

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)**

APPEAL NO. 239 OF 2021 & IA NO. 1175 OF 2021

AND

APPEAL NO. 240 OF 2021 & IA NO. 1179 OF 2021

Dated: 08th February, 2022

**Present: Hon'ble Mr. Justice R. K. Gauba, Officiating Chairperson
Hon'ble Mr. Sandesh Kumar Sharma, Technical Member**

APPEAL NO. 239 OF 2021 & IA NO. 1175 OF 2021

In the matter of:

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

...APPELLANT

VERSUS

1. Central Electricity Regulatory Commission
Through Secretary
3rd & 4th Floor,
Chanderlok Building, 36
Janpath, New Delhi-110001
2. NTPC Limited
NTPC Bhawan, Scope Complex
7 Institutional Area, Lodhi Road
New Delhi-110003
3. Northern Regional Load Despatch Centre
184A, Shaheed Jeet Singh Sansanwal Marg
Katwaria Sarai
New Delhi-110016

...RESPONDENT(S)

Counsel for the Appellant(s) : Mr. J.J. Bhatt, Sr. Adv.
Mr. Amit Kapur
Mr. Buddy A. Ranganadhan
Mr. Anupam Varma
Mr. Nikhil Sharma
Mr. Rahul Kinra
Mr. Aditya Gupta
Mr. Utkarsh Singh
Mr. Aditya Ajay

Counsel for the Respondent(s): Mr. Tushar Mehta, Sr. Adv. & SGI
Mr. M. G. Ramachandran, Sr Adv.
Mr. Basawa Prabhu S. Patil, Sr. Adv.
Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Ms. Geet Ahuja
Ms. Poorva Saigal
Mr. Ravi Nairfor R-2

Mr. Sajan Poovayya, Sr. Adv.
Mr. Anand Kumar Shrivastava
Ms. Priyansha Sharma
Mr. Rahul Jajoo
Mr. Sharan Balakrishana
Ms. Raksha Agarwal
Mr. Atul Kumar Srivastava for Intervener

Ms. Anisha Chopra
Mr. Prashant Garg
Mr. Somara Lakra
Mr. Alok Misra
Mr. Gajendra Singh Vasava for R-3

APPEAL NO. 240 OF 2021 & IA NO. 1179 OF 2021

In the matter of:

BSES Yamuna Power Limited
BSES Bhawan, Nehru Place
New Delhi 110019

...Appellant

VERSUS

1. Central Electricity Regulatory Commission
Through Secretary
3rd & 4th Floor,
Chanderlok Building, 36
Janpath, New Delhi-110001
2. NTPC Limited
NTPC Bhawan, Scope Complex
7 Institutional Area, Lodhi Road
New Delhi-110003
3. Northern Regional Load Despatch Centre
184A, Shaheed Jeet Singh Sansanwal Marg
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Mr. Sharan Balakrishana
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Mr. Atul Kumar Srivastava for Intervener

Ms. Anisha Chopra
Mr. Prashant Garg
Mr. Somara Lakra
Mr. Gajendra Singh Vasava for R-3

J U D G M E N T

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. These appeals were taken up by video conference mode on account of pandemic conditions, it being not advisable to hold physical hearing.

2. The Appellants namely BSES Rajdhani Power Ltd. and BSES Yamuna Power Ltd. in the present Appeals i.e., Appeal no. 239/2021 and Appeal no. 240 of 2021 respectively have challenged the common Order dated 01.07.2021 ("**Impugned Order**") passed by the Central Electricity Regulatory Commission (**in short "Respondent Commission" or Central Commission or "CERC"**) in Petition No. 65 of 2021 & 60 of 2021 ("**Dadri Petition**"). The Appellants are aggrieved by the findings contained in Para Nos. 48 and 49 of the Impugned Order and submitted that the CERC has erred on the following counts: -

- (a) Power Purchase Agreement dated 05.06.2008 ("**PPA**")/ Supplementary PPA dated 29.03.2012 ("**SPPA**") will subsist so long as the allocation of power by the Ministry of Power ("**MoP**") from the National Capital Thermal Power Station at Dadri,

Stage – I (“**Dadri-I**”) of NTPC Limited (“**Respondent No. 2**” / “**NTPC**”) to the Appellant is not de-allocated. With this observation, CERC directed the Appellant to approach the MoP for de-allocating its share from the Dadri-I Station for it to be able to exit from the said PPA/ SPPA.

- (b) Provisions of Regulation 17(2) of the CERC (Terms and Conditions for Tariff) Regulations, 2019 (“**Tariff Regulations, 2019**”) are subject to the condition of MoP’s de-allocation of Appellant’s share of power from Dadri-I.

3. The Appellants also prayed for: -

- a. Directing NTPC Ltd. not to raise any Invoices with respect to any charges qua Dadri – I Station w.e.f. 01.12.2020,
- b. Setting aside the Invoices raised by NTPC with respect to the Dadri-I stations and paid by the Appellants in protest, and
- c. Directing NTPC to refund the entire amount paid under (b) above along with interest at rate of 18%.

The Parties

4. The Appellant in the first & second Captioned Appeals, BSES Rajdhani Power Limited and BSES Yamuna Power Limited, are Distribution Licensees in terms of the Delhi Electricity Reforms Act, 2000 (“**Reforms Act**”) read with section 2(17) and section 14 of the Electricity Act, 2003 (“**the Act**”). The Appellants are two different joint venture companies formed between Reliance Infrastructure Limited (“**R-Infra**”) and Delhi Power Company Ltd. (“**DPCL**”) (a company wholly owned by the Government of NCT of Delhi (“**GoNCTD**”). R-Infra has 51% equity and management control over the Appellant, whereas DPCL has 49% equity in

the Appellant. Delhi Electricity Regulatory Commission ("**DERC**") have granted the Distribution and Retail Supply Licence to the Appellants for undertaking distribution and retail supply of electricity in the specified control areas within the NCT of Delhi.

5. Respondent No. 1 i.e., CERC, is a statutory authority constituted under the Electricity Regulatory Commissions Act, 1998 with powers vested in it by virtue of Sections 79 and 178 of the Electricity Act.

6. Respondent No. 2 i.e., NTPC Limited., is a generating company within the meaning of Sections 2(28) and 79(1) (a) of the Electricity Act.

7. Respondent No. 3 i.e., Northern Regional Load Despatch Centre ("**NRLDC**"), is a statutory body constituted in terms of Section 27 of the Electricity Act. In terms of 28(3)(a) of the Electricity Act, NRLDC is required to ensure optimum scheduling and despatch of electricity within the region in accordance with the contracts entered into with the licensees or the generating company operating in the region.

The Factual Background

8. The factual matrix of both the Captioned Appeals is virtually common and filed against the impugned common order dated 01.07.2021 passed by the Central Commission.

9. The Appellants succeeded to the Delhi Electricity Supply Undertaking, the erstwhile Utility vested with the powers to distribute and supply electricity in the NCT of Delhi.

10. Delhi Electricity Supply Undertaking, in addition to various other entities, signed a Bulk Power Supply Agreement ("**BPSA**") with NTPC on 31.01.1994.

11. In terms of the BPSA, NTPC was to sell energy from the NTPC Stations to the Bulk Power Customers who signed the BPSA on mutually agreed terms as incorporated in the BPSA. As per Clause 12 of the BPSA, the said agreement was deemed to have come into force from the date of signing and the same remained operative till 31.10.1997.

