

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Coram:

Shri P. K. Pujari, Chairperson

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of order: 1st July, 2021

Petition No. 60/MP/2021 along with IA No. 12/2021

In the matter of

Petition under Sections 60, 61, 79(1)(f), 86(1)(e) and 29(5) of the Electricity Act, 2003 read with Regulation 17 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 seeking adjudication of disputes with NTPC Limited and Northern Regional Load Despatch Centre.

And

In the matter of

BSES Yamuna Power Limited
Shakti Kiran Building, Karkardooma,
New Delhi - 110 032.

....Petitioner

Vs

1. NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi - 110 003.

2. Northern Regional Load Despatch Centre
18 A, Shaheed Jeet Singh Sansanwal Marg,
Katwaria Sarai, New Delhi - 110 016.

....Respondents

And

Petition No. 65/MP/2021 along with IA No. 31/2021 and IA No. 33/2021

In the matter of

Petition under Sections 60, 61, 79(1)(f), 86(1)(e) and 29(5) of the Electricity Act, 2003 read with Regulation 17 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 seeking adjudication of disputes with NTPC Limited and Northern Regional Load Despatch Centre.

And

In the matter of

BSES Rajdhani Power Limited
BSES Bhawan, Nehru Place,
New Delhi - 110 019.

....Petitioner

Vs

1. NTPC Limited
NTPC Bhawan, Scope Complex,
7, Institutional Area, Lodhi Road,
New Delhi - 110 003.

2. Northern Regional Load Despatch Centre
18 A, Shaheed Jeet Singh Sansanwal Marg,
Katwaria Sarai, New Delhi - 110 016.

....Respondents

The following were present:

Shri Amit Kapur, Advocate, BYPL and BRPL
Shri Anupam Varma, Advocate, BYPL and BRPL
Shri Rahul Kinra, Advocate, BYPL and BRPL
Shri Aditya Gupta, Advocate, BRPL and BYPL
Shri M. G. Ramachandran, Sr. Advocate, NTPC
Ms. Poorva Saigal, Advocate, NTPC
Ms. Megha Bajpeyi, BRPL
Shri Anjum Khurshid, NTPC
Shri Somara Lakra, NRLDC
Ms. Anisha Chopra, NRLDC
Shri Ashok Rajan, NRLDC

ORDER

The Petitioners, BSES Yamuna Power Limited (Petition No. 60/MP/2021) and BSES Rajdhani Power Limited (Petition No. 65/MP/2021), have filed the present

Petitions purported to be filed under Section 60, Section 61, Section 79(1)(f), Section 86(1)(e) and Section 29(5) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 17 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (hereinafter referred to as 'the 2019 Tariff Regulations') seeking adjudication of disputes with the Respondent, NTPC Limited (in short 'NTPC') and Northern Regional Load Despatch Centre (NRLDC) with regard to supply of power from Stage-I National Capital Thermal Power Station at Dadri (in short, 'Dadri-I generating station'). As the issues involved in the both the Petitions are identical, they are taken up together. The Petitioners have made the following prayers:

Petition No.60/MP/2021:

“(a) Admit the Present Petition;

(b) Set aside the Letters dated 30.11.2020 and 7.1.2021 issued by NTPC to the Petitioner;

(c) Set aside the Invoices raised by NTPC with respect to the Dadri-I stations:

(i) from 1.12.2020 to 31.12.2020 being No. NTPC/ Commercial/ Energy Bill/ 01 2021 dated 6.1.2021 for an amount of Rs. 34,009,123/-.

(ii) from 1.1.2021 to 31.1.2021 being No. NTPC/ Commercial/ Energy Bill/ 02 2021 dated 5.2.2021 for an amount of Rs. 34,212,576/-.

(d) Declare that w.e.f. 00:00 Hrs of 1.12.2020, the Petitioner is not liable for any costs towards NTPC's Dadri-I Plant.

(e) Direct the Respondents NTPC and NRLDC not to:

(i) schedule power to the Petitioner;

(ii) raise any bills on the Petitioner;

(iii) invoke the consolidated Letter of Credit; and/or

(iv) levy late payment surcharge against the Petitioner with respect to NTPC's Dadri-I plant w.e.f. from 30.11.2020;”

Petition No.65/MP/2021:

“(a) Admit the Present Petition;

(b) Set aside the Letters dated 30.11.2020 and 7.1.2021 issued by NTPC to the Petitioner;

(c) Set aside the Invoices raised by NTPC with respect to the Dadri-I stations:

(i) from 1.12.2020 to 31.12.2020 being No. NTPC/ Commercial/ Energy Bill/ 01 2021 dated 6.1.2021 for an amount of Rs. 308,775,143/-.

(ii) from 1.1.2021 to 31.1.2021 being No. NTPC/ Commercial/ Energy Bill/ 02 2021 dated 5.2.2021 for an amount of Rs. 310,159,248/-.

(d) Declare that w.e.f. 00:00 Hrs of 1.12.2020, the Petitioner is not liable for any costs towards NTPC’s Dadri-I Plant.

(e) Direct the Respondents NTPC and NRLDC not to:

(i) schedule power to the Petitioner;

(ii) raise any bills on the Petitioner;

(iii) invoke the consolidated Letter of Credit; and/or

(iv) levy late payment surcharge against the Petitioner with respect to NTPC’s Dadri-I plant w.e.f. from 30.11.2020;”

2. The Petitioners have also filed Interlocutory Applications bearing IA No.12/2021 in Petition No. 60/MP/2021 and IA No. 31/2021 and IA No. 33/2021 in Petition No. 65/MP/2021 inter alia for interim directions and have made the following prayers:

IA No.12/2021 in Petition No. 60/MP/2021

“(a) Restrain NTPC from taking any coercive actions including invocation of LC / imposition of regulation of power/non-levy of LPSC for non-payment of an amount of Rs. 34,212,576/- pertaining to Dadri-I for the period 1.1.2021 to 31.1.2021 which is part of the Invoice No. NTPC/ Commercial/ Energy Bill/02 2021 dated 5.2.2021, till the disposal of the present Petition;

(b) Restrain NTPC Ltd. from raising any further bills on the Applicant w.e.f. from 30.11.2020; and/or seeking payment of the Bill dated 5.2.2021 with respect to NTPC’s Dadri-I plant till the disposal of the present Petition; and..”

IA No. 31/2021 in Petition No. 65/MP/2021

"(a) Restrain NTPC from taking any coercive actions including invocation of LC / imposition of regulation of power/non-levy of LPSC for non-payment of an amount of Rs. 31,01,59,248/- pertaining to Dadri-I for the period 1.1.2021 to 31.1.2021 which is part of the Invoice No. NTPC/ Commercial/ Energy Bill/02 2021 dated 5.2.2021, till the disposal of the present Petition;

(b) Restrain NTPC Ltd. from raising any further bills on the Applicant w.e.f. from 30.11.2020; and/or seeking payment of the Bill dated 5.2.2021 with respect to NTPC's Dadri-I plant till the disposal of the present Petition; and ..."

IA No. 33/2021 in Petition No. 65/MP/2021

"(a) Restrain NTPC from taking any coercive actions including invocation of LC / imposition of regulation of power supply from any NTPC Station/non-levy of LPSC on account of non-payment of the deemed generation/ capacity charge pertaining to Dadri-I Station raised after 30.11.2021 till the disposal of the present Petition.

(b) Restrain NTPC Ltd. from seeking payment of the Invoices with respect to NTPC's Dadri-I plant after 30.11.2021 till the disposal of the present Petition; and

(c) Rectify the errors detailed at Paragraph 9(a) of the present Application that have crept in the Record of Proceeding for the hearing dated 19.03.2021..."

Submissions of the Petitioners

3. The Petitioners, in support of their prayers, have mainly submitted as under:

(a) The Petitioners and the Respondent No. 1, NTPC had entered a consolidated Power Purchase Agreement dated 5.6.2007 (in short, 'the PPA') for various generating stations of NTPC power from which was allocated to the Petitioners. The provisions of the PPA, *inter alia*, provided that the validity of the PPA including Dadri-I generating station was up to 31.3.2012 or 25 years for coal based generating stations from the Commercial Operation Date (CoD) of the last unit of the respective stage/ generating station, whichever is later and that validity of an individual generating station may be extended, renewed or replaced by another agreement and if the Petitioners continued to receive

power from any generating station after the expiry of the above period without being further renewed, the terms of the PPA would continue.

(b) Subsequently, on 29.3.2012, the Petitioners and NTPC entered into a Supplementary Power Purchase Agreement dated 29.3.2012 (in short, 'the SPPA') extending the expiry dates of the various generating stations of NTPC including Dadri-I generating station. As per the SPPA, the parties decided to extend the validity of the PPA for all the generating stations contained in Article 13.1(A) of the PPA in a composite manner till the end of life of the respective generating station considered in the tariff orders or Regulations issued by the Commission or Government of India allocations, whichever is later.

