

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 44/MP/2022

Coram:

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri P.K. Singh, Member

Date of Order: 29th December, 2022

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 CERC (Terms and Conditions of Tariff), Regulations, 2019 seeking adjudication of dispute with NTPC Limited in terms of the Order dated 17.1.2022 passed in Writ Petition (Civil) No. 10026 of 2020

And

In the matter of:

Tata Power Delhi Distribution Limited

Through its Corporate Head Legal
NDPL House,
Hudson Line, Kingsway Camp,
GTB Nagar, Delhi – 110 009

...Petitioner

VERSUS

NTPC Limited,

NTPC Bhawan,
Scope Complex 7-Institutional Area,
Lodhi Road New Delhi - 110003

...Respondent

The following were present:

Shri Sajjan Poovayya, Senior Advocate, TPDDL
Shri Anand Kumar Shrivastava, Advocate, TPDDL
Ms. Anuja Jain, Advocate, TPDDL
Ms. Devyani Bhatt, Advocate, TPDDL
Ms. Rishika Garg, Advocate, TPDDL
Ms. Swapna Seshadri, Advocate, NTPC
Shri Anand K Ganesan, Advocate, NTPC
Ms. Ritu Apurva, Advocate, NTPC
Shri Jai Dhanani, Advocate, NTPC

ORDER

The present Petition has been filed by Tata Power Delhi Distribution Limited (“**Petitioner/TPDDL**”) under Section 79(1)(f) of the Electricity Act, 2003 (the Act) read with Regulation 17 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) regulations, 2019 (Tariff Regulations, 2019), and in pursuance of the order dated 17.1.2022 passed by Hon’ble High Court of Delhi in Writ Petition (C) No. 10026 of 2020 *inter-alia* seeking (i) quashing of the NTPC letter dated 30.11.2020 wherein NTPC (the Respondent herein) has denied the request of the Petitioner for non-scheduling of power from National Capital Thermal Power Station (hereinafter referred to as “Dadri-I) to the Petitioner and not to raise bills against the Petitioner beyond 30.11.2020 on account of completion of 25 years from the date of commercial operation of the said generating station; and (b) direction to NTPC to declare that Dadri-I has completed its useful life of 25 years and the validity of the PPA qua Dadri-I has expired on 30.11.2020.

Background of the case

2. Bulk Power Supply Agreement (“BPSA”) dated 31.1.1994 was executed between Respondent/NTPC and the Delhi Electricity Supply Undertaking (DESU) which inter alia provided that the said agreement would come into force from the date of signing and the remain operative till 31.10.1997. Delhi Vidyut Board (DVB), the successor of DESU was unbundled and restructured through Delhi Electricity Reforms Act, 2000 (Delhi Act No.2 of 2001). On account of privatization of distribution of electricity in Delhi, the Petitioner (TPDCL), BRPL and BYPL succeeded the respective undertakings and business in their respective area of supply with effect from 1.7.2002, by operation of law. On 31.3.2007, Delhi Electricity Regulatory Commission (DERC) re-assigned all the existing Power

Purchase Agreements entered with Delhi Transco Limited (DTL) among the distribution licensees operating in NCT of Delhi, including the Petitioner, as per their respective load profile. Further, the responsibility for arranging power for their respective areas of supply was vested in the respective distribution licensees including the Petitioner with effect from 1.4.2007.

3. The Petitioner TPDDL entered into a Power Purchase Agreement dated 8.5.2008 with NTPC for procuring power from various generating stations of NTPC including Dadri-I. As per Article 13.1(A) of the PPA, the validity of the PPA qua Dadri-I was upto 31.3.2012 or 25 years whichever is later. On 22.3.2012, TPDCL and NTPC entered into a Supplementary PPA (SPPA) whereby the validity of the PPA for all stations mentioned in Article 13.1(A) was extended till the end of life of the respective generating station considered in the tariff orders or Regulations issued by the Commission or GOI allocation whichever is later. Central Electricity Regulatory Commission (terms and Conditions of Tariff) Regulations, 2009 provided that the useful life of coal based generating station would be 25 years. Dadri-I whose COD was 1.12.1995 was to complete its useful life of 25 years on 30.11.2020.

4. The Commission notified the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (Tariff Regulations, 2019) on 7.3.2019 for the Control Period starting covering 1.4.2019 to 31.3.2024. Regulation 17 of the Tariff Regulations, 2019 provided for special arrangement for tariff in respect of thermal generating stations which have completed 25 years of operation from the date of commercial operation. Regulation 17 is extracted as under:

“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.”

5. On 13.3.2020, the Petitioner issued a letter to Respondent seeking for an arrangement in terms of Regulation 17(2) of the Tariff Regulations, 2019 *qua* Dadri-I which was to complete its useful life on 30.11.2020 and sought information from the Respondent regarding the terms of the arrangement on the various parameters *inter-alia* tariff, mentioned under Regulation 17(1). In the said letter, the Petitioner requested the Respondent to provide single part tariff before 31.3.2020 for Dadri-I in line with Tariff Regulations, 2019 for the period 2019-24 under Regulation 17(1) based on which the Petitioner would take necessary decision for scheduling power from the said generating station. The Petitioner reiterated its request *vide* its reminder letter dated 20.5.2020. In response, NTPC in its letter dated 2.5.2020 (stated to be received by TPDCL after 20.5.2020) rejected the requests of TPDDL on the ground that NTPC was not considering the provisions of Regulation 17 for any of its generating stations including Unchahar I and Dadri I and if any such arrangement is considered in future, the same would be communicated to their respective beneficiaries including TPDCL.

6. Aggrieved by the said letter of NTPC dated 2.5.2020, the Petitioner filed Writ Petition (c) 4167/2020 in the High Court of Delhi seeking interpretation of Regulation 17 *qua* Unchahar I and Dadri I generating stations of NTPC. During the pendency of the said Writ Petition, the useful life of Dadri I (i.e.25 years from COD) expired on 30.11.2020. The Petitioner *vide* its letter dated 30.11.2020 requested NTPC not to schedule power and

not to raise bill beyond 30.11.2020. NTPC vide its letter dated 30.11.2020 rejected the requests of the Petitioner. Being aggrieved, the Petitioner filed Writ Petition (C) 10026 of 2020 before the Hon'ble High Court of Delhi.

7. On 20.2.2021, BRPL and BYPL filed Petition Nos.60/MP/2021 and 65/MP/2021 challenging the similar letters of rejection by NTPC. On 16.3.2021, Delhi Electricity Regulatory Commission (DERC) requested MoP, GoI for de-allocation of Delhi's share of power in Dadri-I. On 22.3.2021, MoP issued Guidelines for relinquishment of shares by the distribution licensees in the PPAs after completion of 25 years from CoD. After considering the written and oral submissions made, the Commission vide its order dated 1.7.2021 in Petition No.65/MP/2021 and 66/MP/2021 rejected the prayers of BRPL and BYPL with the following directions:

“48. ... 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.”