12. The Appellant acquired the business from the erstwhile Delhi Electricity Supply Undertaking in its area of supply with effect from 01.07.2002 as part of the unbundling, restructuring and privatization of Distribution of electricity, under the law. Further, from 01.07.2002 till 31.03.2007, the Delhi Transco Limited ("DTL") was entrusted with the responsibility of bulk procurement and bulk supply of power in the National Capital Territory ("NCT") of Delhi.

13. On 11.03.2004, DERC issued the Licence to the Appellant to undertake Distribution and Retail Supply in its licensed area under Section 20 of the Reforms Act read with the Electricity Act, 2003 and as Part of the Licence specified that: -

"5.4 The Licensee shall purchase the energy required by the Licensee for Distribution and Retail Supply in an economical manner and under a transparent power purchase or procurement process and in accordance with the Regulations framed, guidelines, directions and orders issued by the Commission from time to time."

14. DERC vide order dated 31.03.2007 re-assigned all the existing power purchase agreements from DTL to the Distribution Licensees operating in NCT of Delhi, including the Appellants thereby the responsibility for arranging power for its area of supply was vested with the Appellant from 01.04.2007 and pursuant to the order dated 31.03.2017, the Appellant, on 05.06.2008, executed a consolidated PPA with NTPC for procurement of electricity from the generating stations of NTPC as per the allocation of the Appellants.

15. On 29.03.2012, the Appellant and NTPC executed a Supplementary Power Purchase Agreement (“**SPPA**”) extending the expiry dates of all stations of NTPC till the end of life of the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations, whichever is later.

16. CERC notified the Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2019 (“Tariff Regulations 2019”) for the Control Period starting from 01.04.2019 to 31.03.2024.

17. Subsequently, the Appellant vide Communication dated 23.11.2020 addressed to NTPC requested for an arrangement under Regulation 17 of the Tariff Regulations, 2019 for Dadri –I station which would complete 25 years from its Commercial Operation Date (“**COD**”) stating therein:

“6. In view of above, we would earnestly request NTPC to propose a suitable arrangement in terms of Regulation 17(1) of the Tariff Regulations, 2019 for procurement of power from Dadri-I, as soon as possible and in any event prior to the completion of 25 years from the COD i.e., 30.11.2020 as contemplated under the aforesaid Regulation 17(1) and, in any event with recovery of capacity charges being related to scheduled generation. Kindly

provide the proposed arrangement at the earliest, so that further necessary steps can be taken including approval from the Board of BRPL and also from Hon'ble DERC, if any arrangement is agreed to."

18. Further, the Appellant again on 30.11.2020 sent a letter to NTPC, informing that as per the provision contained in Regulation 17 of the Tariff Regulations, 2019, the PPA and SPPA would lapse on 01.12.2020 at 00:00 hrs. i.e. on completion of 25 years from the COD for the Generating Station (Dadri-I), unless a mutually agreed arrangement to extend the supply from Dadri-I is in place.

19. NTPC vide communication dated 30.11.2020, in response to the Appellant's Communication dated 30.11.2020 regarding non-scheduling of Power from Dadri-I, informed the Appellant that: -

"As indicated above, the cost of electricity from Dadri – I Station is comparable with other sources of power of the BRPL and other Discoms in Delhi and NTPC is taking steps to reduce the cost of power further. In view of the above, it is requested that BRPL should reconsider the decision as the same is against the provisions of Central Commission Regulations/ Orders, provisions of the Agreement signed with NTPC, security of supply of strategic location such as National Capital Delhi, various other reasons stated above and the decision is not in the interest of consumers of Delhi and other stakeholders.

This is however, without prejudice to the claim of NTPC that the rights and obligations of the parties under the BPSA continues, even after 30.11.2020 and therefore, the purported contention of BRPL of the BPSA (as amended) cease to have effect from 30.11.2020 is not valid, legal or sustainable. NTPC will proceed to declare availability from Dadri – I Station as before as required under the Tariff Regulations and BRPL shall be responsible for performance of all obligations under the BPSA including payment of tariff to NTPC."

20. On 01.12.2020, NRLDC in response to the Appellant communication dated 30.11.2022 informed the Appellant that: -

“...It may be noted that NRLDC is scheduling the transaction for Central Generating Stations/Inter-State Generating stations based on the share allocation by Ministry of Power(MOP), as received from NRPC. As per the latest NRPC Share Allocation Revision No. 02/2020-21 (w.e.f. from 0000hrs of 18.10.2020) dtd 16.10.2020. Delhi has share allocation (90%) from Dadri Thermal Stage-1. Accordingly, NRLDC is scheduling the power to all beneficiaries in as per NRPC allocation order...

....Therefore, it is requested that the matter may please be taken up with appropriate authority. Till such time any revised allocation order is received from NRPC, NRLDC has to continue scheduling as per IEGC Regulations, requisition received from beneficiaries and NRPC allocation order.”

21. Aggrieved by the unilateral decision of NTPC and its continuation of billing the Appellants, the Appellants filed the Petition No. 60/MP/2021 and Petition No. 65/MP/2021 before the CERC *inter alia* seeking adjudication of dispute with NTPC as: -

(a) NTPC had refused to agree upon an arrangement under Regulation 17 (1) of Tariff Regulations, 2019 to continue supply from Dadri-I Station, which has completed 25 years from its COD.

(b) Under threat of coercive action, NTPC is holding the Appellant hostage to continue supply from Dadri-I with effect from 01.12.2020.

(c) NTPC had unlawfully raised Invoices dated 06.01.2021 and 05.02.2021 on the Appellant and was coercing the Appellant to make payments.

(d) NRLDC had unlawfully acted in unison with NTPC against the mandate of Section 28(3)(a) of the Electricity Act and refused to stop scheduling and despatching of power from NTPC's Dadri-I Station to

the Appellant even when the contract / PPA in respect of the Dadri-I Station lapsed / expired on 00:00 Hrs of 01.12.2020 by operation of law.

(e) NTPC seeks to present a fait-accompli to CERC and its Procurers from Dadri-I by seeking a post-facto approval for installation of FGD at the environmentally and economically inefficient Station without allowing for techno-economic prudence check.

22. CERC vide the Impugned Order disposed of the Petitions with the following observations:

“48. ... Government of India Guidelines also permit the willing distribution companies to relinquish their allocation after a period of 25 years from COD. DERC has already written to Ministry of Power for de-allocation of share of distribution companies of Delhi. For relinquishment of their allocations, the Petitioners may approach the Ministry of Power. Provisions of Regulation 17(2) related to first right of refusal would become effective once the Ministry of Power de-allocates share of the Petitioners from Dadri-I generating station.

49. Accordingly, we answer that PPA/SPPA is still subsisting as the allocation of power by Ministry of Power, Government of India from Dadri-I generating station to the Petitioner is still subsisting as per the Share Allocation Revision No.1/2021-22 dated 1.4.2021 issued by NRPC; that the Petitioner may exit from the PPA/SPPA by approaching the Ministry of Power for de-allocating its share from Dadri-I generating station; and that as Dadri-I generating station has already completed 25 years on 30.11.2020 from its COD, the provisions of Regulation 17(2) related to first right of refusal would become effective once the Ministry of Power de-allocates share of the Petitioners from Dadri-I generating station.

