

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

Appeal No. 106 & 107 of 2009.

Dated: 31st March 2010

**Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr. H.L. Bajaj, Technical Member**

Appeal No. 106 of 2009

In the matter of:

- (1) BSES Rajdhani Power Ltd.
BSES Bhawan, Nehru Place
New Delhi-110 019**

....Appellant

Versus

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

.... Respondent-1

- 2. New Delhi Power Limited
Sub-Station Building
Hudson Lines, Kingsway Camp
Delhi-110 009**

.... Respondent-2

- 3. Maithon Power Limited
NBCC Tower,
IIIrd Floor, Bhikaji Cama Place
New Delhi-110 066**

.... Respondent-3

- 4. BSES Yamuna Power Limited
Shakti Kiran Building
Karkardooma
New Delhi-110 065**

.... Respondent-4

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| Counsel for the Appellant(s) | Mr. V.P. Singh & Mr. Anuj Berry |
| Counsel for the Respondent(s) | Mr. Amit Kapur & Mr. Apporva Misra for R-2 |
| | Mr. Meet Malhotra & Mr. Ravi S. Singh for R-1 |
| | Mr. Sitesh Mukherjee & Mr. Sakya Singha Chaudhuri for R-3 |

Appeal No. 107 of 2009

In the matter of:

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| (2) BSES Yamuna Power Ltd. BSES Bhawan, Nehru Place New Delhi-110 019 | Appellant |
| Versus | |
| 1. Delhi Electricity Regulatory Commission Vinimak Bhawan, C-Block Shivalik, Malviya Nagar, New Delhi-110 017 | Respondent-1 |
| 2. New Delhi Power Limited Sub-Station Building Hudson Lines, Kingsway Camp Delhi-110 009 | Respondent-2 |
| 3. Maithon Power Limited NBCC Tower, IIIrd Floor, Bhikaji Cama Place New Delhi-110 066 | Respondent-3 |
| 4. BSES Rajdhani Power Limited Shakti Kiran Building Karkardooma New Delhi-110 065 | Respondent-4 |

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Counsel for the Respondent(s) Mr. Amit Kapur & Mr. Apporva
Misra for R-2

Mr. Meet Malhotra & Mr. Ravi S.
Singh for R-1

Mr. Sitesh Mukherjee & Mr. Sakya
Singha Chaudhuri for R-3

JUDGMENT

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

1. BSES Rajdhani Power Limited and BSES Yamuna Power Limited have filed these two separate appeals in Appeal No. 106 of 2009 and Appeal No. 107 of 2009 challenging the order passed by the Delhi State Electricity Regulatory Commission on 30.04.2009 allowing the petition filed by North Delhi Power Ltd. praying for the grant of approval to the Power Purchase Agreement entered into between North Delhi Power Limited (NDPL(R-2) and Maithon Power Limited (MPL/R-3).

2. Since the order impugned dated 30.04.2009 challenged by the two different parties in two different Appeals is a common order, we are rendering this common judgment disposing of both these Appeals.

3. The short facts leading to the filing of these appeals are as follows:

- (i) Both the Appellants are engaged in the business of distribution of electricity and retail supply of electricity in the specified areas in Delhi. NDPL (R-2) and MPL (R-3) are group companies. Earlier MPL(R-3) filed a petition on 29.01.2006 before the Central Commission seeking for exemption from applicable requirement of competitive procurement process of power under clause 5.1 of the National Tariff Policy (NTP). The Central Commission, however, by the order dated 17.01.2007 directed the MPL (R-3) to approach the Central Government to seek for clarification whether the MPL (R-3), the utility falls outside the scope of clause 5.1 of

NTP. However, MPL (R-3) did not approach the Central Government seeking for the said clarification.

- (ii) There upon, North Delhi Power Ltd. entered into a Power Purchase Agreement with Mython Power Ltd. for the supply of power on that basis. NDPL (R-2) filed a petition in No. 60 of 2008 before the Delhi Electricity Regulatory Commission (R-1) seeking approval of the said Power Purchase Agreement (PPA) entered into between NDPL (R-2) and MPL (R-3) for supply 300 MW power by MPL (R-3) to NDPL (R-2) on a long-term basis.
- (iii) During the pendency of the said petition, the Appellants being the distribution companies and stake holders filed the Objection Petition before the State Commission mainly contending that the approval sought by the NDPL (R-2) is in violation of the mandatory nature of clause 5.1 of National Tariff Policy (NTP) which prescribes for bidding process for procurement of power by the distribution licensee.

