

DELHI ELECTRICITY REGULATORY COMMISSION

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

No. F.11(748)/DERC/2011-12/

Petition No. 69/2011

In the matter of: **Regulation/Diversion of Power Supply relating to BSES Rajdhani Power Limited (BRPL) for Non-payment and Non-maintenance of Letter of Credit.**

AND

In the matter of:

BSES Rajdhani Power Limited
Through its: **CEO**
BSES Bhawan, Nehru Place,
New Delhi-110019.

...Petitioner

VERSUS

National Thermal Power Corporation Limited
NTPC Bhawan, SCOPE Complex,
7 Institutional Area,
Lodhi Road,
New Delhi – 110 003.

...Respondent

Petition No. 72/2011

In the matter of:

BSES Yamuna Power Limited
Through its: **CEO**
Shakti Kiran Building,
Karkardooma,
New Delhi-110092.

...Petitioner

VERSUS

National Thermal Power Corporation Limited
NTPC Bhawan, SCOPE Complex,
7 Institutional Area,
Lodhi Road,
New Delhi – 110 003.

...Respondent

Coram:

Sh. Shyam Wadhera, Member & Sh. J.P. Singh, Member.

Appearance:

1. Mr. Gopal.K. Saxena, CEO, BRPL;
2. Mr. Sunil Shori, V.P. BRPL;
3. Mr. Ajay Kumar, V.P., BRPL;
4. Mr. Raj Arora, BRPL;
5. Mr. Deepak Shankar, BRPL;
6. Mr. Prashant Dua, BRPL;
7. Mr. S.C. Sharma, BYPL;
8. Mr. A. K. Sharma, BYPL;
9. Mr. Haridas, Sr. Mgr. BYPL;
10. Mr. Sunil Kakkar, AVP, BYPL;
11. Mr. Pankaj Dhingra, HoD, Legal, BYPL;
12. Mr. Sai Krishna, DGM, BYPL;
13. Mr. Amit Kapur, Advocate, BRPL & BYPL;
14. Mr. Anupam Varma, Advocate BRPL & BYPL;
15. Ms. Tarunima, Advocate, BRPL & BYPL;
16. Mr. V. P. Singh, Adv. BRPL & BYPL;
17. Mr. Nikhil Sharma, Adv. BRPL & BYPL;
18. Mr. M. G. Ramachandran, Advocate;
19. Mr. J. Malhotra, Manager, NTPC;
20. Mr. Rohit Chhabra, DGM, NTPC;
21. Mr. C. K. Mondal, AGM, NTPC;
22. Mr. Naresh Anand, AGM, NTPC;
23. Mr. Rakesh Chopra, AGM, NTPC;
24. Ms. Sneha Venkataramani, Advocate;
25. Mr. Mithlesh Kumar, AGM, Power Grid;
26. Mr. N. K. Jain, G.M.(Comml.), Power Grid.

ORDER

(Date of Hearing: 12.12.2011)

(Date of Order: 27.12.2011)

1. Ld. Counsel Mr. Amit Kapur through Petition No. 69/2011 challenged the notice dated 31.08.2011 issued by National Thermal Power Corporation Ltd. (NTPC), whereby, NTPC had threatened regulation/suspension of power supply to BRPL & BYPL for non-maintenance of Letter of Credit for a period of 90 days w.e.f. the midnight of 07.09.2011/08.09.2011.
2. The Petitioners sought adjudication by the Commission on the following issues:
 - (a) Refusal of NTPC to align the credit period in Petitioners PPA to 60 days in line with the applicable CERC Tariff Regulations, instead of 24 days as actually extended;
 - (b) Refusal of NTPC to accept individual station-wise Letter of Credits and insistence on a consolidated Letter of Credit which prevents operational flexibility to BRPL in rostering/managing its off-take in the moment of crisis.
3. Mr. Kapur submitted that power generation has been de-licensed except to the extent where explicit provisions require the same. In contrast, transmission, distribution and trading of electricity are licensed and regulated activities. Further, the Central and State Electricity Regulatory Commissions have been

created and vested with specific regulatory powers and jurisdiction over subject matters and activities as provided by the Act. The underlying objective was to distance the government from regulation.

4. Mr. Kapur further submitted that disputes regarding commercial terms contained in the PPA fall within the jurisdiction of this Commission under Section 86(1)(f) read with Section 86(1)(b) and 64(5) of the Act. He emphasised that there is no dispute regarding regulation of any element of tariff of NTPC, and therefore, the disputes in this matter are not covered under Section 79(1)(a) and Section 79(1)(f) which vests the CERC with exclusive jurisdiction in regulating tariff of generating companies owned or controlled by the Central Government.
5. Mr. Kapur further submitted that jurisdiction under Section 79 has been conferred on CERC to adjudicate upon disputes which relates to aspects stated in Clauses (a) to (d) of Section 79(1) of the Act whereas, jurisdiction of State Commission under Section 86(1)(f) of the Act has no such restriction on the nature of disputes that it can adjudicate upon so long as it is inter-se licensees or inter-se generator and a licensee, as held by the Hon'ble Supreme Court in **Gujarat Urja Vikas Nigam Ltd. Versus Essar Power Ltd.** Further, any dispute between a Distribution Licensee and inter-state trading licensee is excluded from Section 79(1)(f) of the Act. Thus, it is seen from the above that Section 79(1)(a) of the Act is limited to regulating the tariff of generator. It does not envisage regulation of commercial terms for sale of power by a generating company to Distribution Company – including credit period/payment mechanism, payment security mechanism, default. Etc. In order to substantiate the above contention of the Petitioner, Mr. Kapur submitted few Orders passed by CERC which exclusively deal with and determine components of tariff only. Whereas, these components of tariff includes de-capitalisation of assets, capital cost, FERV, Debt-Equity Ratio, Return on Equity, Interest on Loan, Depreciation, Advance Against Depreciation, O & M Expenses, Interest on Working Capital, Annual Fixed Charges and Energy Variable Charges. Mr. Kapur further emphasised that from the above it is clear that the Tariff Order does not deal with any of the commercial terms which are the subject matter of disputes raised before the Commission in this Petition like credit period/payment security mechanism etc.
6. Mr. Kapur further submitted that in contrast the explicit statutory functions and domain of State Commissions like this Commission include:
 - (a) To regulate/approve electricity purchase and procurement process of Distribution Licensee under Section 86(1)(b) of the Act. Inevitably it would involve approval of PPAs which contain the commercial terms and

