BEFORE THE APPELLATE TRIBUNAL FOR ELECTRICITY
APPELLATE JURISDICTION, NEW DELHI

Appeal No. 228 of 2006 & 230 of 2006

Dated this 23rd day of November 2006

Present : Hon'ble Mr. Justice E Padmanabhan, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member

Appeal No. 228/06:

M/s. PTC India Limited
2nd Floor, Bhikaji Cama Place,
New Delhi .....Appellant

Versus

1. Central Electricity Regulatory Commission
   CORE-3, 6th Floor, SCOPE Complex,
   New Delhi – 110 003.

2. Essar Power Limited
   Essar House,
   11, Keshavrao Khadye Marg,
   Mahalaxmi, Mumbai – 400 034.

3. Gujarat Urja Vikas Nigam Limited
   Sardar Patel Vidyut Bhavan,
   Race Course Circle,
   Vadodra – 390 007.

4. Maharashtra State Electricity Distribution Co. Ltd.
   Prakashgad, Plot No. G-9, Bandra (East),
   Mumbai – 400 051.

5. Madhya Pradesh State Electricity Board
   Shakti Bhawan, Rampur,
   Jabalpur – 482 008. .....Respondents

Appeal No. 230/06

Madhya Pradesh Power Trading Company Ltd.
Shakti Bhawan, Vidyut Nagar,
Jabalpur (M.P.) ... Appellant

Versus

1. Central Electricity Regulatory Commission
   Through its Secretary, CORE-3, 6th Floor,
   SCOPE Complex,
   New Delhi.

2. M/s Essar Power Ltd.
   Through the Managing Director,
   Essar House, P. O. Box 7945
   Mahalaxmi,
   Mumbai – 400 034.

3. Power Trading Corp. India Ltd.
   Through its Executive Vice President
   NBCC Tower, 2nd Floor,
   Bhikaji Cama Place,
   New Delhi – 110 066.

4. Gujarat Urja Vikas Nigam Ltd.
   Vidyut Bhawan, Race Course,
   Vadodara – 390 007 (Gujarat)

5. Maharashtra State Electricity Distribution Co. Ltd.
   Prakashgad, 4th Floor,
   Bandra (East),
   Mumbai – 400 052 (Maharashtra) ... Respondents

Counsel for the Appellants : Mr. M. G. Ramachandran, Advocate
Mr. Anand Kumar Ganesan, Advocate for GUVNL
Mr. Rohit Singh, Advocate
Mr. Nishant Beniwal, Advocate
Mr. Shailendra Kumar Singh, Advocate

: Mr. G. Umapathy, Advocate for appellant in A.No.230/06 & 5th respondent in A.No.228/06

Counsel for the Respondents : Mr. K. S. Dhingra, Chief (Law) for CERC
Mr. R. K. Narayan, Director, ESSAR Power Ltd. and Mr. T. Rout, Jt. Chief (Legal), CERC

J U D G M E N T

1. M/s PTC India Ltd. is the appellant in Appeal No. 228 of 2006. The sole appellant seeks to set aside the order dated 02.08.06 passed by the 1st respondent, Central Electricity Regulatory Commission in Petition No. 158/05 to the extent it directs the 2nd respondent to sell power directly to the distribution licensees and prohibits sale of power to any trader.

2. Appeal No. 230 of 2006 has been preferred by Madhya Pradesh Power Trading Corporation praying this Appellate Tribunal to set aside Para 17 of very same order dated 02.08.06 passed by the 1st respondent, Central Electricity Regulatory Commission, in Petition No. 158 of 2005 in so far as it has directed the 2nd respondent to enter into a PPA with distribution licensee (Companies) and not through a trader.

3. As the above two appeals arise out of the same order, the two appeals were taken up together, common arguments were advanced by either side and after the conclusion of the hearing the parties also filed written submissions. It would be sufficient to summarise the facts leading to the appeals as they arise out of the same impugned order.

4. M/s Power Trading Corporation of India Ltd., herein after referred as PTC for brevity, is granted category 'F' trading license by 1st respondent, Central Electricity Regulatory Commission, under Section 14 (c) of The Electricity Act 2003 to undertake trading in electricity as a electricity trader throughout India. The appellant in Appeal No. 230 of 2006, who has chosen to amend the cause title to rectify the typographical error, in the description also claims that it is licensed to trade in electricity by virtue of deeming provisions in the Act. The appellant, Madhya Pradesh Power Trading Company Limited, claims that it is entitled to trade in power by virtue of Section 14, read with Section 13 of The Electricity Act 2003, being an undertaking of Government of the Madhya Pradesh. The appellant further claims that it has been validly constituted and has taken over the obligation of MPSEB and that it is a deemed licensee to trade in power.

