioner has claimed an additional amount of ₹79.528 crore. The disputed amount includes a sum of ₹71.49 crore on account of difference of rate of RAPS. The petitioner has considered weighted average RAPS rate of Unit I and Unit IV. However, UPPCL has calculated the amount of compensation based on RAPS rate of Unit I. As per the agreement arrived at in the meeting of 7/8.6.1977 between Chairman UPSEB and Chairman MPEB it was decided that "current RAPS rate" would be the basis for computation of compensation. The question raised involves interpretation of the expression "current RAPS rate" The rate of compensation agreed to at the meeting held in June 1977 was effective from 1.10.1974. At the time of agreement, RAPS Unit I has been under commercial operation since 16.12.1973. RAPS Unit II to Unit IV was commissioned on 1.4.1981, 1.6.2000 and 23.12.2000, respectively. Therefore, RAPS Unit II to Unit-IV could not be said to be within contemplation of the parties when agreement to work out compensation at "current RAPS rate" was reached. Accordingly, it is held that for*

computing the amount of compensation, "current RAPS rate" means the current rate of RAPS Unit I only. In our view "current rate" refers to the rate having currency during the period for which compensation is payable. In other words, "current RAPS rate" means the governing or applicable rate of RAPS Unit I during with the period of compensation.

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19. In view of the above discussions, we conclude that compensation is to be worked out on yearly basis. The compensation for the year 1.10.1974 to 30.9.1975 shall be payable in accordance with the weighted average rate of RAPS Unit I applicable for that year. The same methodology shall apply for computing the rate of compensation for the succeeding years."

12. Against the said order dated 20.2.2014, the Petitioner had filed Review Petition No. 13/RP/2014 and the Commission vide order dated 11.12.2014 disposed of the said Review Petition with the following observations:

"22. Based on the above discussions, the findings of the Commission are summarized as under:

(a) The question of limitation in filing the review petition as raised by the respondent, UPPCL is rejected.

(b) *The issue of Current RAPS rate as decided in order dated 20.2.2014 shall remain unchanged upto 30.11.2005. With effect from 1.12.2005, the compensation shall be calculated at the notified rate of RAPS-I as on 30.11.2005 which shall be escalated at 4% per annum (which corresponds to the escalation rate for O&M expenses in the Tariff Regulations specified by the Commission for the period 2004-09) till the date of restoration of supply of power to the review petitioner.*

(c) The last line in para 23 of the order dated 20.2.2014 shall stand modified as under:

"……Therefore, the compensation receivable by petitioner, MPPMCL, as a successor entity of MPEB/MPSEB, shall form part of all the dues payable to MPEB/MPSEB"

13. In the above background, the Petitioner has filed this Petition and has submitted as under:

a) The supply of MP's share of power from 'the generating stations' was resumed from 1.4.2008. The respondent, UPPCL has paid undisputed compensation of Rs 326.586 crore to the Petitioner as per order of the Central Commission, the judgment of the Tribunal dated 16.3.2009 and the interim order dated 26.3.2012 of the Supreme Court in the said Civil Appeal. The Petitions (were filed for resumption of Inter-State flow of MP's share of power from 'the generating stations' HPS and payment of compensation by the State of UP on account of non- supply of power for the period up to March, 2008.

(b) The cost of generation (tariff-ROE) taken into account by Uttar Pradesh Electricity Regulatory Commission (UPERC) from the year 1999 onwards till resumption of power i.e 31.3.2008 as directed by Central Commission was on account of non-availability of audited accounts of the generating station with the respondents. Above direction was for computation of compensation till March, 2008 as per Petition No.107/2008 filed by the Petitioner. The tariff or any component of tariff in respect of 'the generating stations' beyond March, 2008 is yet to be decided by Central Commission.

(c) In accordance with the directions in Commission's order dated 11.12.2014, the Petitioner had raised interest claim of ₹376.486 crore and the balance compensation amount of ₹11.59 crore to the respondent, UPPCL vide letter dated 11.3.2015 and 3.9.2015 and these amounts are yet to be paid by UPPCL.

(d) As regards execution of formal PPA, the respondent , UPJVNL has provided the draft formal PPA, which was revised and redrafted by the Petitioner in consonance with the regulation of inter-state flow of power, jurisdiction of appropriate Commission to determine tariff etc., and provided to respondent, UPJVNL for finalization. However, formal PPA could not be finalized on account of disputes in the various clauses as framed by the Petitioner and the respondent, UPJVNL. Most of the clauses as framed by UPJVNL are in contradiction with the regulation of inter-state flow of power, jurisdiction of appropriate Commission and directions of the Central Commission in Petition No. 107/2007 and 45/2010.

(e) Since resumption of share to MP from 'the generating stations', several disputes cropped up between the parties. UPJVNL has been raising bills for supply of MPs share of power as per tariff decided by their State Regulatory Commission (UPERC). It raised its first claim of ₹8.07 crore on 18.12.2012 for the supply period 1.4.2008 to 31.3.2012. From April, 2008 to January, 2016, it has raised total claim of ₹49.699 crore and the Petitioner admitted the same for payment of ₹33.999 crore as O&M charges, indicated in the tariff order of UPERC, on provisional basis.

(f) The Petitioner vide letters dated 23.1.2013, 4.5.2013, 29.7.2013, 24.8.2013, 19.9.2013 and 26.10.2013 objected to the unilateral bills raised by respondent, UPJVNL as per UPERC's tariff. It was informed that supply of power from 'the generating stations' HPS was not a sale of power but the supply of share to MP which arose due to submergence of huge agricultural land, forest, etc. in the State of MP. On account of above submergence, both plants do qualify the composite scheme. As issue regarding determination of tariff or any component of tariff is still open before Central Commission, component of tariff, i.e., O&M expenses of the plants would be payable by MP to UP. It was informed to 1st respondent that the Petitioner has been admitting and paying the bills to the extent of O&M charges only, on provisional basis, as indicated in the tariff orders of UPERC. The respondent, UPJVNL vide its letters dated 25.2.2013, 5.6.2013, 31.8.2013, 17.1.2014 and

3.9.2014 informed that Petitioner is bound to make the payment at the rates as approved by UPERC, plus 5% thereon as per directives of the Central Commission in order dated 12.11.2008 in Petition No. 107/2007. It was further informed that both plants do not qualify the composite scheme in line with Commission's order dated 29.3.2006 in Petition No 103/2205 (UJJVNL v/s UPCL and HSEB) and Tribunal judgment dated 14.9.2010 in Appeal No.183/2009.The respondent, UPJNL threatened to stop the supply of MP's share from 'the generating stations' HPS, if payment of bills, as raised by them as per UPERC's tariff along with late payment surcharge, is not made to them.

(g) The Petitioner, vide subsequent letters dated 28.2.2015, 17.3.2015 and 7.4.2015 informed that till the determination of cost of supply by CERC, provisional payment of O&M charges are being made to respondent, UPJVNL in accordance with observation of CERC in its ROP dated 21.8.2012 in Petition No. 45/2010 in the matter of supply of UP's share of power from Rajghat HPS by MP. In case of disruption of supply from 'the generating stations' HPS to MP, it would amount to violation of CERC's orders dated 27.2.2008 and 12.11.2008 in Petition No. 107/2007 and the Petitioner can take appropriate action against disruption of supply by the respondent, UPJVNL before the appropriate forum. The Petitioner vide letters dated 19.10.2015 and 14.1.2016 further informed that as per affidavit filed by UPJVNL on 2.4.2008 in Petition No 107/2007, the respondent, UPPCL has the responsibility to supply MP's share of power from 'the generating stations', and UPJVNL cannot disrupt the supply. UPJVNL was requested that supply of MP's share of power from 'the generating stations' falls under the composite scheme by virtue of loss of huge land by MP in its submerged area, petition and ARR may be filed before the Central Commission so that payment of bills pertaining to above projects could be regularized from 1.4.2008. In regard to surcharge bills as raised by UPJVNL, it was informed that unilateral billing will not attract any surcharge and the said bills were returned to UPJVNL. The series of correspondences exchanged between the Petitioner and UPJVNL dated 28.2.2015, 19.10.2015, 14.1.2016 & 27.5.2016 (Petitioner) and 26.9.2015, 1.12.2015, 24.2.2016 and 5.3.2016 (1st respondent) are filed herewith.

(h) Meetings were held between UPJVNL and the Petitioner on 12.3.2015 and 10.12.2015 inter-alia, on the issues namely (i) Composite scheme of 'the generating stations' HPS (ii) Jurisdiction of appropriate Commission to decide the cost of generation/ O&M charges; (iii) filing of ARR and petition before this Commission from 1.4.2008 to 31.3.2016; and (iv) finalization of formal PPA. The disputes involved could not be resolved, and therefore, formal PPA could not be finalized.

