

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.12/MP/2019 with IA No/64/2019

**Coram:
Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member**

Date of Order: 26th August, 2020

In the matter of

Petition filed by Madhya Pradesh Power Management Company Limited under Sections 79(1)(c), (f), (k) and other applicable provisions of the Electricity Act, 2003 in connection with the disputes and differences arising due to breach of Power Purchase Agreement dated 8.8.2005 entered between it and Nuclear Power Corporation of India Limited and allowing the claim for damages.

And

In the matter of

Madhya Pradesh Power Management Company Limited
Shakti Bhawan, Rampur, Jabalpur,
Madhya Pradesh- 482008.

... **Petitioner**

Vs

1. Nuclear Power Corporation of India Limited,
16th Floor, Centre-I, World Trade Centre,
Cuff Parade, Mumbai -400005
2. Power Grid Corporation of India Limited,
B-9, Qutab Institutional Area, Katwaria Sarai,
New Delhi-110016
3. Gujarat Urja Vikas Nigam Limited
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara 390007, Gujarat
4. Chhattisgarh State Power Distribution Company Limited
CS Power Companies Campus, Daganiya,
Raipur – 492013
5. Maharashtra State Electricity Distribution Company Limited,
Prakashgad, Plot No. G-9, Anant Kanekar Marg Bandra (E),
Mumbai – 400051



6. Electricity Department Govt. of Goa,
Vidyut Bhavan, 3rd Floor,
Panaji-Goa

7. Electricity Department, Administration of Daman and Diu
Vidyut Bhavan, Near 66/11 kV Kachigam Sub-Station,
Somnath - Kachigam Road, Kachigam,
Daman-396210.

8. DNH Power Distribution Corporation Limited,
Vidhyut Bhavan, 66 KV Road, Near Secretariat, Amli,
Silvassa - 396230, U.T. of Dadra & Nagar Haveli.

9. Western Regional Power Committee,
F-3, MIDC Area, Marol, Andheri East,
Mumbai-400093

10. Western Regional Load Despatch Centre
F-3, MIDC Area, Marol, Andheri East,
Mumbai-400093

... Respondents

Parties present:

Shri Ravi Sharma, Advocate, MPPMCL
Shri Rajeev Gupta, MPPMCL
Shri Narendra Hooda, Senior Advocate, NPCIL
Ms. Shreya Sethi, Advocate, NPCIL
Shri Utpal Kumar, NPCIL

ORDER

Madhya Pradesh Power Management Company Limited (MPPMCL), the
Petitioner herein has filed this petition seeking the following reliefs:

“a. Declare that events set out from paragraph 3 to 21 above as breach of the PPA on account of the failure of Respondent No. 1 to non-supply of energy from KAPS-1 & 2;

b. Restore MPPMCL to same economic position by permitting to Petitioner to recover compensation for the POC transmission Charges i.e. 5532713161- plus interest accrued (as on 30.9.2018) of Rs.8,62,22,479.38 levied by CTU i.e. PGCIL and paid to it due to breach of the PPA due to non-supply of energy and Withdrawal of substantial energy from grid from Petitioner's account for station's use i.e. for auxiliary consumption.



c. Direct the Respondent No.1 NPCIL to pay damages of Rs.140.49 crore (Including interest accrued as on 30.09.2018) as indicated in statement of expensive energy purchased by Petitioner from alternative sources from the date of breach of PPA i.e. April, 2016 till September, 2018; and

d. Award the interest SBI PLR plus 350 point per annum for the period between payment of POC transmission Charges levied by CTU till the filing of present Petition (including but not limited to pendente lite) and reimbursement thereof by Respondent No.1; and

e. Award the interest SBI PLR plus.350 point per annum on the amount paid on account of expensive energy purchased by Petitioner from alternative sources including for the period between payment actually made till the filing of present Petition (including but not limited to pendente lite) and reimbursement thereof by Respondent No.1;

f. Award the cost of this petition: and

g. Pass such other further orders as this Hon'ble Commission may deem appropriate to meet the ends of justice.”

Background

2. MPPMCL is a 100% owned undertaking of the State of Madhya Pradesh. In accordance with the Madhya Pradesh Electricity Reforms First Transfer Scheme Rules, 2003, the erstwhile MPSEB was unbundled into GENCO, TRANCO and three DICOMs and the residual activities remained vested with MP State Electricity Board which included bulk purchase and supply of power to three discoms. Subsequently, the State Government on 3.6.2006 notified the Madhya Pradesh Electricity Reforms Transfer Schemes Rules, 2006 whereby the functions, properties, interest, rights and obligations of the residual MPSEB relating to bulk purchase and bulk supply of electricity along with the related agreements and arrangements have been transferred and vested in MPPMCL.

3. The Respondent No.1, Nuclear Power Corporation of India (in short 'NPCIL') is a public sector undertaking wholly owned by the Government of India (under the administrative control of the Department of Atomic Energy) and is responsible for the



generation of nuclear power. NPCIL has set-up the nuclear power stations namely Kakarpar Atomic Power Station Units 1& 2 (KAPS) and Tarapur Atomic Power Station Units 3 & 4 (TAPS) in the Western Region of India. KAPS with a total installed capacity of 440 MW comprises of Unit-1 which was declared under commercial operation on 6.5.1993, and Unit-2 was declared under commercial operation on 1.9.1995. TAPS comprises of two units (Units 3 & 4) of 540 MW each.

