



Delhi Electricity Regulatory Commission
Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 110017.
No. F.11(1740)/DERC/2019-20/6648

Petition No. 68/2019

In the matter of: **Petition under Section 86(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes between Petitioner (IPGCL) and Respondent (NDMC) regarding non-payment of bills for power supplied from GTPS Station during the period 01.09.2017 to 31.03.2018 as per DERC Tariff Order dated 31.08.2017.**

Indraprastha Power Generation Co. Ltd.

....Petitioner

Versus

- 1. New Delhi Municipal Council**
- 2. State Load Despatch Centre**

.....Respondents

AND

I.A. No. 05 of 2023
in
Petition No. 68/2019

In the matter of: **Interlocutory Application for directions on behalf of the Petitioner seeking appropriate directions against Respondent No. 1(NDMC).**

Coram:

Hon'ble Justice (Retd.) Jayant Nath, Chairperson

Appearance:

- 1. Ms. Swapna Seshadari, Advocate, IPGCL**
- 2. Mr. Amal Nair, Advocate, IPGCL**
- 3. Ms. Kritika Khanna, Advocate, IPGCL**
- 4. Mr. Anil K. Airi, Sr. Advocate, NDMC**
- 5. Mr. Saad Shervani, Standing Counsel, NDMC**
- 6. Mr. Anubhav Deep Singh, Advocate, SLDC**
- 7. Ms. Arushi Makker, Advocate, SLDC**

ORDER

(Date of Order: 30.10.2024)

Matter was heard by the undersigned and the Order was reserved on 31.05.2024

- The Petitioner, Indraprastha Power Generation Company Ltd. (IPGCL) has filed the present Petition seeking adjudication of its dispute related to non-payment of bills by the New Delhi Municipal Council (NDMC), Respondent No.1, for the power supplied by the Petitioner from its GTPS Station during the period 01.09.2017 to 31.03.2018 (hereinafter called 'disputed period') in compliance of the DERC Tariff Order dated 31.08.2017 (hereinafter called 'Tariff Order'). The Petitioner has made the following prayers in its Petition:
 - Direct the Respondent No 1/NDMC to pay the outstanding bill of Rs. 68.58 Crore for the energy consumed for the disputed period alongwith net late

- payment surcharge from the date of default upto the actual date of release of payment;
- b) Direct the Respondent to pay the net late payment surcharge from the date of default upto the actual date of release of payment; and
- c) Direct the Respondent No.1/NDMC to pay the cost of the present Petition.
2. During the pendency of the Petition, the Petitioner filed an Interlocutory Application on 25.05.2023 followed by Rejoinder dated 08.05.2024 submitting *inter-alia* that the Respondent No. 1/NDMC has also failed to pay the bills of the Petitioner in respect of power supplied in compliance of Commission's Order dated 24.03.2021. As such, the total outstanding amount due to be paid by the Respondent No. 1/NDMC as on 31.12.2023 now stands as Rs. 259.67 Crore (including net late payment surcharge).

PETITIONER'S SUBMISSIONS

3. The Petitioner has submitted the following:
- i. The Petitioner/IPGCL is a generating Company as per Section 2(28) of the Electricity Act, 2003 and Respondent No. 1/NDMC is a deemed licensee allowed to distribute power under its control area in the National Capital Territory of Delhi.
 - ii. The Commission, while determining the Tariff for the Respondent No.1/NDMC for FY 2017-18, observed that the Respondent No.1/NDMC had projected to purchase 183.25 MUs of power under short term purchase in Order to meet the demand in its area during September, 2017 to March, 2018 as there was deficit in power availability for the Respondent No. 1/NDMC during FY 2017-18.
 - iii. The Commission, vide its Tariff Order dated 31.08.2017 for determination of tariff for FY 2017-18 and True-Up for FY 2014-15 and FY 2015-16, had revised the allocation of power for the Respondent No. 1/NDMC, whereby, the Petitioner was directed to provide 94.87 MW of Power to the Respondent No 1/NDMC for the disputed period. Pursuant to the said directions of the Commission, Respondent No 2/SLDC, vide its letter dated 01.09.2017, revised the allocation of power from various plants including Petitioner's Plant-GTPS for the disputed period. Accordingly, on a real time basis, the Petitioner's Plant was scheduled to supply 98.6 MUs of energy as against the total scheduled generation share of 183.25 MUs from the GTPS Plant for FY 2017-18.
 - iv. In terms of the above dispensation, the Respondent No. 2/SLDC started scheduling the energy to the Respondent No 1/NDMC as per the Tariff Order. The Petitioner raised the first energy bill dated 07.10.2017 for power scheduled from its Plant for the period from 01.09.2017 to 30.09.2017 (September, 2017) for an amount of Rs. 13,64,50,074/- and subsequent bills were raised for energy

supplied upto 31.03.2018. However, when Respondent No 1/NDMC failed to pay the first energy bill dated 07.10.2017, the Petitioner sent a reminder letter dated 12.10.2017 to the Respondent No. 1/NDMC.

- v. In response to the above letter of the Petitioner, the Respondent No.1/NDMC, vide its email dated 12.10.2017, declined to make the payments for the period 01.09.2017 to 30.09.2017 by stating that the Respondent No. 1 did not schedule the electricity or sign any Power Purchase Agreement (PPA) and the bill raised is illegal and no payments would be made thereto.
- vi. The Petitioner vide letter dated 31.10.2017 replied to the Respondent No.1/NDMC stating that the energy supplied for the month of September 2017 was as per the Tariff Order of Respondent No.1/NDMC and allocation of power provided by the DERC and SLDC's letter dated 01.09.2017.
- vii. As per various revisions of energy account as on 31.10.2019 by the Respondent No. 2/SLDC during the disputed period, the Petitioner had supplied the total energy of 100.8503 MUs to the Respondent No. 1/NDMC during the disputed period and raised the energy bill as per REA issued by Respondent No. 2/SLDC for each month. Therefore, a massive amount of Rs.68.58 Crores had accrued for total energy supply of 100.8503 MUs.
- viii. As per the Tariff Order dated 31.08.2017 of the Respondent No. 1/NDMC, the Petitioner was to supply Power to the Respondent No. 1/NDMC only till 31.03.2018, therefore, there was no scheduling of Power by the Respondent No. 2/SLDC to the Petitioner beyond 31.03.2018. In the meanwhile, since September 2017, the Petitioner had sent various correspondences on 12.10.2017, 31.10.2017 and 01.06.2018 to the Respondent No. 1/NDMC for payment of the outstanding bills for the disputed period. However, the Respondent No. 1/NDMC had failed to make any payments with regard to the outstanding amount and in fact had not even replied to any of the correspondences sent to the Respondent No.1/NDMC by the Petitioner since its first reminder letter dated 12.10.2017 for payment for the month of September 2017.
- ix. In the meanwhile, the Respondent No.1/NDMC, had filed the Petition for True up for FY 2017-18 and ARR for FY 2019-20. The Petitioner submitted its comments vide letter dated 17.06.2019 with regard to the outstanding dues on the Respondent, NDMC, for the disputed period. The Respondent, NDMC, in its True up for FY 2017-18, had shown the consumption of 98.06 MUs of power from Petitioner's plant (GTPS) during the disputed period and has channelled its way to avail the full benefits of allocated power.

- x. The Commission, vide Order dated 31.07.2019, determined the tariff of the Respondent No 1/NDMC for the FY 2019-20 and the True-Up for FY 2017-18 while considering 98.6 MUs of energy consumed by the Respondent till 31.03.2018 from Petitioner's Power Plant. The Respondent No 1/NDMC has admitted in the judicial proceedings while truing up of its tariff for FY 2017-18 that 100.85 MUs of energy was consumed from the Petitioner while arriving at the total power purchased from various sources of long term, short term and medium term. The Respondent No. 1/NDMC has taken benefit of the electricity allocated by the Commission in its Tariff Order and consumed the same but on a vague argument that there is no PPA, has not made any payment for the electricity consumed.
- xi. Further, as per *PTC India Ltd. Vs. CERC (2010) 4 SCC 603*, it is a settled principle that the Regulations notified by the Commission is statutory and is a subordinate/delegated legislation. The said judgement also recognizes the regulatory power of the Commissions to pass Orders. Therefore, even in absence of any PPA entered between the parties, the Order/direction passed by the State Commission will govern the relationship between the parties.
- xii. The Respondent No.1/NDMC denied payments for the disputed period on an erroneous reasoning that the Respondent No. 1/NDMC did not need this power from the Petitioner and has arranged surplus power for the disputed period. A detailed analysis of scheduled energy from the Petitioner's Plant for actual drawl for the Period indicates that 690.18 MUs was drawn by Respondent No.1/NDMC out of total scheduled drawl of 740.72 MUs from state stations. Thus, scheduled drawl and actual drawl has a difference of 50.54 MUs as against scheduled power of 100.85 MUs from Petitioners' plant to Respondent's share.
- xiii. The Respondent No. 1/NDMC has in fact drawn the power from the Petitioner's Plant to meet out its own demand for banking/for bilateral transactions/to sale surplus power through exchanges to earn additional income. In the past, there has been temporary re-allocation through the Commission and Respondent No. 1/NDMC has made payments to the Petitioner wherein no such PPA was signed between the Petitioner and the Respondent No. 1/NDMC with regard to the energy supplied by the Petitioner.
- xiv. The contention of the Respondent No. 1/NDMC that there is no existence of PPA between the parties is erroneous as the Tariff Order was passed by the Commission keeping in view the submission of the Respondent No. 1/NDMC wherein it showed the deficit in the power for the disputed period and accordingly, the Petitioner was directed by the Commission to supply energy for a period of seven months i.e. by September 2017 to March, 2018.

- xv. The total outstanding amount accrued on the Respondent No. 1/NDMC as on 31.10.2019 is Rs. 89.82 Crore out of which Rs 68.58 Crore is the principle amount for the disputed period and Rs 21.24 Crore is the net late payment surcharge levied on the Respondent No. 1/NDMC.

RESPONDENTS' SUBMISSIONS

Reply filed by Respondent No. 1/NDMC

4. The Respondent No. 1/NDMC submitted its reply on 10.12.2020 wherein, following preliminary objections were raised:

i. Lack of Jurisdiction of the DERC to allocate additional power

- a. The Respondent No. 1/NDMC at the outset has disputed the jurisdiction of the Commission to allocate additional power and stated that in view of the combined effect of the provisions contained under Section 86 of the Electricity Act 2003 read with Para 5.3.3 and 5.3.4 of the National Tariff Policy, the primary function of the Commission is fixing tariff and State Commission cannot re-allocate without ensuring a non-discriminatory policy and cannot override the Electricity Act, 2003 and National Electricity Policy by way of multifarious Regulations passed by it which are contrary to the power delegated upon it and is abhorrent to the Central legislation.
- b. While commenting upon the Petitioner's reliance on the Tariff Order dated 31.08.2017 whereby Tariff for FY 2017-18 and True up for FY 2014-15 and FY 2015-16 were determined by the Commission and observations on revised allocation of power were also given, Respondent No. 1/NDMC has submitted that the observations of the DERC in the Tariff Order are mere noting as *obiter dicta* whereas a reasoned Order MUST be necessitated for any such civil rights and obligations being imposed forcefully on a non-party to the Tariff Order. The same have no binding force on the Respondent No. 1/NDMC as no PPA was executed post the Order.
- c. The observations of the Commission on reallocation of power were subject to a due compliance of the statutory provisions governing such reallocation and the requirements under Section 131(4) of the Electricity Act, 2003 and Section 15(5) of Delhi Electricity Reforms Act, 2000 ("DERA 2000"). Since the Respondent No. 1/NDMC is a Council established under the Act of the Parliament through NDMC Act, 1994, all authority is prescribed to the Central Government for the electricity receipt by the Council as per Section 201 of the NDMC Act, 1994.
- d. It is trite law that the Central Legislation viz NDMC Act, 1994 shall prevail over the State Legislation, DERA 2000 as held by the Apex court in *M/s Hoechst Pharmaceuticals Ltd. and Others vs. State of Bihar and Others*

[(1983) 4 SCC 45]. Thus the Order passed by the Commission did not pertain to its assigned functions under the Electricity Act, 2003 and NDMC Act, and, also, the statutory requirement for the same to take effect never fructified.

