

DELHI ELECTRICITY REGULATORY COMMISSION

Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi- 110017.

Petition No. 60/2008

In the matter of: Approval of Power Purchase Agreement for 300 MW Power on Long-Term Basis between NDPL and Maithon Power Ltd. (Maithon Power Limited).

North Delhi Power Limited
Through its: **CEO**
Sub-Station Building,
Hudson Lines, Kingsway Camp,
Delhi-110009.

...Petitioner/Licensee

Coram:

**Sh. Berjinder Singh, Chairman, Sh. K. Venugopal, Member &
Sh. Shyam Wadhera, Member.**

Appearance:

1. Sh. Amit Kapur, Advocate for NDPL;
2. Sh. S. Venkatesh, Advocate for NDPL;
3. Ms. Shobana, Advocate for NDPL;
4. Sh. V.K. Goyal, Advocate for NDPL;
5. Sh. Sunil Wadhwa, CEO, NDPL;
6. Sh. Vivek Singla, HOD, PM & CC, NDPL;
7. Sh. Ajay Kapoor, GM(F), NDPL;
8. Sh. Ashis Kr. Dutta, Manager, NDPL;
9. Sh. Anurag Bansal, HOG, NDPL;
10. Sh. Bharat Sharma, Executive, NDPL;
11. Sh. Syed Husan, Sr. Officer, NDPL;
12. Sh. G.R. Nagendra, CO, Secy. Maithon Power Limited;
13. Sh. V.P. Singh, Advocate, BRPL;
14. Sh. Ashish Gupta, Advocate BRPL;
15. Sh. R.C. Natrajan, BSES R&L;
16. Sh. Mukush Dadhich, Sr. Manager, BRPL
17. Sh. Anurag Sharma, Asstt. Manager;
18. Sh. Sanjay Srivastav, DGM, BYPL;
19. Sh. Ramesh Narayan, Sr. VP, BSES;
20. Sh. Satish Kumar, Director (SEE), DMRC;
21. Sh. R.K. Sharma, CE (Elect.), MCD;
22. Sh. M.P. Agarwal, Member , ECAC;
23. Sh. Arun Kr. Dutta, Stakeholder;
24. Sh. R.K. Singh, Associate Professor, SRCC;
25. Sh. D.C. Khanna, Gen. Secretary, RWA, Rohini;
26. Sh. K.K. Sharma, Consumer, Rohini;
27. Sh. S.K. Auraba, Consumer.

ORDER

(Date of Hearing: 13.03.2009)

(Date of Order: 30.04.2009)

1. The Petitioner/applicant, NDPL through this petition/application, sought approval of Power Purchase Agreement for 300 MW power on long term basis (from 2012 to 2041) between NDPL and Maithon Power Limited (Maithon Power Ltd.). A copy of Power Purchase Agreement initialled by NDPL and Maithon Power Limited was placed on record for the consideration and approval of the Commission.
2. It is stated that Maithon Power Limited has agreed to supply 300 MW power to NDPL from April 2012 to March, 2041 on long term basis. The Maithon Power Limited is a joint venture of Tata Power Company Ltd. (shareholding 74%) and Damodar Valley Corporation (shareholding 26%). The Maithon Power Limited is establishing 1050 MW (2 X 525 MW) Thermal Power Plant named as Maithon Power Limited Right Bank Thermal Power Project at Dhanbad, Jharkhand, on a build, own and operate basis. The Tata Power Trading Company Ltd.(TPTCL) has entered into a Memorandum of Understanding (MOU) with the Seller (Maithon Power Limited) on 12th October, 2006 to tie up sale of 750 MW of Power from Seller to potential buyers.
3. Pursuant to the aforesaid MOU, the TPTCL would also facilitate the long term open access and evacuation arrangements and other related activities, for a consideration/trading margin of 4 paise per unit payable by the Buyer (NDPL) for the duration of this Agreement (from April 2012 to March 2041).
4. It is further stated that the said power purchase agreement is subject to the approval of the Commission. Subsequently the tariff for this plant shall be determined by the Central Electricity Regulatory Commission in accordance with Section 62 of the Electricity Act, 2003. It is further submitted that the PPA requires approval of the Commission also in terms of letter No. F.12(3-5)/DERC/2002-03/1001-1003 dated 02.06.2006 which requires NDPL to take approval of the Commission for any financial transaction with group company/companies under the same management. The terms of the PPA are stated to be based on arms length commercial principles.
5. It is further stated that Govt. of India, Ministry of Power has approved this project under the Mega Power Policy which provides various benefits. The Maithon Power Limited is developing this coal based project under the Mega power

policy. The project has been recognised as Mega Power Project as per Ministry of Finance, Govt. of India. However, the Mega Power Certificate is yet to be issued by Ministry of Power. The benefits of Mega Power Project shall be passed on to NDPL as and when the same are received.