(c) By orders dated 6.7.2012 in Petition No. 255/2009 and dated 11.4.2017 in Petition No. 330/GT/2014, the Commission has approved CoD of the Dadri-I generating station as 1.12.1995. Accordingly, Dadri-I generating station completed 25 years of operation from its CoD on 30.11.2020.

(d) Through Regulation 17 of the 2019 Tariff Regulations, the Commission has for the first time introduced special provisions for tariff for thermal generating station which have completed 25 years of operation from their CoD; i.e.

(i) Regulation 17(1) gives an opportunity to the distribution companies and generating companies to mutually agree on an arrangement based on scheduled generation, w.r.t. a thermal generating station that has completed 25 years of operation from CoD.

(ii) In case no arrangement is agreed upon, Regulation 17(2) envisages the right to the beneficiaries i.e. the Petitioners to exercise 'first right of refusal' for the generating stations that have completed 25 years from CoD to discontinue to the terms of the PPA.

(e) The Petitioners by their communications dated 23.11.2020, issued prior to expiry of 25 years of Dadri-I generating station from its CoD, had requested NTPC to provide for an arrangement in terms of Regulation 17(1). However, no response was received from NTPC in this regard. Consequently, the Petitioners vide their letters dated 30.11.2020 have exercised their right of first refusal of not continuing with the drawl of power from Dadri-I generating station w.e.f. 00:00 hrs of 1.12.2020 in terms of Regulation 17(2) of the 2019 Tariff Regulations.

(f) NTPC on 30.11.2020, instead of proposing any arrangement under Regulation 17, has *inter alia* stated that at present NTPC is not considering/ proposing any arrangement for any of its generating stations and would not allow the Petitioners to discontinue drawl of power from Dadri-I generating station. This stand of NTPC is in clear violation of Regulation 17 of the 2019 Tariff Regulations.

(g) The intent and scheme of Regulation 17(1) is to enable parties to a PPA, on completion of 25 years, to mutually discuss and arrive at a mutual arrangement should they wish to continue supply under that PPA. In such an event, the generating company sells power from a generating station which has recovered its capital cost as well as depreciation. Further, the beneficiary has to make payment of energy charges and capacity charges only as per power scheduled and not otherwise. This is meant to save the standby costs of capacity charges by the Petitioners and tariff of their consumers in case power is not scheduled on account of 'merit order' despatch principles. Such reduced charges, in effect, meet the objects of the Act and in particular, Section 61 of the Act read with the National Electricity Policy and the Tariff Policy by lowering the tariff to be paid by the end consumers, rationalizing the tariff and safeguarding interests of both the utility and its consumers. The interest of the consumers is as important as that of the generating companies as noted by the

Hon'ble Supreme Court of India in the case of A.P. Electricity Regulatory Commission v. R.V.K. Energy (P) Ltd., [(2008) 17 SCC 769].

(h) Regulation 17(2) provides the right of first refusal to the beneficiary, such as the Petitioners, to procure power under the arrangement entered into as per Regulation 17(1). Such a right of refusal has been provided for the beneficiary and its end consumers who have already paid towards the capital cost of the generating stations including depreciation, servicing of debt and equity throughout its useful life.

(i) Vide letter dated 16.3.2021, DERC has also taken cognizance of the issue of non-scheduling of power from Dadri-I generating station by the distribution companies of Delhi, including the Petitioners, in discharge of its function under Section 86(1)(b) of the Act and after deliberation with the stakeholders (including NTPC and SLDC), DERC has requested the Ministry of Power for de-allocation of Delhi's full share of power from Dadri-I generating station. In the said letter, *inter alia*, DERC has also observed that as per Regulation 17 of the 2019 Tariff Regulations, the first right of exiting the PPAs from the generating stations on completing life of 25 years is conferred to the beneficiaries and all the distribution companies of Delhi have confirmed to exit the BPSA/PPA for Dadri-I generating station permanently w.e.f. 1.12.2020.

(j) On 22.3.2021, Ministry of Power has issued guidelines for enabling the distribution companies to either continue or exit from PPAs after completion of the term of PPA i.e. beyond 25 years or a period specified in the PPA and to allow flexibility to the generators to sell power in any mode after the State/distribution companies' exit from PPA.

(k) Despite the PPA and the SPPA with respect to Dadri-I generating station having lapsed, NTPC is coercing the Petitioner to schedule power and is raising invoices towards fixed charges aggregating to approximately Rs. 35

crore per month even when the Petitioners are not availing any power from Dadri-I generating station. NTPC is also coercing the Petitioners to make payments of the said invoices. The Petitioners have been making payments of the invoices under protest. In case the payments against invoices raised by NTPC are not made, NTPC might take unlawful and coercive steps which may lead to Letter of Credit (LC) defaults and banking defaults. Further, in the event, the banks do not replenish the LC, the same would be treated as violation of order of the Ministry of Power, Government of India dated 28.6.2019, in terms of which NRLDC would not schedule power to the Petitioners even from other short-term sources. This is in effect coercing the Petitioners into foregoing their rights enshrined under Regulation 17 and will cause an adverse effect on the competition in electricity industry. Accordingly, appropriate directions are warranted against NTPC under Section 60 of the Act.

(l) This is causing a burden on tariff of the consumers of the Petitioners, essentially for a generating station from which no actual power is being scheduled. Even though the Petitioners have duly exercised their first right of refusal under Regulation 17(2) of the 2019 Tariff Regulations, the consumers of the Petitioners are making payments of approximately Rs. 35 crore per month.

(m) There cannot be any question of paying fixed charges for contracted capacity for the simple reason that after 30.11.2020, there is no contractual arrangement in place as is contemplated by Regulation 17 of the 2019 Tariff Regulations.

(n) NTPC's contention that the PPA and the SPPA are composite arrangement for procurement of power by the Petitioners from various generating stations of NTPC and are not amenable to severability is misconstrued. In the PPA and the SPPA themselves, there are terms regarding severability of the contract and they provide for different end dates and validity

of different generating stations. The SPPA mentions that its validity shall be subject to the orders and regulations of this Commission.

(o) Even though the SPPA contemplates extension of the end life of the generating station through Tariff Orders or Regulations issued by this Commission or Government of India allocations, whichever is later, such arrangement has to be consistent with Regulation 17 of the 2019 Tariff Regulations in terms of the settled ratio laid down by the Hon`ble Supreme Court in the case of PTC v. CERC, [(2010) 4 SCC 603]. Therefore, the terms of the PPA cannot be in contravention and derogation of the regulations.

(p) The 2019 Tariff Regulations have primacy and overriding effect on the Policy of Central Government and/or Government of India allocations with respect to the useful life of the generating station. Further, the provisions of useful life of the generating station under the 2019 Tariff Regulations are distinct from the power of Central Government/ Government of India to re-allocate the power from particular generating station under Regulation 55 of the 2019 Tariff Regulations.

(q) Re-allocation of power by the Ministry of Power is not germane for the Petitioner to exercise its rights under Regulation 17 of the 2019 Tariff Regulations, which is independent of any right available to the beneficiaries under Regulations 55 of the 2019 Tariff Regulations. Regulation 55 has to be harmoniously read with Regulations 17 of the 2019 Tariff Regulations, which *inter alia* allows the beneficiary a right to enter into a mutually agreed arrangement with a generator, which has completed 25 years from its CoD and/or exit the PPA in the absence of such mutually agreed arrangement.

(r) Even NRLDC is relying on the communications of NTPC to reject the Petitioners' request not to schedule power from the Dadri-I generating station.

Actions of NRLDC are in direct contravention of the provisions of Section 28(3)(a) of the Act. The Petitioners by communications dated 30.11.2020 had categorically informed NRLDC about the fact that w.e.f. 00:00 hrs of 1.12.2020, there existed no PPA between the Petitioners and NTPC in respect of Dadri-I generating station. The Petitioners had unequivocally requested NRLDC not to schedule power to the Petitioners. However, NRLDC has failed to appreciate that being a creature of the statute, it has to act within the four corners of the statute and in this context, it has failed to discharge its statutory obligation and compliance with the provisions of the Act.

(s) NTPC has also sought to contend that Dadri-I generating station is essential for Islanding Scheme of NCT of Delhi and also for the security of power supply to Delhi. The said contention is premised on a Draft Proposed Islanding Scheme of Delhi which is still under finalization. Also, the perceived requirement of NTPC's Dadri-I generating station under the Islanding Scheme cannot form basis of violation of Regulation 17 of the 2019 Tariff Regulations.