- e. The State Government is the only authority to undertake re-allocation more so where the public exchequer is overburdened by surplus allocation despite insistence of the Licensee/NDMC not to allocate the same. In this regard the Respondent No. 1/NDMC has also relied upon Section 131 (4) of the Electricity Act, 2003, Section 15(5) of the DERA 2000, and Section 121 (4) of the DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017 to contend that the current allocation is beyond the delegated powers of the Commission.
- f. The Respondent No. 1/NDMC has further contended that at the time of re-allocation, the Commission had not given due consideration to the power purchase ratio and expensive power was re-allocated without just or reasonable cause making a deep impact on the public exchequer.
- g. The Tariff Regulations, 2017 empower DERC to allocate power and reassign the same amongst the distribution Licensees out of the overall power portfolio which has been allocated to the National Capital Territory of Delhi by the Ministry of Power, Government of India. It has been further stated that GTPS is not a part of above overall portfolio, as such, this Regulation itself will not apply. Secondly, the Regulation talks about re-assigning of the allocation of power amongst the distribution licensees, however, the same cannot be exercised in a manner that one particular licensee is burdened with 2/3 of the most expensive power available and that too from a non-renewable source, and also without its agreeing to do so, or without any PPA having been executed, and in spite of the express refusal of the DISCOM to accept the allocated energy.
- h. This ground was further supported by the Government of NCT in its letter issued to the DERC i.e. on 22.02.2018, the Deputy Secretary (Government of National Capital Territory of Delhi, Department of Power) had issued a letter (F.11(19)/2018/Power/506) to the Secretary, Delhi Electricity Regulatory Commission, wherein it was stated that the task of reassignment of the PPAs has to be done by the Government of NCT of Delhi as laid out in Section 131(4) of the Electricity Act, 2003 and Section 15(5) of DERA, 2000.
- i. As per the procedure, for any allocation, a schedule as provided by the DISCOM to the Commission is considered for implementation. In the present case, Respondent No. 1/NDMC did not provide any schedule to Commission. However, over and above Respondent No. 1/NDMC schedule, the Commission added GT Power arbitrarily thus making losses

to NDMC on account of under draw/overall beyond permissible limits. Also, SLDC is meant to implement the Schedule given by the DISCOMs. The Commission has no mandate to schedule the power for DISCOMs without any such requisition.

- j. The said additional re-allocation was grossly erroneous and if effectuated, shall overburden the Respondent No. 1 with additional power without any just and reasonable, intelligible criteria for affixing the additional power on a public body causing loss to the public exchequer. The Respondent No.1/NDMC shall suffer a loss of more than 71.35 Crore for unconsumed power allocated to it forcefully- if the said re-allocation is allowed against the wishes of respondent No.1 as per demand and supply ratio proposed by the respondent No. 1, thereby resulting in loss to the public.

ii. Order in nullity-no jurisdiction

- a. The power of reallocation Order of the DERC was *suo moto* and abhorrent to the principles of natural justice. The Respondent No.1/NDMC had presented its petition for allocation of power, whereupon a demand for only 450 MW was raised for long term requirement and short term allocation was purely to be relied upon short term, bilateral and inter-DISCOM power purchase. This allocation in increase from 450MW to 581.83MW was done in the winter season (off-peak season) when NDMC requirement varies from 80MW to 300MW only. There was a huge surplus on the RTC basis causing revenue loss to the Respondent No. 1/NDMC. These contentions of the Respondent No. 1/NDMC were simply ignored and revised Tariff Order was issued for FY 2017-18 by DERC. There was no due process of law involved in the issuance of the Tariff Order and, thus, suffers from:

- i. Wedensbusry's principle of unreasonableness; and
- ii. Rules of natural justice: Audi alteram partem

Reliance is placed on the Judgement passed by the Hon'ble Supreme Court of India in *Shalini Soni v. Union of India* (SCCP.549, Para7) and Lord Greene in *Associated Provincial Picture Houses Ltd. v. Wednesbury Corpn.* (All ER PP. 682 H-683 A).

- b. That on 09.04.2018, at the 19th Meeting of the Grid Coordination Committee (GCC) before the Delhi Transco Limited, the Petitioner had brought the dispute between the parties into the agenda of the meeting and GCC thereupon advised the Respondent No. 1/NDMC to settle the amount without further delays. The GCC had no authority or jurisdiction to propound upon the dispute between the parties to begin with as per Rule 6.2 of the Delhi Electricity Regulatory Commission (State Grid Code) Regulations, 2008.

iii. No PPA between the Licensee and Distributor: No Privity of Contract

- a. The case of the Petitioner is further that in terms of the dispensation of this Commission, the Petitioner complied the same and SLDC started scheduling the energy to Respondent No.1/NDMC as per the tariff Order dated 31st August 2017. The Petitioner further acknowledges that from time to time the respondent no.1/NDMC raised its objections and categorically informed the Petitioner that it will not pay for any power which it did not require and that there was no PPA executed and further that the Respondent itself did not schedule any electricity and further informed the Petitioner that no payments would be made to the Petitioner for the aforesaid reasons.
- b. A communication to the Commission as well as to the Petitioner was sent as early as on 13th November, 2017 informing the Commission that NDMC did not require the power and will not pay any expenditure in this regard. There is no binding agreement between the parties to allow re-allocation-solely based on ignorance of material considerations of the State Commission in its Tariff Order. Reliance is placed upon the judgement of this Tribunal in Appeal No. 194 of 2016 dated 11.10.2018 in "Punjab State Power Corporation Limited v. Everest Power Pvt. Ltd.
- c. The State Commission has an obligation to look into the various aspects and decide whether power purchase is to be approved or not to be approved which includes the exercise to consider that the power at the cost quoted is not necessary since it may be available at cheaper price elsewhere. In any case, it is not understood how the gap of power purchase cost can be reduced by re-assigning costlier power as deficit energy if any could be purchased at cheaper rate from the power exchange on any day as and when required. Cost being ultimately borne by Consumers.
- d. It is also contended with reference to Section 86(1)(f) that the Commission gets jurisdiction to adjudicate the disputes between the parties only post contract (PPA). That only DISCOMs are permitted under law to seek approval of the PPA and not the generator. The Licensee alone has to approach the Commission for approval of PPA with the Generator, once the Electricity Act, 2003 comes into force even if the tariff between the parties was approved by the concerned Commission. Reliance is placed on Tamil Nadu Generation and Distribution Corporation Limited v. M/s Penna Electricity Limited & Anr in Appeal No. 112 of 2012 and also Saheli Exports Private Limited v. Joint Electricity Regulatory Commission and Ors. In Appeal No. 22 of 2012.

- e. In Section 86(1)(b) of the Act the State Regulatory Commission's duty is to refer electricity purchase and procurement made by distribution licensee including the price at which the electricity is procured. This is so when purchase of power was for the distribution and supply within the state.
- f. The Power of the State Commission is limited under the Electricity Act, 2003 and cannot assume the duty of re-allocating power and forcing enforcement of the same without any PPA. Thereafter the PPAs, entered into between the parties are subject to approval of appropriate authority as per statute. Therefore, the PPA is only the nature of a contingent contract in terms of Section 31 of the Indian Contract Act. So the enforceability of this document can only happen on happening of event that is contemplated in the contract i.e. Approval of Appropriate Authority/Commission. Since such a condition did not happen, parties would not get any vested right in demanding monies for additional allocation of power.
- g. Further, in the decision "Tata Power vs. Maharashtra Electricity Regulatory Commission" (2009) (16) SCC 659) it was held that the duty of the Regulatory Commission is to regulate purchase and procurement of electricity made by the licensee and so far as generation is concern, function of the Commission is to determine the tariff and in relation to supply of transmission and wheeling of electricity.
- h. In BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory Commission (Appeal No. 106 & 107 of 2009), it was also observed that *"32...the State Commissions have been given discretionary powers either to choose Section 62, 62(1)(a) to give approval for the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with Section 63 of the Act."*
- i. If the State Commission fails in discharging its duties by deciding the matter without proper reasoning and justification, it is nothing but failure of its duty. Since, proceedings before the State Commission are not in the nature of a lis as in the case of Civil Suit, it has to take within its fold the interest of various Stakeholders concerned. Therefore, utmost duty of the State Commission while discharging its functions MUst be public interest and decide the matter on merits so far as adoption of capital cost and PPA for re-allocation. The functions provided under Section 86(1)(b) of the Act is not merely a formality to approve the Power Purchase Agreement. In other words, it does not mean one of the parties to the Petition can interdict the

implementation of Power Purchase Agreement at its whims and fancies totally ignoring the fact that the Commission's duty is to regulate electricity purchase and procurement process of distribution licensee including the price at which electricity shall be procured from generating companies through agreements. Procurement of power has to be in conformity with the procurement plan approved by the State Commission.

- j. In the present case, Petitioner had also apprised the State Commission to intervene vide its letter dated 03.04.2018. In this regard reference may be had, of the letter in September, 2017 itself which Respondent No. 1/NDMC had already sent to DERC. In fact, vide its letter dated 3rd September, 2017 Respondent No. 1/NDMC had written DERC for deallocation of power immediately. Respondent No. 1/NDMC also had expressed its unwillingness to pay any expenditure in this regard. This matter had also been taken up at the level DPPG (Delhi Power Procurement Group), where in the meeting dated 14 September, 2017 it was informed that Respondent No. 1/NDMC have long-term Procurement Plan to meet the demand and in case of outage of power, NDMC will not schedule power from GTPS, However, SLDC had clarified that only in case of overdrawl by Respondent No. 1/NDMC, forced scheduling from GTPS will be carried out to NDMC. Therefore, an understanding was reached that Respondent No. 1/NDMC could not be scheduled GTPS power except in the case where there was an overdrawl by Respondent No. 1/NDMC in which case forced scheduling from GTPS will be carried out by SLDC.

iv. Misconceived facts and neglect in DERC Order:

- a. It has been wrongly projected and wrongly observed by the DERC in its Order for reallocation of power amongst Delhi Distribution licensee is valid, that there was a deficit in power availability of Respondent No. 1/NDMC during FY 2017-18 and further that NDMC had projected to purchase 183.25 MUs under short term purchase to meet its demand in its area during September, 2017 to March, 2018. No such projection for short term purchase had been given for the period of September 2017 to March, 2018. In fact, NDMC has always given its projections for long term purchases and that too for renewable from renewable sources as per the mandate issued to NDMC in 2017 in the meeting held under the Chairmanship of the Hon'ble Power Minister on 15.07.2017.
5. In addition to the above preliminary objections, Respondent No. 1/NDMC has made various preliminary submissions in support of its defence and has also given para wise reply to the Petition, relevant facts, submissions of the Petitioner and prayer, thereby specifically denying the contents of the Petition and praying for dismissal of the Petition, the same being not maintainable.

