

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

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

**Date of Order: 17<sup>th</sup> April 2017**

**Petition No.301/MP/2015**

**In the matter of**

Adjudication of disputes and seeking analogous reliefs under Section 79 (1) (a) and section 79(1) (f) of the Electricity Act, 2003 and the Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010.

**And**

**In the matter of**

BSES Yamuna Power Ltd.,  
2<sup>nd</sup> Floor, B Block  
Shakti Kiran Building,  
Karkardooma, New Delhi-110092

**....Petitioner**

**Vs**

1. General Manager (Commercial)  
NTPC Limited,  
NTPC Bhawan, Scope Complex,  
7, Institutional Area, Lodhi Road, New Delhi
2. Joint Secretary (Power)  
Ministry of Power,  
Shram Shakti Bhavan,  
Rafi Marg,  
New Delhi-110001
3. Secretary (Power)  
Govt. of NCT of Delhi,  
8<sup>th</sup> Level, B-Wing,  
Delhi Secretariat,  
New Delhi, 110002

**...Respondents**

## **Petition No. 302/MP/2015**

### **In the matter of:**

Adjudication of disputes and seeking analogous reliefs under Section 79(1)(a), Section 79 (1)(f) of the Electricity Act,2003 and the Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010.

### **And**

### **In the matter of:**

BSES Rajdhani Power Ltd  
BSES Bhawan  
Nehru Place  
New Delhi – 110019

...**Petitioner**

**Vs**

1. General Manager (Commercial)  
NTPC Limited  
NTPC Bhawan, Scope Complex,  
7, Institutional Area, Lodhi Road, New Delhi

2. Joint Secretary (Power)  
Ministry of Power  
Shram Shakti Bhavan  
Rafi Marg  
New Delhi-110001

3. Secretary (Power)  
Govt. of NCT of Delhi  
8<sup>th</sup> Level, B-Wing  
Delhi Secretariat,  
New Delhi, 110002

...**Respondents**

### **Parties Present**

Shri Buddy Ranganadhan, Advocate, BRPL& BYPL  
Shri Arijit Mishra, Advocate, BRPL& BYPL  
Ms. Malvika Prasad, Advocate, BRPL& BYPL  
Shri Hasan Murtaza, Advocate, BRPL& BYPL  
Shri Sameer Singh, BYPL  
Shri Nishant Grover, BYPL  
Shri Mayank Ahlawat, BYPL  
Shri M.G. Ramachandran, Advocate, NTPC  
Ms. Poorva Saigal, Advocate, NTPC

Ms. Anushree Bardhan, Advocate, NTPC  
Shri Manoj Mathur, NTPC  
Shri Prashant Chaturvedi, NTPC  
Shri Shankar Saran, NTPC  
Shri Gaurav Nand, Consumer Representative

### ORDER

In the present petitions, the Petitioners, BSES Yamuna Power Ltd.(BYPL) and BSES Rajdhani Power Ltd.(BRPL), have made the following prayers, namely:

- “(a) To admit the petition
- (b) To hold that the Petitioner stands discharged from the PPAs entered into between the Petitioner and NTPC for power stations mentioned under Table A, B and C in the present petition
- (c) Direct the Respondent No.1 to stop the supply to the Petitioner and stop billing the fixed charges, energy charges and any other charges pertaining to the said stations of the Petitioner with immediate effect
- (d) 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 power station mentioned in table-A,B and C to other power states/utilities
- (e) Grant ad-interim reliefs in terms of prayer clause (b) and/or (c) above
- (f) Pass such other or further orders as the Ld. Commission may deem fit and proper in the facts and circumstances of the case.”

2. The Petitioners are the distribution licensees in the National Capital Territory of Delhi and have been granted licences to distribute electricity in Central & East Delhi and in South & West Delhi respectively by Delhi Electricity Regulatory Commission (DERC).

3. Government of National Capital Territory of Delhi issued a set of policy directives under which with effect from 1.4.2007 the distribution licensees were required to make their own arrangements for procurement of power for supply to the

consumers. Consequently, DERC vide its order dated 31.3.2007 reassigned all the PPAs to the distribution licensees including the Petitioners as per their load profile. Thus, since 1.4.2007, the responsibility for arranging power for their respective areas of distribution has been vested in the respective distribution company.

