

**Delhi Electricity Regulatory Commission**  
**Viniyamak Bhawan, 'C' Block, Shivalik, Malviya Nagar, New Delhi – 17.**

No. F.11(787)/DERC/2011-12/2114

**Petition No. 10/2012**

**In the matter of:**      Petition under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 in connection with the disputes and differences arising under the PPA dated 18.07.2008 between the Maithon Power Limited and BRPL

Maithon Power Limited  
Jeevan Bharti, 10th Floor,  
Tower I, 124,  
Connaught Circus,  
New Delhi-110 001

.....Petitioner

Vs.

BSES Rajdhani Power Limited  
2nd Floor, B-Block  
BSES Bhawan, Nehru Place,  
New Delhi 110 019

....Respondent No. 1

Tata Power Trading Company Limited  
Mahalaxmi Receiving Station,  
Senapati Bapat Marg,  
Lower Parel,  
Mumbai-400013, Maharashtra

.....Respondent No. 2

**Coram:**

**Sh. P.D. Sudhakar, Chairman, Sh. Shyam Wadhera, Member &  
Sh. J.P. Singh, Member.**

**Appearance:**

1. Mr. Suresh Mukherjee, Adv. MPL
2. Mr. Sakya Singha Choudhuri, Adv. MPL
3. Mr. Ashwani Chawala, MPL
4. Ms. Mandakini, Adv. MPL
5. Mr. Ajit Warrier, Adv. BRPL
6. Mr. Paresh B. Lal, Adv. BRPL
7. Ms. Megha Bajpeyi
8. Mr. Sanjay Srivastav

**ORDER**

(Date of Hearing: 09.07.2013)  
(Date of Order 10.09.2013 )

1. The issue before the Commission is regarding the maintainability of the petition filed by M/s Maithon Power Limited in respect of certain terms of PPA dated 18.07.2008 entered into between the company and BSES Rajdhani Power Ltd.

2. The brief facts of the case are as below:

- i. Tata Power Delhi Distribution Limited (TPDDL), earlier known as North Delhi Power Ltd.(NDPL), a distribution licensee operating in the National Capital Territory of Delhi, issued a tender for procurement of power on short/medium term basis for itself and also for BSES Rajdhani Power Limited (BRPL), and BSES Yamuna Power Limited (BYPL) through competitive bidding process. BRPL had authorized TPDDL to act as the nodal agency for carrying out such procurement of power on their behalf. The power was to be procured in terms of the tender documents and the terms and conditions set out in the draft power purchase agreement attached to the tender documents.
- ii. M/s Maithon Power Limited, the petitioner herein submitted its bid for supply of 309 MW power on medium term basis from its generating unit of the Maithon Right Bank Thermal Power Plant (Generating Unit), which was to be commissioned on 01.10.2010. The petitioner was declared the lowest bidder.
- iii. The Petitioner executed a Power Purchase Agreement with BRPL (herein after collectively referred to as the "PPA"). As per the PPA, the Petitioner was required to supply 154.5 MW power to the BRPL on round the clock basis for the period 01.10.2010 to 31.03.2012.
- iv. This Commission by an order indicated their satisfaction that the Tariff for the PPA had been determined through a transparent process of bidding in terms of Section 63 of the Act. This Commission therefore adopted the tariff of Rs. 3.48/Kwh as quoted by the Petitioner for supply of power by the Petitioner to the BRPL under the PPA.
- v. The Petitioner agreed to supply power to the BRPL under the PPA for the period from October 2010 to March 2012. However, the Petitioner submits that due to the reasons beyond its control, the COD of its Generating Unit was delayed and accordingly power could not be made available by Maithon to BRPL from such Generating Unit from October 2010. The position persisted till 31.03.2011. However, with effect from 01.04.2011, Maithon arranged for supply of power to BRPL from alternate source in terms of Clause 4.4. of the PPA. In this connection, the Petitioner had engaged TPTCL to arrange for power to the extent of 154.5 MW from alternate sources to be supplied to BRPL.