4. The Respondent No.2, Power Grid Corporation of India Ltd. (PGCIL) is a company incorporated under the Companies Act, 1956 and is engaged in the inter-State transmission of electricity and other functions provided under the Electricity Act, 2003. PGCIL also discharges the functions of the Central Transmission Utility (CTU). Respondents 3 to 8 are the bulk power beneficiaries in terms of PPA and Respondents 9 and 10 are WRPC and WRLDC, respectively, and are responsible for energy accounting and coordinating amongst the generators and beneficiaries.

5. MPPMCL entered into a PPA with NPCIL on 8.8.2005 for fixed allocated capacity of 93 MW from Kakarpar Atomic Power Station, Units-1 & 2 (KAPS) and 180 MW from Tarapur Atomic Power Station, Units-3 & 4 (TAPS) based on the allocation made by Ministry of Power, Government of India on 4.11.2004 and 12.1.2005 respectively. The period of the PPA is for 15 years from the date of signing of PPA i.e. 8.8.2005. The capacity allocated from NPCIL station from the units of KAPS & TAPS to the Respondent beneficiaries are as under:

Name of the State/UT	Allocation (in MW)	
	KAPS 1 & 2	TAPS-3 & 4
Gujarat	125	274
Maharashtra	152	393
Madhya Pradesh	93	180



Chhattisgarh	0	48
Daman Diu	2	5
Dadra Nagar Haveli	2	7
Goa	0	11
Unallocated	66	162
Total	440	1080

6. The power to be supplied to MPPMCL is through the transmission network owned, maintained & operated by PGCIL. MPPMCL, along with other Respondent beneficiaries had also entered into Bulk Power Transmission agreement (BPTA) with PGCIL on 31.3.1999. Also, in terms of the CERC (Sharing of Inter-state Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as 'the Sharing Regulations') and the Point of Connection (POC) transmission charges regime under the Sharing Regulations, which came into force from 1.7.2011, MPPMCL and the other Respondent beneficiaries have executed Transmission Service Agreement (TSA) with PGCIL on 30.7.2011. Accordingly, in terms of the said BPTA and TSA, MPPMCL has been paying the transmission charges to PGCIL for purchase of power from KAPS 1 & 2.

7. In terms of the PPA dated 8.8.2005, MPPMCL and NPCIL had agreed on the following commercial terms with regard to payments for the supply of energy and auxiliary power requirements:

“7.0 RATES OF SUPPLY

7.1 It is agreed between NPCIL & MPSEB that the charges for supply of energy shall be as per tariff notification issued by DAE, Government of India from time to time in accordance with section 22(1) (b) of the Atomic Energy Act, 1962 (Central Act 33 of 1962) as amended from time to time. The tariff rate so fixed shall be subject to the fuel and heavy water adjustment charge as advised by DAE from time to time. Variations in effective rates as result of fuel cost adjustment charges and heavy water cost adjustment charge shall not be deemed to be charge or revision of the tariff.

7.2 The Bulk Power Beneficiaries including MPSEB shall reimburse to NPCIL, modification in respect of the decommissioning provision component of the tariff rate or any levy in respect of nuclear energy as may be notified by the department of Atomic



Energy from time to time or any other such impositions, and these shall not be deemed to be a revision of the tariff.

7.3 In the event of any additional investment made with the approval of DAE, towards the modification of the Power Stations facilities, to meet the safety requirements, the tariff will be revised as per notification issued by the Government of India. However, in case of operational efficiency, the MPSEB / Bulk Power Beneficiaries shall be consulted and informed.

7.4 As on date, the tariff Notification issued by DAE for the power stations are:

- 1. 1/2(7)/03-Power/675 dated September 15, 2003 for KAPS unit Nos. 1&2*
- 2. 2/9(1)/2005-Power/288 dated May 10, 2005 for TAPS unit Nos. 3&4”*

8. MPPMCL has paid the bills of NPCIL on account of supply of power till March 2016 and has in this Petition enclosed a copy of the receipt of payment of last bill to NPCIL.

9. In the above background, MPPMCL has filed this petition for adjudication of disputes on account of breach of the PPA dated 8.8.2005 by NPCIL due to non-supply of energy from KAPS since April 2016 till September 2018 and for payment of damages and compensation by NPCIL to MPPMCL.

Submissions of MPPMCL

10. MPPMCL in this petition has made the following submissions:

(a) In terms of the PPA, BPTA and TSA, it was duly agreed between the Petitioner, and NPCIL that power generated from NPCIL's generating plants shall be supplied using PGCIL's transmission network. In terms of the PPA, a positive obligation has been imposed on NPCIL to deliver power to MPPMCL at the delivery point to MP Periphery in accordance with the dispatch instructions issued by MPPMCL to Respondent No. 10 (WRLDC), in terms of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (hereinafter referred to as 'IEGC').

(b) NPCIL, all of a sudden and without informing or without any prior notice to MPPMCL, had stopped the supply of power from KAPS 1 & 2 from April 2016



till September 2018 in breach of the PPA under which NPCIL has given its implied warranty for continuous supply of energy for a minimum period of 15 years. However, NPCIL, instead of supplying energy to the Petitioner, had been drawing power of the Petitioner's account using the transmission network of PGCIL for auxiliary consumption of its generating station from April 2016 to September 2018.

