

**Appellate Tribunal for Electricity**  
**(Appellate Jurisdiction)**

**APPEAL No.94 of 2012**

**Dated: 04<sup>th</sup> Sept. 2012**

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,  
CHAIRPERSON  
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

**In the Matter of:**

**BSES Rajdhani Power Limited,  
BSES Bhawan, Nehru Place,  
New Delhi-110019**

**...Appellant**

**Versus**

**1. Delhi Electricity Regulatory Commission  
Viniyamak Bhawan,  
'C'Block, Shivalik,  
Malviya Nagar, New Delhi-110 017**

**2. NTPC Limited,  
NTPC Bhawan, SCOPE Complex,  
7, Institutional Area, Lodhi Road,  
New Delhi-110 003**

**...Respondent(s)**

**Counsel for the Appellant(s) : Mr. Amit Kapur,  
Mr. Vishal Anand  
Ms. Deepika Kalia  
Mr. Nikhil Sharma  
Mr. Anupam Verma  
Mr. Aakash Sherwal**

**Counsel for the Respondent(s): Mr. Ravi S S Chauhan for R-1  
Mr. M G Ramachandran,**

Mr. Anand K Ganesan  
Ms. Swapna Seshadri for NTPC  
Ms. Swagatika Sahoo

Mr. Swetaketu Kishra  
Mr. Ritin Rai

**APPEAL No.95 of 2012**

**In the Matter of:**  
**BSES Yamuna Power Limited,**  
**Shakti Kiran Building,**  
**Karkardooma,**  
**Delhi-110092**

**...Appellant**

**Versus**

**3. Delhi Electricity Regulatory Commission**  
**Viniyamak Bhawan,**  
**'C'Block, Shivalik,**  
**Malviya Nagar, New Delhi-110 017**

**4. NTPC Limited,**  
**NTPC Bhawan, SCOPE Complex,**  
**7, Institutional Area, Lodhi Road,**  
**New Delhi-110 003**

**...Respondent(s)**

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Mr. Vishal Anand  
Mr. Nikhil Sharma  
Ms. Deepika Kalia

Counsel for the Respondent(s): Mr. Ravi S S Chauhan for R-1

Mr. M G Ramachandran,  
Mr. Anand K Ganesan  
Ms. Swapna Seshadri for NTPC  
Ms. Swagatika Sahoo

Mr. Swetaketu Kishra  
Mr. Ritin Rai

## **J U D G M E N T**

**PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM,  
CHAIRPERSON**

1. These are the two Appeals filed by two different Appellants as against the common impugned order dated 27.12.2011 passed by the Delhi Electricity Regulatory Commission (Delhi Commission) dismissing the Petitions filed by the Appellants on the ground of lack of jurisdiction to go into the issue raised by the Appellants. Since the issue is common and both the Appeals are against the common impugned order, we deliver this common judgment. The short facts are as follows:

- (a) The Appellants namely BSES Rajdhani Power Limited and BSES Yamuna Power Limited entered into separate Power Purchase Agreements with the NTPC, the 2<sup>nd</sup> Respondent for taking supply of power from its various Generation Stations

agreeing specifically to various terms including Letter of Credit and its enforceability, if the payment was not made within 30 days by the Appellant.

- (b) The Appellants did not maintain the requisite Letter of Credit in terms of the PPA and did not also comply with regard to the payment to NTPC. Therefore, on 30.8.2011 and 31.8.2011, NTPC issued notices to the Appellants threatening regulation of supply to the Appellants.
- (c) At that stage, on 1.9.2011, the Appellant filed a Petition No.177 of 2011 as against the retrospective revision of tariff by NTPC and liquidation of arrears before the Central Commission. Immediately on the next day, i.e. on 2.9.2011, the Appellant in Appeal No.94 of 2012 filed a Petition No.69/2011 before the Delhi State Commission, 1<sup>st</sup> Respondent seeking injunction from regulation of Power Supply and adjudication of disputes with NTPC relating to some commercial terms of the PPA. This was followed by similar Petition No.72/2011 by the Appellant in Appeal No.95 of 2012.