(iv) However, the Delhi State Commission passed the impugned order dated 30.04.2009 approving the petition filed by the NDPL (R-2) and granted the approval for the PPA entered into between NDPC (R-2) and MPL (R-3). Aggrieved over this order, both the Appellants have filed these 2 separate Appeals, Appeal No. 106 of 2009 and Appeal No. 107 of 2009.

4. The Ld. Counsel for the Appellants would make the following contentions challenging the order impugned.

(i) The State Commission has incorrectly accorded approval to the PPA by holding that it was not mandatory for the NDPL (R-2) to resort to the competitive Bidding Process envisaged under clause 5.1 of NTP. This conclusion is contrary to the provisions of the Indian Electricity Act, 2003 which provides that the Commission is to be guided by the provisions of the NTP.

- (ii) The State Commission while approving the PPA has committed error in fixing the tariff between the generating company namely MPL (R-3) and a distribution company namely NDPL (R-2) as the tariff fixed by the Delhi State Commission was in violation of the Competitive Bidding Process under Section 66 of the Electricity Act.
- (iii) Originally MPL (R-3), generating company first approached the Central Commission by way of a petition 112 of 2006 seeking for exemption from applicability of clause 5.1 of the NTP but the Central Commission by its order dated 17.01.2007 did not incline to give such an exemption. However, the Central Commission directed the MPL (R-3) to get a clarification from the Central Government. Admittedly, such a clarification was not sought by the MPL (R-3) from the Central Government. On the other hand, the NDPL (R-2) being the distribution company, had filed a petition before the State Commission to seek for

approval of the PPA entered into between the distribution Licensee (R-2) and Generating Company (R-3). Thus, the order passed by the Central Commission dated 17.01.2007 has been circumvented by the distribution company (R-2) to obtain the approval from the State Commission thereby the NDPL (R-2) managed to get the orders indirectly from the State Commission which he could not have obtained from the Central Commission directly.

- (iv) The State Commission does not have the jurisdiction to approve the PPA between the NDPL (R-2) and MPL (R-3) prior to the tariff determination for the PPA by the Central Commission.
- (v) The interpretation adopted by the State Commission that Section 62 and 63 of the Act provide that alternative route to a licensee for procurement of power, is wrong since such an interpretation will encourage all distribution licensees to enter into a negotiated PPA

only to the exclusion of the Competitive Bidding Process.

5. The Ld. Counsel appearing for the Respondents have made a common reply to these contentions made by the Ld. Counsel for the Appellants, as follows:

- (i) The order passed by the Central Commission on 17.01.2007 in the application filed by the MPL (R-3) will not in any way affect the powers of the State Commission to pass the order in exercise of the power under Section 86(1)(b) of the Act. The only prayer made by the MPL (R-3) before the Central Commission was to seek for clarification from the Central Commission with reference to the applicability of the clause 5.1 of the NTP. The MPL (R-3) had merely sought for clarification as to whether it will fall under the exempted category by virtue of the nature of the control exercised by the Damodar Valley Corporation, a Central Company, in the ownership, operation and

management of MPL (R-3). In that context, the Central Commission, without giving any finding with regard to the said clarification, merely directed the MPL (R-3) to approach the Central Government to seek for such a clarification. As such, the order of the Central Commission did not give any finding with regard to the issues concerning the determination of tariff of MPL (R-3). Therefore, the order of the Central Commission cannot be treated as one relating to the tariff determination.

- (ii) The contention of the Appellants that by approaching the State Commission, the MPL (R-3) and the NDPL (R-2) have achieved indirectly what they could not achieve directly is baseless. Clause 5.1 of the NTP cannot restrict the liberty of the generating company under Section 10(2) of the Electricity Act to sell power to any person or licensee. In other words, the distribution licensee may be permitted by the State Commission to procure power from a generating

company on a negotiated tariff irrespective of the fact that the generating company is not a State owned Control company. The fact that MPL (R-3) did not approach the Central Government for a clarification does not prevent it from entering into any contract with a distribution licensee through the negotiated route under the NTP.

