

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
AT NEW DELHI
(APPELLATE JURISDICTION)**

APPEAL NO.306 OF 2013

Dated : 14th July, 2016.

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson
Hon'ble Mr. T. Munikrishnaiah, Technical Member.**

In the matter of:-

**M/S. MAITHON POWER LIMITED,)
Jeevan Bharti, 10th Floor, Tower I,)
124, Connaught Circus, New Delhi –)
110 001.) ... **Appellant****

AND

1. **DELHI ELECTRICITY)
REGULATORY COMMISSION,)
Viniyamak Bhawan, "C" Block,)
Shivalik, Malviya Nagar, New)
Delhi – 110 017.)**
2. **BSES RAJDHANI POWER)
LIMITED,)
2nd Floor, "B" Block, BSES)
Bhawan, Nehru Place, New Delhi)
– 110 019.)**
3. **TATA POWER TRADING)
COMPANY LIMITED,)
Mahalaxmi Receiving Station,)
Senapati Bapat Marg, Lower)
Parel, Mumbai – 400 013.) ... **Respondents****

Counsel for the Appellant(s) : Mr. Sakya Singha Chaudhary
Mr. Avijeet Lala
Mr. Anand Srivastava
Mr. Mazag Andrabi

Counsel for the Respondent(s) : Mr. Nikhil Nayyar
Mr. Dhananjay for **R-1**

Mr. Dushyant Manocha
Mr. Paresh Bihar Lal
Mr. Ajit Warriier
Ms. Shreya Munoth for **R-2**

JUDGMENT

PER HON'BLE (SMT.) JUSTICE RANJANA P. DESAI – CHAIRPERSON:

1. The Appellant has challenged in this appeal Order dated 10/09/2013 passed by the Delhi Electricity Regulatory Commission ("**State Commission**") whereby the State Commission has held that the petition filed by the Appellant under Sections 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 ("**the said Act**") was not maintainable before it and that the Appellant may approach the Central Electricity Regulatory Commission ("**Central Commission**") for determination of the dispute.

2. It is necessary to give gist of the following facts which led to the filing of the present Appeal:

Tata Power Delhi Distribution Limited (“**TPDDL**”), earlier known as North Delhi Power Ltd. (“**NDPL**”), a distribution licensee operating in the National Capital Territory of Delhi, issued a tender for procurement of power on short/medium term basis for itself and also for Respondent No.2 - BSES Rajdhani Power Limited (“**BRPL**”), and BSES Yamuna Power Limited (“**BYPL**”) through competitive bidding process. BRPL had authorized TPDDL to act as the nodal agency for carrying out such procurement of power on their behalf. The power was to be procured in terms of the tender documents and the terms and conditions set out in the draft Power Purchase Agreement (“**PPA**”) attached to the tender documents.

3. The Appellant submitted its bid for supply of 309 MW power on medium term basis from its generating unit of the Maithon Right Bank Thermal Power Plant (Generating Unit), which was to be commissioned on 1/10/2010. The Appellant was declared the lowest bidder.

4. The Appellant executed a PPA with BRPL. As per the PPA, the Appellant was required to supply 154.5 MW power to BRPL on round the clock basis for the period 1/10/2010 to 31/03/2012. The State Commission by an order indicated its satisfaction that the tariff for the PPA had been determined through a transparent process of bidding in terms of Section 63 of the said Act. The State Commission, therefore, adopted the tariff of Rs.3.48/Kwh as quoted by the Appellant for supply of power by the Appellant to BRPL under the PPA.

5. The Appellant agreed to supply power to BRPL under the PPA for the period from October, 2010 to March, 2012. However, according to the Appellant, due to the reasons beyond its control, the Commercial Operation Date (“**COD**”) of its Generating Unit was delayed and, accordingly, power could not be made available by the Appellant to BRPL from such Generating Unit from October, 2010. This position persisted till 31/03/2011. According to the Appellant, with effect from 1/04/2011, the Appellant arranged for supply of power to BRPL from alternate source in terms of Clause 4.4. of the PPA.