5. The 2nd respondent is a public limited company, incorporated under the provisions of Companies Act 1956, and it is setting up a 1500 mw Combined Cycle Power Project at Hazira in the State of Gujarat. The respondents 3, 4 & 5 are state undertakings engaged in the distribution of power within their respective area of license. The 2nd respondent is executing the Combined Cycle Gas Based Thermal Power Plant at Hazira in the State of Gujarat, with an ultimate capacity of 1500 mw. The gas based project with 750 mw capacity is expected to be commissioned by April 2007. The appellant, M/s. PTC India and the 2nd respondent entered into a Memorandum of Understanding on 19.08.2004 whereby the 2nd respondent recorded its willingness to sell the entire power to PTC India for a full term of power purchase for 25 years after commissioning of its 1500 mw Combined Cycle Power Project. The appellant also recorded its willingness to buy the entire generation at levelised tariff for a term of 25 years, based on the norms set by the 1st respondent, Commission. The MoU entered into was for a period of 1 year, ending on 18.08.2005 and the same has been extended for the subsequent period. The appellant PTC addressed and approached various State utilities offering to sell power on the commissioning of second respondent's power project.

6. The 2nd respondent and the appellant pursuant to the MoU filed a joint application dated 08.08.2005 before the Power Grid Corporation for long term open access after remitting the prescribed fees.

7. The 2nd respondent filed Petition No. 158 of 2005 on 21.12.2005 before the 1st respondent, Commission, under Section 79(1) (b) of The Electricity Act of 2003, read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2004 seeking "in principle acceptance of project, capital cost and the financing plan" of the said 1500 mw power project as proposed by the 2nd respondent. During the relevant period the CERC also amended its regulations and it examined the application filed by the 2nd respondent in the light of Regulation 17. According to the appellant, the term 'licensee' appearing in CERC regulation 17 also includes a trading licensee. In the application filed by the 2nd respondent has specifically stated that the power from its project will be sold to PTC through a power purchase agreement, who in turn may enter into contract for sale of power with various distribution utilities or consumers. The 2nd respondent has also specifically set out that it and PTC have jointly filed an application with the transmission utility, seeking long term open access.

8. The 1st respondent, Regulatory Commission, while according its in principle approval to the project cost and the financing plan of 2nd respondent, by the impugned order granted its approval subject to the condition incorporated in Para 17(a) of its order. The said condition is being impugned in these two appeals. The material portion of the impugned order reads thus :

"*(a) The Petitioner shall file before the Commission power purchase agreement for off take of atleast 85% of the capacity, with more than one State, latest by 30th September, 2006, PPA shall be entered directly by the petitioner with the distribution companies and not through the trader.*"

9. In Para 20 of the said order, the 1st respondent, Commission, has clarified that non fulfillment of said condition (a) of Para 17 will render the approval null and void. The said condition is being challenged in these two appeals. According to the appellant, no reason whatsoever is assigned by the 1st respondent, Commission, for imposing such a condition. The appellant in both the appeals are aggrieved by the said condition imposed by the 1st respondent, Commission, since the said condition directly and prejudicially affects the appellants in respect of the power purchase agreement entered.

10. It is contended by the learned counsel appearing for the appellant that the impugned order is without jurisdiction, arbitrary, misconceived and in excess of power conferred on the 1st respondent, Commission, besides ultra vires of The Electricity Act 2003. The appellant further contended that the 1st respondent has exceeded its jurisdiction in directing the 2nd respondent to enter into PPA directly with distribution companies / utilities and not through the trader. It is contended that such a condition is imposed while considering the application for in principle acceptance of project, capital cost and the financing plan is totally unwarranted and illegal. The CERC has exceeded in its jurisdiction in imposing the said condition, which has no bearing on the project cost and such a condition is not even contemplated under Regulation 17. At no point of time, the 2nd respondent was disclosed or informed that it has to sell power directly to Discoms only nor an opportunity has been accorded nor was it disclosed to the parties by the Central Commission before imposing such a condition. It is contended that the CERC has no jurisdiction to take upon itself a non issue and pass orders pertaining to such issues, which is arbitrary.

