

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 223/MP/2015

Coram:

Shri Gireesh B. Pradhan, Chairperson

Shri A.K. Singhal, Member

Shri A.S Bakshi, Member

Dr. M. K. Iyer, Member

Date of Order: 18th of April, 2017

In the matter of

Petition relating to dispute between the parties involving the termination of PPA's due to high average power purchase cost of NTPC, NHPC and THDC plants, seeking surrender of power allocation from the stations and requesting issuance of statutory advise to Ministry of power recommending surrender, reallocation of the Petitioner's share from these PPA's in the interest of the consumers of Petitioner's share from these PPA's in the interest of the consumers of Petitioner's licensed area of supply in NCT of Delhi.

And

In the matter of

Tata Power Delhi Distribution Ltd.,
Grid-Station Building, Hudson Lines
Kingsway Camp,
New Delhi-110009

....Petitioner

Vs

1. NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road, New Delhi

2. NHPC
N.H.P.C. Office Complex, Sector-33,
Faridabad-121003 (Haryana)

3. THDC
Pragatipuram, By Pass Road,
Rishikesh-249201 (Uttarakhand)



4.Govt. of NCT of Delhi
Through
Department of Power
GNCTD, 8th Level, B-Wing,
Delhi Secretariat, Delhi, 110002

5.Union of India
Through
Ministry of Power
Shram Shakti Bhavan, Rafi Marg,
Delhi 110001

...Respondents

Parties Present:

Shri Gopal Jain, Senior Advocate, TPDDL
Mr. Alok Shankar, Advocate, TPDDL
Shri Sumit Sachdev, TPDDL
Shri Buddy Ranganathan, Advocate, BRPL & BYPL
Shri Arijit Mishra, Advocate, BRPL & BYPL
Ms. Malavika Prasad, Advocate, BRPL & BYPL
Shri Sameer Singh, BYPL
Shri Nishant Grover, BYPL
Shri Mayank Ahlawat, BYPL
Shri Suma Kant
Shri M.G. Ramachandran, Advocate, NTPC & THDC
Ms. Poorva Saigal, Advocate, NTPC & THDC
Ms. Anushree Bardhan, Advocate, NTPC & THDC
Shri Nishant Gupta, NTPC
Shri Shankar Saran, NTPC
Shri Ashant Chaturvedi, NTPC
Shri Piyush Kumar, NHPC
Shri Sarosh Majid Siddiqi, THDC
Shri Gaurav Nand, Consumer Representative

ORDER

The petitioner is a Joint Venture of the Tata Power Company Limited and the Delhi Power Company Ltd. (a fully owned company of Government of NCT of Delhi "GNCTD"). Consequent to reorganization of power sector in the National Capital Territory of Delhi (NCTD) by GNCTD in July 2002, the petitioner came into existence. The Petitioner distributes electricity in the North and North-West area of Delhi catering



to around 14.2 lakh consumers. Till 31.3.2007, Delhi Transco Limited (DTL) was the sole entity responsible for procurement and bulk supply of power in Delhi. All distribution companies including the Petitioner had to purchase power from DTL at an approved Bulk Supply Tariff (**BST**) based on their capacity to pay principle.

2. GNCTD issued a set of policy directives on 28.6.2006 under which the distribution licensees were required to make their own arrangements for procurement of power for supply to the consumers with effect from 1.4.2007. Consequently, Delhi Electricity Regulatory Commission (DERC) vide its order dated 31.3.2007 re-assigned all the existing PPAs with DTL to distribution licensees of Delhi including the Petitioner based on their load profile. With effect from 1.4.2007, the entire responsibility for arranging power for their respective areas of distribution was vested on the respective distribution licensees.

3. The Petitioner has submitted that with effect from 1.4.2007, the Petitioner has been procuring electricity directly from the central generating stations and other generating stations based on its share of the contracted capacity with DTL (i.e. 29.18%) as approved by DERC. The Petitioner has further submitted that the share of the Petitioner has been further increased to 30.68% by DERC vide its order dated 27.2.2014. The Petitioner has submitted that with the assignment of the PPAs between DTL and the generating companies like NTPC Ltd., NHPC Ltd. and THDC Ltd., the rights and obligations of DTL under the earlier PPAs stood vested to the Petitioner. The Petitioner has submitted that under the Electricity Act, 2003 and applicable Rules and Regulations governing the Petitioner, it is required to develop and maintain an efficient,



coordinated and economical distribution system in its area of supply and to supply electricity in accordance with the Act to ensure reasonable and minimum possible retail tariff. The Petitioner has further submitted that the power procurement cost constitute a significant component in the ARR and has more than 80% bearing on the retailed supply tariff of the Petitioner on year to year basis. The Petitioner has submitted that learned DERC while determining the retailed supply tariff for the petitioner has recognized the need to check and arrest the increase in cost of power purchase so as to ensure that no adverse impact is suffered by the consumer of Delhi in electricity bills to be paid by them.