(t) Power from Dadri-I generating station was supplied to the Petitioners at average cost of about Rs. 6.50 per kWh in financial year 2019-20 and is one of the costliest generating stations providing power to the entire National Capital Region. ECR (energy charge rate) of Dadri-I generating station for last two years and up to December 2020 clearly demonstrates that it ranges from Rs 4.47 per kWh to Rs 2.902 per kWh. Due to high ECR, Dadri-I generating station does not qualify in merit order despatch for scheduling and the Petitioners cannot procure power from it whereby Dadri-I generating station remains inoperative for most of the time in the year. Perusal of the NTPC's Tariff Petition for control period 2019-24 of Dadri-I generating station reveals that the expenses sought for the said control period have considerably increased year to year from the expenses approved in the earlier control period of 2014-19. This is despite the fact that the generating station has completed its useful life of 25 years as on 30.11.2020.

(u) Contention of NTPC that due to installation of the Emission Control System (ECS) and recovery of its cost being spread over 15 years, the useful life of Dadri-I generating station has been increased by 15 years, is misconceived. Installation of ECS under Regulation 29 of 2019 Tariff Regulations cannot be considered as an extension of useful life by 15 years. Issue regarding in-principle approval for installation and allowance of additional capital expenditure for implementation of ECS by NTPC is pending in Petition No. 414/MP/2020 and it has no relevance in interpretation or applicability of Regulation 17 of the 2019 Tariff Regulations.

4. By Record of Proceedings for the hearing on 19.3.2021, the Respondents were directed to file their reply. Both the Respondents (NTPC as well as NRLDC) have filed their reply and the Petitioners have also filed their rejoinder.

Reply of NTPC

5. The Respondent, NTPC vide its reply dated 30.3.2021, has mainly submitted the following:

(a) Provisions of Regulation 17 of the 2019 Tariff Regulations read with Statement of Objects and Reasons (SOR) dated 22.3.2019 issued with the 2019 Tariff Regulations, the special provisions as contained in Regulation 17 can be invoked only when the generating company and the beneficiaries duly agree to the arrangement as provided therein.

(b) Special provisions of Regulation 17 were envisaged as alternative to the generators who have not availed Renovation and Modernization (R&M) and special allowance under Regulations 27 and 28 of the 2019 Tariff Regulations respectively. Regulation 17 can, therefore, be triggered by the generating company not opting for special allowance or R&M.

(c) Regulation 17 does not deal with the duration of the PPA nor it contemplates the effect on the PPA where the initial useful period of thermal generating station of 25 years expires. It neither contemplates the rights and obligations of the generators and the beneficiaries under the PPA upon the expiry of 25 years of initial useful life or the implications of R&M or otherwise the decision of the generator to continue with the operation of the generating station with special allowance as provided in Regulations 27 and 28 of the 2019 Tariff Regulations.

(d) Interpretation of Regulation 17 as advanced by the Petitioners is not only contrary to the express language contained therein but also against the principle settled by the Hon'ble Supreme Court in the case of Tata Power Co. Ltd. v. Reliance Energy Limited, [(2009) 6 SCC 659] which stipulate that a generator is free to enter into an agreement and cannot be compelled to agree to the term proposed by the procurer. There cannot be a unilateral change to an existing PPA at the instance of one party, when the other party is not agreeable to the same.

(e) Regulation 17 of the 2019 Tariff Regulations is really an option for a generator to decide on invoking the arrangement under the said Regulation and enter into an arrangement for the same with the beneficiaries and/or to provide a first right of refusal. If the generator does not wish to do so, there cannot be any compulsion. There is no option 'to exit or extend' under Regulation 17 at the instance of one of the parties unilaterally as is sought to be contended by the Petitioners.

(f) Regulation 17 is an optional arrangement and does not lead to an automatic termination of the PPA at the expiry of 25 years. In terms of Regulation 17, a special dispensation has been provided for the generating company to propose an arrangement whereunder the target availability and

other norms including the capacity charges and energy charges can be agreed to be related to the scheduled energy instead of declared availability, in which case it is open to the beneficiary to consent to the same at its discretion. If, however, the beneficiary decides not to accept the above arrangement proposed by the generator, the generator can offer the power to others. There is no mandate cast upon NTPC to necessarily propose an arrangement on expiry of 25 years.

(g) The Petitioners have entered into the SPPA dated 29.3.2012 with NTPC consciously and voluntarily extending the validity of the PPA dated 5.6.2008 in respect of a number of generating station including Dadri-I generating station. The SPPA provides that the validity of the agreement shall continue "till the end of the useful life of the respective generating station considered in the tariff orders or Regulations issued by CERC or Government of India allocation, whichever is later".

(h) Having solemnly agreed to the extension of validity period for all the generating stations covered by the agreement without any limitation of 25 years since the validity is to be determined in terms of the Regulations or Orders of this Commission or allocation of the Government of India, whichever is later, there cannot be any claim either directly or indirectly by the Petitioners that the PPA expired on 30.11.2020.

(i) As on date, tariff orders of this Commission have determined the initial useful life of the Dadri-I generating station till May 2021. The 2019 Tariff Regulations contemplate extension of useful life beyond 25 years and the Government of India allocation is subsisting. In each of the Tariff Regulations notified by the Commission, there is a provision for R&M, life extension, etc. requiring NTPC and the beneficiaries to continue the arrangement of generation, supply and purchase of electricity even beyond the initial useful life

of 25 years. In such circumstances, the PPA continues to remain valid and binding between the parties beyond 25 years.

(j) Since the PPA and the SPPA are composite agreements in respect of the procurement of power by the Petitioners from a number of generating stations of NTPC including Dadri-I generating station, the rights and obligations of the respective parties are to be considered on a uniform and composite basis with reference to all such generating stations. It is not open to the Petitioners to selectively act with regard to any one of the generating stations, namely, Singrauli STPS, Rihand (Stage I), Anta, Auraiya, Dadri Gas, Unchahar (Stage I) and Dadri-I generating stations. It is not open for the Petitioners to make any claims on the basis of severability/ different validity periods, etc.

(k) The Petitioners in Review Petition Nos. 44 and 45 of 2017 filed before DERC had themselves specifically pleaded that the PPA had been entered into on a collective/ composite basis and the various generating stations cannot be discriminated. DERC in its order dated 22.3.2018 has also observed that the bundled/ consolidated PPA does not provide for partial termination of the PPA with regard to the generating stations/ units and the PPA needs to be enforced in a combined manner in regard to all the generating stations/ units mentioned therein.

(l) After taking advantage of the factum of collective/ composite PPA before DERC, the Petitioners now seek a plea of severability or different validity periods. It is not open for them to approbate and re-probate on its stands regarding the validity of the PPA and the SPPA.

(m) Also, by Tariff Order dated 28.1.2020, DERC has allowed the procurement of power by the Petitioner from Dadri-I generating station for the financial year 2020-21 in terms of the tariff Petitions filed by the Petitioners.

(n) The Petitioner cannot selectively apply Regulation 17 in respect of the Dadri-I generating station while continuing to avail power from Singrauli and Rihand generating stations, both of which have completed 25 years of initial useful life before Dadri-I generating station.

(o) The PPA/ Tariff Regulations cannot be read in absolute sense that the maximum period of a generating station is 25 years only, merely because 'useful life' is defined in the 2019 Tariff Regulations to be 25 years. The same definition also contemplates for an extension of useful life.

(p) In terms of Regulation 28 of the 2019 Tariff Regulations, the generator may decide to continue the generation of electricity at the generating station after the initial useful life of 25 years by availing the special allowance provided therein. In such a case, the beneficiaries who have entered into the PPA shall continue to have the rights and obligations to procure the power as per the tariff determined by the Commission in terms of the Tariff Regulations.

(q) The Commission in its order dated 11.4.2017 in Petition No. 330/GT/2014, has extended the life of the Dadri-I generating station at the end of tariff period i.e. 31.3.2019. In the said order, the Commission had allowed NTPC to avail special allowance for financial year 2018-19 which clearly establishes the intent to operate the generating station beyond 25 years. The Petitioners have neither objected to the same nor have challenged the said decision of the Commission. Thus, extension of the useful life has already been implemented.

(r) By the first amendment to the 2019 Tariff Regulations, the Commission has notified the amortization of servicing of additional capital cost on account of ECS over the balance useful life of the generating station or unit thereof plus fifteen years in case the generating station or unit thereof is in operation for

more than 15 years as on the date of operation of ECS. Since ECS of Dadri-I generating station has been established in July, 2020 (i.e. before 25 years of life), the recovery of the cost of ECS will be spread over to next 15 years from date of operation of ECS. Thus, the Commission necessarily envisages the continued operation of Dadri-I generating station even after the initial useful life of 25 years.

(s) Further, the PPA read with the SPPA, continues to remain valid so long as the Central Government allocation subsists and the parties would continue to be bound by the terms contained thereto. As per the definition of the term 'beneficiary' read with Regulations 42 and 55 of the 2019 Tariff Regulations, until the power currently allocated to the Petitioners is re-allocated to other beneficiaries, the liability to pay the capacity charges would be of the Petitioners. The obligations of the Petitioners can be foreclosed only if the Government of India re-allocates the power from Dadri-I generating station to any other procurer.