(i) In Petition No 107/2007, the Central Commission had held that it has jurisdiction to adjudicate interstate flow of MP's share of power from 'the generating stations' HPS and payment of compensation on account of non-supply of MP's share of power by UP. The Central Commission in para 20 of its order dated 27.2.2008 had

held that the dispute is in regard to a matter connected with regulation of inter-state transmission of electricity as prescribed in clause 79 (1) (c) and therefore adjudication of any dispute related thereto is within the jurisdiction of the Central Commission under clause 79 (1) (f) of the Act. The order of the Central Commission has been upheld by the Tribunal vide its judgment dated 9.1.2009 in Appeal No. 35 of 2008.

(j) Thus, the only issue left in regard to supply of MP's share of power from 'the generating stations' by UPJVNL is determination of tariff or any component of tariff. The erstwhile UPSEB supplied power to MP from Rihand HPS till 1992 and from Matatila HPS till March, 2008 intermittently. There was no component of return on equity in the cost of generation. The non-inclusion of return on equity (ROE) in above cost of generation by Sachdeva Committee was on account of contribution of State of MP in the project by way of huge submergence of forest land, agriculture land, villages etc. in its geographical area. Allocation to MP on account of above was already adjudicated in above petitions and appeals before Tribunal as well. The Tribunal in order dated 9.1.2009 in Appeal No 35 of 2008 has held as under:

"31. In the light of the above definition, if we look at the records relating to the agreements and minutes of meetings, it is evident that the allocation of power from the two projects in U.P. to M.P. is required because the land, trees, forests, houses etc. in the Rewa District of M.P. got submerged. Therefore the State of U.P. and its organs were obliged to honour the agreement between the two States by ensuring the supply of power from the above-referred two power projects located in U.P.

37. As pointed out above, this is not the case of mere sale of electricity, but this is a case of share of supply of power on cost, as per the agreement between the States of U.P. and M.P. If there is no supply of power by U.P. to M.P. of its legitimate share from the 'the generating stations' Hydel Power Stations as per the agreement entered into between the two States, the flow of expected quantum of power through the Inter-State Transmission system will be affected."

(k) In Para 28 of the judgment dated 21.7.2011 in Appeal No 151 of 2008, the Tribunal had held that the present case is not a case of sale of Electricity but supply of the share of power which has been agreed to by the State of UP. Thus, in the past, allocation of share to MP and cost of generation had been decided by an independent authority, i.e., Central Zonal Council under Ministry of Home Affairs, GOI and not by the authority situated and belonging to the State of UP and jurisdiction limited to the State of UP. After enactment of Electricity Act, 2003 and resumption of MP's share of power in 'the generating stations' from 1.4.2008, the issue of payment to UPJVNL in lieu of generation of MP's share of power, is to be decided afresh by this Commission.

(l) In view of proceedings and decisions of the Central Commission and the Tribunal, supply of MP's share of power from 'the generating stations' by UPJVNL falls under 'composite scheme' as per section 79 (1) (b) of 2003 Act, as allocation to MP arose on account of huge submergence of land, forest, agriculture land,

catchment area etc. in the State of MP. Therefore, being an independent authority between two states, the Central Commission has the jurisdiction to regulate the tariff or component of the tariff in respect of supply of MP's share of power from 'the generating stations' by UPJVNL. UPJVNL besides generating its own power in 'the generating stations', is acting as manager and operator for and on behalf of the petitioner to generate its share in the above projects. The supply of power is to more than one state, i.e., Petitioner and UPPCL belonging to MP and UP respectively. Independent regulator, i.e., the Central Commission has jurisdiction to fix the component of tariff (O&M charges) of the plants for the purpose of supply of share of power exclusively belonging to Petitioner. Supply of power to UPPCL is the power belonging to UPJVNL and allocated to UPPCL, for which generation tariff is being determined by UPERC.

(m) It can be concluded from orders dated 21.8.2012 ad 2.1.2014 in Petition No. 45/2010 that supply of MP's share of power from 'the generating stations' by UPJVNL falls under the composite scheme as per Electricity Act 2003, as facts involved in these projects (Rihand, Matatila and Rajghat HPS) are similar except parties are reversed. It can further be concluded that supply of share from the projects having such composite scheme between participating States, would be at the O&M expenditure of the plant. The direction for payment of O&M charges to MP, for supply of UP's share in Rajghat HPS, is on account of the fact that participating states in the project are MP and UP, and MP, besides generating its own share in the project, is acting as manager and operator for and on behalf of the participating state, i.e., UP, to generate its share which is presently subjudice before the Tribunal in Appeal No. 120 of 2014. It is pertinent to mention here that in Rajghat HPS, the MPERC has been determining generation tariff of capacity belongs to MPPGCL and allocated to the Petitioner for supply of power within MP. The share of UP and tariff determination or component of tariff are subjudice before the Tribunal.

(n) The Central Commission in its order dated 30.6.2015 in Petition No. 267/SM/2012 in the matter of supply of share by Sardar Sarovar Narmada Nigam Ltd (SSNNL) to the participating States from Sardar Sarovar project (SSP), has held that SSNNL is a Company incorporated under Companies Act 1956 with the main object to construct, operate and maintain the Hydro generating station and associated substations and transmission line on behalf of participating states, i.e., Madhya Pradesh, Maharashtra and Gujarat. The project cost chargeable to the power component, i.e., capital cost, operating cost and benefit of power generated by the project were shared by states of M.P., Maharashtra and Gujarat in the ratio of 57:27:16. It is submitted that Rihand, Matatila and Rajghat projects are analogous to the Sardar Sarovar project.

(o) Thus, such type of shared project falls under the composite scheme and O&M expenses would be the appropriate cost payable to the entity which is operating the plant on behalf of participating state(s). This would entail generality of the charges of

such type of inter-state (shared) projects. The State Regulatory Commission has been determining generation tariff corresponding to share of respective participating state for supply to distribution companies, e.g., MP's share in Rajghat HPS is owned by MPPGCL and its generation tariff is being determined by MPERC for supply to MP's Discoms through MPPMCL. But the determination of expenses of operating companies (O&M charges) supplying power or share of power more than one state including respective state, is absolutely vested with the Central Commission, e.g., UPJVNL is supplying MP's share in 'the generating stations' to MPPMCL and the balance capacity to UPPCL, as well. The jurisdiction, for supply of power to MP, is vested with the Central Commission.

(p) In regard to the jurisdiction of UPERC over supply of MP's share from 'the generating stations' by UPJVNL, the Central Commission in its order dated 12.11.2008 in Petition No 107/2007 held as under:

> *"36. On the question of jurisdiction, it is to be noticed that UPERC has jurisdiction to adjudicate disputes between the licensees and the generating companies operating within the State of Uttar Pradesh since its jurisdiction is to determine tariff for generation, supply, transmission and wheeling of electricity within that State and is also assigned function to facilitate intra-State transmission and wheeling of electricity. UPERC does not have jurisdiction to adjudicate disputes involving the utilities outside the State……."*

UPJVNL was a party in Petition No 107/2007, which has neither opposed the conclusion of Central Commission on the applicability of the judgment in Petition No 103/2005 to 'the generating stations' and the jurisdiction of UPERC nor has filed any appeal before the Tribunal.

(q) The Central Commission has issued Tariff Regulations for the period 2001-2004, 2004-09, 2009-14 and 2014-19. In all these regulations, it was provided that cost of Rehabilitation and Resettlement (R&R) plan shall be as per National R&R policy which provides provisions relating to land acquisition, compensation, R&R etc. The cost incurred on this account in the project would be the part of capital cost of the project. Allocation to MP in 'the generating stations' arose due to huge submergence of agriculture land, forest land and rehabilitation of people in the State of MP, thereby making MP as capital contributor in the projects. On account of capital contribution as stated above and supply of shares to distribution companies in MP, both projects do qualify under the composite scheme and attract the jurisdiction of the Central Commission. Thus, the Central Commission, undoubtedly, has jurisdiction to adjudicate payment of O&M charges to UPJVNL which is a component of tariff, for supply of MP's share from 'the generating stations'.

(r) UPJVNL has been contesting the issue of composite scheme of 'the generating stations' on the pretext of the Central Commission order dated 29.3.2006 in Petition No. 103/2005 (UPJVNL v/s UPCL & Ors (supply of power by UPJVNL to non-participating state viz, Himachal Pradesh). In this connection para 28 of the

judgment dated 27.2.2008 in Petition No 107/2007, wherein UPJVNL was also a party, is reproduced as under:

> *"28. We make it clear that while deciding the issue of jurisdiction, the applicability of the ratio of the Commission's order dated 29.3.2006 in Petition No.103/2005 to the case on hand has not been examined since that case, with prayer for determination of tariff of the generating stations situated in the State of Uttaranchal, and contested between intra-State parties of the same State, was decided on its own facts. The facts and issues in the present case are prima facie very different."*

The judgment dated 29.3.2006 in Petition No.103/2005 would not be applicable to 'the generating stations'. This was upheld by the Tribunal in Appeal No 35/2008 and 151/2008 filed by UPPCL. The major difference between Rihand & Matatila HPS and Yamuna Hydel scheme are that in former case, allocation to MP arose on account of huge submergence of agricultural land, forest, rehabilitation of people etc in the geographical area of MP, whereas in later case, allocation to Himachal Pradesh arose in lieu to maintain natural flow of water and allowing the usage of rights of water of river Yamuna and its tributaries emanating (natural) from Himachal Pradesh exclusively to Uttaranchal. Hence, the Central Commission has jurisdiction to regulate and determine tariff or any component of tariff in former case due to composite scheme of the projects, whereas State Commission has jurisdiction in the latter case, as hydel power stations situated in Uttaranchal do not qualify to be a composite scheme.