11. The sweeping condition imposed by 1st respondent, Commission, is un-constitutional, violative of Article 19(1)(g), as it prohibits sale of power by the 2nd respondent to the trader and it is an unreasonable restriction. It

is further contended that the impugned order is violative of Article 14 of The Constitution as it is patently unfair, arbitrary, against principles of natural justice and against the Doctrine of Wednesbury's principles. Being an extraneous and unreasonable restriction placed on the rights of the appellant, to undertake its licensed lawful business, the condition imposed is arbitrary and Section 79(3) in no way confers such a power. It is further contended that the condition imposed is against the doctrine of legitimate expectation of the appellant, a licensed trader. The impugned order has illegally taken away the accrued contractual rights available to 2nd respondent as a generating company and the impugned order is ultra vires the provision of The Electricity Act 2003 and the Regulations framed thereunder. The impugned order is contrary to regulation 17 of CERC Regulations and that condition imposed in Para 17(a) of the impugned proceedings is liable to be set aside in this appeal. Identical contentions, in Appeal No. 230 of 2006, were advanced and it is not necessary to repeat the same.

12. The 2nd respondent, generator, had not chosen to file an appeal but supported the appellant's challenge to that portion of the impugned order and stood by the appellants.

13. A detailed counter has been filed on behalf of the 1st respondent, CERC, apart from written submissions submitted after the conclusion of the hearing. According to the 1st respondent, there are absolutely no merits in the appeal and no interference is called for. It is stated that by virtue of sub section (4) of Section 79 of The Electricity Act 2003, the Central Commission, in discharge of its functions, shall be guided by National Electricity Policy, the National Electricity Plan and the Tariff Policy published under Section 3 of the said Act. The condition imposed by the 1st respondent is valid and the challenge by the appellants in these two appeals are devoid of merits, untenable and liable to be rejected.

14. It is stated that seeking in principle acceptance of the capital cost and financing plan is not mandatory for a generator but it is optional. As generating companies are at liberty to establish a generating station by seeking for in principle acceptance of the capital cost and financing plan, and in such case alone tariff or sale of electricity from it will be determined in accordance with the principles applicable, at the time of its commissioning operation.

15. Generating companies not owned or controlled by Central Government have been approaching the central commission to seek in principle acceptance of the capital cost and financing plan before undertaking

investment since it provides a level of comfort in the matter of determination of tariff when the generating station becomes operational. The 2nd respondent sought for in principle approval of capital cost and financing plan as per the CERC Regulations, as amended. The 1st respondent took notice of contents of the application filed by the 2nd respondent and also took notice of response submitted by respondent Nos. 3 & 4. As the 2nd respondent met the basic threshold, i.e. generation of 1000 mw and entered into an agreement for sale of power, the 1st respondent, Commission, was perfectly satisfied that the 2nd respondent fulfilled the criteria of entering into or having composite scheme for generation and sale of electricity in more than one State and it was recorded so in Para 5 of its order. Para 17(a) of the order dated 02.08.2006 is to be read in the context of conclusion arrived at in Para 5 of the order since no firm commitment for purchase of power from generating station by any Discom / utility was placed on record before the Central Commission. The Central Commission did not take into consideration of the contents of Para 18 of the Petition but it was solely guided by the Ministry of Power letter dated 14.02.2005.

16. The 1st respondent accorded in principle approval of project cost for the generating station subject to the conditions imposed in Para 17(a) and (b), besides ordering that non fulfillment of condition 17(a) will render the

approval null and void. The 2nd respondent, generating company, is not owned nor controlled by Central Government. The expressions 'composite scheme' 'entered into' and 'sale' are not defined in the Act, their meanings are to be ascertained from the legal thesaurus. Composite scheme under 79(b) covers a scheme combining generation and sale of electricity by a generating company.

17. The Central Commission directed signing of long term PPAs by 2nd respondent with more than one state Discom for 85% of the power generated by it in keeping with clause (b) of sub section (1) of Section 79 of the Act, leaving 15% of power to be sold through short term PPAs, including through PPAs to be signed with electricity trader. The direction contained in Para 17 (a) is reasonable, such a direction is issued in exercise of regulatory power and it aims to strike a balance between the interest of consumers and development of electricity market through trading. Protecting the consumer is the primordial object of the National electricity policy and tariff policy notified by the Central Government and such objects will be frustrated if the entire power is sold through trading licensees since trading licensees will add their margin and burden the end consumers. The Central Commission does not find any justification for hiking the price of electricity payable by the ultimate consumer through the involvement of other agencies like traders.

18. It is stated by first respondent that the entire electricity generated by 2nd respondent are to be made available to various distribution licensees in the states of Gujarat, Maharashtra and Madhya Pradesh and they have an opportunity to buy power directly from the generating stations at the tariff regulated by CERC. The direction issued by Central Commission is, therefore, to be seen in this context and in overall public interest. In terms of National electricity policy and tariff policy, the distribution licensees are to buy power directly from generating companies. The National electricity policy provides that 15% of the power generated shall be sold outside the long term PPAs. The Electricity Act 2003 incorporated a policy to introduce trading as an additional method for convening power from the generating station to the distribution licensees and the consumers. In terms of the tariff policy, generating companies are expected to sell only to the distribution companies directly and purchase of power by the distribution companies through traders is an exception, as seen from tariff policy.