- (d) The Appellants did not make payment and did not maintain the Letter of Credit to various Generating Companies. On 16.11.2011, the Appellants wrote letters to Delhi Commission informing of the threat of Regulation of power from various generators including NTPC.
- (e) On 19.11.2011, the Delhi Commission took suo-moto cognizance of the said letters and entertained the same as Petition No.67 of 2011.
- (f) On receipt of the notice, NTPC, the Respondent filed a preliminary reply before the Delhi Commission raising the objection over maintainability of those Petitions contending that the Delhi Commission has no jurisdiction in the matter. Then on 12.12.2011, the Delhi Commission heard the parties in Petition Nos. 69 and 72 of 2011. Ultimately, the Delhi Commission on 27.12.2011, passed the common impugned order upholding the objection observing that it has no jurisdiction to adjudicate the dispute in question as the present dispute between these parties would only be gone into by the Central Commission and not by the State Commission.

(g) As against this order passed on 27.12.2011, the Appellants have filed the present Appeals on 24.2.2012. Since there was delay, they filed the application to condone the delay. Though the application to condone the delay was objected by the Respondent on the ground of alleged misconduct on the part of the Appellants, we have condoned the delay of 136 days since we were inclined to hear the Appellants and Respondents on the question of jurisdiction of the Delhi Commission which is the main issue raised and decided by the Delhi Commission. Thereupon, we have taken up the matter for hearing the parties on the question of maintainability of these Appeals. Accordingly, we heard the learned Counsel for both the parties who argued at length with regard to the jurisdiction of the Delhi Commission.

2. The short question that may arise for consideration is this: “Whether the Delhi Commission has got the jurisdiction to go into the dispute in question and whether the impugned order passed by the Delhi Commission holding that it has no jurisdiction by upholding the objection of the Respondent is valid or not ?

3. Before discussing the issue referred to above, it would be worthwhile to refer to the findings of the Delhi Commission with reference to the jurisdiction:

*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 sub-section (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 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”.*

4. The gist of the findings on the question of jurisdiction in the impugned order referred to above is given below:
  - (a) The question before the State Commission is as to whether the Delhi Commission has got the jurisdiction under Section 86 (1) (f) or the Central Commission has got the jurisdiction u/s 79 (1) (f) to go into the present dispute between the Distribution Licensees and the Generating Companies like NTPC owned by the Central Government. Section 79 (1) (a), (b) and (c)

provide for the functions of the Central Commission to regulate the tariff of generating Companies owned by the Central Government or those Generating Companies which have a Composite Scheme for generation and sale of electricity in more than one State and to regulate the inter State transmission of the Electricity. Section 79 (1) (f) is a special provision which provides for adjudication of disputes involving NTPC, the generating company owned by the Central Government. Therefore, the Central Commission will have the jurisdiction under Section 79 (1) (f) of the Act.

- (b) Further, any dispute regarding the generation and supply of electricity from a NTPC station would come under section 79(1)(f) of the Act and Tariff Regulations, 2009 and Regulation of Power Supply Regulations, 2010. That apart, Rule-8 of the Electricity Rule, 2005 also would state that the tariff can be determined by the Central Commission for generating companies under clause (a) or (b) of sub section (1) of Section 79 and the same shall not be subject to determination by the State Commission in

exercise of the functions under clause (a) or (b) of the Section 86 (1) of the Act.

- (c) Section 79 (1) (a) (b) and (f) are the special provisions which would apply to resolve the dispute between the NTPC; Central Government owned Company and the Licensee. The special law, which has been laid down under Section 79 (1) (a), (b) and (f) which deals with the dispute between the Generating Company owned by the Central Government and the Licensee, shall override the general law laid down in Section 86 (1)(f) of the Act, 2003.
- (d) On harmonious construction of the provisions under Section 79 and 86 of the Act, 2003, it has to be concluded that whenever there is a dispute involving the Generating Company owned or controlled by the Central Government, such a dispute shall be resolved under Section 79 (1) (f) of the Act and not under Section 86 (1) (f) of the Act. Therefore, the State Commission has no jurisdiction in this matter as this matter, relating to NTPC, has to be dealt with only by the Central Commission. Therefore, these Petitions are not maintainable.

5. Keeping in mind the above findings rendered by the Delhi Commission to hold that it has no jurisdiction, we shall now refer to the respective contentions urged by the rival parties.
6. According to the Appellant, the jurisdiction of the Central Commission u/s 79 (1) (a) of the Act is restricted only to the Regulation of the tariff whereas the commercial terms and arrangements such as supply by NTPC to the end users like the Distribution Licensees which is governed by the terms of the PPA executed between the parties, and the adjudication of dispute between the generating company NTPC and the Appellants, the Distribution Licensees pertaining to the commercial terms and conditions of supply would attract the jurisdiction of the Delhi Commission and not the Central Commission.
7. On the other hand, the Learned Counsel for the Respondent in its reply submitted that the power Supply Regulation is a comprehensive regulation dealing with Regulation of Power Supply to the defaulting beneficiaries and the term “regulate” which is used, would indicate that it not only involves the determination of tariff but also it is having a wider scope and implications and allowing everything necessary for the organised implementation of above and that Section 61 and 79 deal with the terms and conditions of tariff and not merely with tariff.