- (iii) The clear demarcation of the separate and independent jurisdiction exercised by the Central Commission and the State Commission in discharging their statutory functions has been underlined in Rule 8 of the Electricity Rules, 2005. Thus, the regulation of power procurement of a distribution licensee by the State Commission under Section 86(1)(b) is separate from the determination of tariff of a generating station by the Central Commission under Section 79 of the Act.
- (iv) The State Commission has rightly proceeded to exercise its powers under Section 86(1)(b) to

approve the PPA entered into between the NDPL (R-2) and MPL (R-3) having regard to the reasonability of the indicative tariff. The State Commission has made it amply clear in this impugned order that the PPA will be effective only after the tariff has been fixed by the Central Commission.

- (v) Section 62 and 63 are alternative methods available to the Appropriate Commission for determination of tariff. It is open to the Commission to adopt either of the procedures prescribed under Section 62 and 63 of the Act. Clause 5.1 of NTP cannot be read to debar the State Commission for exercising its statutory power for determination of tariff under Section 62 of the Act for all future procurement of power. The Tariff Policy cannot mandate the State Commission to exercise its power of approval of power procurement only in a particular manner by allowing the procurement of power only through the Competitive Bidding Process. Such a mandate will

be inconsistent with wider range of regulatory power conferred on the State Commission under Section 86(1)(b). In other words, the policy directions which are directory cannot exclude the operation of Section 62 which confers power to State Commission to determine the tariff of a company under Section 62(1)(a). In other words, the Central Government, through a policy direction, cannot take away the powers of the State Commission what has been specifically provided in the Act.

- (vi) The Appellants have no locus standi to challenge the impugned order since they cannot claim themselves as an aggrieved party as they have not shown any direct injury so as to offer it a remedy under Section 111 of the Electricity Act, 2003.

6. The Ld. Counsel for the Appellants has cited various authorities under the Supreme Court. They are as follows:

- (i) (2003) 2 SCC 111 in *Bhavnagar University versus Paltina Sugar Mills (P) Ltd. & Anr.*
- (ii) (2004) 5 SCC 409 in *Ramesh Mehra versus Sanwal Chand Singhvi and Ors.*
- (iii) (1980) Supp (2) SCC 43 in *Commissioner of Wealth Tax versus Smt. Hasmatunnisa & Ors.*
- (iv) (1965) 1 SCR 542 in *Municipal Corporation of Greater Bombay versus Lala Pancham & Ors.*

7. The Ld. Counsel for all the respondents has also cited authorities in order to substantiate their pleas. They are as follows:

- (i) (2006) 4 SCC 327 in *Kerala Samasthana Chethu Thozhilali Union versus State of Kerala and Ors.*
- (2) (1992) Supp (1) SCC 150 in *State of Madhya Pradesh & Another versus M/s G.S. Dall & Flour Mills*
- (3) (1985) 1 SCC 641 in *Agricultural Market Committee versus Shalimar Chemical Works Ltd.*

- (4) (2002) 2 SCC 95 in *British Airways Pic versus Union of India*.
- (5) (2001) 8 SCC 540 in *Anwar Hassan Khan versus Mohd Shaifi*
- (6) (1997) 1 SCC 373 in *Sultana Begum versus Prem Chand Jain*
- (7) (1997) 5 SCC 516 in *Agricultural Market Committee versus Shalimar Chemicals Works Ltd.*
- (8) (2008) 7 SCC 748 in *Deepak Agro Foods versus State of Rajasthan*
- (9) (2001) 8 SCC 676 in *Bharthidasan University versus All India Council for Technical Education*

8. We have heard the Ld. Counsel for the parties and considered carefully and perused the entire records. In the light of the rival stands taken by the respective parties, the following questions would arise for consideration in the present appeals.

- (i) Whether the compliance with the Competitive Bidding Process as envisaged in clause 5.1 in the NTP, 2006 is

mandatory for the procurement of power by a distribution company?

- (ii) Whether the State Commission has erred by ignoring the fact that the Central Commission had rejected the petition of MPL (R-3) for exemption from NTP and that the NDPL (R-2) was seeking to bypass the provisions of the NTP by seeking the approval of the State Commission to the PPA entered into with MPL (R-3) even though he same was entered into in contravention of the provisions of NTP?
- (iii) Whether the State Commission has the jurisdiction to approve the PPA entered into between NDPL (R-2) and MPL (R-3) prior to tariff determination for the PPA by the Central Commission?
- (iv) Whether Section 63 of the Electricity Act is the exception to Section 62 and the guidelines framed by the Central Government will operate only when tariff is being determined by the competitive bidding process?