In this connection, the Appellant had engaged Tata Power Trading Company Limited (“**TPTCL**”) to arrange for power to the extent of 154.5 MW from alternate sources to be supplied to BRPL.

6. While effecting supply of power from alternate sources, in some cases, the rate of power made available to BRPL by TPTCL from various sources, including trading margin (TPTCL Rate) was higher than the PPA tariff. In such cases, TPTCL had billed BRPL at the PPA tariff of Rs.3.58 per unit and recovered the excess charges over and above the PPA tariff (“Excess charges”) from the Appellant. According to the Appellant, there were certain instances when the TPTCL Rate was lower than the PPA tariff. In such cases, TPTCL billed BRPL at the TPTCL Rate which is lower than the PPA tariff. As a result, the effective tariff paid by BRPL on such occasions was lower than the PPA tariff. In such circumstances, the Appellant filed a petition before the State Commission against the Respondents with the following prayers.

- “(a) Admit the present petition;*
- (b) Issue appropriate directions to BRPL to pay to the Petitioner an amount of Rs. 1.77 Crores as Differential amount on account of the difference between the PPA Tariff and the lower TPTCL Rate at which TPTCL charged BRPL from time to time.*
- (c) Issue appropriate directions to BRPL to pay to the Petitioner STOA Charges amounting to Rs. 1.09 Crores which TPTCL had erroneously charged to Maithon Power along with late payment surcharge as per clause 7.4.5 of the PPA @ 1.25% per month.*
- (d) Direct BRPL to pay amount of Rs. 16.90 crores being the outstanding energy charges for the supply of power during the period 1.09.2011 to 30.06.2011 (including Capacity Charges for the Un-availed Power during the period 8.09.2011 to 14.09.2011) along with late payment surcharge as per clause 7.4.5 of the PPA @1.25% per month.*
- (e) Direct BRPL to pay Maithon Power an amount of Rs. 35.51 Crores being the Capacity Charge for the Un-availed Power during the period October, 2011 to December, 2011 along with late payment surcharge as per clause 7.4.5 of the PPA @ 1.25% per month.*
- (f) Direct BRPL to pay Maithon Power the Capacity Charges for the months January 2012 to March 2012 if offered capacity is un-availed;*
- (g) Determine the appropriate court fees to be paid by Maithon Power in accordance with the DERC (Conduct of Business) Regulations, 2001; and*
- (h) Pass such other and further order/ directions as this Hon’ble Commission may deem appropriate*

in the facts and circumstances of the case ix. M/s BSES Rajdhani Power Ltd, Respondent no. 1 has filed objections regarding maintainability of the present petition before the Commission. Respondent no. 1 argued that CERC is the appropriate forum for adjudication on the matter.”

7. BRPL filed objection regarding maintainability of the petition before the State Commission. It contended that the Central Commission is the appropriate forum to adjudicate upon the matter. This submission of BRPL found favour with the State Commission. The State Commission recorded a finding that the Appellant is having a composite scheme for power generation. The State Commission, inter alia, observed that there is only one test to determine whether the Central Commission has jurisdiction namely whether the Appellant has a composite scheme for generation and sale of electricity in more than one State. The State Commission, in the circumstances, held that the Appellant's petition was not maintainable. Hence, this appeal.

8. We have heard Mr. Chaudhary, learned counsel appearing for the Appellant. We have perused the written

submissions filed by him. Gist of the written submissions is as under:

- (a) The test of 'composite scheme' employed by the State Commission for non-exercise of its jurisdiction under Section 86(1)(f) is wrong. The subject matter of dispute is the determinative factor for invoking the adjudicating powers of the Central or the State Commission as the case may be.
- (b) The adjudicatory jurisdiction of the Central Commission is restricted to the disputes in regard to matters connected with clauses (a) to (d) of Section 79(1). The adjudicatory powers of the State Commission, however, are wide and extend to any dispute which may arise between a licensee and a generating company (See: **Pune Power Development Pvt. Ltd. v. KERC & Ors. in Appeal No.200 of 2009 - 2011 ELR (APTEL) 0303** ("**Pune Power**").
- (c) The Central Commission in exercise of its powers under Section 79(1)(f) can only adjudicate disputes in relation to

matters falling within clause (a) to (d) of Section 79(1) of the said Act. The residuary adjudicatory powers of the State Commission cover all disputes excepting the matters covered by clauses (a) to (d) of Section 79(1) of the said Act.