8. It is further contended on behalf of the Respondent that the Central Commission has the power not only to notify the Regulations with respect to the terms and conditions of tariff but also to implement such Regulations in all aspects and therefore, Delhi Commission has no jurisdiction.
9. In order to substantiate their respective submissions, the learned Counsel for both the parties have cited number of authorities which are as follows:
10. With regard to the jurisdiction issue, the Learned Counsel for the Appellant has cited the following authorities:
  - (a) Tata Power Company Ltd. Vs. Reliance Energy Ltd (2009) 16 SCC 659;
  - (b) Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd (2008) 4 SCC 755;
  - (c) Lanco Power Ltd vs Haryana ERC & Ors: 2011 ELR (APTEL) 1714
  - (d) Pune Development Pvt Ltd. Vs Karnataka ERC: 2011 ELR (APTEL) 0303
  - (e) Lanco Amarkantak Power Pvt Ltd vs Madhya Pradesh ERC:2010 ELR (APTEL) 0161
  - (f) BRPL vs DERC & Anr (Maithon): 2010 ELR (APTEL) 0404
  - (g) A.P. Transco vs. Sai Renewable Power Ltd. and Ors etc (2011) 11 SCC 34
  - (h) BSES Ltd. vs Tata Power Co Ltd. & Ors (2004) 1 SCC 195

- (i) L.M.L Ltd. vs State of UP and Ors (2008) 3 SCC 128
- (j) Southern Petrochemical Industries Co. Ltd. Vs Electricity Inspector and E.T.I.O and Ors (2007) 5 SCC 447
- (k) Reliance Energy Limited vs Maharashtra ERC and Ors: 2007 ELR (APTEL)543
- (l) PTC vs CERC reported as (2010) 4 SCC 603
- (m) Bhagubhai Dhanabhai Khalasi and Anr vs State of Gujarat and Ors: (2007) 4 SCC 241
- (n) Sardar Amarjit Singh Kalra (Dead) by LRs & Ors. Vs Pramod Gupta (Smt) (Dead) by LRS & Ors (2003) 3 SCC 272
- (o) Makhan Singh Tarsikka vs. State of Punjab: (1964) 4 SCR 797
- (p) O.P. Gupta vs Rattan Singh: (1964) 1 SCR 259
- (q) K.K. Bhalla vs State of MP and Ors: (2006) 3 SCC 581
- (r) V.K. Ashokan vs Asstt Excise Commnr: (2009) 14 SCC 85
- (s) Gujarat Urja Vikas Nigam Ltd vs Eassar Power (2008) 4 SCC 755;
- (t) Kumaranchal Institute etc vs. Chancellor, M.J.P Rohilkhand Univ and Ors: (2007) 6 SCC 35
- (u) C.I.T Mumbai vs Anjum M.H. Ghaswala: (2002) 1 SCC 633

11. The Learned Counsel for the Respondents in order to support the findings of the State Commission holding that it has no jurisdiction, has cited the following authorities:

- (a) V.S. Rice and Oil Mills v State of A.P (1964) 7 SCR 456;
- (b) K Ramanathan v. State of Tamil Nadue (1958) 2 SCC 116;
- (c) Deepak Theatre v. State of Punjab 1992 Supp (1) SCC 684;
- (d) State of UP v. Maharaja Dharmander Prasad Singh (1989) 2 SCC 505;
- (e) Hotel & Restaurant Association v. Star India (P) Ltd.,(2006) 13 SCC 753
- (f) Uttar Pradesh Power Corporation Limited v NTPC and Ors (2009) 6 SCC 235
- (g) PTC India Limited Vs. Central Electricity Regulatory Commission (2010) 4 SCC 603
- (h) Central Power Distribution Company & Ors vs. Central Electricity Regulatory Commission & Anr (2007) 8 SCC 197
- (i) Pune Power Development Private Limited v Karnataka Electricity Regulatory Commission & Anr 2011 ELR (APTEL) 303
- (j) Gujarat Urja Vikas Nigam Limited v Essar Power Limited (2008) 4 SCC 755
- (k) Lanco Amarkantak Power Limited v Haryana Electricity Regulatory Commission and Others order dated 4.11.2011 in Appeal No.15 and 52 of 2011;