8. Aggrieved by the above order of the Commission, BRPL and BYPL filed Appeal Nos.239 and 240 of 2021 before APTEL.

9. Hon'ble High Court of Delhi vide its judgement dated 17.1.2022 in Writ Petition (C) 4167/2020 and Writ Petition (C) 10026 of 2020 declined to exercise its jurisdiction under Article 226 of the Constitution of India on the ground that other similarly placed licensees, having allocation from Dadri I have already availed of the alternative remedy of statutory resolution mechanism.

10. Thereafter, the Petitioner sought to intervene in Appeal Nos.239 and 240 of 2021 and was allowed by APTEL as an intervener. The Petitioner was heard by APTEL in the said appeals and judgement was reserved on 25.1.2022.

11. On 31.1.2022, the Petitioner filed the present petition challenging the letter dated 30.11.2020 issued by NTPC. In the meantime, APTEL vide its judgement dated 6.2.2022 in Appeal Nos.239 and 240 of 2021 set aside the Commission's order dated 1.7.2021 in Petition No.65/MP/2021 and 66/MP/2021 and allowed the appeals in favour of BRPL and BYPL.

Submissions of the Petitioner

12. The Petitioner has made the following submissions in the Petition in support of its contention and prayers:

- (a) The CoD of Dadri I is 1.12.1995 and admittedly, the generating station has completed 25 years from its CoD on 30.11.2020. Since as on 30.11.2020, Tariff Regulations, 2019 has come into force, the Petitioner is entitled for the benefits of Regulation 17 thereof.

(b) The Petitioner wrote to Respondent on 30.11.2020 invoking Regulation 17 and seeking special arrangement from the Respondent which was denied by the Respondent vide its letter dated 30.11.2022. Therefore, the Petitioner has exercised its right of first refusal in respect of Dadri-I with effect from 00:00 hrs of 1.12.2020. Hence the Petitioner is not liable for any cost towards Dadri-I of NTPC. As per the provisions of Regulation 17(2), the Petitioner is free to sell power from Dadri-I as it deems fit.

(c) NTPC is in arbitrary action and wilful disregard of Regulation 17 of Tariff Regulations, 2019. Since the said regulation is in force, it is binding on NTPC and necessary directions be issued to NTPC to abide by the same.

(d) 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 in order to continue the power procurement under the PPA. Regulation 17(2) provides the right of first refusal to the beneficiary to procure power at the tariff determined 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 old generating stations including depreciation, servicing of debt and equity throughout its useful life. Regulation 17(2) safeguards the interests of end consumers since once the power plant has completed its 25 years term in commercial operation, they cannot be compelled to pay higher tariff and bear the burden of running an old and financially unviable generating plant.

(e) NTPC has misconstrued the PPA dated 8.5.2008 and SPPA dated 22.3.2012 to be composite agreements for procurement of power by the Petitioner from various generating stations of NTPC which is not amenable to severability. However, the Commission in its order dated 1.7.2021 in Petition No.60/MP/2021 and 65/MP/2021 has held that the distribution companies are permitted to sever the individual generating plants from the composite agreements upon completion of 25 years from the COD.

(f) Regulation 3(73)(b) of Tariff Regulations, 2019 clearly provides that the useful life of the plant is 25 years in case of a coal based thermal generating station. Even though the SPPA contemplates extension of end life of the plant through tariff orders or regulations issued by the Commission or Government of India allocation, whichever is later, such arrangement has to be consistent with Tariff Regulations, 2019 in terms of judgement of Supreme Court in PTC India Ltd Vs CERC [(2010) 4 SCC 603].

(g) While the allocation of power from different stations of NTPC as per the PPA between the parties was based on the allocation by MoP, the concept of 'Government allocation' is alien to any right, liability or obligations under the Act. MoP allocation has translated into terms of the PPA and culminated into a contractual right which itself is regulated by statutory regulations. Therefore, the said allocation cannot be given a statutory colour and cannot be binding.

(h) Though NTPC has claimed that due to installation of FGD in Dadri I, useful life has increased by 15 years, installation of ECS under Regulation 29 can never be considered as an extension of useful life by 15 years.

Reply of NTPC

13. The Respondent, NTPC vide its reply dated 16.06.2022 (filed on 24.6.2022) has mainly submitted as under:

(a) The contention of TPDDL that as per Regulation 17 of the Tariff Regulations, 2019, it is not bound or has no obligation to take power from Dadri-I is wrong. A plain reading of Regulation 17 of the Tariff Regulations, 2019, provides that the said Regulation is a special provision and an enabling provision for tariff recovery to be agreed to between the generating company and the beneficiaries when the generating company completes 25 years from COD. The provision does not even refer to a PPA, either extend the term or otherwise curtail the term of the PPA.

(b) The only application of Regulation 17 of the Tariff Regulations, 2019 is that if 25 years have passed from the COD of a generating station, by mutual agreement, the generating company and the beneficiary *may agree on an arrangement* by which the capacity charges determined under these Regulations would be recovered based on scheduled generation. It is crucial to note the words "*capacity charges determined under these Regulations*". Thus, this Commission continues to determine the capacity charges under the Tariff Regulations, 2019. However, the recovery of the same can be on the basis of scheduled generation if voluntarily agreed between the generating company and the beneficiary.

(c) Regulation 17 (1) of the Tariff Regulations, 2019 by its very terms is an enabling provision and is by no stretch mandatory. The tariff determination has to be as per the Tariff Regulations, 2019 only. In case a special arrangement is made, the tariff

determined, both capacity charges and energy charges, would be recovered on scheduled generation.

(d) Regulation 17 (1) of the Tariff Regulations, 2019 does not mandate the parties to negotiate or make attempts to arrive at an arrangement. This is evident from usage of expression 'may agree' under Regulation 17 (1) of the Tariff Regulations, 2019. When either party do not reply to the proposed arrangement by one of the parties, it *ipso facto* implies that the party is not agreeable to enter into any arrangement contemplated under Regulation 17 of the Tariff Regulations, 2019 and would continue as per the existing arrangement in the PPAs.

(e) Though Regulation 17 (1) of the Tariff Regulations, 2019 does not provide that it is the generator which, at its discretion, can initiate the process of entering into discussion on arriving at special arrangement, the same appears to be implied into it. The beneficiary under Regulation 17 (2) of the Tariff Regulations, 2019 has been conferred with first right to refuse arrangement under Regulation 17 (1) of the Tariff Regulations, 2019. Also, the generating company, upon refusal by the beneficiary is provided with the discretion to sell power to third parties. It implies that it is the generating company which, at its discretion, may offer the beneficiary to enter into arrangement contemplated under Regulation 17 (1) of the Tariff Regulations, 2019 and the beneficiary on the other hand has a right to refuse such proposal. Having granted the right of refusal to beneficiary, it would be incongruous to say that the entity granted with right to refuse the offer is also granted the right to make offer.