(c) The issues regarding non-supply of power from KAPS from April 2016 onwards by NPCIL to the beneficiaries including MPPMCL, was raised by one of the beneficiaries in the 74th Meeting of Commercial Committee of WRPC on 9.12.2016, wherein it was agreed to discuss on the methodology to settle the charges along with the issues related to additional financial burden on MPPMCL due to drawl of approximately 5 MUs per month from the interconnection points by NPCIL for its station's use of auxiliary consumption.

(d) The PPA has no provisions for planned or forced outage and only deals with force majeure conditions. Even if it is assumed that forced outage may be treated as force majeure, NPCIL would have to give express written notice to MPPMCL, as regards the existence of such an event, within 30 days of occurrence of the event, as per the provisions of the PPA. Without fulfilling the mandatory criteria of written notice, no force majeure event can be considered. NPCIL was, therefore, obliged to supply electricity generated by it to MPPMCL in terms of the PPA during the period from April 2016 till September 2018.

(e) No consensus was reached in the Special Commercial Committee Meeting of WRPC held on 5.1.2017 and the 33rd WRPC meetings held on 31.1.2017 and 1.2.2017. Aggrieved by non-supply of energy by NPCIL from KAPS; significant drawal of power from MPPMCL's account by NPCIL for use of KAPS by using the transmission network of PGCIL which has been built for exclusive use of the Respondent beneficiaries including MPPMCL; losses incurred by the Petitioner due to payment of POC charges to PGCIL; and purchase of expensive power from alternative sources resulting in huge losses; MPPMCL on 28.3.2018 sent a 'notice of Demand' to NPCIL for Rs. 41.91 crore



demanding recovery and payment of POC transmission charges for breach of the PPA terms along with other directly associated costs. NPCIL has not responded to the demand notice dated 28.3.2018 issued by MPPMCL and has, therefore, impliedly given its consent to all the claims raised by MPPMCL.

(f) To resolve the issues mutually between the Respondent beneficiaries and NPCIL, the Petitioner along with other Respondents discussed the matter in the 36th meeting of TCC/WPRC and NPCIL and PGCIL asked MPPMCL to approach the Commission for recovery of POC transmission charges, other costs and compensation. Therefore, MPPMCL has approached this Commission for appropriate relief. The PPA continued to exist till it came to an end by efflux of time and as a result of this, NPCIL was obliged to supply the electricity generated by it to MPPMCL as per the terms of the PPA and the aforesaid act of non-supply of energy and withdrawal of substantial energy from MPPMCL's account is a clear act of breach of the PPA by NPCIL and, therefore, NPCIL is liable to pay damages and compensation to the Petitioner.

(g) Over and above the provisions of the Electricity Act, 2003 (in short the 2003 Act') and the provisions of the Sharing Regulations, the PPA shall be governed by the provisions of the Indian Contract Act, 1872 (sections 37 & 73). Also, electricity being a goods, will be covered under the provisions of the Sale of Goods Act (sections 57 & 59) for grant of compensation.

(h) Even though the PPA is silent on the interest to be paid on compensation, Section 3(2) of the Interest Act, 1978 confers discretionary power on the Commission to allow interest (SECL v State of MP (2003) 8 SCC 648). Therefore, interest of SBI PLR plus 350 points shall be applicable as under:

(a) On the amount paid for POC transmission charges levied by CTU for the period between April, 2016 till September, 2018

(b) For the period between payment of POC transmission charges levied by CTU till filing of present petition (including pendente lite) and reimbursement thereof; and



(c) On the amount paid on account of expensive energy purchased by Petitioner from alternative sources including for the period between payment till filing of present petition (including pendente lite) and reimbursement thereof.

(i) Since POC charges were paid to PGCIL even though there was no use of the transmission asset, the payments of monthly POC charges to PGCIL from April 2016 till September 2018 needs to be paid as compensation towards loss on account of breach of PPA, which works out to Rs. 55.32 crore. The interest of Rs. 8.62 crore levied by CTU on the said amount is also be payable.

(j) Due to non-supply of energy from the units of KAPS, MPPMCL was compelled to purchase expensive energy from alternate sources. The difference in cost of energy due to purchase of expensive energy from alternate sources with interest has been tabulated and enclosed as Annexure- P 13 to the petition. This works out to Rs. 140.49 crore as on 30.9.2018.

11. The Petition was admitted on 9.5.2019 and notices were issued to the Respondents with direction to complete pleadings. In response to the directions of the Commission vide ROP of the hearing dated 9.5.2019, NPCIL has filed Interlocutory Application (IA No.64/2019) vide affidavit dated 18.6.2019 challenging the 'maintainability' of the Petition filed by MPPMCL.