14. Based on the above, the Petitioner has submitted that the Respondent, UPJVNL is subject to the scrutiny and regulatory jurisdiction of the Central Commission. The Petitioner has also submitted that as per Section 64 (1) to (4) of the 2003 Act, it is the obligation of UPJVNL to file appropriate petition before the Central Commission to determine the O & M charges from the date of resumption of supply of MP's share of power from 'the generating stations' i.e. 1.4.2008, pursuant to the orders passed by this Commission. The Petitioner has further submitted that inspite of the repeated correspondences, UPJVNL is not filing Petition before this Commission for determination of tariff viz. O & M charges payable by the Petitioner towards supply of power pursuant to the agreement towards the share of power to the State of MP on account of compensation towards loss of land, etc in setting up 'the generating stations' in the State of UP. Hence, the present Petition.

15. The Petition was admitted on 9.8.2016 and the Commission ordered notice on the respondents, with directions to parties to complete pleadings in the matter. During the hearing on 14.12.2016, the learned counsel for the Petitioner, submitted that the respondent UPJVNL had issued notice on 9.11.2016 for disconnection of power supply from 'the generating stations' on the premise that it is entitled to recover balance amount of ₹24.618 crore towards tariff approved by UPERC. Accordingly, the learned counsel prayed for an interim order restraining the respondent No.1, UPJVNL from disconnecting power supply from 'the generating stations' till disposal of the Petition. The Commission, based on the submissions of UPJVNL, directed the respondent not to take coercive action in terms of the notice dated 9.11.2016 and continue to supply power to the Petitioner till further orders. The Record of Proceedings of the hearing dated 14.12.2016 is extracted as under:

> "*Learned counsel for the petitioner submitted that during the pendency of the present petition, U.P.Jal Vidyut Vitran Nigam Limited (UPJVNL) issued a notice on 9.11.2016 for disconnection of power supply from Rihand and Matatila on the premise that it is entitled to recover tariff approved by UPERC. In the said notice, UPJVNL has referred to the payment of Rs. 24.99 crore having been paid by the petitioner and balance of Rs. 24.618 crore is being sought to be raised on the premise that it is entitled to charge the tariff as determined by UPERC, ignoring the fact that it is not a sale of power but a share of power to the State of M.P. Learned counsel for the petitioner requested to pass appropriate orders restraining UPJVNL from disconnecting the power supply from Rihand and Matatila till the disposal of the present petition.*
>
> *2. The representative for UPJVNL requested for time to file additional reply. The representative for UPJVNL further submitted that UJVNL shall not regulate the power supply from Rihand and Matatila till the next date of hearing*
>
> *3.The Commission directed UPJVNL to file additional reply by 30.12.2016 with an advance copy to the petitioner who may file its rejoinder, if any, by 16.1.2017. The Commission directed that due date of filing the replies and rejoinders should be strictly complied with. No extension shall be granted on that account.*
>
> *4. The Commission directed UPJVNL not to take any coercive action in terms of the notice dated 9.11.2016 and continue to supply power to MPPMCL till further orders."*

16. Respondent No.1, UPJVNL has filed its reply and the Petitioner has filed its rejoinder to the said replies. The Commission after hearing the parties reserved its orders in the Petition on 14.2.2017, with directions to file additional information. The

parties have filed the additional information in terms of the directions of the Commission vide ROP of the hearing dated 14.2.2017.

Submissions of the Respondent

17. The respondent No.1, UPJVNL vide affidavits dated 25.10.2016 and 9.12.2016 has submitted the following:

(a) The respondent seeks indulgence of the Central Commission to the preliminary objections raised herein for proper adjudication of the dispute raised by the Petitioner which has been set at rest by Central Commission orders dated 27.2.2008 and 12.11.2008 in Petition No. 107/2007 and attained finality after the disposal of appeal against order dated 12.11.2008 by the Tribunal vide order dated 21.7.2011 in Appeal No. 151/2008.

(b) UPJVNL has been filing ARR and petition for determination of tariff before UPERC since the formation of the State Commission under the UP Electricity Reforms Act, 1999 which is the Appropriate Commission for determination of ARR & tariff in respect of UPJVNL. Till now the ARR & tariff determined by UPERC for UPJVNL for the period from 2000-01 to 2013-14 by various orders include "the generating stations'. For the period 2014-15 to 2018-19, the ARR petitions are pending before UPERC. Instead of approaching the Central Commission, the Petitioner ought to have approached the UPERC or its higher forum stating that UPERC does not have jurisdiction to determine the ARR & tariff for UPJVNL in respect of 'the generating stations'. The Petitioner has approached the Central Commission which has no power under the 2003 Act or otherwise, to pass restraint order restraining the UPERC to pass orders in the matter of determination of multiyear tariff for the control period 2014-15 to 2018-19, in respect of the hydel power stations under the ownership of UPJVNL which includes 'the generating stations'. As such, for the years for which tariff, which also includes O&M charges, has already been determined by UPERC, cannot be re-determined or annulled by the Central Commission.

(c) For determination of tariff, a tariff petition cannot be filed before more than one Commission and as such the adjudication on the issue raised in the present Petition will be an exercise in futility, which will yield no result.

(d) The Central Commission's order dated 12.11.2008 in Petition No. 107/2007 directing "for giving credit to the second respondent, the cost of generation based on audited accounts of the generating stations or those taken into account by UPERC from the year 1999 onwards shall be considered," implying that from 1999 onwards tariff determined by UPERC will be taken into account in

respect of 'the generating stations', has attained finality after the disposal of appeal by Tribunal vide order dated 21.07.2011 in Appeal No. 151 of 2008.

(e) It is worthwhile to mention that in Commission's order dated 27.2.2008 in Petition No. 107/2007, the Commission has accepted the realignment of responsibilities as per Clause 2.01 of Memorandum of Understanding dated 18.12.2000 signed between UPJVNL and UPPCL.

(f) In view of the aforesaid, it is amply clear that UPERC is the Appropriate Commission to determine the tariff of the hydro power stations of UPJVNL, which includes 'the generating stations'.

(g) The dispute raised by the Petitioner is barred by the principles of constructive res-judicata and the dispute regarding the Petitioner's share of power from 'the generating stations' has attained finality and stands concluded in terms of order dated 12.11.2008 which attained finality after disposal of Appeal No. 151 of 2008 by order dated 21.7.2011 by Tribunal.

(h) The Petitioner had full knowledge of the determination of first tariff of 'the generating stations' for 2000-01 by UPERC vide order dated 27.07.2000 but was never objected by the Petitioner. Rather the Petitioner took its benefit in settling the amount of compensation, as such at such a belated stage, the Petitioner cannot be allowed to raise the same issue once again to unsettle the settled position, in view of the doctrine of estoppel by acquiescence.

(i) The present petition amounts to the abuse of process of the court and as such is liable to be dismissed without entering into the merit of the case.

(j) The 'generating stations' do not envisage the composite scheme for generation or sale of electricity in more than one state. The Petitioner's share of electricity is made available to the Petitioner at the generating station step-up substation terminal. The Petitioner has not made any kind of capital investment in the 'power stations'. The State Government of Uttar Pradesh had paid compensation for the lands submerged in Madhya Pradesh at the time of setting up of 'the generating stations'. The Central Zonal Council in its meeting held on 1st and 2nd July, 1963 had suggested that all future hydro-electric projects on rivers constituting the boundary between the two states shall be executed jointly, implying that 'the generating stations' is not a joint venture of both the States, which was agreed by the Governments of U. P. and M. P. The aforesaid position is admitted position in Petition No.107/2007 filed by the Petitioner before the Central Commission and decided vide order dated 12.11.2008.

(k) The aforesaid position precludes the Central Commission to determine the tariff of 'the generating stations' and entitles the UPERC to determine tariff for it.

Rejoinder

18. The Petitioner vide rejoinder affidavit dated 18.11.2016 has submitted the following:

(a) The Central Commission issued order dated 27.2.2008 directing respondents to schedule and resume MP's share of power from 'the generating stations' w.e.f. 1.4.2008 and order dated 12.11.2008 in Petition No. 107/2007 for direction to UPJVNL to make payment of compensation due to non-supply of MP's share of power from 'the generating stations' from 1.9.1967 to 31.3.2008 and payment of interest on outstanding compensation as well to the petitioner. Thus, the aforesaid petition filed by the petitioner was restricted to the flow of power and payment of compensation on account of non-supply of MP's share of power as per agreed arrangements between erstwhile UPSEB and MPEB/MPSEB.