50. The Petition No. 60/MP/2021, Petition No. 65/MP/2021, IA No. 12/2021, IA No. 31/2021 and IA No. 33/2021 are disposed of in terms of the above findings and discussion.”

[Emphasis Supplied]

23. Being aggrieved by the observations of CERC under para 48 and 49 of the order, the Appellants filed the captioned Appeals. This Tribunal vide its interim order dated 26.08.2021 in the captioned Appeals issued the following directions:

*“Having heard the learned counsel on all sides at length on the prayer for interim relief, we notice that the question of law to be addressed requires interpretation of the terms of the Power Purchase Agreement (PPA) and regulations that are applicable would be same for disposal of the interim application and the main appeal. In these circumstances, we deem it proper to call upon the learned counsel to instead argue on the main appeal. The learned senior counsel for the second Respondent, however, submitted that he would be inclined to argue on the main appeal only after filing counter affidavit with supporting documents. We grant him liberty to do so within one week. Rejoinder, if required, may be filed within one week thereafter. The appeal be listed on 17.09.2021. **Meanwhile, the recovery of the impugned demand (capacity charges) shall remain stayed till next date. Written submissions may also be filed well in advance before the next date.**”*

24. The said interim order of this Tribunal was challenged in the Hon'ble Supreme Court of India vide Civil Appeals nos. 5974 and 6018 of 2021. Hon'ble Supreme Court of India vide its order dated 05.01.2022 disposed of the Appeals requesting the Hon'ble Tribunal to dispose of the Appeal in accordance with law, preferably within a period of six (6) weeks from the date of communication of the Order. The extract of the said order is:

*“On the joint request made by Mr. Tushar Mehta, learned Solicitor General and Mr. Harish N. Salve, learned senior counsel, who appears on caveat on behalf of respondent No.2, and without going into the merits of the case, **we dispose of these appeals by requesting the APTEL to dispose of the***

matter, pending adjudication before it, in accordance with law, preferably within a period of six weeks from the date of communication of the instant order.”

25. In compliance with the said order of the Hon’ble Supreme Court of India, the two captioned Appeals were considered for hearing on priority. Accordingly, on 14.01.2022, this Tribunal passed the following order:

“This bench is presently in the midst of hearing Appeal No. 280 of 2021 - Tata Power Company Limited (Transmission) vs. MERC & Ors. - which comes up on regular course on Mondays & Tuesdays, those days being reserved for long matters. it is agreed by learned counsel on all the sides that the captioned appeal can be taken up immediately after hearing in the said appeal i.e Appeal No. 280 of 2021 is concluded.

We, thus, direct this appeal and the connected appeal to be included in the List A i.e ‘list of priority hearing’ immediately below Appeal No.280 of 2021.----”

Questions of Law

- 26.** The main issues that arise out of the Appeals are: -
- 1) Whether the beneficiaries can relinquish the PPA/SPPA after the completion of useful life of 25 years from the COD of the Dadri-I Generating Station under Regulation 17 of the Tariff Regulation, 2019?
 - 2) Whether the provisions contained in PPA & SPPA and/ or the Guidelines vide letter dated 22.03.2021 issued by Government of India/ MoP can override the provisions of the Regulations?

27. The Appellants also prayed for certain other reliefs which will be considered after the above two issues are deliberated and decided. The other reliefs sought are: -

- a. Directing NTPC Ltd. not to raise any Invoices with respect to any charges qua Dadri – I Station w.e.f. 01.12.2020,
- b. Setting aside the Invoices raised by NTPC with respect to the Dadri-I stations and paid by the Appellants in protest, and
- c. Directing NTPC to refund the entire amount paid under (b) above along with interest at rate of 18%.

28. To examine the above issues, it is important that the relevant provisions of Law are referred and quoted for analyzing the Appeals. The relevant extracts are noted as follows:

1) Relevant Extracts of Tariff Regulations, 2019

“2. Scope and extent of application.

(1) These regulations shall apply in all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof is required to be determined by the Commission under section 62 of the Act read with section 79 thereof:

Provided that any generating station for which agreement(s) have been executed for supply of electricity to the beneficiaries on or before 5.1.2011 and the financial closure for the said generating station has not been achieved by 31.3.2019, such projects shall not be eligible for determination of tariff under these regulations unless fresh consent of the beneficiaries is obtained and furnished.

(2) These regulations shall not apply to the following cases:-

(a) Generating stations or transmission systems whose tariff has been discovered through tariff based competitive bidding in

accordance with the guidelines issued by the Central Government and adopted by the Commission under section 63 of the Act;

(b) Generating stations based on renewable sources of energy whose tariff is determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions for Tariff determination from Renewable Energy Sources) Regulations, 2017.

3. Definitions. - In these regulations, unless the context otherwise requires:-

(1) '**Act**' means the Electricity Act, 2003 (36 of 2003);

(24) '**Extended Life**' means the life of a generating station or unit thereof or transmission system or element thereof beyond the period of useful life, as may be determined by the Commission on case-to-case basis;”

(73) '**Useful Life**' in relation to a unit of a generating station, integrated mines, transmission system and communication system from the date of commercial operation shall mean the following:

(a) Coal/Lignite based thermal generating station 25 years

(b) Gas/Liquid fuel based thermal generating station 25 years

Provided that the extension of life of the projects beyond the completion of their useful life shall be decided by the Commission on case to case basis;

17. Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation:

(1) In respect of a thermal generating station that has completed 25 years of operation from the date of commercial operation, the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation.

(2) The beneficiary shall have the first right of refusal and upon its refusal to enter into an arrangement as above, the generating company shall be free to sell the electricity generated from such station in a manner as it deems fit.

27. Additional Capitalisation on account of Renovation and Modernisation:

(1) The generating company or the transmission licensee, as the case may be, intending to undertake renovation and modernization (R&M) of the generating station or unit thereof or transmission system or element thereof for the purpose of extension of life beyond the originally recognised useful life for the purpose of tariff, shall file a petition before the Commission for approval of the proposal with a Detailed Project Report giving complete scope, justification, cost-benefit analysis, estimated life extension from a reference date, financial package, phasing of expenditure, schedule of completion, reference price level, estimated completion cost including foreign exchange component, if any, and any other information considered to be relevant by the generating company or the transmission licensee:

Provided that the generating company making the applications for renovation and modernization (R&M) shall not be eligible for Special Allowance under Regulation 28 of these regulations;

Provided further that the generating company or the transmission licensee intending to undertake renovation and modernization (R&M) shall be required to obtain the consent of the beneficiaries or the long term customers, as the case may be for such renovation and modernization (R&M) and submit the same along with the petition.

(2) Where the generating company or the transmission licensee, as the case may be, makes an application for approval of its proposal for renovation and modernisation (R&M), approval may be granted after due consideration of reasonableness of the proposed cost estimates, financing plan, schedule of completion, interest during construction, use of efficient technology, cost-benefit analysis, expected duration of life extension, consent of the beneficiaries or long term customers, if obtained, and such other factors as may be considered relevant by the Commission.