arrangements. Depending upon the tenure of the plan, the requirement of the Distribution Licensee vis-à-vis its consumers; the nature of supply and all other relevant considerations, approval thereof can be granted or refused;

- (b) To determine the tariff for generation, supply, transmission and wheeling of electricity under Section 86(1)(f) of the Act.
7. Mr. Kapur further submitted that jurisdiction of CERC under Section 79(1)(a) of the Act is restricted to regulation of tariff only. Under the Act 'tariff' has neither been defined nor explained in any of the provisions of the Act. As such, the definition given by the Hon'ble Supreme Court shall be determinative, viz – Tariff is a cartel of commerce and normally it is a book of rates. It will mean a schedule of standard prices or charges provided to the category or categories of customers specified in the tariff.
8. Mr. Kapur further submitted that in the light of above submissions it is clear that tariff for NTPC generating stations is determined by the CERC. Whereas, the commercial terms and arrangements such of supply by NTPC to the end user, which is the Distribution Licensee is governed by the terms of the PPA executed between the parties. Thus, by adjudicating the dispute between NTPC and BRPL & BYPL, there is no re-determination of tariff, but adjudication of a dispute pertaining to the commercial terms and conditions of supply.
9. Further, in support of his arguments, Mr. Kapur cited the case of **Tata Power Company Ltd. Versus Reliance Energy Ltd.** where, the Hon'ble Supreme Court has interpreted power of the State Commission under Section 86 of the Act. Hon'ble Supreme Court observed that a generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long term agreement with the distribution agency. Terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply meet the need of the distributing agency vis-à-vis the consumer. If in its view, these arrangements are not found to be reasonable, approval may not be granted. Section 86(1)(b) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine, the tariff for generation as also in relation to supply; transmission and wheeling of electricity. Clause (b) of sub-section(1) of Section 86 provides to regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be

procured from the generating companies or licensees or from other sources through agreements. As a part of the regulation it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement. Section 86(1)(b) of the 2003 Act clearly shows that the generating company indirectly comes within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrella the generating company also for the purpose of issuance separate direction.

10. Mr. Kapur is of the view that the provision pertaining to adjudication of dispute between a generator and licensee as contained in Section 86(1)(f), does not distinguish between a central government company which is a generator or a private one. Therefore, this Commission has jurisdiction to entertain the disputes between BRPL & BYPL and NTPC in terms of Section 86(1)(f) read with Section 86(1)(b) and 64(5) of the Act.
11. Mr. Kapur cited the following cases in support of his arguments advanced above:
 - (a) **Gujarat Urja Vikas Nigam Ltd. versus Essar Power Ltd.** (2008) 4 SCC 755 (paras 6, 21, 26, 28, 59, 60);
 - (b) **Lanco Power Limited versus Haryana Electricity Regulatory Commission and Ors.**, Judgment dated 04.11.2011 in Appeal no. 15/2011 (paras 3-5, 9, 11, 14-17, 77, 80, 82, 86-88, 97, 98);
 - (c) **Pune Development Pvt. Ltd. versus Karnataka Electricity Regulatory Commission**, 2011 ELR (APTEL) 0303 (paras 1, 5, 7, 10, 12, 16, 18, 19, 24, 31, 32, 37);
 - (d) **Lanco Amarkantak Power Pvt. Ltd., Hyderabad versus Madhya Pradesh Electricity Regulatory Commission** reported as 2010 ELR (APTEL) 0161 (paras 11, 13, 14, 18, 19).
12. In **Gujarat Urja Vikas Nigam Ltd. versus Essar Power Ltd.** the Hon'ble Court has decided 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 dispute. In **Lanco Power Limited versus Haryana Electricity Regulatory Commission and Ors.** the Hon'ble Court has decided that since, the

licensee Haryana Power is involved in procurement of power for the state of Haryana for distribution of the said power to the consumers of the state of Haryana, the Haryana Electricity Regulatory Commission alone will have the jurisdiction under Section 86(1)(f) of the Act to adjudicate upon the dispute between the licensee and the Generating Company. In **Pune Development Pvt. Ltd. versus Karnataka Electricity Regulatory Commission** the Hon'ble Court has decided that the location of the Trading Licensees has no bearing to determine the jurisdiction of the State Commission under Section 86(1)(f). So long as the Distribution Licensees procuring the power is in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute. The supplier of electricity being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the disputes. If a generating company enters into an agreement for sale of power generated by it, knowing the place where the power is going to be consumed, the generating company acts with the knowledge and the nexus to such consumers. This nexus forms the basis of the jurisdiction of this Hon'ble Commission over disputes between NTPC and BRPL for the supply of power covered by the PPA dated 05.06.2008.