(b) After adjudication by the Central Commission, supply of MP's share of power from 'the generating stations' was resumed from 1.4.2008 on Long Term Open Access (LTOA) basis. The 'generating stations' are the only plants in Northern region wherein the Petitioner has its shares. Any deviation against the scheduled energy may attract DSM charges as per regulations, and therefore UPERC absolutely has no jurisdiction on the share of MP in 'the generating stations'.

(c) The Central Commission in para 9 of the order dated 27.2.2008 has observed that the jurisdiction to determine tariff for supply of MP's share of power from 'the generating stations' by State of U.P is still open and is yet to be decided by the Central Commission. Thus, the submission of the respondent that determination of tariff by UPERC has attained its finality, as per decision of Central Commission in order dated 12.11.2008, is wholly untenable.

(d) The present petition has been filed for a specific direction to UPJVNL for filing of petition before Central Commission for determination of O&M expenses of the generating stations' or any component of tariff in respect of supply of MP's share of power from Rihand HPP (45 MW) and Matatila HPP (10 MW). These shares have been allocated to the State of MP on account of huge submergence of agriculture land, forest and rehabilitation of people in the State of MP and the Tribunal in Appeal No 151/2008 had held that this was not the case of mere sale of electricity, but was a case of share of supply of power on cost to the petitioner. The submergence of land, R&R etc. are part of capital expenditure. Therefore, the appropriate Commission, which has to decide the expenditure incurred by UPJVNL to generate MP's share of power from 'the generating stations', is the Central Commission. UPERC has jurisdiction to determine the tariff of UP's share of power in Rihand HPS (255 MW) and Matatila HPS (20 MW) for supply to its Discoms and it has no jurisdiction to decide the same with regard to MP's share.

(e). The principle of constructive res-judicata as defined under Section 11 of the Civil Procedure Code cannot be invoked and applied in this case, since (a) the matter regarding determination of tariff of 'the generating stations' by the Central Commission is still open, as decided in order dated 27.2.2008 (b) the Petition No 107/2007 filed by the Petitioner was restricted to the resumption of supply of MP's share of power from 'the generating stations' and for payment of compensation on account of non-supply of MP's share of power from 'the generating stations', by UPPCL. The dispute was for the period up to 31.3.2008 and thereafter the same was resolved on the basis of old agreements between erstwhile UPSEB and MPEB (c) both the issues before the Central Commission came to an end after commencement of scheduling of MP's share of power from these projects with effect from 1.4.2008 and any dispute after resumption of power should be held afresh and (d) the Commission's order dated 12.11.2008 and 21.2.2014 (in Petition No. 248/2010) stood merged with the judgment of the Tribunal dated 21.7.2011. Hence the sentence ''*adjustment of cost of generation based on audited accounts of the generating stations or those taken into account by UPERC from the year 1999 onwards shall be considered*' as appeared in order dated 12.11.2008 becomes null and void.

(f) The decision of the Central Commission to take cost of generation as taken into account by UPERC from the year 1999 onwards was on account of the fact that the audited accounts of the cost of generation was not available with UPPCL. Moreover, the main parties contesting in Petition No. 107/2007 were UPJVNL and the Petitioner and the cost of generation taken into account by UPERC was restricted to the computation of compensation for the period up to 31.3.2008. There was no adjudication on the tariff determination of 'the generating stations' in Petition No. 107/2007 between UPJVNL and the Petitioner. The principle of constructive res-judicata cannot be applied as neither UPJVNL has neither filed any Petition before this Commission for determination of tariff nor any adjudication was held on the same.

(g) The Petitioner has intimated that the determination of generation tariff by UPERC would not be applicable to the share of MP in 'the generating stations'. The tariff determination by UPERC for the above projects would only be applicable to discoms of UP up to the share of UP, i.e., 255 MW power in Rihand HPS and 20 MW power in Matatila HPS.

(h) The Petitioner has always been objecting to the unilateral billing towards supply of MP's share of power from 'the generating stations' as per UPERC tariff and has been admitting the claims of UPJVNL for payment of O&M charges (provisionally) subject to adjudication by the Central Commission.

19. From the above discussions, the issues which emerge for consideration in the present Petition are as under:

(a)Whether the Central Commission has the jurisdiction to determine the tariff of 'the generating stations'?

(b) Whether the dispute raised by the Petitioner in this petition is barred by the 'principles of constructive res judicata' ?

(c) Whether the reliefs prayed for by the Petitioner can be granted?

20. We now examine the above issues based on the submissions of the parties as stated in the subsequent paragraphs.

Jurisdictional Issue

21. Section 79(1) of the 2003 Act provides as under:

"Section 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 (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the Inter-State transmission of electricity;

(d) to determine tariff for Inter-State transmission of electricity;

(e) ……..

(f) To adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute or arbitration"

22. The question of jurisdiction of the Central Commission 'to adjudicate the disputes' between the parties herein was raised by the Respondents, UPJVNL and UPPCL in the proceedings in Petition No.107/2007 filed by the Petitioner before the Central Commission, seeking compensation for non-supply of power from the generating stations. In the said Petition, the said respondents had contended that the Central Commission does not have the jurisdiction to adjudicate the disputes under Section 79(1)(f) of the 2003 Act, based on the premise that the Commission

does not have the jurisdiction to regulate the tariff of the 'generating stations' under clauses (a) or (b) of Section 79 of the 2003 Act. The Commission after examining the obligation of the generating stations in the State of UP to supply power to the State of MP, considered the question as to whether the said supply of power to State of MP involved inter-state transmission of electricity and held by order dated 27.2.2008 that the supply of power from the 'generating stations' located in the State of UP to MP involves inter-State transmission in terms of Section 2(36) of the 2003 Act, thereby falling within the scope and jurisdiction of the Central Commission under Section 79(1)(c) read with Section 79(1)(f) of the 2003 Act. The relevant portions of the order dated 27.2.2008 is extracted as under:

> "*9. There is no denying the fact that this Commission can adjudicate on the disputes relating to any of the matters falling under clauses (a) to (d). The adjudication of disputes is not limited to clauses (a) and (b) but also extends to the matters under clauses (c) and (d). Therefore, for the purpose of examination of the issue of jurisdiction of the Commission to adjudicate the dispute raised in the petition, it is not necessary for us to decide whether or not the Commission has authority to - 8 - regulate tariff of the power stations. Accordingly, we propose to examine as to whether the dispute can relate to any matter other than clause (a) and (b) under subsection (1) of Section 79 of the Act leaving open the question of jurisdiction of the Commission to regulate tariff of the power stations, though the learned counsel for the petitioner has contended that the dispute falls under clause (c).*
>
> *xxxx*
>
> *14. From clause (i) of sub-section (36) of Section 2 of the Act it follows that any system used for conveyance of electricity by means of main transmission line from the territory of one State to another State qualifies to be categorized as the inter-State transmission system. It, therefore, follows that conveyance of electricity from the territory of one State to the territory of another State amounts to inter-State transmission within the meaning of the term used in the Act. In the present case, based on our above analysis there is no doubt that supply of electricity from the power stations located in the State of UP to State of Madhya Pradesh involves inter-State transmission.*
>
> *xxxxxx*
>
> *19. While delineating the functions of the Commission, the Act distinguishes between the function of regulating inter-State transmission of electricity and determination of tariff of various utilities. It is obvious that there are issues other than determination of tariff which are germane to inter-State transmission of electricity. The Act assigns to the Commission the overall responsibility of overseeing and facilitating the smooth transmission of electricity from one State to another State (inter-State transmission).*
>
> *20. In the light of the foregoing, we have no hesitation to hold that the dispute in the*

instant case is in regard to a matter connected with regulation of inter-State transmission of electricity as prescribed in clause 79(1) (c) and therefore adjudication of any dispute related thereto is within the jurisdiction of this Commission under clause 79(1) (f) of the Act."

23. Thus, the jurisdiction of the Central Commission to adjudicate the disputes between the parties under Section 79(1)(c) read with Section 79(1)(f) of the 2003 Act was decided by the Central Commission in order dated 27.2.2008 and affirmed by the Tribunal by judgment dated 9.1.2009. Moreover, the jurisdiction of the Central Commission to adjudicate disputes under Section 79(1)(f) relates to any of the matters falling under clauses (a) to (d) of Section 79(1) of the 2003 Act. In this background, the respondent, UPJVNL who was a party to the proceedings in Petition No. 107/2007 before the Commission and on appeal before the Tribunal, and whose contentions had been rejected, should have, in our view, refrained from raising preliminary objection as to the jurisdiction of the Central Commission in respect of 'the generating stations' on extraneous grounds. Nevertheless, we proceed to deal with the question of jurisdiction of the Central Commission raised by the respondent UPJVNL for determination of tariff for supply of power from 'the generating stations' to the Petitioner, as stated in the subsequent paragraphs.

