

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 98/MP/2023**

**Coram:**

**Shri Jishnu Barua, Chairperson  
Shri I. S. Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member**

**Date of Order: 13<sup>th</sup> January, 2024**

**In the matter of:**

Petition under Section 79(1)(f) and other applicable provisions of the Electricity Act, 2003 in regard to disputes related to the liability of Minimum Alternate Tax and recovery of excess amount paid by the Petitioner towards payment of Minimum Alternate Tax for the financial years 2011-2012 to 2021-2022 in relation to Power Purchase Agreements dated 22.9.2005 and 16.12.2008.

**And**

**In the matter of:**

Gujarat Urja Vikas Nigam Limited,  
Sardar Patel Vidyut Bhavan,  
Race Course, Vadodara- 390007

**...Petitioner**

**Vs**

Nuclear Power Corporation of India Limited,  
16th Floor, Centre - I, World Trade Centre  
Cuffe Parade, Mumbai

**...Respondents**

**Parties Present:**

Shri M.G. Ramachandran, Senior Advocate, GUVNL  
Ms. Sristi Khindaria, Advocate, GUVNL  
Ms. Swapna Seshadri, Advocate, GUVNL  
Shri Aneesh Bajaj, Advocate, GUVNL  
Ms. Ashabari Basu Thakur, Advocate, GUVNL  
Shri Narendra Hooda, Senior Advocate, NPCIL  
Shri A.P. Singh, Advocate, NPCIL  
Shri Shaurya Lamba, Advocate, NPCIL  
Ms. Rashi, Advocate, NPCIL  
Ms. Akshada Mujwar, Advocate, NPCIL  
Shri Nitin Chaudhary, NPCIL  
Shri S. Venugopal, NPCIL



## **ORDER**

The Petitioner, Gujarat Urja Vikas Nigam Limited (in short 'GUVNL'), has filed the present Petition seeking the following relief(s):

*(a) Declare that the recovery of tax component by the NPCIL is to be only as per Tariff Notifications issued by Department of Atomic Energy, Government of India and not de hors the same in the manner NPCIL is purporting to recover the amount of taxes as set out hereinabove;*

*(b) Hold and clarify that the effective tax rate is the rate at which the tax is actually paid by the NPCIL as per the statute i.e. the percentage of profit paid as tax;*

*(c) Direct NPCIL to raise future Invoices considering the tax component only on the return on equity as provided in Tariff Notification issued by Department of Atomic Energy, Government of India;*

*(d) Direct NPCIL to refund the excess amount of tax component recovered by NPCIL from GUVNL of Rs. 119,95,88,504.00 for the period FY 2011-12 to FY 2021-22 and any further amounts recovered subsequent to the said period, along with applicable interest;*

*(e) Pass an ad interim ex-parte order to direct NPCIL to raise the invoices based in terms of the prayer (c) and (d) above; and*

*(f) Pass any other direction as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case.*

### **Submissions of the Petitioner**

2. The Petitioner, in support of the above prayers, has mainly submitted the following:

(a) The Respondent NPCIL has set up various nuclear power stations in the country, and the capacity is allocated among various bulk power beneficiaries. Amongst others, NPCIL has set up Kakrapar Atomic Power Station at Kakrapar, Gujarat and Tarapur Atomic Power Station at Tatapur, Boisar, Maharashtra.

(b) GUVNL and NPCIL have entered into a Power Purchase Agreement (PPA) dated 22.9.2005 for the supply of 125 MW capacity from Kakrapur Atomic Power Station (KAPS) Units-1 and 2 and 274 MW capacity from Tarapur Atomic Power Station (TAPS) Units-3 and 4.

(c) The PPA provides for the charges for the supply of power as per the Tariff Notification issued by the Department of Atomic Energy (DAE), GOI in accordance with the Atomic Energy Act, 1962. However, such rates of supply



fixed were exclusive of taxes etc., and the PPA provides for the recovery of actual tax liability from GUVNL.

(d) GUVNL and NPCIL have also entered into another PPA dated 16.12.2008 for the supply of power from TAPS Units-1 and 2 for a capacity of 160 MW, with similar terms in relation to the rates for supply of power. At the time of the PPAs, the prevailing tariff notifications for the sale of the power was:

*i. Tariff notification dated 10.05.2005 of the Department of Atomic Energy for Tarapur Atomic Power Station, Units 3 and 4;*

*ii. Tariff notification dated 22.09.2006 of the Department of Atomic Energy for Tarapur Atomic Power Station, Units 1&2.*

*iii. Tariff Notification dated 15.09.2003 for Kakrapur Atomic Power Station, Units 1&2;*

(e) In the above-mentioned tariff notifications, the tariff rate was fixed, and the income tax liability was considered separately. However, from 2012, the notification for the tax component became a part of the post-tax ROE and the tariff notified included the component of income tax in the ROE itself. In this regard, the tariff notification dated 8.2.2012 was issued in respect of KAPS Units 1 and 2 and provided for tariff effective from 1.7.2010.

(f) The recovery of tax cannot be on a double counting basis, being included in the post-tax ROE and also recovery under Articles 7.5.2 and 7.5.3 of the PPA. The recovery of statutory taxes, levies, duties, and cess paid by NPCIL to the authorities from GUVNL was earlier based on the specific assertion in Article 7.5.1 that the tariff under Article 7 was exclusive of any statutory taxes, levies, duties, and cess. The amount of ROE on which the tax component for each generating station was to be considered was also specifically provided in the tariff notifications issued by the DAE.