6. It is further stated that considering the long term power scenario in NCT of Delhi, as projected by Central Electricity Authority (CEA) in their 17th EPS, NDPL would require this 300 MW of power by April 2012 to meet its universal service obligation of supply to its consumers. There are not many power projects in the country which are getting commissioned in this period and from where the power can be procured at the tariff determined by CERC. It may be noted that even Hon'ble Supreme Court is constantly monitoring the power situation in the NCT of Delhi and NDPL cannot afford to miss such opportunity of getting firm supply of power for 29 years, from April 2012 to March 2041.
7. It is further stated that this project has already achieved financial closure based on the PPA entered into between TPTCL and MPL and construction is in full swing at the site. It may also be noted that the power from this project shall be procured at the tariff to be determined by CERC, as is going to be the case with Indira Gandhi Super Thermal Power Station (3 X 500 MW) being established by Aravalli Power Company Ltd., with whom NDPL has already signed PPA on June 10, 2008.
8. It is further stated that the TPTCL has signed a PPA with Maithon Power Limited for 750 MW power and has confirmed that the entire 750 MW of power i.e. entire share of TPTCL will be sold at similar terms and conditions as offered to NDPL and if TPTCL extend any better terms to any other buyer the same shall be extended to NDPL also. NDPL shall be executing the PPA with TPTCL. The payment risk to Maithon Power Limited (Generating Company) shall be borne by TPTCL. TPTCL will be free to sell power in the open market if NDPL is in default. It may also be noted that TPTCL shall be facilitating long term open access and shall take care of the schedule and despatch for this power.
9. It is further submitted that in line with current practice, power procured through Trader are being transacted through an agreement between buyer and trader. The trader in turn enters into an agreement with generator. The Commission however, may like to approve the initial draft agreement between NDPL and Maithon Power Limited or the agreement between NDPL and Tata Power Trading Company Ltd. as the Commission may feel appropriate. NDPL does not have any reservation on any of these agreements.

10. It is contended by the Ld. Counsel Sh. Amit Kapur appearing for the Petitioner that it is essential to understand the interpretation and impact of the provisions of the Tariff Policy issued by the Central Government pursuant to Section 3 and 63 of the Electricity Act, 2003 on the legislative scheme qua bilateral power purchase agreements:

(a) The Electricity Act, 2003 was enacted with the objectives, inter alia, of repealing and consolidating the existing Central Laws; deregulating generation of power; inducing private investments and developing a market.

(b) Sections 62(1)(a) and 63 of the Act provide for two alternatives to the concerned parties to procure power with the approval of Tariff by the Appropriate Commission, viz.:-

(i) Under Section 62 (1)(a), Commission shall determine tariff for supply of electricity by a generating company to a distribution licensee; and

(ii) Under Section 63 in the event, tariff has been determined by Competitive Bidding; the Commission shall adopt such tariff.

(c) Clause 5.1 of the NTP provides that power procurement for future requirements should be through a transparent Competitive Bidding mechanism using the guidelines issued by the Central Government on 19.01.2005.

(d) Subsequently, MoP clarification dated 28.08.2006 has, inter-alia, clarified that:

"2. Your attention is drawn to Rule 8 of the Electricity Rules, 2005 which prescribes that the tariff determined by CERC for generating companies under clause (a) or (b) of sub-section 1 Section 79 of the Act shall not be subject to re-determination by SERC and with this condition, the State Commission may determine whether a distribution licensee in the State should enter into PPA or procurement process with such generating companies based on the tariff determined by CERC.

3. Therefore, the concerned SERC has the jurisdiction to regulate electricity purchase and procurement process of a distribution licensee under Section 86(1)(b) of the Act except the tariff and tariff related matters of the PPA.

4. It is further clarified that the PPA, in cases where tariff has been determined through Competitive Bidding process under Section 63 of the

Act and in accordance with the relevant guidelines issued by the Central Government, is finalized within the bidding process and the Appropriate Commission is required to adopt the tariff in accordance with the provisions of the law."

11. It was pointed out that from the above it is clear that the Distribution Licensees are not barred from procuring power at any time at a rate to be determined by the CERC. This position has since been settled by the Hon'ble Appellate Tribunal in its judgement dated 23.11.2006 in Appeal No. 228 and 230 of 2006 after analysing the applicable provision of the Electricity Act, the National Electricity Policy and the Tariff Policy. The findings are mentioned below:-
 - (a) The National Electricity Policy and the Tariff Policy are guidelines framed to achieve the objectives of the Electricity Act, which cannot run counter to the legislative mandate. It is not permissible to a delegatee to overturn the legislative enactment, and as such the scope of these policies cannot be read so as to overturn the statutory provisions of the 2003 Act;
 - (b) Section 63 is an exception to Section 62 and the guidelines will operate only where tariff is being determined by the bidding process;
 - (c) It is a settled law that the statutory rule/ regulation / clarification which does not conform to the provisions of the statute under which it is made or does not come under the scope of rule making power is void;
12. Ld. Counsel Sh. Amit Kapur submitted that it is a settled position that entering into a regulated PPA is permitted as it is the alternative to resort to Competitive Bidding based procurement under Section 63. In the former case, the tariff will be determined under Section 62(1) (a) and 79(1) of the Electricity Act, 2003 by the Appropriate Commission.
13. Ld. Counsel further submitted that Section 62 of the Act vests the power of determination of tariff for procurement of electricity by a DISCOM with the appropriate Commission. Such a power cannot be treated as curtailed or read down by a policy direction issued by the Government, so as to render the provision of the Act providing the said power otiose. In this regard, the settled principle of statutory interpretation is noteworthy that a subordinate legislation, clarification or notification issued by Government must be limited to and consistent with the letter and spirit of the parent statute where under the same is issued. Any executive instructions/rules/notifications which are contrary to, or

violative of, or seek to limit the scope of any provision of the parent statute shall be struck down or read down as ultra vires the parent statute.