- (l) BSES Rajdhani Power Limited v Delhi Electricity Regulatory Commission and Others, 2010 ELR (APTEL) 404

12. In the light of above contentions, let us now deal with the question framed in this Appeal. The question is this:

“Whether the Delhi Commission has got the jurisdiction to go into the dispute in question between the distribution licensee and NTPC, owned and controlled by the Central Government”?

13. The learned Counsel for the Appellant has relied upon Section 86 (1) (f) of the Electricity Act. The same is as follows:

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

14. He has also referred to other Sections, Section 86 (1) (b) of the Electricity Act, 2003 which is as follows:

*“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.”*

15. By quoting these provisions, the learned Counsel for the Appellant submitted that Section 86 (1) (f) clearly provides

that the disputes between the licensees and generating companies can only be adjudicated upon by the State Commission. He also explained Section 86 (1) (b) of the Act by contending that the State Commission can regulate electricity purchase, purchase of power and supply from the generating Companies within the State. He also referred to Section 64 (5) of the Electricity Act, 2003 which indicates that the State Commission has got the jurisdiction as the tariff would be determined even in the case of inter State supply involving territories of two States.

16. On the other hand, the learned Counsel for the NTPC has referred to Section 79 (1) (a), 79 (1) (b) and 79 (1) (f) and Section 61 and 178 of the Electricity Act, 2003 along with Central Commission's Tariff Regulations 2009 and Regulation of Supply Regulations, 2010 and Rule 8 of the Electricity Rules, 2005 to contend that the Central Commission alone has got the jurisdiction.
17. On going through these provisions referred to above, and on considering the submissions made by the parties, we are of the considered view that the impugned order passed by Delhi Commission holding that it has no jurisdiction as this dispute between the Appellant and NTPC has to be dealt with only by the Central Commission is perfectly justified.
18. The reasons for our above conclusions are as under.

19. Section 79 of the Electricity Act, 2003 provides for the functions of the Central Commission which is as follows:

*“(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.”*

20. Section 61 of the Electricity Act, 2003 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 the 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”.*

21. Section 178 of the Electricity Act, 2003 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 the following matters, namely:-*
  - (a)....:*
  - (b).....;*
  - (c) to (r).....;*
  - (s) the terms and conditions for the determination of tariff under Section 61;*

22. In exercise of the above powers U/S 178 of the Act, 2003, the Central Commission has 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.
23. It cannot be disputed that the tariff terms and conditions presently applicable for the generation and supply of electricity by NTPC to the Appellants are subject to and are governed by the above Regulations.
24. The Tariff Regulations, 2009 sets out the basic norms and parameters for determination of tariff. The Tariff Regulations further provide for the methodology for computation of tariff. They also provide for scheduling, metering, accounting, billing and payment of charges, rebate, late payment surcharge, etc. as set out in the said Regulations.
25. That apart, the terms and conditions for generation and sale of electricity by NTPC to the beneficiaries including to Appellant are agreed to and incorporated in the Bulk Supply Agreement or the Power Purchase Agreement duly executed between the parties. In this case, there is no dispute as the Power Purchase Agreement has been signed and executed by the parties.
26. The Regulation of Power supply Regulations, 2010 notified by the Central Commission provide the following:

*(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.*

27. These Regulations specifically provide for Regulation of Power Supply and its procedure, in case of non payment of money or non establishment of Letter of Credit in favour of the Generating Companies. They also provide that the Generating Companies can sell quantum of the power rendered surplus due to Regulation to the 3<sup>rd</sup> parties.

28. The Power Supply Regulation is a comprehensive Regulation dealing with Regulation of Power Supply to the defaulting beneficiaries.

29. As pointed out by the learned Counsel for the NTPC, 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 with regard to tariff, its terms and conditions including the regulations of power of supply in case of default on the part of the beneficiaries.

30. Thus, it is clear that any issue relating to the NTPC will necessarily fall under Section 79 (1) (f) and not u/s 86 (1) (f).
31. As pointed out by the learned Counsel for the NTPC, the term 'Regulate' used in Section 79 (1) (f) of the Act has got a wider scope and implication not merely confined to determination of tariff.
32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.
33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay

in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc, are nothing but terms and conditions of supply.