13. Mr. Kapur cited the case of Maithon Power Limited wherein, the Commission in its Order dated 30.04.2009 in Petition no. 60/2008 held that one of the statutory functions of the State Commission is to regulate/approve electricity purchase and procurement process of Distribution Licensee under Section 86(1)(b) of the Act. There is no ambiguity with regard to this power of the State Electricity Regulatory Commission. This power is not subject to any other condition or restriction. There is no overriding power in case of the Central Commission to similarly regulate the process of procurement of electricity in a manner so as to override the functions of the State Electricity Regulatory Commission under Section 86(1)(b) of the Act. If the State Electricity Regulatory Commission is satisfied on the facts of the case that a PPA has been negotiated and good terms have been secured, the State Commission will have the power under Section 86(1)(b) of the Act to permit the DISCOM to enter into a PPA with the generator. The PPA was approved by the this Commission on various conditions including the following:

14) Article 7 regarding metering and energy accounting shall be elaborated to describe use of main/check meter etc.;

15) All benefits on account of mega power policy and passing on the same to the Petitioner by MPL needs to be incorporated."

14. Mr. Kapur further submitted that the aforesaid Order of this Commission was upheld by the Hon'ble Appellate Tribunal for Electricity in its Order dated 31.03.2010.
15. Mr. Kapur further submitted that Delhi Electric Supply Undertaking (DESU) and other Bulk Power Customers in Northern Region, jointly entered into a Bulk Power Supply Agreement (BPSA) on 31.01.1994 with NTPC for purchase of power from various power stations of NTPC on mutually agreed terms and conditions contained in the said BPSA. Thereafter, the Delhi Vidyut Board (DVB) was assigned the functions of DESU and thereby assumed the rights and obligations of DESU under the BPSA with NTPC. In the recent past after the unbundling of erstwhile DVB, DTL was assigned the above BPSAs and PPAs. Subsequently, the said PPAs were re-assigned by this Commission to various Distribution Licensees on 01.04.2007. Mr. Kapur emphasised that the parties to this Agreement acknowledge, accept and confirm the transfer and vesting of the rights and obligations of DTL to BRPL & BYPL for procurement of power from NTPC under the Power Purchase Agreements to the extent of the capacities allocated to in the terms of the DERC Order from the effective date, as amended from time to time by DERC or such other Competent Authorities. Further, the parties agree that from the effective date, BRPL & BYPL shall for all intent and purposes be treated as a purchaser of power from NTPC with NTPC and BRPL & BYPL being entitled to enforce their respective rights and obligations under the Power Purchase Agreements. Since, the re-assigning and signing of PPAs was done on the basis of an Order of this Commission, the jurisdiction of this Commission was established and accepted by NTPC in matters concerning the terms of the PPA.
16. Mr. Kapur further submitted that NTPC has refused to align the credit period in Petitioner's PPA to 60 days in line with the applicable CERC Tariff Regulations, 2009, instead of 24 days as actually extended. Regulation 35 of the CERC Tariff Regulations, 2009 (which continue the dispensation from Regulation 26 of the CERC Tariff Regulation, 2004) mandate for a 60 days credit period before levy of late payment surcharge. NTPC's tariff for all plants is determined by Ld. CERC is predicated upon a 60 day credit period under the CERC Tariff Regulations, 2009. In this sense, NTPC has been persistently discriminating against the consumers of Delhi and refusing to extend the same to BRPL.
17. Ld. Counsel Mr. M. G. Ramachandran, appearing for NTPC, opposed the contentions raised by Ld. Counsel Mr. Amit Kapur. He submitted that the Commission has no jurisdiction under the Electricity Act, 2003 qua NTPC to entertain the claim of the Petitioner either in regard to the regulation of supply notified by NTPC or in regard to any other matter concerning the terms and

conditions for generation and supply of electricity by NTPC to the Petitioners. He further submitted that their Petitions are totally misconceived and are not maintainable.

18. Mr. Ramachandran advanced his arguments based on the following provisions of the Act and Regulations made by the Central Commission. Section 79 of the Electricity Act, 2003 provides for the functions of the Central Commission:

- “(a) to regulate the tariff of generating companies owned or controlled by the Central Government;*
 - (b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;*
 - (c) to regulate the inter-State transmission of electricity;*
 - (d) to determine tariff for inter-State transmission of electricity;*
 - (e) ...;*
 - (f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
 - (g) ...;*
 - (h) ...;*
 - (i) ...;*
 - (j) ...;*
 - (k) ...*
- (2) The Central Commission shall advise the Central Government on all or any of the following matters, namely:--*
- (i) formulation of National Electricity Policy and tariff policy;*
 - (ii) promotion of competition, efficiency and economy in activities of the electricity industry;*
 - (iii) promotion of investment in electricity industry;*
 - (iv) any other matter referred to the Central Commission by that Government.”*