- (v) Whether the Appellants are the aggrieved person as provided under Section 111 of the Electricity Act?

9. Before dealing with the various questions relating to the alleged infirmities of the impugned order, it would be appropriate at the outset to deal with the question as to whether the Appellants have the locus standi to challenge the impugned order as the aggrieved party.

10. According to the Appellants, the expression “person aggrieved” appearing under Section 111 of the Act, which has not been defined in the Act, has to be given its natural and liberal meaning in the wider sense possible and since the impugned order had been passed in disregard of clause 5.1 of the NTP which would result in denial to access of power to the Appellant through Competitive Bidding Process which consequentially would adversely affect the interest of the consumer, the Appellants would certainly come under the category of aggrieved person and therefore, the Appeal is

maintainable. Though the word “person aggrieved” as provided under Section 111 of the Act has not been defined, this Tribunal as well as the Supreme Court has given interpretation and meaning of the words “person aggrieved” in the following decisions:

- (i) (2008) 13 SCC 414 in *GRIDCO versus Gajendra Haldia and others.*
- (ii) 2007)-Aptel 746 Energy Journal in *Chhatisgarh State Electricity Board versus Chhatisgarh State Electricity Regulatory Commission and others.*
- (iii) The recent decision is (2000)-LR-Aptel 0459 *Jindal Stainless Ltd. versus State of Orissa.*

11. In the Jindal Stainless Limited case this Tribunal has quoted the various Supreme Court decisions in (2003)9 606 Banarasi and others versus Rampal; (1997) 7 SCC 452 in Northern Plastic Ltd. versus Hindustan Photo Films and referred to various propositions laid down by the Supreme Court

with reference to the term “Aggrieved person” These proportions are as follows:

- (i) A person who was not a party to the original proceedings may still file an appeal with leave of the Appellate court, provided that the person claiming himself to be the aggrieved party shall make it a prima facie case as to how he is aggrieved.
- (ii) A person can be said to be aggrieved by an order only when it caused on him some prejudice in some form or another unless the person is prejudicially or adversely affected by the order, he cannot be entitled to file an Appeal as an aggrieved person.
- (iii) The words “person aggrieved” did not mean a man who is merely disappointed of a benefit which he may have received if some other order had been passed. A person aggrieved means a person who has suffered a legal grievance, a person against whom a decision has been pronounced which have wrongly deprived him of

something or wrongfully refused him something or wrongly affected his title to something.

- (iv) When a person had not been deprived of a legal right, when he is not subject to legal wrong, when he has not suffered any legal grievance, when he has no legal peg for a justifiable claim to hang on, he cannot claim that he is a person aggrieved.

12. In the light of the above principles laid down by the Hon'ble Supreme Court, this question has to be analysed. There is no dispute in the fact that the Appellants were a party in the proceedings before the State Commission as they had opposed the prayer made by the NDPL (R-2). But that alone will not entitle the person to file an appeal before this Tribunal. The ratio decided by the Supreme Court as mentioned above is that a person aggrieved does not mean a man who is merely disappointed of a benefit which he might have received. On the other hand, it is to be established that the order impugned has caused a legal grievance to him, order impugned is prejudicially

or adversely affecting him, or the order impugned has wrongfully deprived him or wrongly refused him something. Only when all these ingredients are satisfied, the party can claim himself as aggrieved party and is entitled to file an appeal.

13. In the present case, the Appellant simply say that if a Competitive Bidding Process is allowed, he may have access to get the power by becoming the successful bidder in the Competitive Bidding Process and that opportunity is lost. However, it is noticed that the stand taken by the Appellants in these appeals that even if the impugned order is confirmed then such power procured under that PPA should be allocated to all the distribution companies in Delhi including the Appellants. Thus, it is evident from the pleadings of the Appellants and the prayer in the Appeal that real intention of the Appellants is to secure indirectly portion of the power procured by the NDPL (R-2) from MPL (R-3) under the PPA and as such he has not established any direct legal injury due to the impugned order. As such the Appellant have failed to establish that they suffered

a legal grievance or legal injury or they have been unjustifiably deprived and denied of something which he would have been entitled to obtain in usual course. Therefore, our conclusion is that the Appellants are not a person aggrieved.