(g) The tariff of 228.13 paisa per kWh for the KAPS Units 1 and 2, as notified, was considered on ROE rate of 15.5% grossed up by the tax rate of 20.008% and a formula was provided for the adjustment charge for ROE, due to change in the tax rate. Therefore, the tariff was to be adjusted for any change in the tax rate. If the effective tax rate applicable was to be higher or lower than 20.008%, then NPCIL was to calculate the ROE adjustment charges to adjust the tariff.



- (h) In the case of TAPS, Units- 3 and 4, the tariff notification dated 8.2.2012 provides for a tariff of 280.13 Paisa per kWh, which included the tax component on ROE and provided a formula for adjustment charge for ROE, based on the effective tax rate applicable, to be applied on account of change in the tax rate. The ROE adjustment charges were to be calculated every time based on the applicable tax rate for the relevant period.
- (i) NPCIL was entitled to claim an equity adjustment charge if the effective rate applicable is higher than the tax rate considered in the Tariff Notifications, and beneficiaries would be entitled to an equity adjustment charge if the effective rate is lower than the tax rate considered in the tariff notification. If the effective tax rate is the same as the rate considered in the tariff notification, there would be no equity adjustment charge.
- (j) DAE vide notification dated 20.11.2017, had determined the norms in accordance with which the tariff for sale of electricity by the Atomic Power stations shall be determined. The relevant part of the notification states as under:
- "2.3 Return on Equity (ROE)*
- The return on equity shall be computed on a pre-tax basis at the base rate of 15.5% and shall be grossed up with the normal tax rate applicable during each year of the tariff period. An additional return on equity will be available to those projects which are commissioned within the originally sanctioned time lines.*
- 2. 10 Provision for taxation*
- The provision for income tax would be taken into tariff by way of grossing up the base rate of return on equity of 15.5% with the normal income tax rate applicable for the year such that, effective ROE = base ROE / (1- T), where T = effective tax rate applicable for the year."*
- (k) NPCIL has been claiming an equity adjustment charge for the period 2011-12 to 2021-22 on an erroneous formulation without providing details of the equity adjustment charge and the formula for the computation of the effective tax rate, which is claimed to be higher than the base rate considered in the tariff notifications. NPCIL has not provided the computation for the equity adjustment charge and effective tax rate in terms of the tariff notifications.
- (l) GUVNL had sought detailed workings of the effective tax rates by NPCIL. However, NPCIL has failed to do so. GUVNL had written various letters to NPCIL for the detailed workings. GUVNL vide letter dated 23.10.2020 had requested



NPCIL to provide the detailed working of the effective tax rate of 23.9985%. GUVNL vide its letter dated 29.10.2020, sought information from NPCIL as to details of the additional profit earned from the generation of power and working of effective tax rate of 23.9985%. Similarly, the other 31 letters were written by GUVNL to NPCIL.

- (m) After repeated requests for an explanation of the effective tax rate, NPCIL finally admitted vide email dated 30.7.2022 that the effective tax rate has been arrived at by trial and error method. The effective tax rate is the rate as provided in the statute, and there can be no element of trial and error method in the same.
- (n) NPCIL has erroneously computed the effective tax rate and admitted that the effective tax rate is computed by it by a trial and error method. The effective tax rate is the rate at which the NPCIL pays the tax, and the derivation and iteration claimed by the NPCIL are without any basis. The effective tax rate does not change based on the differential in the tax paid by NPCIL and the tax collected by NPCIL from the beneficiaries.
- (o) GUVNL has computed the effective tax rate for NPCIL from the actual tax paid by NPCIL on the actual profit of NPCIL in terms of the figures provided by NPCIL itself. The total excess amount recovered by NPCIL for all generating stations for the period 2011-12 to 2021-22 is Rs.119,95,88,504.00. Any excess amount recovered by NPCIL towards the tax component is required to be refunded by NPCIL with interest to the beneficiaries. However, NPCIL, despite repeated request from GUVNL, has failed to do so.
- (p) GUVNL came to know of the mistake in the billing of the amount towards taxes by NPCIL being higher than the amount of taxes being actually paid by NPCIL. NPCIL never disclosed the discrepancy before 2020. GUVNL wrote to NPCIL seeking an explanation for the computation of the effective tax rate by NPCIL, and there were repeated communications between the parties. It was only in 2021 that NPCIL responded to the letters of GUVNL and attempted to provide an explanation of the computation. Thereafter, it became clear that NPCIL had been seeking a higher rate than the actual tax rate for the entire period in question and, therefore, GUVNL is filing the present Petition.



### **Hearing dated 10.8.2023**

3. During the hearing of the Petition, on 'admission' on 10.8.2023, the learned Senior counsel for the Petitioner made elaborate submissions on the issue of jurisdiction of this Commission to adjudicate the matter. However, at the request of the learned counsel for the Respondent, the Commission directed the Respondent to file its reply on the 'maintainability' of the Petition and for completion of pleadings by the parties.