(4) After completion of the renovation and modernisation (R&M), the generating company or the transmission licensee, as the case may be, shall file a petition for determination of tariff. Expenditure incurred or projected to be incurred and admitted by the Commission after prudence check, and after deducting the accumulated depreciation already recovered from the admitted project cost, shall form the basis for determination of tariff.

55. Billing and Payment of charges:

(2) Payment of the capacity charge for a thermal generating stations shall be shared by the beneficiaries of the generating station as per their percentage shares for the month (inclusive of any allocation out of the unallocated capacity) in the installed capacity of the generating station.....

Note 1

Shares or allocations of each beneficiary in the total capacity of Central sector generating stations shall be as determined by the Central Government, inclusive of any allocation made out of the unallocated capacity. The shares shall be applied in percentages of installed capacity and shall normally remain constant during a month. Based on the decision of the Central Government, the changes in allocation shall be communicated by the Member-Secretary, Regional Power Committee in advance, at least three days prior to beginning of a calendar month, except in case of an emergency calling for an urgent change in allocations out of unallocated capacity. The total capacity share of a beneficiary would be sum of its capacity share plus allocation out of the unallocated portion. In the absence of any specific allocation of unallocated power by the Central Government, the unallocated power shall be added to the allocated shares in the same proportion as the allocated shares.

Note 2

The beneficiaries may propose surrendering part of their allocated firm share to other States within or outside the region. In such cases, depending upon the technical feasibility of power transfer and specific agreements reached by the generating company with other States within or outside the region for such transfers, the shares of the beneficiaries may be re-allocated by the Central Government for a specific period (in complete

months) from the beginning of a calendar month. When such reallocations are made, the beneficiaries who surrender the share shall not be liable to pay capacity charges for the surrendered share. The capacity charges for the capacity surrendered and reallocated as above shall be paid by the State(s) to whom the surrendered capacity is allocated. Except for the period of reallocation of capacity as above, the beneficiaries of the generating station shall continue to pay the full capacity charges as per allocated capacity shares...”

2) Explanatory Memorandum:

3.5.8 Besides Special Allowance, the Commission has also proposed an alternate provision for thermal generating station which have completed 25 years of operation. This provision will be available to those thermal generating stations, which have neither undertaken R&M nor availed Special Allowance. Under this special provision, the generating company and the beneficiary may agree to enter into an arrangement, wherein the total cost (fixed and variable) of the generating station, as determined under these regulations, shall be recovered on scheduled generation basis. Further, under this provision, the beneficiary shall have first right of refusal and in the event of such refusal, the generating company shall be free to sell the electricity generated from such station in a manner it deems fit.”

3) Statement of Object and Reasons:

“6.4 Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation [Regulation 17]

...
6.4.2 In the draft 2019 Tariff Regulations, this Regulation was placed after Regulation pertaining to Renovation and Modernisation (R&M) and Special Allowance which also kicks in only after completion of useful life of the generating station. Considering the fact that the Regulation pertaining to "Special Provision for Tariff..." is an optional tariff structure, the same is now placed under 'Chapter 4 - Tariff Structure'.

...
6.4.4 The Commission after reviewing the comments has decided to revise the Regulation to bring in the desired clarity. The objective of the Regulation was to introduce an enabling provision,

where the recovery of both capacity charges and energy charges shall be linked to scheduled generation. Further, this provision is only optional, which may be exercised after completion of useful life of a thermal generating station, if both the beneficiary and the generating company agree. Accordingly, the Regulation has been amended to state that 'the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation'."

4) Relevant Extract of Bulk Supply Power Agreement:

"12. EFFECTIVE DATE AND DURATION OF AGREEMENT

shall remain operative upto 31st Oct 1997 provided that this Agreement may be mutually extended, renewed or replaced by another Agreement on such terms and for such further period as the parties may mutually agree In case Bulk Power Customer(s) continue to get power from the NTPC Station(s) even after expiry of this Agreement, without further renewal or formal extension thereof then all the provisions of this Agreement shall continue to operate till this Agreement is formally renewed, extended or replaced."

5) Relevant Extract of the Power Purchase Agreement dated 05.06.2008

"6.2 Letter of Credit

6.2.8 If the Letter of Credit is not maintained or the same is not replenished after drawal made there from by BRPL within a period of seven days from the date of such drawal, the Escrow arrangement shall come into operation in the manner specified in the Default Escrow Agreement signed separately between the parties.

6.6 Disputed Bill

6.6.3 If the Bill raised by the NTPC is not disputed within sixty (60) days of receiving it, such bill shall be taken as conclusive. If BYPL disputes any amount, it shall pay 95% of the disputed amount forthwith and file a written objection with NTPC within

sixty days (60) days of presentation of the bill. BYPL shall issue a notice (the Bill Dispute Notice”) to NTPC setting out the following:

- i) Item disputed, with full details/data and reasons thereof for the dispute
- ii) Amount disputed against each item.

Provided that non-acceptance of tariffs determined/approved by CERC shall not be a valid ground for dispute.

13.0 DURATION OF AGREEMENT

13.1 Validity of this Agreement for power supply shall be as follows:

(A) Stations: (i) Singrauli Super Thermal Power Station Stage- I (2000 MW), (ii) Rihand Super Thermal Power Station Stage – I (1000 MW), (iii) Anta Gas Power Station (419.33 MW), (iv) Auraiya Gas Power Station (663.36 MW), (v) Dadri Gas Power Station (829.78 MW), (vi) Feroz Gandhi Unchahar Thermal Power Station Stage – I (420MW), **(vii) National Capital Thermal Power Station (840 MW).**

...
NOTE: For all the above stations under (A), (B), (C) and (D).

Validity: Upto 31st March, 2012 or 25 years for coal-based stations and 15 years for gas-based stations, from the COD of the last unit of the respective stage/station whichever is later.

- ...
- (i) The Power Agreement for individual stage/station may be extended, renewed or replaced by another Agreement on such terms and for such further period as the parties may mutually agree.
 - (ii) In case BRPL continues to get power from these station(s)

after the above period without further renewal or formal extension of the Power Agreement then the terms and conditions of this PPA shall continue to operate till the Power Agreement is formally renewed, extended or replaced.”

6) Relevant Extract of the Supplementary Power Purchase Agreement dated 29.03.2012:

- “A. In consideration of mutual rights and obligations of the respective parties contained herein and as per the agreement of the parties to continue the sale and purchase of power from the gas based stations of NTPC beyond 31.3.2012 and from other stations contained in sub clause 13.1 (A) of clause 13.0 of PPA dated 05.06.2008, beyond their respective expiry dates as currently specified, it is hereby mutually agreed between the parties to extend the validity of the said PPA for all the stations contained in sub clause 13.1 (A) of clause 13.0 of the said PPA in a composite manner till the end of life of the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations whichever is later.*
- B. The parties agree that the extension of the validity period as aforesaid shall apply collectively to all stations covered by the said PPA dated 05.06.2008.”*

Our Findings and Analysis

29. Firstly, the question at sub para 2) of para 26 is dealt herewith. If the answer to it is 'Affirmative', then the allocation or deallocation order of Government of India will have precedence over the Regulation 17 of the Tariff Regulations, 2019.