4. The petitioner has submitted that the following facts have led to filing of this petition:

(a) The Petitioner has sufficient surplus power to meet the projected demand in its area of supply till financial year 2019-2020 as under:

	Summer Peak (in MW)					
	2015-16	2016-17	2017-18	2018-19	2019-20	2020-21
Total Availability	1967	1977	2095	2285	2305	2325
Average Load	1300	1378	1461	1548	1641	1740
Surplus Quantum	667	599	634	737	664	585

(b) The Petitioner has substantial amount of surplus power. As a result of the surplus power, the Petitioner is constrained to pay the entire fixed cost of the generating stations without being able to utilize the entire quantum. The



Petitioner is not able to schedule capacity upto its contracted capacity which leads to backing down of the generating stations. The setting high percentage as normative availability of a generating station has clear underlying objective that maximum generation from the generating station would bring down the effective per-unit cost and lead to ultimate welfare of the stakeholders. The petitioner has further stated that any instructions which are required to be issued to a generating station to back down effectively frustrates the very purpose of setting high standards for operation and maintenance of the generating station as per the unit cost actually incurred makes the generating station unviable.

(c) When the average demands of most States are not being met, backing down of generating stations leads to dual loss. On the one hand, the procurer to whom the capacity has been allocated has to bear the fixed cost which is passed on to the consumer in the retail tariff and resultantly, consumers pay higher tariff without getting any corresponding benefit. On the other hand, the power starved/needy States suffer power outage due to lack of availability of much needed power. Therefore, re-allocation of these plants to needy States would help in utilizing these plants efficiently and in the larger good of the nation consistent with the provisions of the Electricity Act, National Electricity Policy and Tariff Policy.

(d) In order to arrive at a mutually beneficial arrangement for the Petitioner and the States where demand is not being completely met, the Petitioner vide its various representations made to GNCTD, DERC and the Ministry of Power



(Government of India) made efforts to surrender the power allocated to it from the generating station. The Petitioner also approached the power deficient States for seeking temporary re-allocation of power (Communications with Bangalore Electric Supply Company Limited, J&K Power Development Department, Uttar Pradesh Power Corporation Limited, Punjab state Power Corporation Limited, Rajasthan Discoms Power Purchase Centre and Uttarhand Power Corporation Limited placed at Annexure A to the Petition).

(e) On the persistent requests of the Petitioner, GNCTD, vide its letter dated 6.7.2015 made a representation to Ministry of Power, Government of India for surrender of power allocated to Delhi from the Central Generating Stations, namely BTPS(Badarpur NTPC), Auriya (NTPC),Dadri -Gas (NTPC), Anta (NTPC), Dadri stage -II (Thermal) (NTPC), APPCL Jhajjar (Aravalli) (NTPC), Koldam (NTPC), Dulhasti (NHPC), Chamera-III (NHPC), Parwati-III (NHPC) and Tehri HEP (THDC)and reallocation of the same to the needy States. The Petitioner has submitted that these stations are at the bottom of the merit order and accordingly, scheduling from these generating stations is very low. The Petitioner has submitted that plants like BPTS, Anta Gas, Auriya Gas and Unchahar I are old, inefficient and coupled with fuel shortages have outlived their useful life of 25 years.

(f) GNCTD, after having reviewed the power supply and demand position in Delhi, requested the Ministry of Power vide letter dated 27.10.2014 for reallocation from various other Central Generating Stations. If the old generating stations,



namely BTPS, Anta, Auriya and Unchahar-1 which have outlived their useful lives are reallocated, it would result in reduction in the Power Purchase cost for the Petitioner and would ultimately result in reduction of the retail tariffs.