34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensees in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.
35. As indicated above, the Tariff Regulations 2009 and the Regulation of Power Supply Regulations, 2010 providing for the terms and conditions of tariff and Regulation of Supply 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.
36. According to the Appellant, the provisions pertaining to adjudication of dispute between a generating and licensee as contained in Section 86 (1) (f) does not distinguish between a Central Generating Company and the Appellant and as such, the Delhi Commission has got the jurisdiction to adjudicate a dispute between the Appellants and the

NTPC, the Generating Company in terms of Section 86 (1) (f) read with Section 86 (1) (b). He also pointed out that the Delhi Commission is vested with the jurisdiction to adjudicate the dispute between the generators and a licensee pertaining to the commercial terms of the PPA in terms of Section 86 (1) (b) read with Rule 8 of the Electricity Rules, 2005.

37. According to the Appellant, the terms of Power Purchase Agreement are broadly of two types:

(a) Pertaining to tariff

(b) Commercial (Non tariff)

38. Though the Delhi Commission has got the jurisdiction to approve the commercial terms of the PPA between the generating Company and the distribution company, in the instant case, the grievance of the Appellant is that the tariff related terms of the PPA with NTPC are not aligned to the Central Commission's Regulations.

39. The provisions of the Electricity Act, 2003 specifically provide for the regulatory jurisdiction of the Central Commission in regard to NTPC being a Company owned by the Central Government 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. Therefore, in the matter falling within the scope of Section 79 (1) (a) and 79(1)(b) of the Act, 2003, the provisions of Section 86(1)(f) will have no application as the scope of Section 79 (1) (f) is applicable.

40. 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 61 and 178 of the Electricity Act, 2003.
41. When the Central Commission has got the powers to specify the terms and conditions of tariff, the State Commission cannot have any powers to nullify the impact of such Regulations. The harmonious construction of various provisions of the Electricity Act would indicate whatever is within the jurisdiction of the Central Commission, the State Commission cannot encroach upon the same by claiming to exercise concurrent jurisdiction by virtue of Section 86 of the Electricity Act, 2003.
42. The Electricity Act, 2003 carves out the regulatory control over the Central Sector Generating Companies like NTPC and the generating Companies having composite arrangements of generation and sale of electricity in two or more States. By virtue of those powers, the Central Commission will have to ensure 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.

43. Thus, these utilities are subjected to a special treatment and brought under the jurisdiction of the Central Commission.
44. The Central Commission has got a wide jurisdiction. In fact, the functions vested in the Central Commission are specific in nature. Whereas, the functions vested in the State Commissions 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. This is provided under Rule-8 of the Electricity Rules, 2005 which provides as under:

*“The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub section (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 sub-section (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.”*

45. In terms of the above Rule, the tariff determined by the Central Commission which would include the terms and

conditions of supply also cannot be re-worked by the State Commission.

46. The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between the NTPC and the Distribution Company for purchase of Electricity from NTPC Stations at the tariff determined by the Central Commission has 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 to supply the same to the concerned State.
47. The said power of scrutiny by the State Commission cannot be taken to mean that the State Commission has got the powers to suggest modifications to the terms and conditions or even reserving to deal with the implications of the terms and conditions at a later stage.
48. Therefore, in all respects, the Power Purchase Agreement shall be subject to the Regulation of Central Commission and certainly not of the State Commission.
49. As indicated above, Section 79 (1) (f) of the Act, 2003 provides for adjudication of the disputes involving a Generating Company or a Transmission Licensee in the matters connected with under Clause (1) (a) to (d) of the Section 79. In view of the above, anything involving the

Generating Station of NTPC as to generation and supply of electricity is governed in 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 the tariff are clearly matters involving a generating company covered u/s 79 (1) (a). Therefore, it would squarely fall within the scope of Section 79 (1) (f) of the Act.

50. Admittedly, the Central Commission 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 to enforce the non-payment of money or non-establishment of payment of security mechanism such as Letter of Credit by the beneficiaries.
51. Thus, the Central Commission having implemented the above in relation to the Generating Company namely, the NTPC owned by the Central Government which is covered under section 79 (1) (a) of the Act, 2003 has the power to adjudicate any dispute arising out of the same.
52. In other words, the agreement entered into by the NTPC and the beneficiaries for generation and sale of power has to be subjected to the Regulations notified by the Central Commission.