### **Reply on behalf of Respondent, NPCIL**

4. The Respondent NPCIL, vide its reply dated 14.9.2023, has mainly submitted as under:

- (a) The present Petition ought to be dismissed in limine on the ground of maintainability as the dispute raised by the Petitioner does not come within the scope of Section 79(1) (a) to (d) of the Electricity Act, 2003 (the '2003 Act') and therefore, the Petitioner cannot invoke the jurisdiction and purview of this Commission.
- (b) The actual issue raised by the Petitioner is about the interpretation of the Tariff Notification issued by DAE, and the Petitioner is trying to disguise the said issue as an alleged breach of PPA.
- (c) The first Atomic Energy Commission was set up in August 1948 under Section 13 (Delegation of Powers) of the Atomic Energy Act, 1948. Later on, the DAE was set up in August 1954. In the year 1987, the provisions of the Atomic Energy Act, 1962 were amended by means of the Amendment Act of 1987, whereby the Central Government acquired powers to implement the provisions of the Atomic Energy Act, 1962 ('the 1962 Act') for generation of electricity through Atomic Energy, either by itself or by a statutory Corporation or a Government Company. Accordingly, in exercise of the powers vested with it, the Central Government, incorporated 'the Nuclear Power Corporation of India Ltd' as a Government Company wholly owned by the Central Government on 4.9.1987. NPCIL is functioning under the administrative control of the DAE, GOI.



- (d) DAE has been empowered to issue Notification as per Section 22 of the 1962 Act. Clause 7 of the PPA entered between the parties provides for the Rates for Supply of energy, as per tariff notification issued by the DAE, GOI from time to time. The Petitioner is invoking the jurisdiction of this Commission to interpret the Tariff Notification issued by the DAE, but such interpretation/ clarification can be provided by the DAE, the author.
- (e) The function and jurisdiction of the Commission are derived from Section 79 of the 2003 Act, particularly Section 79(1)(f) and the same would be applicable if the dispute falls within the provision of Section 79(1)(a) to (d). Since the adjudicatory power of the Commission is derived from section 79(1)(f) of the said Act, the Commission can only adjudicate disputes in relation to matters related to section 79(1)(a) to (d) of the 2003 Act. The present dispute raised by the Petitioner is not about the determination of the tariff, in fact, the Tariff Notification has not been challenged in the present Petition. The dispute raised only pertains to the interpretation of a clause in a Tariff Notification issued by DAE pertaining to the calculation of taxes.
- (f) Section 79(1)(a) of the 2003 Act does not apply to the present case, as the Petitioner is not seeking regulation of tariff. The regulation of power tariffs for nuclear power stations delves with the DAE, GOI. Section 79(1)(b) of the Act deals with the 'regulation' of the tariff 'of a generating company, which has a composite scheme for the generation and sale of electricity in more than one State. The present dispute does not involve the issue of the tariff being determined or regulated qua the generating company, whereby section 79(1)(b) is not attracted, and this power is only with the DAE.
- (g) Section 79(1)(c) of the 2003 Act confers powers to this Commission to regulate inter-state transmission of electricity. However, the subject matter in the present petition is not related to inter-state transmission of electricity, as the issue involved is entirely different. Section 79(1)(d) of the Act deals with the determination of a 'tariff' for inter-State transmission of electricity. The said provision is not at all attracted in the present case, as the Petition is not for determination of tariff.



- (h) A bare reading of the provisions of Section 79 of the 2003 Act and the aforementioned facts demonstrated that the present dispute cannot be entertained by this Commission. Though the power for determination of the tariff norms and tariff is vested with the Commission under Sections 61 & 62 of the Act, in the matter of the nuclear power plants, this power is out of the purview of the Act and is vested in the DAE under section 22 (1) (b) of the 1962 Act. This is clear from the bare reading of the provisions of Sections 173 and 184 of the 2003 Act.
- (i) If anything is inconsistent in the provisions of the Act and the 1962 Act, then it is the 1962 Act that will prevail, and the provisions of the Act shall not apply to the departments or ministries dealing with the Atomic Energy Act, and in the present case, the Tariff Notification issued by the Central Government for generation of electricity by NPCIL.

#### **Rejoinder of the Petitioner to the reply of NPCIL**

5. The Petitioner, vide its rejoinder dated 7.10.2023, has mainly submitted the following:

- (a) The dispute arises out of the PPA entered into between GUVNL related to the treatment of tax component considering the Tariff Notifications issued by the DAE and refund of the excess amount recovered by NPCIL as well as future invoices to be raised, based on the correct interpretation of the effective tax rate.
- (b) In terms of Section 79(1)(f) of the 2003 Act, the dispute between the generating company controlled by the Central Government and the licensees is within the jurisdiction of this Commission. Further, in terms of the judgment of the Hon'ble Supreme Court in GUVNL v Essar Power Ltd (2008) 4 SCC 755, the present dispute may be adjudicated by this Commission under section 79(1)(f) of the 2003 Act.
- (c) In relation to NPCIL itself, an issue on jurisdiction has been considered and decided by this Commission in Petition No.12/MP/2019 (related to the same generating station as in the present case), which was filed by MPPMCL for breach of non-supply of power. In the said case, NPCIL had raised the issue





inter alia that the said case does not fall within the scope of Section 79(1)(a) to (d) through an IA on maintainability and the same was rejected by the Commission vide its order dated 26.8.2020 in 64/IA/2019 in Petition No. 12/MP/2019. In the said case, the Commission, after taking note of Section 22 of the 1962 Act, decided, on a harmonious interpretation, that while the tariff shall be determined by the DAE, the adjudication of the dispute with regard to the regulation of generation tariff shall fall within the jurisdiction of the Commission.