19. The Central Commission referred the matter to the Central Government, Ministry of Power for advice and the ministry of power in its letter dated 28.03.2006 clarified that the pricing of power project started before

06.01.06, procurement of power from such projects will be treated as falling outside clause 5.1 of the tariff policy where PPAs are filed before the appropriate commission by 30th September, 2006. The said time prescribed by central government has already expired. There is no challenge to the tariff policy or the clarification issued by Central Government on 28.03.06 before the competent judicial forum nor the central government has been impleaded as respondent in these appeals.

20. In Para 44 of the reply, the 1st respondent has spelt out a specific stand, which reads thus :

"44. That despite non-fulfillment of the condition laid down by the Central Commission at clause (a) of Para 17 of the order dated 2.8.2006. Respondent No.2 is at liberty to establish the generating station and sell power to any licensee including the electricity traders or a consumer, in accordance with Section 10 of the Act, in which case the comfort of 'in principle' acceptance of the project capital cost as per order dated 2.8.2006 will not be available and tariff will be determined in accordance with law applicable at the time of commercial operation of the generating station."

21. It is submitted by 1st respondent that various grounds urged by the appellant are misconceived and unfounded. The order dated 02.08.2006 has been made in exercise of express provisions, to carry out the object and spirit of the Act and on being guided by National electricity policy,

the Tariff policy, guidelines framed for competitive bidding and it is in discharge of regulatory power by the Central Commission. The order of the 1st respondent in no way suffers with illegality and no interference is called for. The power generated by 2nd respondent needs to be ensured and sold in accordance with the provisions of the Act and also National electricity policy and Tariff policy, which are the guiding factors for Central Commission. In public interest restriction is being imposed and the condition is considered necessary to protect consumers from unjustifiable price hike which is un-nurtured to the detriment of the ultimate consumers and the economy of the country.

22. It is submitted that the provision of the 2003 Act, the National electricity policy, the tariff policy and the guidelines for competitive bidding, treated the traders and distribution licensees as two separate classes based on an intelligible differentia and the distinction has a nexus with the objective of the legislation, which include protection of consumers' interest. The impugned order is being passed in due discharge of statutory functions by the 1st respondent, Commission, and as a regulatory measure. The various contentions advanced by the appellants are devoid of merits and without substance. Section 62, 63, 79(1) (b) and 79(4) prescribe in express terms as well as by necessary implications that the power generated by the generating companies need to be sold only to

the distribution licensees, whether through PPAs or through competitive bidding.

23. As an exception to the rule, the national electricity policy provides that 15% may be sold in the market for the long term PPAs. Further PPAs for sale of entire power to a trader may have serious implications on the ultimate consumers and the National economy by making power costlier without enough justification and which can be avoided through prudent exercise of functions by the public authority. Regulation 7 has to be read in conjunction with Electricity Act, National Electricity Policy, the tariff policy and guidelines prescribed for competitive bidding. The 1st respondent has imposed the condition to protect the consumers' interest and to enforce the National electricity policy, Tariff policy and guidelines for competitive bidding. It is contended that the appellants have to seek legal remedy before appropriate forum other than this Appellate Tribunal in accordance with law. The appellant has also made preliminary submissions.

24. The appellant and the respondents submitted written arguments after the conclusion of hearing. On behalf of appellants, Mr.M.G.Ramachandran, Advocate submitted detailed arguments. On behalf of the 1st respondent the Chief (Law), Central Electricity

Regulatory Commission submitted detailed arguments and also placed reliance on the following pronouncements in support of his contentions that the impugned condition set out in Para 17 (a) is a regulatory measure and it has the power to impose such conditions:

i) N. V. Chowdary, Appellant v. Hindustan Steel Works Construction Ltd., Visakhapatnam, Respondent. AIR 1984 Andhra Pradesh 110

ii) Khargram Panchayat Samiti & Another, Appellant v. State of West Bengal & Others, Respondents. 1987 (3) Supreme Court Cases 82

iii) U.P. Co-operative Cane Unions Federations, Appellant v. West U,.P. Sugar Millls Association and others etc. Respondents. AIR 2004 Supreme Court 3697

iv) State of Tamil Nadu, Appellant v. M/s Hind Stone & Others, Respondents. 1981 (2) Supreme Court Cases 205

v) K. Ramanathan, Appellant v. State of Tamil Nadu and Another, Respondents. 1985, 2 Supreme Court Cases 116

vi) Deepak Theatre, Dhuri, Appellant v. State of Punjab & Others, Respondents. 1992 Supp. (1) Supreme Court Cases 684.

vii) Bishambhar Dayal Chandra Mohan and Others, Petitioners v. State of Uttar Pradesh & Others, Respondents. 1982(1) Supreme Court Cases 39.

viii) MD. Serajuddin & Others, Appellants v. The State of Orissa, Respondent. 1975(2) Supreme Court Cases 47.