14. Ld. Counsel further submitted that the seller had entered into similar agreements with other state utilities also namely, WBSEB (150 MW) and PSEB (300 MW). Looking at the long term energy scarcity scenario in country where many buyers were pressing for this power, NDPL has been able to secure 300 MW of power in order to provide Long-Term benefits to the consumers of NDPL area which should not be denied. If NDPL is deprived of this economical power, the same will be tied up elsewhere in no time.
15. It was further submitted that the price of power procured under present PPA is estimated to be much lower than the rates at which power is being procured by way of Competitive Bidding elsewhere. For instance:
 - (a) Talwandi Saheb Project (Punjab) of 2000 MW capacity under “**case-2**” Competitive Bidding was awarded to Sterlite Energy by Punjab SEB at the levelised tariff for **Rs. 2.86/unit**.
 - (b) Jhajjar Power Project of 1320 MW capacity was awarded to China Light and Power India Ltd. under “**case-2**” Competitive Bidding by Haryana SEB at the levelised tariff of **Rs. 3.00/unit**.
 - (c) Jaypee Associates was the lowest bidder for Karachana Project of Uttar Pradesh SEB under “**case-2**” Competitive Bidding project at the levelised tariff of **Rs. 2.97/unit**. Reliance bid for this project was **Rs. 4.00/unit**.
16. The above instances are of case-2 bidding, where the responsibility of all clearances, fuel linkage and land acquisition rests with DISCOMs whereas in the present case all such responsibilities were undertaken by Maithon Power Limited at their own risk and cost (similar to Case-I bidding). It may be noted that the indicative tariff for power from Maithon Power Limited (i.e. **levelised tariff of Rs.2.58 per Kwh**) is much lower than the tariffs at which above referred projects have been awarded despite the risk and cost of development of project including obtaining of statutory clearances, fuel linkage and land acquisition which have been borne by Maithon Power Limited. In all the competitively bid projects mentioned above the responsibility and cost of obtaining clearances, fuel linkage and land acquisition etc., was that of the DISCOMs. It may be noted that in the event of going for a competitive bid for procurement of power from a

plant like Maithon Power Limited it would fall under Case-1 bidding for which presently there are no guidelines.

17. Ld. Counsel Mr. Amit Kapur further submitted that procurement of long term power from a reasonably secured source such as Maithon Power Limited with substantial progress in project including financial closure already achieved, at the rates to be determined by CERC and estimated to be lower than the competitively bid rates elsewhere would be a prudent proposal.
18. Ld. Counsel contended that Maithon Power Limited quoted a tariff of Rs.3.19 per Kwh against the medium term tender floated by DISCOMs of Delhi. It is pertinent to mention that the power tariff quoted by other bidders was much higher than tariff quoted by Maithon Power Limited in the Competitive Bidding. The medium term bid rates arrived after first medium term bidding in July 2007 was cancelled considering the high quoted rates of power. The Medium term bids rates arrived after second medium term bidding in November 2007 was as following:
 - (a) Maithon Power Limited levelised tariff was Rs.3.57 per Kwhr at NDPL periphery.
 - (b) Jindal Power Ltd. levelised tariff was Rs.6.5 per Kwhr at NDPL periphery.

Maithon Power Limited was selected as the lowest bidder and PPA was duly signed with Maithon Power Limited.

19. It is further contended on behalf of the petitioner that the present approval is being sought by the petitioner and not by the generator of power as part of the approval process of PPA. This Commission is required to assess and evaluate inter alia:
 - (a) Requirement of Power by the NDPL;
 - (b) The reasonable certainty of availability of power from the proposed generating station, considering the achievement of financial closure and progress of the project; and
 - (c) The reasonableness of the estimated price (eventually to be approved by the CERC) given the current market conditions.

As the power is proposed to be procured from an inter-state generating station, the Tariff for the same shall be determined by the appropriate Commission under

the Electricity Act, 2003 (CERC). **It is reiterated that the present PPA is operative, once approved by the Commission only on determination of Tariff by CERC.** It is also mentioned that BRPL and BYPL would neither be aggrieved by the approval of the present PPA nor it would be deprived of anything to which it is legally entitled.

20. The Ld. Counsel Mr. V.P. Singh, appearing for BRPL and BYPL (DISCOMs) submitted that the present proceedings are not maintainable as NDPL is required to follow the procedure contemplated by the National Tariff Policy dated 6.1.2006 issued by the Govt. of India under Section 3 of the Electricity Act, 2003 and the Guidelines for Determination of Tariff by Bidding Process for procurement of power by Distribution Licensees (Competitive Bidding Guidelines) dated 19.1.2005 issued by the Government of India.
21. It is submitted that as per the provisions of Clause 5.1 of NTP, all the requirement of power (from the coming into force of the NTP) should be procured competitively by the distribution licensees. The relevant portion of the NTP is extracted hereinbelow:

"All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a state controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity. Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of Competitive Bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition."