- (d) Further, the Commission also upheld that any money claims, which are otherwise traceable to tariff, shall be subject to adjudication under Section 79(1)(f) of the 2003 Act. In this case, the claim of GUVNL is inter alia for a refund of the excess amounts recovered by NPCIL as well as related to future invoices to be raised in relation to the tax component, which is traceable to the tariff. Therefore, there can be no dispute that the present petition is within the jurisdiction of the Commission.
- (e) NPCIL has sought to rely on Sections 173 and 174 of the 2003 Act, read with the 1962 Act. Section 173 only provides that the provisions of the 2003 Act shall not have effect insofar as it is inconsistent with any other provisions of the 1962 Act. Section 174 is not relevant to the present case. NPCIL has not produced any notification under Section 174. If two enactments are in the same field and there is a possibility for both of them to operate without colluding with the other, then the doctrine of inconsistency is not attracted. The two Acts have to be harmoniously interpreted, and the principle of inconsistency would only apply if there are irreconcilable inconsistencies. Even under the Atomic Energy Act, it is only recognized that the same would prevail only in case of any inconsistency (Section 22(2)):
- (f) the implication of Section 173 of the 2003 Act, providing for non-application of the Electricity Act, 2003, is only restricted to such provisions of the 2003 Act, which are found to be inconsistent with any provisions of the 1962 Act. NPCIL cannot read the above provision to the effect that anything and everything contained in the 2003 Act has been disapplied on account of Section 173 for



companies whose tariffs are determined under the 1962 Act. If that were the intention, Section 173 would have been worded as 'nothing contained in this Act will apply to matters arising under or in relation to the 1962 Act.

- (g) Section 79(1)(f) of the 2003 Act has been held to override the arbitration clause in the contract, and such statutory provision overrides the contractual provision as it provides for statutory adjudication. Therefore, only to the extent that Section 79, including Section 79(1)(f), is irreconcilably inconsistent with the 1962 Act, would the jurisdiction of the Commission be excluded. NPCIL has only referred to one provision of the 1962 Act, Section 22(b). The above provision relates to fixing rates and regulating the supply. However, the same does not address the issue of adjudication of disputes arising out of such rates and supply. There is no provision under the 1962 Act, which is inconsistent with Section 79(1)(f) of the 2003 Act.
- (h) There is no dispute on the fact that the Central Government issues Tariff Notifications for the determination of tariffs for nuclear power projects such as those of NPCIL. However, this does not mean that the disputes arising out of the said Tariff Notifications or their implementations are outside the jurisdiction of the Regulatory Commissions under the 2003 Act.
- (i) The issue in the present case involves the tariff components - ROE and tax component and for adjudication of disputes involving tariff components, the Commission has the jurisdiction. Even if the Commission does not have jurisdiction to determine the tariff under Section 79(1)(a) and (b), it does not mean that the Commission does not have power to adjudicate disputes arising out of the tariff terms and conditions.
- (j) Even otherwise, to the extent that the Commission follows the Tariff Notifications issued by the Central Government, the Commission can regulate tariffs. The Tribunal, in the case of BRPL v. DERC & anr, dated 4.9.2012 in Appeal No. 94 and 95 of 2012, had noted that the "regulate" is wider than the "determination of tariff.



- (k) NPCIL is a Central Government company and further supplies power out of the same generating station to more than one state and, therefore, is a generating company under Section 79(1)(a) and (b) of the 2003 Act. Based on the above, this Commission has already upheld its jurisdiction under Section 79(1)(f) in regard to NPCIL
- (l) The issue is not merely issuance of clarification of the Tariff Notifications but rather adjudication of the disputes which may involve the consideration of the Tariff Notifications. In fact, as per GUVNL, it is clear that there is no issue of interpretation, and there can be only one understanding/interpretation of the Tariff Notification. As submitted in the Petition, the Central Government itself has admitted that under the present Tariff norms, the grossing up of the ROE is to be by the normal tax rate applicable.

### **Hearing dated 11.10.2023**

6. During the hearing, the learned Senior counsel for the Petitioner made detailed oral submissions on the issue of 'maintainability' of the Petition and reiterated the submissions made in the Petition and in its rejoinder. In response, the learned Senior counsel for the Respondent, made detailed oral submissions, mainly on the lines of its submissions made in its reply, contending that the Petition is not maintainable. He also submitted that since the present case does not fall within the scope and ambit of Section 79 of the 2003 Act, and the Commission does not have jurisdiction to adjudicate the disputes, the parties can settle their disputes through arbitration. The Commission, after permitting the parties to file their short-written submissions 'on maintainability', reserved its order in the Petition. Also, the Commission, without prejudice to the submissions of the parties on 'maintainability', advised the Petitioner and the Respondent to explore the possibilities of an amicable settlement of the issue, and report the same.