Rejoinder filed by the Petitioner

6. The Petitioner has filed its Rejoinder dated 08.03.2021 to the Reply filed by the Respondent on 10.12.2020, thereby contending that the Respondent No 1/NDMC is trying to wriggle out its obligation for payment of outstanding amount of Rs. 104.75 Crore (Interest of Rs. 37.64 Crore + Principle of Rs. 67.11 Crore) as on 28.02.2021 for the energy supplied by IPGCL for the period for 01.09.2017 to 31.03.2018. In its Rejoinder, the Petitioner has replied the contentions of the Respondent No. 1/NDMC as detailed below:

i. Re: Lack of Jurisdiction of the DERC to allocate Additional power

- a. The Respondent No. 1/NDMC is erroneously challenging the jurisdiction of the Commission in reallocating the power for NDMC in the Tariff Order passed by the Commission.
- b. The Respondent No. 1/NDMC is relying on power of the Commission u/s 86(1)(a) of the Electricity Act, 2003 that provides for the power of the State Commission in determining the tariff for Generator and Transmission licensees. The primary contention of NDMC is that the Commission only has the power to determine tariff or adopt tariff as per the Electricity Act, 2003 and does not have the power to revise or reallocate as per the terms of the Act and the DERC Terms and Conditions for determination of Tariff) Regulations, 2017 ("Tariff Regulations, 2017"). As per NDMC, the power to allocate or re-allocate is vested with the State Government which is GoNCTD of Delhi in the present case.
- c. The Commission has the power to regulate the entire electricity purchase and procurement process of the Distribution Licensees including the price at which such power is procured. It would be wrong to read the above provisions in a restrictive manner since the word 'Regulate' has been interpreted consistently to be wide in nature. (*Deepak Theatre, Dhuri vs State of Punjab and Others 1992 Supp (1) SCC 684, U.P. Co-Operative Cane Unions v. West U.P. Sugar Mills Association (2004) 5 SCC 430 etc.*)
- d. The Commission while determining the tariff for Respondent No. 1/NDMC for FY 2017-18 has observed that the Respondent No. 1/NDMC had projected to purchase 183.25 MUs of power under short term purchase to meet the demand in its area for the disputed period. Further, the Commission allocated the said quantum of power vide tariff Order dated 31.08.2017, wherein IPGCL (GTPS Station) was directed provide for 94.87 MW to NDMC for the disputed period.
- e. Thereafter, Respondent No. 2/SLDC vide its letter dated 01.09.2017 revised the allocation of power from various plants including Petitioner plant for the

disputed period as per the direction of the Commission. On real time basis, the Petitioner's Plant was scheduled to supply 98.06 MUs of power as against the total allocation of 183.25 MUs from GTPS corresponding to the disputed period. In terms of the above dispensation, the petitioner raised the energy bills to NDMC. However, NDMC had failed to make any payments for the said energy bills as raised by the IPGCL for the said Period.

- f. The fact that the power stood allocated and even consumed by Respondent No. 1/NDMC becomes clear from the NDMC True-Up Petition for FY 2017-18 had shown the consumption of 98.06 MUs of Power from IPGCL's Plant (GTPS) during the disputed period and has channelled its way to avail the full benefits of allocated power from the Petitioner.
- g. The Tariff of Respondent No. 1/NDMC subsequent to the disputed period i.e., for the period FY 2019-20 and True-up for FY 2017-18 was determined by the Commission vide Order dated 31.07.2019. The Commission mentioned that the petitioner had scheduled a total of 100.85 MUs of power to the Respondent for the disputed period. However, the Commission did not issue any specific direction with regard to the power purchase cost for scheduled power from the Petitioner to the Respondent No. 1/NDMC during the disputed period.
- h. Respondent No. 1/NDMC never challenged any of the above Orders passed by the Commission as being without jurisdiction and it's too late in the day to contend the Commission does not have the power to revise or allocate electricity from one licensee to another.
- i. Further, having consumed the power from IPGCL's station and having admitted the same in its tariff determination process, it is absolutely perverse on the part of Respondent No. 1/NDMC to now challenge the tariff Order on grounds of jurisdiction of the Commission in passing the very same Order.
- j. Specific power has been recognized under Regulation 121(4) of the Tariff Regulation, 2017 which provides for the power of the Commission to re-assign the allocation amongst the distribution licensees in view of the gap in the power purchase cost.
- k. The above Regulation is based on the principles of the Section 86(1)(b) of the Act that provides for the regulatory power of the State Commission for 'electricity purchase' and 'procurement process', wherein the State Commission has extensive power to regulate the pricing and quantum of power under said section. It is also a settled principle that the regulatory powers of a State Commission are wide and multifarious in nature and State

Commission cannot be a mere post office while regulating the tariff process for a generator/licensee (*Energy Watchdog v. CERC (2017) 14 SCC 80*).

- l. Further, having consumed the power at one hand, and now challenging the Tariff Order on the other hand, Respondent No. 1/NDMC cannot approbate and reprobate by challenging the jurisdiction of the Commission in allocating the power in the Tariff Order. Respondent No. 1/NDMC cannot be entitled to consume the power and thereafter challenge the same by evading the legitimate payments of the energy bills to IPGCL.
- m. The issue of jurisdiction of the Commission to allocate/reallocate electricity qua Respondent No. 1/NDMC already stand settled by the judgement dated 16.02.2009 passed in Appeal No. 34 of 2008 in NDMC v. DERC & Ors., wherein the Hon'ble APTEL after going through the merits held that the Commission has the jurisdiction to allocate power under Section 23 of the Electricity Act, 2003.
- n. The allocation of power was subsequent to the instance of the Government of NCT of Delhi in view of the unbundling of PPAs, of erstwhile DVB and DTL. In this case it was NDMC who made the application before the Commission for re-allocation of power and thereafter challenged the jurisdiction, as exactly what NDMC has challenged in the present case. Infact the conduct of the NDMC in repeatedly challenging the jurisdiction of the Commission in passing the said Tariff Order for re-allocating of power is in fact barred under Principles of Res-judicata and the contentions of NDMC should be rejected on this very ground itself.
- o. Reliance by the Respondent No. 1/NDMC on Sections 131(4) of the Electricity Act 2003, and 15(5) of Delhi Electricity Reforms Act, 2000 does not support its contentions of the Respondent No. 1/NDMC. Section 131(4) deals with the recognition of the Electricity Board through the issue of statutory transfer schemes. Further, Section 15(5) of the DERA deals with drawing up the transfer schemes and therefore it has no application in the present case.
- p. Section 201 of the NDMC Act, 1994 relied on by Respondent No. 1/NDMC only states that Respondent No. 1/NDMC is entitled to receive bulk supply of electricity from an authority prescribed by a Central Government subject to entering into a contract. It is also stated that the dispute under such contracts shall be referred to the Central Government for decisions. The above provisions permit Respondent No. 1/NDMC which is a Municipal Commission to receive electricity.

- q. The Respondent No. 1/NDMC is a deemed licensee under the provisions of Section 14 of the Electricity Act, 2003 and does not need to obtain a separate license for distribution of Electricity in its area of operation. However, Section 201 of the NDMC Act does not in any manner interfere with the powers of the Commission conferred under Electricity Regulatory Commission Act 1993, DERA 2000 as consolidated in the Electricity Act, 2003. Without prejudice to the above, the Electricity Act, 2003 is a subsequent Act and overrides the provisions of the NDMC Act.
- r. Further, the reliance of Respondent No. 1/NDMC on the judgement of *M/s Hoechst Pharmaceuticals Ltd. State of Bihar (1983) 4 SCC 45* has no application in the present case as there is no conflict between the powers of central and state law in the present case. The only issue arising in the present case is non-payments of the energy bills for the power consumed by Respondent No. 1/NDMC during the disputed period. There is no question of centre and state differences arising out as 'power' is a state subject wherein tariff of a licensee and generator is determined by the State Commission under its power envisaged under Section 86 of the Act. Respondent No. 1/NDMC is trying to divert the attention of the Commission against the non-payments of the bills raised by IPGCL to a completely different issue of jurisdiction, which primarily does not even arise in the present case.
- s. It is preposterous for Respondent No. 1/NDMC to contend that the powers under Regulations 121(4) of the DERC Tariff Regulations 2017 is beyond the scope of delegation of powers. Regulation 121(4) is clearly in terms of Sections 23 and 86(1)(b) of the Electricity Act. It is also not available to Respondent No. 1/NDMC to contend that reallocation of Electricity by the Commission is unjust or unreasonable since these contentions already stand rejected in the Judgment passed in Appeal No. 34 of 2008 passed by the Appellate Tribunal.
- t. The Respondent No. 1/NDMC is wrongly projecting that it has not asked for any extra power and the Commission has arbitrarily allocated power to IPGCL Station. This is wrong as NDMC has in fact drawn the power from the IPGCL's Plant to meet out its own demand for banking/for bilateral transactions/to sale surplus power through exchanges to earn additional income. The Respondent No. 1/NDMC has drawn 50.31 MUs from IPGCL's Plant – GTPS, to meet out its own demand balance being part of DSM Power and non – availability of power from other state stations etc, resulting in additional earning of Rs 10.60 Cr. for under drawl from scheduled energy from the state generating stations.

- u. The contention of Respondent No. 1/NDMC that the additional power will cause loss to the public exchequer is totally erroneous as the said power consumption is already been admitted by Respondent No. 1/NDMC in the petition filed before the Commission for the True up of FY 2017-18. It is unfortunate that the NDMC is simply trying to evade payments by raising frivolous grounds for non- payment of the energy consumed by Respondent No. 1/NDMC and thereby causing grave financial prejudice to the Petitioner/IPGCL.

ii. Re: Order in Nullity; No jurisdiction

- a. The contentions of Respondent No. 1/NDMC under the above issue are wrong and denied. The contention of Respondent No. 1/NDMC is frivolous that the power allocation by the Commission was *suo-moto* and abhorrent to the principles of natural justice.
- b. There is no basis for the Respondent No. 1/NDMC to contend that the allocation of power has been made illegally. The re-allocation was questioned by NDMC in a process of Appeal and the Appellate Tribunal in its judgment dated 16.02.2009 has upheld power and jurisdiction of the Commission for the allocation and re-allocation of electricity within the State of NCT of Delhi.
- c. Respondent No. 1/NDMC is contending that the allocation of power was for winter duration which is an off-peak season for Respondent No. 1/NDMC. The issue of violation of natural justice and Wednesbury unreasonableness were already argued and stands rejected by the Appellate Tribunal in the judgement dated 16.02.2009 passed in Appeal No. 34 of 2008. Respondent No. 1/NDMC cannot be permitted to raise such defenses to the present petition.
- d. The fact is that Respondent No. 1/NDMC has consumed around 50.31 MUs from IPGCL's plant during the disputed period. Had this been the off season for Respondent No. 1/NDMC, there was no need for Respondent No. 1/NDMC to project power demand of 183 MUs specifically for the disputed period i.e. September 2017-March 2018 in its tariff petition filed before the Commission. In any case, having consumed the energy from IPGCL's station for the disputed period, issues such as off season is not relevant at all.
- e. Respondent No. 1/NDMC has itself admitted the consumption of power from IPGCL during the disputed period in its tariff petition being Petition No. 10 of 2019. The tariff for the subsequent period for Respondent No. 1/NDMC has been determined as per the consumption of the said power. Therefore,

there is no reason for Respondent No. 1/NDMC to not pay the energy charges for the disputed period and raise hyper technical objections.