25. On behalf of the respondents, reliance was also placed on (i) CERC's terms and conditions of Tariff regulations 2004, (ii) guidelines for determination of tariff by bidding process, (iii) policy for setting up mega power project in private sector, (iv) the tariff policy, (v) ministry of power's letter dated 7th & 14th September, 2006, (vi) National Electricity Policy and (vii) plan in support of its stand.

26. The points that arise for consideration in both the appeals are :

A. Whether the condition imposed by the 1st respondent, Central Electricity Regulatory Commission, in paragraph 17(a) of its order while according the " in principle approval to the project capital cost and the financing plan" of the 2nd respondent for its proposed generating plant, is in excess of jurisdiction, arbitrary and misconceived and liable to be interfered?

B. Whether an IPP could be directed/compelled to enter into PPA directly with distribution utilities and not to sell to a licensed trader? Whether such a condition is sustainable in law? Whether

the condition imposed is in conformity with the statutory provision and the policy or is arbitrary and unwarranted as contended by the appellants?

C. Whether Regulation 17 of the CERC regulations enables CERC to impose the condition 17 (a) which is impugned in these appeals?

D. Whether the 1st respondents' action in taking upon itself a non issue and pass orders on its own without putting the 2nd respondent and the appellant on notice of its proposal to impose the condition, which is a violative of principles of natural justice and fair procedure?

E. Whether the provisions of The Electricity Act, the regulations framed by the CERC, the National Electricity Policy and plan, the National Tariff Policy, provide for or contemplates imposition of impugned condition, detailed in Para 17(a)?

F. To what relief, if any?

27. The above points could be considered together as they over lap each other. On behalf of the appellants Mr. M. G. Ramachandran, Learned

Counsel, contended that the condition imposed by 1st respondent in Para 17(a) is arbitrary, uncalled for, runs counter to the provisions of The Electricity Act 2003 and the CERC Regulations. It is also contended by Mr.M.G.Ramachandran and Mr. G. Umapathy, Advocates that restrictions imposed on the 2nd respondent, an IPP, is not called for nor it is contemplated either under the provisions of The Electricity Act 2003 or in the National Electricity Policy and Plan or Tariff Policy as well as guidelines issued. Per contra, it is contended by Mr. K.S. Dhingra, Chief (Law), CERC that CERC has imposed the condition with the object of reducing power cost to the consumers and such a condition has been imposed as a regulatory measure and taking into consideration and in terms of the National Electricity Policy, Tariff Policy and to achieve the object with which The Electricity Act 2003 was enacted by the Parliament.

28. As seen from the main features of the bill, the following objects would emerge:

"4.(i) Generation is being de-licensed and captive generation is being freely permitted. Hydro projects would, however, need approval of the State Government and clearance from the Central Electricity Authority which would go into the issues of dam safety and optimal utilization of water resources.

xx xx xx

(iii) There is provision for private transmission licensees.

xx xx xx

(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary.

(x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only the transmission and wheeling charges with surcharge would be regulated."

xx xx xx

The above objects would show a marked change which the Parliament intended to introduce by bringing in The Electricity Act 2003.

29. Section 2(8), 2 (28) and 2(30) respectively defines the expressions "captive generating plant", "generating company" and "generating stations" 2(28) " captive generating plant" as under :

"2 (28). "generating company" means any company or body corporate or association or body of individuals, whether incorporated or not, or

artificial juridical person, which owns or operates or maintains a generating station;

xx xx xx

Section 2(30) defines the expression "generating station" as under:

(30) "generating station" or "station" means any station for generating electricity, including any building and plant with step-up transformer, switch-gear, switch yard, cables or other appurtenant equipment, if any, used for that purpose and the site thereof; a site intended to be used for a generating station, and any building used for housing the operating staff of a generating station, and where electricity is generated by water-power, includes penstocks, head and tail works, main and regulating reservoirs, dams and other hydraulic works, but does not in any case include any sub-station;

xx xx xx

These definition clauses indicate a special meaning, purpose and object as seen from the objects with which the 2003 enactment was enacted.