(f) The provisions of Regulation 17 (2) of the Tariff Regulations, 2019 will kick in when the generating company makes an offer for an arrangement under Regulation

17 (1) of the Tariff Regulations, 2019. If there is no arrangement proposed (which is only an option), Regulation 17 (2) of the Tariff Regulations, 2019 has no application. Only if an arrangement under Regulation 17 (1) of the Tariff Regulations, 2019 is reached by mutual consent, the tariff in the form of capacity charges will be paid and recovered on the basis of scheduled generation.

(g) The only implication of Regulation 17 (2) of the Tariff Regulations, 2019 is that in case the beneficiary does not agree to the special arrangement under Regulation 17 (1) of the Tariff Regulations, 2019, the generator is free to sell to third parties. There is, however, no mandate that the generator has to sell to third parties or that the PPA comes to an end.

(h) The Regulatory Commissions under the Act do not have the power either for allocation of electricity or creating a contract between parties. This position is no longer *res-integra* having been settled by the Hon'ble Supreme Court in the case of Tata Power Company Ltd. vs Reliance Energy Limited [(2009) 16 SCC 659].

(i) In the present factual matrix, the parties have already, by entering into the SPPA, agreed on the arrangement which would govern by them after completion of 25 years of the project. Thus, the dispensation and course created by Regulation 17 of the Tariff Regulations, 2019 is inapplicable to the parties herein as much as they have already agreed upon the arrangement to follow after project completed 25 years of operation by entering into SPPA.

(j) The contention of TPDDL that NTPC has misconstrued the PPA dated 8.5.2008 and SPPA dated 22.3.2012 to be composite agreements for procurement of power

from various generating stations of NTPC is wrong. The PPA in respect of the Dadri-I, as in the case of other Central Sector generating station supplying power to the TPDDL were all entered into pursuant to the allocation of power by the Ministry of Power, Government of India and BPSA was executed on 31.1.1994 between NTPC and Delhi Electric Supply Undertaking (the predecessor in interest of the TPDDL- prior to the reorganization and privatization of the Distribution function in 2008). Thereafter on 8.5.2008, a PPA was entered into and subsequently, on 22.3.2012, a Supplementary PPA (SPPA) was entered into between the TPDDL and NTPC, wherein, the duration of the PPA was extended and the same was voluntarily signed and duly agreed to by the TPDDL without any reservations or conditions. 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

(k) The contention of TPDDL that NTPC is forcing a contract on it till eternity, is not correct. The SPPA which was voluntarily signed by the TPDDL envisages that the parties have decided to continue to sale and purchase of electricity till the subsistence of the Government of India allocation. If the TPDDL wish to exit the PPA, they have to approach the Government of India for de-allocation which also has been done by the TPDDL through the Delhi Electricity Regulatory Commission.

(l) The contention of TPDDL that the useful life of the power plant expires on expiry of 25 years from the Commercial Operation Date is completely misplaced, TPDDL has projected the useful life of 25 years which has been prescribed in the Tariff

Regulations, 2019 as being the life of the generating plant. It is not that on the 25th year from COD, the generating plant becomes 'useless.' The concept of 'useful life' is primarily for computation of depreciation in the recovery of tariff. It is not that after 25 years, tariff is not determined by this Commission. This Commission has been determining the tariff for various generating stations of NTPC even after completion of 25 years. There are various provisions in the Tariff Regulations, 2019 such as Regulation 27 which deals with additional capitalization by way of Renovation & Modernization and Regulation 28 which deals with special allowance to enable the generating stations to operate beyond 25 years. In the case of Singrauli station (1982) and Rihand-I (1991) which have completed 25 years from COD, the same are operating based on Special Allowance and no R&M / life extension has been claimed by NTPC before this Commission.

(m) The procurers of electricity from Central Sector Generating Stations including TPDDL have been benefitted by virtue of continuing to get electricity beyond the initial 25-year period with substantial cost reduction in the past. The Central Sector Generating Stations were not given the right to foreclose the PPA by efflux of time on the expiry of 25 years, as is prevalent in the PPAs executed with Independent Power Producers. The Procurers including TPDDL herein have continued to get electricity beyond 25 years of the COD of the generating stations such as Singrauli (COD being 1.5.1988), Rihand-I (COD 1.1.1991) where the total tariff for the past 8 years have been in the region of Rs 2.00/kWh (both – capacity and variable charges). This is on account of the PPAs with NTPC, a Central Sector Generating Station which is governed by the Central Government allocation and de-allocation.

(n) The contention of TPDDL that since the concept of 'Government allocation' is alien to any right, liability or obligation under the Act, the MoP allocation has translated into the terms of the PPA and culminated into a contractual right, which itself is regulated by statutory Regulations, is wrong. NTPC is a Central Government undertaking and has established all its generating stations based on the allocation of power by the Central Government to various States and Union Territories. The Central Government has exercised this power as per the '*Gadgil Formula*' formulated with the formulation of the third five-year plan for the distribution of plan transfers amongst the states and which is part of the Central Plan Assistance of the Government of India. The central assistance provided for in the first three plans and annual plans of 1966–1969 lacked objectivity in its formulation and did not lead to equal and balanced growth in the states. The Guidelines for allocation of power by the Central Government have been modified from time to time. The last Amendment was in April 2000, therein the Central Government had decided on firm allocation of 85% capacity and the balance 15% was on infirm basis.

(o) With regard to judgment dated 8.2.2022 of the APTEL in Appeals No. 239 & 240 of 2021 pertaining to Dadri-I Station, the admitted position of all parties was that the Central Government alone performs the functions of allocation / re-allocation / de-allocation of power.

(p) This Commission while framing its various tariff regulations including for the year 2004-09, 2009-14, 2014-19 and 2019-24 has also treated the Central Government allocations a different pedestal as compared to other power

purchases. The power under Section 79(1)(a) is only to regulate the tariff. The contractual provisions or otherwise the allocation of power by the Central Government is not vested with this Commission. Thus, this Commission does not have the power to either create a contract or provide for exit routes from such contracts under the Electricity Act, 2003 and can only interpret the contracts as entered into between the parties, apart from determining the tariff for the supply of electricity.