- f. The reliance on the judgement of *Shalini Soni v. UOI* [1981 AIR 431] has no application to the present case. Respondent No. 1/NDMC cannot simply enjoy the energy for the disputed period and make profits out of it and thereafter seeks to challenge the Tariff Order and wriggle out of its obligations to pay the energy charge bills.
- g. Having lost the challenge to the findings of re-allocation in the tariff Order before the Appellate Tribunal, Respondent No. 1/NDMC cannot raise hyper technical objections to evade the IPGCL's payments for the disputed period on grounds of nullity of the Tariff Order. In this regard, the reliance on the judgements by NDMC on *Kiran Singh & Ors v. Chaman Paswan & Ors* (1954 AIR 340) and *Sushil Kumar Mehta v. Gobind Ram Bohra* (1980 SCC (1) 193) has no application in the present case as there is no question of jurisdiction or lack of authority on part of the Commission.
- h. The reliance placed on the 19th meeting of GCC held on 09.04.2018 and subsequent meetings completely supports IPGCLs contention. In all the meetings, the committee advised Respondent No. 1/NDMC to pay the energy bills raised by IPGCL but still Respondent No. 1/NDMC did not pay heed to it. It is preposterous on the part of Respondent No. 1/NDMC to contend that in the remarks made in the GCC meetings are defamatory. According to Respondent No. 1/NDMC, the GCC has no jurisdiction to make any remarks. This reflects the attitude of Respondent No. 1/NDMC, i.e. to ignore the advice of a statutorily formed committee for mutual discussion and resolution of operational issues. On one hand Respondent No. 1/NDMC is not accepting the judicial Order passed by the Commission and confirmed by the Appellate Tribunal and on the other hand, not heeding to the advice of GCC. This also reflects the complete lack of respect that the Respondent No. 1/NDMC shows to statutory authority.

iii. **RE: No PPA between the Licensee and Distributor: No Privity of Contract; and RE: Misconceived facts and Neglect in DERC Order**

- a. The contention of Respondent No. 1/NDMC under the above issues are wrong and denied. The averments of Respondent No. 1/NDMC that there was no binding agreement/PPA between the parties to allow re-allocation on the basis of the Tariff Order and therefore Respondent No. 1/NDMC is not liable to pay the energy charges of IPGCL for the disputed period.
- b. The Tariff Order of the Commission is a statutory document and is binding on all the parties. While Respondent No. 1/NDMC has taken benefit of the

electricity allocated by the Commission in its Tariff Order and consumed the same, NDMC cannot take such erroneous defence to evade the legitimate payments of IPGCL for the disputed period.

- c. The Regulations notified by the Commission are statutory and are subordinate/delegated legislations. [*PTC India Ltd. Vs CERC (2010) 4 SCC 603*]. The said judgment also recognises the regulatory power of the Commission to pass Orders. Therefore, even in absence of any PPA entered between the parties, the Order/direction passed by the State Commission will govern the relationship between the parties.
- d. Respondent No. 1/NDMC had denied payments for the disputed period on an erroneous reasoning that the Respondent No. 1/NDMC did not need this power from the IPGCL and had arranged surplus power for the disputed period. A detailed analysis of scheduled energy from the IPGCL for the actual drawl for the period indicates that 690.18 MUs was drawn by Respondent No. 1/NDMC out of total scheduled drawl of 740.72 MUs from state stations. Thus, scheduled drawl and actual drawl has a difference of 50.54 MUs as against scheduled power of 100.85 MUs from IPGCLs' plant to NDMC's share.
- e. In any event, as long as power stood allocated to Respondent No. 1/NDMC, it cannot escape the liability to make payments for the same, irrespective of actual consumption of the power. The capacity charges are recoverable based on the allocated capacity and energy charges based on scheduled energy. In the present case, IPGCL has demonstrated not only the power allocated to the Respondent No. 1/NDMC, but Respondent No. 1/NDMC also substantially consumed the said power for the disputed period.
- f. Respondent No. 1/NDMC has also contended that the power of the Commission is limited and it cannot force such allocation without any PPA in place. This contention of NDMC is in teeth of NDMC's earlier conduct where there has been temporary re-allocation through the Commission and Respondent No. 1/NDMC had made payments to the IPGCL, wherein no such PPA was signed between the IPGCL and Respondent No. 1/NDMC. In this regard, the Petitioner/IPGCL has submitted the Energy Accounts issued by the Respondent No.2/ SLDC, allocation considered by the Commission in Respondent No. 1/NDMC tariff Orders along with the bills and payment details for the period July, 2009 to August 2013.
- g. It is not clear as to how the judgment of the Appellate Tribunal dated 11.08.2018 passed in Appeal No. 194 of 2016 – PSPCL v. Everest Power Pvt Ltd helps the case of NDMC. The question of cost of power is totally irrelevant since this is not the proceedings under Section 86(1)(b) of the Act for approval

of power purchase. The present proceedings are for seeking payments for the power already allocated and consumed by Respondent No. 1/NDMC.

- h. The contention of Respondent No. 1/NDMC that since proceedings before the Commission are not in nature of *lis* as in the case of Civil Suit, it has to take within the folds of interest of various stakeholders. It is stated that the Commission is a court of first instance and Section 86 of the Act is exhaustive in nature which provides for administrative, regulatory and adjudicatory powers to the Commission. The judgments cited by Respondent No.1/NDMC at para f-h of its reply are misplaced and have no relation to the present case. The Orders passed by the Commission are judicial in nature and can only be challenged before the Appellate Tribunal. The re-allocation of power was in terms of the deemed projections as given by NDMC to the Commission. In view of the same, the contentions of Respondent No.1/NDMC that the Commission has passed the Tariff Order at its whims and fancy is wrong and denied.

In addition to reply on objections, the Petitioner has further submitted its reply to the preliminary submissions and para wise reply of the Respondent No.1/NDMC, thereby specifically denying the contents of the reply and praying for grant of relief for recovery of the outstanding dues, as prayed for in the Petition.

Supplementary Counter Affidavit/Sur-Rejoinder by Respondent No.1/NDMC

7. The Respondent No.1/ NDMC filed a Supplementary Counter Affidavit/Sur-Rejoinder on 15.04.2021 in response to the Rejoinder filed by the Petitioner. In its Sur-Rejoinder, Respondent No. 1/NDMC has reiterated its stand as already taken in the reply filed on 10.12.2020 and accordingly denied the contention of the Petitioner submitted by way of Rejoinder filed on 08.03.2021. Briefly, the following has been submitted in the sur-rejoinder:
 - a. Respondent No. 1/NDMC has always made timely payments to the Petitioner and has been entitled to rebate on said account of timely payment for all other period than the present disputed period.
 - b. The Government of NCT in its letter issued to the DERC i.e. on 22.02.2018, the Deputy Secretary (Government of National Capital Territory of Delhi, Department of Power) had issued a letter (F.11(19)/2018/Power/506) to the Secretary, Delhi Electricity Regulatory Commission, wherein it was stated that the task of re-assignment of the PPAs has to be done by the Government of NCT of Delhi as laid out in section 131(4) of the Electricity Act 2003 and Section 15(5) of DERA 2000.

- c. There was no PPA between Respondent No. 1/NDMC and Petitioner for supply of power during disputed period.
- d. By allocating the GT Power to NDMC/Respondent No. 1 has negated/lowered the chances of procurement of cheaper power from exchange. That the Respondent No. 1/NDMC had presented its petition for allocation of power, whereupon it had raised a demand for only 450 MW for long term requirement and short term allocation was purely to be relied upon short term, bilateral and inter-DISCOM power purchase. Further, the Respondent No. 1 had clarified this in its Business Plan Petition for the period FY 2017-18 to FY 2021-22. However, this allocation in increase from 450MW to 581.83 MW was done in the winter season (off-peak season) when Respondent No. 1/NDMC's requirement varies from 80MW to 300MW only. Furthermore, there was huge surplus of the RTC basis causing revenue loss to the Respondent No. 1/NDMC. But the said contentions of the Respondent No. 1/NDMC were not considered and revised Tariff Order was issued for FY 2017-18.
- e. There is the laid procedure under Delhi Grid Code to schedule the power by DISCOM, however, in present case Respondent No. 1/NDMC was imposed with said schedule/re-allocation of power without any requisition, hence, it is not obliged to make the payment against the bills raised by the Petitioner.
- f. That there are various letter/ emails on record wherein the Respondent No. 1/NDMC requested Respondent No. 2/SLDC to not schedule the said additional re-allocated power to Respondent No. 1/NDMC.
- g. Respondent No. 1/NDMC has not consumed any power from Petitioner, as there was no schedule given by Respondent No. 1/NDMC for the same.
- h. The issues involved in present matter are way wider and include the question of jurisdiction of the Commission to impose allocation of power unilaterally without any requisite need that too during off-peak season without any giving a hearing to the Respondent No.1/NDMC. In absence of PPA between the DISCOM and Generator, the Commission has no power to regulate any aspect. Further, it is the PPA executed between Power Generators and the DISCOMs, which could be regulated by the Commission and not otherwise.
- i. It is wrong and hence denied that Respondent No. 1/NDMC has used any power from Petitioner during disputed period. The unrequired power was unilaterally allocated to the Respondent No. 1/NDMC and accordingly, the said allocated power has gone to the Grid.

Additional Affidavit filed by Respondent No.1/NDMC on 11.10.2021

8. During the hearing of the matter on 29.07.2021, the Counsel for the Respondent No.1/NDMC sought leave of the Commission to seek instructions and place the same before the Commission in the form of a sworn affidavit, which request was accepted and direction was accordingly given to the Respondent No. 1/NDMC vide Order dated 30.07.2021 to place the requisite affidavit on record. In compliance thereof, NDMC has filed Affidavit before the Commission on 11.10.2021 and *inter-alia* submitted that:
- i. The Respondent No.1/NDMC procured more power than its requirement and, as a result, the surplus power was sold through IEX. The excess unrequired power scheduled by Respondent No. 2/SLDC to Respondent No. 1/NDMC was neither consumed in the area of Respondent No. 1/NDMC nor was sold through power exchange by the Respondent No. 1/NDMC and hence, the Respondent No. 1/NDMC had to return the said excess power to the Grid.
 - ii. Respondent No. 2/SLDC had scheduled less power/energy than the total power/energy that Respondent No. 1/NDMC was entitled to as per its allocation. There was a difference of approximately 18 MUs between the energy/power scheduled and percentage of what the Respondent No.1/NDMC was entitled to. The permissible under drawl/over drawl limit for the Respondent No.1/NDMC as mentioned in Scheduling Procedure was 17MW.
 - iii. The functional requirement of interface Availability Based Tariff (ABT) meters including all the consumers availing power from open access or direct connection to the State Transfer System (STS) covered under ABT are required to be aligned with the provisions as specified in Indian Electricity Grid Code. Further, said alignment has to be in an Order that special energy meters conform to a uniform minimum technical specification.
 - iv. Under Multi Year Tariff (MYT) regime, variations in revenue/costs on account of the uncontrollable factors like sales, power purchase and the controllable factors like Return on Capital Employed (RoCE) and depreciation is trued up annually. Therefore, the Respondent No. 1/NDMC has mentioned un-required scheduling of power from the Petitioner to Respondent No. 1 in its True-up Petition. Further, a mere mention of the Petitioner in True-up Petition does not confirm any consumption of power supplied by the Petitioner in Respondent No. 1/NDMC's area. As part of variation in revenue which occurred due to excess un-required power allocated from Petitioner to Respondent No. 1/NDMC, the Respondent No. 1/NDMC had to mention the same in its True-up Petition duly filed before the Commission.