53. In view of the above fact situation, it is the Central Commission which retains the power to modify the said Regulations.
54. It is a settled law that the Regulations of the Commission governing the relationship of the parties are binding on the parties. Accordingly, the Regulations of the Central Commission recognising the agreement and the clauses contained therein provide for the consequence of default on the part of the beneficiaries and the same have to be enforced by the Central Commission and these can be altered only by the Central Commission by appropriate Regulations.
55. The provisions of the Act, 2003 specifically provide for the regulated jurisdiction of the Central Commission with regard to NTPC as per section 79 (1) (a). The provisions of Section 86 vesting the powers and functions in the State Commission have to be read subject to Section 79 (1) (a) and Section 79 (1) (b) of the Act, 2003.
56. There cannot be any dispute that the issue of terms and conditions including the Regulations of supply is fully covered by the provisions of Section 79 (1) (a) read with section 178 of the Act, 2003.

57. There is a purpose in the way the provisions of Electricity Act, 2003 vests the jurisdiction in the Central Commission and in the State Commission. As mentioned above, the Act, 2003 carves out the regulatory control over the NTPC and other Central Sector Generating Companies for uniformity in the tariff among more than one State beneficiary and common terms and conditions of supply of electricity to more than one State beneficiary as well as the supply from the Central Sector Generating Companies. The Central Sector Generating Companies have an All India presence with each of the Generating Station supplying electricity to a number of States. Therefore, these utilities which are subjected to special treatment, are brought under the jurisdiction of the Central Commission.
58. The provisions of Section 86 (1) (f) of the Act, 2003 is for regulating the role of Distribution Licensee in the procurement of power. It does not regulate a Generating Company supplying the power especially in the context of deregulation of Generating Companies under the Act, 2003.
59. NTPC generates and supplies electricity to the Purchasers of electricity based on the tariff determined by the Central Commission. The Purchaser of electricity including the Appellants are required to pay such tariff as allowed by the Central Commission from time to time. The Tariff Terms and

Conditions determined by the Central Commission cannot be subject matter of any inquiry or proceedings before any other authority including the Delhi Commission. None of the Distribution Licensees who are the purchasers of electricity from NTPC can be allowed to raise any issue on the tariff and Terms and Conditions of Tariff of NTPC including the matters relating to the payment security mechanism, default in payment and consequences thereof, the regulation of Power Supply by NTPC on account of default, billing disputes etc., All these are within the exclusive jurisdiction and control of the Central Commission.

60. As indicated above, the Central Commission has notified the Tariff Regulations, 2009 and Regulation of Power Supply Regulations, 2010.
61. The Tariff Regulations, 2009 provide for metering, accounting, billing, rebate, default in payment and surcharge etc., The Tariff Regulations, 2009 sets out the basic norms and parameters for determination of tariff. That apart, the Terms and Conditions for Generation and Sale of Electricity by NTPC to the beneficiaries including the Appellants are agreed to and incorporated in the Bulk Supply Agreement.
62. In the present case, Power Purchase Agreements were executed between the parties.

63. The Regulation of Power Supply Regulations, 2010, provides for recognition of the Agreement entered into by NTPC with the beneficiaries, Regulation of the Power Supply in case of default on the part of the beneficiaries, the procedure for implementing the Regulation of Power Supply and empowers the Central Commission to remove the difficulties in the implementation of the Regulations. As per these Regulations, any person aggrieved, shall approach the Central Commission.
64. Regulation 3 provides for its application in case of an agreement between the Generating Company and the beneficiary for regulation of power supply as per the agreement.
65. Regulation 4 provides for procedure for Regulation of power supply in case of non-payment of money or non-maintenance of Letter of Credit in favour of the Generating Company.
66. Regulation 12 allows the Generating Company to sell the quantum of power rendered surplus due to regulation to 3<sup>rd</sup> parties.
67. From the above Regulations, it is clear that the Power Supply Regulation is a comprehensive Regulation dealing with the Regulation of Power Supply of defaulting beneficiaries. The Central Commission notified the above regulations to deal

with the consequences of default in the payment or maintaining payment security mechanism as provided in the Agreement entered into between the parties.