30. The Ld. Senior Advocate Mr. J.J. Bhatt, appearing for the Appellants, placed before us the Hon'ble Supreme Court Judgment passed by Constitution Bench in **PTC India Ltd Vs Central Electricity Regulatory Commission & Ors. 2010 4 SCC 603**, whereby it was ruled that the PPA are to be aligned to the extent of the express provisions of Regulation notified even after the date of signing of the PPA. Relevant extract of the judgement is quoted below:

*“58. One must understand the reason why a regulation has been made in the matter of capping the trading margin under Section 178 of the Act. **Instead of fixing a trading margin (including capping) on a case to case basis, the Central Commission thought it fit to make a regulation which has a general application to the entire trading activity which has been recognized, for the first time, under the 2003 Act. Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate Legislation. Such subordinate Legislation can even override the existing contracts including Power Purchase Agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an Order of the Central Commission under Section 79(1)(j).”***

[Emphasis Supplied]

31. The Appellant submitted that the provisions of the PPA & SPPA signed between the Appellant and Respondents shall be aligned with the provisions of the Tariff Regulations, 2019. Any provision contained under the PPA and/or SPPA in question, inconsistent with the said Regulations shall be aligned or overridden by the provision contained in these Regulation.

32. On the contrary, Mr. Tushar Mehta, Ld. Senior Advocate & SGI, appearing on behalf of the Respondent no. 2, submitted that:

a) the above (PTC Judgement) states that the framing of the statutory regulation would override the terms of the existing contract. The contract sought to be overridden in the present case is '**Clause A**' of the SPPA dated 29.03.2012. The PTC Judgement would have effect if the Regulation framed by the Central Commission (even if it is assumed that the Central Commission can deal with allocation and deallocation of power), deals with the issue of validity of PPA entered into in pursuance of the GoI allocation. There is no conflict in so far as the present case is concerned since while Regulation 17 of the Tariff Regulations 2019 is a generic provision with regard to an alternative manner of recovery of tariff after 25 years from COD, the SPPA contemplates a continuance of the relationship till the life of the project as per the Orders of the Central Commission or Regulations or GoI allocations, whichever is later.

b) Further, the question of inconsistency arises only when the Regulations, the SPPA and the allocation by the GoI, are not construed harmoniously. On the other hand, the Regulations cannot possibly be read as being inconsistent with the exercise of power by the GoI under Article 73 of the Constitution of India. In any event, the question of the Regulations over-riding the exercise of constitutional powers does not arise.

33. He, further, invited our attention towards the Explanatory Memorandum (para 3.5) and the Statement of Reasons (para 6.4).

i. **“3.5 Commission’s Proposal**

3.5.1 After examining and reviewing the comments/suggestions of stakeholders, the Commission has proposed as follows: *Renovation and Modernisation*.

3.5.2 The Commission is of the view that the provision for R&M for the purpose of extension of life beyond the useful life of generating stations and transmission assets is essential. The provision for R&M will ensure availability of well-maintained generating stations and transmission systems to the beneficiaries at reduced cost -----.

3.5.3 As part of the prudence check, various beneficiaries have suggested that the generating station should obtain consent from the beneficiaries before applying for R&M. In the current tariff regime, the generating station submits plan for R&M through a tariff petition, before the Commission where beneficiaries get the opportunity to submit their responses. The Commission considers approval of R&M only after undertaking prudence check and carefully considering beneficiaries’ comments. -----**Therefore, the Commission proposes that the generating company or the transmission licensee intending to undertake R&M shall be required to obtain the consent of the beneficiaries or the long term customers, as the case may be, for such R&M and submit the same along with the petition.”**

ii. Further, the **Statement of Reasons(‘SoR’)** at Para 6.4 reads as under

“6.4 Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation [Regulation 17]

6.4.1 The draft 2019 Tariff Regulations provides for a special provision for tariff for thermal generating stations which have completed 25 years of operation in 'Chapter 7 - Computation of Additional Capital Expenditure'. The Regulation provides that the generating company and the beneficiary may agree on an arrangement where the total generation cost inclusive of the fixed cost and the variable cost shall be payable on scheduled generation.

6.4.2 In the draft 2019 Tariff Regulations, this Regulation was placed after Regulation pertaining to Renovation and Modernisation (R&M) and Special Allowance which also kicks in only after completion of useful life of the generating station. Considering the fact that the Regulation pertaining to Special Provision for Tariff..... is an optional tariff structure, the same is now placed under Chapter 4- Tariff Structure

6.4.3 One of the stakeholders has suggested to provide clarity in the Regulation, about whether the Merit Order Dispatch (MOD) would operate on the total cost inclusive of both the fixed cost and variable cost or otherwise. If MOD is to be considered based on total cost, it is possible that the generation from the unit may not get dispatch due to higher cost. As a result, the generating station will not be entitled for any tariff.

6.4.4 The Commission after reviewing the comments has decided to revise the Regulation to bring in the desired clarity. The objective the Regulation was to introduce an enabling provision, where the recovery of both capacity charges and energy charges shall be linked to scheduled generation. Further, this provision is only optional, which may be exercised after completion of useful life of a thermal generating station, if both the beneficiary and the generating company agree. Accordingly, the Regulation has been-mended to state that the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation.”

34. We are not inclined to accept the above contention of the Respondent on the following counts:

- (1)The judgement of the Hon'ble Supreme Court Judgment passed by Constitution Bench in **PTC India Ltd Vs Central Electricity Regulatory Commission & Ors. 2010 4 SCC 603** has laid down the principle of law whereby any provision of an agreement has to be aligned with the Regulations, the

subordinate legislation, if it falls under the domain of the Regulation. The provisions of any PPA cannot be derogatory to the Tariff Regulations as also the life of any Generating Station defined under these Regulations.

(2) Further, any extension to the useful life of a generating station can only be granted by the Appropriate Commission and cannot be extended by the Central Government through an executive order.

(3) Para 3.5 is regarding Renovation & Modernisation of a Generating Station or a Transmission Line thereby increasing the efficiency and life of the plant. However, for such an activity the consent of beneficiaries is must. In the present case, there is no such proposal moved by the Respondent no. 2 before the completion of 25 years or when the matter was heard except the ECS unit which is installed for the purpose of compliance of environment norms and not for increasing the life of the Plant. Further, it has resulted into increase in tariff and not in its reduction.

(4) Further, para 6.4 of the Statement & Reasons in no way suggests that the ruling under the cited Judgment of the Hon'ble Supreme Court is not applicable in the present case.

35. We also decline to accept the contention of the Respondent No. 2 that Regulation 17 is a Generic provision, as the provision has been introduced for the first time and is applicable only under special condition that the Generating Station completes 25 years of operation from COD.

36. Our attention was further invited on the principle that the Regulatory Commissions under the Electricity Act do not have any power with regard

to allocation of electricity or for that matter creation of a contract has been settled by the Hon'ble Supreme Court in the case of **Tata Power Company Ltd. vs Reliance Energy Limited (2009) 16 SCC 659**. The Hon'ble Supreme Court has decided that under Section 86 (1) (b) of the Act, the State Commission cannot reallocate the electricity of a generating company from one Distribution company to another by issuing any directions. By the very same principle, if there is an allocation of electricity, the Regulatory Commission cannot direct the reallocation or de-allocation or cancellation thereof, particularly when the PPA between the parties subsists.