4. The Petitioners have submitted three categories of generating stations of NTPC Ltd namely, Generating Stations of which cost is disallowed by DERC (Table A); Generating Stations with extremely high plant cost which have outlived their useful life (Table B); and Future Stations of NTPC (Table C) about which the Petitioners have sought adjudication of disputes. Under Table A, there are three generating stations, namely Anta Gas Station, Auraiya Gas Station and Dadri Gas Station. Under Table B, Badarpur TPS has been mentioned. Under Table C, five stations are common to both BRPL and BYPL namely, Anta Gas II, Auraiya Gas-II, Koldam, North Karanpura and Lata Tapovan. In addition, BRPL has included six more stations of NTPC, namely, Singrauli Stage III, Tanda TPS II, Tapovan Vishnugad, Meja Stage-I, Gidderbaha and Bilhaur.

5. As regards the first and second categories of the Generating Stations of NTPC Limited, the Petitioners have submitted that the Commission has determined the tariff of these generating stations by order dated 15.5.2014 in respect of Anta GPS, order dated 6.8.2013 in respect of Auraiya GPS, and order dated 16.7.2013 in respect of Dadri Gas and order dated 16.12.2013 in respect of Badarpur TPS. The energy charges were determined as per the extant Tariff Regulations. The Petitioners have submitted that subsequently, DERC by its order dated 29.9.2015 disallowed the costs of the Anta, Auriya and Dadri generating stations on the ground

that the power purchase cost from these gas based generating stations should not be considered into the total power purchase cost after the expiry date of PPA dated 5.6.2008 i.e. 31.3.2012 due to their high cost of generation. DERC also disallowed the cost of procurement from these generating stations in its earlier PPAC order dated 12.6.2015 for Q-2, 3 and 4 of FY 14-15. Aggrieved by the DERC order dated 29.9.2015, the Petitioners filed an appeal before Appellate Tribunal for Electricity which is pending for disposal. The Petitioners vide their letter dated 4.9.2015 informed NTPC that they would discontinue the procurement of power from the Anta, Auriya and Dadri generating stations if DERC disallows the cost of power to be procured from these stations. In response, NTPC vide letter dated 28.9.2015 informed the Petitioners that they are liable for payment of all applicable tariff as per the PPA and in case of non-payment of dues, NTPC would be constrained to take action as per the Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 (Power Supply Regulations). The Petitioners have submitted that notwithstanding the DERC order dated 29.9.2015 and the Petitioners' refusal to schedule power from these three generating stations, SLDC Delhi is continuing to schedule power from the generating stations to maintain the technical minimum standard and NTPC is continuing to bill fixed and energy charges to the Petitioners. The Petitioners vide their letters dated 5.4.2014, 8.7.2014, 26.6.2015, 30.6.2015, 6.7.2015, 31.8.2015 and 22.9.2015 requested to the Central Government, Ministry of Power and GNCTD for surrender and reallocation of the power supply from the above generating stations. The Petitioners have submitted that a dispute between the Petitioners and NTPC Limited has arisen in respect of the tariff determined by this Commission and the power from these generating stations is required to be apportioned to other beneficiaries excluding the Petitioners. Based on

the submissions made, the Petitioners have sought directions to NTPC Ltd to stop the supply of power from these generating stations to the Petitioners and stop billing the fixed charges, energy charges and any other charges with immediate effect.

6. As regards the Badarpur Thermal Power Station (BTPS), the Petitioners have submitted that the said station has outlived its useful life and has been named as one of the most inefficient, costly and polluting stations in the country by Centre for Science and Environment. BTPS has incurred additional expenses on Renovation and Modernization (R&M). Despite the huge expenditure, the generating station is not able to achieve the performance standards set by this Commission and has been allowed to operate on relaxed norms. The Petitioners have averred that investments on R&M of this generating station is leading to higher capacity charges and its operation on relaxed operating norms results in higher Energy Charge Rate. The Petitioners have submitted that though the Commission has in its order dated 23.5.2012 has recommended for phasing out Units 1, 2 & 3 of BTPS in near future, NTPC Limited has not phased out the said units.