## **Affidavit of the Petitioner GUVNL**

7. In response to the observations of the Commission, vide ROP of the hearing dated 11.10.2023, the Petitioner, vide its affidavit dated 23.11.2023, has submitted the following:

*“I say that in terms of the above, the parties had met at office of the Respondent on 09.11.2023, however no amicable solution or settlement could be reached between the parties. In view of the same it is submitted that this Hon’ble Commission may with proceed with adjudication of the present Petition. The Petitioner would file its short submission on maintainability in terms of the Record of Proceedings”*

## **Written submissions of Petitioner GUVNL and the Respondent NPCIL**

8. Both the Petitioner and the Respondent have filed their written submissions on 30.11.2023. The submissions of the parties are mainly on the lines of their respective submissions/contentions, as raised in the Petition/replies/rejoinders, as above, and therefore, the same are not set out herein for the sake of brevity. The Petitioner has, in support of its contention, relied upon and enclosed copies of the judgments/orders in State of Orissa Vs. M.A. Tulloch & Co. (1964) 4 SCR 461; Forum for People’s Collective Efforts v State of W.B. (2021) 8 SCC 599; GUVNL Ltd. v Essar Power Limited, (2008) 4 SCC 755; Commission’s Order dated 26.8.2020 in Petition No. 12/MP/2019 and APTEL judgment dated 4.9.2012 in Appeal No. 94 & 95 of 2012 (BRPL v DERC). Accordingly, based on the submissions of the parties and the documents available on record, we proceed to examine the issues in the subsequent paragraphs.

## **Issue of Jurisdiction**

9. Based on the submissions of the parties, the issue which emerges for consideration with regard to the ‘maintainability’ of the Petition is:

*“Whether the Commission has the jurisdiction to adjudicate the dispute raised by GUVNL in terms of Section 79(1)(f) of the Electricity Act, 2003?”*



10. NPCIL has mainly contended that the dispute raised in this Petition does not fall within the scope of clauses (a) to (d) of Section 79(1) of the 2003 Act and therefore this Commission does not have the jurisdiction to adjudicate the dispute. Referring to Section 22(1) of the 1962 Act, which starts with a non-obstante clause, NPCIL has argued that the power under the 1962 Act is to formulate and develop a national policy with regard to atomic power, which is wider and comprehensive power, specific to atomic/nuclear sector and though the phrase 'regulating the tariff' is not used, as it has been used in the 2003 Act, the functions of regulating the tariff are exercised by the DAE. NPCIL has also submitted that though in respect of general electricity, the power for determination of tariff norms and tariff is vested with the Central Commission, under Sections 61 and 62 of the 2003 Act, but with respect to Nuclear Power plants, this power is out of the purview of the 2003 Act and is vested only with the DAE under Section 22(1) (a) and (b) of the 1962 Act read with the provisions of Section 173 and 184 of the 2003 Act.

11. *Per contra*, GUVNL has contended that while the determination of tariff of the atomic power stations is through the Tariff Notifications issued by the DAE, in terms of Section 22 of the 1962 Act, the jurisdiction with regard to the adjudication of disputes involving NPCIL is with the Central Commission under Section 79(1)(f) of the 2003 Act. While pointing out that that neither the 1962 Act nor the 2003 Act completely excludes the application of the 2003 Act to NPCIL, GUVNL has submitted that it is only to the extent of any inconsistency between the two Acts where the 1962 Act will apply to the exclusion of the 2003 Act. If there is no such inconsistency, the provisions of the 2003 Act are equally applicable and NPCIL is bound by the same. GUVNL has added that the expression used in Section 79(1)(f) of the 2003 Act with regard to adjudication is in regard to matters connected with clauses (a) to (d), and what is required is some nexus



to Section 79(1)(a) and (b) in the case of a generating company and similarly Section 79(1)(c) and (d) in the case of a transmission of electricity. GUVNL has further submitted that the scope of Section 79(1)(a) providing for regulating the tariff of a generating company is wider and not synonymous with the determination or fixing of rates and what is covered under Section 22(1)(b) of the 1962 Act is confined to fixing the rate and, in any event, not related to adjudication of the dispute or matters other than fixing the rate or regulating the supply of electricity.

### **Analysis and Decision**

12. We have gone through the pleadings and submission of the parties during the hearing. GUVNL has filed this Petition under Section 79(1)(f) and other applicable provisions of the 2003 Act. Section 79(1) of the 2003 Act provides as under:

*“79. (1) The Central Commission shall discharge the following functions, namely;*

*(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*

*(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*

*(c) to regulate the inter-State transmission of electricity;*

*(d) to determine tariff for inter-State transmission of electricity;*

*(e) xxx*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clause (a) to (d) above and to refer any dispute for arbitration.”*

13. Under clauses (a) to (d) of sub-section 1 of Section 79 of the 2003 Act, the Commission is required to regulate the tariff of the generating stations owned or controlled by the Central Government and the tariff of the generating stations which have a composite scheme for generation and sale of electricity in more than one State, to regulate the inter-State transmission of electricity and determine the tariff of inter-State transmission system. Under Section 79(1)(f) of the 2003 Act, the Commission has the power to adjudicate the dispute involving the generating company or



transmission licensee in respect of the matters connected with Clauses (a) to (d) of sub-Section 1 of Section 79 of the 2003 Act. The word used is “involving” a generating company or a transmission licensee in a case to be brought before the Commission for adjudication of a dispute under Section 79(1)(f) of the 2003 Act. In other words, if one of the parties to the dispute is a generating company or transmission licensee and the dispute can be related to any of the functions under Section 79(1)(a) to (d) of the 2003 Act, the case for adjudication of such a dispute shall lie before this Commission. Thus, the jurisdiction of the Commission for adjudication of the dispute gets activated if the dispute involves either a generating company or a transmission licensee and the dispute pertain to the regulation of tariff.