Section 61 provides as under:

- “The Appropriate Commission shall, subject to the provisions of this Act, specify the terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:--*
- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;*
 - (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
 - (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;*
 - (d) safeguarding of consumers' interest and at the same time, recovery of the cost of electricity in a reasonable manner;*
 - (e) the principles rewarding efficiency in performance;*
 - (f) multiyear tariff principles;*
 - (g) that the tariff progressively reflects the cost of supply of electricity and also reduces cross-subsidies in the manner specified by the Appropriate Commission;*
 - (h) the promotion of co-generation and generation of electricity from renewable sources of energy;*
 - (i) the National Electricity Policy and tariff policy:*
PROVIDED that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory

Commissions Act, 1998, and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

Section 178 provides as under:

(1) The Central Commission may, by notification make regulations consistent with this Act and the rules generally to carry out the provisions of this Act.

(2) In particular and without prejudice to the generality of the power contained in sub-sec. (1), such regulations may provide for all or any of following matters, namely:--

- (a) ...;*
- (b) ...;*
- (c) ...;*
- (d) ...;*
- (e) ...;*
- (f) ...;*
- (g) ...;*
- (h) ...;*
- (i) ...;*
- (j) ...;*
- (k) ...;*
- (l) ...;*
- (m) ...;*
- (n) ...;*
- (o) ...;*
- (p) ...;*
- (q) ...;*
- (r) ...;*
- (s) the terms and conditions for the determination of tariff under section 61;*

19. In exercise of the above powers the Central Commission made the following Regulations:

- (a) The Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009; and
- (b) The Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010.

The tariff terms and conditions presently applicable for the generation and supply of electricity by NTPC to various purchasers including the Petitioner herein are subject to and are governed by the above Regulations.

The Tariff Regulations, 2009 sets out the basic norms and parameters for determination of tariff. The Tariff Regulations provide for the methodology for calculation of tariff. The Tariff Regulations, inter alia, provides for metering, accounting, billing and payment, rebate, delayed payment surcharge etc. as more fully set out in the said Regulations. It may be seen that even the title of

Tariff Regulations, 2009 is Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009.

Apart from the above, the terms and conditions for generation and sale of electricity by NTPC to the beneficiaries including the Petitioners are agreed to and incorporated in the Bulk Supply Agreement or the Power Purchase Agreement duly executed between the parties. In the case of the Petitioners, the Power Purchase Agreement has been signed between the parties on 05.06.2008.

The Regulation of Power Supply Regulations, 2010 notified by the Central Commission, inter alia, provides for:

- (a) Recognition of the agreement entered into by NTPC with the beneficiaries including the terms contained in the agreement for the consequences in default of payment or breach of other obligations such as maintenance of the Letter of Credit;
- (b) Regulation of Power Supply in case of default on the part of the beneficiaries in the payment of the money or non-maintenance of the Letter of Credit;
- (c) Procedure for implementing the Regulation of Power Supply;
- (d) Power of the Central Commission to remove difficulties in the implementation of the Regulation and any person aggrieved by the implementation of the same ought to approach the Central Commission.

20. Mr. Ramachandran further submitted that Regulation 4 specifically provides for Regulation of Power Supply and its procedure, in case of non-payment of money or non-establishment of the Letter of Credit in favour of the generating company. Regulations 5 to 11 provide the various steps to be taken by various authorities including the RLDC, SLDC to implement the Regulation of Power Supply to the defaulting entities. Regulation 12 allows the generating company to sell the quantum of power regulated to third parties.
21. Mr. Ramachandran submitted that the Power Supply Regulation is a comprehensive regulation dealing with Regulation of Power Supply to the defaulting beneficiaries. In terms of Section 79(1)(a) of the Electricity Act, 2003 and the Tariff Regulations, 2009 and the Regulation of Power Supply Regulations, 2010, NTPC is regulated and supervised by the Central Commission in regard to tariff, its terms and conditions including the Regulation of Power of Supply in case of default on the part of the beneficiaries. Thus, it is clear from the above that

NTPC and any issues related thereto will necessarily fall under Section 79(1)(f) and not under Section 86(1)(f). Further, the term used is 'regulate' and not merely determination of Tariff in Section 79(1)(f) of the Act. The term 'regulate' has been interpreted by the Hon'ble Supreme Court as having wider scope and implications and as allowing doing everything necessary for the organised implementation and development.

22. Mr. Ramachandran further submitted that Section 61 and 79 deal with the terms and conditions of tariff and not merely with tariff. The terms and conditions would necessarily include all terms related to tariff. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply. The Central Commission not only has the power to notify Regulations with respect to the terms and conditions of tariff but also to implement such Regulations in all aspects. In support of above contention Mr. Ramachandran cited the case of **U. P. Power Corporation Ltd. Versus National Thermal Power Corporation Ltd. And others** wherein, the Hon'ble Supreme Court held as under:

"A Regulatory Commission not only makes Regulations but in view of its extensive power BUT ALSO in-charge of implementation thereof. It is furthermore in the event of any dispute or difference arising between several players involved in the framing of tariff for the consumers of electrical energy has also an adjudicatory role to play."