7. As regards the generating stations covered under Table C, the Petitioners have submitted that the PPAs in relation to these generating stations (Anta Gas-II, Auriya Gas-II, Koldam, North Karanpura Lata Tapovan, Singrauli Stage-III, Tanda TPS-II, Tapovan Vishnugad, Mejia Stage-I, Gidderbaha and Bilhaur) were signed long back with DBV/DTL/Discoms. Pursuant to DERC's order dated 31.3.2007, the capacities in these plants under the PPAs signed by DBV/DTL were allocated to BRPL, BYPL, TPDDL, NDMC and MES. Except Koldam which was commissioned in July 2015, other projects are excessively delayed and are yet to achieve COD. The

Petitioners have submitted that NTPC is stated to have informed the Petitioners that due to non-availability of gas, implementation of other generating stations has been delayed. The Petitioners have submitted that due to the inordinate and unexplained delay in commissioning of the above projects, the Petitioners have made alternative arrangements to meet their power requirements. The Petitioners have urged that because of inordinate delay in commercial operation of the generating stations, the PPAs have been frustrated. The Petitioners have averred that neither party assumed that commercial operation of the generating stations would get delayed by more than 15 years. According to the Petitioners, sale and purchase of power from the generating stations for which PPAs were entered into in 1999 and 2002 would result in performance of obligations which are significantly different from the obligations undertaken at the time of signing of the PPAs because since the execution of the PPAs, cost of construction of the generating stations has substantially increased. Therefore, according to the Petitioners, if the obligations under the PPAs are enforced on commercial operation of the generating stations, these obligations would be substantially different from those assumed under the PPAs.

8. The Petitioners have submitted that the Petitioners are bound to take measures for the efficient and economical use of resources and for safeguarding of consumers' interest and at the same time recover the cost of electricity in a reasonable manner. The Petitioners have urged that it is incumbent on the Commission to take steps which would encourage efficient and economical use of resources as well as for safeguarding consumers' interest.

9. The Petitioners have submitted that the Petitions fall within the jurisdiction of

the Commission in the light of the ratio of the judgment dated 4.9.2012 rendered by Appellate Tribunal for Electricity in appeal Nos.94 and 95 of 2012.

10. Notices were issued to the respondents to file their replies. Replies to the petition have been filed by NTPC Ltd. and Government of India, Ministry of Power.

### **Reply of NTPC**

11. NTPC in its reply has submitted that the directions sought in the petition are misconceived and are liable to be dismissed for the following reasons:

(a) The petitions have been filed under section 79(1)(f) of the Act which provides for adjudication of disputes between NTPC as a generating company and the Petitioners as licensees in relation to generation and supply of power by NTPC to the Petitioners. No issue on the aspect of tariff determination has been raised by the Petitioners in the present petitions. The Petitioners cannot challenge the allocation of power to the Petitioners or its predecessor in interest made by the Government of India at the instance of the Government of NCTD. Therefore, directions sought by the Petitioners to the Central Government to allocate the entire share of power of the Petitioners in the generating stations of NTPC specified in Tables A, B and C is totally outside the purview of the present petitions.

(b) The Petitioners have entered into binding, concluded and enforceable PPA dated 5.6.2008 with NTPC for purchase of power of the specified contracted capacities from the various generating stations of NTPC in continuation of the earlier PPAs entered into, as more fully stated in the said PPA. The Petitioners have entered into Supplementary PPA dated 29.3.2012 for



extension of PPAs beyond the period of 25 years in case of coal based generating station and 15 years in case of gas based generating station of NTPC beyond 31.3.2012. The Petitioners having entered into binding and concluded PPAs pursuant to allocations made by Government of India cannot now seek any directions for change in allocation by raising a dispute under section 79(1)(f) of the Act. The re-allocation of contracted capacity to others permitting the Petitioners to foreclose and surrender the capacity and other such matters are within the domain of the Central government and is possible in the event and only to such extent the Central Government is able to identify an alternative procurer for the contracted capacity or any part thereof. The issue relating to the Central Government finding an alternate buyer cannot be a subject matter of petitions under section 79(1)(f) of the Act.

(c) The PPAs are applicable on a long term basis for the life of the power stations. The benefits, rights and obligations of the Petitioners cannot be segregated either in the form of period or capacity and have to be enforced in an integrated manner. NTPC has made significant investment in the Renovation and Modernization of the stations based on the long term PPAs and having taken advantage of the PPAs in the past, it is not now open to the Petitioners to wriggle out of the PPAs on the grounds mentioned in the petitions or otherwise. The regulatory power of the Commission to determine the tariff and also to regulate generation and sale of electricity cannot extend to terminating the PPAs.