14. However, we are of the view that in spite of our above conclusions about the maintainability of the Appeal, we deem it appropriate to go into the legal issues which are raised by the learned counsel for Appellant, who argued at length, questioning the legality or the correctness of the impugned order.

15. Let us now discuss those issues. According to the Appellants, the tariff fixed by the State Commission was not determined by a Competitive Bidding Process as contemplated by Section 63 of the Act, 2003 read with clause 5.1 of NTP and therefore the impugned order is bad in law. On going through the relevant provisions of the Act, it is evident that the legislature carved out 2 distinct fields for (i) tariff determination and (ii) PPA approval. The domain of tariff determination is

governed under Part-VII of the Act. It contains Sections 61 to 65 of the Act. There are two routes and options provided: (a) tariff determination under Section 62(1)(a) by the Appropriate Commission in terms of Section 79 and Section 86 of the Act and (b) tariff discovery in terms of the Competitive Bidding Process in accordance with the guidelines issued by the Government of India, which shall be binding on the Appropriate Commission in terms of Section 63 of the Act.

16. In terms of Section 86(1)(b), the regulation of electricity purchase and procurement process to distribution licensee including the price at which electricity shall be procured from generating companies through agreements for purchase of power for distribution and supply between the State is within the sole domain of the concerned State Commissions. Admittedly, there is no provision in the Act which overrides or restricts the said powers of the State Commission. But it is contended by the Ld. Counsel for the Appellants that clause 5.1 of NTP as well as Section 63 of the Act put such restrictions on the power of the

State Commission to give approval for the PPA without resorting to the Competitive Bidding Process.

17. Section 62(1)(a) of the Act provides that the Appropriate Commission shall determine the tariff in accordance with the provisions of the Act for the supply of electricity by a generating company to a distribution licensee, whereas Section 63 of the Act provides that the tariff arrived through a transparent Competitive Bidding Process shall be adopted by the Appropriate Commission. Section 62(1)(a) and Section 63 of the Act are quoted as under:

“Determination of tariff – (1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) supply of electricity by a generating company to a distribution licensee

Provided that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of

electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity.”

“63. Determination of tariff by bidding process –
Notwithstanding anything contained in Section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

18. Thus these Sections provide for 2 alternatives to the concerned parties to procure power with the approval of tariff by the Appropriate Commission. These 2 alternatives are as follows:

- (i) Under Section 62(1)(a), the Appropriate Commission shall determine the tariff for the supply of electricity by a generating company to a distribution licensee.

- (ii) Under Section 63, when the tariff has been determined by the Competitive Bidding Process, the Appropriate Commission shall adopt such tariff. The wording contained in Sections 62 and 63 of the Act would make it clear that Section 63 is not couched as a non-obstante clause being an exception carved out from Section 62. Section 62 is a substantive provision. Section 63 is an exception. So the exception contained in Section 63 cannot override the scope of the substantive namely Section 62. In other words, Section 62 provides substantive power to the Appropriate Commission for determination of tariff with the sole exception of price discovery through the Competitive Bidding Process under Section 63.

19. Clause 5.1 of NTP provides that the power procurement for future should be through a transparent Competitive Bidding Process using the guidelines issued by the Central Government on 19.01.2005. Further, giving a clarification, Ministry of Power

issued a circular dated 28.08.2006 clarifying the above position. The relevant extracts of the said clarification issued by the Ministry of Power is reproduced below:

“.....3. Therefore, the concerned State Commission has a jurisdiction to regulate electricity purchase and procurement process of a distribution licensee under Section 86(1)(b) of the Act except the tariff and the tariff related matters of the PPA.

4. It is further, clarified that the PPA in cases where tariff has been determined through Competitive Bidding Process under Section 63 of the Act and in accordance with the relevant guidelines issued by the Central Government, it is finalised within the bidding process and the Appropriate Commission is required to adopt the tariff in accordance with the provisions of the law”.

20. The above relevant quoted portions of the clarification would make it clear that Section 63 is optional route for procurement of power by a distribution licensee and in case the

same is followed, the Appropriate Commission is required to adopt the said tariff. Therefore, the power under Section 62(1)(a) and Section 86(1)(b) conferred on the State Commission cannot in any manner be restricted or whittled down by way of a policy document or a subordinate legislation or notification issued by the Government/Executive. Any rules, or executive instructions or notification which are contrary to any provisions of the tariff statute shall be read down as ultra vires of the parent statute. This is a settled law as laid down by the Supreme Court in (2006) 4 SCC 327 in *Kerala Samsthana Chethu Thozhilali Union versus State of Kerala and Ors.* (quoted below)

“17. A rule is not only required to be made in conformity with the provisions of the Act whereunder it is made, but the same must be in conformity with the provisions of any other Act, as a subordinate legislation cannot be violative of any plenary legislation made by Parliament or the State Legislature:.