Petitioner's Reply dated 11.11.2021 to the Additional Affidavit of the Respondent No.1/NDMC

9. The Petitioner has filed reply before the Commission on 11.11.2021 to the Affidavit filed by Respondent No. 1/NDMC on 11.10.2021 and has submitted the following:
- i. The Respondent No 1/NDMC has entirely skirted the issue while attempting to hide the fact that power remained allocated and was indeed supplied by the GTPS Station of the Petitioner from September 2017 to March 2018.
 - ii. Respondent No. 1/NDMC has instead given some data to show that in certain months under dispute, it had sold some quantum of electricity on the energy exchange on a real time basis. This fact does not establish that power from the GTPS Station of the Petitioner was not allocated to Respondent No. 1/NDMC or supplied to Respondent No. 1/NDMC by the Petitioner from September 2017 to March 2018.
 - iii. Merely because Respondent No. 1/NDMC was able to sell some power on short term basis does not mean that it did not draw the electricity allocated to it from GTPS Station. The SLDC Monthly Energy Accounts for September 2017 clearly reflect that 20.02 MUs of electricity was scheduled to NDMC from the GTPS Station.
 - iv. The said averment of Respondent No. 1/NDMC is a technical fallacy and incorrect in terms of the laws of physics. The electricity cannot be demarcated and it is technologically impossible to ascertain as to which quantum of electricity was scheduled and not utilised and whether it was the same quantum of power which was then further sold. Therefore, the data as relied by the NDMC, does not in any manner establish that power scheduled from GTPS Station was excessively allocated to NDMC and was then sold on the energy exchange.
 - v. Further discrepancies in the affidavit filed by Respondent No. 1/NDMC are evident from the fact that at Para 3 of the Affidavit Respondent No. 1/NDMC has stated that it had procured more power than its requirement and as a result surplus power was sold through the energy exchange. However, in contradiction to the same, in Para 4 of the affidavit the Respondent No. 1/NDMC has stated on a sworn affidavit that the excess power scheduled by SLDC was neither consumed by NDMC nor was sold through power exchange.
 - vi. Further in para 4 of the affidavit the Respondent No. 1/NDMC has stated that since the power was neither consumed by it nor sold on the power exchange hence it "*had to return the said excess power to the Grid*". It is stated that such an averment being made by NDMC is in itself a technical fallacy as power cannot be "*returned*" to the grid.

- vii. Further, NDMC has averred that in its True up Petition for determination of tariff for the FY 2019-20 and the True-Up for FY 2017-18, it had referred to the excess *unrequired power allocated from the GTPS Station*. This is an incorrect statement. The True up Petition filed by the Respondent No. 1/NDMC does not describe the allocation of electricity from the GTPS Station, either as unrequired or excess. It is reiterated that in its True up Petition, Respondent No.1/NDMC has shown 98.60 MUs as being purchased from the GTPS Station.

Reply filed by Respondent No. 2/DSLDC

10. The Respondent No. 2/Delhi State Load Despatch Centre (DSLDC) has filed reply on 23.12.2021 to the Petition and has submitted the following:
- i. Respondent No. 2/DSLDC is the apex body to ensure integrated operation of the power system in Delhi and is responsible for discharging various functions as specified under the Indian Electricity Act, 2003 specifically under Section 32 of the Act, one of which being optimum scheduling and despatch of electricity within Delhi.
 - ii. Respondent No. 2/DSLDC implemented the Tariff Order dated 31.08.2017 passed for the year 2017-18 by the Commission wherein the allocation of power was reassigned amongst the Distribution Licensees and deemed licensees out of the overall power portfolio allocated to the NCT of Delhi. It had also received a Letter from the Commission in this behalf. The said reassigned allocation was duly intimated to all the Utilities including the Petitioner.
 - iii. Respondent No. 2/DSLDC has finalized the weighted average entitlement based upon the revised allocation as issued by the Commission in its Tariff Order for the year 2017-18 which is the base for apportionment of DSLDC Charges amongst the Distribution Licensees and Deemed Licensees of Delhi. However, Respondent No. 1/NDMC has made short payment of DSLDC charges for the disputed period on account of reallocation of Power from GTPS of the Petitioner.
 - iv. Respondent No. 2/DSLDC sent various letters with regard to said short payment of DSLDC Charges by Respondent No. 1/NDMC for disputed period on account of reallocation of power from GTPS Station of the Petitioner to Respondent No. 1/NDMC. The issue of short payment was also raised in various meetings. Subsequently, the Respondent No. 2/DSLDC vide its letter dated 08.05.2019 apprised the Commission also to intervene in the matter and direct the Respondent No.1/NDMC to clear the aforesaid dues.

- v. Since, the Respondent No. 2/DSLDC implemented the direction of the Commission with respect to the reallocation of power from GTPS of the Petitioner to Delhi Distribution Licensees and Deemed Licensees, Respondent No. 1/NDMC ought to be directed to release the payment of DSLDC Charges which are illegally withheld by the Respondent No. 1/NDMC.
11. In addition to the above, Respondent No. 2/DSLDC has given para wise reply to the Petition, and prayer, thereby specifically stating the contents of the Petition are either matter of record or pertain to a dispute between the Petitioner and the Respondent No. 1/NDMC. Further, since no prayer is made against the Respondent No. 2/DSLDC, the Petition deserves to be rejected as against Respondent No. 2/DSLDC.

Rejoinder filed by Respondent No. 1/ NDMC

12. Respondent No. 1/NDMC has filed its rejoinder on 05.04.2022 before the Commission to the reply filed by the Petitioner against the Affidavit dated 11.10.2021 filed by the Respondent No. 1/NDMC wherein para wise response has been submitted. In the said rejoinder Respondent No. 1/NDMC has denied the averments of the Petitioner and *inter-alia* stated as follows:
- i. Respondent No. 1/NDMC has never denied the very allocation of power to the Respondent No. 1/NDMC. However, the power forced on Respondent No. 1/NDMC at a higher price, as the said power was totally unrequired. The power so allotted was never requested by Respondent No. 1/NDMC and was unanimously allocated to NDMC/Respondent No. 1.
 - ii. Perusal of Sales data provided by Respondent No. 1/NDMC would amply clarify and confirm that there was sufficient Power arrangement with NDMC/Respondent No 1 to meet the demand of power in NDMC areas without any allocation from GTPS/forced Scheduling.
 - iii. The month wise data filed by Respondent No. 1/NDMC clearly shows that there was sufficient Power arrangement to meet Respondent No. 1/NDMC's demand and there was no need to allocate the unrequested/unrequired power of 131.82MW to Respondent No. 1/NDMC as an addition. The unrequired allocation was done only to relax the fixed charges which were to be incurred by the original allottee i.e. BRPL and simultaneously meaning that intention of the Commission was only to share the fixed cost burden with NDMC/Respondent No. 1 as a result of which, the Respondent No. 1/NDMC was unable to use said unrequired/requisite power and had to additionally incur the revenue loss by selling the said high cost Power in the Power exchange.

- iv. The excess power which was neither sold nor consumed by Respondent No.1/ NDMC is to be treated as UI Power and is to be settled on the basis of Grid frequency. Thus, the un-requisite Power received from GTPS is reflected in the UI account. Therefore, the bilateral sale and consumption of power allocated from GTPS was denied by Respondent No. 1/NDMC in its Affidavit.

IA No. 05 of 2023 filed by The Petitioner

13. The Petitioner has filed an Interlocutory Application on 25.05.2023 before the Commission for Directions, and in addition to praying for allowing the present petition, has made the following prayers:

- a. To Pass appropriate directions to Respondent No. 1/NDMC to pay the total outstanding amount alongwith the net late payment surcharge from the date of default upto the actual date of release of payment;
- b. To Pass appropriate directions to Respondent No. 1/NDMC to pay the bills in future raised in accordance with the Orders of the Commission and
- c. To Direct Respondent No. 1/NDMC to sign a Power Purchase Agreement with the Petitioner.

14. The Petitioner has submitted as under:

- i. On 18.08.2020, Petition No. 35 of 2020 was filed by the Petitioner before the Commission *inter-alia* seeking firstly the approval of the expenditure on account of Renovation and Modernization (R&M) and, secondly, seeking Life Extension of GTPS Station for additional 10 years beyond the expiry of the Power Purchase Agreement.
- ii. On 24.03.2021, the Commission granted in-principle approval for the extension of useful life of the GTPS Station for a period of ten (10) years beyond March, 2021 and reallocated power from GTPS Station Delhi DISCOMs in the following ratio:

Particulars	NDMC	BRPL	BYPL	TPDDL
Average Based on the yearly consumption	5%	42%	23%	30%
Total Quantum of GTPS	90			
Allocation of Quantum of GTPS	4.5	37.8	20.7	27

In Order to give effect to the reallocated share of power, the Commission had also directed the beneficiaries to enter into new PPAs with the Petitioner.

- iii. On 31.03.2021, SLDC wrote to the Delhi DISCOMS including Respondent No. 1/NDMC informing that in compliance of Order dated 24.03.2021, the effective allocation of power from GTPS Station from 01.04.2021 would be as under:

Total Quantum of GTPS	NDMC	BRPL	BYPL	TPDDL	RPH
90MW	4.45	37.38	20.47	26.7	1
100%	4.94	41.53	22.74	29.67	1.11

- iv. On 31.03.2021, the Petitioner, thereafter, wrote to Delhi DISCOMs requesting them to sign a Power Purchase Agreement for the reallocated share in compliance of the Order dated 24.03.2021. The Petitioner had also appended a copy of the Draft Power Purchase Agreement.
- v. On 31.03.2021, Respondent No. 1/NDMC wrote to SLDC stating that since it is not an existing beneficiary of GTPS Station and also since it does not have a Power Purchase Agreement with Respondent No. 1/NDMC, it is neither liable to procure power from GTPS Station, nor is it liable to pay charges for the same. Respondent No. 1/NDMC, after failing to sign the Draft Power Purchase Agreement as circulated earlier, took a position that it will not be in a position to procure power without a PPA.
- vi. By way of email dated 01.04.2021, Respondent No. 1/NDMC wrote to SLDC requesting that since there is no PPA for the allocated capacity, Respondent No. 2/DSLDC not to schedule any power to NDMC from GTPS Station.
- vii. On 18.06.2021, Respondent No. 1/NDMC wrote a letter to SLDC reiterating its earlier stand as conveyed by way of email dated 01.04.2021. While refusing to execute the draft PPA as already shared with Respondent No. 1/NDMC, it continued to take an incorrect position that *sans* a PPA Respondent No. 1/NDMC would not be in a position to procure its reallocated share of power. It is stated that NDMC had all this while not responded to Draft PPA as already shared with it.
- viii. Further, on 16.11.2022 and 09.02.2023, the Petitioner wrote letters to NDMC requesting it to sign the PPA with the Petitioner at the earliest as directed by the Commission and also release the outstanding dues of the Petitioner at the earliest. However, neither did NDMC respond to any of the above letters nor did it clear the outstanding dues towards the reallocated share of power
- ix. Respondent No. 1/NDMC ought to have complied with the Order dated 24.03.2021 of the Commission in Petition No. 35 of 2020. Since, Respondent No. 1/NDMC has taken benefit of the electricity allocated by the Commission and has consumed the same, Respondent No. 1/NDMC has made a vague

argument that there is no PPA and had not made payment for the electricity consumed.