(d) Reference to various orders passed by DERC cannot in any manner justify the Petitioners from not performing the obligations under the PPAs. The

Petitioners can only request or represent to the Central Government for the re-allocation of the contracted capacity and in the event, the Central Government is able to identify an alternative procurer, the Petitioners can seek release from their obligations to the extent and for the period for which such alternative arrangement is available. The Petitioners cannot as a matter of right be entitled to contend that they can unilaterally seek the closure of the PPAs.

(e) NTPC has made significant investments and financial commitments in new generating stations for which long term PPAs have been entered into by the Petitioners. NTPC has furnished the details of the expenditure incurred by it up to October 2015 on the upcoming generating stations:

S. No	Project	Current Approved Cost (₹ in crore)	Cumulative Expenditure (₹ in crore)
1	Lata Tapovan	1527	1,42
2	North Karanpura	14,367	2,214
3	Koldam	Station declared 18.7.2015	COD from
4	Tanda TPS-II	9,189	873
5	Tapovan Vishnugad	3,846	2,606
6	Meja Stage I	10,830	4003
7	Bilhaur	FR under approval	555

(f) The implication of the delay in the commissioning of the projects including whether it is attributable to NTPC or not, the consequence of the same including on the IDC, IEDC etc. would be considered by the Commission after the generating stations have been commissioned by NTPC. At this stage, it is premature for the Petitioners to raise the above issues.

## Reply of Ministry of Power

12. 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 Petitions filed by the Petitioners. 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 funding. 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.”

### **Rejoinder of the Petitioners**

13. The Petitioners in their rejoinders have submitted that the cases of the Petitioners are entirely covered by the Judgment dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (BRPL V DERC & Others and BYPL V DERC & Others) rendered by the Appellate Tribunal for Electricity. The Petitioners have submitted that in terms of the said Judgment, anything involving the generating stations of NTPC as to generation or supply of electricity is governed by Section 79 (1)(f) of the Act. The Petitioners have further submitted that they are not challenging the allocation of power made by the Government of India. The Petitioners are only seeking a declaration that the PPAs with NTPC are to be discharged/terminated as DERC has disallowed the power procurement from Anta, Auryia and Dadri Gas Station; as BPTS is producing power at very high rates even after the completion of its useful life; and COD of future stations have been unduly and unreasonably delayed by NTPC. The Petitioners have further submitted that in terms of Note-2 under

Regulation 42 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff Regulations), the Petitioners can seek a direction from this Commission to Central Government to allocate the shares of Petitioners in the generating stations of NTPC to others.

### **Submissions during the hearing**

14. Learned Counsel for NTPC Ltd submitted that the jurisdiction of the Central Commission over the Central Generating Companies in terms of Section 79(1)(a) of the Act has not been disputed and the issue of maintainability of the petitions has been raised only with regard to the prayers/subject matters involved in these petitions. Learned Counsel further submitted that the prayers of the Petitioners seeking advice to the Central Government or to issue necessary directions with regard to the discharge from the PPAs do not fall within the scope and ambit of the adjudication of disputes under Section 79 (1) (f) of the Act. Learned Counsel further submitted that the advisory jurisdiction of the Central Commission under Section 79 (2) of the Act cannot be invoked by way of quasi-judicial proceedings. Further, word “shall” indicated in Section 79(2) is not with reference to issuance of directions but the duty to aid and advise the Central Government on policy issues in electricity sector. Learned Counsel further submitted that the PPA to procure power is a contractual document subject to regulation of tariff by the Commission and only matters involving interpretation, scope and application of the terms and conditions of the PPA executed by the parties are required to be adjudicated under Section 79(1) (f) of the Act. Learned Counsel further submitted that the terms and conditions of the PPAs are not in conflict with the regulations notified by the Commission and therefore, the PPAs cannot be interfered with under either Section 79(1) or 79(2) of the Act.

15. Learned Counsel for the Petitioners submitted that the obligations of the Petitioners under the PPAs cannot be continued on account of the orders of DERC disallowing the cost of procurement of power from Antra, Auriya and Dadri generating stations of NTPC. Learned Counsel further submitted that the Appellate Tribunal in its judgment dated 26.5.2006 in Appeal No. 4 of 2005 (M/s Siel Ltd. Vs PSERC &Ors. Ad other connected appeals) has held that the Commission can issue directions relating to matters having a bearing on and nexus with the determination and fixation of tariff and such directions shall be binding on all persons and authorities including the State Government. Accordingly, the Petitioners have prayed for issuance of directions to the Central Government in this matter. Learned Counsel further submitted that in terms of Section 46 of the Indian Contract Act, 1872, non-commissioning of the projects within a reasonable time of the execution of the PPAs amounts of breach of obligations by NTPC and therefore, the Petitioners need to be discharged from the obligations under the PPAs.