37. To our mind, it is clear that there was no dispute on whether the allocation or de-allocation of power from the Central Generating Stations (CGS) is vested upon the Central Government. All agreed that the power of allocation or de-allocation is vested with the Central Government but such power doesn't provide any delegation of power to the Central Government for extension of the life of Generating Station through an order for allocation, re-allocation or de-allocation of power and in case the useful life of a generating station is completed, further, extension of life can be extended by the Central Commission for CGS. In case the life for a CGS is extended by Central Commission, the allocation and de-allocation will be made as per the orders of the Central Government.

38. The judgement passed by Hon'ble Supreme Court of India, in CLP India Limited v GUVNL (2020) 5 SCC 185, was also relied upon by the Appellant, however the Respondent submitted that the Judgement also confirms the position that if a clause in an agreement is in variation to a statutory notification, the statutory notification would prevail. Added further that there is no conflict, and it is possible to read Regulation 17 in a harmonious manner.

39. The contention of the Respondent that the powers of the Central Government for allocation and de-allocation of power from CGS are exercised under Article 73 of the Constitution as such cannot be overridden by any Statutory Laws as the Tariff Regulations, 2019 need further deliberation.

40. Mr. Tushar Mehta submitted that the allocation of power from Central Sector Generating Companies has been, is, and continues to remain with the Ministry of Power (**'MoP'**), Government of India (**'GoI'**) to be exercised under Article 73 of the Constitution of India. The power of allocation and de-allocation has not been vested either by framing a law or by any rules by the Central Government, in any other authority. As such, the Regulations cannot possibly be read as being inconsistent with the exercise of power by the GoI under Article 73 of the Constitution of India. In any event, the question of the Regulations over-riding the exercise of constitutional powers does not arise.

41. It was, further, added that Allocation of power is a sovereign function which vests solely in the jurisdiction of the Central Government and has not been delegated to any authority under the Electricity Act and previous enactments. By virtue of Article 73 of the Constitution of India, dealing with 'the extent of the executive power of the Union', the power stands extended to all matters with respect to which the Parliament has the power to make laws. Therefore, Tariff Regulations cannot be interpreted to overreach the power of the Central Government.

42. Before, the above submission of the Respondent is considered, it is important to note that Article 73 of the Constitution provides that the

executive powers of the Union shall extend to matters with respect to which the Parliament has power to make laws. Article 73 is as under:

“73. Extent of executive power of the Union. - (1) Subject to the provisions of this Constitution, the executive power of the Union shall extend –

(a) to the matters with respect to which Parliament has power to make laws; and

(b) to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or agreement:

Provided that the executive power referred to in sub-clause (a) shall not, save as expressly provided in this Constitution or in any law made by Parliament, extend in any State to matters with respect to which the Legislature of the State has also power to make laws.

(2) Until otherwise provided by Parliament, a State and any officer or authority of a State may, notwithstanding anything in this article, continue to exercise in matters with respect to which Parliament has power to make laws for that State such executive power or functions as the State or officer or authority thereof could exercise immediately before the commencement of this Constitution”

43. Hon'ble Supreme Court in the case of ***Rai Sahib Ram Jawaya Kapur v. State of Punjab, (1955) 2 SCR 225*** while dealing with the executive powers of the Union and State under the Constitution as covered under Article 73 (for Central Government) and Article 162 (for State Government) has held as under: -

“7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162.

...

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List

except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. **Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other.** They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them

...

12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence

and that the powers of the executive are limited merely to the carrying out of these laws.”

[Emphasis Supplied]

44. Further, the Hon’ble Supreme Court in **Satya Narain Shukla v. Union of India, (2006) 9 SCC 69 [Para. 16]**, while relying on the ratio in **Rai Sahib Ram Jawaya Kapur (Supra)** has held that:

“16. It is now well established that the Central Government's executive power extends to the same subjects and to the same extent as that of Parliament, as long as it does not infringe any provision of any law made by Parliament or of the Constitution. In Rai Sahib Ram Jawaya Kapur v. State of Punjab [(1955) 2 SCR 225 : AIR 1955 SC 549] this Court has observed (vide AIR para 12): (SCR pp. 235-36)…”

[Emphasis Supplied]

45. Therefore, the contentions of the Respondent are misplaced in the light of the two judgements as quoted above which clearly provides that the Central Government can exercise the powers to issue executive orders under 73 only on subjects which does not encroach upon the provisions of any law made by the Parliament. In the present case, the Electricity Act, 2003 vests the powers of formulating and notifying the Tariff Regulations with the Central Commission as such any executive order issued by the Central Government infringing any provisions of either the Electricity Act, 2003 or the Tariff Regulations, 2019 is bad in law.

46. We are inclined to accept the submission made by the Appellant that even if the allocation by Central Government is an executive action and not the guidelines/ advisories, it cannot infringe the provisions of the Electricity Act and the Regulations framed thereunder. The Central Government has

no role in framing Rules or passing policy directions regarding the tariff determination exercise.

47. Therefore, the allocation or de-allocation of power by the Central Government can best be considered as guidelines or advisory. Further, the Hon'ble Supreme Court of India in *Bhim Singhji v. Union of India*, (1981) 1 SCC 166 has ruled that once a statute provides for a specific remedy then the same cannot be made subject to an alternate mechanism provided under a Guideline. The Appellant submitted that MoP Guidelines are merely administrative advisories and cannot override, alter or amend the statutory Tariff Regulations, 2019. Reliance was further placed on: -

- (i) ***State of Haryana v. Mahender Singh*, (2007) 13 SCC 606**
- (ii) ***J. Fernandez v. State of Mysore & Ors.*, AIR 1967 SC 1753**

48. We are of the firm opinion that the provisions of the PPA or SPPA, as in the present case, have to be aligned with the Tariff Regulations, 2019 and cannot be in derogation to the Regulations. As such answer to second question under para 26(2) is '**Negative**', i.e. the provisions contained under PPA & SPPA and the Guidelines issued by Government of India on allocation or deallocation of power cannot override the provisions contained in the Tariff Regulations, 2019.

49. NTPC further submitted that:

- a. The relevant clause was added in the SPPA on the insistence of the Appellants since they were aware that several of the generating stations had completed or were about to complete 25 years from commercial operation and the Appellants wished to continue the power purchase in several of the older

generating stations from which it has been allocated power by the MoP. The SPPA therefore linked the power purchase 'till the end of life of *the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations whichever is later.*'

- b. With the due execution of the SPPA dated 29.03.2012, the duration of the PPA of all Generating Stations covered by the said SPPA was extended when the same was voluntarily signed and duly agreed to by the Appellants without any reservations or conditions.
- c. It is respectfully submitted that there is a valid, subsisting, binding PPA till the de-allocation of power by the Central Government, even if, in terms of the tariff orders and/or Regulation 17 of the Tariff Regulations, 2019, the impugned order has decided that there could be termination of the PPA at the end of 25 years from the commercial operation date. It is also pertinent that the same Tariff Regulations, 2019 recognizes and provides a statutory effect to the Central Government allocation and terms thereof, as more fully dealt hereunder.