(t) The aforesaid position has been reiterated by the Commission in its order dated 17.4.2017 in Petition Nos. 301/MP/2015 and 302/MP/2015 filed by BYPL. The nature and status of the Central Government allocation has also been recognized by this Commission in its order dated 9.3.2017 in Petition No. 20/MP/2017 (Kanti Bijlee Utpadan Nigam Limited v. Central Transmission Utility and Ors.). Reliance has also been placed on DERC's order in Review Petition No. 44/2017 filed by the Petitioners.

(u) DERC's letter dated 16.3.2021, as relied upon by the Petitioner, clearly fortifies the position in regard to the allocation of power and the only avenue by which the Petitioners can be relieved is when the Central Government identifies an alternative purchaser who will assume the obligations of the Petitioners.

(v) There is no merit in the contention of the Petitioners that appropriate directions are warranted against NTPC under Section 60 of the Act. There cannot be an abuse of dominant position when the contracting party is insisting on the duration of the PPA/SPPA to be maintained namely until the Government of India allocation subsists or as per Tariff Orders and Regulations notified by the Commission.

(w) It is not the case where NTPC is asking for enforcement of an onerous condition by virtue of its dominant position. It is a settled principle of law that in cases of agreements freely and voluntarily entered into, there can be no question of the party contending that it is not bound by the terms and conditions. Reliance has been placed on the judgment of Hon'ble Supreme Court in case of Excise Commr. vs. Issac Peter [(1994) 4 SCC 104]. The said decision has also been considered by Appellate Tribunal for Electricity (APTEL) in the case of Indian Oil Corp. Ltd. vs. Gujarat State Petroleum Corp. Ltd. 2014 [ELR (APTEL) 579] to hold that the gas supply agreements entered into between the parties of their own volition for commercial purposes cannot be said to be an abuse of the dominant position.

(x) The issue of dominant position was also raised by Tata Power Delhi Distribution Company Limited before the Competition Commission of India in the context of NTPC generating stations and the validity of the long-term PPAs was upheld by the Competition Commission of India on the ground that the tariff determination by the Central Commission and the remedy to surrender the allocated power, sufficiently protects the interests of the consumers. Reliance has been placed on the Competition Commission's decision dated 12.10.2017 in Case No. 20 of 2017.

(y) The reliefs claimed by the Petitioners against NRLDC is contrary to the provisions of Section 28(3)(a) of the Act, in terms of which NRLDC is

responsible for optimum scheduling and despatch of electricity within the region in accordance with the contracts entered into with the licensees or the generating companies operating in the region. Thus, NRLDC is required to and has acted in accordance with the said provisions in scheduling and dispatch of electricity. NRLDC is not entitled to go into the dispute raised by the Petitioners on the status of the PPA.

Reply of NRLDC

6. NRLDC, vide its reply dated 15.4.2021 has submitted the following:

(a) NRLDC is scheduling the transaction for Central Generating Station/ Inter-State Generating Station based on the share allocation by MoP, as received from Northern Regional Power Committee (NRPC). As per NRPC Share Allocation Revision No. 2/2020-21 dated 16.10.2020, the Delhi State has a share allocation of 90% from Dadri-I generating station of NTPC and NRLDC has done the scheduling of power to all the beneficiaries as per NRPC allocation order. Even as per the latest Share Allocation Revision No.1/2021-22 dated 1.4.2021, the allocation from Dadri-I generating station remains unchanged and the same is scheduled to Delhi.

(b) The Petitioners have vide letters dated 30.11.2020 and 28.12.2020 requested for non-scheduling of power from Dadri-I generating station and in response, NRLDC vide its letters dated 1.12.2020 and 8.1.2021, asked the Petitioners to take up the matter with appropriate authority. Since NRLDC cannot adjudicate the issue and pending a consensus on the validity of contract between the parties, NRLDC would continue the scheduling as per the provisions of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (hereinafter referred to as 'the Grid Code'), requisition received from beneficiaries and NRPC allocation order.

Rejoinder of the Petitioners

7. The Petitioners, vide their rejoinder dated 7.4.2021, have mainly submitted as under:

(a) NTPC has failed to consider the mandate of Regulation 17 of the 2019 Tariff Regulations. Regulation 17(2) can be invoked by the beneficiaries in case no arrangement under Regulation 17(1) has been agreed between the generating station and the beneficiaries. Regulation 17(1) provides an opportunity to enter into a new arrangement for a generating station that has completed 25 years from its CoD in case they wish to continue the supply from the generating station beyond the period of 25 years of CoD.

(b) The first right of refusal as exercised by the Petitioners is in terms of Regulation 17 of the 2019 Tariff Regulations and there is no unilateral exercise of exit from PPA as contended by NTPC. Reliance placed on the judgment in case of Tata Power Co. Ltd. v. Reliance Energy Limited [(2009) 6 SCC 659] is misplaced and there has been no unilateral change/ or termination or exit of the PPA or the SPPA in the present case by the Petitioners. The PPA has lapsed in terms of the Regulation 17 of the 2019 Tariff Regulations since the Petitioners have exercised their right to discontinue the power supply from Dadri-I generating station under Regulation 17(2) of the 2019 Tariff Regulations. The judgment referred by NTPC categorically holds that a generating company is not beyond the regulatory purview of the Commission and the Regulations framed by the Commission are binding on a generator.

(c) NTPC's contention that the PPA/SPPA is still valid and subsisting between the parties is also erroneous. NTPC is deliberately confusing and obfuscating the issues regarding useful life. The useful life and/or extended life of the generating station have no relevance to applicability of Regulation 17. Also, the provisions of useful life of the generating station are distinct from the power of Central Government to re-allocate the power from a particular

generating station. The re-allocation of power as regard to the end life of the generating station has to be re-aligned as per the provisions of the 2019 Tariff Regulations.

(d) The Commission's order dated 11.4.2017 in Petition No. 330/GT/2014 provided for recovery of depreciation and cannot in any manner be construed for an automatic extension of the useful life of the Dadri-I generating station. The Petitioners vide their letters dated 30.11.2020 have categorically stated that if there are any amounts pending as regard to Dadri-I generating station on account of any unrecovered fixed costs such as depreciation limited to operation of the station upto 30.11.2020 as per the orders of this Commission, the same can be mutually settled between the parties subject to reconciliation as well as the approval of DERC.

(e) Even though the PPA is a consolidated one for the generating stations, the PPA and the SPPA provide for different dates for exit from different generating stations of NTPC. NTPC has failed to appreciate that the Doctrine of Severability is inherent in the PPA and the SPPA as also recognized under Regulation 17. Thus, the contention of NTPC that the PPA/SPPA are a composite agreement for various generating stations and not severable, is erroneous. The severable portion of the contract, which in facts of the present case stands overridden by Regulation 17, must be capable of being separated from the remainder of the agreement without affecting the meaning of the remainder.

(f) NTPC is deliberately confusing the issues in Review Petitions No.44 and 45 of 2017 with the present Petitions. The order in aforesaid review petitions was passed in the context of extension of supply of power from NTPC generating station in terms of the SPPA entered into between the parties i.e. allowance of power procurement costs of Anta, Auraiya and Dadri gas generating stations and did not involve the issue regarding severability of PPA

and SPPA or the lapse of PPA and SPPA after 25 years from CoD. However, the present Petitions deal with the applicability and the interpretation of Regulation 17 of the 2019 Tariff Regulations. Similarly, DERC's Tariff Order dated 28.8.2020 allowing power procurement costs is also not relevant to the present Petitions as the said order neither decides the useful life/ extended life of Dadri-I generating station nor in any manner impacts the mandate of Regulation 17 of the 2019 Tariff Regulations.

(g) Useful life and extension of useful life are different concepts as contemplated under Regulation 3(73) of the 2019 Tariff Regulations and cannot be confused to mean the same. Useful life of the generating station is defined to be 25 years for thermal generating station and during this time, generating stations are allowed to recover its capital expenditure from the beneficiaries. Once the entire depreciation is recovered, the obligation of the beneficiaries towards the fixed costs relating to capital expenditure incurred during the said life of the plant comes to an end. On the other hand, extension of useful life can happen by two modes i.e. R&M under Regulation 27 and special allowance under Regulation 28.

(h) Regulation 17, on the other hand, is a special provision which allows the beneficiaries to seek an arrangement from the generating station that have completed 25 years from CoD. There is no reference to useful life of the generating station. The arrangement can be entered into between the parties considering the balance unrecovered depreciation, extension of useful life and all other parameters. In case no arrangement is agreed upon, the generating station is free to sell its power to other beneficiaries in the manner it deems fit.

(i) NTPC's contention that DERC's letter dated 16.3.2021 further fortifies its contention that the only Central Government/ Government of India can relieve the obligations of the Petitioners towards NTPC, is erroneous. The perusal of the said letter itself shows that DERC has relied on the provisions of

Regulation 17 of the 2019 Tariff Regulations for de-allocating of power from Dadri-I generating station as all the distribution companies have confirmed the exit from the BSPA, PPA and SPPA from 1.12.2020.