68. As mentioned above, Section 79 (1) (a) provides for the functions of the Central Commission to regulate the tariff of the Generating Companies owned or controlled by the Central Commission like the NTPC. The term used is “regulate” and not merely the determination of tariff.
69. As mentioned above, Sections 61 and 79 deal with the Terms and Conditions of the tariff and not merely with the tariff. In other words, the Terms and Conditions would necessarily include all the terms related to tariff. Accordingly, the billing, the payment, the consequences of delay in the payment by way of surcharge, rebate for payment within a specified period, termination or suspension of supply, payment security mechanism etc., include the terms and conditions of supply. The Central Commission has not only the power to notify the regulations with reference to the terms and conditions of tariff but also to implement such Regulations in all respects.
70. Section 79 (1) (f) of the Act, 2003 provides for the adjudication of the disputes involving the Generating Company in the matters connected with clauses 1 (a) to 1 (d) of Section 79. Thus, anything involving 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.

71. In terms of the above, it is evident that the Central Commission constituted under the Act, 2003 can exercise two functions (1) it may notify the Tariff Regulations governing the Terms and Conditions of Tariff including the consequences in case of default on the part of the beneficiaries (2) it has got the jurisdiction to enforce the non-payment of money or non-establishment of payment security mechanism.
72. By exercising those powers, the Central Commission has notified the Tariff Regulations, 2009 and Regulation of Power Supply Regulations, 2010.
73. Thus, the Central Commission having implemented the above provisions in relation to a generating company owned by the Central Government covered by Section 79(1)(a) or in relation to the Generating Companies covered by Section 79 (1) (b), the Central Commission has the powers to adjudicate upon any dispute arising out of the same. In other words, the agreement entered into between the NTPC and its beneficiaries for generation and sale of power have to be subject to the Regulations notified by the Central Commission. Therefore, the Central Commission has the requisite powers u/s 79 (1) (f) of the Act, 2003 to deal with the following aspects:

- (a) Any dispute which may arise between the NTPC and the beneficiaries in regard to generation and sale of electricity by NTPC to beneficiaries;
- (b) Any claim of NTPC for recovering the money from the beneficiaries for supply of electricity or for maintenance of payment security mechanism;
- (c) The Central Commission by way of appropriate Regulations can make any modifications with regard to the terms of the Power Purchase Agreement entered into between the parties.

74. Thus, the NTPC, being under the regulatory control of the Central Commission can be subjected to such Regulations of the Central Commission alone.

75. The provisions of Electricity Act, 2003 specifically provides 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 with the State Commission have to be read subject to the Sections 79 (1) (a) and 79 (1) (b) of the Electricity Act, 2003. In other words, if the matter falls within the scope of Section 79 (1) (a) to (1) (d) of the Electricity Act, 2003, the provision of Section 86 (1) (f) will have no application as the scope of Section 79 (1) (f) is applicable.

76. In the present case, there cannot be any dispute that the issue of terms and conditions including the Regulations of supply is fully covered by the provisions of Section 79 (1) (a) read with Section 178 of the Act, 2003. Therefore, it cannot be contended that the Central Commission will specify the terms and conditions of tariff and at the same time, the State Commission can pass orders nullifying the impact of the regulations imposed such as the terms and conditions of the tariff.
77. As referred to above, 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 the 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 the 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 the case of Central Sector Generating Companies, the

entire regulatory control is vesting with the Central Commission and not with the State Commission.

79. Therefore, it can be safely held that the Delhi Commission has no jurisdiction whatsoever to entertain the Petitions claiming relief against the NTPC in regard to any aspect of generation and sale of electricity by the NTPC to the beneficiaries namely the Appellants.
80. As indicated above, all the aspects concerning with generation and sale of electricity namely the Terms and Conditions of tariff including the billing, payment, rebate, delayed payment, Regulation of power supply etc., all fall within the jurisdiction of the Central Commission by virtue of Section 79 (1)(a) providing for Regulation of Tariff of NTPC.
81. Let us now refer to the applicability of various authorities of the Hon'ble Supreme Court and this Tribunal cited by the Learned Counsel for both the parties. Among the authorities cited by the authorities, the ratio decided by the Constitution Bench of the Hon'ble Supreme Court in PTC India Limited V Central Electricity Regulatory Commission, (2010) 4 SCC 603 is quite important. In this decision, it has been held that the Regulations of the Commission governing the relationship of the parties are binding on the parties. This ratio would apply to the present case. In the instant case, the Regulations of the Central Commission recognise the Agreement and the

clauses in the Agreement provided for the consequences of default on the part of the beneficiary have to be enforced by the Central Commission and the same can be altered or modified by appropriate Regulation only by the Central Commission.