(q) A harmonious construction of the provisions of the Article 73 of the Constitution of India, contents of the Act as well as the Tariff Regulations framed by this Commission would lead to the conclusion that by an interpretation of Regulation 17 of the Tariff Regulations, 2019, a PPA entered into capturing the Government of India allocation cannot be exited unilaterally. The contention of TPDDL if accepted would lead to absurd results, namely that Regulation 17 of the Tariff Regulations, 2019 ought to be read to interfere with the allocation by the Government of India, where the powers are exercised under Article 73 of the Constitution and where the Regulatory Commissions have been held to have no power of allocation of electricity.

(r) The contentions raised by TPDDL with regard to installation FGD in Dadri-I has increased its useful life by 15 years more are completely misplaced. NTPC has nowhere stated that due to installation of FGD system in Dadri-I or any of its Generating Stations, the life of the concerned generating station increases by 15 years more. The case of NTPC is that there is no need to pass a formal order extending the useful life of a generating station since the availing and granting of

'Special allowance' clearly recognizes that the plant continues to operate beyond 25 years from COD.

Submissions during hearing

14. During the course of hearing, the learned senior counsel for the Petitioner pointed out that the APTEL judgment dated 8.2.2022 in Appeal Nos. 239/2021 and 240/2021 (against the Commission's common order dated 1.7.2021 in Petition No. 65 of 2021 & Petition No. 60 of 2021) holding that the distribution licensees of Delhi have the powers to exit the PPA/SPPA signed with the Respondent in terms of Regulation 17(2) of the 2019 Tariff Regulations, in respect of Dadri-I generating station of the Petitioner, is squarely applicable to the present case of the Petitioner. He further submitted that the Petitioner was also permitted by APTEL to intervene and put forth its submissions in the said appeal. The learned Senior Counsel also submitted that there is no stay order of the Hon'ble Supreme Court, till date, in the Civil Appeal filed by the Respondent against the APTEL judgment dated 8.2.2022. He added that the submission of the Respondent, in its reply, indicating the stand taken by the Petitioner in the Writ Petition (WP No. 3735/2022) filed by it, before the Hon'ble Delhi High Court challenging the de-allocation of power by MOP, GOI from Dadri-II project of the Respondent vis-à-vis the present petition, is irrelevant for consideration, as the Petitioner, in the present case, has sought to set aside the letter dated 30.11.2020 issued by the Respondent and to exit the PPA/SPPA in terms of Regulation 17(2) of the 2019 Tariff Regulations, from Dadri-I project, on the strength of the APTEL judgment dated 8.2.2022.

15. In response, the learned counsel for the Respondent submitted that the Hon'ble Supreme Court has listed the stay application for hearing on 18th July, 2022, considering the submissions of the Respondent regarding parties exiting the PPA/SPPA. Learned Counsel also pointed out that while the Petitioner, in the present petition, submitted that it has sufficient and economically tied up for power supply to service the consumers in its licensed area even if it stops scheduling power from Dadri-I project of the Respondent, it has in the Writ Petition (3735/2022) filed before the Hon'ble High Court submitted that any de-allocation of power from Dadri-II project to the Respondent will jeopardize energy security scenario of Delhi/NCT and may lead to power blackout in the State of Delhi. Accordingly, the learned counsel submitted that such inconsistent stand taken by the Petitioner before different forums may be taken note of by the Commission, while passing order in the present petition.

Analysis and Decision

16. Based on the submissions of the parties and documents available on record, the following issues arise for our consideration:

Issue No.1: Whether the APTEL judgment dated 8.2.2022 rendered in Appeal Nos. 239 of 2021 and 240 of 2021 by APTEL in case of two other Distribution Licensees in Delhi (BRPL and BYPL) is squarely applicable in the case of the Petitioner?

Issue No.2: Whether the Petitioner can relinquish the PPA/SPPA after the completion of useful life of 25 years from the COD of the Dadri-I Generating Station of NTPC under Regulation 17 of the Tariff Regulations 2019?

Issue No.3 : Reliefs to be granted to the Petitioner.

17. The above issues have been dealt with hereinafter in this order.

Issue No.1: Whether the APTEL judgment dated 8.2.2022 rendered in Appeal Nos. 239 of 2021 and 240 of 2021 by APTEL in case of two other Distribution Licensees in Delhi (BRPL and BYPL) is squarely applicable in the case of the Petitioner?

18. Petition No.60/MP/2021 filed by BYPL, Petition No.65/MP/2021 filed by BRPL and Petition No. 44/MP/2022 filed by TPDDL are based on the same set of facts arising on account of the completion of 25 years of operation from the COD of Dadri I generating station of NTPC. The background facts concerning the three petitions are common which have been discussed in brief in paras 2 to 6 of this order. In Petition No. 60/MP/2021 filed by BYPL, the following prayers were made:

“(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;”

19. In Petition No.65/MP/2021 filed by BYPL, the following prayers were made:

“(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;"*

20. The present Petition has been filed by the Petitioner with the following prayers:

"(a) Admit the present Petition;

(b) Set aside the Letter dated 30.11.2020 issued by the Respondent NTPC to the Petitioner;

(c) Set aside the following Invoices raised by NTPC with respect to the Dadri-I station from 01.12.2020 onwards;

(d) Declare that w.e.f. 00:00 Hrs of 01.12.2020, the Petitioner is not liable for any costs towards NTPC's Dadri-I Plant.

(e) Direct the Respondents NTPC to not:

- 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 Dadri-I plant w.e.f. from 30.11.2020; and*

(f) Direct NTPC to not raise any bills qua Dadri – I, during the pendency of the present Petition

(g) Pass any such other and further reliefs as this Commission deems just and proper in the nature and circumstances of the present case."

21. Thus, the background facts of the case and prayers in the present Petition are *pari materia* with the facts and prayers in Petition Nos.60/MP/2021 and 65/MP/2021.

22. Appeal Nos. 239 of 2021 and 240 of 2021 were filed by BRPL and BYPL against the common order dated 1.7.2021 of the Commission in Petition No.60/MP/2021 and 65/MP/2021. By a common judgement dated 8.2.2022, APTEL set aside the

Commission's order dated 1.7.2021, allowed BRPL and BYPL to exit the PPA and SPPA with NTPC with effect from 1.12.2020 on completion of 25 years of operation from COD and directed NTPC not to raise any invoice with effect from 1.12.2020 and refund the payments made by BRPL and BYPL alongwith interest.

23. APTEL in its judgement dated 8.2.2022 framed the following issues:

"26 (1) Whether the beneficiaries can relinquish the PPA/SPPA after the completion of useful life of 25 years from the COD of the Dadri-I Generating Station under Regulation 17 of the Tariff Regulation, 2019?"

(2) Whether the provisions contained in PPA & SPPA and/ or the Guidelines vide letter dated 22.03.2021 issued by Government of India/ MoP can override the provisions of the Regulations?"

24. As regards the first issue, APTEL recorded its findings as under:

"55. The Regulation 17 is again quoted here for ease of reference:

"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.