- (d) In **Gujarat Urja Vikas Nigam Limited v. Essar Power Ltd. (2008) 4 SCC 755**, the Supreme Court has upheld the wide powers of the State Commission to adjudicate upon all disputes under Section 86(1)(f) of the said Act.
- (e) Even in relation to matters specified in clauses (a) to (d) of Section 79(1), the said Act does not exclude jurisdiction of the Central Commission. Issues in relation to tariff in matters of inter-State supply of electricity may also be adjudicated by the State Commission if the parties so choose. This is clear from Section 64(5) of the said Act.
- (f) The Appellant is only seeking recovery of amounts that it is entitled to under the terms of the PPA. The Appellant

has made following claims against the Respondent-Distribution Licensee, viz.

- (i) Under recovery of price for the power supplied through TPTCL and for recovery of Short-Term Open Access Charges paid to TPTCL in this regard and
 - (ii) Recovery of charges for power supply made, including capacity charge for un-availed power.
- (g) None of the above claims relates to regulation of the Appellant's tariff as a generating company as specified under Section 79(1)(b) of the said Act. The above claims are contractual in nature and relate to recovery of dues by the Appellant from the Respondent-Distribution Licensee that are worked out on the basis of agreed tariff under their PPA and interpretation of contractual terms of the PPA. Since the present case is one of competitively discovered tariff under Section 63, so long as there is no claim for alteration, modification or adjustment of the bid out tariff or a claim for compensatory tariff, there cannot be said to be a tariff-related dispute so as to attract

Central Commission's jurisdiction under Section 79(1)(b) of the said Act.

(h) Section 79(1) does not have a clause similar to Section 86(1)(b) since the Central Commission does not have the power to deal with functions of a distribution licensee under the said Act. The said Act has not bestowed the Central Commission with jurisdiction to regulate power purchase and procurement process as is vested in the State Commission under Section 86(1)(b). The contractual and commercial terms of supply under a PPA can, therefore, only be looked into by the State Commission of the procuring licensee (See ***Pune Power***). Hence, in the present case, the dispute raised by the Appellant can only be gone into by the State Commission under Section 86(1)(f) of the said Act.

(i) The Appellant does not dispute the fact that it is having a composite scheme for generation and sale of power. However, determinative factor for invoking the adjudicatory powers of the Central Commission or the State Commission, as the case may be, is the nature of

subject matter of dispute and not the status of generating plant. The **Full Bench decision dated 7/4/2016 in Appeal No.100 of 2013 and batch in Uttar Haryana Bijli Vitran Nigam Limited & Ors. v. Central Electricity Regulatory Commission & Ors.** (“**Full Bench decision**”) is, therefore, not applicable to this case.

- (j) In **Appeal Nos.94 and 95 of 2012 in BSES Rajdhani Power Limited v. Delhi Electricity Regulatory Commission & Anr. decided on 4/09/2012** (“**2012 BSES Rajdhani**”) the disputes arose out of the application of the CERC Regulations. The dispute in those appeals related to determination of tariff for central sector generating stations. This Tribunal has, therefore, rightly held that such disputes have to be subject to the adjudication of Central Commission. In the present case, dispute is between two private entities in relation to recovery of dues. It is purely a commercial dispute under the PPA approved by the State Commission.

- (k) Regulations framed by the Central Commission under Section 79(1)(a) and (b) relate to determination of tariff under Section 62 of the said Act. These regulations and terms and conditions thereunder cannot be entered in a PPA where tariff is discovered under Section 63 of the said Act (See: **Full Bench Decision**).
- (l) Reliance placed on **Appeal Nos.82 and 90 of 2012 in BSES Rajdhani Power Limited v. Central Electricity Regulatory Commission decided on 24/1/2013** (“**2013 BSES Rajdhani**”) to contend that power to regulate tariff would also include power to regulate terms and conditions of tariff is misplaced. That case related to the application of the provisions of the CERC Tariff Regulations. They are not applicable here.