Interlocutory Application (IA No.64/2019)

12. NPCIL has submitted that the petition is not maintainable either under the provisions of the contract between the parties or the applicable law and the same deserves to be rejected. According to NPCIL, in terms of Clause 12 of the PPA, the disputes between the parties shall have to be resolved initially at Chief Engineer level and thereafter through arbitration in accordance with Arbitration & Conciliation Act, 1996, as amended. NPCIL has submitted that MPPMCL has chosen to invoke the provisions under Section 79 of the 2003 Act, without adherence to the terms of



dispute resolution as per Clause 12 of PPA and, therefore, the petition is premature and deserves to be rejected. NPCIL has further submitted that since MPPMCL is an undertaking of the Govt. of MP and NPCIL is a Central Public Sector Enterprise (CPSE), the disputes have to be adjudicated in terms of the Office Memorandum (OM) dated 22.5.2018 issued by the Department of Public Enterprises, Government of India, towards settlement of the commercial disputes between CPSEs *inter se* and between CPSEs and the Govt. departments through Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD). Therefore, the dispute, if any, between MPPMCL and the Respondent falls within the purview of the said OM and has to be exclusively resolved in accordance with the procedure and structure envisaged therein. Accordingly, NPCIL has made the following prayers in the IA:

“a) Withdraw/review/revoke/revise/modify the Records of Proceedings dated 9.5.2019 issued by this Commission and direct the parties to avail of the redress mechanism evolved under the Office Memorandum dated 22.05.2018 issued by the Department of Public Enterprises, Government of India;

b) in the alternative to prayer (a) above, dismiss the above Petition as premature and direct the parties to exhaust the alternative remedies for redress available in accordance with law, preceded by invoking the dispute Resolution mechanism contemplated under the Office Memorandum dated 22.5.2018 issued by the Department of Public Enterprises, Government of India;

c) for costs of this application;

d) for such further and other reliefs as the nature and circumstances of the case may be deemed necessary”.

Hearing on 6.8.2020

13. During the hearing on 6.8.2019, NPCIL mainly argued on the lines of its submissions in the said IA and reiterated that the dispute does not fall within the ambit and scope of clauses (a) to (d) Section 79(1) of the 2003 Act. In reply, MPPMCL has submitted that in terms of the judgment of the Hon'ble Supreme Court in *GUVNL v Essar Power Ltd (2008) 4 SCC 755* (in short 'GUVNL case'), the



provisions of the Arbitration & Conciliation Act, 1996, will have no application and the present dispute needs to be adjudicated by this Commission under Section 79(1)(f) of the 2003 Act. The Commission, after hearing the parties, reserved its order in the IA, after directing MPPMCL to file its reply on 'maintainability' on following issues;

(i) Jurisdiction of this Commission to adjudicate the dispute under section 79(1)(f) of the 2003 Act;

(ii) Whether the dispute is of purely commercial nature falling within the ambit of Office Memorandum dated 22.5.2018; and

(iii) Whether the dispute falls within the scope of the Arbitration & Conciliation Act 1996 as per agreement entered into by the parties.

Reply of MPPMCL in IA

14. In compliance to the aforesaid directions of the Commission, MPPMCL has filed its reply vide affidavit dated 23.8.2019. With regard to the issue (i) in paragraph 13 above, MPPMCL has submitted that the present dispute fall under the Section 79(1)(f) of the 2003 Act since MPPMCL is a trading licensee which sells electricity to various distribution licensees in the State of Madhya Pradesh and NPCIL is an inter-State generating company, which supplies power to more than one State namely, Gujarat, Madhya Pradesh, Chhattisgarh and Maharashtra. MPPMCL has further stated that the issues related to non-supply of electricity by the generator (NPCIL) to MPPMCL and the losses suffered due to payment of transmission charges to CTU, despite non-supply of power by NPCIL; and withdrawal of power by NPCIL from the account of MPPMCL for auxiliary power consumption are in nature of disputes related to money claims which directly impact the Annual Revenue Requirement (ARR) of the distribution licensees and, therefore, falls within the adjudicatory and regulatory power of this Commission. Referring to the Hon'ble Supreme Court judgments dated 4.4.2014 and 11.4.2017 respectively in CA No. 4126 of 2013



(TANGEDCO v PPN Genco) and C.A No. 5415 of 2016 (Energy Watchdog V CERC), Judgment dated 15.5.2019 of the Hon'ble High Court of Delhi in O.M.P. No. 677 of 2011 (PTC Ltd v Jai Prakash Power Ventures Ltd) and Judgments dated 10.9.2011 and 4.11.2011 of the Appellate Tribunal for Electricity in Appeal No. 49/2010 (TNEB v NLC) and Appeal No. 15/2011 (Lanco Power Ltd v HERC), MPPMCL has submitted that the disputes between a trading licensee and a generator fall within the jurisdiction of this Commission. It has also stated that the Commission can adjudicate all the disputes including the dispute related to commercial claims and/or money claims, regulatory disputes etc. between trading licensees and the generating companies as they squarely falls within the adjudicatory and regulatory power of this Commission.

15. As regards the issue (ii) in paragraph 13 above, MPPMCL has submitted that the OM dated 22.5.2018 is in the nature of administrative action having no relationship with the generation, distribution or transmission of electricity and hence the same would not be applicable in the present case. As regards the legal applicability of the said OM, MPPMCL has stated that the same cannot prevail over the 2003 Act which is special law relating to all the matters including but not limited to disputes relating to generation, distribution, transmission or trading of electricity. MPPMCL, while pointing out to the judgments of the Hon'ble Supreme Court in GUVNL case and BSAL v DVC & ors (judgment dated 23.7.2018 in C.A. No. 971973/2008) has submitted that special law overrides the general law and administrative action cannot override a legislation (i.e. the 2003 Act) by an Act of Parliament.