- vi. While effecting supply of power from alternate sources, in some cases, the rate of power made available to BRPL by TPTCL from various sources, including trading margin (TPTCL Rate) was higher than the PPA Tariff. In such cases, TPTCL had billed BRPL at the PPA Tariff of Rs. 3.58 per unit and recovered the excess charges over and above the PPA Tariff ("Excess charges") from Maithon Power.
- vii. There were also certain instances when the TPTCL Rate was lower than the PPA Tariff. In such cases, TPTCL billed BRPL at the TPTCL Rate which is lower than the PPA Tariff. As a result, the effective tariff paid by BRPL in such occasions was lower than the PPA Tariff.
- viii. The Petitioner (Maithon Power Limited) filed a petition against the Respondents (BSES Rajdhani Power Limited & Anr.) and prayed that this Hon'ble Commission may be pleased to:
  - (a) Admit the present petition;
  - (b) Issue appropriate directions to BRPL to pay to the Petitioner an amount of Rs. 1.77 Crores as Differential amount on account of the difference between the PPA Tariff and the lower TPTCL Rate at which TPTCL charged BRPL from time to time.
  - (c) Issue appropriate directions to BRPL to pay to the Petitioner STOA Charges amounting to Rs. 1.09 Crores which TPTCL had erroneously charged to Maithon Power along with late payment surcharge as per clause 7.4.5 of the PPA @ 1.25% per month.
  - (d) Direct BRPL to pay amount of Rs. 16.90 crores being the outstanding energy charges for the supply of power during the period 1.09.2011 to 30.06.2011 (including Capacity Charges for the Un-availed Power during the period 8.09.2011 to 14.09.2011) along with late payment surcharge as per clause 7.4.5 of the PPA @1.25% per month.
  - (e) Direct BRPL to pay Maithon Power an amount of Rs. 35.51 Crores being the Capacity Charge for the Un-availed Power during the period October, 2011 to December, 2011 along with late payment surcharge as per clause 7.4.5 of the PPA @ 1.25% per month.
  - (f) Direct BRPL to pay Maithon Power the Capacity Charges for the months January 2012 to March 2012 if offered capacity is un-availed;
  - (g) Determine the appropriate court fees to be paid by Maithon Power in accordance with the DERC (Conduct of Business) Regulations, 2001; and

(h) Pass such other and further order/directions as this Hon'ble Commission may deem appropriate in the facts and circumstances of the case

- ix. M/s BSES Rajdhani Power Ltd, Respondent no. 1 has filed objections regarding maintainability of the present petition before the Commission. Respondent no. 1 argued that CERC is the appropriate forum for adjudication on the matter.
- x. The Commission heard the counsels and considered the arguments made by the Ld. Counsel for Maithon Power Ltd. and BRPL and was of the view that the Commission would first hear both the parties on maintainability of the said petition.

3 The Respondent no. 1 has placed reliance on the following judgments in support of its claim:

- 1. Order dated 10.06.2009 passed by the Hon'ble Delhi Electricity Regulatory Commission in Petition no. 23 of 2008.
- 2. Order dated 30.04.2009 passed by the Hon'ble Delhi Electricity Regulatory Commission in Petition no. 60 of 2008.
- 3. Reply on behalf of the Hon'ble Delhi Electricity Regulatory Commission filed before the Appellate Tribunal for Electricity in Appeal no. 106 and 107 of 2009.
- 4. Written submission on behalf of the Hon'ble Delhi Electricity Regulatory Commission filed before the Appellate Tribunal for Electricity in Appeal no. 106 and 107 of 2009.
- 5. Written submission on behalf of Maithon Power Ltd. filed before the Appellate Tribunal of Electricity in Appeal no. 106 and 107 of 2009.
- 6. Judgment dated of the Hon'ble Appellate Tribunal for Electricity in appeal no. 106 and 107 of 2009.
- 7. Order dated 27.12.2011 passed by the Hon'ble Delhi Electricity Regulatory Commission in Petition no. 69/2011 and 72/2011.
- 8. Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal no. 94 and 95 of 2012.