9. We have heard Mr. Nikhil Nayyar, learned counsel appearing for the State Commission. We have gone through the written submissions filed by him. Gist of the submissions is as under:

- (a) The Appellant's contention is that the dispute is not concerning "regulation of tariff" because the Appellant merely seeks to recover the contractual tariff amount. This contention is wrong. In **U.P. Co-operative Cane Unions Federation v. West U.P. Sugar Mills Association, (2004) 5 SCC 430**, the Supreme Court has held that the word 'regulate' has a broad impact having wide meaning. Similar view has been taken by this Tribunal in **2012 BSES Rajdhani**.
- (b) The Appellant is admittedly engaged in a composite scheme and is covered by Section 79(1)(b) of the said Act. Therefore, jurisdiction to regulate all aspects of the agreement would vest in the Central Commission.
- (c) The interpretation of the Appellant would cause violation to the statutory framework.
- (d) The Appellant had also approached the Central Commission for determination of tariff for the period 1/9/2011 to 31/3/2012.

- (e) In **2012 BSES Rajdhani**, this Tribunal has categorically held that the State Commission cannot encroach upon the jurisdiction of the Central Commission.
- (f) The impugned order is perfectly legal. The Appeal deserves to be dismissed.

10. We have heard Mr. Dushyant Manocha, learned counsel appearing for Respondent No.2 in Appeal No.306 of 2014. We have perused the written submissions filed by him. The gist of the submissions is as under:

- (a) The present case is completely covered by the **Full Bench Decision** of this Tribunal. Admittedly, the Appellant supplies electricity to more than one State. It has, therefore, composite scheme for generation and sale of electricity in more than one State. It is not open to the Appellant to contend that the Central Commission does not have jurisdiction to entertain the dispute raised by it under Section 79(1)(b) of the said Act.

- (b) The disputes raised by the Appellant are related and connected to the 'regulation of tariff' in terms of Section 79(1)(b) of the said Act.
- (c) The term 'regulate' used in Section 79(1)(b) has a wide scope. In **2012 BSES Rajdhani**, this Tribunal has held that the term 'regulate' used in Section 79(1)(b) of the said Act is not merely confined to the determination of tariff. It is held that determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. Power to regulate tariff also includes its recovery.
- (d) **2012 BSES Rajdhani** makes it clear that even disputes regarding commercial terms of a PPA such as credit period and payment security fall within the jurisdiction of the Central Commission under Section 79(1)(b) of the said Act.
- (e) In fact reliefs claimed by the Appellant in its petition before the State Commission demonstrate that the same squarely fall within the jurisdiction of the Central Commission.

- (f) It is wrong to contend that decision of this Tribunal in **2012 BSES Rajdhani** is not applicable to this case. In that case, this Tribunal discussed the true import of the term 'regulation of tariff'. Both Sections 79(1)(a) and 79(1)(b) use the said term. Therefore, the fact that in **2012 BSES Rajdhani**, Section 79(1)(a) was under consideration and the present case relates to Section 79(1)(b), makes no difference. Similarly, assuming that the said decision was given in the context of certain regulations, it makes no difference.
- (g) In **Full Bench Decision**, it is made clear that the **2012 BSES Rajdhani** has been overruled only to the extent it holds that uniform tariff and common terms and conditions are requisites of composite scheme as envisaged in Section 79(1)(b) of the said Act. The said judgment continues to be good law on other points.
- (h) Reliance placed by the Appellant on **Pune Power** to contend that the territorial nexus of the PPA to Delhi conferred jurisdiction to adjudicate disputes raised by the Appellant upon the State Commission is misplaced.

Similarly, reliance placed by the Appellant on the judgment of the Supreme Court in **M/s. Gujarat Urja Vikash Nigam Limited** to contend that the State Commission has wide jurisdiction under Section 86(1)(f) of the said Act and hence, can adjudicate the present dispute, which is related to a distribution licensee of Delhi is also misplaced.