16. With regard to the issue (iii) in paragraph 13 above, MPPMCL has submitted that the present dispute between MPPMCL and NPCIL does not fall within the scope of the Arbitration and Conciliation Act, 1996 ('the 1996 Act') but squarely falls within the purview and jurisdiction of this Commission because of the settled law by the Hon'ble Supreme Court and APTEL in their judgments. MPPMCL has stated that the Commission is an expert body in complex field of electricity to adjudicate upon disputes and in view of aforesaid, the IA filed by NPCIL is liable to be dismissed with costs.

Rejoinder of NPCIL to the reply of Petitioner MPPMCL

17. NPCIL vide its Rejoinder dated 30.8.2019 has mainly submitted that the Commission has the jurisdiction to adjudicate the disputes in terms of Section 79(1)(f) of the 2003 Act, only if the said dispute is relatable to any of the functions under clauses (a) to (d) of Section 79(1) of the said Act. NPCIL has stated that in the present case, the dispute is neither related to tariff nor is related to regulation of inter-State transmission of electricity and hence does not fall within the scope of the clauses (a) to (d) of Section 79(1) of the 2003 Act. Accordingly, NPCIL has stated that the Commission has no jurisdiction to adjudicate the present dispute and the petition is, therefore, not maintainable. It has also stated that the judgment of the Hon'ble Supreme Court in the GUVNL case has no application to the present case, as the dispute raised by MPPMCL does not have any implication on the tariff and hence not maintainable before the Commission. NPCIL has added that in terms of Clause 12 of the PPA, the dispute between the parties shall have to be resolved initially at Chief Engineer level and thereafter through Arbitration in accordance with



Arbitration & Conciliation Act, 1996. NPCIL has further stated that since MPPMCL is a State organisation and NPCIL is a CPSE, the disputes shall have to be adjudicated in terms of the office Memorandum dated 22.5.2018 issued by the Department of Public, Enterprises, GOI.

18. Since order in the IA could not be issued prior to one of the Members of this Commission (who formed part of the Coram) demitting office, the IA was heard on 20.7.2020 and the Commission reserved its orders on 'maintainability'.

Submissions of NPCIL during the hearing on 6.8.2020

19. During the hearing of IA No. 64/2019, the learned senior counsel for NPCIL made detailed arguments mainly on the lines of its submissions made in its rejoinder to IA dated 30.8.2019. The learned senior counsel submitted that the judgment of the Hon'ble Supreme Court in GUVNL case relates to the jurisdiction of the State Electricity Regulatory Commission to adjudicate the disputes under Section 86(1)(f) of the 2003 Act which is wider than the scope of Section 79(1)(f) as it permits the adjudication of disputes between a generating company and a licensee without any limitation, whereas Section 79(1)(f) talks about the dispute involving generating company or transmission licensee with regard to clauses (a) to (d) of sub-Section (1) of Section 79 of the Act. Accordingly, the learned counsel submitted that the judgment of the Hon'ble SC in GUVNL case is not applicable to the present case as the dispute does not fall under any of the provisions of Section 79(1)(a) to (d) of the 2003 Act. He submitted that, therefore, the issues raised by MPPMCL may be referred for arbitration in terms of Clause 12 of the PPA dated 8.8.2005 or for settlement in terms of the OM dated 22.5.2018. The learned senior counsel,



however, clarified that in case the dispute raised by MPPMCL is found to be covered under any of the sub-clauses (a) to (d) of Section 79(1) of the 2003 Act, then the Commission may adjudicate the dispute or refer the matter for arbitration in terms of the judgment of the Hon'ble SC in GUVNL case. Referring to the judgment of the APTEL dated 11.11.2013 in Appeal No. 51 & 79 of 2013 (TANGEDCO v CERC & ors), the learned counsel submitted that if the issues raised in the petition do not relate to tariff, then the petition is not maintainable under Section 79 of the 2003 Act.

Submissions of MPPMCL during the hearing on 6.8.2020

20. In response, the learned counsel for MPPMCL has reiterated its submissions made in the reply to IA. Placing reliance on the Commission's order dated 11.10.2017 in Petition No. 95/MP/2017, the learned counsel submitted that apart from the disputes related to tariff, the disputes which have implication on tariff would also fall within the jurisdiction of the Commission. The learned counsel further pointed out that NPCIL supplies power to more than one State namely, Gujarat, Madhya Pradesh, Chhattisgarh, Maharashtra etc., and, therefore, the issues related to non-supply of power by NPCIL to MPPMCL; losses suffered due to payment of transmission charges to CTU despite non-supply of power by NPCIL; and withdrawal of auxiliary power by NPCIL from the account of MPPMCL are in nature of regulatory and tariff/money disputes. Referring to the judgments of the Hon'ble Supreme Court in TANGEDCO v PPN Genco and the 'GUVNL case', the learned counsel submitted that this Commission can adjudicate all disputes including disputes on money claims between the licensees and generating companies. He added that as per the observations of the Hon'ble High Court of Delhi in its judgment dated 15.5.2012 in



PTC India v JPVNL, it is the prerogative of the Commission to decide which dispute, if any, involving a generating company has to be referred for arbitration and NPCIL cannot, therefore, dictate the Commission to refer the dispute to an arbitrator. The learned counsel also submitted that a similar issue was considered by the Commission in its order dated 23.7.2019 in Petition No.236/MP/2017 and the decision therein may be applied to the present case. As regards the settlement of dispute in terms of the OM dated 22.5.2018, the learned counsel referred to the judgment dated 23.7.2018 of the Hon'ble Supreme Court in BSAL v DVC & ors and submitted that an administrative action or subordinate regulation cannot override the provisions of the 2003 Act that has been passed by the Parliament. Accordingly, the learned counsel for MPPMCL contended that the Commission has the jurisdiction to entertain the petition and requested that the IA may, therefore, be rejected.