23. Mr. Ramachandran further submitted that Section 79(1)(f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with Clauses (a) to (d) of Section 79. Thus, anything involving a generating station of NTPC as to the generation and supply of electricity will be a matter governed by Section 79(1)(f) of the Act. The Tariff Regulations, 2009 and the Regulation of Power Supply Regulations, 2010 providing for the terms and conditions of tariff are clearly matters involving a generating company covered under Section 79(1)(a) and, therefore, would squarely fall within the scope of Section 79(1)(f) of the Electricity Act, 2003.

In terms of the above, it is undisputedly clear that the Central Commission constituted under the Electricity Act, 2003 has:

- (a) Notified the Tariff Regulations, 2009 and the Regulation of Power Supply Regulations, 2010 governing the terms and conditions of tariff including the consequences in case of default or failure on the part of the beneficiary; and

- (b) Jurisdiction to enforce the non-payment of money or non-establishment of payment security mechanism such as the Letter of Credit by the beneficiaries.

The Central Commission having implemented the above in relation to a generating company owned and controlled by the Central Government or in relation to the generating companies covered by Section 79(1)(b) of the Electricity Act, 2003, the Central Commission has the power to adjudicate on any dispute arising out of the same. The agreement entered into by NTPC and the beneficiaries for generation and sale of power have to be subjected to the Regulations notified by the Central Commission. It is the Central Commission which retains the power to modify the said agreement through Regulations.

Further, the decision of the Hon'ble Supreme Court in **PTC India Limited versus Central Electricity Regulatory Commission** is that the Regulation of the Commission governing the relationship of the parties are binding on the parties. Accordingly, the Regulations of the Central Commission recognizing the agreement and the Clauses in the agreement providing for the consequences of default on the part of the beneficiaries have to be enforced by the Central Commission and can only be altered or modified by the Central Commission by appropriate Regulation.

24. Mr. Ramachandran in order to further develop his arguments that only Central Commission has jurisdiction over NTPC has cited the case of **Central Power Distribution Company & Ors. Versus Central Electricity Regulatory Commission & Anr.** where the Hon'ble Supreme Court has held as under:

"(15) The principal contention of the counsel for the appellants is founded on two grounds, (1) that the CERC did not have the jurisdiction to introduce ABT for generating stations supplying power within the State of Andhra Pradesh and (2) the CERC has failed to provide an opportunity of hearing to the appellants whose interests have been adversely affected by the impugned order.

(16) It is submitted that the order dated 4.7.2005 passed by the Commission in discharge of its power under Section 79(1)(a) of the Electricity Act, 2003 cannot be justified. It is further argued under Section 79(1)(c) the Central Commission can only regulate inter-State transmission of electricity. It is argued that Section 86(1)(c) of the Act confers the power of jurisdiction of facilitating intra-State transmission upon the State Regulatory Commission. It is also argued that the UI charges in respect of Simhadri could have only been imposed by the State Regulatory Commission, after due consultation with all other generators in the State and the transmission utility who has the responsibility to maintain the grid.

(17) In our view, the aforesaid contention is thoroughly misconceived. Simadhri Station is owned and controlled by the NTPC which is a Government of India undertaking. Section 79(1)(a) of the Act contemplates that the Central Commission has jurisdiction over generating companies owned or controlled by the Central Government. In view thereof, the provisions under Section 86 cannot be applied for NTPC station. The various sections under the Electricity Act would clearly show beyond any doubt the powers of Central Commission and jurisdiction in regard to the grid, the scheduling and despatch.

(18) Under Section 79(1)(h) the Central Commission has the power to specify Grid Code. It also provides that the function of the State Commission to specify State Grid Code under Section 86(1)(f) should be consistent with the Grid Code specified by the Central Commission and therefore the power of the State Commission is subservient to the power of the Central Commission. Section 2 (32) defines Grid as inter connected transmission lines. The expression used inter connected has a significant meaning. Sub-section (1) of Section 28 deals with the function of RLDC (Regional Load Despatch Centre) to ensure integrated operation of the power system in the concerned region. The term power system is of wide import. It is not confined to inter State Transmission Lines but extends to even supply lines, distribution, main service lines etc. However, sub-section (3) of Section 28 deals with duties of RLDC using the expression "within the region" or "in the region". Obviously it includes both "Inter State" and "Intra State" lines and is not restricted to inter State lines. Section 29 of the Act empowers the RLDC to give directions and exercise such supervision and control to any person for ensuring stability of grid operation. It also provides that the State Load Despatch Centre shall duly enforce such directions. Sub-section (3) of Section 33 of the Act provides that the State Load Despatch Centre shall comply with the directions of the Regional Load Despatch Centre.

(19) A fascicule reading of the above provisions would clearly show that the scheme of the Electricity Act is that RLDC is required to follow the principles, guidelines and methodologies specified by the Central Commission and all persons including the distribution licensees like the appellants herein are required to follow the directions of RLDC. RLDC can enforce such directions through SLDC. In turn SLDC is required to follow the directions of RLDC.

(20) Having regard the aforesaid mentioned provisions of law the contention that the Central Commission has no jurisdiction to deal with grid discipline in regard to single State beneficiary station, in our view, has no merit. As already noticed ABT is to ensure discipline in the integrated system. Further ABT is being introduced stationwise and it is the Central Commission alone who has the jurisdiction particularly, in regard to generating stations of NTPC, which is a Central Government, owned and controlled generating company."