- (i) In **2012 BSES Rajdahni**, this Tribunal has considered the impact of the territorial nexus of the power procurement process to a State on the jurisdiction of the Central Commission. This Tribunal after noting the decision in **Pune Power** and the judgment of the Supreme Court in GUVNL rejected the argument that such a nexus would divest the Central Commission of its jurisdiction and confer it on the State Commission.
- (j) The judgment of the Supreme Court in GUVNL relates to a private sector generating company which is not covered by Section 79(1)(b) of the said Act. Besides, in that case, the Supreme Court had no occasion to consider the jurisdiction of the Central Commission under Section

79(1)(b) of the said Act vis-à-vis the jurisdiction of the State Commission under Section 86(1)(f) of the said Act. In the said case, the Supreme Court only considered the interplay between Section 11 of the Arbitration and Conciliation Act, 1996 (“**Arbitration Act**”) and Section 86(1)(f) of the said Act. The said judgment is not applicable to the present case.

11. We shall first go to the **Full Bench Decision**. The Full Bench was called upon, inter alia, to decide the following issue:

“3. *Whether the supply of power to procurers in more than one State from the same generating station of a generating company, ipso facto, qualifies as ‘Composite Scheme’ to attract the jurisdiction of the Central Commission under Section 79 of the said Act?*”

12. The Full Bench after considering the provisions of the said Act, scheme of the said Act and more particularly Section

79(1)(b) and Section 86 of the said Act, inter alia, observed as under:

“89. A closer scrutiny of the provisions of the said Act discloses the intention to continue with the role assigned to the Central Commission as a regulator of inter-State and multi-State activities. The State Commissions were designed to control intra-State activities.

90. A comparison between Section 79 of the said Act which delineates functions of the Central Commission and Section 86 of the said Act which delineates functions of the State Commissions shows that the Central Commission is concerned with inter-State transmission of electricity and State Commissions are concerned with intra-State transmission of electricity.”

107. The Central Commission’s jurisdiction under clause (b) of sub-section (1) of Section 79 of the said Act is attracted the moment the generating company executes PPAs to supply electricity to be generated by it to more than one State or it undertakes actual supply to more than one State under some other binding arrangement.....”

The Full Bench answered the issue as under:

“118. In view of the above discussion, we hold that the supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as ‘Composite Scheme’ to attract

the jurisdiction of the Central Commission under Section 79 of the said Act.”

13. It is an admitted position that the Appellant supplies power to more than one State from the same generating station. The Appellant has admitted in its written submissions filed in this Appeal that it is having a composite scheme for generation and sale of power. Therefore, as held by this Tribunal in the **Full Bench Decision**, the jurisdiction of the Central Commission under Section 79 of the said Act is attracted to the present case. However, we cannot lose sight of the fact that we are concerned here with tariff discovered under Section 63 of the said Act which was adopted by the State Commission. In this context, it is necessary to again refer to the **Full Bench Decision**. The Full Bench was also called upon to answer the following issue:

“5. Whether the Central Commission, de-hors the provisions of the PPAs, has the regulatory powers to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in the case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act?”

The Full Bench answered the said question as under:

“Ans: We hold that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. If a case of Force Majeure or Change in Law is made out, relief provided under the PPA can be granted, under the adjudicatory power.”

14. The present case will have to be dealt with against the backdrop of the **Full Bench Decision**, more particularly its answers to Issue Nos.3 and 5.

15. It is the Appellant’s contention that only disputes in relation to such subject matters which are specifically covered by clauses (a) to (d) of Section 79(1) may be adjudicated upon by the Central Commission. The Appellant contends that it has not sought any improvement, alteration, increase or change of any nature whatsoever in the tariff that was discovered through the competitive bidding process and, therefore, there is no element of regulation of tariff in the

present case. The Appellant further contends that in the present case, it is only seeking recovery of amounts that it is entitled to get under the terms of the PPA viz. (i) under recovery of price for the power supplied through TPTCL and for recovery of Short-Term Open Access Charges paid to TPTCL in this regard and (ii) recovery of charges for power supply made, including capacity charge for un-availed power. Therefore, the State Commission has jurisdiction to deal with the Appellant's petition.