- x. The total outstanding amount accrued on Respondent No. 1/NDMC as on 10.05.2023 of filing the present Application is Rs. 230.78 Crore, out of which Rs 168.42 Crore is the principal amount and Rs 62.36 Crore is the net late payment surcharge levied on Respondent No. 1/NDMC.

NDMC's Reply on IA No. 5 of 2023

- 15. The Respondent No. 1/NDMC has filed its Reply to the Interlocutory Application No. 5 of 2023 filed on 15.03.2024 and submitted that;

RE : ISSUE CANNOT BE RAISED BY WAY OF AN APPLICATION AND IS TO BE RAISED IN A SEPARATE PROCEEDINGS

- i. The Petitioner, at this belated stage, in the garb of seeking Interim directions, actually seeks to mischievously agitate a completely distinct and separate issue which is not a subject matter of the captioned Petition. Even assuming, without being admitted, that there is a non-compliance of the Commission's Order dated 24.03.2021 passed in Petition No. 35 of 2020, the said issue ought to be subject matter of a separate proceeding and the Petitioner cannot be allowed to agitate the same in the present proceedings where the issue is completely distinct and separate.
- ii. Without prejudice, its merits mention at this stage that in furtherance of the Order dated 24.03.2021 passed by the Commission, the SLDC issued letter dated 25.03.2021 intimating the beneficiaries regarding the allocation share of 90MW from GTPS. In response to the letter dated 25.03.2021, the Respondent No. 1 issued letter dated 31.03.2021 intimating that Respondent No. 1 is not an existing beneficiary of GTPS, neither can the Respondent procure power from GTPS in absence of a Power Purchase Agreement. Respondent is not liable to pay any type of charges on account of power procured from GTPS. The Respondent No. 2/DSLDC was further requested not to schedule any power from the GTPS to Respondent No. 1/NDMC w.e.f 01.04.2021. The Respondent No. 1/NDMC further issued letter dated 20.04.2021 to the SLDC reiterating its stance and requesting the SLDC to not schedule any power from GTPS.
- iii. The Petitioner, in Petition No. 35 of 2020, did not array Respondent No. 1 as a party and neither did the Petitioner seek any reliefs with respect to Respondent No. 1. The Commission in the said Petition, without affording any opportunity to the Respondent No. 1 allocated power from GTPS to Respondent No. 1.
- iv. Aggrieved by the Order dated 24.03.2021 passed by the Commission in Petition No. 35 of 2020, Respondent No. 1/NDMC filed an Appeal bearing DFR No. 107

of 2023 before the Hon'ble APTEL. The said appeal was listed before the Hon'ble APTEL on 13.07.2023 wherein the Hon'ble APTEL was pleased to issue Notice in the Appeal and the accompanying applications. The matter was thereafter listed on 21.08.2023, the Hon'ble APTEL was pleased to allow IA bearing No. 1379 of 2023 for condonation of delay in filing appeal, subject to deposit of costs of INR 50,000 to the Central Transmission Utility of India Ltd. (CTUIL) within four weeks. Thereafter on 05.10.2023, since the Respondent No. 1/NDMC was unable to deposit the cost, the Hon'ble APTEL dismissed the appeal. That the Respondent No. 1/NDMC is in process of filing a Special Leave Petition (SLP) against the Order dated 05.10.2023 passed by the APTEL.

Rejoinder dated 09.05.2024 filed by the Petitioner

16. The Petitioner has filed its rejoinder on 09.05.2024 before the Commission to the Reply filed by Respondent No. 1/NDMC in respect of IA No. 5 of 2023 wherein the following has been submitted:
 - a. The objection of the Respondent No. 1/NDMC that the Petitioner by way of the present application sought to agitate a separate issue which is not subject matter of the present Petition. Respondent No. 1/NDMC has further contended that non-compliance of the Order dated 24.03.2021 passed in Petition No. 35 of 2020 ought to have been raised by a separate proceeding. Such a defense is not only hyper-technical but also misconceived.
 - b. The present Application is only an extension of the same, i.e., non-payment of bills for power allocated/supplied from GTPS Station to Respondent No. 1/NDMC from 01.04.2021 onwards in terms of the Order dated 24.03.2021 in Petition No. 35 of 2020.
 - c. The time period for which the non-payment of bills has arisen may differ but the issue to be decided is identical, namely when power is allocated to Respondent No. 1/NDMC by Orders of the Commission, is it liable to make payment of the monthly bills raised by the Petitioner towards the same.
 - d. The defence taken by Respondent No. 1/NDMC is hyper-technical in nature and ought not to be entertained by the Commission while adjudicating the dispute at hand. Since the issue as raised in the present Application is the same as raised by the Petitioner in the present Petition, the reliefs as sought in the present Application are justifiable and ought to be considered by the Commission. Instead of multiplying the litigation, the Petitioner has moved an appropriate application in the pending Petition itself.

RE: NDMC NOT BEING A PARTY TO PETITION NO. 35 OF 2020

- a. It is the case of Respondent No. 1/NDMC that since it was not a party to the proceedings before the Commission in Petition No. 35 of 2020, no relief was

sought for by the Petitioner against NDMC and none could have been granted by the Commission. Respondent No. 1/NDMC has further contended that since it was not a party to the said proceedings, the Commission ought not to have allocated power from GTPS Station to NDMC without affording any opportunity to be heard. This is misconceived, wrong and denied.

- b. The question that was considered by the Commission in Petition No. 35 of 2020 was of life extension of GTPS along with approval of certain additional capital expenditure. There was no need for Respondent No. 1/NDMC to be made party to such a petition.
- c. The allocation of power amongst the various distribution companies in the NCT of Delhi is the prerogative of the Commission and the Petitioner has no say in the same. However, once the power is allocated, there can be no question of the distribution licensee not paying for such allocated power.
- d. The most important aspect so far as Respondent No. 1/NDMC is concerned is that effective the date of passing of the Order dated 24.03.2021, NDMC is continuously scheduling power from GTPS Station.
- e. It cannot be that Respondent No. 1/NDMC is enjoying the electricity but can feign ignorance when it comes to making payment for the same.
- f. The Order/direction passed by the Commission will govern the relationship between the parties. Respondent No. 1/NDMC was wrong and continues to be wrong by not complying with the Order dated 24.03.2021.
- g. Respondent No. 1/NDMC cannot challenge the Order as passed by the Commission in Petition No. 35 of 2020 in the present proceedings. The appropriate remedy for the same would have been to either file a review petition or an appeal.
- h. The Respondent No. 1/NDMC had in fact filed an appeal bearing DFR No. 107 of 2023 against the Order dated 24.03.2021 in Petition No. 35 of 2020. The said appeal was dismissed by the Hon'ble Appellate Tribunal for Electricity vide Order dated 05.10.2023 on account of non-payment of costs. Since DFR No. 107 of 2023 has been dismissed by the Hon'ble Tribunal, the Order dated 24.03.2021 has attained finality. Respondent No. 1/NDMC has contended that is in the process of approaching the Hon'ble Supreme Court against the Order dated 05.10.2023, but this does not mean that it can choose to violate the Order dated 24.03.2021 passed by the Commission.
- i. The said Order dated 24.03.2021 is binding upon all the parties including Respondent No. 1/NDMC. Therefore, till the relief (if any) is granted by the

Hon'ble Supreme Court, Respondent No. 1/NDMC is bound to pay the bills for power supplied to it from GTPS Station.

- j. Accepting the submissions of Respondent No. 1/NDMC would mean that the Order dated 24.03.2021 can be invalidated by Respondent No. 1/NDMC by simply not making payments as is being done in the present scenario. It is well settled that an Order passed by an authority cannot be violated by a party to which it applies. Reliance is placed on Hon'ble Supreme Court' Judgment in Krishnadevi Malchand Kamathia and Ors. v. Bombay Environmental Action Group and Ors., (2011) 3 SCC 363.
- k. In view of the above, it is reiterated that Respondent No. 1/NDMC conduct of treating the Order dated 24.03.2021 as invalid and accordingly not paying the bills is incorrect in law.

RE: NDMC NOT BEING A BENEFICIARY TO GTPS STATION

- a. It is the case of Respondent No. 1/NDMC that since it is not a beneficiary of the GTPS Station it cannot procure power from the station in the absence of a PPA. In this regard, Respondent No. 1/NDMC has contended that it is not liable to pay any charges on account of power procured from GTPS Station.
- b. Such a submission goes against the fact that Respondent No. 1/NDMC is continuously receiving supply of 4.5 MW from the GTPS Station from the date of the Order dated 24.03.2021. The conduct of Respondent No. 1/NDMC is perverse with regards to non-payment of the energy bills for the power consumed by it during the disputed period. The decision of Respondent No. 1/NDMC for withholding the payment due to nonexistence of PPA between Respondent No. 1/NDMC and the Petitioner is arbitrary and illegal.
- c. The Respondent No. 1/NDMC ought to have complied with the Order dated 24.03.2021 of the Commission in Petition No. 35 of 2020. Since Respondent No. 1/NDMC has taken benefit of the electricity allocated by the Commission and has consumed the same, Respondent No. 1/NDMC's vague argument that there is no PPA amounts to Respondent No. 1/NDMC taking advantage of its wrong which is impermissible.
- d. Pursuant to the Order of the Commission dated 24.03.2021, the reallocated share of power was scheduled to Respondent No. 1/NDMC by SLDC. Admittedly, the reallocated share of power has been consumed by NDMC from 01.04.2021 onwards. Having taken benefit of the power, it cannot lie in the mouth of Respondent No. 1/NDMC to refuse to pay for the same on a vague argument that there is no PPA executed between the parties towards the reallocated share of power. (Details of energy scheduled by SLDC to NDMC at Pg Nos. 45-69 of I.A. No. 05 of 2023)