25. Mr. Ramachandran further submitted that the provisions of the Electricity Act, 2003 specifically provide for the regulatory jurisdiction of the Central Commission in regard to NTPC as per Section 79(1)(a). The provisions of Section 86 vesting the functions in the State Commission have to be read subject to Section 79(1)(a) and Section 79(1)(b) of the Electricity Act, 2003. This has also been recognized by the Hon'ble Appellate Tribunal in the case of **Pune Power Development Private**

Limited versus Karnataka Electricity Regulatory Commission and Another. Para 23 of the said judgment reads as under:

“The clauses (a) to (d) refer to the tariff of Central generating Companies and Tariff relating to composite scheme and inter-state transmission. A reading of this Section would make it clear that the jurisdiction conferred on the Central Commission is restricted to the aspects which are specified under clauses (a) to (d) aforesaid. However, if the jurisdiction of the State Commission which conferred under Section 86(1)(f) of the Act is looked into, it would be clear that no such restrictions are placed on its jurisdiction. In other words, all disputes between the licensees which do not fall under Section 79(1)(a) to (d) are within the jurisdiction of the State Commission.”

Accordingly, if the matter falls within the scope of Section 79(1)(a) to (d) of the Electricity Act, 2003, the provisions of Section 86(1)(f) will have no application as the scope of Section 79(1)(f) is applicable.

26. Mr. Ramachandran further submitted that in view of the above, there cannot be any dispute that the issue of terms and conditions including the Regulation of Supply is squarely and fully covered by the provisions of Section 79(1)(a) read with Section 178 of the Electricity Act, 2003. It is rather preposterous to contend that the Central Commission will specify the terms and conditions of tariff, but the State Commission can pass Orders nullifying the impact of such Regulations. If the contention of the Petitioner is to be accepted, the State Commission can pass an Order to the effect that no payment be made and no Letter of Credit be established or even in the case of default in payment or default in maintenance of the Letter of Credit, the power supply should not be regulated. This would amount to promoting anarchy in the system if the State Commissions are given the liberty of individually interfering/changing various terms and conditions of supply of electricity by central stations such as NTPC which have been finalised by CERC.
27. Thus, Mr. Ramachandran contends that the provisions of the Electricity Act, 2003 have to be harmoniously construed. As held in the **Pune Power Case**, whatever is within the jurisdiction of the Central Commission, the State Commission should not encroach upon the same by claiming to exercise concurrent jurisdiction by virtue of Section 86 of the Electricity Act, 2003. Thus, the jurisdiction of the State Commissions is in respect of matters other than those which are already covered by the jurisdiction of the Central Commission under Section 79.
28. Mr. Ramachandran further submitted that there is a purpose in the way the provisions of the Electricity Act, 2003 vest jurisdiction in Central Commission and in the State Commission. The Electricity Act, 2003 carves out the regulatory

control over NTPC and other Central Sector Generating Companies and Generating Companies having composite arrangements of generation and sale of electricity in two or more States in the Central Commission for – (a) uniformity in the tariff amongst more than one State beneficiary; and (b) common terms and conditions of supply of electricity to more than one State beneficiary as well as supply from the Central Sector Generating Companies. The Central Sector Generating and Transmission Companies have an all India presence with each of the generating stations supplying electricity to a number of states and Powergrid as a transmission entity rendering transmission service across the country. Therefore, these utilities have been subject to a special treatment and brought under the jurisdiction of the Central Commission. Thus, it is baseless on the part of the Petitioner to contend that the State Commission's jurisdiction also would extend to direct NTPC and other central sector companies to follow any order of the State Commission. This would amount to a direct conflict of jurisdiction and absence of comity in jurisdiction. The above contention of Mr. Ramachandran was duly supported by **Bennion on Statutory Interpretation and N. S. Bindra's Interpretation of Statutes**. In **N. S. Bindra's Interpretation of Statutes** it is provided that it is a matter of great public importance that there should be no conflict or clash of jurisdiction between two equally competent authorities. Applying the principle it was held in *Bhabarprintananda v. President, Bihar State Board of Religious Trusts*, that the expression 'Religious Trust' in the title and preamble and in Section 2(1) and (3) of the Bihar Hindu Religious Trusts Act, 1951, must be construed not in the plain and grammatical sense but must be cut down so as to exclude such religious trusts which are administered under a scheme prepared by Court outside the territorial limits of Bihar. Under the circumstances, the Bihar Act does not apply to Baidyanath Temple and the President has no jurisdiction to take any proceedings against the Petitioner under any of the Sections of the Act.

29. Mr. Ramachandran submitted that Central Electricity Regulatory Commission has Pan India jurisdiction and the functions vested in the Central Commission are specific in nature. Whereas, the functions vested in the State Commission are general in nature applicable to a particular state. The specific function will, therefore, have to be given supremacy to the general functions vested in the State Commission. In law, a specific power, function or jurisdiction vested will always has supremacy over a general power, function or jurisdiction.
30. In support of his arguments Mr. Ramachandran cited Rule 8 of the Electricity Rules, 2005 which provides that:

"The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of subsection (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission."

In terms of the above Rule the tariff determined by Central Commission which would include the terms and conditions also cannot be re-worked by the State Commission. The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between NTPC and the Petitioner for purchase of electricity from NTPC Stations at the tariff determined by Central Commission is to be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner. The examination by the Commission cannot be for suggesting modification to the terms and conditions or even reserving to deal with the implications of the terms and conditions at a later stage. Therefore, in all respects the Power Purchase Agreement shall be subject to the Regulation of Central Commission and certainly not of the State Commissions.