24. Respondent, UPJVNL in this petition has submitted that 'the generating stations' do not envisage a 'composite scheme' for generation and sale of electricity in more than one State. The respondent has further submitted that it has been filing ARR and tariff Petition before UPERC since its formation under the U.P. Electricity Reforms Act, 1999 and UPERC is the Appropriate Commission for determination of tariff in respect of UPJVNL including 'the generating stations'. It has also stated that the Petitioner, instead of approaching the Central Commission, ought to have approached the UPERC or its higher forum, stating that UPERC does not have

jurisdiction to determine tariff, as Multi Year Tariff Petitions for the period from 2000-01 till 2018-19 had been filed before UPERC in respect of 'the generating stations'. It has further added that the Central Commission has no power under the 2003 Act or otherwise, to pass restraint order restraining UPERC to pass orders determining the tariff for the period from 2014-15 to 2018-19 in respect of hydel projects of UPJVNL including 'the generating stations'. The Petitioner has however contended that the supply of power from 'the generating stations' was not a sale of power but the supply of share to MP which arose due to submergence of huge agricultural land, forest, etc. in the State of MP and hence, both the plants (the generating stations) do qualify for the composite scheme as per section 79(1) (b) of the 2003 Act. Accordingly, the Petitioner has submitted that the Central Commission has the jurisdiction to regulate the tariff or component of the tariff in respect of supply of MP's share of power from 'the generating stations' by UPJVNL.

Analysis and Decision

25. The Central Commission has been vested with the function under clause (b) of subsection (1) of section 79 of the Electricity Act to regulate the tariff of generating companies other than those owned or controlled by the Central Government which either enter into or otherwise have a composite scheme for generation and sale of power in more than one State. Thus, for invocation of section 79(1)(b) of the 2003 Act, the conditions that are required to be fulfilled are: (a) the generating company is not owned or controlled by the Central Government; (b) the generating company has a composite scheme for generation and sale of electricity in more than one State. There is no dispute that "the generating stations' are not owned or controlled by the Central Government. As regards the composite scheme, it is an admitted fact that the State of UP had agreed for allocation of power since the two projects in UP

involved submersion of land, trees, forests, houses etc in the State of MP. Accordingly, the transfer scheme notified by the State Govt. of UP enjoins upon the respondent, UPJVNL to honour the commitment of the said State Govt. for supply of power to the State of MP. The Respondents have been supplying electricity from 'the generating stations' to the State of MP, though intermittently. Thus, there exists an obligation on the part of the respondents in the State of UP to supply power from 'the generating stations' to the State of MP. In view of the above discussions, we conclude that 'the generating stations' fulfill the conditions of having a composite scheme for generation and sale of electricity in more than one State and hence fall within the regulatory jurisdiction of the Central Commission in terms of clause (b) of sub-section (1) of Section 79 of the 2003 Act. Also, any dispute relating to the regulation of tariff under section 79(1)(b) shall be adjudicated by the Central Commission under section 79(1)(f) of the 2003 Act. In this regard, it is pertinent to mention that the expression 'composite scheme' was examined by the Hon'ble Supreme Court in Civil Appeal Nos. 2399-5400 of 2016 (Energy Watchdog v CERC & ors) {(2017) SCC online SC 378}, while considering the issue of jurisdiction of the Central Commission under Section 79(1)(b) of the 2003 Act. In the said case, the Hon'ble Supreme Court has observed that the expression 'composite scheme' is nothing more than a scheme by a generating company for generation and sale of electricity in more than one state. Accordingly, the Hon'ble Court, vide judgment dated 11.4.2017 held that the State Commission's jurisdiction is only where generation and supply takes place within the State and the moment the generation and sale takes place in more than one State, the Central Commission becomes the Appropriate Commission. The relevant portion of the judgment is extracted as under:

"22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State."

26. This decision of the Hon'ble Supreme Court is squarely applicable to the present case. Admittedly, in the present case, there is supply of power from 'the generating stations' located in the State of UP to the State of MP in terms of the transfer scheme notified by the State Govt. of UP. The supply of power as aforesaid involves inter-state transmission. Thus, it can be concluded that 'the generating stations' has a composite scheme for generation and sale of electricity in more than one State. Thus, we have no hesitation to hold that the Central Commission has the regulatory jurisdiction over 'the generating stations' in terms of Section 79(1)(b) of the 2003 Act. Accordingly, the Petition filed by the Petitioner is maintainable as the Central Commission has the power to adjudicate the disputes under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act. The UPERC, in our view, shall only have the jurisdiction in respect of supplies made from the generating stations, within the State. The contention of the respondent, UPJVNL that UPERC shall have the jurisdiction for determination of tariff of 'the generating stations' is rejected accordingly.

27. The Petitioner has pointed out that the Respondent, UPJVNL has contended that 'the generating stations' do not qualify as 'composite scheme' by placing reliance on the Commission's order dated 29.3.2006 in Petition No. 103/2005 (UJVNL V UPCL & ors) and the judgment of the Tribunal dated 14.9.2010 in Appeal No.183/2009, wherein the question of jurisdiction in respect of the five hydrogenating stations owned by Uttaranchal Jal Vidyut Nigam Ltd, but supplying power to the State of HP, was decided in favour of HPERC. It is noticed that the applicability of the ratio in Commission's order dated 29.3.2006 to the case in Petition No.107/2007 were different and hence the same was not considered in the present case. The observations of the Commission in order dated 27.2.2008 is as under:

> *"28. We make it clear that while deciding the issue of jurisdiction, the applicability of the ratio of the Commission's order dated 29.3.2006 in Petition No.103/2005 to the case on hand has not been examined since that case, with prayer for determination of tariff of the generating stations situated in the State of Uttaranchal, and contested between intra-State parties of the same State, was decided on its own facts. The facts and issues in the present case are prima facie very different"*

28. Thus, reliance made by the respondent on the above order/judgment is misconceived. Even otherwise, in terms of the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog case, (as quoted in para 25 above), which is applicable in the present case, the issue of composite scheme is settled, and accordingly, all transactions involving the territories of two or more states would fall within the exclusive jurisdiction of the Central Commission. The contentions of the respondent are accordingly rejected.

29. Further, the Respondent, UPJVNL has contended that the Central Commission in order dated 27.2.2008 in Petition No.107/2007 had accepted the realignment of responsibilities as per Clause 2.01 of the MOU signed between the respondent UPJVNL and UPPCL. Also, the respondent has referred to the directions of the

Central Commission in order dated 12.11.2008 in Petition No. 107/2007 (*as quoted below*) and has submitted that the dispute raised by the Petitioner in the present Petition has been set to rest and attained finality, since the directions of the Commission would imply that from 1999 onwards tariff determined by UPERC will be taken into account, in respect of 'the generating stations'.

> *"for giving credit to the second respondent, the cost of generation based on audited accounts of the generating stations or those taken into account by UPERC from the year 1999 onwards shall be considered",*

30. We find no merit in the submissions of the respondent. Clause 2.01 of the MOU dated 18.2.2000 signed between the respondents UPJVNL and UPPCL provide as under:

> *"2.01 ALLOCATION OF POWER*
>
> *Subject to and in accordance with the terms of this agreement, UPJVNL agrees to sell and UPPCL agrees to purchase the entire Net Electrical Output of the generating units covered by this agreement. The obligation of supply of power to some other states, as per the mutual agreement entered in to or to be entered in future would be discharged by UPPCL."*

31. It is noticed that the respondent, UPJVNL in the proceedings in Petition No. 107/2007 had relied upon the said clause 2.01 of the MOU and contended that the responsibility of supply of power to other States is that of the respondent, UPPCL, despite the fact that under the scheme notified by the State of UP, UPJVNL was to supply power to UPPCL, after honoring the commitments of supply of power to State of MP from 'the generating stations'. The Commission by order dated 27.2.2008 directed as under:

> *"21. Under the transfer scheme notified by the State Govt, of UP, as per relevant extract quoted in para 11, the third respondent is to supply electricity to the second respondent after honouring commitments of supply of power to the State of Madhya Pradesh in Rihand HPS and Matatila HPS. However, it transpires that under a Memorandum of Understanding signed by It with the second respondent, the entire energy generated by the power stations is being supplied to the second respondent….*
>
> *22. Based on the above, the third respondent has contended that responsibility of supply of power to other States is that of the second respondent. Although this is not in strict*

conformance with the transfer scheme, which has a statutory flavour, we note that the MoU referred to above is between two organizations belonging to and controlled by the State Government which has notified the transfer scheme. We have, therefore, accepted the realignment of responsibilities as per the MoU.