The only exceptions to the applicability of the said provision are specified very clearly in the said provision which are not clearly attracted in the present proceedings. The Ld. Counsel Mr. Singh submitted that it is settled law that any exemption or expansion from the applicability of a Regulation/Notification is to be interpreted strictly and thus a strict construction of the NTP makes it clear that the Petitioner is not exempt from its provision.

22. In addition to the above, it is submitted that this Commission does not have the jurisdiction to exempt the price arrived at between the petitioner and Maithon Power Limited for sale/supply of 300 MW of power since such price has not been arrived in consonance with the procedure contemplated under the National Tariff Policy (NTP) read with the Competitive Bidding Guidelines. The jurisdiction

of the appropriate commission only gets triggered once the concerned utility follows the procedure laid down in the NTP read with the Competitive Bidding Guidelines. The same has not been followed in the present case, it is liable to be dismissed straightway.

23. It is further stated that the present proceedings are liable to be dismissed as being non maintainable since NDPL has not called for any bids for procurement of power as per the procedure laid down in the National Tariff Policy read with Competitive Bidding Guidelines.
24. Ld. Counsel Sh. V.P. Singh stated that in July 2007, the petitioner on behalf of BRPL, BYPL and NDPL invited bids for short term/medium term power procurement. After following the bidding process provided for in the Competitive Bidding Guidelines, Maithon Power Limited was declared as the successful bidder. Subsequently, agreement was entered into between the Petitioner, BRPL and Maithon Power Limited. Thus, having accepted the applicability of the NTP and the Competitive Bidding Guidelines for procurement of power on one occasion, it is now not open to the Petitioner to conveniently bypass the said procedure for a different transaction. It is further contended by Ld. Counsel that the petitioner is trying to achieve indirectly what Maithon Power Limited could not achieve directly. The Petitioner and Maithon Power Limited are related entities/ Group Companies in as much as Tata Power Ltd. has a 74% shareholding in Maithon Power Limited and the remaining share 26% in the Maithon Power Limited being held by Damodar Valley Corporation. It is submitted that Maithon Power Limited sought exemption from applicability of requirement of competitive procurement of power under clause 5.1 of the NTP vide its petition dated 29.1.2006 before the CERC. The said petition of Maithon Power Limited was disposed of by the CERC giving liberty to approach the Central Government for clarification. Ld. Counsel Mr. V.P. Singh stated that it appears that till date no application/petition has been made by Maithon Power Limited to the Central Government for clarification of the applicability of NTP in terms of the liberty granted to it by the CERC. This makes it evident that it has accepted that it is not exempt from the application of clause 5.1 of NTP. Therefore, it is submitted that this itself is a standalone ground to reject the petition.
25. Ld. Counsel Sh. V.P. Singh contended that assuming but not admitting that the petitioner is exempted from clause 5.1 of NTP and is permitted to enter into PPA with Maithon Power Limited for procurement of power then BRPL and BYPL may also be allocated power as per the proportion detailed herein below:-

Name of DISCOM	Capacity Allocated
NDPL	29.18%
BRPL	43.58%
BYPL	27.24%

26. It is most respectfully submitted that the PPA in the present Petition, if approved by the Commission, should be allocated among all the DISCOMs in line with the Order of the Commission dated 31.3.2007 i.e. power should be allocated to NDPL, BRPL and BYPL in the following proportion 29.18%, 43.58% and 27.24% respectively.
27. The Commission heard the petitioner as well as all Stakeholders present during the hearing at length. The Ld. Counsel for the Petitioner submitted his arguments essentially based on Section 61, 62(1)(a), 63, 86(1)(b) and 79(i) of the Electricity Act, 2003, Rule VIII of the Electricity Rules, 2005, Rajasthan Electricity Regulatory Commission Order dated 19.10.2006 in Petition No. 110/2006 and Order of ATE dated 23.11.2006 in Appeal No. 228 and 230 of 2006. Whereas The Ld. Counsel for BRPL and BYPL and some stakeholders present during the hearing opposed the Petitioner on the issue of approval of the power purchase Agreement for 300 MW power on long term basis from Maithon Power Limited. Ld. Counsel Mr. Singh argued his case on the basis of clause 5.1 of National Tariff Policy and the Guidelines for Determination of Tariff by bidding process for procurement of power by Distribution Licensees dated 19.1.2005 and Section 63 of the Electricity Act, 2003. The Ld. Counsel vociferously argued that since the Maithon Power Limited has not made any application to the Central Government for clarification of the applicability of NTP in terms of the liberty granted to it by CERC vide its order dated 17.1.2007, therefore it has accepted that it is not exempt from obligation of clause 5.1 of NTP and thus the said petition is not maintainable.
28. Before deciding the issue regarding approval of the said Power Purchase Agreement for 300 MW power from Maithon Power Ltd. it is essential to examine the relevant provisions of the Electricity Act, 2003, Rules, Regulations, and National Electricity Policy, Tariff Policy and the guidelines issued by the Central Government for Competitive Bidding.
29. Section 86 of the Electricity Act, 2003 provides that:

- “(1) The State Commission shall discharge the following functions, namely:--
- (a) ...
 - (b) **regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;**
 - (c) facilitate intra-State transmission and wheeling of electricity;
 - (d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;
 - (e) ...
 - (f) ...
 - (g) ...
 - (h) ...
 - (i) ...
 - (k) discharge such other functions as may be assigned to it under this Act.”