16. On the other hand, counsel for Respondent No.2 has urged that the term 'regulate' cannot be construed in such a narrow manner. It is a term of wide import. In this context, reference is made to the following observations of the Supreme Court in **U.P. Co-operative Cane Unions Federation.**

“20. “Regulate” means to control or to adjust by rule or to subject to governing principles. It is a word of broad impact having wide meaning comprehending all facets not only specifically enumerated in the Act, but also embraces within its fold the powers incidental to the regulation envisaged in good faith and its meaning has to be ascertained in the context

in which it has been used and the purpose of the statute”.

17. At this stage, we need to mention that we shall be referring to the decisions of this Tribunal in **2012 BSES Rajdhani** and **2013 BSES Rajdhani** to which our attention is drawn. It is necessary to clarify that in the **Full Bench Decision**, the Full Bench has overruled the decision in **2012 BSES Rajdhani** so far as it holds that “uniform tariff amongst more than one State beneficiary” and “common terms and conditions” for supply of electricity in more than one State are the requisites of composite scheme as envisaged under Section 79(1)(b) of the said Act. Rest of the judgment in **2012 BSES Rajdhani** still holds the field.

18. So far as the contention of the Appellant that the Appellant is seeking only recovery of amounts that it will be entitled to get under the PPA and that there is no element of regulation of tariff in the present case, it is necessary to refer

to the relevant observations of this Tribunal in **2012 BSES Rajdhani**, on which reliance is placed by Respondent No.2.

“31. As pointed out by the learned Counsel for the NTPC, the term ‘Regulate’ used in Section 79 (1) (f) of the Act has got a wider scope and implication not merely confined to determination of tariff.

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

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

34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensees in matters connected with clauses (a) to (d) of Section

79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.” [emphasis supplied]

19. It is pointed out by counsel for Respondent No.2 that again in **2013 BSES Rajdhani**, this Tribunal while considering whether the Central Commission has jurisdiction to adjudicate upon matters related to credit period and letter of credit in respect of a PPA, affirmed and relied on the decision of this Tribunal in **2012 BSES Rajdhani** and held as under:

“17. The second issue is regarding jurisdiction of the Central Commission for adjudication of matters relating to billing and payment.

18. On this issue, the Ld. Counsel for the Appellants has made the following submission:

“Under Section 79(1)(a) and (b) of the Electricity Act, 2003, the power of the Central Commission is limited to regulate tariff of generating stations owned and controlled by Central Government or generating stations which enters into or otherwise have composite scheme for generation and sale of electricity in more than one state. The power of the Central

Commission to adjudicate under Section 79(1)(f) of the Act is limited to dispute between generating company and transmission licensees in regard to matters connected with Section 79(1)(a) to (d) of the Act. According to Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005, the State Commission has power to regulate/approve electricity purchase and procurement process of distribution licensees. The power to regulate PPA would involve approval of PPAs which contain the commercial terms and arrangements. In view of above the disputes regarding commercial terms i.e. credit period and payment security contained in the PPA falls within the jurisdiction of the State Commission under Section 86(1)(f) read with 86(1)(b) of the Act.”

19. We are not able to agree with the contentions of the Ld. Counsel for the Appellants. The Regulation of tariff is not just the determination of tariff rate at which the electricity is to be supplied or transmitted but also terms and conditions of tariff. The Central Commission has notified the Regulations called the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 on 19.1.2009. These Regulations not only provide for norms of determination of tariff but also scheduling, metering and accounting, billing and payment of charges, rebate and late payment surcharge.

20. This issue has already been decided by this Tribunal in judgment dated 4.9.2012 in Appeal nos. 94 and 95 of 2012 in the matter of BSES Rajdhani Power Ltd. Vs. Delhi Electricity Regulatory

Commission & Ors. The finding of the Tribunal in these cases is as under.