82. In fact, the Hon'ble Supreme Court has in the judgment in the Central Power Distribution Company & Ors Vs Central Electricity Regulatory Commission & Anrs (2007) 8 SCC 197 held as under:

*“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”.*

83. In the light of the above interpretation, it can be safely held 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).
84. The provisions of Section 86 vesting the functions in the State Commission have to be read subject to Section 79 (1)(a) to 79(1)(d) of the Electricity Act, 2003.
85. 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 will have no application as the scope of Section 79(1) (f) alone will have its application.

86. As referred to in the impugned order, the authorities cited by the Appellant are all involving a Private Sector Generating Company and not a company owned and controlled by Central Government or a generating company covered under Section 79(1)(b). The nexus Theory would be applicable only when it is a Private Sector Generating Company. The Central Commission has no jurisdiction over the said Companies except in cases covered by Section 79(1)(b) of the Act, 2003. The nexus Theory is important to find out which of the State Commission will have jurisdiction namely, the State Commission of the State where the generating company is situated or the State Commission of the State where the supply is affected to a distribution licensee of the State.
87. Therefore, the judgments relied upon by the Appellant would not support the case of the Appellant.
88. On the other hand, those judgments support the case of NTPC. In other words, the State Commission has no jurisdiction whatsoever to entertain the petition claiming the relief against NTPC in regard to any aspect of generation and sale of electricity by NTPC to the Appellant 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, would all fall within the jurisdiction of the Central Commission by virtue of Section 79 (1) (a) providing for regulation of tariff for NTPC.

89. As indicated above, specific provisions are contained in Section 79 (1)(a), (b) and (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, the dispute between the NTPC and the Appellant should be resolved as per Section 79 (1) (f) of the Electricity Act, 2003 by the Central Commission and not under Section 86 (1) (f) by the State Commission.
90. On harmonious construction of the provisions of Section 79 and Section 86 of the Electricity Act, 2003, it becomes clear that whenever there is a dispute between the Generating Company owned or controlled by the Central Government, such a dispute should be resolved under Section 79 (1)(f) by the Central Commission.
91. In short, it has to be observed that the authorities cited by the Appellant which deal with the different issues are not applicable to the present case involving the jurisdiction issue.

92. The Appellant has also cited the PTC case as reported in (2010) 4 SCC 603. In fact, this decision does not support the contention of the Appellant. The Hon'ble Supreme Court in the said case has held that the Regulation notified by the Central Commission U/S 178 of the Act, 2003 is statutory in nature and cannot be challenged before the Appellate Tribunal.
93. In view of the above, the Regulation of Power Supply Regulation 2010, notified by the Central Commission in exercise of the powers U/S 178 has got statutory force and the same cannot be interfered with by any order passed by the State Commission.
94. The case of BSES Rajdhani Power Limited v Delhi Electricity Regulatory Commission and Others reported in 2010 ELR (APTEL) 404 has nothing to do with the issue relating to the jurisdiction between the Central Commission and the State Commission. This case deals with the issue as to whether Section 63 completely excludes Section 62 of the Act, 2003. In this case, this Tribunal recognised the implication of Rule-8 of the Electricity Rules, 2005 and the Supremacy of tariff terms and conditions determined by the Central Commission. In these matters, the State Commission will not interfere.

95. In view of the above, this judgment relied upon by the Appellant does not support the contentions of the Appellant.
96. As mentioned above, the Central Commission has already notified comprehensive Regulations in the form of Tariff Regulations, 2009 and the Regulation of Power Supply Regulations, 2010. The State Commission cannot have any jurisdiction to direct the NTPC not to regulate the supply of electricity to the Appellant or to vary the terms and conditions contained in the Power Purchase Agreement entered into between the parties or otherwise in regard to the payment of amount outstanding to NTPC or opening of the Letter of Credit.
- 97. Summary of the findings:**
- 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 jurisdiction under section 79(1) (f) of the 2003 Act to adjudicate upon the dispute involving generating companies owned and controlled by Central Government in the matter of terms and conditions of tariff and Regulation of supply. The jurisdiction of 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 Central Commission's Tariff Regulation and Regulation of Power Supply Regulations.**

98. In view of our above findings, the Appeals are dismissed. However, there is no order as to costs.

**(Rakesh Nath)**  
**Technical Member**

**(Justice M. Karpaga Vinayagam)**  
**Chairperson**

Dated: 04<sup>th</sup> Sept. 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~