21. Another decision cited by the Ld. Counsel for the Appellants is (1992) Supp (1) SCC 150 in *State of Madhya Pradesh versus M/s G.S. Dall and Flour Mills* (quoted below)

“19. The second ground on which the Full Bench has sought to invoke the instructions is also not correct. Executive instructions can supplement a statute or cover areas to which the statute does not extend. But they cannot run contrary to statutory provisions or whittle down their effect”.

22. In the light of the above rationale laid down by the Supreme Court, clause 5.1 of the NTP which is a subordinate legislation would not restrict or whittle down the scope of the statutory powers conferred to a State Commission under Section 62(1)(a) especially when it is noticed that clause 5.1 of NTP would apply to Section 63 only and not to Section 62 which is a substantive provision. As stated above, Section 63 is an exception to Section 62 and the same cannot be taken away by way of a policy document like guidelines – clause 5.1 of NTP.

23. Secondly it has been held that clause 5.1 of the NTP which is a policy direction cannot be held to control or override Section 62 of the Act and when these two provisions cannot be reconciled, Section 62 alone must prevail.

24. This aspect has to be viewed from one other angle. The scope and applicability of clause 5.1 of NTP in the present case involves the scrutiny of 3 issues: namely:

- (i) The power of the State Commission to approve the PPAs entered into between the distribution licensee and the generating company under Section 86(1)(b) of the Act;
- (ii) The jurisdiction of the Central Commission to determine tariff for generating companies set up under composite scheme for supply of power to more than one state and
- (iii) The mandate under clause 5.1 of the NTP in relation to procurement of power by distribution licensees through the Competitive Bidding route.

25. In regard to the first aspect, it has to be stated that the procurement of power by distribution licensees and the price at which the same is done is approved by the State Commission under Section 86(1)(b) of the Act. The power to regulate the procurement process of a distribution licensee is a wide ranging power vested exclusively with the State Commission. This cannot be curtailed in any manner by the tariff policy. In fact, even for inter-State transactions, the State Commission has been conferred with the power under Section 64(5) of the Act to determine the tariff for the supply of power by a generating company situated outside the State from whom a distribution licensee is procuring the power.

26. In regard to the second aspect, it is to be pointed out that Section 79((1)(a) and (b) of the Act confers the power on the Central Commission to regulate the tariff of a central generating station and of generating stations with a composite scheme to supply power to more than one State. The clear demarcation of the separate and independent jurisdiction exercised by the

Central Commission and the State Commissions in discharging their statutory functions has been underlined in Rule 8 of the Indian Electricity Rules, 2005.

27. A situation whereby the State Commission can examine and approve the PPA leaving it open to the Central Commission to fix the tariff component is itself contemplated in the said rules – Rule 8 . Rule 8 reads as follows:

“Tariff of generating companies under Section 79: The tariff determination 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 redetermination by the State Commission in exercise of the functions under clause (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 a State should enter into a PPA or procurement process with such a generating company based on the tariff determined by the Central Commission”.

28. In this case the State Commission has exactly done this following Rule 8. The relevant portion of the impugned order is reproduced as below:

“50. Subject to the incorporation of the said rule in the PPA for procurement of 300 MW of power from MPL (R-3) is approved for a period of 29 years, commencing from 2012. The tariff for supply of this power shall be fixed by the Appropriate Commission”.

29. From this paragraph it is clear that the State Commission has not fixed the tariff at all. On the other hand, it has observed that exercise has to be done by the Central Commission which alone can determine tariff under Section 79(1)(b) in respect of the inter-State transmission of electricity by the generating company. In this case, the State Commission has adopted a normative tariff only for the limited purpose of examining and scrutinising the PPA.