56. It can be interpreted by simple reading of the Regulation that the Regulation will become applicable only once a Generating Station completes 25 years of operation from the COD, the period equivalent to the "Useful Life" as defined in these Regulations. The Regulation 3 provides the definition of "Useful Life" and the "Extended Life" of the Generating Station as:

(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.

(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 (b) Gas/Liquid fuel 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;

57. There is no dispute that the 25 years of operation from COD or the Useful Life of the said Generating Station: Dadri-I has been completed on 30.11.2020, and as such, Regulation 17 is relevant and applicable for Dadri-I. Further, the Central Commission, vested with the powers to extend the life of the Station, has not extended the life under the provisions of the Tariff Regulations, 2019.

58. It may also be noted here that the Tariff Regulations, 2019 shall be applicable to all Generating Stations as covered by Regulation 2 and as such any provision contained in these Regulations shall be applicable to Dadri-I. Relevant extract from Regulation 2 is reproduced below. "These regulations shall apply in all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof is required to be determined by the Commission under section 62 of the Act read with section 79 thereof:"

59. Therefore, in line with Regulation 17(1), in the instant case, on completion of 25 years of operation from the COD. i.e., 30.11.2020, 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. The Appellant vide letter dated 23.11.2020 requested the Respondent no. 2, the Generating Company (NTPC) for a suitable arrangement in terms of Regulation 17(1) of the Tariff Regulations, 2019 for procurement of power from Dadri-I, as soon as possible and in any event prior to the completion of 25 years from the COD i.e., 30.11.2020.

60. As no response was received from NTPC, the Appellant, vide letter dated 30.11.2020, again informed the NTPC that as per the provision contained in Regulation 17 of the Tariff Regulations, 2019, the PPA and SPPA would lapse on 01.12.2020 at 00:00 hrs. i.e., on completion of 25 years from the COD for the Generating Station (Dadri-I), unless a mutually agreed arrangement to extend the supply from Dadri-I is in place, there will be no scheduling of power.

61. It is, thus clear that the Appellant invoked the provisions contained under sub-regulation (1) and sub-regulation (2). In pursuant to second letter for non-scheduling of power from Dadri-I, NTPC vide its letter dated 30.11.2020 submitted its response, however, no arrangement was proposed by NTPC. NTPC vide the said letter, in case of BRPL (the Appellant in second captioned Appeal), has stated that: "the rights and obligations of the parties under the BPSA continues, even after 30.11.2020 and therefore, the purported contention of BRPL of the BPSA (as amended) cease to have effect from 30.11.2020 is not valid, legal or sustainable."

62. The Appellant by its letter dated 30.11.2020 discontinued scheduling of power from Dadri-I with effect from 01.12.2020 at 00.00 hrs since Dadri-I

completed 25-year life term on 30.11.2020, thereby exercising its right of first refusal under Regulation 17(2) of the Tariff Regulations, 2019.”

25. As regards the second issue, APTEL after considering the submissions of learned Senior Counsel for the parties and the principles of law decided by the Supreme Court judgement in PTC India Ltd Vs Central Electricity Regulatory Commission & Ors. [2010 4 SCC 603], Tata Power Company Ltd. vs Reliance Energy Limited [(2009) 16 SCC 659] and CLP India Limited v GUVNL [(2020) 5 SCC 185], came to the following conclusions:

“37. To our mind, it is clear that there was no dispute on whether the allocation or de-allocation of power from the Central Generating Stations (CGS) is vested upon the Central Government. All agreed that the power of allocation or de-allocation is vested with the Central Government but such power doesn’t provide any delegation of power to the Central Government for extension of the life of Generating Station through an order for allocation, re-allocation or de-allocation of power and in case the useful life of a generating station is completed, further, extension of life can be extended by the Central Commission for CGS. In case the life for a CGS is extended by Central Commission, the allocation and de-allocation will be made as per the orders of the Central Government.”

26. Further, APTEL considered the contention of NTPC that the powers of the Central Government for allocation and de-allocation of power from CGS in exercise of power under Article 73 of the Constitution of India cannot be overridden by any Statutory Laws as the Tariff Regulations, 2019 in the light of the judgements in Rai Sahib Ram Jawaya Kapur v. State of Punjab, [(1955) 2 SCR 225] and Satya Narain Shukla v. Union of India, [(2006) 9 SCC 69] and came to the following findings:

“45. Therefore, the contentions of the Respondent are misplaced in the light of the two judgements as quoted above which clearly provides that the Central Government can exercise the powers to issue executive orders under 73 only on subjects which does not encroach upon the provisions of any law made by the Parliament. In the present case, the Electricity Act, 2003 vests the powers of formulating and notifying the Tariff Regulations with the Central Commission as such any executive order issued by the Central Government infringing any provisions of either the Electricity Act, 2003 or the Tariff Regulations, 2019 is bad in law.

46. We are inclined to accept the submission made by the Appellant that even if the allocation by Central Government is an executive action and not the guidelines/ advisories, it cannot infringe the provisions of the Electricity Act and the Regulations framed thereunder. The Central Government has no role in framing Rules or passing policy directions regarding the tariff determination exercise.

47. Therefore, the allocation or de-allocation of power by the Central Government can best be considered as guidelines or advisory. Further, the Hon'ble Supreme Court of India in *Bhim Singhji v. Union of India*, (1981) 1 SCC 166 has ruled that once a statute provides for a specific remedy then the same cannot be made subject to an alternate mechanism provided under a Guideline. The Appellant submitted that MoP Guidelines are merely administrative advisories and cannot override, alter or amend the statutory Tariff Regulations, 2019. Reliance was further placed on: - (i) *State of Haryana v. Mahender Singh*, (2007) 13 SCC 606 (ii) *J. Fernandez v. State of Mysore & Ors.*, AIR 1967 SC 1753

48. We are of the firm opinion that the provisions of the PPA or SPPA, as in the present case, have to be aligned with the Tariff Regulations, 2019 and cannot be in derogation to the Regulations. As such answer to second question under para 26(2) is 'Negative', i.e. the provisions contained under PPA & SSPA and the Guidelines issued by Government of India on allocation or deallocation of power cannot override the provisions contained in the Tariff Regulations, 2019.

51. Therefore, we decline the above contention of the Respondent (as indicated in para 49) as discussed in the foregoing paragraphs wherein it has been made clear that the PPA and SPPA are to be aligned with the Tariff Regulations, 2019 and any provision of the PPA/SSPA infringing the provision contained in the Tariff Regulations, 2019 have to be succeeded by the provision contained in the Regulations. Therefore, the provision contained under para (A) of SPPA mandating "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" have to be amended in line with the Tariff Regulations, 2019."