30. Section 79 of the Electricity Act, 2003 provides that:

- “(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) ...
 - (f) ...
 - (g) ...
 - (h) ...
 - (i) ...
 - (j) **to fix the trading margin in the inter-State trading of electricity, if considered, necessary;**
 - (k) to discharge such other functions as may be assigned under this Act.
- (4) In discharge of its functions, the Central Commission shall be guided by the National Electricity Policy, National Electricity Plan and tariff policy published under section 3.”

31. Section 61 of the Electricity Act, 2003 provides that:

“The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:--

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;
- (e) ...
- (f) ...
- (g) ...
- (h) ...
- (i) the National Electricity Policy and tariff policy."

32. Section 62 of the Electricity Act, 2003 provides that:

- "(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for--
- (a) supply of electricity by a generating company to a distribution licensee:
PROVIDED that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity."

33. Section 63 of the Electricity Act, 2003 provides that:

"Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government."

34. Clause 5.1 of the National Tariff Policy provides that:

*"All future requirement of power should be procured competitively by Distribution Licensees except in cases of expansion of existing projects or where there is a state controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.
 Even for the Public Sector project, tariff of all new generation and transmission projects should be decided on the basis of Competitive Bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition."*

35. From the above, it is seen that to regulate/approval of electricity purchase and procurement process of Distribution Licensees is one of the statutory functions of the State Commission under Section 86 (1)(b) of the Electricity Act, 2003. There is no ambiguity with regard to the power of Commission to regulate/approve

electricity purchase and procurement process of Distribution Licensee. This power of the Commission is not subject to any other condition and is not restricted in any way. Further, it is seen that there is no overriding power in the Central Government to similarly regulate the process of procurement of electricity in a manner so as to override the functions of the Commission. In case the State Commission is satisfied on the facts of a case that a negotiated PPA has secured terms as good if not better than those which would be availed by a Competitive Bidding process it has the power under Section 86(1)(b) to so permit the DISCOM to enter into a PPA with the generator. Further, the Commission has noticed from the submissions of the Petitioner that DISCOMs of Delhi have recently signed a Power Purchase Agreement with Maithon Power Ltd. for Medium Term Procurement of Power through Competitive Bidding at the levelised tariff of Rs. 3.57 /unit which sufficiently indicates that levelised tariff of Rs. 2.59 paisa/unit as indicated in this PPA is less than the levelised tariff as mentioned above determined through bidding process. If benefit of Mega Power Project becomes available to this project, the estimated tariff is likely to go down.

36. Section 63 of the Electricity Act, 2003 clearly states that the appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government. This provision specifically empowers the Commission to adopt the tariff when such tariff is arrived at through transparent process of bidding. This power of the Commission for adoption of tariff is particularly specific and distinct. The conditions when the appropriate Commission can adopt the tariff are also clearly dealt with in Section 63. However, it is seen that Section 63 carves out the situation where the discretion of the Commission is circumscribed in the matter of determination of the tariff where such tariff has been determined through a transparent process of bidding. It is pertinent to mention here that guidelines/amendments/modification of the guidelines issued by the Central Government are applicable only when tariff is to be determined through the process of bidding and appropriate Commission has to adopt such tariff. The Commission is of the considered view that the guidelines issued by the Central Government has no application when tariff is to be determined under Section 62.
37. Under Section 62 (1)(a), Commission shall determine tariff for supply of electricity by a Generating Company to a Distribution Licensee. It is altogether a different route for determination of tariff. In other words, powers to fix tariff by different methods is conferred upon the appropriate Commission.

38. Clause 5.1 of the National Tariff Policy formulated under Section 3 of the Electricity Act, 2003 provides that:

"All future requirement of power should be procured competitively by Distribution Licensees except in cases of expansion of existing projects or where there is a state controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.

Even for the Public Sector project, tariff of all new generation and transmission projects should be decided on the basis of Competitive Bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition."

39. The Commission is of the view that Regulation of business practices of Distribution Licensee including the manner of purchase of electricity is a function of the State Commission and the National Electricity Policy and National Tariff Policy is a guideline in this area. Of course, it has to be followed as far as it can be followed in larger public interest by the State Commission.
40. Further, Commission is of the view that guidelines which provides that all future requirement of power should be procured competitively by Distribution Licensee is not a policy relating to tariff but, a policy relating to the manner in which the power should be procured. It merely suggest the need for Distribution Licensee to try and procure power as competitively as possible. It is clear that mode and manner of procuring power should ensure that uneconomic costs are not passed through to the consumer, and power is procured at optimum prices, and the modality of procuring power through a Competitive Bidding process is one of the effective way to secure this. But, it is not correct to say that in no circumstance a Distribution Company can procure power through long term Power Purchase Agreement through regulated tariff route. The Commission feels that there is no legal bar upon Power Purchase based on Tariff determined under Section 62, at any point in time although Section 63 envisages adoption of tariff by the Commission without again resorting to fixation of tariff U/S 62, if competitive bids were initiated following the Govt. of India Guidelines issued in this regard. Guidelines issued for Case-II bidding by Govt. of India in January 2005 has no application in the present case. The guidelines for Case-I bidding was issued by Govt. of India on 27.3.2009 only. The State Commissions while approving the Power Purchase Agreement U/S 62 would have to see whether the tariff is reasonable and the same is in the interest of consumer.