Issue of Maintainability

21. Based on the submissions of the parties in the IA, the issue which emerges for consideration with regard to 'maintainability' of the Petition is:

"Whether the Commission has the jurisdiction to adjudicate the dispute raised by MPPMCL in terms of Section 79(1)(f) of the Electricity Act, 2003 or should the Commission refer the parties for Arbitration in terms of the Arbitration and Conciliation Act, 1996, as amended."

22. NPCIL has mainly contended that the disputes raised in this Petition are purely contractual/ money disputes and do not fall within the scope of clauses (a) to (d) of Section 79(1) of the 2003 Act. It has submitted that being a purely contractual matter not connected to tariff, this Commission does not have the jurisdiction to adjudicate the disputes and the same is, therefore, amenable to arbitration in terms of Clause 12 of the PPA or the Settlement Mechanism in terms of the OM dated 22.5.2018 of



Department of Public Enterprises, Government of India. NPCIL has argued that while Section 86(1)(f) of the 2003 Act has a broader scope and covers all types of disputes between the licensees and generating companies, the disputes to fall within the jurisdiction of the Central Commission under Section 79(1)(f) of the 2003 Act should not only involve generating companies or transmission licensee, but should also be in regard to matters connected with clauses (a) to (d) of Section 79(1) of the 2003 Act. NPCIL also submitted that in terms of the judgment of the Hon'ble Supreme Court in GUVNL case, the Commission has the power to adjudicate the dispute or refer the matter for Arbitration, only if the dispute is covered under any of the clauses (a) to (d) of Section 79(1) of the 2003 Act.

23. *Per contra*, MPPMCL has contended that non-supply of power by NPCIL to MPPMCL; losses suffered due to payment of transmission charges to CTU despite the non-supply of power by NPCIL; and drawal of auxiliary power by NPCIL from the account of MPPMCL are in nature of regulatory and tariff/money disputes which are amenable to the jurisdiction of this Commission. Accordingly, it has contended that in terms of the judgments of the Hon'ble Supreme Court in GUVNL case, TANGEDCO v PPN Genco, BSAL V DVC & ors, this Commission has the jurisdiction to adjudicate all disputes including money claims between the licensees and generating companies.

Analysis and Decision

24. We have gone through the pleadings and submission of the parties during the hearing. MPPMCL has filed the present petition under Section 79(1)(c),(f) and (k) of the 2003 Act. NPCIL has submitted that Section 79(1)(f) of the 2003 Act would



apply only if one of the parties to the dispute is a generating company or transmission licensee and dispute in question can be relatable to any of the functions under clauses (a) to (d) of sub-section (1) of Section 79 of the 2003 Act. NPCIL has submitted that since the dispute in the present case is not relatable to tariff nor to inter-State transmission of electricity and does not fall under clauses (a) to (d) of the 2003 Act, the present dispute is beyond the jurisdiction of the Commission under Section 79(1)(f) of the 2003 Act. The Petitioner, MPPMCL has submitted that the Petitioner is an inter-State trading licensee and fully owned undertaking of Government of Madhya Pradesh and NPCIL is an inter-State generating company fully owned and controlled by Government of India. The Petitioner has submitted that since the dispute has arisen between the parties due to non-supply of power by NPCIL in accordance with the Power Purchase Agreement dated 8.8.2005 (for fixed allocated capacity of 93 MW from KAPS 1 & 2), the dispute is covered under Section 79(1)(f) of the 2003 Act.

25. Clauses (a) to (d), (f) and (k) of sub-section (1) of Section 79 of the 2003 Act are extracted as under:

“Section 79. Functions of Central Commission: (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 for arbitration;

(k).to discharge such other functions as may be assigned under the Act”.

26. Section 79(1)(a) provides that the Central Commission shall have the functions “to regulate the tariff of the generating companies owned and controlled by the Central Government.” There is no iota of doubt that NPCIL is a generating company which is fully owned and controlled by the Central Government and electricity generated from KAPS 1&2 of NPCIL is supplied to more than one State. However, the tariff of the generating stations of NPCIL including that of KAPS 1 & 2 is being determined by the Department of Atomic Energy under the provisions of Section 22 of the Atomic Energy Act, 1962 (‘1962 Act’). Section 22 of the 1962 Act is extracted as under:

“22. Special provisions as to electricity:

1. Notwithstanding anything contained in the Electricity (Supply) Act, 1948, the Central Government shall have authority:-
 1. To develop a sound and adequate national policy in regard to atomic power, to co-ordinate such policy with the Central Electricity Authority and the State Electricity Boards constituted under sections 3 and 5 respectively of that Act and other similar statutory corporations concerned with the control and utilization of other power resources, to implement schemes for the generation of electricity in pursuance of such policy and to operate either by itself or through any authority or corporation established by it or a Government Company, atomic power stations in the manner determined by it in consultation with the Boards or Corporations concerned, with whom it shall enter into agreement regarding the supply of electricity so produced.
 2. To fix rates for and regulate the supply of electricity from atomic power stations either by itself or through any authority or corporation established by it or a Government Company in consultation with the Central Electricity Authority.
 3. To enter into arrangements with the Electricity Board of the State in which an atomic power station is situated either by itself or through any authority



or corporation established by it or a Government Company for the transmission of electricity to any other State.

4. Provided that in case there is a difference of opinion between the Central Government or such authority or corporation or Government Company as the case may be and any State Electricity Board in regard to the construction of necessary transmission lines, the matter shall be referred to the Central Electricity Authority whose decision shall be binding on the parties concerned.
2. No provision of the Indian Electricity Act, 1910 or any rule made thereunder or of any instrument having effect by virtue of such law or rule shall have any effect so far as it is inconsistent with any of the provisions of this Act.
3. Save as otherwise provided in this Act, the provisions of this Act shall be in addition to and not in derogation of, the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948.”

27. Section 22 of the 1962 Act starts with a non-obstante clause with regard to the provisions of the Electricity (Supply) Act, 1948. Hon’ble Supreme Court in the case of Chandavarkar Sita Ratna Rao Vs. Asha Lata S Guram [(1946) 4 SCC 447] has observed the following in the context of the construction of non obstante clause:

“67. A clause beginning with the expression “notwithstanding anything contained in this Act or in some particular provision in the Act or in some particular Act or in any law for the time being in force or in any contract’ is more often than not appended to a section in the beginning with a view to give the enacting part of section in case of conflict an overriding effect over the provisions of the Act or the contract mentioned in the non obstante clause. It is equivalent to saying that inspite of the provision of the Act or any other Act mentioned in the non obstante clause or any contract or document mentioned, the enactment following it will have full operation or the provisions embraced in the non obstante clause would not be an impediment for an operation of the enactment. See in this connection the observations of this Court in South Indian Corporation (P) Ltd. V. Secretary, Board of Revenue, Trivandrum.”

Thus the non obstante clause at the beginning of Section 22 of the 1962 Act seeks to provide that despite the provisions in the Electricity (Supply) Act, 1948 with regard to generation, supply and transmission of electricity, the provisions of Section 22 shall have full operation in so far as electricity generated from atomic energy is



concerned and the provisions of the 1962 Act and the provisions of the Electricity (Supply) Act, 1948 will not be an impediment for the operation of Section 22 of the 1962 Act. As per Section 22(3) of the 1962 Act, the provisions of the said Act are in addition to and not in derogation of Indian Electricity Act, 1910 and Electricity (Supply) Act, 1948. Both these latter Acts have been repealed by 2003 Act. Therefore, the provisions of the 1962 Act and 2003 Act have to be harmoniously interpreted in so far as the provisions pertaining to electricity is concerned.

28. It is pertinent to mention that under Section 22(1)(2) of the 1962 Act, Department of Atomic Energy has been empowered to fix the rates for and regulate the supply of electricity from atomic power plants which corresponds to Section 79(1)(a) of 2003 Act. Further, Clause (3) of Section 22 of 1962 Act provides that the Central Government may enter into an agreement with the Electricity Board of the State in which the plant is located for transmission of electricity from the atomic power plant to any other State. After the coming into effect of 2003 Act, transmission of electricity is being carried out by Central Transmission Utility, State Transmission Utilities and transmission licensees. Under Section 79(1)(c) of the 2003 Act, the Central Commission is vested with the function to regulate inter-State transmission of electricity and under Section 79(1)(d) to determine the inter-State transmission of electricity. Whenever atomic power generating stations are connected with the inter-State transmission system for transmission of electricity to their beneficiaries, these generating stations are not only liable to pay the transmission charges, they also become subject to the regulation of inter-State transmission of electricity. Moreover, the Central Commission is vested under Section 79(1)(f) of 2003 Act with the



functions to adjudicate disputes involving generating companies and transmission licensees in the matters covered under Section 79(1)(a) to (d) of the 2003 Act. Harmonious construction of the 1962 Act and the 2003 Act requires that those functions which are not covered under Section 22 of the 1962 Act should fall under the jurisdiction of the Central Commission under section 79 of the 2003 Act in the absence of which the atomic power generating stations will remain largely unregulated. In view of the above discussion, it is held that while the tariff of the atomic power generating stations shall continue to be determined by the Department of Atomic Energy in terms of Section 22 of the 1962 Act, the issues relating to transmission of electricity and adjudication of dispute with regard to the regulation of generation tariff and transmission of electricity shall fall under the jurisdiction of the Central Commission.