23. We would not like to perpetuate the present status. There is no reason why the second respondent should not start supplying power to the State of Madhya Pradesh forthwith as agreed to by the State Government of Uttar Pradesh and UPSEB, ***the*** *predecessor of the second and third respondents. This would at least stop further compounding of the problem. As of now, the Northern and Western Regions are operating in synchronized mode and the supply of electricity from the power stations does not depend any longer on the availability of and actual power flows on the transmission lines originally built for that purpose. The applicable quantum of power has only to be considered in the net drawal schedules of the second respondent* ***and*** *the petitioner from the respective regional grids. The power would then flow notionally through displacement. All that is necessary is that the second respondent advises NRLDC on a regular basis about the schedule and actual generation of the power stations whereupon NRLDC has to reduce the net drawal schedule of the second respondent by 15% of Rihand generation and one third of Matatila generation. WRLDC would correspondingly increase the net drawal schedule of the petitioner. In this arrangement, which is now possible, there would be no default in supply and therefore, no issues regarding compensation for non-supply or short-supply by Uttar Pradesh to Madhya Pradesh in future. We direct accordingly"*

32. Thus, the contentions of the respondent, UPJVNL that the responsibility of supply of power to other States in terms of clause 2.01 of the MOU was that of the respondent, UPPCL, was noted by the Commission and since the MOU was between two organizations belonging to and controlled by the State Government of UP (which has notified the transfer scheme), the realignment of responsibilities as per the MoU, was accepted by the Commission in the order. The Commission in the said order had also suggested an arrangement for supply and schedule of power and to avoid default in supply of power and payment of compensation for non-supply/short supply by the respondents (State of UP) to the Petitioner (State of MP) in future. In our considered view, the said observations/ directions of the Central Commission, would in no way support the contention of the respondent, UPJVNL that UPERC is the Appropriate Commission for 'the generating stations'. The said directions in the order only reiterates the obligation/responsibilities of the respondents to supply power to the Petitioner, in terms of the transfer scheme, and

do not in any manner, override the findings that the Central Commission only has the jurisdiction to adjudicate the disputes in respect of 'the generating stations' under Section 79(1)(f) of the 2003 Act. The submission of the respondent deserves no merit for consideration and is therefore rejected.

33. Similarly, the directions in order dated 12.11.2008 in Petition No. 107/2007, (quoted in para 29 above), do not, in our view, justify the contentions of UPJVNL that UPERC is the appropriate Commission for determination of tariff of 'the generating stations'. The relevant context upon which such directions were issued could be traced from the deliberations in order dated 21.11.2008 and the same is extracted under:

> "*13……...The issue of release of payment by UPSEB in favour of MPEB was subsequently discussed at various meetings between the two sides. UPSEB has, however, always insisted that it was not liable to pay interest. As regards the principal, UPSEB or its successor entities, without denying their liability to pay, had been seeking reconciliation of the amount demanded and deferring payment of even the undisputed amount on the ground of unavailability of funds. At the last meeting the minutes of which are held on record, held on 7/8.6.2007, it was pointed out on behalf of the applicant that an amount of Rs.335 crore as on 30.9.2005 was due against the respondents who insisted that because of discrepancies in RAPP rates between April, 2000 to March, 2003 the amount due could not be reconciled. It was informed at that meeting that for exact RAPP rates applicable, the second respondent had already taken up the matter with Nuclear Power Corporation. As regards the cost of generation of power at the generating stations, for which credit was to be given for adjustment against the claim for compensation, it was agreed that the rates provided by the third respondent, duly audited, would be final and binding on all parties. At this meeting, the officers of the third respondent assured to provide the cost of generation from October 1999 and onwards, within a month's time. However, as it transpires, these details have not been furnished."*

34. It is therefore evident that the parties herein had agreed that the cost of generation of power from 'the generating stations' were to be adjusted against the compensation amount, as per the rate furnished by the respondent UPJVNL, which was binding. Since the respondent, despite assurance, had failed to provide the cost of generation from October, 1999 onwards, the Central Commission, as an alternative, directed that the cost of generation, based on audited accounts of the

generating stations or those taken into account by UPERC from the year 1999 onwards, should be considered for adjustment, while working out the compensation payable by the respondents to the Petitioner. The directions given by the Commission for working out the credit adjustment towards compensation amount cannot in any manner, be construed as findings on the issue of jurisdiction. This direction, according to us, neither vests UPERC with the jurisdiction in respect of 'the generating stations' nor would render *otiose* the orders of the Central Commission/ judgment of the Tribunal holding that the Central Commission has the jurisdiction to decide the disputes between the parties in respect of 'the generating stations'. The submissions of the respondent are therefore arbitrary and untenable. The jurisdiction to decide the dispute regarding filing of tariff petitions in respect of 'the generating stations' lie with the Central Commission in terms of Section 79(1)(f) read with Section 79(1)(b) of the 2003 Act.

Constructive Res judicata

35. Another contention of the Respondent, UPJVNL is that the dispute raised by the Petitioner in the Petition is barred by the principles of 'constructive res-judicata' and the dispute regarding the petitioner's share of power from 'the generating stations' has attained finality and stands concluded in terms of order dated 12.11.2008 in Petition No. 107/2007 and judgment of Tribunal dated 21.7.2011 in Appeal No. 151 of 2008. The respondent has also submitted that the Petitioner had full knowledge of the determination of first tariff of 'the generating stations' for 2000-01 by UPERC vide order dated 27.7.2000 but was never objected by the petitioner. It has stated that the Petitioner took its benefit in settling the amount of compensation, as such at such a belated stage, the Petitioner cannot be allowed to raise the same issue once again to unsettle the settled position, in view of the

doctrine of estoppel by acquiescence. In response, the Petitioner has clarified that the principle of constructive res-judicata cannot be invoked and applied in this case, since (a) the matter regarding determination of tariff of 'the generating stations' by the Central Commission is still open, as decided in order dated 27.2.2008 (b) Petition No 107/2007 filed by the Petitioner was restricted to the resumption of supply of MP's share of power from 'the generating stations' and for payment of compensation on account of non-supply of MP's share of power from 'the generating stations', by UPPCL. It has further stated that the dispute in the said Petition was for the period up to 31.3.2008 which was resolved based on old agreements between erstwhile UPSEB and MPEB. The Petitioner has contended that above issues came to an end after commencement of scheduling of MP's share of power from these projects with effect from 1.4.2008 and dispute, if any, after resumption of power should be considered afresh.

Analysis and decision

36. Section 11 of the Civil Procedure Code deals with the concept of Res judicata as under:

"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit' between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

Explanation I: The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto.

Explanation II: For the purposes of this section, the competence of a court shall be determined irrespective of any provisions as to a right of appeal from the decision of such court.

Explanation Ill: The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation IV: Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation V: Any relief claimed in the plaint, which is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused.

Explanation VI: Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

Explanation VII: The provisions of this section shall apply to a proceeding for the execution of a decree and reference in this section to any suit, issue or former suit shall be construed as references, respectively, to a proceeding for the execution of the decree, question arising in such proceeding and a former proceeding for the execution of that decree.

Explanation VIII: An issue heard and finally decided by a Court of limited jurisdiction, competent to decide such issue, shall operate as res judicata in a subsequent Suit, notwithstanding that such court of limited jurisdiction was not competent to try such subsequent suit or the suit in which such issue has been subsequently raised.

37. In order to determine whether the present Petition is barred by the principles of res-judicata / constructive res-judicata, it needs to be examined if the dispute raised by the Petitioner has attained finality and stood concluded between the parties in the earlier proceedings. The respondent, UPJVNL has submitted that the dispute regarding the Petitioners' share of power from the generating station has attained finality in terms of order dated 12.11.2008 in Petition No. 107/2007 and the judgment of the Tribunal dated 21.7.2011 in Appeal No. 151/2008 and hence barred by the principle of *res judicata*. In response, the Petitioner has clarified that the said principle cannot be invoked since the issue of determination of tariff of 'the generating stations' is yet to be decided by the Central Commission in terms of order dated 27.2.2008 and that the prayer in Petition No. 107/2007 was restricted to the resumption of supply of MP's share of power from the generating stations and payment of compensation for non-supply of power by UPPCL. Accordingly, it has submitted that the said principle cannot be invoked.