31. Mr. Ramachandran further submitted that the provisions of Section 86(1)(f) of the Electricity Act, 2001 is for regulating the role of the Distribution Licensee in the procurement of power. It does not regulate a generating company supplying the power. This is particularly in the context of de-regulation of generating companies under the Electricity Act, 2003.
32. Mr. Ramachandran further submitted that the Petitioner has placed reliance on the following decision in support of its submissions:
 - (a) **PTC India Limited versus Central Electricity Regulatory Commission**, (2010) 4 SCC 603;
 - (b) **Gujarat Urja Vikas Nigam Limited versus Essar Power Limited**, (2008) 4 SCC 755;
 - (c) **Lanco Amarkantak Power Limited versus Haryana Electricity Regulatory Commission and Others**, Order dated 04.11.2011 in Appeal Nos. 51 and 52 of 2011;
 - (d) **Pune Power Development Private Limited versus Karnataka Electricity Regulatory Commission and Anr.**, 2011 ELR (APTEL) 303; and
 - (e) **BSES Rajdhani Power Limited versus Delhi Electricity Regulatory Commission and Others**, 2010 ELR (APTEL) 404.

33. Mr. Ramachandran submitted that the case of **PTC India Limited** does not support the contention of the Petitioner because the Hon'ble Supreme Court has held that the Regulations notified by the Regulatory Commission under Section 178 of the Electricity Act, 2003 is statutory in nature and cannot be challenged before the ATE in Appeal. Infact, this decision of Hon'ble Supreme Court supports the case of NTPC. The Regulation of Power of Supply Regulations, 2010 having been notified by the Central Commission in exercise of the powers under Section 178, has a statutory force and cannot be interfered by any Order that may be passed by this Commission.
34. The case of **Lanco Amarkantak Power Limited, Pune Power Development Private Limited and BSES Rajdhani Power Limited** are all involving a Private Sector Generating Company and not a company owned and controlled by Central Government. The Nexus Theory etc would be applicable if it is a private sector generating company and the Central Commission has no jurisdiction over the same except in cases covered by Section 79(1)(b) of the Electricity Act, 2003. The Nexus Theory is important in regard to finding which of the State Commission will have jurisdiction namely, the State Commission where the generating company is situated or the State Commission where the supply is affected to a Distribution Licensee. The above case dealing with the aspect has nothing to do with the division of the functions between the Central Commission and the State Commission. Whereas, Para 23 of the judgment in the **Pune Power Development** case has clearly brought about a distinction between the functions of the Central Commission and the State Commission by stating that the dispute other than those covered by Section 79(1)(f) of the Electricity Act, 2003 will fall under Section 86(1)(f) of the Act. In view of the above, none of the judgments referred to and relied on by the Petitioner supports the case of the Petitioner and they are consistent with the stand of NTPC in this Petition.
35. Mr. Ramachandran further submitted that it is clear from the above that this Commission has no jurisdiction whatsoever to entertain the Petition claiming relief against NTPC in regard to any aspect of generation and sale of electricity by NTPC to the Petitioner or such aspects concerning the generation and sale of electricity, namely, the terms and conditions of tariff including the billing, payment, rebate, delayed payment, payment security mechanism, regulation of power supply, all fall within the jurisdiction of the Central Commission by virtue of Section 79(1)(a) providing for regulation of tariff of NTPC. Thus, the State Commission does not have any jurisdiction either concurrently or otherwise to direct NTPC not to regulate the supply of electricity to the Petitioner or to modify

its terms and conditions contained in the Power Purchase Agreement executed between the parties or otherwise in regard to the payment of the amount outstanding to NTPC or opening of the Letter of Credit.

36. The Commission heard Ld. Counsel for the parties and perused the record placed before the Commission and legally examined relevant provisions of the Electricity Act, 2003, Rules and Regulations made thereunder.
37. The Petitioner challenged the Regulation notice dated 31.08.2011 issued by NTPC wherein, NTPC issued notice regarding regulation/suspension of power supply to BRPL for non-maintenance of Letter of Credit for a period of 90 days w.e.f. midnight of 07.09.2011/08.09.2011. The Commission heard the parties essentially on the issue of jurisdiction on 12.12.2011.
38. Mr. Amit Kapur, Ld. Counsel for the Petitioner has relied on Section 86(1)(f) of the Electricity Act, 2003 which states that:

"Adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration."

He has also invited attention of the Commission to Section 86(1)(b) of the Electricity Act, 2003 which states that:

"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."

Mr. Kapur then invited the attention of the Commission to Section 64(5) of the Electricity Act, 2003 which states that:

"Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor."

39. Ld. Counsel for the Petitioner submitted that Section 86(1)(f) of the Act clearly indicates that the disputes between the Licensee and Generating Companies can only be adjudicated upon by the State Commission, either itself or by arbitrator to whom the Commission refers the dispute. Hence, he submitted that the Commission has jurisdiction to hear this Petition under Section 86(1)(f) of the Electricity Act, 2003.