30. As a matter of fact, in the present case the State Commission gave conditional approval to the PPA as far as other terms and conditions were concerned. In other words, the State Commission did not embark upon the exercise of determination of tariff as the same is wholly in the domain of the Central Commission. It is also noticed from the impugned order that the State Commission has made it amply clear in its order that the PPA will be effective only after the tariff has been fixed by the Central Commission. As referred to above, the State Commission has rightly pointed out that Section 62(1)(a) and Section 63 are alternative methods available to the Appropriate Commission for determination of tariff and therefore, it is open to the Appropriate Commission to adopt either of the procedures prescribed under Section 62(1) and under Section 63 of the Act in relation to the determination of tariff.

31. In regard to the third aspect it is to be stated that clause 5.1 of the NTP which relates to the power under Section 63 of the Act cannot be read to debar the State Commission from

exercising its statutory power for determination of tariff under Section 62(1) of the Act for all future procurement of power.

32. In the light of the above discussions, the argument advanced by the Ld. Counsel for the Appellants that resort to tariff determination under Section 62(1)(a) without adopting the Competitive Bidding Process will render clause 5.1 of the NTP redundant as the distribution licensees in the future will procure power from the generating companies only through the negotiated route, cannot be accepted as it is always open to the State Commission to direct the distribution licensee to carry out power procurement through Competitive Bidding Process only in case where the rates under the negotiated agreement are high. In other words, the State Commissions have been given discretionary powers either to chose Section 62, 62(1)(a) to give approval for the PPA or to direct the distribution licensee to resort to the Competitive Bidding Process as per clause 5.1 of the NTP read with Section 63 of the Act. As such, the main

contention urged by the Ld. Counsel for the Appellant would fail.

33. Nextly, it was contended by the Ld. Counsel appearing for the Appellant that by approaching the State Commission for the approval of the PPA, MPL (R-3) and NDPL (R-2) have achieved and obtained orders indirectly from the State Commission what they could not achieve directly before the Central Commission in respect of claim for exemption from the applicability of clause 5.1 of NTP. This contention also, in our view, lacks substance. The MPL (R-3) has merely approached the Central Commission to seek a clarification for the question as to whether it will fall within the exempted category from clause 5.1 of NTP as it is state owned by virtue of the nature of control exercised by the Damodar Valley Corporation, a Central Government company. In the said petition the Central Commission did not give any findings with regard to the issues concerning the determination of tariff of MPL (R-3). It is clear from the order dated 17.01.2007 passed by the Central

Commission that the Central Commission carefully refrained from finding any issue relating to clause 5.1 of NTP and instead the Central Commission directed the MPL (R-3) to approach the Central Government to seek such clarification as it felt that it does not have the jurisdiction in adjudication of such matters. This order cannot be treated as one relating to tariff determination. As a matter of fact, the Central Government has clearly observed in its order dated 28.08.2006 that it is for the Central Government to interpret its policy to determine whether a particular utility falls outside the scope of clause 5.1 of the NTP. Such an observation cannot be construed to be a finding nor a direction of the Central Commission. As such the observation does not have a binding effect. Nowhere in the order the Central Commission observed that clause 5.1 of the NTP will be binding on the State Commission while exercising their powers under Section 86(1)(b) to approve all future procurement of power by the distribution licensee. The fact that MPL (R-3) did not chose to approach the Central Government as directed by the Central Commission for a clarification cannot

prevent the MPL (R-3) from entering into any contract with a distribution licensee through negotiated route nor would it prevent the NDPL (R-2) to procure power from the MPL (R-3), the generating company through a contract to be approved by the State Commission. It cannot be said that MPL (R-3) has done anything which it otherwise is restricted in law to do. So far as NDPL (R-2) is concerned, it is purely a decision of the State Commission to decide whether to approve a negotiated tariff for the NDPL (R-2) under Section 62 or to direct the licensee to adopt the Competitive Bidding Process under Section 63 read with clause 5.1 of the NTP. Therefore, the principle that a person cannot be allowed to do something indirectly that he cannot do directly is not applicable to the present facts of the case.

34. In view of the above discussions, our conclusion is that the approval of the State Commission to the PPA entered into between NDPL (R-2) and MPL (R-3) by the order dated 30.4.2009 passed by the State Commission subject to the

various conditions, is perfectly valid in law and it does not warrant any interference. Consequentially these appeals are liable to be dismissed. Accordingly they are dismissed. No costs.

(H.L. BAJAJ)
TECHNICAL MEMBER

(JUSTICE M. KARPAGA VINAYAGAM)
CHAIRPERSON

Dated: 31st March, 2010.

REPORTABLE/NOT-REPORTABLE