41. The Commission is also of the considered view that the National Electricity Policy and National Tariff Policy are guidelines framed to achieve the objectives of the Electricity Act, 2003 which cannot run counter to the legislative mandate. In no circumstances it is permissible to a delegatee to over-turn the legislative enactment and as such, the scope of these policies/guidelines cannot be read so as to over-turn the relevant statutory provisions of Section of the Electricity Act, 2003. Further, Section 63 is an exception to Section 62 and the guidelines framed by the Central Government will operate only when tariff is being determined by the bidding process. The Commission has no hesitation in accepting the submission of the Petitioner that it is settled law that the statutory rule/regulation/clarification which does not conform to the provisions of statute under which it is made or does not come under the scope of rule making power is void.
42. The Commission is of the view that Clause 5.1 of National Tariff Policy has a specific and limited application under Section 63 only and as a guideline it cannot interfere with Section 62.
43. In ITW Signode India Ltd. Vs. CCE (244) 3SCC 48: (2003) 158 ELT 403, the Hon'ble Supreme Court held a rule framed under the primary Act even in case of conflict must give way to the substantive provisions of the statute. In case of a conflict between a substantive Act and delegated legislation, the former shall prevail in as much as delegated legislation must be read in the context of the primary/legislative Act and not vice versa.
44. The Hon'ble Supreme Court in Sukhdeev Singh Vs. Bhagatram Sardar Singh Raghuvanshi, (1975) 1SCC 421 has clarified the legal position between statutory provision in the Act, Rules and Regulations on the one hand and the policy guidelines/tariff and administrative instructions issued by the Government on the other.
- "Broadly stated, the distinction between rules and regulations on the one hand and administrative instructions on the other is that rules and regulations can be made only after reciting the source of power whereas administrative instructions are not issued after reciting source of power. "
45. It is also a settled law that while making subsidiary law the delegatee or legislation cannot widen or restrict the scope of Act or the policy there under. In

Agricultural Market Committee Vs. Shalimar Chemical Works Ltd., (1997) 5 SCC 516, the Hon'ble Supreme Court held thus;

"The power of delegation is a constituent element of the legislative power as a whole under Article 245 of the Constitution and other relative articles and when the legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying out the policy laid down by the Acts as part of the Administrative Law. The essential legislative function consists of the determination of the legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implementation, the policy and the principles for the guidance of the delegates. These principles also apply to taxing statutes, the effect of these principles is that the delegate which has been authorised to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down there under. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act."

46. Various issues arising out of this petition are broadly listed below:

- 1) Whether all future power procurement by the distribution licensees, consequent to the issue of Tariff Policy in Jan., 2006, is required to be procured through competitive bidding only?
- 2) Whether Electricity is to be procured directly from the generators or it could be procured through a trader, who in this case happens to be a related party.

The above issues are dealt with in detail below:

- 1) The tariff policy envisages that all future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State Controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developer for this purpose would be restricted to one time addition of not more than 50% of the existing capacity.
- 2) Even for the public sector projects, tariff of all new generation and transmission projects should be decided on the basis of competitive bidding

after a period of 5 years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition.

Para 5.1 of the tariff policy discussed above needs to be examined in the context of Sections 62 and 63 of the Electricity Act, 2003. Based on the various citations and reasons discussed in paragraphs 32 to 46, the Commission is of the view that the determination of Tariff, as contained in Section 62 of the Act is not restricted by any time limit and as such, may continue at all times. As far as Section 63 is concerned, it is a non obstante provision, which states that notwithstanding anything contained in Section 62, the appropriate Commission shall adopt the Tariff, if such tariff has been determined through a transparent process of bidding in accordance with the guidelines issued by the Central Govt. The Commission observes that the guidelines issued by the Govt. of India for competitive bidding is issued under Section 63 of the Act. The Commission is also of the view that any policy, rules or regulations cannot go beyond the provisions of the Act itself. In this particular case, the Commission is of the view that determination of the tariff under Section 62 will have to be resorted to since determination of tariff by bidding process is not done. Further, the Commission is also of the view that the provisions of the Section 63 is more specific to non-determination of tariff under Section 62 if the tariffs have been determined through transparent process of bidding in accordance with the guidelines issued by the Central Govt. and adopting of such tariff by the Commission. In view of this, the Commission is of the considered view that both these sections will have to co-exist and Section 62 cannot become redundant after a certain time period, by the interpretation of tariff policy to allow all future power procurement only through competitive bidding process.