14. There is no doubt that NPCIL is a generating company, which is fully owned and controlled by the Central Government in terms of Sectionn79(1)(a) of the 2003 Act, and the electricity generated from the units of the generating stations of NPCIL (KAPS and TAPS), is being supplied to the distribution licensees (which include the Petitioner) in more than one State. However, the tariff of the generating stations of NPCIL is being determined by the DAE through various Tariff Notifications issued from time to time, under the provisions of Section 22 of the 1962 Act. Section 22 of the 1962 Act is extracted as under:

*“22. Special provisions as to electricity:*

*1. Notwithstanding anything contained in the Electricity (Supply) Act, 1948, the Central Government shall have authority: -*

*(a) To develop a sound and adequate national policy in regard to atomic power, to co-ordinate such policy with the Central Electricity Authority and the State Electricity Boards constituted under sections 3 and 5 respectively of that Act and other similar statutory corporations concerned with the control and utilization of other power resources, to implement schemes for the generation of electricity in pursuance of such policy and to operate either by itself or through any authority or corporation established by it or a Government Company, atomic power stations in the manner determined by it in consultation with the Boards or Corporations concerned, with whom it shall enter into agreement regarding the supply of electricity so produced.*

*(b) To fix rates for and regulate the supply of electricity from atomic power stations either by itself or through any authority or corporation established by it or a Government Company in consultation with the Central Electricity Authority.*



(c) To enter into arrangements with the Electricity Board of the State in which an atomic power station is situated either by itself or through any authority or corporation established by it or a Government Company for the transmission of electricity to any other State.

(d) Provided that in case there is a difference of opinion between the Central Government or such authority or corporation or Government Company as the case may be and any State Electricity Board in regard to the construction of necessary transmission lines, the matter shall be referred to the Central Electricity Authority whose decision shall be binding on the parties concerned.

2. No provision of the Indian Electricity Act, 1910 or any rule made thereunder or of any instrument having effect by virtue of such law or rule shall have any effect so far as it is inconsistent with any of the provisions of this Act.

3. Save as otherwise provided in this Act, the provisions of this Act shall be in addition to and not in derogation of, the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948.”

15. Further, Section 173 of the 2003 Act provides as under:

**“Inconsistency in laws:**

*Nothing contained in this Act or any rule or regulation made thereunder or any instrument having effect by virtue of this Act, rule or regulation shall have effect in so far as it is inconsistent with any other provisions of the Consumer Protection Act, 1986 or the Atomic Energy Act, 1962 or the Railways Act, 1989.”*

16. Section 22 of the 1962 Act starts with a non-obstante clause with regard to the provisions of the Electricity (Supply) Act, 1948. Thus, the non-obstante clause at the beginning of Section 22 of the 1962 Act seeks to provide that despite the provisions in the Electricity (Supply) Act, 1948 with regard to generation, supply and transmission of electricity, the provisions of Section 22 shall have full operation in so far as electricity generated from atomic energy is concerned and the provisions of the 1962 Act and the provisions of the Electricity (Supply) Act, 1948 will not be an impediment for the operation of Section 22 of the 1962 Act. As per Section 22(3) of the 1962 Act, the provisions of the said Act are in addition to and not in derogation of the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948. Both these latter Acts have been repealed by the 2003 Act. Therefore, the provisions of the 1962 Act and 2003 Act have to be harmoniously interpreted in so far as the provisions pertaining to electricity are concerned. Even Section 22(2) of the 1962 Act recognizes that the same would prevail only in case of any inconsistency. In other words, neither the 1962 Act nor the 2003 Act completely excludes the application of the 2003 Act to NPCIL. It is only to the extent





of any inconsistency between the two Acts, where the 1962 Act will apply to the exclusion of the 2003 Act, and if there is no such inconsistency, the provisions of the 2003 Act are equally applicable, and NPCIL is bound by the same.

17. NPCIL has contended that even though the specific phrase 'regulating the tariff' is not used as it has been used by the 2003 Act, the functions of regulating the tariff are exercised by the DAE under Section 22 (1) (a) and (b) of the 1962 Act. We note that under Section 22(1)(b) of the 1962 Act, the DAE has been empowered to fix the rates for and regulate the supply of electricity from atomic power plants, which corresponds to Section 79(1)(a) of the 2003 Act. Thus, the powers of the DAE, as covered under Section 22(1)(b) of the 1962 Act, are confined to fixing the rate and regulating the supply of electricity and, in no case, are related to the adjudication of the disputes or matters connected therewith. In contrast to this, the Central Commission, under Section 79(1)(f) of the 2003 Act, is vested with the function of adjudicating the disputes involving generating companies and transmission licensees in the matters covered under Section 79(1)(a) to (d) of the 2003 Act. Thus, a harmonious construction of the 1962 Act and the 2003 Act requires that those functions which are not covered under Section 22 of the 1962 Act should fall under the jurisdiction of the Central Commission under Section 79 of the 2003 Act, in the absence of which, the atomic power generating stations will remain largely unregulated. Thus, while the tariff of the atomic power generating stations shall continue to be determined by the DAE in terms of Section 22 of the 1962 Act, the issues relating to the regulation of generation tariff and adjudication of disputes thereof shall fall within the jurisdiction of the Central Commission.