38. Petition No. 107/2007 was filed by the Petitioner before this Commission for direction to UPPCL for payment of compensation amount to M.P Power Trading

Company Ltd (MPTRADECO) due to retention of MP's share of power/ non-supply of it from 'the generating stations' to MPSEB and for resumption of MP's share of power from 'the generating stations'. This Commission by interim order dated 27.2.2008 decided the question of jurisdiction, but the question regarding compensation to the Petitioner for non-supply of power by respondents was not considered. The order dated 27.2.2008 was affirmed by the Tribunal vide judgment dated 9.1.2009 in Appeal No.35/2008. Thereafter, the said Petition was disposed of on merits, by order dated 12.11.2008, reiterating the jurisdiction of this Commission to adjudicate the disputes between the parties in terms of Section 79(1) (c) read with Section 79(1)(f) of the 2003 Act. It was also directed that (a) the respondents shall supply power from 'the generating stations' to the Petitioner in accordance with agreed shares (b) the respondents to pay compensation @6 paisa /kWh for the period from 1.9.1967 to 30.9.1974 and thereafter, the compensation to be payable at RAPP rate plus 10% thereof, less the cost of generation at the generating stations along with interest from 1.4.1982. However, the compensation amount claimed by the Petitioner was not decreed for want of details. This order was affirmed by the Tribunal vide its judgment dated 21.7.2011 in Appeal No. 151/2008 filed by the Respondent, UPPCL. Also, the Respondent filed Civil Appeals before the Hon'ble Supreme Court against the judgment dated 21.7.2011 and the Hon'ble Court by interim order had directed the respondents to comply with the directions given by the Central Commission. These appeals are pending. Thereafter, Petition No. 248/2010 was filed by the Petitioner for directions to the respondent, UPPCL for payment of compensation amount to the Petitioner due to retention of MPs' share of power/non supply of it from 'the generating stations' to MPSEB and resumption of MPs share of power from 'the generating stations', and the Commission by order dated 20.2.2014

decided the issue of the rate of compensation payable by the respondents. Thus, the parties herein at no point of time had raised the issue of filing of tariff petition in respect of 'the generating stations' in any of the proceedings before this Commission and/or the Tribunal. It is abundantly clear that the proceedings in the earlier Petitions/Appeals between the parties herein related only to the disputes regarding payment of compensation for non-supply of power and resumption of power supply from 'the generating stations' by the respondents to the Petitioner. This was disposed of on merits along with the issue of jurisdiction. Moreover, the prayer for payment of compensation and resumption of supply of power by the respondents from 'the generating stations' in these Petitions, relate to the period upto 31.3.2008. This aspect could be corroborated from the directions given by the Commission in order dated 27.2.2008, as under:

> *"24. The petitioner and second respondent are also directed to immediately interact with WRLDC and NRLDC to formalize the scheduling procedure, and resume the power supply latest by 1.4.2008. In case any difficulty is foreseen or experienced in the above matter by any party, it may be brought to the notice of the Commission latest by 14.3.2008*."

39. As demonstrated above, the parties herein had never raised issues relating to filing and/or determination of tariff of 'the generating stations' in any of the earlier proceedings. The prayers of the Petitioner in para 1 above, is apparently, based on the above directions for commencement of scheduling of MPs share of power from 'the generating stations' with effect from 1.4.2008. In view of the fact that the disputes relating to filing of tariff application by the respondents and the determination thereof by this Commission were never raised and/ or decided in the aforesaid proceedings, it cannot be said that the dispute has attained finality. The Petition is therefore not covered by the principle of res judicata. Accordingly, we hold that the Petition filed by the Petitioner is not barred by the principles of res judicata.

The submission of the respondent, UPJVNL is accordingly rejected.

40. In addition, the respondent UPJVNL has argued that the Petitioner had full knowledge of the determination of first tariff of 'the generating stations' by UPERC for the year 2000-01 by order dated 27.7.2000 but had never objected to the same. It has also submitted that the Petitioner having taken the benefit of the settling the amount of compensation, cannot at this belated stage be allowed to raise the same issue once again to settle the unsettled position, in view of the doctrine of estoppel by acquiescence. This submission of the respondent is also misconceived and arbitrary. Admittedly, UPERC was the appropriate Commission for determination of ARR and tariff in respect of the hydel generating stations of the respondents, under the UP Electricity Reforms Act, 1999. However, with the advent of the Electricity Act, 2003 and the decisions of the Commission in its orders dated 27.2.2008 & 12.11.2008 and the judgments of the Tribunal dated 9.1.2009 and 21.7.2011, affirming the jurisdiction of this Commission in respect of 'the generating stations', there is no legality on the part of the respondent, UPJVNL to approach the UPERC for determination of ARR & tariff for 'the generating stations'. The respondents cannot, in our view, confer jurisdiction upon UPERC *de hors* the orders/judgments of the statutory authorities, and obtain orders from UPERC which would be *ab initio* void. In our view, irrespective of the fact as whether the Petitioner had objected or not, the respondent, UPJVNL was duty bound, in terms of this Commission's orders to approach the Central Commission, instead of UPERC, for determination of tariff of 'the generating stations', with effect from 1.4.2008. Needless to say, the same would abide by the decision of the Hon'ble Supreme Court. The respondents having not acted upon in terms of the said orders, cannot be permitted to invoke the doctrine of estoppel against the Petitioner. On the contrary, the stand of the respondent,

UPJVNL, would squarely be covered under the doctrine of estoppel, since the issue of jurisdiction has been raised once again in the present proceedings, despite the Commission's orders and judgments of the Tribunal affirming the jurisdiction of the Central Commission in respect of 'the generating stations', in the earlier proceedings as narrated above. The attempt of the respondent, UPJVNL to unsettle the settled position as regards jurisdiction, could also be gauged from the stand taken by the said respondent in this proceeding, in deference to the Commission's order dated 21.8.2012 in Petition No. 45/2010. This Petition filed by the respondent UPPCL, pertains to sharing of 50% power from Rajghat Hydel Power Station (Rajghat HPS) to UPPCL, wherein it had sought directions to Madhya Pradesh Power Generating Company Ltd (MPPGCL) for filing of ARR and Petition for determination of tariff of Rajghat HPS by this Commission. MPPGCL had contended that the Central Commission does not have the jurisdiction since there was no composite scheme for generation and sale of power to more than one state and that the dispute cannot be adjudicated by the Central Commission in terms of Section 79(1)(f) of the 2003 Act. Rejecting the contentions of MPPGCL, the Central Commission referred to the Commission's orders dated 27.2.2008 / 12.11.2008 in Petition No. 107/2007 and the judgment of the Tribunal dated 9.1.2009 and 21.7.2011 and by order dated 21.8.2012 held that the Central Commission has the jurisdiction to adjudicate the disputes between the parties. The relevant portion of the order dated 21.8.2012 is extracted as under:

"*19. From the orders of this Commission and the judgments of the Appellate Tribunal it emerges that supply of share electricity by one State to the other State in accordance with the agreement between them involves the inter-State transmission and adjudication of any dispute in such cases is within the purview of this Commission. As already noted the primary dispute in the present case is regarding supply of power to the State of Uttar Pradesh from a generating station located in the State of Madhya Pradesh. The facts of the case at hand are exactly similar to the case earlier decided by this Commission and the Appellate Tribunal. The main parties are also the same but their roles have been*

reversed. Therefore, the present case falls with all fours of the case already decided. In view of the judgments of the Appellate Tribunal in the earlier appeals, it is accordingly concluded that this Commission has jurisdiction to adjudicate the primary dispute of supply of power raised in the present petition and also adjudicate upon the claim for compensation. We, therefore, admit the petition.

20. As the petition has been admitted, it is not necessary at this stage to examine the question of jurisdiction of this Commission to regulate the tariff of the generating station. The question is left open for the present and will be gone into at the time of adjudicating the main dispute regarding supply of electricity by the respondents to the petitioner"

41. Thereafter, this Commission disposed of Petition No. 45/2010 on merits, as well as on jurisdiction, by order dated 2.1.2014. As regards jurisdiction, it was held in the said order as under:

"Jurisdiction of the Commission to regulate tariff of the generating station

15. The petitioner in prayer (ii) has sought a direction to the respondents to file tariff petition before the Commission for approval of tariff for Rajghat HPP. According to the respondents, the State Commission of Madhya Pradesh is the Appropriate Commission for approval of tariff since entire power is being supplied to the fourth respondent for sale within the State of Madhya Pradesh. In the interim order, the Commission has held that the petitioner is entitled to its share of power. Moreover, it is an undisputed fact that the respondent supplied power to the petitioner from the generating station for a brief period from July to September, 2001. Therefore, the plea of the respondents that supply is exclusively to the fourth respondent is not correct. No other argument has been raised to dispute the jurisdiction of the Commission to regulate the tariff of the generating station. Since the supply of power generated by Rajghat HPP is to more than one State which was envisaged since inception of Rajghat HPP, we conclude that Rajghat HPP has entered into or otherwise has a composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Rajghat HPP is within the jurisdiction of the Commission by virtue of clause (b) of sub-section (1) of Section 79 of the Electricity Act, 2003. We, therefore, direct the respondents, and in particular the third respondent, to file an appropriate petition for approval of tariff of Rajghat HPP in accordance with the Commission's regulations governing the subject, latest by 31.12.2013 w.e.f. the date of supply of power to the petitioner as per our order dated 21.8.2012……"

42. Thus, the respondents having accepted the jurisdiction of the Central Commission in the case of Rajghat HPS, has taken a different stand in respect of 'the generating stations' in this Petition, despite being aware that the facts and circumstances in both these cases were similar. In this background, the respondent, UPJVNL cannot be permitted to reopen the matter on extraneous grounds and is therefore estopped from contesting the question of jurisdiction. In our considered view, the issue of compensation amount payable upto 31.3.2008 in respect of 'the

generating stations‘ having been decided in the earlier proceedings, the Petitioner cannot be estopped from seeking directions on the respondents to file tariff petition, in respect of the generating stations’ from 1.4.2008.