30. Section 7 of the 2003 Act provides that any generating company may establish, operate and maintain a generating station without obtaining a license under the Act, if it complies with the technical standards relating

to connectivity with the grid referred to in clause (b) of Section 73. Section 9 also enables a person to construct, maintain or operate a "captive generating plant" and dedicated transmission lines. Sub Section (2) of Sub Section 9 confers right on a person who has constructed a captive generating plant to have the "right to open access" for the purpose of carrying electricity from the captive generating plant to destination of use. Section 10 of the Act enumerates the duties of a generating company, such as, to establish, maintain and operate generating station tie-lines etc. Sub Section (2) of Sub Section 10 provides that a generating company is free to supply electricity to any licensee in accordance with the provisions of the Act and Rules or Regulations made there under and subject to Regulations that may be made under Section 42(2), supply electricity to any consumer. In the light of the above provision, we shall now refer to the statutory definition clauses in Sec. 2 (38) and 2 (39). Sec. 2 (38) defines "license" means a license granted under sec 14; Sec. 2 (39) defines "licensee" means a person who has been granted license under sec. 14. It is obvious that no difference is made among the license or licenses granted under sec. 14 of The Act excepting as to functions of the three licensees. No dichotomy had been introduced by the legislature as to "license" except as to the right of the licensee who is granted the license to transmit or distribute

or undertake trading, i.e. functional/operational difference of the said three licensees.

31. Section 11 confers power on the appropriate government in extra ordinary circumstances to specify that a generating company operate and maintain generating station as may be directed by that government in accordance with directions. "Extraordinary circumstance" is indicted in the explanation to Section 11. Section 2(39) defines the expression licensee as a person who has been granted a license under Section 14. In terms of Section 14, the appropriate Commission on an application made to it under Section 15 grant license to any person (i) to transmit electricity as a transmission licensee or (ii) to distribute electricity as a distribution licensee and (iii) to undertake trading in electricity as an electricity trader.

32. A conjoint reading of various Sections of part III, – Generation of Electricity Part IV Licensing in the 2003 Act and in particular Section 7, 10 (2), 14 read with Section 12 to 24 and definition clauses, the generating company may supply electricity to any licensee including a Trader in accordance with the provisions of the Act and the rules and Regulations made there under. It is also open to the generating company to supply electricity to any consumer subject to the regulations made

under Section 42(2) of the Act. It is well open to a generating company to supply electricity generated by it to any licensee, be it a transmission licensee or distribution licensee or a licensed electricity trader and there could be no restriction nor impediment contemplated in the 2003 Act. In the light of the above and other statutory provisions, we have to examine the contentions advanced before us in the challenge to the condition imposed by 1st respondent in Para 17(a) of the order, impugned in this appeal.

33. Nothing has been pointed out on behalf of the 1st respondent, to scuttle or restrict the operation of part III and IV of The Electricity Act 2003 or any part of it. No regulation could be framed to restrict the scope and purport of statutory provisions of The Act by any delegated rule making / regulation framing authority. This is a well settled fundamental principle of law and it may not be necessary to quote any precedent in this respect.

34. It is not the case of the first respondent that appropriate government has issued directions in terms of section 11 directing the generating company / companies to sell power generated by it / them only to distribution utility or company. Such a direction, if at all, could be issued only in an extraordinary circumstance as indicted in the explanation appended to

Section 11 (1) of The Electricity Act 2003. The provisions of the Act do not lend support to the novel contentions advanced on behalf of the first respondent. It is not as if by virtue of the provisions in The Electricity Act 2003, an independent generator could be compelled to sell entire power generated much less 85% or any portion of the power generated by it only to distribution licensees/ utilities nor there is any provision in the Act by which a generator could be compelled or directed not to sell the power generated by it to a licensed trader. This legal position is clear and follow on a consideration of the entire Act and not controverted before us.

35. There is nothing in National Electricity Policy and Plan or Tariff Policy or guidelines issued by the Government of India, which are relied upon to support the said stand taken on behalf of the first respondent in terms of the 2003 Act and no such direction could be issued either by Central Government or any other authority constituted under the Act restricting the sale of power generated by an IPP or for that matter a CPP and / or not to sell to a licensed trader only nor they could be compelled to sell only to state utility/Discom. On a conspectus consideration of the entire 2003 Act, directing generators to sell power only to state utility/distribution licensees much less 85% of power generated is not

contemplated, except under extraordinary circumstances falling under Section 11 of the Act.

36. The first respondent has lost sight of the statutory provision viz. there could be a private distribution licensee as well and they are to undertake bulk purchase either directly or indirectly from a generator and distribute in terms of license conditions. The stand of the first respondent bristles with incongruity and apparent fallacies in the construction placed on the provisions of 2003 Act.