40. Mr. Kapur also relied on the judgment laid down by the superior Courts in the following cases:

- (a) Tata Power Company Ltd. Versus Reliance Energy Ltd.;
- (b) Gujarat Urja Vikas Nigam Ltd. Versus Essar Power Ltd.;
- (c) Lanco Power Limited versus Haryana Electricity Regulatory Commission and Ors.;
- (d) Pune Development Pvt. Ltd. versus Karnataka Electricity Regulatory Commission;
- (e) Lanco Amarkantak Power Pvt. Ltd., Hyderabad versus Madhya Pradesh Electricity Regulatory Commission;
- (f) Commission's Order dated 30.04.2009, Approval of Power Purchase Agreement for 300 MW Power on Long Term Basis between NDPL and Maithon Power Ltd.;
- (g) ATE Order dated 31.03.2010 in Appeal no. 106 & 107 of 2009.

41. Mr. Kapur further submitted that various Power Purchase Agreements signed between NTPC and the Petitioner were reassigned by the Commission vide its Order dated 31.03.2007. Thus, the jurisdiction of this Commission was established and accepted by NTPC.

42. On the other hand Mr. Ramachandran, Ld. Counsel for NTPC, has invited Commission's attention to the Section 79(1)(a), 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 which states that:

"79(1)(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

79(1)(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State.

79(1)(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration."

43. Mr. Ramachandran further invited the attention of the Commission to Section 61 of the Electricity Act, 2003, which states that:

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

- (a) the principles and methodologies specified by the Central Commission for determination of the tariff applicable to generating companies and transmission licensees;
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;
- (c) the factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;
- (d) ...;
- (e) ...;
- (f) ...;
- (g) ...;
- (h) ...;
- (i) ...;

PROVIDED that the terms and conditions for determination of tariff under the Electricity (Supply) Act, 1948, the Electricity Regulatory Commissions Act, 1998, and the enactments specified in the Schedule as they stood immediately before the appointed date, shall continue to apply for a period of one year or until the terms and conditions for tariff are specified under this section, whichever is earlier."

44. Mr. Ramachandran further invited the attention of the Commission to Central Electricity Regulatory Commission (Terms & Conditions of Tariff) Regulations, 2009 and Rule 8 of the Electricity Rules, 2005.
45. The main question before the Commission is whether under Section 86(1)(f), the Commission has jurisdiction for adjudication of disputes between the Licensee and the Generating Companies, particularly between NTPC and the Petitioner in this matter or such disputes shall be dealt with under Section 79(1)(f).
46. In our opinion, Section 79(1)(a) provides for the functions of Central Commission to regulate the tariff of Generating Companies owned or controlled by the Central Government and Section 79(1)(b) provides to regulate the tariff of Generating Companies, other than those owned or controlled by the Central Government specified in Clause (a) above, if such Generating Companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one state.

Section 79(1)(c) provides to regulate the inter-state transmission of electricity.
47. Further, Section 61 deals with Tariff Regulations which provides that the appropriate Commission shall subject to the provision of this Act specify the terms and conditions for the determination of tariff.
48. Section 79(1)(f) of the Electricity Act, 2003 is a special provision which provides for adjudication of disputes involving generating company or transmission licensee in matter connected with Clause (a) to (d) of Section 79. Thus, it is clear from the above that any dispute regarding a generating station of NTPC as to

generation and supply of electricity will be a matter covered under Section 79(1)(f) of the Act and Tariff Regulations, 2009 and Regulation of Power of Supply Regulation, 2010.

49. This is also evident from Rule 8 of the Electricity Rules, 2005 which states that:

"The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of subsection (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission."

50. 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.
51. Thus, it is clear that the dispute between NTPC and the Petitioner should be resolved in accordance with the specific provisions provided in Section 79(1)(a) and Section 79(1)(f) and not under Section 86(1)(f) as argued on behalf of the Petitioner.
52. In our opinion, specific provisions are laid down in Section 79(1)(a), (b) & (f) of the Electricity Act, 2003 which deal with any dispute between Generating Company owned and controlled by the Central Government. Whereas, Section 86(1)(f) is general in nature. Hence, in the present Petitions, the dispute between NTPC and the Petitioner should be resolved as per Section 79(1)(a), (b) & (f) and not under Section 86(1)(f) of the Electricity Act, 2003. With this interpretation of the relevant provisions of the Electricity Act, 2003, provisions under Section 79(1)(a), (b) & (f) can be read harmoniously with the provisions under Section 86(1)(b) & (f) of the Electricity Act, 2003. Hence, on harmonious consideration of the above-mentioned provisions under Section 79 and Section 86 of the Electricity Act, 2003, we are of the opinion that 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.

53. We are also inclined to agree with the Respondent that the decisions of various Courts cited in PTC India Limited versus Central Electricity Regulatory Commission, Gujarat Urja Vikas Nigam Limited versus Essar Power Limited, Lanco Amarkantak Power Limited versus Haryana Electricity Regulatory Commission and Others, Pune Power Development Private Limited versus Karnataka Electricity Regulatory Commission and Anr. and BSES Rajdhani Power Limited versus Delhi Electricity Regulatory Commission and Others are not applicable in the present case for reasons already given by the Respondent in his oral and written submissions.
54. In view of the above, the Commission is of the considered view that Commission has no jurisdiction in these matters. Therefore, these Petitions are not maintainable. These Petitions are rejected at the admission stage itself.
55. Ordered accordingly.

Sd/-
(J.P. Singh)
Member

Sd/-
(Shyam Wadhera)
Member