18. It is well settled that the 'power to regulate' is very wide and includes any issue incidental or consequential thereto so as to make the 'power to regulate' purposeful and effective. While explaining the scope of the term 'regulate' under Section 79(1)(a) of the 2003 Act, the Appellate Tribunal for Electricity (APTEL) in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v. BRPL & Ors.) has held as under:

*"18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term "regulate" as contained in Section 79(1)(a) is a broader term as compared to the term "determine" as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term "regulation" has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. Vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513."*

19. NPCIL has argued that the power of DAE to issue notifications/tariff determination would necessarily include the power to issue necessary clarification/interpretation by the author Department. It has been submitted that the dispute raised pertains only to the interpretation of a clause in a Tariff Notification issued by DAE relating to the calculation of taxes. In our view, the issue raised by GUVNL is not merely for a clarification of the Tariff Notifications issued by DAE but for adjudication of the disputes, which involve the consideration/interpretation of the said tariff notifications. It is pertinent to note that in the Tariff Notifications issued by the DAE, the tariff included the ROE component with grossing up of the tax rate, and a formula was provided for the ROE adjustment charge, to be calculated based on the applicable tax rate for the period. GUVNL, in the present Petition, has raised disputes in relation to the computation of the ROE payable by GUVNL to the NPCIL and the recovery of the excess amount claimed by NPCIL and paid by GUVNL towards ROE adjustment charges (due to change in effective tax rate) for the financial years 2011-12 to 2021-



22. As the issue in the present case is relatable to the tariff components-tax component on ROE, we are of the considered view that this Commission has the jurisdiction to adjudicate the disputes in relation to the tariff, in terms of Section 79(1)(a) read with Section 79(1)(f) of the 2003 Act by itself or by referring such dispute to the arbitration. The submissions of the Respondent NPCIL are therefore rejected.

20. Further, the scope of Section 79(1)(a) of the 2003 Act, providing for regulating the tariff of a generating company, is wider and not synonymous with the determination or fixing of rates. It would also involve the terms and conditions of supply as held by the APTEL in its judgment dated 4.9.2012 in Appeal No. 94 & 95 of 2012 (BRPL v DERC & ors) as under:

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

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

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

21. As per the above judgement, Sections 61 and 79 of the 2003 Act do not only deal with tariffs but also the terms and conditions of tariffs, which have an impact on tariff, billing, payment, surcharge, rebate, payment security mechanisms such as a letter of credit and escrow arrangement, termination and suspension of supply etc. In the present case, the claim of GUVNL is inter alia for a refund of the excess amounts recovered by NPCIL as well as related to future invoices to be raised in relation to the



tax component, and the same is traceable to the tariff. Keeping in view the scope of the power of the Central Commission under Section 79 of the 2003 Act as interpreted by the APTEL, we are of the view that any money claim, which is otherwise traceable to tariff for the supply of electricity from the generating station of NPCIL to GUVNL, shall be subject to adjudication under Section 79(1)(f) of the 2003 Act.

22. It is pertinent to mention that in the case of NPCIL, wherein similar contentions were raised by MPPMCL in Petition No.12/MP/2019 (MPPMCL v NPCIL), the Commission vide its order dated 26.8.2020, held that the said Petition was maintainable and it had the jurisdiction to adjudicate the disputes between MPPMCL and NPCIL, in relation to the supply of power from its projects. NPCIL has contended that the order dated 26.8.2020 has neither analysed nor deliberated the issue of whether it will be within the power of the Commission to clarify the terms used by DAE in the tariff notifications when it has no power to determine/regulate tariff of atomic power stations. This contention of NPCIL is devoid of merits. The Commission in the said order, after harmonious construction of the 1962 Act and the provisions of the 2003 Act, had concluded that it had the jurisdiction to adjudicate the disputes therein.

Some of the relevant portions in the said order are extracted below:

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

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



*the regulation of generation tariff and transmission of electricity shall fall under the jurisdiction of the Central Commission.*

*30. While the items at paragraph 27(a), (c) and (d) are relatable to regulation of generation and supply of electricity from KAPS 1&2, the item at paragraph 27(b) is relatable to transmission of electricity. Therefore, the disputes are subject to adjudication under Section 79(1)(f) of the 2003 Act.*

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*32... Keeping in view the scope of the power of the Central Commission under Section 79 of the 2003 Act as interpreted by the APTEL, the Commission is of the view that any money claim which is otherwise traceable to tariff for generation and supply of electricity from the generating station shall be subject to adjudication under Section 79(1)(f) of the Act.”*

23. In our view, the above decision of the Commission is squarely applicable to the present case, wherein the disputes raised by GUVNL are traceable to the tariff.