50. The SPPA was signed prior to notification of the Tariff Regulations, 2019. CERC notified the Tariff Regulation, 2014 after the signing of the SPPA, however, such a provision was not introduced, it is only in Tariff Regulation, 2019, this provision for 'EXIT' has been introduced and that to without any condition therein. Further, it cannot be accepted that CERC was not aware of such a provision is contained in the PPA/SPPA. As such any provision contained in PPA or SPPA which is not consistent with the

Tariff Regulations, 2019 has to be aligned and cannot have overreaching effect over the Tariff Regulations.

51. Therefore, we decline the above contention of the Respondent (as indicated in para 49) as discussed in the foregoing paragraphs wherein it has been made clear that the PPA and SPPA are to be aligned with the Tariff Regulations, 2019 and any provision of the PPA/SSPA infringing the provision contained in the Tariff Regulations, 2019 have to be succeeded by the provision contained in the Regulations. Therefore, the provision contained under para (A) of SPPA mandating “till the end of life of the respective station considered in the tariff orders or Regulations issued by CERC or GOI allocations whichever is later.” have to be amended in line with the Tariff Regulations, 2019.

52. The Respondent No. 2 has further invited our attention towards Regulations 3(8)(definition of ‘beneficiary’), Regulation 42(‘Computation and Payment of Capacity Charge for Thermal Generating Stations:’) and Regulation 55 (‘Billing and Payment of charges:’).

53. We are not inclined to accept the above contention of the Respondent as Regulation 17 is a special provision and provisions contained under Regulation 42 and Regulation 55 can kick in only when the agreement continues beyond 25 years. In case the beneficiary invokes the provision under Regulation 17(2) to exit from the agreement, the provision contained under Regulations 42 & 55 shall become redundant.

54. Now the first question under para 26(1) has to be dealt with to resolve the dispute. The first question is “Whether the beneficiaries can relinquish the PPA/SPPA after the completion of useful life of 25 years from

the COD of the Dadri-I Generating Station under Regulation 17 of the Tariff Regulations, 2019?”. If the answer to this is “Affirmative” the Appeals will have merit.

55. The Regulation 17 is again quoted here for ease of reference:

“17. Special Provisions for Tariff for Thermal Generating Station which have Completed 25 Years of Operation from Date of Commercial Operation:

(1) In respect of a thermal generating station that has completed 25 years of operation from the date of commercial operation, the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these regulations shall also be recovered based on scheduled generation.

(2) The beneficiary shall have the first right of refusal and upon its refusal to enter into an arrangement as above, the generating company shall be free to sell the electricity generated from such station in a manner as it deems fit.

56. It can be interpreted by simple reading of the Regulation that the Regulation will become applicable only once a Generating Station completes 25 years of operation from the COD, the period equivalent to the “Useful Life” as defined in these Regulations. The Regulation 3 provides the definition of “Useful Life” and the “Extended Life” of the Generating Station as:

(24) ‘Extended Life’ means the life of a generating station or unit thereof or transmission system or element thereof beyond the period of useful life, as may be determined by the Commission on case-to-case basis;”

(73) **'Useful Life'** in relation to a unit of a generating station, integrated mines, transmission system and communication system from the date of commercial operation shall mean the following:

(a) Coal/Lignite based thermal generating station 25 years

(b) Gas/Liquid fuel based thermal generating station 25 years

Provided that the extension of life of the projects beyond the completion of their useful life shall be decided by the Commission on case to case basis;

57. There is no dispute that the 25 years of operation from COD or the Useful Life of the said Generating Station: Dadri-I has been completed on 30.11.2020, and as such, Regulation 17 is relevant and applicable for Dadri-I. Further, the Central Commission, vested with the powers to extend the life of the Station, has not extended the life under the provisions of the Tariff Regulations, 2019.

58. It may also be noted here that the Tariff Regulations, 2019 shall be applicable to all Generating Stations as covered by Regulation 2 and as such any provision contained in these Regulations shall be applicable to Dadri-I. Relevant extract from Regulation 2 is reproduced below.

"These regulations shall apply in all cases where tariff for a generating station or a unit thereof and a transmission system or an element thereof is required to be determined by the Commission under section 62 of the Act read with section 79 thereof."

59. Therefore, in line with Regulation 17(1), in the instant case, on completion of 25 years of operation from the COD. i.e., 30.11.2020, the generating company and the beneficiary may agree on an arrangement, including provisions for target availability and incentive, where in addition to the energy charge, capacity charges determined under these

regulations shall also be recovered based on scheduled generation. The Appellant vide letter dated 23.11.2020 requested the Respondent no. 2, the Generating Company (NTPC) for a suitable arrangement in terms of Regulation 17(1) of the Tariff Regulations, 2019 for procurement of power from Dadri-I, as soon as possible and in any event prior to the completion of 25 years from the COD i.e., 30.11.2020.

60. As no response was received from NTPC, the Appellant, vide letter dated 30.11.2020, again informed the NTPC that as per the provision contained in Regulation 17 of the Tariff Regulations, 2019, the PPA and SPPA would lapse on 01.12.2020 at 00:00 hrs. i.e., on completion of 25 years from the COD for the Generating Station (Dadri-I), unless a mutually agreed arrangement to extend the supply from Dadri-I is in place, there will be no scheduling of power.

61. It is, thus clear that the Appellant invoked the provisions contained under sub-regulation (1) and sub-regulation (2). In pursuant to second letter for non-scheduling of power from Dadri-I, NTPC vide its letter dated 30.11.2020 submitted its response, however, no arrangement was proposed by NTPC. NTPC vide the said letter, in case of BRPL (the Appellant in second captioned Appeal), has stated that: *“the rights and obligations of the parties under the BPSA continues, even after 30.11.2020 and therefore, the purported contention of BRPL of the BPSA (as amended) cease to have effect from 30.11.2020 is not valid, legal or sustainable.”*

62. The Appellant by its letter dated 30.11.2020 discontinued scheduling of power from Dadri-I with effect from 01.12.2020 at 00.00 hrs since Dadri-I completed 25-year life term on 30.11.2020, thereby exercising its right of first refusal under Regulation 17(2) of the Tariff Regulations, 2019.

63. The Respondent no. 2 submitted that the power under Section 79(1)(a) is only to regulate the tariff. The contractual provisions or otherwise the allocation of power by the Central Government is not vested with the Central Commission. There is no power vested in the Central Commission to either create a contract or provide for exit routes from such contracts under the Electricity Act, 2003. The Central Commission can only interpret the contracts as entered into between the parties, apart from determining the tariff for the supply of electricity.

64. It was, further, submitted that the Central Commission while exercising its powers either under Section 79(1) or under Section 178 of the Electricity Act, 2003 cannot give alternates to distribution companies to rescind the allocations made by Gol. The allocation continues to remain a sovereign function and the PPA between the parties contemplates the sale and purchase to continue till the end of the life of the respective station considered in the tariff orders or Regulations issued by the Central Commission or Gol allocation whichever is later.

65. The Respondent relied upon the fact that the powers exercised by the Central Government cannot be succeeded by the provisions of the Regulations.

66. This issue has already been decided in the foregoing paras and as such we are not satisfied by the submission made by the Respondent No. 2.

67. The Respondent no. 2 submitted that if the Central Government can allocate the electricity from the Central Generating Stations, then irrespective of a decision to be taken on the reallocation and de-allocation by the Central Government, the Central Commission cannot provide a

route for de-allocation or cancellation of the allocation under Regulation 17 to exit the PPAs based on such an allocation.