27. APTEL summarised its findings on the issues raised in the appeals as under:

"77. After hearing the Ld. Advocates appearing for the Appellants and the Respondents, we are of the opinion that:

a. The MoP Allocation by letter dated 05.07.1991 including subsequent allocations and the Guidelines dated 22.03.2021 read with clarification dated 05.07.2021 cannot be considered as Executive Orders under Article 73 of the Constitution as the powers for determination of tariff and framing the Tariff Regulations, 2019 are vested with the Central Commission for CGS and therefore, are non-statutory documents.

b. The provisions of the Tariff Regulations, 2019 have overriding effect on the Contractual Agreements, the PPA and SPPA signed between the Respondent-Generating Station and the Appellants- Delhi Discoms.

c. The Allocation / De-allocation of power from CGS by the Central Government cannot restrict or infringe the provisions contained under the Tariff Regulations, 2019, especially Regulation 17 which provide an option to the beneficiary Discom- the Appellant to exit the PPA/SPPA on completion of 25 years of operation from the COD for the Generating Station.

d. Once the provision under Regulation 17(2) is exercised by the Appellant to exit from the agreement, the scheduling of power to the Appellant from the Generating Station deemed to terminated.”

28. In the light of the decision of APTEL in its judgement dated 8.2.2022 in Appeal No. 239 of 2021 and Appeal No.240 of 2021, the issues raised by the Petitioner are examined and decided in the succeeding paras.

Re: Regulation 17 of Tariff Regulations, 2019 and its applicability to the Petitioner

29. The Petitioner has submitted that as per Regulation 17 of Tariff Regulations, 2019, upon completion of 25 years from the date of commercial operation, either a generating company may offer to the beneficiary or a beneficiary may seek an offer from the generating company for entering into a fresh arrangement for payment. The beneficiary has the right to first refusal to refuse scheduling of power in case the parties are unable to arrive at an arrangement or the generating company denies offering an arrangement. In case the existing beneficiaries refuse to enter into an arrangement with the generating company, the generating company in such a situation is given freedom to supply power to third parties. NTPC on the other hand has submitted that Regulation 17(1) is an enabling provision and is by no means mandatory. The tariff determination has to be as per the tariff regulations only. In case a special arrangement is made, the tariff determined (both capacity charges and energy charges) would be recovered on scheduled generation. According to NTPC, provisions of Regulation 17(2) of Tariff Regulations,2019 will kick in only when the generating company makes an offer for an arrangement under Regulation 17(1) and if there is no arrangement, Regulation 17(2) has no application.

30. We have noted APTEL's observation in para 59 of the judgement dated 8.2.2022 that the Appellant therein vide letter dated 23.11.2020 requested the NTPC for a suitable arrangement in terms of Regulation 17(1) of the Tariff Regulations, 2019 for procurement of power from Dadri-I, as soon as possible and in any event prior to the completion of 25 years from the COD i.e., 30.11.2020. The Appellant vide letter dated 23.11.2020 requested NTPC for a suitable arrangement in terms of Regulation 17(1) of the Tariff Regulations, 2019 for procurement of power from Dadri-I, as soon as possible and in any event prior to the completion of 25 years from the COD i.e., 30.11.2020. As no reply was received from NTPC, the Appellant therein, vide letter dated 30.11.2020, again informed the NTPC that as per the provision contained in Regulation 17 of the Tariff Regulations, 2019, the PPA and SPPA would lapse on 1.12.2020 at 00:00 hrs. i.e., on completion of 25 years from the COD for the Generating Station (Dadri-I), unless a mutually agreed arrangement to extend the supply from Dadri-I is in place and there will be no scheduling of power thereafter. APTEL has observed that the Appellant invoked the provisions contained under sub-regulation (1) and sub-regulation (2) of Regulation 17 of Tariff Regulations, 2019. APTEL in para 62 has observed that the Appellant therein by its letter dated 30.11.2020 discontinued scheduling of power from Dadri-I with effect from 01.12.2020 at 00.00 hrs since Dadri-I completed 25-year life term on 30.11.2020, thereby exercising its right of first refusal under Regulation 17(2) of the Tariff Regulations, 2019.

31. In the case in hand, the Petitioner took up with NTPC vide its letter dated 13.3.2020 seeking the information regarding terms of the arrangement on the various parameters of tariff as required under Regulation 17(1) as Dadri-I was to complete its useful life on 30.11.2020. Since the Petitioner did not receive any response from NTPC, it reiterated

its request vide letter dated 20.5.2020. NTPC replied vide its letter dated 2.5.2020 (which was stated to be received by the Petitioner on 20.5.2020) as under:

“The above provision is an enabling provision where the recovery of both capacity and energy charges shall be linked to scheduled generation.....the Hon’ble Commission has kept this provision as optional, which may be exercised after completion of useful life of a thermal generating station, if both the beneficiary and the generating company agree. Presently, NTPC is not considering this provision of Regulation 17 for any of its stations including Unchahar I and Dadri I. If any such arrangement is considered in future, the same shall be communicated to TPDDL.”

In other words, NTPC rejected the request of TPDDL to have an arrangement under Regulation 17(1) in respect of Dadri-I. thereafter, the Petitioner wrote a letter to NTPC requesting for non-scheduling of power from Dadri-I to the Petitioner and to not raise bills beyond 30.11.2020. In the light of the findings of APTEL in judgement dated 8.2.2020, we hold that the Petitioner having exercised its rights under Regulation 17(1) and the same having not yielded any arrangement as per the said regulation, has exercised its right of first refusal under Regulation 17(2) by not scheduling its share of power from Dadri-I with effect from 1.12.2020.

Re: Issue of composite agreement

32. The Petitioner has submitted that NTPC has misconstrued the PPA dated 8.5.2008 and SPPA dated 22.3.2012 to be composite agreements for procurement of power by the Petitioner from various generating stations of NTPC which is not amenable to severability. NTPC has submitted that under the Act, the Commission has no power to create a contract or curtail the period of a contract entered into between parties. NTPC has further submitted that the PPA in respect of Dadri-I as well as other generating stations of NTPC supplying power to TPDDL was entered into pursuant to the allocation by Government of

India and BPSA was signed on 31.1.1994. Thereafter, PPA was signed on 8.5.2008 and SPPA was signed on 22.3.2012. Recital A of SPPA reads as under:

“A.....It is hereby mutually agreed between the parties to extend the validity of the said PPA for all stations contained in sub-clause 13.1(A) of 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.”

NTPC has submitted that the procurement of power is envisaged even beyond the 25 years period considered in the tariff regulations to be the initial useful life, and therefore, the rights and obligations of the procurer shall continue even after the period of 25 years from the CoD of Dadri-I station. NTPC has further submitted that the obligation of TPDDL can be foreclosed only if the Government of India deallocates the power from Dadri-I station.