(j) Re-allocation of power by Government of India is not germane for the Petitioners to exercise their rights under Regulation 17, which is independent of any right available to the beneficiaries under Regulation 55 of the 2019 Tariff Regulations. Regulation 17 provides a special right to the Petitioners to discontinue supply of power in existing terms and conditions. Reliance on the decision of the Commission dated 9.3.2018 in Petition No. 20/MP/2017 is misplaced as there is no unilateral termination/ exit of PPA by the Petitioner. Also, when the said order was passed, the specific provision regarding 'right to refusal' under Regulation 17(2) to the beneficiary was not present, which was first introduced under 2019 Tariff Regulations.

(k) Reliance on the judgments of Excise Commr. v. Issac Peter [(1994) 4 SCC 104] and Indian Oil Corp. Ltd. v. Gujarat State Petroleum Corp. Ltd. [2014 ELR (APTEL) 579] is also erroneous as question of whether the PPA or SPPA was freely entered into or not, is not there in the present case. The primary submission of the Petitioner is that the Petitioner can exercise the first right of refusal to discontinue supply from Dadri-I generating station upon completion of its 25 years of useful life on 30.11.2020.

8. The matters were called out for virtual hearing on 8.4.2021. During the course of hearing, learned counsel for the Petitioners and learned senior counsel for the Respondent, NTPC made detailed submissions relying upon their respective pleadings which are not reproduced hereunder for sake of brevity.

Analysis and Decision

9. Based on the submissions of the parties and documents on record, we have mainly to decide

Whether the PPA and the SPPA entered into between the Petitioners and NTPC are still valid and subsisting in respect of Dadri-I generating station? If Yes! Whether the Petitioner may exit from the agreement unilaterally?

10. The Petitioners have submitted that Regulation 17(1) of the 2019 Tariff Regulations enables the parties to mutually discuss the terms of power supply from a generating station after completion of 25 years from CoD of the generating station and arrive at a mutual arrangement should they wish to continue supply from the generating station while Regulation 17(2) provides for the first right of refusal to the Petitioners in case no arrangement has been reached as per Regulation 17(1). The Petitioners have submitted that since they were not agreeable to continue with the supply of power from Dadri-I generating station beyond 25 years from its CoD that got over on 30.11.2020, they had written to NTPC seeking an arrangement in terms of Regulation 17(1). However, as no arrangement was suggested or proposed by NTPC, the Petitioners have validly exercised their first right of refusal under Regulation 17(2) and thus, the Petitioners are not liable to schedule power or make payment of capacity charges in respect of Dadri-I generating station w.e.f. 1.12.2020.

11. *Per contra*, NTPC has submitted that Regulation 17 of the 2019 Tariff Regulations is an option provided to the generators to decide on an arrangement under the said Regulation and enter into an agreement for the same with the

beneficiaries and/or to provide a first right of refusal. If the generator does not wish to do so, there cannot be any compulsion to have an arrangement under Regulation 17(1). NTPC has further contended that there is no option 'to exit or extend' under Regulation 17 at the instance of one of the parties unilaterally as sought to be contended by the Petitioners. Also, there are no provisions in Regulation 17 which allow the beneficiaries to exit/terminate an existing PPA on the plea that 25 years of operation from its COD for a generating station has expired. It has been also submitted that the special provisions of Regulation 17 are envisaged as another alternative to the generators who have not availed R&M and Special Allowances respectively under Regulations 27 and 28 of the 2019 Tariff Regulations, both of which envisage the continued operation of the generating station beyond 25 years from CoD and Regulation 17 can be proceeded with only if the alternatives of R&M and Special Allowance are not adopted.

12. We have considered the submissions of the parties. Since arguments hinge around Regulation 17 of the 2019 Tariff Regulations, it is reproduced below:

“17. Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation:

(1) In respect of a thermal generating station that has completed 25 years of operation from the date of commercial operation, the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation.

(2) The beneficiary shall have the first right of refusal and upon its refusal to enter into an arrangement as above, the generating company shall be free to sell the electricity generated from such station in a manner as it deems fit.”

13. A simple reading of Regulation 17(1) connotes that a generating company and beneficiaries of its generating station may agree on an arrangement in respect of a thermal generating station that has completed 25 years of operation from its CoD. Such arrangement may include the provisions for target availability, incentive and recovery of energy charges as well as payment of the capacity charges based on the scheduled generation. Provision of payment of capacity charges based on scheduled generation is noteworthy as otherwise only energy charges are recovered based on scheduled generation while capacity charges are to be paid by beneficiaries based on availability declaration by the generating station. Similarly, Regulation 17 provides that target availability and incentive in respect of such generating stations may be as agreed between generating company and its beneficiary, while in case of generating stations that have not completed 25 years of operation after COD, there are specific provisions in the 2019 Tariff Regulations as regards target availability and incentive and that the generating station and beneficiary do not have option to negotiate on these issues. Further, Regulation 17(2) provides the beneficiary the first right of refusal for any arrangement under Regulation 17(1) and upon its refusal to enter into an arrangement, the generating company shall be free to sell the electricity generated in a manner as it deems fit. Clearly, the Regulation 17 is a special provision that has been carved out in respect of generating stations that have completed 25 years of operation after COD and is an exception to other provisions of the 2019 Tariff Regulations.

14. The period of 25 years of operation from CoD also has some significance, as it has been specified as the useful life of a thermal generating station as defined in Regulation 3(37) of 2019 Tariff Regulations, which is as under:

"3(73) 'Useful Life' in relation to a unit of a generating station, integrated mines, transmission system and communication system from the date of commercial operation shall mean the following:

(a) Coal/Lignite based thermal generating station 25 years

.....

Provided that the extension of life of the projects beyond the completion of their useful life shall be decided by the Commission on case to case basis;"

15. Further, 'Extended Life' has been defined in Regulation 3(24) of the 2019 Tariff Regulations as under:

"3(24) 'Extended Life' means the life of a generating station or unit thereof or transmission system or element thereof beyond the period of useful life, as may be determined by the Commission on case to case basis;"

16. Thus, the 2019 Tariff Regulations specifies the useful life of the coal/lignite based thermal generating station as 25 years and that the useful life of these generating station or unit thereof may be extended by the Commission on case to case basis.

17. Further, the 2019 Tariff Regulations provides for renovation and modernisation for the purpose of extension of life beyond the useful life of the generating station as under:

27. Additional Capitalisation on account of Renovation and Modernisation

(1) The generating company or the transmission licensee, as the case may be, intending to undertake renovation and modernization (R&M) of the generating station

or unit thereof or transmission system or element thereof for the purpose of extension of life beyond the originally recognised useful life for the purpose of tariff, shall file a petition before the Commission for approval of the proposal with a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension from a reference date, financial package, phasing of expenditure, schedule of completion, reference price level, estimated completion cost including foreign exchange component, if any, and any other information considered to be relevant by the generating company or the transmission licensee:

Provided that the generating company making the applications for renovation and modernization (R&M) shall not be eligible for Special Allowance under Regulation 28 of these regulations;

Provided further that the generating company or the transmission licensee intending to undertake renovation and modernization (R&M) shall be required to obtain the consent of the beneficiaries or the long term customers, as the case may be for such renovation and modernization (R&M) and submit the same along with the petition.

(2) Where the generating company or the transmission licensee, as the case may be, makes an application for approval of its proposal for renovation and modernisation (R&M), approval may be granted after due consideration of reasonableness of the proposed cost estimates, financing plan, schedule of completion, interest during construction, use of efficient technology, cost-benefit analysis, expected duration of life extension, consent of the beneficiaries or long term customers, if obtained, and such other factors as may be considered relevant by the Commission.

.....

(4) After completion of the renovation and modernisation (R&M), the generating company or the transmission licensee, as the case may be, shall file a petition for determination of tariff. Expenditure incurred or projected to be incurred and admitted by the Commission after prudence check, and after deducting the accumulated depreciation already recovered from the admitted project cost, shall form the basis for determination of tariff.

18. In terms of the Regulation 27, generating company that intends to undertake R&M of a generating station or unit thereof beyond the originally recognized useful life for the purpose of tariff is required to file a Petition before the Commission along with detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension from reference date, financial package, estimated

completion cost and schedule of completion, etc. Moreover, the generating company intending to undertake R&M is also required to obtain the consent of the beneficiaries and submit the same along with the Petition.