37. Mr. Dhingra, Chief (Law) appearing for the 1st respondent is unable to point out any portion in the National Electricity Policy and Plan or Tariff Policy or the guidelines issued by the Government in this respect to advance his contentions, much less indirectly even to support an inference. The Central Government was conscious that by issuing the National Electricity Policy and Tariff Policy, which it is authorized to prepare and publish, no such authority is conferred on it and such a policy, if any, would be in total disregard or negation and violation of the statutory provisions of The Electricity Act 2003.

38. Hacking back to the impugned portion of the order, it is stated that it has been passed by purported exercise of power under Section 79 (1)(b)

of the 2003 Act. For immediate reference Sec 79(1)(a)(b) is extracted hereunder :

Sec. 79. Functions of Central Commission (1) The Central Commission shall discharge the following functions namely :

(a) to regulate the tariff generating companies owned or controlled by the Central Govt.

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

39. Sec. 79(4) provides that in discharge of its functions, the Central Commission shall be guided by National Electricity Plan and the Tariff Policy published under Section 3 of the Act. Much reliance is placed on the said policy and plan by Mr. Dhingra appearing on behalf of the 1st respondent, though such a stand does not find support nor finds a place in the impugned proceedings. In fact, when confronted Mr. Dhingra tried to snatch one or two words in the policy, torn out of context as an endeavor of a sinking man to float out of desperation. Hence, we have to refer to that portion of the policy / plan for analyzing the contention advanced by the first respondent.

40. On an analysis of Section 79(1) (b), in respect of generating companies other than those owned or controlled by Central Government falling under Section 79(1)(a), if a generating company enter into or otherwise has a composite scheme for generation and sale of electricity in more than one State, the fixation of tariff may arise in the hands of Central Commission. If the sale is within the State by the generator, then it follows that the Central Commission has no jurisdiction. If the generating company enters into or otherwise has composite scheme for generation and sale, in more than one state then the Central Commission may regulate the tariff of such generating company. In this respect it is useful to refer to specific stand taken by the 1st respondent in its reply, which would go to show that the 2nd respondent is at liberty to establish a generating station and sell power to any licensee including electricity traders or a consumer in accordance with Section 10 of The Act, in which case the comfort of "in principle acceptance" of the project capital cost as per order dated 02.08.2006 will not be available and tariff will be determined in accordance with law applicable at the time of commercial operation of the generating station.

41. Further, it is needless to state that it is optional for the 2nd respondent to seek for in principle approval of project cost for its generating station and

it is not a must as spelt out from sec 79 (i) (b) Sec 79 (1) (a) & (b) provides for a dichotomy between generating companies owned by Central Government and other than those owned by Central Government. This distinction and the further obligation to determine the tariff of central Government owned generating station is a must shall not be lost sight. This has been totally lost sight by the Respondent.

42) The stand as set out in Para 44 of reply statement which reads as under, support the contention advanced by appellants:

"44. That despite non-fulfillment of the condition laid down by the Central Commission at clause (a) of Para 17 of the order dated 2.8.2006. Respondent No.2 is at liberty to establish the generating station and sell power to any licensee including the electricity traders or a consumer, in accordance with Section 10 of the Act, in which case the comfort of 'in principle' acceptance of the project capital cost as per order dated 2.8.2006 will not be available and tariff will be determined in accordance with law applicable at the time of commercial operation of the generating station."

43. Regulation 17 framed by the 1st respondent reads thus :

"17. ***Capital Cost:*** *Subject to prudence check by the Commission, the actual expenditure incurred on completion of the project shall form the basis for determination of final tariff. The final tariff shall be determined based on the admitted capital expenditure actually incurred up to the date of commercial operation of the generating station and shall include*

capitalized initial spares subject to following ceiling norms as a percentage of the original project cost as on the cut off date:

(i) Coal-based/lignite-fired generating stations – 2.5%

(ii) Gas Turbine/Combined Cycle generating stations – 4.0%

Provided that where the power purchase agreement entered into between the generating company and the beneficiaries provides a ceiling of actual expenditure, the capital expenditure shall not exceed such ceiling for determination of tariff;

Provided further that in case of the existing generating stations, the capital cost admitted by the Commission prior to 1.4.2004 shall form the basis for determination of tariff.

Note

Scrutiny of the project cost estimates by the Commission shall be limited to the reasonableness of the capital cost, financing plan, interest during construction, use of efficient technology, and such other matters for determination of tariff.

"Provided further that any person intending to establish, operate and maintain a generating station may make an application before the Commission for 'in principle' acceptance of the project capital cost and financing plan before taking up a project through a petition in accordance with the procedure specified in the Central Electricity Regulatory Commission (Procedure for making application for determination of tariff, publication of the application and other related matters) Regulations, 2004 as applicable from time to time. The petition shall contain information regarding salient features of the project including capacity, location, site specific features, fuel, beneficiaries, break up of capital cost estimates, financial package, schedule of commissioning, reference price level, estimated completion cost including foreign exchange component, if any, consent of beneficiary licensees to whom the electricity is proposed to be sold etc.