- e. Even otherwise, absence of a PPA cannot be a reason for not making payment for the reallocated share of power in light of the fact that a draft PPA was shared by the Petitioner with Respondent No. 1/NDMC immediately after passing of the Order dated 24.03.2021 i.e., on 31.03.2021.
- f. After a clear direction from the Commission to the parties for signing of PPA for the reallocated share of power, Respondent No. 1/NDMC has failed to sign the same and is further using absence of a PPA as a reason for not making payments to the Petitioner. Even in the past, there has been temporary re-allocation and Respondent No. 1/NDMC has made payments to the Petitioner wherein no such PPAs were signed between the Petitioner and Respondent No. 1/NDMC with regard to the energy supplied by the Petitioner and consumed by the Respondent No. 1/NDMC.
- g. With regard to signing of PPA, the Petitioner had duly sent the copy of the draft PPA to all Delhi DISCOMs including Respondent No. 1/NDMC by way of an e-mail dated 31.03.2021 for necessary inputs/comments. However, no inputs/comments were received. The unilateral decision of Respondent No. 1/NDMC regarding non-payment of any charges on account there being no PPA is illegal.
- h. It is clear that Respondent No. 1/NDMC is trying to take advantage of its own wrong-doing by stating that it is not obligated to make any payment since no PPA has been signed by it with the Petitioner when it was Respondent No. 1/NDMC itself who did not respond to the Petitioner's draft PPA. Reliance is placed on Hon'ble Supreme Court's Judgment in Mrutunjay Pani and Anr. v. Narmada Bala Sasmal and Anr., 1961 SCC OnLine SC 41.
- i. This is without prejudice to the submissions of the Petitioner that even *de hors* the PPA, Respondent No. 1/NDMC in terms of the Order dated 24.03.2021 is liable to make payments towards the reallocated share of power.
- j. The Commission vide Order dated 10.12.2019 in Petition Nos. 26 of 2016 and 28 of 2019 had directed BYPL and BRPL (concerned distribution companies) to pay for the share of power as allocated to the said distribution companies even after the expiry of their PPAs with IPGCL.
- k. It was the case of the distribution companies that since their respective PPAs with IPGCL had come to an end by efflux of time, they were not liable to pay for the power scheduled by Respondent No. 2/DSLDC beyond the PPA date. The said contention of the distribution companies was rejected by the Commission. The Commission had noted that Delhi Government in a meeting dated 05.06.2015 had directed that '*allocation of power from the Rajghat Power Station would continue for at-least six-months after the stabilization of*

400 KV grid sub-station, under construction by Central Sector, under InterState Transmission System Scheme.' Therefore, sans any PPA the power continued to be allotted and basis the same, the Commission directed the distribution companies to pay for the power scheduled till 31.12.2015. Thus, even in the past, de hors any PPA, The Commission has in fact directed the distribution companies to pay for the power as scheduled/allotted.

- I. In view thereof, the Commission ought to direct Respondent No. 1/NDMC to pay the invoices as raised (along with interest) for the power as allocated and consumed by it.

RE: POWER PROCUREMENT BY NDMC FROM OTHER GENERATING STATIONS

- a. Respondent No. 1/NDMC had filed a petition bearing Petition No. 12 of 2024 before the Commission seeking approval for procurement of 181.8 MW power and approval of PPAs.
- b. On one hand, Respondent No. 1/NDMC has not been making payments to the Petitioner in terms of the reallocated share of power of 4.5 MW as has been done by the Commission (Order dated 24.03.2021) on account that no PPA has been signed between the parties and on the other hand, Respondent No. 1/NDMC has sought approval of procurement of 181.8 MW of power to fulfil its power needs having peak power demand of approximately 450 MW.
- c. Respondent No. 1/NDMC had in the above-mentioned petition stated that since NTPC BTPS generating station was shut-down in October 2018 and the PPA of NTPC Dadri Thermal-I expired in November 2020, NDMC is short of 250 MW power. In this regard, Respondent No. 1/NDMC invited proposals by RfS for shortlisting the bidders whereby 8 bidders were shortlisted for a total quantum of 236.40 MW. However, only 5 bidders out of the 8 selected bidders executed the PPAs (total of 181.8 MW). In this regard, Respondent No. 1/NDMC filed the said petition for approval of 181.8 MW of power. The Commission had vide Order dated 28.03.2024 allowed the Petition No. 12 of 2024 as filed by Respondent No. 1/NDMC for power procurement of 181.8 MW.
- d. It is also visible from the cause list as notified by the Commission for 08.05.2024 and 09.05.2024 that Respondent No. 1/NDMC is in requirement of electricity and is seeking approvals from the Commission to purchase additional power under Section 86 (1) (b) of the Act. No such permission should be given till such time NDMC clears the dues of the Petitioner.
- e. The Respondent No. 2/NDMC even after having a shortage of power has not signed the PPA with the Petitioner. Respondent No. 1/NDMC has been wrongly taking the ground of non-existence of the PPA with the Petitioner for non-payment of the re-allocated power. It ought to be noted that NDMC has not complied with the Commissions' Order dated 24.03.2021 for re-allocation of power but has sought for approval for procurement of 181.8 MW of power.
- f. Admittedly, Respondent No. 1/NDMC has shortage of power. It is not the case that NDMC is not signing the PPA with the Petitioner as it does not require any

more power. Therefore, Respondent No. 1/NDMC ought to have entered into a PPA with the Petitioner for allocation of 4.5 MW of power as has been re-allocated by the Commission vide Order dated 24.03.2021. The action of NDMC in this regard is not justified.

- g. The power plant of the Petitioner is a gas-based power plant which is environment friendly in nature. Therefore, Respondent No. 1/NDMC' action of not procuring power from a gas-based power plant (which is not hazardous to the environment) even after specific directions of the Commission, however, seeking to procure power from thermal power plants (which are not environment friendly), is wrong and cannot be justified.
- h. The total outstanding amount accrued on Respondent No. 1/NDMC as on 31.12.2023 is Rs. 259.67 crores, out of which Rs 177.39 crores is the principal amount and Rs 82.28 crores is the late payment surcharge levied on NDMC.
- i. It is unfortunate that Respondent No. 1/NDMC is simply trying to evade payments by raising frivolous grounds for non- payment of the energy consumed by it and thereby causing grave financial prejudice to the Petitioner.

Written Submissions filed by NDMC on 30.05.2024

- 17. The Respondent No. 1/NDMC has yet again submitted that:
 - a. at every instance the reallocation of power by DERC was opposed and, further, that the Respondent as well as the public exchequer would be overburdened by the such surplus allocation.
 - b. The said allocation was also opposed by way of numerous correspondences it entered with the Commission and which have been duly referred to in the Petition.
 - c. The Respondent has also summarised its earlier submissions with regard to allocation of additional power which was grossly erroneous and, further, which shall make the Respondent No. 1/NDMC loss of more than Rs. 71.35 crore for unconsumed power allocated to it forcefully.
 - d. There was no PPA signed between the Petitioner and Respondent No. 1/NDMC and there was no binding agreement between the parties to allow reallocation solely based on ignorance of material considerations in the tariff Order passed by the State Commission and, further, as per Section 86(1)(f) only post contract (PPA) disputes can be adjudicated by the Commission.
 - e. It was wrongly projected and wrongly observed by the Commission that there was deficit in power availability and the Respondent No. 1/NDMC had projected to purchase 183.25 MUs under Short-term purchase agreement.
 - f. The unilateral and arbitrary allocation of power on Respondent No.1/NDMC without distributing any such surplus power either in or on a pro rata basis or without there being any intelligible criteria in contravention to the statute of

Respondent No. 1/NDMC and further in contravention of the principles of natural justice as Respondent No. 1/NDMC was not even heard in such allocation, cannot be sustained.

The Petitioner accordingly prayed to allowing the present petition along with the Interlocutory application.

Commission Analysis

18. Before proceeding with the merits of the dispute, it is necessary to decide first the preliminary objections raised by the Respondent No. 1 that the Commission has no jurisdiction to reallocate the power in its Tariff Order and further, that the jurisdiction of the Commission comes into play only after signing of the PPA between the parties and, in the instant case, no such PPA exists.

19. Before the plea of jurisdiction is analysed on facts, it is important to first highlight the relevant legal provisions as well as the judicial determinations thereon:

Sections 23 and 86(1)(b) of the Electricity Act, 2003, provide as follows:

"23. If the Appropriate Commission is of the opinion that it is necessary or expedient so to do for maintaining the efficient supply, securing the equitable distribution of electricity and promoting competition, it may, by Order, provide for regulating supply, distribution, consumption or use thereof."

"86. Functions of State Commission: (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; ..."

20. In Order to maintain 'One City One Tariff' principle and considering different sales mix across various DISCOMs, the Commission has specified in its Regulation 121(4) of Tariff Regulations, 2017 as follows:

"121. While approving the cost of power purchase, the Commission shall determine the quantum of power to be purchased considering:

.....

(4) The gap between average Power Purchase Cost of the power portfolio allocated and average revenue due to different consumer mix of all the distribution licensee."

21. The Hon'ble Supreme Court in the matter of PTC India Ltd. Vs. CERC (2010) 4 SCC 603 held, inter-alia, that: -

"17. The term "tariff" is not defined in the 2003 Act. The term "tariff" includes within its ambit not only the fixation of rates but also the rules and regulations relating to it. If one reads Section 61 with Section 62 of the 2003 Act, it becomes clear that the Appropriate Commission shall determine the actual tariff in accordance with the provisions of the Act, including the terms and conditions which may be specified by the Appropriate

Commission under Section 61 of the said Act. Under the 2003 Act, if one reads Section 62 with Section 64, it becomes clear that although tariff fixation like price fixation is legislative in character, the same under the Act is made appealable vide Section 111. These provisions, namely, Sections 61, 62 and 64 indicate the dual nature of functions performed by the Regulatory Commissions, viz, decision-making and specifying terms and conditions for tariff determination.

18. Section 66 confers substantial powers on the Appropriate Commission to develop the relevant market in accordance with the principles of competition, fair participation as well as protection of consumers' interests."

"19. It is important to note that the regulatory powers of the Central Commission, so far as tariff is concerned, are specifically mentioned in Section 79(1). This regulatory power is a general one, and it is very difficult to state that when the Commission adopts tariff under Section 63, it functions de hors its general regulatory power under Section 79(1)(b). For one thing, such regulation takes place under the Central Government's guidelines. For another, in a situation where there are no guidelines or in a situation which is not covered by the guidelines, can it be said that the Commission's power to "regulate" tariff is completely done away with? According to us, this is not a correct way of reading the aforesaid statutory provisions. The first rule of statutory interpretation is that the statute MUST be read as a whole. As a concomitant of that rule, it is also clear that all the discordant notes struck by the various Sections MUST be harmonized. Considering the fact that the non-obstante clause advisedly restricts itself to Section 62, we see no good reason to put Section 79 out of the way altogether. The reason why Section 62 alone has been put out of the way is that determination of tariff can take place in one of two ways – either under Section 62, where the Commission itself determines the tariff in accordance with the provisions of the Act, (after laying down the terms and conditions for determination of tariff mentioned in Section 61) or under Section 63 where the Commission adopts tariff that is already determined by a transparent process of bidding. In either case, the general regulatory power of the Commission under Section 79(1)(b) is the source of the power to regulate, which includes the power to determine or adopt tariff. In fact, Sections 62 and 63 deal with "determination" of tariff, which is part of "regulating" tariff. Whereas "determining" tariff for inter-State transmission of electricity is dealt with by Section 79(1)(d), Section 79(1)(b) is a wider source of power to "regulate" tariff. It is clear that in a situation where the guidelines issued by the Central Government under Section 63 cover the situation, the Central Commission is bound by those guidelines and MUST exercise its regulatory functions, albeit under Section 79(1)(b), only in accordance with those guidelines. As has been stated above, it is only in a situation where there are no guidelines framed at all or where the guidelines do not deal with a given situation that the Commission's general regulatory powers under Section 79(1)(b) can then be used."