19. Another provision dealing with extension of useful life is contained in Regulation 28, that is extracted as under:

"28. Special Allowance for Coal-based/Lignite fired Thermal Generating station

(1) In case of coal-based/lignite fired thermal generating stations, the generating company, instead of availing renovation and modernization (R&M) may opt to avail a 'special allowance' in accordance with the norms specified in this Regulation, as compensation for meeting the requirement of expenses including renovation and modernisation beyond the useful life of the generating station or a unit thereof and in such an event, upward revision of the capital cost shall not be allowed and the applicable operational norms shall not be relaxed but the Special Allowance shall be included in the annual fixed cost:

Provided that such option shall not be available for a generating station or unit thereof for which renovation and modernization has been undertaken and the expenditure has been admitted by the Commission before commencement of these regulations, or for a generating station or unit which is in a depleted condition or operating under relaxed operational and performance norms;

Provided further that special allowance shall also be available for a generating station which has availed the Special Allowance during the tariff period 2009-14 or 2014-19 as applicable from the date of completion of the useful life.

(2) The Special Allowance admissible to a generating station shall be @ Rs 9.5 lakh per MW per year for the tariff period 2019-24.

(3) In the event of a generating station availing Special Allowance, the expenditure incurred upon or utilized from Special Allowance shall be maintained separately by the generating station and details of same shall be made available to the Commission as and when directed.

(4) The Special Allowance allowed under this Regulation shall be transferred to a separate fund for utilization towards Renovation & Modernisation activities, for which detailed methodology shall be issued separately."

20. In terms of Regulation 28, instead of availing R&M as provided under Regulation 27, the generating company may opt for availing special allowance to meet its expenses including R&M beyond the useful life of the generating station or unit thereof and in such an event, neither an upward revision of the capital cost nor any relaxation in applicable operational norms is to be allowed to such generating station. In such case, the generating station shall be allowed special allowance @ Rs. 9.5 lakh per MW per year for the tariff period 2019-24. It is pertinent to note that unlike Regulation 27, provisions of Regulation 28 do not require the beneficiaries' consent.

21. NTPC has relied upon definitions of 'useful life' and 'extended life' in the 2019 Tariff Regulations to contend that even if a generating station has completed 25 years, its useful life may get extended and in such a case, Regulation 17 is not required to be triggered. It has also submitted that Regulation 27 and Regulation 28 have provisions for extension of useful life of a generating station and that in case of generating stations that have extended useful life in terms of these regulations, there is deemed consent of beneficiaries and, therefore, Regulation 17 will have no applicability in such cases. NTPC has also relied upon the first amendment to the 2019 Sharing Regulations to argue that by installing emission control system, the useful life of a generating station gets extended. However, the issue before us is not whether useful life of a generating station gets extended when a generating station avails R&M or special allowance or installs emission control system; rather the issue sought to be decided is whether Regulation 17 can be invoked on completion of 25 years of operation of a generating station from its COD unilaterally. We note that

Regulation 17 is not linked to the useful life or extended useful life of a thermal generating station rather it explicitly mentions the period of 25 years for the provisions to kick in. In our view, when a specific period is mentioned in a regulation, it is incorrect to link it to useful life though the same also incidentally happens to be 25 years. Thus, Regulation 17 may be invoked once a generating station completes 25 years irrespective of it having completed its useful life or not. Therefore, Regulation 17 is neither an alternative provision to Regulation 27 and Regulation 28 nor its operation is linked in any manner to Regulation 27 and Regulation 28. It is an independent provision which comes into effect on completion of 25 years of useful life of a thermal generating station.

22. NTPC has submitted that Regulation 17 is an option provided to a generating company and that if the generating company does not provide an arrangement, provisions of this Regulation cannot be triggered. We note that Regulation 17(1) provides that “*the generating company and the beneficiary may agree on an arrangement*” in respect of generating station that have completed 25 years and, therefore, it would be incorrect to say that the option to propose an agreement under 17(1) vests only with the generating company. In fact, the regulation requires both the generating company and beneficiaries to agree on an arrangement beyond 25 years of useful life. In such cases, either party is entitled to initiate the process of reaching an arrangement and the other party has to either agree or disagree to the proposed arrangement. In case of agreement, the arrangement is made and in case of disagreement, the arrangement does not materialise. In the present case, the beneficiaries initiated the process by writing to NTPC to work on an arrangement in

terms of Regulation 17(1) of the 2019 Tariff Regulations, but NTPC did not respond and consequently, the arrangement envisaged under the said regulation did not materialise. Therefore, the contention of NTPC that Regulation 17 vests a discretion in the generating company only to initiate the process of reaching an arrangement cannot be countenanced.

23. NTPC has also relied upon the Explanatory Memorandum (EM) to the draft 2019 Tariff Regulations and the Statement of Objects and Reasons (SOR) to the 2019 Tariff Regulations. The relevant provisions of EM and SOR are reproduced as under:

Explanatory Memorandum:

*“3.5.8 Besides Special Allowance, the Commission has also proposed an alternate provision for thermal generating station which have completed 25 years of operation. **This provision will be available to those thermal generating stations, which have neither undertaken R&M nor availed Special Allowance.** Under this special provision, the generating company and the beneficiary may agree to enter into an arrangement, wherein the total cost (fixed and variable) of the generating station, as determined under these regulations, shall be recovered on scheduled generation basis. Further, under this provision, the beneficiary shall have first right of refusal and in the event of such refusal, the generating company shall be free to sell the electricity generated from such station in a manner it deems fit.”*

Statement of Object and Reasons:

“6.4 Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation [Regulation 17]

...

6.4.2 In the draft 2019 Tariff Regulation, this Regulation was placed after Regulation pertaining to Renovation and Modernisation (R&M) and Special Allowance which also kicks in only after completion of useful life of the generating station. Considering the fact that the Regulation pertaining to "Special Provision for Tariff..." is an optional tariff structure, the same is now placed under 'Chapter 4 - Tariff Structure'.

...

6.4.4 The Commission after reviewing the comments has decided to revise the Regulation to bring in the desired clarity. The objective of the Regulation was to introduce an enabling provision, where the recovery of both capacity charges and energy charges shall be linked to scheduled generation. Further, this provision is only optional, which may be exercised after completion of useful life of a thermal generating station, if both the beneficiary and the generating company agree. Accordingly, the Regulation has been amended to state that 'the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation'."

24. Relying upon the above-stated clauses of the Explanatory Memorandum and the Statement of Objects and Reasons, NTPC has contended that Regulation 17 has been envisaged as another alternative to the generating stations which have not availed R&M (under Regulation 27) or special allowance (under Regulation 28) and is merely an enabling provision/option which may be exercised after 25 years of operation of the generating station provided both the beneficiary and the generating company mutually agree. In our view, there is undue emphasis laid by NTPC on the word 'optional tariff structure' in the Statement of Objects and Reasons in relation to applicability of Regulation 17. As per Regulation 17(1), the generating company and the beneficiaries of the generating station may agree to an arrangement for supply of power from the generating station to the beneficiaries beyond 25 years as per the agreed terms and conditions including capacity charges, energy charges, target availability and incentive. To the limited extent of agreed terms and conditions regarding tariff as required under Regulation 17(1), the words "optional tariff structure" have been used in the Explanatory Memorandum and Statement of Objects and Reasons. These words by no means take away or dilute the spirit of

Regulation 17(1) requiring the generating company and the beneficiaries to enter into an arrangement after 25 years of useful life for supply of power on payment of tariff as per agreed terms and conditions. We have already pointed out earlier that Regulation 17(1) does provide an option to the generating station and the beneficiaries to enter into an arrangement and that in case no arrangement is reached, Regulation 17(2) gives an option to the beneficiaries to exercise its first right of refusal and in that event the generating station has the freedom to sell power to any other entity it deems fit. In our view, by placing reliance on the Statement of Objects and Reasons and the Explanatory Memorandum, NTPC has sought to give a meaning to Regulation 17 which is contrary to the expressed provisions of the Regulation itself. In *Bhaiji Vs Sub-Divisional Officer, Thandla* [(2003) 1 SCC 692], the Hon'ble Supreme Court has held as under:

“Reference to the Statement of Objects and Reasons is permissible for understanding the background, antecedent state of affairs, the surrounding circumstances in relation to the statute and the evil which the statute sought to remedy. The weight of the judicial authority leans in favour of the view that Statement of Objects and Reasons cannot be utilised for the purpose of restricting or controlling the plain meaning of the language employed by the legislature in drafting a statute and excluding from its operation such transactions which it plainly covers.”

25. When the provisions of the statute are clear and unambiguous, the Explanatory Memorandum and Statement of Objects and Reasons cannot be invoked to give an interpretation contrary to the plain and unambiguous provisions of the statute. The Commission is of the view that Regulation 17(1) cannot be interpreted in the manner as sought by NTPC by relying on the Explanatory Memorandum and the Statement of Objects and Reasons.