(g) A meeting of the Delhi Power Procurement Group was held on 6.7.2015 to discuss the issues regarding reallocation of surplus power of various generating stations and to seek consent from the DISCOMs. In the said meeting, DISCOMs have submitted their consent for surrender of power. The matter of costly power was discussed by the Department of Power, GNCTD with the Government of India, Ministry of Power, in the meeting held on 28.4.2015 and in the said meeting, Ministry of Power assured that it would extend full support and co-operation with regard to surrender of power allocated to Delhi from certain Central Generating Stations.

(i) As per the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2014, a beneficiary is entitled to request for reallocation of power from generating station, but the liability to pay capacity charge would cease only upon reallocation of power from the generating station. Also, when such reallocations are made, the beneficiaries who surrender the share shall not be liable to pay capacity charges for the surrendered share. The capacity charges for the capacity surrendered and reallocated as above shall be paid by the State to whom the surrendered capacity is allocated. Except for the period of reallocation of capacity as above, the beneficiaries of the generating station shall continue to pay the full capacity



charges as per allocated capacity shares.

(j) The Petitioner has surplus power to meet its supply obligations towards consumer base and to meet the peak demand as per its license conditions. The reduction in the total power purchase cost is possible only if required capacities are surrendered and reallocated to needy the States.

5. In the light of the submissions made, the Petitioner has made the following prayers, namely:

“(a) To issue necessary directions/advice in exercise of powers under the Electricity Act, 2003 to the Central Government to allocate the Petitioner’s entire firm share of power from the Respondent’s NTPC, NHPC and THDC power station mentioned in Table A to other power deficient states/utilities;

(b) To direct for closure/reallocation of old stations namely BTPS, Anta, Auriya and Unchahar 1 which have outlived their useful lives.

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

6. Notices were issued to the respondents to file their replies to the petition. Replies to the petition have been filed by NTPC, NHPC, THDC and UOI.

Reply of NTPC Limited

7. NTPC has taken a preliminary objection to the maintainability of the petition as well has filed its reply on merit. NTPC has submitted that the petitioner has not raised any issue related to determination of tariff or any matter connected with tariff which may fall within the scope of clause (a) and (f) of subsection (1) of Section 79 of the Electricity Act, 2003. NTPC has submitted that in the proceedings under clause (a) and (f) of



subsection (1) of Section 79, the petitioner cannot seek reallocation of power allocated to it by the Central Government, but can only seek enforcement of the rights and obligations under the PPAs and adjudication of the disputes arising out of the PPAs. NTPC has stated that re-allocation of the capacity contracted by the petitioner to others and foreclosure and surrender of the allocated capacity and other such matters are within the purview of the Central Government and is possible only in the event and to the extent, the Central Government is able to identify an alternative procurer. According to NTPC, the prayers for directions to the Central Government to reallocate the share of the petitioner in the generating stations of NTPC to others are outside the purview of the present petition. NTPC has submitted that it is not open to the petitioner to seek directions for reallocation of power by raising a dispute under clause (f) of subsection (1) of Section 79 of the Electricity Act, 2003.

8. On merits, NTPC has submitted that the Petitioner has entered into binding, concluded and enforceable PPA dated 8.5.2008 with NTPC for purchase of power of the specified contracted capacity from the various generating stations. The PPA is in continuation of the earlier PPAs entered into, as noted in the PPA. NTPC has placed on record the Supplementary PPA dated 22.3.2012 entered into by the petitioner for extension of the agreement for sale and purchase of electricity beyond the initial period of 15 years in the case of gas-based generating stations i.e. beyond 31.3.2012. NTPC has stated that the petitioner having entered into binding and concluded contract, cannot seek a unilateral termination of the PPAs.

9. NTPC has pointed out that the petitioner and its predecessors have secured the



benefits from the PPA and that in view of long-term applicability of the PPAs, NTPC has made significant investments in the Renovation and Modernization of the generating stations based on the long term PPA. NTPC has submitted that it had set up the generating stations on the basis of allocation by the Central Government at the instance of the Government of National Capital Territory of Delhi and the predecessor in interest of the petitioner and TPDDL had duly confirmed the same in the PPA and the Supplementary PPA. Therefore, the petitioner is not entitled to seek termination, surrender, re-allocation, etc. of the contracted capacity adverse to the interest of NTPC. NTPC has clarified that in response to the communications received from the petitioner, it had duly explained the position in regard to the obligations of the parties in its letters dated 22.9.2015 (Annexure R3 to NTPC's reply) and 12.10.2015 (Annexure R4 to NTPC's reply).