Tariff policy in Section 5.1 while stipulating competitive bidding for public sector projects envisages that their tariffs be based on competitive bidding after a period of 5 years or when Regulatory Commission is satisfied that the situation is ripe to introduce such competition. Emphasis seems to be more on the availability of conditions which are ripe to introduce competition rather than the time period of 5 years.

In the light of the above, it will be necessary to examine the present power supply position in the country.

The overall peaking shortages (MW) is estimated at 12% and the overall energy shortage(MUs) is estimated at 11% and such a situation is likely to prevail over the

next few years. Under these circumstances, the available capacity being limited, competitive bidding may not necessarily lead to competitive tariff.

In the light of the above discussions, the Commission is of the view that for power procurement, both the routes i.e. deciding the tariff under Section 62 by the appropriate Commission as well as determination of tariff through competitive bidding are available and hence there is no difficulty in entering into a PPA where the tariff is decided by the appropriate commission under Section 62.

As far as this project is concerned, details are sufficiently available, and there is certainty of the project coming up in time. In the instant case, the Commission observes that the financial closure of the project is already reached and the project work has commenced. The commission also notes that through a process of short term/medium term bidding, the utilities in Delhi have already tied up about 300 MW from this project for short term and the present petition is for extension of this short term agreement by NDPL for another 27 years. Accordingly, in the light of the earlier discussions, the commission is of the view that the Law permits entering into a PPA by the Discoms with the generators, wherein the tariff shall be decided by the appropriate commission under Section 62 of the Act.

As regards entering into PPA with a trader, the Commission's attention has been drawn to an order issued by the CERC in the case of Essar power, wherein the CERC has directed the generator to sign the PPA directly with the purchaser instead of entering into a PPA with a trader. It was pleaded by the petitioner before the Commission that an appeal was preferred before the ATE vide petition No 228 of 2006 and 230 of 2006 and while disposing of this petition, the Hon'ble ATE decided that there cannot be any direction to prevent signing of a PPA with the trader. It is also pointed out by the petitioner that no appeal has been filed against the ATE's order and therefore this order has achieved finality. The Commission is therefore of the view that entering into a PPA with a trader may not be barred. However, this being a long term PPA and the limits for trading in the case of the Regulations issued by the CERC for trading companies is in terms of number of million units per annum, the Commission would like this issue to be debated before the CERC by the petitioner for fixing the Trading Margin, which however shall not be more than 4 paise/KWhr as indicated in the PPA. This will also be further subject to the levels of trading margin, if a lower trading margin is charged by TPTCL, to any other Power Purchaser from this project.

47. Notices were also issued to both the Ministry of Power, Govt. of India and GoNCTD in this matter. However, neither these parties appeared before the Commission nor did they file any reply. As such the Commission did not have the benefit of their responses.
48. Having concluded that there is no bar in tying up power through section 62, issues relating to PPA is being taken up for further discussion.
49. The petitioner has indicated that the Commission could either approve the PPA between NDPL and Maithon Power Ltd. with TPTCL as a facilitator or the PPA between NDPL and TPTCL. The Commission prefers to deal with the PPA between NDPL and Maithon Power Ltd being a generating company as the roles of buyer and seller can be clearly brought out in such a PPA. The role of trader shall also be well defined. In view of this, the views of the Commission on the PPA between NDPL and MPL are given below:
- 1) Any specific deviation with respect to any standard PPA has not been brought out by the petitioner. Accordingly, only major issues of the power purchase agreement with specific reference to the Act/Regulation are seen by the Commission.
 - 2) Any new charge creation shall duly take into account the existing charges on revenue of the petitioner vis-à-vis other agencies.
 - 3) If any better treatment is given to any other buyers of power from this project either by MPL or TPTCL, the same shall be extended to NDPL also.
 - 4) The dispatch of power from this power station shall be on merit order basis. Further, all efforts shall be made by NDPL for utilizing this power, so that the burden of fixed cost is not passed on to the consumers, without using the power from this project.
 - 5) CERC had issued new Regulations for the period 2009-14. Accordingly any change required in this PPA needs to be revisited.
 - 6) An indicative tariff schedule shall be appended to the PPA.

- 7) All normative parameters for tariff calculations shall be in accordance with the applicable CERC Regulations.
- 8) Copies of the fuel supply agreement including fuel transportation agreement be filed with the Commission.
- 9) Reference to RLDC and RPC in the PPA needs to be re-examined, since the supply of power from this station involves inter regional power transfer.
- 10) Any waiver to the conditions precedent shall be carried out only with the prior approval of the DERC.
- 11) Clear demarcation between the obligations of the generator and the obligations of the trader needs to be made.
- 12) Clause 3.4.1 – Time periods prescribed from the Effective Date may be reviewed duly taking into account the current stage of progress of the Project.
- 13) If the tested capacity of the unit is less than its installed capacity, while allocating the capacity on a pro-rata basis to various power purchasers, it is presumed that the capital cost shall also be reduced on a pro-rata basis or in accordance with the applicable CERC regulations.
- 14) Article 7 regarding metering and energy accounting shall be elaborated to describe use of main/check meter etc.
- 15) All benefits on account of mega power policy and passing on the same to the petitioner by MPL needs to be incorporated.
- 16) In para 9.9.3, STU may also be included along with CTU for availing open access in the transmission system.
- 17) In Article 13, termination for seller's events of default needs to be incorporated.
- 18) With reference to Schedule-B of the PPA, mode of disposal of dry fly ash and treatment of revenue arising on account of the same, if any, needs to be incorporated.