4. The Respondent No. 1 has submitted that the Hon'ble CERC in its order dated 16.10.2012 passed in Petition no. 155/MP/2012, in the matter of Adani Power Limited Vs. has categorically held, at para 20, that:

*"The expression 'composite scheme' therefore means the scheme comprising more than one element. It is clear from clause (b) of sub-section (1) of Section 79 that two elements of the composite scheme should be generation and sale of electricity. There is no doubt that Adani generates electricity and sells the electricity generated. So, the second condition of clause (b) of having the*

*composite scheme of generation and sale of electricity is met. Adani is currently selling electricity generated at Mundra Power Project to more than one State, the States of Gujarat and Haryana. Therefore, the condition of sale of electricity in more than one State' is duly met. All the three conditions of clause (b) are duly satisfied. Therefore, as at present Adani has entered into or otherwise has the 'composite scheme' for generation and sale of electricity in more than one State. Regulation of tariff of Adani is within the jurisdiction of this Commission".*

Further, the Hon'ble Tribunal held, at para 23, that:

*" ... The dictionary meanings of the phrase 'enter into' include 'to participate in, engage in take an active role or interest in; to form a constituent or component or part or ingredient of; to become party to. '. The starting point for participation or engagement or performance of active role for sale of electricity to more than one State can be any time after conception of the generating station. The generating company can be said to have entered into the composite scheme of generation and sale of electricity in more than one State. Such a stage is reached when the generating company makes the binding commercial arrangement for supply of electricity to more than one state, that is when it executes the PPAs in more than one State or enters into any other similar arrangement. To say that the composite scheme should be only at the inception stage will amount to frustrating the legislative intent of the Act. Such a course is not open while interpreting a statutory position. Further, such an interpretation will defeat the legislative mandate since in that case jurisdiction of this Commission can be ousted at the whims of the generating Company. Therefore, it is our considered opinion that a generating may enter into the composite scheme for generation and sale of electricity in more than one state at any time during the life of the generating station owned by it. Any other interpretation would also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one state enshrined in clause (b) of sub-section (1) of section 79."*

5. The Respondent has further submitted that the Petitioner is a company which has a composite scheme for generation and sale of Electricity within the terms of section 79(1)(b) as it supplies electricity to more than one state and hence any dispute regarding the regulation of the tariff in the PPA dated 18.07.2008 entered into between the Petitioner and Respondent No. 1 and Respondent No.2 can only be adjudicated by the Hon'ble CERC.

6. The Respondent No.1 has further submitted that the adoption of tariff under section 63 of the Electricity Act does not confer the jurisdiction to adjudicate disputes regarding the regulation of tariff to this Hon'ble Commission. The power to adjudicate on disputes connected to the regulation of tariff in a PPA for inter-state sale of electricity vests solely with the Hon'ble CERC and not with this Hon'ble Commission.

7. It has been argued by the Respondent No.1 that the true import of the term 'regulate' in section 79(1)(b) of the Electricity Act, 2003 has extensively been deliberated on and discussed by the Hon'ble Appellate Tribunal for Electricity in their Judgment in Appeal 94 and 95 of 2012. It has been held by the Appellate Tribunal for

Electricity (at para 31,32 and 33, pg 21, Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal no. 94 and 95 of 2012, in the matter of BSES Rajdhani Power Ltd. Vs. DERC & NTPC Limited) that:

*"31 .... the term 'regulate used in section 79(1)(f) of the Act has got a wider scope and implication not merely confined to the determination of tariff.*

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

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

8. The Respondent No.1 has further submitted that the Petitioner has misinterpreted section 86(1)(b) and section 86(1)(f) of the Electricity Act, 2003 to conclude that this Commission has the jurisdiction to adjudicate upon the disputes raised by the present petition. The Respondent no. 1 submitted that said sections are a) not applicable to the issues raised vide the present petition and b) even assuming that these sections were applicable to the present petition, the jurisdiction conferred upon the Central Electricity Regulatory Commission under section 79(1)(f) of the Electricity Act, 2003 shall supersede the jurisdiction of this Hon'ble Commission under section 86(1)(f) of the Electricity Act, 2003.