Reply of NHPC Limited

10. Besides submitting the reply on merits, NHPC has taken a preliminary objection to the maintainability of the petition. NHPC has stated that the petitioner has not raised any issue related to determination of tariff or any matter connected with tariff which may fall within the scope of clause (a) and (f) of subsection (1) of Section 79 of the Electricity Act. NHPC has submitted that in the proceedings under clause (a) and (f) of subsection (1) of Section 79, the petitioner cannot seek reallocation of power allocated to it by the Central Government, but can only seek enforcement of the rights and obligations under the PPAs and adjudication of the disputes arising out of the PPAs. NHPC has stated that reallocation of the capacity contracted by the petitioner to others and foreclosure



and surrender of the allocated capacity and other such matters are within the purview of the Central Government and is possible only in the event and to the extent, the Central Government is able to identify an alternative procurer. NHPC has submitted that the prayers for directions to the Central Government to reallocate the share of the petitioner in the generating stations of NHPC to others are outside the purview of the present petition. NHPC has submitted that the petitioner is trying to interpret the Section 79 (2) of the Act stating that the Central Commission is empowered/required to issue statutory advice to the Central Government.

11. On merits, NHPC has submitted that the petitioner's claim of exorbitant power purchase cost from the generating stations of Dulhasti, Chamera-III and Parbati-III making it prohibitory and unviable is unjustified as the tariffs of these generating stations are determined by the Commission. NHPC has stated that the tariff is fixed by Commission through transparent process after the respondents have been given ample opportunity of being heard and keeping the interest of the consumers at the same time. NHPC has asserted that the allocation of power to various States are done by the Ministry of Power, Government of India, after considering various factors including long-term requirement of the States and as per their requisition. NHPC has stated that the petitioner having signed the PPA from any generating station, cannot now refuse to accept the power from any plants saying it to be costlier. NHPC has pointed out that since, the allocation of power is done by MoP, any de-allocation/re-allocation of power from these generating stations shall also be through the same route. NHPC has stated that the scheduling to the Delhi Discoms including the petitioner is being done by SLDC, Delhi and therefore, NHPC does not have any control.



12. NHPC has clarified that the petitioner's share allocation of power from the generating stations is 146.28 MW and 593.67 MU per year (Annexure R 1 to NHPC's Reply) and the weighted composite tariff from these generating stations comes around to Rs.3.27 per unit which is very reasonable as per present market rates. NHPC has stated that the reasons given by the petitioner for surrender are not logical and justifiable as the petitioner is surrendering only the power from selected three generating stations which is costlier than others. NHPC has averred that the power supplied by its generating stations consists of both cheaper and costlier source and mix of such power to the beneficiaries is required so as not to burden any particular beneficiary with the relatively costlier power and in case, every beneficiary starts surrendering such so called 'costlier power', then it will not be in the interest of the generators and will be detrimental for development of hydro potential in the country.

Reply of THDC Limited

13. THDC has taken a preliminary objection to the maintainability of the petition. THDC has stated that the petitioner can only challenge the rights and obligations under the Power Purchase Agreement entered into between the parties and seek orders on the disputes arising out of the PPA. THDC has averred that the petitioner cannot challenge the allocation of power to the petitioner or its predecessor in interest made by the Government of India and that too, at the instance of Government of National Capital Territory of Delhi and Delhi Transco Limited, the predecessor in interest of petitioner. THDC has submitted that reallocation of the cap city contracted by the petitioner to others and foreclosure and surrender of the allocated capacity and other such matters are within the purview of the Central Government and is possible only in the event and



to the extent, the Central Government is able to identify an alternative procurer. Accordingly, the petitioner's prayers for directions to the Central Government to reallocate the share of the petitioner in the old generating stations to others are outside the purview of the present petition. THDCIL has submitted that it is not open to the petitioner to seek any direction for change in the allocation by raising a dispute under Section 79(1)(f) of the Act.