26. NTPC has placed reliance on the Commission's order dated 11.4.2017 in Petition No. 330/GT/2014, wherein the Commission under Regulation 16 of the 2014 Tariff Regulations had allowed Special Allowance for the year 2018-19. NTPC has contended that the aforesaid order clearly establishes the intent of NTPC to operate the Dadri-I generating station beyond 25 years, which has not been challenged by the Petitioners and, therefore, the said decision has attained finality. The relevant extract of the order is reproduced hereinbelow:

“90. The petitioner has claimed Special allowance of ₹2014.79 lakh in 2018-19 and the same is allowed in terms of above regulation.

91. Accordingly, annual fixed charges approved for the generating station for the period from 1.4.2014 to 31.3.2019 is summarized as under:

(in lakhs)

	2014-15	2015-16	2016-17	2017-18	2018-19
..
<i>Special Allowance</i>	<i>0.00</i>	<i>0.00</i>	<i>0.00</i>	<i>0.00</i>	<i>2014.79</i>

27. It is noted that as per provisions of Regulation 28 of the 2019 Tariff Regulations, the generating companies have the option of availing Special Allowance on year to year basis as an alternative to renovation and modernisation. NTPC sought special allowance for the year 2018-19 and the same was allowed by the Commission in its order dated 11.4.2017. The impact of special allowance is limited to the year in which it is availed and cannot be said to extend the useful life of the generating station indefinitely. Pertinently, the Commission has not extended the useful life of the generating station by any specified number of years while approving the special allowance for the year 2018-19. Even otherwise, we have noted in earlier

part of this order that provisions of Regulation 17 can be invoked on completion of 25 years of operation after COD and is not linked to useful life or extended useful life of a generating station. Hence, reliance placed by NTPC on the Commission's order dated 11.4.2017 is misplaced.

28. NTPC has contended that the scheme provided under Regulation 17 is for extension of PPA beyond 25 years from CoD of a generating station and not for termination of PPA. Termination of the PPA as sought by the Petitioners cannot be unilaterally done by them. According to NTPC, there is no provision in Regulation 17 which allows the beneficiary to exit/terminate the existing PPA because the initial useful life of 25 years has expired. NTPC has further contended that the dispensation under Regulation 17(2) will come into play only once the option under Regulation 17(1) is exercised by the generator and that there is no compulsion for NTPC that it should necessarily propose the course provided in Regulation 17(1).

29. Regulation 17(2) provides that *“The beneficiary shall have the first right of refusal and upon its refusal to enter into an arrangement as above, the generating company shall be free to sell the electricity generated from such station in a manner as it thinks fit”*. We have noted in paragraph 22 of this order that from the language of Regulation 17(1), it is clear that either the generating company or the beneficiaries are entitled to initiate the process of reaching an arrangement for a period beyond 25 years. Three scenarios emerge from the operation of Regulation 17(1). First, either the generating company or the beneficiaries initiates the process and both the generating company and the beneficiaries agree on an arrangement. Secondly, the

generating company initiates the process by making a proposal and beneficiaries do not respond nor agree to the proposal or put certain conditions not acceptable to the generating company. Thirdly, the beneficiaries initiate the process by making a proposal and the generating company does not respond nor agree to the proposal or puts certain conditions not acceptable to the beneficiaries. In the first scenario, there is no occasion for invocation of Regulation 17(2) as arrangement is materialised. In the second and third scenarios, Regulation 17(2) entitles the beneficiaries to exercise their first right of refusal and in the event of beneficiaries actually exercising their first right of refusal, the generating company is relieved from its obligations to supply power from the generating station to the beneficiaries and is free to sell the power from the generating station in any manner it deems fit.

30. NTPC has also submitted that there is a subsisting SPPA between the parties and as per the SPPA, the parties have decided to extend the validity of the PPA (that was up to 31.3.2012) for all the generating stations contained in Article 13.1(A) of the PPA in a composite manner till the end of the life of the respective generating stations as considered in the tariff orders or Regulations issued by the Commission or Government of India allocations, whichever is later. NTPC has further submitted that as on date, each of the above i.e. the tariff order, Tariff Regulations as well as the Government of India allocation envisages the continuation of the PPA between the NTPC and Petitioners and, therefore, the SPPA is still valid and the Petitioner cannot unilaterally terminate the PPA (read with the SPPA) by virtue of Regulation 17(2).

31. NPTC has submitted that the obligations of the Petitioners can be foreclosed only if the Government of India reallocates the power from the Dadri-I generating station to other procurers/beneficiaries and in this regard, reliance has been placed on order of the Commission dated 17.4.2017 in Petition No. 301/MP/2015 and Petition No. 302/MP/2015 and order dated 9.3.2017 in Petition No. 20/MP/2017; and DERC's decision dated 22.3.2018 in Review Petition No. 44/2017 and Review Petition No. 45/2017.

32. NTPC has also submitted that the PPA and the SPPA are composite agreements in respect of procurement of power by the Petitioners from a number of generating station of NTPC including Dadri-I generating station and, therefore, the rights and obligations of the respective parties are to be considered on a uniform and composite basis for all such generating stations. The Petitioners, therefore, cannot selectively apply Regulation 17 in respect of Dadri-I generating station while continuing to avail power from Singrauli and Rihand generating stations, both of which have completed 25 years of initial useful life long before Dadri-I generating station.

33. *Per contra*, the Petitioners have submitted that even though the SPPA contemplates extension of the life of a generating station through Tariff Orders or Regulations issued by this Commission or Government of India allocations, such arrangement has to be consistent with Regulation 17 of the 2019 Tariff Regulations in terms of the settled ratio laid down by the Hon`ble Supreme Court in the case of

PTC v. CERC, [(2010) 4 SCC 603]. The terms of the PPA cannot be in contravention and in derogation of the regulations.

34. The Petitioners have submitted that the 2019 Tariff Regulations have primacy and overriding effect on the Policy of Central Government and/or Government of India allocations with respect to the useful life of the generating station. The re-allocation of power by Central Government with regard to Dadri-I generating station would have to be re-aligned as per the provisions of the 2019 Tariff Regulations. It has been submitted that the re-allocation of power by Government of India is not germane for the Petitioners to exercise their rights under Regulation 17 of the 2019 Tariff Regulations and the decisions relied upon by the Respondent, NTPC are not relevant to the present case as the present Petitions involve the specific issue of applicability and interpretation of Regulation 17 of 2019 Tariff Regulations, which has been introduced for the first time in 2019 Tariff Regulations. The Petitioners have also submitted that the PPA and the SPPA themselves contain the terms regarding severability of the contract as they provide for different end dates and validity in respect of different generating stations.

35. The question that arises for consideration of the Commission is whether the “first right of refusal” mentioned in the first line of Regulation 17(2) can be exercised only if there is no existing arrangement between the parties or it can even be exercised de hors any PPA between the parties. We note that neither Regulation 17(1) nor Regulation 17(2) provides for or depends upon any pre-existing agreement

between parties for its provisions to kick in. It simply requires that the generating station should have completed 25 years of operation from its COD.

36. It is pertinent to refer to the relevant provisions of the PPA and the SPPA, which are reproduced below:

PPA

“13.0 DURATION OF AGREEMENT

13.1 Validity of this Agreement for power supply shall be as follows:

(A) Stations: (i) Singrauli Super Thermal Power Station Stage- I (2000 MW), (ii) Rihand Super Thermal Power Station Stage – I (1000 MW), (iii) Anta Gas Power Station (419.33 MW), (iv) Auraiya Gas Power Station (663.36 MW), (v) Dadri Gas Power Station (829.78 MW, (vi) Feroz Gandhi Unchahar Thermal Power Station Stage – I (420MW), **(vii) National Capital Thermal Power Station (840 MW).**

Validity: Up to 31st March, 2012 or 25 years for coal-based stations and 15 years for gas-based stations, from the COD of the last unit of the respective stage/station whichever is later.

.....

.....

NOTE: For all the above stations under (A), (B), (C) and (D).

(i) The Power Agreement for individual stage/station may be extended, renewed or replaced by another Agreement on such terms and for such further period as the parties may mutually agree.

(ii) In case BRPL continues to get power from these station(s) after the above period without further renewal or formal extension of the Power Agreement then the terms and conditions of this PPA shall continue to operate till the Power Agreement is formally renewed, extended or replaced.”]

Supplementary Power Purchase Agreement

“A. In consideration of mutual rights and obligations of the respective parties contained herein and as per the agreement of the parties to continue the sale and purchase of power from the gas based stations of NTPC beyond 31.03.2012 and from other stations contained in sub clause 13.1 (A) of clause 13.0 of PPA dated 05.06.2008, beyond their respective expiry dates as currently specified, it is hereby mutually agreed between the parties to extend the validity of the said PPA for all the stations contained in sub clause 13.1 (A) of the clause 13.0 of the said PPA in a composite manner till the end of life of the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations whichever is later.”

B. The parties agree that the extension of the validity period as aforesaid shall apply collectively to all stations covered by the said PPA dated 05.06.2008.”