22. Further, the Hon'ble Supreme Court of India in the judgment passed in Jaipur Vidyut Vitran Nigam Ltd. And Others v. MB Power (Madhya Pradesh) Limited and Others 2024 SCC OnLine SC 26, while relying upon its earlier judgements passed in Energy Watchdog v. CERC (2017) 14 SCC 80 and PTC India Ltd. Vs. CERC (2010) 4 SCC 603 held that:

"113. We have already referred to Section 86(1)(b) of the Electricity Act, which is analogous to Section 79 of the Electricity Act, Section 79 determines the functions of Central Commission, whereas Section 86 provides for the functions of the State Commission, Section 86 of the Electricity Act empowers the State Commission to 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.

114. It can thus be seen that Section 86(1)(b) of the Electricity Act gives ample power on the State Commission to regulate electricity purchase and procurement process of distribution licensees. It also empowers the State Commission to regulate the matters including the price at which electricity shall be procured from the generating companies etc."

23. Thus, as can be seen from the legal provisions and the judicial pronouncements, it is settled law that (a) the Commission is vested with the power to allocate (and reallocate) power and (b) the regulatory powers of the State Commission are wide and multifarious in nature.
24. Also, the tariff fixation in this case was Ordered by the Commission through Tariff Order, 2017-18, has been made appealable under section 111 of the Act. The fact that needs consideration at this stage itself is that under these provisions, the Respondent No.1 had appealed before the Hon'ble APTEL vide Appeal No. 34 of 2009 challenging, inter-alia, the said Tariff Order. The Hon'ble Tribunal, *inter alia*, held in its judgement dated 16.02.2009 that the Commission has the jurisdiction to allocate power under Section 23 of the Electricity Act, 2003. The Respondent No.1/NDMC has not challenged the said judgement and the same, therefore, has attained finality and, thereby, the said Tariff Order 2017-18 was passed by the Commission continued to be in force.
25. The second part of the plea of jurisdiction is that the Commission's jurisdiction comes into play only after signing of the PPA and not otherwise.
26. The relevant facts of the case bear mentioning here. Respondent No. 1 approached the Commission in and through the Tariff Petition for buying electricity for the disputed period in Order to meet the anticipated deficiency. Given the fact that the said Respondent supplies electricity to a VIP area and, also, that the proposal given was to purchase electricity at a higher price which would have ultimately affected the Consumer, the Commission, under the powers vested in it as aforesaid, directed that the 94.87MW of power from the Petitioner's GTPS to be allocated to the Petitioner at Fixed Charges amounting to Rs. 35.17 Cr. and Energy Charges Rs. 25.24 Cr.
27. In these circumstances, if the said Respondent's contention about 'non-signing of PPA and, therefore, lack of jurisdiction' is to be accepted, it shall amount to the NDMC taking advantage of its own wrong: *Nullus Commodum Capere Potest de Injuria Sua Propria*. The same is prohibited in law.
28. In the light of above, the Commission finds that it has jurisdiction in the matter and, therefore, proceeds, further on the merits of the case.

29. The Commission in its Tariff Order dated 31/08/2017 had revised the allocation of power to NDMC for the period 01/09/2017 to 31/03/2018 and allocated 80% of GTPS of BRPL to NDMC for the said period. Such reallocation was done as NDMC projected to purchase 183.25 MU under short term power to meet the demand of FY 2017-18, and accordingly, SLDC scheduled power to NDMC.
30. NDMC itself in the Tariff Petition had projected a shortfall of 183 MUs and had indicated to purchase the same from short term sources for FY 2017-18. However, considering the non-reliability of procurement through short term purchase, high rates during peak period and considering the fact that NDMC serves the VIP areas of Delhi and to avoid any outage, the Commission diverted 80% share of GTPS from BRPL to NDMC for the period 01/09/2017 to 31/03/2018 (94.87 MW) and accordingly, the Commission provided the Fixed cost of Rs.35.17 Crore and Energy Charges of Rs.25.24 Crore on the said quantum to NDMC in their Tariff Order for FY 2017-18. Relevant extract of Tariff Order dated 31/08/2017 of NDMC is as follows:

Table 67: Power Allocation for FY 2017-18 approved by the Commission

Sl. No	Power Generating Stations	Installed Capacity (MW)	NDMC Share (%)	NDMC (MW)	MUs
A	Badarpur TPS	705.00	17.73	125.00	283.20
B	NCPP - Dadri	840.00	14.88	124.99	447.30
C	Pragati - I	330.00	30.30	99.99	469.54
D	PPS -III, Bawana	1,371.20	7.30	100.10	150.64
E	Delhi MSW Solutions	24.00	5.09	1.22	5.66
F	GTPS	270.00	35.14	94.87*	183.25
G	Total	3,270.20		546.17	1539.59

** from SEPTEMBER 2017 ONWARDS*

Table 69: Power Purchase Cost from various sources for FY 2017-18

Sl. No	Power Generating Stations	MU	Fixed Charges (Rs. Cr.)	Energy Charges (Per Unit)	Energy Charges (Rs. Cr.)	Total Charges (Rs. Cr.)	Avg. Rate
A	Badarpur TPS	283.20	33.01	3.78	107.14	163.72	5.78
B	NCPP - Dadri	447.30	68.73	3.18	142.08	210.81	4.71
C	Pragati - I	469.54	52.65	2.79	126.21	155.09	3.30
D	PPS -III, Bawana	150.64	74.57	2.28	34.39	108.96	7.23
E	Delhi MSW Solutions	5.66		7.03	3.98	3.98	7.03
F	GTPS	183.25	35.17	2.66	25.24	51.34	2.80
G	Total Cost	1539.59	264.12		439.04	693.90	

31. The Commission, vide its Order dated 31/07/2019, i.e. True-up of FY 2017-18 of NDMC has considered the quantum of power supplied by GTPS to NDMC under Power Purchase Quantum for the said period but did not include the cost of power purchase from GTPS because of the reason that NDMC had not made any payment towards the same. Relevant extract of Tariff Order dated 31/07/2019 is as follows:

"3.38 the power purchase cost does not include the cost of Gas Turbine station and solar power from generating plant/ net metering. The power quantum available from GT Power Station at Petitioner's periphery has been considered as per data submitted by SLDC and

cost of power purchase has not been considered as Petitioner has not made the payment to GT Power Station. Accordingly, the Commission approves the long term power purchase as follows for FY 2017-18:

Table 16: Commission Approved: Long Term Power Purchase cost for FY 2017-18

S. No.	Source	Quantum (MU)	Amount (Rs. Crore)	Average Rate (Rs/kWh)
A	Central Generating Stations			
i.	Dadri TPS	413.96	216.00	5.22
ii.	Badarpur TPS	258.01	124.68	4.83
iii.	Arrears		(37.73)	
iv.	Gross CGS	671.97	302.95	
v.	Less Rebate		(6.71)	
vi.	Total CGS (including BTPS)		296.24	
B	State Generating Stations			
i.	Pragati I	575.11	271.55	4.72
ii.	Pragati III- CCGT Bawana	186.76	130.52	6.99
iii.	Less Rebate		(8.03)	
iv.	Net Pragati		394.04	
v.	GT	100.85		
C	Total Power Purchase (A+B)	1534.69	690.28	
D	DMSWSL	3.98	3.03	7.61
E	EDWPCL	0.42		
F	Total w/o Rebate		708.05	
G	Total Power Purchase	1539.10	693.31	

32. In light of above facts, the Commission observes that there is no denying the fact that the power allotted to the Respondent No.1/NDMC has been consumed/utilised by it with the knowledge that the same was being supplied to it by the Petitioner; not intending to be gratuitous, since the bills against the same were raised by the Petitioner. In view of this, the Respondent No.1 is legally bound to pay the Petitioner the outstanding bill of Rs.68.58 Crore as derived after verification of bills submitted by the Petitioner for the energy consumed for the period 01.09.2017 to 31.03.2018 (the disputed period).
33. As far as the portion of the Petitioner's prayer seeking Late Payment Surcharge (LPSC) due to non-payment of dues of the Petitioner is concerned, it is observed that the Commission has framed DERC (Terms and Conditions for Determination of Tariff) Regulations, 2017 and Regulation 137 thereof specifies levying of LPSC in case of delayed payments as follows:

"137. In case the payment of any bill for charges payable under these Regulations is delayed by a beneficiary of generating entity or long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating entity or the transmission licensee, as the case may be."

Thus, the Respondent No. 1 is also liable to pay LPSC @ 1.50% per month from the date of occurrence of the default till the date of actual payment made by it to the Petitioner.

34. The Petitioner, in its Interlocutory Application No. 05/2023 filed on 25.05.2023 has sought directions from the Commission against Respondent No. 1/NDMC for

payment of total outstanding amount alongwith late payment surcharge, for payment of bills in future and for signing PPA with the Petitioner. The Petitioner drew the attention of the Commission that in spite of the Commission's Order dated 24.03.2021 in Petition Nos. 24 and 35 of 2020, that the Petitioner and all Distribution Licensees, including the Respondent No. 1, shall sign the PPA, the latter has not complied with the same even as the Petitioner has been repeatedly requesting the said Respondent to sign the PPA as directed. Further, the Petitioner has stated that the total outstanding amount accrued against Respondent No.1/NDMC as on 10.05.2023 is Rs.230.78 Crore.

35. In its reply to the IA, the Respondent No. 1/NDMC submitted that non-compliance of the above Order dated 24.03.2021 ought to be subject matter of a separate proceeding and, therefore, the same is not maintainable in its present form by way of filing the aforesaid IA. Respondent No. 1/NDMC further submitted that since it is not an existing beneficiary of GTPS Station, it can neither procure power from the GTPS Station in absence of PPA nor it is liable to pay any type of charges on account of power procured from GTPS Station.
36. It is observed that the aforesaid Order of the Commission's Order dated 24.03.2021 in Petition No. 24 and 35 of 2020 was also challenged by the Respondent No. 1/NDMC before the Hon'ble APTEL appeal bearing No. DFR 107 of 2023. The same stands dismissed vide Order dated 05.10.2023 and, as per records, no further appeal has been preferred. Hence, the Order dated 24.03.2021 has attained finality. In light of the same, Respondent No. 1/NDMC is legally bound under the Act to comply with the directions contained in the Commission's Order dated 24.03.2021 with respect to the Respondent No.1/NDMC.
37. The Petition is, therefore, allowed and Respondent No. 1/NDMC is accordingly directed as follows:
 - a. to pay the outstanding bill of Rs.68,58,34,339/- to the Petitioner w.r.t the diverted 80% of share of GTPS from BRPL for the period 01.09.2017 to 31.03.2018 alongwith Late Payment Surcharge from the date of default till the date on which the payment is made.
 - b. Further, the said outstanding bill shall be paid expeditiously so that the effect of it can be allowed to the Respondent No.1/NDMC in its forthcoming Tariff Order, albeit, only after receiving confirmation from it to the effect that the said payment has been duly made to the Petitioner as directed vide 'a' above.
 - c. As regards to IA. No. 05 of 2023, Respondent No. 1 shall duly comply with the directions of the Common Order of the Commission dated 24.03.2021 passed in Petition No. 24 and 35 of 2020 and shall sign the PPA with the Petitioner within

6 months from the date of issuance of this Order; failing which, the Petitioner shall be at liberty to approach this Commission by way of filing an appropriate Petition.

38. Petition and the IA are disposed of in above terms.

39. Ordered accordingly.

Sd/-
(Justice (Retd.) Jayant Nath)
Chairperson