14. On merits, THDC has submitted that the petitioner had entered into a binding, concluded and enforceable PPA dated 23.3.2011 with THDC for purchase of power of the specified contracted capacity from Tehri HPP (1000MW), Koteshwar HEP (400 MW), Tehri PSP (100MW) and Vishnugad Pipalkoti HEP (444MW). THDC has pointed out that it is not open to the petitioner at its whims and fancies, to seek a unilateral modification, change or termination of the PPA entered into between the parties. THDC has stated that the petitioner and its predecessors have secured the benefits from the PPA in the past and the PPAs are applicable on a long term basis for 35 years from the COD of the generating station. THDC has submitted that it has made significant investment in its generating stations based on the long term PPAs and it is not open to the petitioner, having taken advantage of the PPA in the past, to wriggle out of the same now. THDC has submitted that

15. THDC has clarified that in response to the communications received from the petitioner, it had duly explained the position in regard to the obligations of the parties in its letters dated 26.12.2012 (Annexure R3 to THDCIL's reply) and 9.4.2013 (Annexure R4 to THDCIL's reply).



Reply of Ministry of Power, Government of India

16. The Ministry of Power, Government of India (hereinafter referred to as "MoP") in the reply filed vide affidavit dated 8.1.2016 has placed on record the views of the Government of India on the Petition filed by the Petitioner. The views of Government of India have been extracted as under:

"3. It is respectfully submitted that these Power Purchase Agreements are long term arrangements entered into by the Petitioner and other Distribution Companies and/or their Holding Companies and/or their Predecessor for procurement of power on long term basis at the instance of the respective States. The Government of India had allocated various quantum of power from different Generating Stations to the said Procurers including the Petitioner herein and/or its predecessor in interest at the instance of the respective State Governments/Utilities. The generating stations have been set up by the Central Public Sector Units on the basis of the long term Power Purchase Agreements entered into with the Procurers. The Procurers including the Petitioner are bound by the terms and conditions of the Power Purchase Agreements. The Procurers are not entitled to terminate the Power Purchase Agreement except in accordance with the provisions contained in the Power Purchase Agreements, either on account of the procurement of electricity at the price provided for in the Power Purchase Agreements or in accordance with the provisions of the Tariff Regulations and Tariff Orders notified by the Central Commission, being higher or otherwise. The Procurers are bound by the Power Purchase Agreements entered into as the Generating Companies, namely, the Central Public Sector Units had invested in and established the generating stations based on the allocation and the Power Purchase Agreements agreed to between the parties. A substantial part of the investment by CPSUs is by Government/Public fundings. Such investments made by the generating companies are to be served through the long term period agreed to between the parties.

4. That the Petitioner and other Procurers are also bound by the terms and conditions of any further agreement entered into with the Central Public Sector Units for renewal or extension of the Power Purchase Agreements entered into between the parties. Such extension had been voluntarily agreed to between the parties. Further, such extension has been provided in order to enable the parties to continue with the agreement beyond the initial period in view of the ability of the generating stations to continue to generate and supply electricity with renovation, modernisation and/or other up-gradation. These are essentially for the optimum use of resources.

5. That the Central Public Sector Units can approach the Ministry of Power, Government of India for re-allocation of the power to any Procurer, in case the Procurer does not wish to take the power at any time during the operation of the long term Power Purchase Agreements. The release of the Procurer from the obligations under the Power Purchase Agreement shall, however, be subject to the Ministry of Power, Government of India being able to re-allocate the power to any other Procurer and shall be limited to the



period for which such re-allocation fructifies. The obligation of the Procurer who wishes to surrender the power i.e. payment of fixed charges pertaining to the quantum of electricity allocated (in case of non-scheduling of power) shall continue till such time the re-allocation is made and another Procurer assumes the obligation to take electricity and pay for the fixed charges. Further, such release shall be restricted to the quantum and period for which the re-allocation is done.

6. That the very essence of allocation made and the Power Purchase Agreement entered into in pursuance thereof, is that the Procurer has a right to the allocated capacity at all times and accordingly, the obligation to pay the fixed charges for the power allocated continues even in case of non-scheduling of power. The purported cancellation or termination of the Power Purchase Agreement by the Procurer on unilateral basis was not contemplated at the time of allocation of power by the Ministry of Power, Government of India. Such an action on the part of the Procurer will seriously affect the scheme of investment to be made in the infrastructure such as power generation by the Central Public Sector Units. The investments made by the Central Public Sector Units are to be serviced and accordingly the Central Public Sector Units will be prejudiced if any Procurer decides to unilaterally terminate the agreement in the middle.