9. By relying upon the decision of this Commission in the case of BSES Rajdhani Power Limited v. National Thermal Power Corporation Limited, Petition No. 69 of 2011, the Respondent No. 1 submitted that the decision of the commission is of critical import to the maintainability of the present petition. In the said case it was held by this Commission that since National Thermal Power Corporation Limited is a government controlled generating station the jurisdiction to adjudicate upon the disputes in relation to the regulation of tariff was conferred upon the Central Electricity Regulatory Commission under section 79(1)(f) read with section 79(1)(a) of the Electricity Act, 2003. This Hon'ble Commission (para 50, pg 21, Order dated 27.12.2011 passed by the Hon'ble Delhi Electricity Regulatory Commission in Petition no. 69/2011, in the matter of BRPL Vs. NTPC Ltd. and Petition no. 72/2011, BYPL Vs. NTPC Ltd. held that:

"We are inclined to agree with the contention of Mr. Ramachandran that the functions assigned to the Central Commission are specific in nature. Therefore, a specific function will have to be given supremacy to the general functions assigned to the State Commission. It is also a settled law that a specific power, function or jurisdiction vested with a particular agency will always have supremacy over a general power, function or jurisdiction. In our opinion, Section 79 (1)(a), (b) and (f) are special provisions in the Electricity Act, 2003 which will apply to resolve a dispute between NTPC and the Petitioner. This also get due support of the principle that the special law shall over-ride the general law. Hence, the general law in Section 86(1)(f) of the Electricity Act, 2003 will not apply in these Petitions. "

whenever there is a dispute between a Generating Company owned or controlled by the Central Government or a Generating Company other than those owned or controlled by Central Government specified above, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one state, such a dispute should be resolved under Section 79(1)(f) and not under Section 86(1 )(f) which is general in nature." (emphasis supplied)

10. It has been contended by the Respondent No.1 that the Hon'ble Appellate Tribunal for Electricity In the aforesaid decision has reasoned and summarized that:

" 77 .... Whatever is within the jurisdiction of the Central Commission, the State Commission should not encroach upon the same by claiming to exercise the concurrent jurisdiction or exclusive jurisdiction by virtue of section 86 of the Act, 2003. The Jurisdiction of the State Commission would be only in respect of matters other than those which are already covered by the jurisdiction of the Central Commission under section 79.

78. The provisions of section 86(1)(b) is for regulating the role of distribution licensee in procurement of power. It does not regulate a generating company supplying the power. This is particularly in the context of de-regulation of the generating company under the Act, 2003. In short, it is to be stated that in case of Central Sector Generating Companies, the entire regulatory control is vesting with the Central Commission and not with the State Commission. "

(i) The State Commission does not have jurisdiction under section 86(1)(f) of the 2003 Act to adjudicate upon the dispute between a licensee and generating company in the matter of terms and conditions of tariff of a generating section owned and controlled by the Central Government, including the Regulation of supply by the generating company in the event of default in payment.

(ii) Only Central Commission has the jurisdiction under section 79(1)(f) of the 2003 Act to adjudicate upon the dispute involving generating companies owned and controlled by the Central Government in the matter of terms and conditions of tariff and Regulation of supply. The jurisdiction of the State Commission under Section 86(1)(f) is subject to Section 79(1)(f) of the Act.