24. GUVNL has referred to the judgment of the Hon'ble Supreme Court in GUVNL v Essar Power Ltd (2008) 4 SCC 755 and submitted that it is well settled that upon the enactment of the 2003 Act with Section 79(1)(f) read with Section 2(3) of the Arbitration and Conciliation Act, 1996, the bilateral arbitration of the nature specified in the PPAs gets superseded and adjudication is only by the Appropriate Commission in matters relating to electricity. Per contra, NPCIL has submitted that the PPAs dated 22.9.2005 and 16.12.2008 have been entered into and agreed by GUVNL subsequent to the passage of the 2003 Act, and in such PPAs, they have voluntarily agreed for choosing to resolve the dispute in a manner as provided therein (in the PPA). Therefore, it has submitted that by the principle of estoppel, GUVNL will be estopped from denying such voluntary agreement to the dispute resolution mechanism mentioned in the PPA, citing the provisions of the 2003 Act. It has added that the judgment of the Hon'ble Supreme Court in GUVNL v Essar Power Limited ('GUVNL case') has no relevance to the jurisdictional power of the Commission, as the issue in the present case, is about the correct interpretation of the terms used by DAE in tariff notifications and not a dispute under the PPA.



25. The matter has been examined. As noted earlier, the issue raised by GUVNL in the present case is not merely for a clarification of the Tariff Notifications issued by DAE, but for adjudication of the disputes, which involve the consideration/interpretation of the said tariff notifications. Since the issue in the present case is relatable to the tariff components-tax component on ROE and traceable to the tariff, we find and hold that this Commission has the necessary jurisdiction to adjudicate the disputes in relation to the tariff, in terms of Section 79(1)(a) read with Section 79(1)(f) of the 2003 Act by itself or by referring such dispute to the arbitration. In the present case, the PPAs entered into between the parties provide for reference to arbitration or for settlement in terms of the OM. In terms of Clause 12 of the PPA, the disputes between the parties shall have to be resolved initially at the Chief Engineer level and thereafter through arbitration in accordance with the Arbitration & Conciliation Act, 1996, as amended. Similarly, the Office Memorandum (OM) dated 22.5.2018 issued by the Department of Public Enterprises, Government of India, provides for the settlement of the commercial disputes between CPSEs inter se and between CPSEs and the Govt. departments through Administrative Mechanism for Resolution of CPSEs Disputes (AMRCD). It is pertinent to mention that in order to invoke the alternative dispute resolution such as arbitration, there must be an initial element of settlement which may be acceptable to both parties for a matter being referred to the arbitration.

26. It is pertinent to note that NPCIL, in Petition No. 12/MP/2019, had contended that the issues raised by MPPMCL therein may be referred to arbitration in terms of Clause 12 of the PPA dated 8.8.2005 or for settlement in terms of the OM dated 22.5.2018. However, the Commission, vide its order dated 26.8.2020, held that in terms of the judgment of the Hon'ble Supreme Court in the GUVNL case, in case of a dispute between a licensee and generating company, only the State Commission or the Central



Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. The Hon'ble Supreme Court, in the GUVNL case, on a harmonious construction of the provisions of the 2003 Act and the Arbitration and Conciliation Act, 1996, has held that whenever there is a dispute between a licensee and generating company, only the State Commission or the Central Commission (as the case may be) or the arbitrator or arbitrators nominated by them can resolve such disputes. The relevant portion of the judgment is extracted as under:

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

*59. In the present case, it is true that there is a provision for arbitration in the agreement between the parties dated 30.5.1996. Had the Electricity Act, 2003 not been enacted, there could be no doubt that the arbitration would have to be done in accordance with the Arbitration and Conciliation Act, 1996. However, since the Electricity Act, 2003 has come into force w.e.f. 10.6.2003, after this date all adjudication of disputes between licensees and generating companies can only be done by the State Commission or the arbitrator (or arbitrators) appointed by it. After 10.6.2003 there can be no adjudication of dispute between licensees and generating companies by anyone other than the State Commission or the arbitrator (or arbitrators) nominated by it. We further clarify that all disputes, and not merely those pertaining to matters referred to in clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute.*

27. Section 79(1)(f) is pari materia with Section 86(1)(f) of 2003 Act. Therefore, the judgement of the Hon'ble Supreme Court in the GUVNL case is applicable in the case of this Commission also. As per the above judgement, where a dispute falls under the adjudicatory jurisdiction of the Commission, the Commission may either adjudicate the



dispute or refer it to arbitration. The Commission will take a view on whether to adjudicate the dispute or refer the same for adjudication after the completion of pleadings by the parties. Accordingly, the contention of NPCIL that GUVNL is estopped from denying its agreement to the dispute resolution mechanism mentioned in the PPA is not acceptable.

28. Based on the above discussions and findings, we conclude that this Commission has the necessary jurisdiction to deal with the issues involved in the present Petition under Section 79(1)(f) read with Section 79(1)(a) of the 2003 Act. The Petition is, therefore, maintainable.

29. It is clarified that this order is limited to a determination of the issue of the jurisdiction of this Commission to decide the dispute, and we have not expressed any view on the merit of the issues raised in the Petition. Having held that the Petition is maintainable, we direct that the matter shall be heard on 'merits'. Accordingly, the Respondent NPCIL is directed to file its reply on merits, on or before **6.2.2024**, after serving a copy to GUVNL, who shall file its rejoinder, if any, by **20.2.2024**.

30. Petition No. 98/MP/2023 will be listed for hearing on **6.3.2024**.

**Sd/-**  
**(Pravas Kumar Singh)**  
**Member**

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

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

**Sd/-**  
**(Jishnu Barua)**  
**Chairperson**