7. That the claims made by the Petitioner in the above petition for enforcement of the termination of the Power Purchase Agreements entered into on long-term basis on the ground that the power supplied from the generating stations is costlier ought not to be entertained. However, the determination of tariff terms and conditions including the issue of delay in the completion of the projects, consequent interest during construction etc. are to be allowed, are matters entirely within the domain and jurisdiction of the Central Electricity Regulatory Commission in accordance with the provisions of Sections 61, 62, 64 and 79 of the Electricity Act, 2003.”

Rejoinders of the Petitioner

17. The Petitioner in its rejoinders to the replies of the Respondents has reiterated that in terms of section 79(1)(a) and (f) of the Electricity Act, 2003, the Commission is empowered to adjudicate the dispute between the Petitioner and NTPC & Others as the questions of law and facts ultimately relate to the liability of the Petitioner to pay tariff and terms and conditions of supply of power from Central Generating Stations. The Petitioner has further submitted that as per Clause 11.1 of the PPA dated 8.5.2008 between NTPC and TPDDL, all disputes, claims and controversy between the Petitioner and NTPC fall under the jurisdiction of the Electricity Act, 2003 and hence require adjudication under the Electricity Act, 2003. In its rejoinder to the submissions of MoP,



the Petitioner has submitted that the affidavit of MoP not only ignores the law in relation to commercial contracts but also ignores the fundamentals for which reforms in the sector were introduced. The Petitioner has submitted that the submission of MoP that the parties are required to act only as per the provisions of the contract is not correct and rights under positive law cannot be taken away merely because there is no contractual stipulation enabling termination of the contract. The Petitioner has submitted that a right to terminate the commercial contract is inherent in law. The Petitioner has submitted that generating plants of CPSUs are implemented to match the requirements of power expected and subsequent factors if affecting the ability of the generating station to supply and/ or a distribution licensee to procure power have to be taken into account. The Petitioner has submitted that the distribution licensees cannot be burdened with the powers that are not needed to service the universal supply obligations.

Submissions during the hearing

18. Learned Senior Counsel for the Petitioner submitted that the prayer of the Petitioner essentially is that its liability to pay capacity charges in relation to these generating stations cannot arise after a direction to the contrary has been issued by the State Commission and PPAs have been terminated or have been discharged by operation of law. Learned Senior Counsel further submitted that the issue in the present petition arises with respect to liability to pay tariff (capacity charge) which is a matter arising out of and in relation to tariff. Learned Senior Counsel submitted that under section 79(1)(a) of the Act, the functions of the Commission include “to regulate the



tariff” and under section 79(1)(f), the Commission can adjudicate disputes in regard to matters under clauses (a) to (d) of Section 79(1) of the Act. The case of the Petitioner falls under clause (a) of section 79 of the Act. Learned counsel referred to the judgments of the Supreme Court in BSNL Vs Telecom Regulatory Authority of India {(2014) 3 SCC 222}, PTC India Ltd. Vs Central Electricity Regulatory Commission {(2010) 4 SCC 603} and submitted that the term “regulate is of wide amplitude” and cannot be restricted to determination of tariff only. Learned Senior Counsel further referred to the judgment of the Appellate Tribunal for Electricity dated 4.9.2012 in Appeal No. 94 of 2012 and submitted that as per the said judgment, the State Commission does not have the jurisdiction under section 86(1)(a) of the Act to adjudicate the dispute between a licensee and generating company in the matter of terms and conditions of a generating company owned and controlled by the Central Government including regulation of supply by the generating company in the event of default in payment. Learned Senior Counsel submitted that Appellate Tribunal has clearly held that only the Central Commission has the jurisdiction to adjudicate the dispute involving generating companies owned and controlled by Central Government in the matter of tariff and regulation of power supply and the jurisdiction of the State Commission under section 86(1)(f) of the Act is subject to section 79(1)(f) of the Act. Learned Senior Counsel further submitted that the ambit and scope of the powers of the Commission are wide enough to encompass within itself the reliefs sought by the Petitioner. Learned Senior Counsel also submitted that the Commission has the inherent power under the Conduct of Business Regulations to resolve the issues which relate to tariff payments and this is a fit case for exercising the inherent power.