68. The allocation of power from CGS can be made only when the Generating Station is under operation. Once the useful life as defined by CERC through Regulation is exhausted, the life can be extended under the provisions of the Regulations by the Central Commission. Regulation 17 is the relevant provision where a process has to be adopted for the determination of tariff for the Generating Station on completion of 25 years from the COD i.e., on continuation of the operation beyond the useful life. It is for this reason that the Central Commission has brought in the Regulation 17 for the first time so that Generating Stations completing their useful life (25 years in this case) can continue to operate under mutual agreement, at the same time providing a route for the beneficiary to exit or terminate the PPA, in case the agreement is not settled on agreed terms.

69. CERC vide the impugned order observed that:

“...neither Regulation 17(1) nor Regulation 17(2) provides for or depends upon any pre-existing agreement between parties for its provisions to kick in. It simply requires that the generating station should have completed 25 years of operation from its COD.”

70. From the above, the Central Commission has interpreted its own Regulation 17, providing that Regulation 17(1) and Regulation 17(2) can be invoked without dependence over pre-existing agreement. The only condition for its implementation is completion of 25 years of operation from COD for the Generating Station.

71. It is observed that in case the Regulation 17(2) can be invoked once an arrangement is proposed by the Generating Company and Central Government agree to de-allocate or cancel the allocation against an application made by the Appellant in terms of the MoP Guidelines for the de-allocation to be allowed, then the exercise under Regulation 17 would become redundant and infructuous.

72. The Appellant also invited our attention to the comments furnished by the Respondent No. 2 against the Draft Regulations published in December, 2018 by CERC seeking comments of the stakeholders. In January 2019, NTPC submitted its response to Draft Regulation 28 (which came to be renumbered as Regulation 17) stating that:

“... Discoms also have the first right of refusal to enter into such arrangement. On refusal by Discom to enter into such arrangement, generator shall be free to sell the electricity from the station in open market in manner it deems fit.”

73. Appellant, further, submitted that, NTPC, as evident from the above, has agreed to the vested right of beneficiaries such as the Appellant to seek exit from PPAs. However, contrary to this, the sole contention of NTPC in these Appeals is that Regulation 17 cannot be invoked till the de-allocation of power by the Central Government / GoI and also the beneficiary cannot exit the agreement, the PPA or SPPA, unilaterally. However, this contention is contrary to the express language of the Regulation 17 and contrary to the letter and spirit of the Electricity Act and the settled law that Regulations will have overridden effect over agreement between parties, GOI Allocations and Guidelines which have no statutory backing.

74. From the three agreements signed between the Appellants and the Respondent No. 2, the BPSA, the PPA and the SPPA, provides that the extension of contract between the parties can be carried out by signing the subsequent agreements and the final extension by SPPA. It is clear that allocation of power from different Stations of NTPC by the MoP has translated into a term of the PPA and culminated into a contractual right, which itself is regulated by statutory Regulations. In fact, if the power was to be scheduled by NTPC only in accordance with the allocation, then there was no need for NTPC to enter into a SPPA with the Appellant to extend the term of the PPA post 31.03.2012.

75. The Regulation 17 is a special provision incorporated in the Tariff Regulations, 2019 for the first time and therefore, is a subordinate legislation framed by the CERC under the power conferred to it under Section 178 read with Section 61 of the Electricity Act. Any provision contained therein is a statute specifying a remedy, as such the same cannot be made subject to an alternate mechanism provided under a Guideline. Reliance in this regard is placed on ***Bhim Singhji v. Union of India, (1981) 1 SCC 166.***

76. The allocation or de-allocation orders issued by the Central Government may offer guidance for administrative actions. But they cannot override or curtail the jurisdiction and mandate of CERC to implement its own Regulations. Reliance in this regard is placed on: -

- a) *State of Haryana v. Mahender Singh, (2007) 13 SCC 606*
- b) *G.J. Fernandez v. State of Mysore, (1967) 3 SCR 636*
- c) *Aravali Transmission Service Company Ltd. and Ors. v. Rajasthan Electricity Regulatory Commission and Ors., 2012 SCC Online APTEL 76*

77. After hearing the Ld. Advocates appearing for the Appellants and the Respondents, we are of the opinion that:

- a. The MoP Allocation by letter dated 05.07.1991 including subsequent allocations and the Guidelines dated 22.03.2021 read with clarification dated 05.07.2021 cannot be considered as Executive Orders under Article 73 of the Constitution as the powers for determination of tariff and framing the Tariff Regulations, 2019 are vested with the Central Commission for CGS and therefore, are non-statutory documents.
- b. The provisions of the Tariff Regulations, 2019 have overriding effect on the Contractual Agreements, the PPA and SPPA signed between the Respondent-Generating Station and the Appellants- Delhi Discoms.
- c. The Allocation / De-allocation of power from CGS by the Central Government cannot restrict or infringe the provisions contained under the Tariff Regulations, 2019, especially Regulation 17 which provide an option to the beneficiary Discom- the Appellant to exit the PPA/SPPA on completion of 25 years of operation from the COD for the Generating Station.
- d. Once the provision under Regulation 17(2) is exercised by the Appellant to exit from the agreement, the scheduling of power to the Appellant from the Generating Station deemed to terminated.

78. Therefore,

- a. the Guidelines vide letter dated 22.03.2021 issued by Government of India/ MoP cannot override the provisions of the Regulations of the Central Commission.
- b. the beneficiaries can relinquish the PPA/SPPA after the completion of useful life of 25 years from the COD of the Dadri-I Generating Station under Regulation 17 of the Tariff Regulation, 2019.

79. We, therefore, opined that the Appellant has the powers to exit the PPA/SPPA signed with the Respondent No. 2 under Regulation 17(2) of the Tariff Regulations, 2019 for Dadri-I Generating Station of NTPC and exercising such power vide letter dated 30.11.2020 is in line with the provision contained under the said Regulation.

80. We, further, opined that any Invoices raised by NTPC and paid by the Appellants in protest with respect to any charges qua Dadri – I Station w.e.f. 01.12.2020 have to be set aside and NTPC to refund the entire amount paid with interest at rate specified under the Law.

ORDER

81. In light of the above, we are of the considered view that the issues raised in the Appeals have merits and hence must succeed. The impugned order (common order) dated 01.07.2021 in Petition No. 60/MP/2021 and Petition No. 65/MP/2021 passed by Central Electricity Regulatory Commission cannot be allowed and is set aside.

82. The Appellants are allowed to exit the PPA and SPPA signed with the Respondent No. 2, the NTPC Ltd. in respect of Dadri-I Generating Station from the date (01.12.2020: 00:00 hours) of completion of 25 years of operation from the date of COD.

83. NTPC is directed not to raise any Invoices with respect to any charges qua Dadri – I Station w.e.f. 01.12.2020 and the payment made by the Appellants under protest shall be refunded immediately by NTPC along with interest as specified in the PPA/ SPPA.

The appeals are disposed of in above directions.

No order as to costs.

**PRONOUNCED IN THE VIRTUAL COURT THROUGH VIDEO
CONFERENCING ON THIS 08th DAY OF FEBRUARY, 2022.**

(Sandesh Kumar Sharma)
Technical Member
pr

(Justice R.K. Gauba)
Officiating Chairperson