33. We have considered the submissions of the Petitioner and NTPC. The gist of submissions of NTPC is that Regulation 17 cannot curtail the contractual relationship between the parties after 25 years from the date of commercial operation since the parties through the PPA and SPPA have envisaged procurement of power beyond 25 years. APTEL in para 77(b) and (c) of the judgement dated 8.2.2022 has observed on the interplay between regulation and contractual provision as under:

“b. The provisions of the Tariff Regulations, 2019 have overriding effect on the Contractual Agreements, the PPA and SPPA signed between the Respondent-Generating Station and the Appellants- Delhi Discoms.

c. The Allocation / De-allocation of power from CGS by the Central Government cannot restrict or infringe the provisions contained under the Tariff Regulations, 2019, especially Regulation 17 which provide an option to the beneficiary Discom- the Appellant to exit the PPA/SPPA on completion of 25 years of operation from the COD for the Generating Station.”

34. Thus, as per the above observations, Regulation 17 shall have overriding effect on the contractual relationship between the parties and once the 25 years of operation from the date of commercial operation is complete, the parties may either agree to specific arrangement regarding tariff to be recovered based on scheduled generation or may exit the contractual relationship. As regards allocation or deallocation of power from central generating stations by MoP, APTEL has held that the same cannot infringe or restrict the provisions of the Regulations. In the light of the above findings of APTEL, irrespective of the provisions in the contract having validity period of more than 25 years or extension of the period of allocation by MoP, a beneficiary may either agree to a special arrangement under Regulation 17(1) or exit the PPA under Regulation 17(2) of the Tariff Regulations, 2019. This issue is decided accordingly.

Re: Issue of Useful Life:

35. The Petitioner has submitted that the useful life of a thermal power plant essentially expires on expiry of 25 years from the day of commercial operation, in terms of Regulation 3(73) of the CERC Tariff Regulations, 2019. The Petitioner has submitted that NTPC, contrary to the provisions of the Tariff Regulations, has sought to perpetuate its PPA/SPPA beyond the 25 year term to negate the intent of Tariff Regulations of incorporating a mutually agreed extension beyond the 25 years term of PPA on the grounds that (a) the BPSA, PPA and the SPPA were entered pursuant to allocation of power by the Ministry of Power for an indefinite period beyond 25 years; (b) PPA/SPPA remains in force till the life considered in the tariff orders or till the MoP considers reallocation; and (iii) the Commission determined the useful life of Dadri – I Station till May 2021 in order dated 11.4.2017 in Petition No. 330/GT/2014. The Petitioner has submitted that the useful life or extended life has no relevance to the applicability of Regulation 17 of Tariff Regulations, 2019.

36. NTPC has submitted that the concept of useful life in the Tariff Regulations, 2019 is primarily for computation of depreciation in the recovery of tariff. NTPC has further submitted that the Commission has been determining tariff for various generating stations of NTPC much after 25 years is over. NTPC has further submitted the generating company is not required to file specific petition to get the useful life extended. There are various provisions in the Tariff Regulations, 2019 such as Regulation 27 (Renovation and Modernisation) and Regulation 28 (Special Allowance to operate beyond 25 years) which enable the generating stations to function beyond 25 years. NTPC has submitted that GOI allocation is not restricted to 25 years from the date of commercial operation of the generating station and envisages continued operation generation and supply even beyond the period of 25 years.

37. We have considered the submissions of the Petitioner and the Respondent. Useful life of a thermal generating station has been specified as 25 years from the date of commercial operation. Further, there are provisions in the Tariff Regulations, such as Renovation and Modernisation and grant of special allowances where the Commission decides the extended useful life. However, those provisions do not stand on the way of operation of Regulation 17 of the Tariff Regulations. Even in case of extended life as per Tariff Regulations, Regulation 17 can operate on completion of 25 years as the said Regulation is neither dependent nor encumbered by any other Regulation for its operation. On completion of 25 years from the date of commercial operation of the last unit of the generating station, the parties may agree to an arrangement in terms of Regulation 17 or in case of non-materialisation of an agreed arrangement, the beneficiary distribution company has the option to exit the PPA.

Re: MoP Allocation

38. The Petitioner has submitted that NTPC had taken a stand before the High Court that PPA can only be terminated if the Government of India reallocates the power from Dadri-I plant to any other procurer. The Petitioner has further submitted that while the allocation of power from different stations of NTPC as per the PPA between the parties was based on allocation by the MoP, the concept of a "Government allocation" is alien to any right, liability or obligations under the Act. The MoP allocation has translated into the terms of the PPA and culminated into a contractual right, which itself is regulated by statutory regulations. The Petitioner has submitted that the said allocation, under any circumstances, cannot be given a statutory colour and at best, the MoP Guidelines can be considered as recommendatory in nature and not binding. Regulation 17 being a special legislation provides a mechanism to the distribution companies to seek special arrangement with right of first refusal from the old power plants which have outlived 25 years of their life. Regulation 17(2) while providing the right of first refusal to distribution licensees, nowhere contemplates seeking de-allocation from MoP to exercise such right of first refusal.

39. NTPC has submitted that the Central Government has exercised the power of allocation as per 'Gadgil Formula' which is part of Central Plant Assistance of the Government of India. The Guidelines for allocation of power by the Central Government have been modified from time to time, the last amendment being made in April 2000. NTPC has further submitted that Central Government vide letter dated 5.7.1991 has allocated 756 MW to the NCT of Delhi of which only 10 MW are allocated to TPDDL. Further, this allocation continued till 25.3.2022 when by the letter dated 25.3.2022, power has been reallocated to the State of Gujarat. NTPC has submitted that the Commission

has the power under Section 79(1)(a) is only to regulate tariff. The contractual provisions or otherwise the allocation of power by the Central Government is not vested with the Commission. The Commission does not have power either to create a contract or provide for exit routes from such contracts under the Act. The Commission can only interpret the contracts as entered into by the parties, apart from determining the tariff for the supply of electricity. NTPC has submitted that if the contention of TPDDL is accepted that in the absence of mutual arrangement under Regulation 17 of the Tariff Regulations, 2019 and without the Central Government deciding on the deallocation, TPDD can proceed to exit the PPA/SPPA entered into with the Central Sector Generating Stations, it would amount to giving a unilateral right to exit to one of the parties which voluntarily signed the SPPA and agreed to purchase electricity till the subsistence of Government of India allocation.

40. We have considered the submissions of TPDDL and NTPC. APTEL in its judgement dated 8.2.2022 has dealt with the MoP allocation as under:

“37. To our mind, it is clear that there was no dispute on whether the allocation or de-allocation of power from the Central Generating Stations (CGS) is vested upon the Central Government. All agreed that the power of allocation or de-allocation is vested with the Central Government but such power doesn't provide any delegation of power to the Central Government for extension of the life of Generating Station through an order for allocation, re-allocation or de-allocation of power and in case the useful life of a generating station is completed, further, extension of life can be extended by the Central Commission for CGS. In case the life for a CGS is extended by Central Commission, the allocation and de-allocation will be made as per the orders of the Central Government.”