19. Learned counsel for NTPC submitted that in respect of each of the generating stations there exists valid, binding, concluded and legally enforceable PPAs. Each of the PPAs provides for the terms and conditions for generation and sale of electricity by the Central Generating Companies to the Petitioner, duration, renewal of the PPA and other terms and conditions governing the Agreement. As regards the tariff, PPA provides that it shall be as per the determination by the Commission from time to time. Learned counsel further submitted that there is no provision in the PPA authorizing either NTPC or the Petitioner to terminate the PPA at an early date and the parties are required to perform the contractual obligations for the entire duration of the PPA and its renewed terms. Learned counsel submitted that there cannot be any unilateral termination of the PPA as sought by the Petitioner. Learned counsel for NTPC submitted that the petition is not maintainable as there is valid dispute which can be adjudicated by the Commission under section 79(1)(f) of the Act. As regards the prayer of the Petitioner to render advice to the Central Government, learned counsel submitted that the Central Commission in exercise of its power under section 79(2) cannot direct the Central Government to implement certain aspects of the matters concerning generation and sale of electricity in the country.

Analysis and Decision:

20. We have carefully considered the rival submissions as regards the maintainability of the petition.

21. The Petitioner in the present petition has sought a direction/advice in exercise of



powers under the Electricity Act, 2003 to the Central Government to allocate the Petitioner's entire share of firm power from the power stations of NTPC, NHPC and THDC. The Petitioner has further sought a direction for closure/reallocation of old stations which have outlived their lives. The Respondents have taken a preliminary objection with regard to the maintainability of the Petition and have also made submissions with regard to merit of the issues involved.

22. We shall take up the issue of maintainability first. It was argued on behalf of the Petitioner that the function of the Central Commission under clause (a) of subsection (1) of Section 79 of the Electricity Act, is not limited to the determination of tariff but the function assigned is of "regulation" of tariff of the generating companies owned or controlled by the Central Government. It was urged that the word "regulate" has a very wide connotation. In this regard reliance was placed on the judgments of the Hon'ble Supreme Court in cases reported as (i) U.P. Co-Op Cane Unions Federations Vs West U.P. Sugar Mills Association [(2004) 5 SCC 430], (ii) PTC India Ltd Vs Central Electricity Regulatory commission [(2010) 4 SCC 603] and (iii) BSNL Vs Telecom Regulatory Authority of India [(2014) 3 SCC 222]. It was submitted on behalf of the Petitioner that in the ultimate analysis the dispute relates to payment of tariff by the Petitioner to NTPC, NHPC and THDCIL, and therefore, adjudication of the dispute falls within the scope of clause (f) of sub-section (1) of Section 79.

23. The legal position is fully settled that "power to regulate is very wide and the power to regulate tariff includes any power incidental or consequential thereto so as to make the power of regulation purposeful and effective. However, in the present case,



the dispute raised and consequential prayers made in the petition have no relationship with regulation of tariff. Relevant provisions of the Act to regulate tariff of Central Generating Stations under section 79 are extracted below:

“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;

.....

(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;

(2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:-

(i) formulation of National electricity Policy and tariff policy;

(ii) promotion of competition, efficiency and economy in activities of the electricity industry;

(iii) promotion of investment in electricity industry;

(iv) any other matter referred to the Central Commission by that Government.”

As per the clause (a) of sub-section (1) of Section 79 of the Act, the Central Commission has the power to regulate the tariff of the generating companies owned or controlled by the Central Government. Under Section 79(1) (f) of the Act, the Central Commission has the power to adjudicate the dispute involving generating company or transmission licensee in respect of clauses (a) to (d) of sub-section (1) of Section 79 of the Act. The legal position is fully settled that “power to regulate” is very wide and the power to regulate tariff includes any power incidental or consequential thereto so as to make the power of regulation purposeful and effective. Therefore, in all matters



connected with the regulation of tariff of the generating companies owned or controlled by the Central Government shall be regulated by the Central Commission and the disputes arising therefrom shall be adjudicated by the Central Commission. This position has been affirmed by the Appellate Tribunal in judgments dated 4.9.2012 in Appeal Nos. 94 and 95 of 2012. The relevant observations of the Appellate Tribunal are extracted as under:

31. As pointed out by the learned Counsel for the NTPC, the term 'Regulate' used in Section 79 (1) (f) of the Act has got a wider scope and implication not merely confined to determination of tariff.

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 licensees 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.