43. We have in this order decided that ‘the generating stations’ has a composite scheme for generation and supply of power in more than one State and accordingly, this Commission has the jurisdiction to determine the tariff of ‘the generating stations’ for supply of power made by the respondent, UPJVNL to the Petitioner. The respondent has submitted that the ARR & tariff petitions filed before UPERC in respect of ‘the generating stations’ for the period from 2000-01 till 2014-19, had been decided, excepting for the period 2014-19, which is still pending. In view of this and as a corollary to the findings in this order, we direct the respondent, UPJVNL to file petition for determination of tariff of ‘the generating stations’ for the period from 2014-15 to 2018-19 in terms of the provisions of the CERC (Terms and Conditions of Tariff), Regulations, 2014, within three months from the date of this order.

Whether the relief prayed for can be granted

44. As stated, the Petitioner in this Petition has prayed, amongst others, for a direction to the respondent, UPJVNL to file Petition and ARR for determination of O & M expenses of the generating station for the period from 1.4.2008 onwards under Section 64 (1) to (4) and 79 (1) (b) of the 2003 Act as per the Tariff Regulations of this Commission notified from time to time. The Petitioner has referred to Commissions orders in respect of BBMB and Sardar Sarovar projects and has submitted that shared project falls under the composite scheme and O & M expenses would be the appropriate cost payable to the entity which is operating the plant on behalf of the participating states. This, according to the Petitioner would

entail generality of the charges of such type of Inter-State shared projects. The Petitioner has further submitted that the Central Commission has the jurisdiction to adjudicate payment of O & M charges to Respondent, UPJVNL for supply of MP's share from 'the generating stations'. The Petitioner has stated that UPERC has jurisdiction to determine tariff of UP's share of power in the generating stations for supply to each of its discoms and it has no jurisdiction to decide the same with regards to MP's share. In response, the Respondent, UPJVNL vide affidavit dated 9.12.2016 has stated that the Petitioner has not made any kind of capital investments in the generating stations and the Govt. of UP had paid compensation for the land submerged. The respondent has also submitted that the Petitioner has approached the Central Commission which has no power under the 2003 Act or otherwise to pass restraint order restraining the UPERC and as such for the years for which tariff has been determined, including O & M charges cannot be re-determined or annulled by the Central Commission.

45. During the hearing of the petition on 14.2.2017, the Commission had directed as under:

"*After hearing the learned counsels for the parties, the Commission directed the petitioner to file the Sachdeva Committee Report or any other available record which proves the cost of generation charged to erstwhile MPSEB was exclusive of Return on Equity, Interest on Loan, Interest on working capital and Depreciation. The Commission further directed the respondent to file the Sachdeva Committee Report or any other available record which proves the cost of generation charged to erstwhile MPSEB was inclusive of Return on Equity, Interest on Loan, Interest on working capital and Depreciation"*

46. The Petitioner vide affidavit dated 15.5.2017 has submitted the following:

(a) In accordance with the decision taken in the Chairman level meeting held on 7th & 8th June, 1977, the actual cost of generation in paise/unit would be actual expenditure incurred during the financial year to generate X-units in Rihand or Matatila Hydel Power Station. Actual costs refer to the costs which an entity incurs for acquiring inputs or producing a good and service such as the cost of raw materials, wages, rent, interest, depreciation and obsolescence charges on machines etc. The total expenses recorded in the books of accounts are the actual costs. It is obvious that return on equity is not a part of actual expenditure and hence actual cost of

generation. Moreover, 15% allocation of power from Rihand HPS and 113rd allocation of power from Matatila HPS to the State of Madhya Pradesh arose on account of huge submergence of agriculture land, forest, rehabilitation etc. It is beyond doubt that submergence of agriculture land, forest, rehabilitation etc are the part of the capital expenditure and therefore, respondent cannot charge RoE from petitioner corresponding to allocation of power to MP. The parties concerned in the projects would charge the RoE from their respective beneficiaries within the state.

(b) In the Sachdeva Committee meeting held at New Delhi on 2ml& 3 rd September, 1964, it was decided that power to be supplied to the State of MP, MPEB would bear annual charges amounting to ? 1.5 lakhs to cover interest, depreciation, operation and maintenance of the transmission line. It is submitted that the transmission lines associated with the projects were the part and parcel of the negotiation between both the States towards allocation of 15% share in Rihand HPS and l/3ri share in Matatila PIPS. In the above decision, there was no component of return on equity to fix the annual transmission charges.

(c) The erstwhile UPSEB had provided the cost of generation in respect of Rihand and Matatila Hydel Power Station. The cost of generation, as provided by erstwhile UPSEB, till 1998-1999 were considered in the computation of compensation on account of non-supply of MP's share of power by UP from Rihand and Matatila HPS. The statements indicating the UPSEB's computation of cost of generation in respect of Rihand and Matatila HPS for the year 1991-92, 1992-93 and 1993-94 are filed herewith as Annexure III. It is seen from the computation that components considered in the cost of generation were establishment, other management expenses, R&M, depreciation and interest charges. There were no components in respect of return on equity and interest on working capital.

(d) The decision of the Commission dated 21.8.2012 in Petition No. 45 of 2010 in respect of tariff of Rajghat HPS would also be applicable to Rihand and Matatila HPS or vice-versa so that generality of the charges of such type of Inter-State shared projects would be maintained.

47. The respondent, UPJVNL vide affidavit dated 23.6.2017 has submitted the following:

(i) It is pertinent to mention that UPSEB was an entity running on perpetual loan from the State Government and interest charges were allowed for fixation of tariff. As such, in the bills raised by UPSEB as contained in Annexure III to the Additional Affidavit, the components of' Return on Equity" and 'Interest on Working Capital' are not mentioned. The concept of 'Return on Equity' and 'Interest on Working Capital' came into being after unbundling of UPSEB and application of Companies Act on the companies formed thereafter. It is pertinent to mention that in Schedule 'B' Part-II, wherein the aggregate value of assets and liabilities to be transferred and vested in UPJVNL as on 14.01.2000 shows that State Government made (GoUP) Loans nil and Equity worth Rs. 372.18 crores. In view of the aforesaid UPJVNL is entitled for the component of 'Return on Equity' and 'Interest on Working Capital' in the tariff determined for Rihand HPS and Matatila HPS.

(ii) In the Rihand HPS and Matatila HPS, the Petitioner has not been able to show the capital cost incurred by them at any point of time. The Petitioner has not agreed to show the audit balance-sheet, to prove the payment of capital cost, even on the specific request of the Respondent. The onus is on the Petitioner to prove that expenses have

been incurred by him towards capital cost. In fact, no expenses have been incurred by the petitioner in Rihand HPS and Matatila HPS towards capital cost, as such there cannot be any audited balance-sheet to show that the petitioner incurred expenses towards capital cost. The petitioner is claiming expenses towards capital cost on the basis of submergence of agriculture land, forest, rehabilitation etc. The Government of Uttar Pradesh has paid compensation for submergence of land, rehabilitation etc. The share of the Petitioner in Rihand HPS and Matatila HPS is for the uninterrupted flow of water to be used for generation of electricity in Rihand HPS and Matatila HPS.

(iii) At present, multi-year tariff petition for the period 2014-19 is pending before UPERC.

Analysis and decision

48. As stated, the Commission vide ROP of the hearing dated 14.2.2017 had directed the parties to file the Sachdeva Committee Report or any other relevant record in order to examine whether the cost of generation charged for supply of power to erstwhile MPSEB was either inclusive or exclusive of components of tariff namely, Return of Equity, Interest on Loan, Interest on Working Capital and Depreciation. It is noticed that both parties have narrated facts regarding the Sachdeva Committee, and since these have been deliberated in our earlier orders, the same has not been considered in this order, for the sake of brevity. While the Petitioner has submitted that the components considered in the cost of generation were inclusive of establishment, other management expenses, R&M, depreciation and interest charges, except return on equity and interest on working capital, the respondent, UPJVNL has submitted that there was no component of RoE and Interest on working capital in the Electricity Supply Act, 1948. The concept of RoE and Interest on working capital came into being after unbundling of UPSEB and application of the Companies Act on companies formed thereafter. Accordingly, it has stated that UPJVNL is entitled for the component of RoE and Interest on working capital in the tariff determined for the generating stations.

49. We have in para 43 of this order directed the respondent, UPJVNL to file tariff Petition in respect of 'the generating stations' for the period 2014-19 in terms of the

provisions of the 2014 Tariff Regulations. Accordingly, the above submissions of the parties as regards the cost of generation charged for supply of power to the Petitioner shall be considered at the time of determination of tariff of 'the generating stations'. We direct accordingly.

50. Petition No. 128/MP/2016 is disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***	***Sd/-***
(Dr. M.K.Iyer)	**(A. S. Bakshi)**	**(A. K. Singhal)**	**(Gireesh B. Pradhan)**
Member	**Member**	**Member**	**Chairperson**