Thus, APTEL has held that the power of the Central Government to allocate or deallocate the share in the Central Generating Station can be exercised only when the useful life of the said generating station is extended by the Commission.

41. It was further argued by NTPC before APTEL that by virtue of Article 73 of the Constitution of India, the powers of the Central Government stand extended to all matters

in respect of which Parliament has the power to make laws and therefore, Tariff Regulations cannot be interpreted to overreach the power of the Central Government.

The said argument was repelled by APTEL as under:

“45. Therefore, the contentions of the Respondent are misplaced in the light of the two judgements as quoted above which clearly provides that the Central Government can exercise the powers to issue executive orders under 73 only on subjects which does not encroach upon the provisions of any law made by the Parliament. In the present case, the Electricity Act, 2003 vests the powers of formulating and notifying the Tariff Regulations with the Central Commission as such any executive order issued by the Central Government infringing any provisions of either the Electricity Act, 2003 or the Tariff Regulations, 2019 is bad in law.”

APTEL further proceeded to hold that the allocation or de-allocation of power by the Central Government can best be considered as guidelines or advisory and once a statute provides for a specific remedy then the same cannot be made subject to an alternate mechanism provided under a Guidelines. In para 77(c) of the judgement, APTEL summarised the legal position of MoP allocation/de-allocation as under:

“c. The Allocation / De-allocation of power from CGS by the Central Government cannot restrict or infringe the provisions contained under the Tariff Regulations, 2019, especially Regulation 17 which provide an option to the beneficiary Discom- the Appellant to exit the PPA/SPPA on completion of 25 years of operation from the COD for the Generating Station”

42. In the light of the clear-cut findings and conclusions of APTEL as quoted above, the Commission holds that exercise of option by TPDDL under Regulation 17(2) of the Tariff Regulations does not depend on the deallocation of share of power of TPDDL in Dadri-I in favour of any other beneficiary.

Re: FGD

43. TPDDL has submitted that according to NTPC, the useful life of Dadri-I has increased by 15 years due to installation of FGD as the recovery of cost of upgrading the emission

control system would be in 15 years. TPDDL has submitted that the installation of ECS under Regulation 29 of the Tariff Regulations, 2019 can never be considered as an extension of the useful life by 15 years. NTPC has submitted that it has nowhere stated that due to installation of FGD system in Dadri-I or any of its generating stations, the life of the concerned station is extended by 15 years. NTPC has submitted that its stand all along is that there is no need to pass formal order extending the useful life of a generating station since availing and granting of special allowance clearly recognises that the plant continues to operate beyond 25 years from COD.

44. We have considered the submissions of TPDDL and NTPC. We notice that NTPC has denied having made the submission that the useful life of Dadri-I has increased by 15 years due to installation of FGD. Moreover, since it has been held by APTEL that the beneficiary has a right to exit the PPA on completion of 25 years from the date of commercial operation unless a mutually agreed tariff sharing mechanism is put in place in terms of Regulation 17(1) of Tariff Regulations, 2019, we do not find any relevance of installation of FGD on the statutory right of TPDDL to exit the PPA on completion of 25 years from the date of commercial operation.

45. In the light of the above discussion, the Commission is of the view that the issues raised by the Petitioner in the present petition were considered by the APTEL in its judgement dated 8.2.2022 rendered in Appeal Nos. 239 of 2021 and 240 of 2021. Therefore, the principles of law decided in the said judgement is squarely applicable in case of the Petitioner. In other words, the arrangement in terms of Regulation 17(1) having not been put in place by the parties, the Petitioner has a statutory right to exit the PPA in terms of Regulation 17(2) of the Tariff Regulations, 2019.

Issue No.2: Whether the Petitioner can relinquish the PPA/SPPA after the completion of useful life of 25 years from the COD of the Dadri-I Generating Station of NTPC under Regulation 17 of the Tariff Regulations 2019?

46. As already mentioned in para 31 of this order, the Petitioner took up with NTPC vide its letter dated 13.3.2020 seeking the information regarding terms of the arrangement on the various parameters of tariff as required under Regulation 17(1) as Dadri-I was to complete its useful life on 30.11.2020. Since the Petitioner did not receive any response from NTPC, it reiterated its request vide letter dated 20.5.2020. NTPC replied vide its letter dated 2.5.2020 informed that it was not considering any arrangement under provision of Regulation 17 (1) for any of its stations including Dadri I. Thereafter, the Petitioner wrote a letter to NTPC requesting for non-scheduling of power from Dadri-I to the Petitioner and to not raise bills beyond 30.11.2020. In the light of the findings of APTEL in judgement dated 8.2.2020, the Petitioner having exercised its rights under Regulation 17(1) and the same having not yielded any arrangement as per the said regulation, the Petitioner has exercised its right of first refusal under Regulation 17(2) by not scheduling its share of power from Dadri-I with effect from 1.12.2020. The Petitioner has a right to exit the PPA and not schedule power from Dadri-I with effect from 1.12.2020.

Issue No.3: Reliefs to be granted to the Petitioner

47. The Petitioner has prayed for the following reliefs:

(a) To set aside the letter of NTPC dated 30.11.2020 and the invoices raised by NTPC with respect to Dadri -I from 1.12.2020.

(b) To declare that with effect from 00:00 hrs of 1.12.2020, the Petitioner not liable to pay any charges towards Dadri-I plant of NTPC.

(c) To direct NTPC to not (i) schedule power to the Petitioner, (ii) raise bills on the Petitioner, (iii) invoke the consequential letter of credit and (iv) levy late payment surcharge.

48. Since the letter dated 30.11.2020 by NTPC denying exit of the Petitioner is inconsistent with Regulation 17(2) of Tariff Regulations as discussed in this order, the said letter cannot be sustained and is accordingly set aside. The Petitioner is allowed to exit the PPA and SPPA signed with NTPC in respect of Dadri-I from 00:00 hrs of 1.12.2020 on completion of 25 years of operation from the date of commercial operation. NTPC is directed not to raise any Invoices with respect to any charges qua Dadri - I w.e.f. 1.12.2020 and the payment, if any, made by the Petitioner shall be refunded within a period of 15 days by NTPC along with interest as specified in the PPA/ SPPA. It is noted that the allocation of the Petitioner in Dadri I has been re-allocated to Gujarat by MoP vide letter dated 25.3.2022. In view of the said development, we do not find any necessity to issue any directions with regard to prayers mentioned in para 47(c) of this order.

49. Petition No.44/MP/2022 is disposed of in terms of the above.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member