37. As per Article 13.1(A) of the PPA, the validity of the PPA for supply of power in respect of various generating stations including the Dadri-I generating station was up to 31.3.2012 or 25 years (in case of coal-based station) from CoD of the last unit of the respective generating station, whichever is later. Note (i) under Article 13 of the PPA provided that validity of an individual generating station may be extended, renewed or replaced by another agreement. Note (ii) under Article 13 of the PPA provides that even in the absence of another agreement, if the Petitioners continue to receive power from any generating stations after the expiry of the above period without further renewal or formal extension of the PPA, then the terms of the PPA would continue till the PPA is formally renewed or extended or replaced. In other words, Note (ii) fills in a gap where the beneficiaries without formally renewing the PPA continue to get power from a generating station till the PPA is formally renewed or extended or replaced. Further, the parties entered into the SPPA dated 29.3.2012 and extended the validity of the PPA dated 5.6.2008 for all the generating stations under Clause 13.1(A) in a composite manner till the end of life of the respective

generating station considered in the tariff orders or Regulations issued by CERC or Government of India allocation, whichever is later.

38. Thus, while the agreements have been entered into between the parties in a composite manner in respect of the various generating stations of NTPC, the validity of the agreement in respect of supply of power from any individual generating station is subject to the end of the life of each generating station. The agreements themselves provide for extension, renewal or replacement of the agreement in respect of individual stage/generating station. Even as per the provisions of the SPPA, the extension of validity period is till the end life of the respective generating station as considered in this Commission's Tariff orders, Regulations or Government of India allocations. The dictionary meaning of the word "composite" as per Chambers Third International Dictionary is 'something that is made up of diverse elements'. Thus, composite PPA includes PPAs for various generating stations. Though the PPA and the SPPA pertain to a number of stations of NTPC, their dates of commercial operation are different and accordingly, their useful life and the end of the validity of the PPA are different. Precisely for that reason, the PPA provides for the validity as "*Up to 31st March, 2012 or 25 years for coal-based stations and 15 years for gas-based stations, from the COD of the last unit of the respective stage/station whichever is later.*" Therefore, validity of the PPA in case of each generating station is different depending on the commercial operation of their last unit. The SPPA also provides for the extended validity of the PPAs of the respective generating station as under:

“..... it is hereby mutually agreed between the parties to extend the validity of the SPPA for all the stations contained in sub clause 13.1 (A) of the clause 13.0 of the said PPA in a composite manner till the end of life of the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations whichever is later.”

39. The use of the words “till the end of the respective stations considered in the tariff orders or regulations issued by CERC or GOI allocations whichever is later” clearly envisages that the validity of the PPAs in case of individual generating stations shall be considered separately based on the criteria prescribed. This, in our view, clearly establishes the severability of the individual generating stations from the composite agreements on the basis of the end of the life of such generating stations. It is not the intention of the parties to continue with the PPA and the SPPA of all generating stations till end of life of the last generating station.

40. NTPC has contended that the Petitioners cannot selectively apply Regulation 17 in respect of Dadri-I generating station of NTPC while continuing to avail power from Singrauli and Rihand generating stations both of which have completed 25 years of initial useful life long before Dadri-I generating station. Thus, it has been argued that the Petitioners cannot cherry pick the generating station to which the mandatory provisions of Regulation 17 would apply.

41. The provisions of Regulation 17(1) refer to “*In respect of a thermal generating station*”. Thus, a plain reading of Regulation 17 reveals that it is in no way mandatory to invoke such provisions in respect of all of the generating stations which have completed 25 years of operation from CoD. Moreover, Regulation 17(2) provides the

beneficiaries (the Petitioners herein) the first right of refusal in respect of a generating station where the beneficiaries refuse to enter into an arrangement envisaged under Regulation 17(1). Therefore, even if generating stations such as Singrauli and Rihand generating stations have completed 25 years of operation, the beneficiaries have the freedom whether or not to exercise their first right of refusal in availing power from those generating stations. Unless and until the beneficiaries exercise their first right of refusal in respect of Singrauli and Rihand generating stations, NTPC cannot refuse to supply power to the Petitioners from these generating stations by virtue of operation of Regulation 17(2).

42. NTPC has further contended that the PPA and the SPPA between the parties are subsisting as per the Commission's Tariff orders and the 2019 Tariff Regulations. Even the Government of India allocation envisages the continuation of the PPA between the Petitioners and NTPC in respect of the Dadri-I generating station.

43. However, the question arises as to whether the aforesaid SPPA entered into between the parties on 29.3.2012 can restrict the Petitioners from exercising their right under Regulation 17 of the 2019 Tariff Regulations, which provides for special provisions in respect of thermal generating station which have completed 25 years of operation from commercial operation date.

44. The beneficiaries had entered into a composite PPA dated 5.6.2008 with NTPC in respect of a number of generating stations including Dadri-I generating station. Subsequently, NTPC and the Petitioners signed the SPPA dated 23.3.2012. Validity of the PPA dated 5.6.2008 was up to 31.3.2012 or 25 years in case of coal

based generating station and 15 years in respect of gas based generating station whichever is later. Dadri-I generating station being a coal based generating station, validity of its PPA is up to 31.3.2012 or 25 years from the date of commercial operation whichever is later. The SPPA was signed on 23.3.2012. The SPPA extended the validity of the PPA (a) *till the end of life of the respective station considered in the tariff orders or (b) as per Regulations issued by CERC or (c) as per GOI allocations.* The useful life of thermal generating station is 25 years as per successive Tariff Regulations. COD of Dadri-I generating station being 1.12.1995, the useful life of Dadri-I generating station expired on 30.11.2020 as per tariff regulations as well as the tariff orders issued by the Commission. It is pertinent to mention that NTPC has availed only the Special Allowance which is admissible on year to year basis. Further, NTPC has not availed R&M under Regulation 27 for Dadri-I generating station and hence, its useful life has not been extended.

45. The other parameter for validity of the SPPA is as per GOI allocations. The original allocation made by Government of India in respect of Dadri-I generating station does not specify any period for which such allocation shall remain valid. However, as submitted by NRLDC, as per Share Allocation Revision No.1/2021-22 dated 1.4.2021 issued by NRPC, the allocation of power by Ministry of Power, Government of India from Dadri-I generating station is still subsisting.

46. We note that Ministry of Power, Government of India vide its guidelines dated 22.3.2021, has enabled the distribution companies to either continue or exit from PPAs after completion of the term of PPA i.e. beyond 25 years or the period

specified in PPA and to allow flexibility to the generators to sell power in any mode after the State/distribution companies' exit from PPA. We have already noted that Dadri-I generating station has completed 25 years on 30.11.2020 from the date of commercial operation.

47. We also take note of letter dated 16.3.2021 of DERC that in discharge of its functions under Section 86(1)(b) of the Act and after deliberation with the stakeholders (including NTPC and SLDC), has taken cognizance of the issue of non-scheduling of power from Dadri-I generating station by the distribution companies of Delhi, including the Petitioners. DERC has requested the Ministry of Power for de-allocation of Delhi's full share of power from Dadri-I generating station. In the said letter, DERC has also observed that as per Regulation 17 of the 2019 Tariff Regulations, the first right of exiting the PPAs from the generating stations on completing life of 25 years is conferred to the beneficiaries and all the distribution companies of Delhi have confirmed to exit the BPSA/PPA for Dadri-I generating station permanently w.e.f. 1.12.2020.

48. In light of the above discussion, we are of the view that in terms of the PPA and the SPPA and the fact that Dadri-I generating station having completed 25 years on 30.11.2020, the Petitioners are eligible to exercise the first right of refusal as per provisions of Regulation 17(2) of the 2019 Tariff Regulations. Government of India Guidelines also permit the willing distribution companies to relinquish their allocation after a period of 25 years from COD. DERC has already written to Ministry of Power for de-allocation of share of distribution companies of Delhi. For relinquishment of

their allocations, the Petitioners may approach the Ministry of Power. Provisions of Regulation 17(2) related to first right of refusal would become effective once the Ministry of Power de-allocates share of the Petitioners from Dadri-I generating station.

49. Accordingly, we answer that PPA/SPPA is still subsisting as the allocation of power by Ministry of Power, Government of India from Dadri-I generating station to the Petitioner is still subsisting as per the Share Allocation Revision No.1/2021-22 dated 1.4.2021 issued by NRPC; that the Petitioner may exit from the PPA/SPPA by approaching the Ministry of Power for de-allocating its share from Dadri-I generating station; and that as Dadri-I generating station has already completed 25 years on 30.11.2020 from its COD, the provisions of Regulation 17(2) related to first right of refusal would become effective once the Ministry of Power de-allocates share of the Petitioners from Dadri-I generating station.

50. The Petition No. 60/MP/2021, Petition No. 65/MP/2021, IA No. 12/2021, IA No. 31/2021 and IA No. 33/2021 are disposed of in terms of the above findings and discussion.

**Sd/-
(P.K.Singh)
Member**

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

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

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