35. As indicated above, the Tariff Regulations 2009 and the Regulation of Power Supply Regulations, 2010 providing for the terms and conditions of tariff and Regulation of Supply are clearly matters involving a generating company covered under Section 79 (1) (a) and, therefore, would squarely fall within the scope of Section 79 (1) (f) of the Electricity Act, 2003.”

Thus, in the above judgments, the Appellate Tribunal has held that the scope of the powers of the Central Commission in the context of Section 79(1)(b) and (f) of the



Act pertains to terms and conditions of tariff which includes determination of tariff, its method of recovery, payment security mechanism and enforcing the recovery of tariff through regulation of power supply.

24. The Petitioner has sought directions to Central Government to re-allocate the power allocated to the Petitioners to other States. MoP has made its position clear about the policy of allocation and re-allocation of power from the Central Generating Stations including NTPC, NHPC and THDC. It is entirely within the purview of the Central Government to allocate or reallocate power from the Central Generating Stations to the beneficiaries and the same being not covered under regulation of tariff under Section 79(1)(a) of the Act cannot be subject to adjudication under Section 79(1)(f) of the Act by this Commission. Therefore, the prayer of the Petitioner for issue of directions to the Central Government to allocate the Petitioner's entire share of power from the generating stations of NTPC, NHPC and THDC to power deficit States/Utilities cannot be entertained as the same is beyond the scope of the power vested in the Commission under Section 79 (1) (a) and (f) of the Act. However, the Petitioner may approach the Central Government with its grievance for redressal.

25. The Petitioner has also submitted that in terms of Regulation 42 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff Regulations), the Petitioner can seek a direction from this Commission to Central Government to allocate the shares of Petitioner in the generating stations of NTPC, NHPC and THDC to others. As per Note 2 under Regulation 42 of the 2014 Tariff Regulations, the beneficiaries intending to surrender part of their share of power



to other States inside or outside the regions shall have to approach the Central Government for re-allocation of power and only after re-allocation by Central Government, the liability for payment of fixed charges during the period of re-allocation will be governed by the said provision. This provision does not enable the Commission to issue directions to the Central Government for re-allocation of power of the Petitioner to other State(s).

26. The Petitioner has sought directions/advice of the Central Commission under Section 79 (2) of the Act to allocate the Petitioner's entire firm share of the powers to other deficit States/Utilities. The Commission is of the view that no such advice can be issued in the proceedings initiated by a contracting party (in this case, the Petitioner) against the other contracting parties (in this case NTPC, NHPC and THDC). Under subsection (2) of Section 79 of the Act, the Commission is required to advise the Central Government on formulation of National Electricity Policy and Tariff Policy and matters of common importance namely, promotion of competition, investment, efficiency and economy in activities of the electricity industry. The Petitioner is seeking a statutory advice to the Central Government for reallocation of power allocated to the Petitioner from the Central Generating Station of NTPC to any other party. In our view, statutory advice can be rendered by the Commission to the Government in the matters concerning overall interest of the electricity industry and cannot be invoked to address the individual grievances of a particular entity. In our view, the Commission cannot render any statutory advice on the subject to the Central Government.

27. The Petitioner has sought direction for closure/re-allocation of old generating



stations, namely BTPS, Anta, Auriya and Unchahar-I as they have outlived their useful lives. The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 defines de-commissioning as under:

“ ‘De-Commissioning’ means removal from service of a generating station or unit thereof or transmission system including communication system or element thereof, after it is certified by the Central Electricity Authority or any other authorized agency, either on its own or on an application made by the project developer or the beneficiaries or both, that the project cannot be operated due to non-performance of the assets on account of technological obsolescence or uneconomic operation or a combination of these factors.”

Therefore, for de-commissioning of the generating station, the procedure laid down in the above regulation needs to be complied with. It is pertinent to mention that BRPL and BYPL have filed Petition No. 86/MP/2016 seeking directions in this regard. The Commission will take an appropriate view in the said case after hearing all parties. Therefore, the issue cannot be decided in a petition filed under Section 79 (1) (a) read with Section 79 (1) (f) of the Act.

28. In view of the above decision, the prayers of the Petitioner cannot be maintained in an adjudication proceedings filed under Section 79 (1) (f) of the Act or under the advisory jurisdiction of the Commission under Section 79 (2) of the Act.

29. The Petition is disposed of in terms of the above directions.

Sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(Gireesh B. Pradhan)
Chairperson