(iii) The Terms and Conditions of Tariff and Regulation of supply will be covered by the Central Commission's Tariff Regulation and Regulation of Power Supply Regulations. "

11. Whereas, the petitioner namely Maithon Power Limited has controverted the arguments of the Respondent No.1 and has submitted that law is well settled that the provisions of a statute have to be read harmoniously to avoid any conflict between different provisions of the law. The Hon'ble Supreme Court in the case of P.S. Sathappan v. Andhra Bank Ltd., (2004) 11 SCC 672, has held as follows:

"....it is a well-established rule of interpretation that if one interpretation leads

*to a conflict whereas another interpretation leads to a harmonious reading of the section, then an interpretation which leads to a harmonious reading must be adopted. In the guise of giving a purposive interpretation one cannot interpret a section in a manner which would lead to a conflict between two sub-sections of the same section".*

12. The Petitioner has submitted that the facts of the present case calls for a harmonious interpretation of sections 79(1) and 86(1) of the Act. Having regard to the nature of the Long-term and Medium-term agreements, the Hon'ble CERC and this Hon'ble Commission are exercising jurisdiction over distinct activities and transactions entered into by the generating station with its Beneficiaries. There is no conflict in such exercise of power by both the Commissions.

13. It is further submitted by the Petitioner that the function of regulation of electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from generating companies or licensees or from other sources for distribution and supply within the State has been vested on the concerned State Electricity Regulatory Commission under Section 86(1)(b) of the Act. In the present case where the power is being procured by the distribution companies in the state of Delhi, it is this Hon'ble Commission which has the power to regulate the electricity purchase and procurement process of BRPL including the price at which electricity is procured by BRPL from MPL. It is in this light that BRPL has got the Medium-term PPA and the tariff approved by this Hon'ble Commission. This principle has also been established in the judgment of the Hon'ble Appellate Tribunal for Electricity ("Hon'ble Tribunal") in the case of Pune Power Development Authority, Appeal No. 200 of 2009. The relevant extracts are set out below:

The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute".

14. The Petitioner has put forward the point that the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd., (2008) 4 SCC 755 has upheld the wide power of the state commissions to adjudicate upon any disputes u/s 86(1)(f)

of the Act in the following words:

*"We further clarify that all disputes, and not merely those pertaining to matters referred to in Clauses (a) to (e) and (g) to (k) in Section 86(1), between the licensee and generating companies can only be resolved by the Commission or an arbitrator appointed by it. This is because there is no restriction in Section 86(1)(f) about the nature of the dispute".*

15. The Petitioner has further submitted that the exercise of adjudicatory power has to be preceded by or concomitant to the exercise of jurisdiction u/s 79(1)(a) to (d) of the Act. This position has been elaborated by the Hon'ble Tribunal in the case of Pune Power Development Authority, Appeal No. 200 of 2009 while dealing with the adjudicatory powers of the State Commission u/s 86(1)(f) of the Act:

*"18. A plain reading of the above provision would clearly show that the State Commission has jurisdiction to entertain disputes between the licensees and also the Generating Companies. Thus, the scope of Section 86(1)(f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86(1)(f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission".*

16. The line of argument of the Petitioner is that in the present case, Hon'ble CERC has not exercised any jurisdiction in relation to the tariff for supply of power under the Medium-term PPA. The tariff has been approved by this Hon'ble Commission u/s 63 of the Act since the supply relates only to the state of Delhi. This Hon'ble Commission having so exercised regulatory jurisdiction over the Medium-term PPA, the Hon'ble CERC cannot exercise adjudicatory jurisdiction in relation to any dispute arising under the PPA. In fact as elaborated in para k below, the Hon'ble CERC has not exercised its regulatory jurisdiction under Section 79(1)(b) of the Act for the Medium-term PPA approved by this Hon'ble Commission. Accordingly, it has proceeded with the determination of tariff for the Long-term PPA's by taking into consideration the proportionate cost and expenses related to the generating station in relation to the capacity contracted under Long-term PPA's and excluded the cost relating to the supply of electricity under the present Medium-term PPA.