29. In the petition, the Petitioner has raised disputes regarding the following:
- (a) Declaration that failure to supply power by NPCIL from April 2016 to September 2018 is a breach of the provisions of the PPA dated 8.8.2005 between the Petitioner and NPCIL.
 - (b) Recovery of the PoC charges paid by the Petitioner for the period from April 2016 to September 2018 to PGCIL from NPCIL even though power was not supplied to the Petitioner from KAWS 1&2 during the said period and award of interest thereon.
 - (c) Compensation for withdrawal of substantial power from the grid by KAPS 1&2 on the account of the Petitioner to meet its auxiliary consumption during the period from April 2016 to September 2018.



(d) Damages for purchase of the expensive energy by the Petitioner during the period from April 2016 to September 2018 and award of interest thereon.

30. While the items at paragraph 27(a), (c) and (d) are relatable to regulation of generation and supply of electricity from KAPS 1&2, the item at paragraph 27(b) is relatable to transmission of electricity. Therefore, the disputes are subject to adjudication under Section 79(1)(f) of the 2003 Act. Accordingly, the petition is maintainable. The Commission is not expressing any view on the merits of the claims at this stage which shall be adjudicated in accordance with the provisions of the relevant regulations, PPA, BPTA and TSA.

31. One of the arguments taken by NPCIL is that the reliefs sought by the Petitioner are in the nature of money claims and do not pertain to tariff which cannot be entertained by the Commission in exercise of its adjudicatory power under Section 79(1)(f) of 2003 Act. The Petitioner on the other hand has placed reliance on the judgement of APTEL dated 4.9.2012 in Appeal No. 94 & 95/2012 (BRPL-V-DERC & ors) in support of the contention that determination of tariff includes all terms and conditions of tariff and therefore, any dispute which can be relatable to tariff including the money claims shall fall under Section 79(1)(f) read with section 79(1)(a) and (b) of 2003 Act. We have considered the submissions of the parties. APTEL in the said judgement has held as under:

“32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the



power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing but terms and conditions of supply.

34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.”

32. As per the above judgement, Section 61 and 79 of the 2003 Act do not only deal with tariff but also terms and conditions of tariff which include determination of tariff, availability of the power station and scheduling of power having impact on tariff, billing, payment, surcharge, rebate, payment security mechanism such as letter of credit and escrow arrangement, termination and suspension of supply etc. Keeping in view the scope of the power of the Central Commission under Section 79 of the 2003 Act as interpreted by the APTEL, the Commission is of the view that any money claim which is otherwise traceable to tariff for generation and supply of electricity from the generating station shall be subject to adjudication under Section 79(1)(f) of the Act.

33. NPCIL has argued that the judgment of the Hon'ble Supreme Court in GUVNL case is not applicable in the present case as the dispute does not fall under any of the provisions of Section 79(1)(a) to (d) of the 2003 Act. It has also submitted that the issues raised by MPPMCL may be referred to arbitration in terms of Clause 12 of the PPA dated 8.8.2005 or for settlement in terms of the OM dated 22.5.2018. NPCIL has, however, submitted that in case the dispute raised by MPPMCL is found to be



covered under any of the sub-clauses (a) to (d) of Section 79(1) of the 2003 Act, then the Commission may adjudicate the dispute or refer the matter for arbitration in terms of the said judgment of the Hon'ble Supreme Court. The Hon'ble Supreme Court in GUVNL case, on a harmonious construction of the provisions of the 2003 Act and the Arbitration and Conciliation Act, 1996 had held that whenever there is a dispute between a licensee and generating company, only the State Commission or the Central Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. Relevant portion of the judgment is extracted as under:

"58. In the present case we have already noted that there is an implied conflict between Section 86(1)(f) of the Electricity Act, 2003 and Section 11 of the Arbitration and Conciliation Act, 1996 since under Section 86(1)(f) the dispute between licensees and generating companies is to be decided by the State Commission or the arbitrator nominated by it, whereas under Section 11 of the Arbitration and Conciliation Act, 1996, the Court can refer such disputes to an arbitrator appointed by it. Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other disputes (unless there is some other provision in the Electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996. This is also evident from Section 158 of the Electricity Act, 2003. However, except for Section 11 all other provisions of the Arbitration and Conciliation Act, 1996 will apply to arbitrations under Section 86(1)(f) of the Electricity Act, 2003 (unless there is a conflicting provision in the Electricity Act, 2003, in which case such provision will prevail.)"

34. Section 79(1)(f) is pari materia with section 86(1)(f) of 2003 Act. Therefore, the judgement of the Hon'ble Supreme Court in GUVNL case supra is applicable in case of this Commission also. As per the above judgement, where a dispute falls under the adjudicatory jurisdiction of the Commission, the Commission may either adjudicate the dispute or refer it to arbitration. The Commission will take a view



whether to adjudicate the dispute or refer the same for adjudication after completion of pleadings by the parties.

35. Having held that the Petition is maintainable, we direct that the matter shall be heard on 'merits'. Accordingly, the Respondents are directed to file their replies, on merits, on or before 14.9.2020, with copy to MPPMCL, who shall file its rejoinder, if any, by 28.9.2020. Petition No. 12/MP/2019 shall be listed for hearing in due course for which separate notices shall be issued to the parties.

36. I.A. No. 64/2019 in Petition No.12/MP/2019 is disposed of in terms of the above.

**Sd/-
(Arun Goyal)
Member**

**Sd/-
(I.S.Jha)
Member**

**Sd/-
(P. K. Pujari)
Chairperson**