**Analysis and Decision:**

16. We have carefully considered the submissions of the Petitioners and NTPC. The Petitioners in the present petitions have sought directions/advice of the Central Commission in exercise of powers under section 79 of the Electricity Act, 2003 to the Central Government to reallocate the Petitioner`s entire share of firm power from the generating stations of NTPC to others in order to save the Petitioners from paying the fixed cost of these generating stations as the high cost of power from these generating stations has been disallowed by DERC while approving the ARR of the Petitioners under Section 86(1)(a) read with Rule 8 of the Electricity Rules. The Petitioners have further submitted that BPTS has outlived its useful life and directions need to be issued to close down the plant. The Petitioners have further

sought directions to be discharged from the PPAs in respect of the upcoming plants of NTPC on account of inordinate delays in commissioning of these plants. NTPC has taken the position that the prayers of the Petitioners in the present petitions fall outside the purview of the powers of the Commission under Section 79(1)(f) and 79 (2) of the Act and therefore, no relief can be granted to the Petitioner in exercise of adjudicatory powers or advisory powers of the Commission.

17. As regards the maintainability of the petitions under section 79(1)(f) of the Act, the Petitioners have argued that the function of the Central Commission under clause (a) of sub-section (1) of Section 79 of the Electricity Act is not limited to the determination of tariff but to all matters having a bearing and nexus with the determination on fixation of tariff and therefore, disputes with regard to such matters can be adjudicated under Section 79(1)(f) of the Act. In this connection, the Petitioners have relied on the judgment of the Appellate Tribunal for Electricity dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (BRPL V DERC & Others and BYPL V DERC & Others). As regards the maintainability of the petition under Section 79(2) of the Act, the Petitioners have submitted that the Appellate Tribunal in its judgment dated 26.5.2006 in Appeal No.4 of 2015 and connected appeals (M/s Siel Ltd Vs. PSERC &Ors) has observed that the Commission can issue orders and directions to all persons and authorities including State Government on matters which have a nexus with determination and fixation of tariff and since the issues raised by the Petitioners have a nexus with tariff, the Commission can issue directions to the Central Government in the matter. NTPC has submitted that the prayers of the Petitioners are neither covered under Section 79 (1) (f) of the Act nor under Section 79 (2) of the Act and therefore, the petitions are misconceived and are liable to be

dismissed.

18. Section 79 of the Act, particularly clauses (a) and (f) of sub-section (1) and sub-section (2) of Section 79 of the Act which are relevant for the purpose of these petitions 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 judgment, 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. The Petitioners have sought directions to NTPC, a Central Generating Company, to stop supply power from some of its generating stations to the Petitioners and declaration that the Petitioners are discharged from the obligations under the PPAs entered into with NTPC. In our view, the judgments of the Appellate Tribunal in Appeal Nos.94 and 95 of 2012 does not support the case of the Petitioners as these prayers are beyond the scope of regulation of tariff of the generating stations of NTPC.

19. The Petitioners have 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. 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. The Petitioners have relied upon the judgments of the Appellate Tribunal dated 26.5.2006 in Appeal No. 4 of 2005 (M/s Siel Ltd Vs PSERC & Ors. And other connected appeals) in support of their contention that the Commission's directions shall be binding on all persons and authorities including the Central Government and therefore, the Commission can issue directions to the Central Government for re-allocation of power. Relevant observations of the Appellate Tribunal in the said judgment are extracted as under:

“58. Having held so, we would examine the question whether the State Government independently, directly and by itself, without being reached through the Board, will be bound by the directions of the Commission. The answer lies in Section 61 of the Act of 2003 and Section 28 of the Act of 1998

and other allied provisions. The Appropriate Commission while determining tariff under Section 61 of the Act is required to be guided by the factors and parameters enshrined therein. One of the factors on the basis of which tariff is to be determined is the consumer interest. Sub-clause (d) of Section 61 requires the Commission to safeguard the interest of the consumers and ensure that the recovery of the cost of electricity is effected in a reasonable manner. This was also one of the requirements under Section 28(2)(e) of the Act of 1998. The Commission, therefore, is/was bound to determine fair, prudent and reasonable cost of the RSD project which is to be allocated to the Board, in consonance with the interest of the consumers. At the same time recovery of the cost of electricity is/was to be made in a reasonable manner. The aforesaid provisions of the Act of 2003 and the Act of 1998 are not hedged in with the limitation that in case the State Government or any other authority has allocated an unwarranted cost to the generator or a licensee, it can not be interfered with, even when such a cost may be imprudent and unjust and not in the interest of the consumers. Otherwise the cost loaded by the State Government on the Board will have to be allowed by the Commission for the purposes of tariff and the ARR of the Board. In case such a limitation is read, into the aforesaid provisions, the purpose of the Act including Section 61 will be frustrated. Since the Commission has the power to determine the tariff and the ARR of a utility, it has all the incidental and ancillary powers to effectuate the purpose for which power is vested in it. Consequently, directions or orders of the Regulatory Commission made for the purpose of determination of tariff and ARR in consonance with the provisions of the Act are binding on all the concerned parties including the State and the Board.”

As per the above judgment, the directions or orders issued by the Regulatory Commissions in discharge of their functions under the Act for determination of tariff shall be binding on all parties including the Governments. Therefore, directions issued by the Central Commission to the Central Government in the course of discharge of its statutory functions shall be binding on the Central Government. However, in a case where the directions sought to be issued to the Central Government fall outside the scope of the functions of the Central Commission, no such directions can be issued. Allocation and re-allocation of power from the Central Generating Stations to the States is purely a policy matter on which the Central Government is only competent to take decisions as considered appropriate. Therefore, the prayer of the Petitioners for issue of directions to the Central

Government to allocate the Petitioner's entire share of power from the generating stations of NTPC 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 Petitioners may approach the Central Government with their grievance for redressal, if so advised.

20. The Petitioners have also submitted that in terms of Note 2 under Regulation 42 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 (2014 Tariff Regulations), the Petitioners can seek a direction from this Commission to Central Government to allocate the shares of Petitioners in the generating stations of NTPC 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 Petitioners to other State(s).

21. The Petitioners have sought directions/advice of the Central Commission under Section 79(2) of the Act to re-allocate the Petitioner's entire firm share in the generating stations of NTPC to other deficit States/utilities. Under sub-section (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. 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 and therefore, the Commission cannot render any statutory advice on the subject to the Central Government.

22. The Petitioners have submitted that the generating stations mentioned in Table C of the Petitions, namely, Anta Gas II, Auraiya Gas-II, Koldam, North Karanpura and Lata Tapovan, the PPAs were signed long back and the commissioning of these projects except Koldam are excessively delayed. The Petitioners have submitted that due to excessive delay, the Petitioners have made alternative arrangements to meet their power requirements and therefore, the PPAs in respect of these generating stations have been frustrated. NTPC has submitted that it has made significant investment in the new generating stations for which long term PPAs have been entered into by the Petitioners. NTPC has submitted that the implication of the delay in the commissioning of the project including its impact on the IDC and IEDC would be considered by the Commission at the time of determination of tariff. We agree with the submissions of NTPC. These issues will be taken up at the time of determination of tariff after the COD of these projects and the Petitioners shall have opportunity to make their submissions on time overrun and cost overrun in the relevant petitions. It is premature to raise this issue at this stage, especially in a petition seeking adjudication of the dispute. Accordingly, no direction on this prayer of the Petitioners can be issued.

23. The Petitioners have sought direction for closure/re-allocation of old generating station, namely, BTPS as it has outlived its useful life. The Petitioners

have filed Petition No. 86/MP/2016 seeking directions in this regard. 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.”

24. The Commission has referred the matter to the CEA in the said petition. In view of the same, this issue cannot be decided in the present petition filed under Section 79 (1) (a) read with Section 79 (1) (f) of the Act. The Commission will take an appropriate view in the said case after hearing all parties.

25. In view of the above discussion, we hold that the prayers of the Petitioners to discharge them from the PPAs entered into between the Petitioners and NTPC and seeking directions/advice to the Central Commission to reallocate the Petitioner`s entire share of firm power from the generating stations of NTPC to others is not maintainable before this Commissions in terms of the Section 79 (1) (a) read with Section 79 (1) (f) and Section 79 (2) of the Act.

26. The Petitions are 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**