50. Subject to incorporation of the above views in the PPA, Procurement of 300 MW Power from Maithon Power Ltd. is approved for a period of 29 years commencing from 2012. The tariff for supply of this power shall be fixed by the Appropriate Commission. The Revised PPA incorporating the changes mentioned above alongwith the other documents as called for be submitted to the Commission for record within 3 months.
51. Member, Shri Shyam Wadhera while agreeing with the proposal to approve the PPA between NDPL and Maithon Power Ltd. has not agreed with the connected interpretation of Sections 61, 62 and 63 of Electricity Act, 2003 and Clause 5.1 of the National Tariff Policy as given in paras 35 to 46 above. The rationale given by the Member for approval of the PPA is at para 52 of the Order.

Sd/-
(K. Venugopal)
MEMBER

Sd/-
(Berjinder Singh)
CHAIRMAN

52. Rationale given by Member, Shri Shyam Wadhera :-
- 52.1 The Applicant, NDPL filed this Petition (No. 60/2008) for approval of Power Purchase Agreement between the Applicant, NDPL and Maithon Power Ltd. (MPL) for purchase of 300 MW power on long term basis. The Petition mentions that the tariff for this plant shall be determined by the CERC in line with Section 62 of the Electricity Act, 2003.

The Ld. Counsel Sh. V.P. Singh appearing for the Respondents BRPL and BYPL argued that the above provision contradicts Clause 5.1 of the National Tariff Policy which mandates that :

"All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a state controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity. Even for the Public Sector projects, tariff of all new generation and transmission projects should be decided on the basis of Competitive Bidding after a period of five years or when the Regulatory Commission is satisfied that the situation is ripe to introduce such competition."

According to the Respondents, the PPA violates the above provision of the Tariff Policy and should not be approved.

In his reply, the Counsel for the Petitioner argued that Sections 62 and 63 of the Electricity Act, 2003 are alternative routes concurrently available to the Petitioner for determination of tariff for this plant. According to him, the law does not place any restrictions on the independent operation of Sections 62 and 63 and the restriction only comes from Clause 5.1 of the Tariff Policy. He contended that the Tariff Policy which is in the nature of a subordinate legislation, cannot dilute the provisions of the Statute. In support of the above, the Petitioner cited the Order dated 23.11.2006 of ATE in Appeal No. 228 and 230 of 2006 in the matter of PTC India Limited Vs. Central Electricity Regulatory Commission and Others and the Order of Rajasthan Electricity Regulatory Commission in Petition No. RERC/110/06 in the matter of Raj West Power Pvt. Ltd. Vs. Ajmer Vidyut Vitran Nigam Limited and Others.

52.2 After considering the above contentions raised on behalf of the Petitioner, I am of the view that the above cases cited by the Petitioner have not specifically dealt with the interpretation of Section 62 and 63 of the Electricity Act, 2003 in the context of provisions of Clause 5.1 of the National Tariff Policy. I am therefore, unable to accept the above arguments presented on behalf of the Petitioner. However, this Commission is at liberty to decide that notwithstanding Clause 5.1 of the National Tariff Policy, it is in the public interest to permit the purchase of power based on tariff determined by CERC under Section 62 of the Electricity Act, 2003.

It may be mentioned that the Generating Company, M/s Maithon Power Ltd. with whom the PPA is proposed to be signed had filed a petition on 29.1.2006, in response to which the CERC had directed the Generating Company i.e. M/s Maithon Power Ltd. to obtain necessary clarification from Central Government regarding the applicability of Clause 5.1 of the National Tariff Policy.

52.3 The Ld. Counsel Sh. Amit Kapur for Petitioner, in the hearing in this Commission on 13.3.2009 mentioned that the tariff which may be determined by CERC for this generating station based on the 2009-14 Tariff Regulations of CERC, as per the Petitioner's expectations, would be around Rs.2.58 Kwh in comparison to the tariffs which have emerged in various Case –I Competitive Bidding Processes conducted by various States.

1. Haryana procured 300 MW @ Rs.2.86/unit from PTC in Project developed by GMR.
2. Haryana procured 1424 MW @ Rs.2.94/unit from project of Adani Power in Gujarat.
3. Gujarat procured 1000 MW @ Rs.2.89/unit from project of Adani Power.

It was argued by the Petitioner that power under this PPA would be available from 2012 at a regulated tariff which at current price levels would be quite attractive compared to the tariffs which have emerged through recent Case-I Competitive Bidding Processes.

The Petitioner also gave justification regarding the need for this power during the term of the PPA.

52.4 I am, therefore, of the view that the PPA be approved for purchase of 300 MW at a regulated tariff, in case the same is determined by CERC under Section 62 of the Electricity Act, 2003.

Sd/-

(Shyam Wadhera)
MEMBER