17. To further strengthen its argument the Petitioner has submitted that the jurisdiction of the Hon'ble CERC to adjudicate any dispute involving generating companies or transmission licensees u/s 79(1)(f) of the Act is limited to matters connected with Clauses (a) to (d) of Section 79(1). Therefore, any disputes that are beyond the scope of Section 79(1)(a) to (d) do not fall within the scope of Section 79(1)(f) of the Act. The disputes in the present case do not relate to the regulation of tariff by MPL as a generating company. It is clear from a plain reading of the petition that it relates to the recovery of dues by MPL from BRPL that are worked out on the

basis of agreed tariff under the Medium-term PPA and approved by this Hon'ble Commission, which is a purely commercial issue. Further, the petition also has raised issues regarding interpretation of the Medium-term PPA regarding the meaning and applicability of certain conflicting provisions of the PPA. Therefore, none of the disputes in the present petition per-se fall within the scope of Section 79(1)(a) to (d) of the Act. This being the position, section 79(1)(f) of the Act will not be applicable to the facts of the present case. It is further submitted that while disputes under Section 79 (1) (f) of the Act relate to tariff matters regulated by the Hon'ble CERC, the disputes under Section 86 (1) (f) of the Act have a broader scope and are not restricted to such Tariff matters alone. The matter in the instant case relate to interpretation of the Medium-term PPA and recovery of the dues under the same which can be dealt under the jurisdiction of this Hon'ble Commission.

18. The Commission, after hearing the arguments put forward by the parties, is of the opinion that in the instant case it is established that the petitioner company M/s Maithon Power Limited is having a composite scheme for power generation and it is also established that the jurisdiction of CERC under section 79 of the Electricity Act is specific in nature whereas the jurisdiction of the State Commission under section 86 is general in nature and is subject to the provisions under section 79. In other words it may be said that the topics on which CERC has the jurisdiction to adjudicate is ousted from the jurisdiction of the State Commission and in this sense the jurisdiction of SERCs is a residuary and general jurisdiction.

19. The Commission would like to refer its order in the matter of NTPC (Petition no. 69/2011 and 72/2011), wherein it was held that:

*“the functions assigned to the Central Commission are specific in nature. Therefore, a specific function will have to be given supremacy to the general functions assigned to the State Commission. It is also a settled law that a specific power, function or jurisdiction vested with a particular agency will always have supremacy over a general power, function or jurisdiction. In our opinion, Section 79 (1)(a), (b) and (f) are special provisions in the Electricity Act, 2003 which will apply to resolve a dispute between NTPC and the Petitioner. This also get due support of the principle that the special law shall over-ride the general law. Hence, the general law in Section 86(1)(f) of the Electricity Act, 2003 will not apply in these Petitions.*

*whenever there is a dispute between a Generating Company owned or controlled by the Central Government or a Generating Company other than those owned or controlled by Central Government specified above, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one state, such a dispute should be resolved under Section 79(1)(f) and not under Section 86(1)(f) which is general in nature.”*

20. The decision of this Commission was upheld by the Appellate Tribunal wherein it was observed that :

*" 77 .... Whatever is within the jurisdiction of the Central Commission, the State Commission should not encroach upon the same by claiming to exercise the concurrent jurisdiction or exclusive jurisdiction by virtue of section 86 of the Act, 2003. The Jurisdiction of the State Commission would be only in respect of matters other than those which are already covered by the jurisdiction of the Central Commission under section 79.*

*78. The provisions of section 86(1)(b) is for regulating the role of distribution licensee in procurement of power. It does not regulate a generating company supplying the power. This is particularly in the context of de-regulation of the generating company under the Act, 2003. In short, it is to be stated that in case of Central Sector Generating Companies, the entire regulatory control is vesting with the Central Commission and not with the State Commission. "*

21. Attention is invited to the observation of the Appellate Tribunal for Electricity (at para 31, 32 and 33, pg 21, Judgment of the Hon'ble Appellate Tribunal for Electricity in Appeal no. 94 and 95 of 2012, in the matter of BSES Rajdhani Power Ltd. Vs. DERC & NTPC Limited) on the term regulate as given in Section 79(1) (f). The Appellate Tribunal observed that:

*"31 .... the term 'regulate' used in section 79(1)(f) of the Act has got a wider scope and implication not merely confined to the determination of tariff.*

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

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

22. Section 79 (b) stipulates that the Central Commission shall, inter alia, discharge the function to **regulate the tariff** of generating companies other than those owned or controlled by the Central Government, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

23. In view of the above there would be only one test to determine the issue of jurisdiction as to whether CERC has jurisdiction over dispute involving PPA between a licensee and a generation company having composite scheme for power generation.

If CERC has jurisdiction over the subject, the jurisdiction of DERC would get ousted.

24. Observation of the Appellate Tribunal in the judgment dated 23.11.2006 in Appeal No 228 of 2006 (PTC India Ltd. Vs CERC and Others) is also important, wherein it was opinion that:

*"56. What has been contemplated or provided for in Section [79 1\(b\)](#) is to regulate the tariff of generating companies, if such a contingency arises for fixation of tariff for such generating companies in case of a generating company having a composite scheme of generation and sell **electricity** in more than one **State**. **This obviously means that when sale of power takes place by the generator and with whom should the said utility / Discom, should have a uniform purchase price for such Discoms / utilities, the legislature has enabled the Central Commission to regulate the tariff of such generating companies and not otherwise.**"*

25. The Commission in the hearing on 20.11.2012 heard the arguments made by Maithon Power and BRPL. In order to decide the issue of maintainability of case before this Commission it had sought following information from the petitioner:

- a. The duration of power supply under the said Power Purchase Agreement;
- b. Whether any power was supplied for the same generating unit to any other power purchase by invoking the jurisdiction of CERC for determination of tariff for power supplied during the above period;
- c. If so, Maithon Power may file copies of the petition filed by them before CERC and the order passed by CERC for determination of tariff.

26. In reply to the aforesaid queries M/s Maithon Power has submitted that they had filed a petition before CERC for determination of tariff for supply of power from Maithon Power to DVC from 01.09.2011 to 31.03.2012 and 1.04.2012 to 31.03.2014.

27. It is noteworthy that the instant PPA was for power supply from M/s Maithon Power to the Respondent No.1 for a period from 1.10.2010 to 31.03.2012. Whereas, the Petitioner has filed a petition before CERC for determination of tariff for supply of power to DVC from 01.09.2011 to 31.03.2012, which overlaps with the period of supply in the instant PPA i.e. from 1.10.2010 to 31.03.2012. Determination of any disputes on the terms of PPA by this Commission would certainly have a financial implication on the petitioner company and may affect the petition filed before CERC for determination of tariff for supply to DVC. It is also worth mentioning that CERC has provisionally determined the Tariff for power supply by Maithon and the petition for final determination of tariff has yet not been decided.

28. In any case, even if the present Commission were to assume jurisdiction to decide the limited issue of disputes in respect of the medium term PPA approved by this Commission, since the medium term PPA period overlaps with the supply of power

from MTL to other stations (where CERC is the undisputed arbiter of tariff) the financial impact of the decisions taken by the present Commission in term of the dispute would definitely impact the tariff regulation of MTL by CERC and the matter would necessarily have to be taken to CERC for a final determination of tariff as indicated above. Such a cumbersome procedure is best avoided in the interest of minimizing litigation and bringing one supervisory lens on the entire process of tariff regulation (where CERC is without doubt the final arbiter in a generating station with a composite scheme).

29. In view of the above, this Commission is of the view that the Petitioner may approach CERC for determination of the terms and dispute of the instant petition

30. The petition is disposed off accordingly.

Sd/-  
(J.P. Singh)  
MEMBER

Sd/-  
(Shyam Wadhera)  
MEMBER

Sd/-  
(P.D. Sudhakar)  
CHAIRPERSON