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

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

iii) The terms and conditions of Tariff and Regulation of supply will be covered by Central Commission’s Tariff Regulation and Regulation of Power Supply Regulations.”

21. Therefore this issue is decided against the Appellants in line with the above findings of the Tribunal in the Appeal nos. 94 and 95 of 2012.”

It is contended that thus, even the disputes regarding commercial terms of a PPA such as credit period and payment security are within the jurisdiction of the Central Commission under Section 79(1)(b) of the said Act.

20. It is further contended by counsel for Respondent No.2 that the prayers made by the Appellant in the petition before the State Commission clearly indicate that it has raised a dispute regarding the price to be recovered for the power supplied by the Appellant through TPTCL. According to Respondent No.2, this claim is purely related to tariff payable for the power supplied under the PPA and is within the scope of 'regulation' of tariff in terms of Section 79(1)(b) of the said Act. The Appellant has raised dispute regarding payment of capacity charges as provided for under the PPA. The capacity charges are a part of the terms and conditions of supply of electricity and related to the tariff under the PPA. The same would, according to Respondent No.2 therefore, fall within the scope of 'regulation' of tariff in terms of Section 79(1)(b) of the said Act. The Appellant has also raised dispute regarding the

Short-Term Open Access charges as provided for under the PPA. Short-Term Open Access charges are part of the terms and conditions of supply of electricity. According to Respondent No.2, the same would also fall within the scope of 'regulation' of tariff in terms of Section 79(1)(b) of the said Act.

21. It is also pointed out to us that in **2012 BSES Rajdhani**, this Tribunal has clarified, the scope of jurisdiction of the Central Commission under Section 79(1)(b) and Section 79(1)(f) of the said Act and that of the State Commission under Section 86(1)(f) in the following terms:

“46. The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between the NTPC and the Distribution Company for purchase of Electricity from NTPC Stations at the tariff determined by the Central Commission has to be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State.

47. The said power of scrutiny by the State Commission cannot be taken to mean that the State Commission has got the powers to suggest modifications to the terms and conditions or even

reserving to deal with the implications of the terms and conditions at a later stage.

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

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

On the basis of the above, it is contended that even if the PPA is approved by a State Commission that would not divest the Central Commission of its jurisdiction to adjudicate the disputes in a petition as they are covered under Section 79(1)(b) of the said Act.

22. We have already concluded on the basis of **Full Bench Decision** that since in this case, there is composite scheme, Section 79 of the said Act is attracted. The State Commission is therefore right in holding that the Central Commission has jurisdiction. The **Full Bench Decision** has, however, also made it clear that the Central Commission has no regulatory powers under Section 79(1)(b) of the said Act to vary or modify the tariff or otherwise grant compensatory tariff to the generating companies in case of a tariff determined under a tariff based competitive bid process as per Section 63 of the said Act. However, if a case of *Force Majeure* or Change in Law is made out, relief provided under the PPA can be granted, under the adjudicatory power. Therefore, if the Appellant presents a petition in the Central Commission, it will have to be entertained and take a decision in the light of the **Full Bench Decision**.

23. Since in this case, there is composite scheme and, therefore, Section 79 of the said Act is attracted, it is not

necessary for us to refer to **Pune Power** which relates to territorial nexus. The judgment of the Supreme Court in **M/s. Gujarat Urja Vikas Nigam Limited** will also be not applicable here because it considers the interplay between Section 11 of the Arbitration Act and Section 86(1)(f) of the said Act.

24. In the circumstances, we find no merit in the Appeal. The Appeal is dismissed. If the Appellant presents a petition in the Central Commission, it shall entertain and deal with the contentions raised by the parties in light of the **Full Bench Decision**. We make it clear that on the merits of the case, we have expressed no opinion. The Central Commission shall deal with the petition independently and in accordance with law.

25. Pronounced in the Open Court on this **14th day of July, 2016**.

T. Munikrishnaiah
[Technical Member]

Justice Ranjana P. Desai
[Chairperson]

√**REPORTABLE/NON-REPORTABLE**