Provided further that where the Commission has given 'in principle' acceptance to the estimates of project capital cost and financing plan, the same shall be the guiding factor for applying prudence check on the actual capital expenditure;"

44. Regulation 17 just enables the 1st respondent, Commission, to scrutinize the reasonableness of the capital cost, financing plan, interest during

construction, use of efficient technology and such other matters for determination of tariff. Neither the 1st proviso nor the 2nd proviso to Regulation 17 contemplates or confers power or provides for a direction being issued as has been directed by the 1st respondent in Para 17(a) of the impugned order. The stand as taken by the first respondent cannot be sustained nor it could be appreciated.

45. Nextly, much reliance, as already pointed out, has been placed on the tariff policy as well as National Electricity Policy and Plan. The following are the portions of the said policy, on which reliance is placed by Mr.Dhingra on behalf of the 1st respondent. Though ex-facie, the impugned proceeding nowhere draws such a strength nor there is a reference to specific portions of policy etc. except a passing reference. As already pointed out it is out of desperation, strength is sought to be drawn on the Tariff policy etc in the statement of reply and at the hearing.

46. The portions of the National Policy, Tariff Policy etc. relied are extracted hereunder to examine the stand taken by the respondent:

"31. … The National Electricity Policy which imply that the distribution licensees are to buy power directly from generation companies.

xx xx xx

"5.3.3 Open access in transmission has been introduced to promote competition amongst the generating companies who can now sell to different distribution licensees across the country. This should lead to availability of cheaper power".

xx xx xx

"5.3.4. The Act prohibits the State transmission utilities/transmission licensees from engaging in trading in electricity. Power purchase agreements (PPAs) with the generating companies would need to be suitably assigned to the Distribution Companies, subject to mutual agreement. To the extent necessary, such assignments can be done in a manner to take care of different load profiles of the Distribution Companies."

xx xx xx

"5.7.1 To promote market development, a part of new generating capacities, say 15% may be sold outside long-term PPAs. As the power markets develop, it would be feasible to finance projects with competitive generation costs outside the long-term power purchase agreement framework. In the coming years, a significant portion of the installed capacity of new generating stations could participate in competitive power markets. This will increase the depth of the power markets and provide

alternatives for both generators and licensees/consumers and in long run would lead to reduction in tariff."

xx xx xx

Tariff Policy

"5.1 Introducing competition in different segments of the electricity industry is one of the key features of the Electricity Act, 2003. Competition will lead to significant benefits to consumers through reduction in capital costs and also efficiency of operations. It will also facilitate the price to be determined competitively. The Central Government has already issued detailed guidelines for tariff based bidding process for procurement of electricity by distribution licensees for medium or long-term period vide gazette notification dated 19th January, 2005.

xx xx xx

All future requirement of power should be procured competitively by distribution licensees except in cases of expansion of existing projects or where there is a State controlled/owned company as an identified developer and where regulators will need to resort to tariff determination based on norms provided that expansion of generating capacity by private developers for this purpose would be restricted to one time addition of not more than 50% of the existing capacity."

xx xx xx

8.4 Definition of tariff components and their applicability

1. …… xx xx xx

2. The National Electricity Policy states that existing PPAs with the generating companies would need to be suitably assigned to the successor distribution companies. The State Governments may make such assignments taking care of different load profiles of the distribution companies so that retail tariffs are uniform in the State for different categories of consumers. Thereafter the retail tariffs would reflect the relative efficiency of distribution companies in procuring power at competitive costs, controlling theft and reducing other distribution losses.

3. …. xx xx xx

4. … xx xx xx

xx xx xx

47. In our considered view the construction placed by the 1st respondent on the above portions of The National Electricity Policy / National Electricity Plan or Tariff Policy, cannot be sustained, as such a construction cannot be spelt out from the above policies. Even assuming so, and to construe such, so the policy will be ultra vires the statutory provisions of The Electricity Act, 2003. The policy etc. are guidelines indicated as an object to be achieved in the power sector and being a policy or guideline, it cannot run counter to the legislative mandate nor such a course is

permissible to a delegatee to over turn the legislative enactment much less as a whole.

48. On a consideration of the above passage relied upon by the 1st respondent, the construction placed by the 1st respondent is neither called for nor permissible nor acceptable to us. The interpretation placed on the said policy, plan and tariff policy cannot be sustained. In exercise of power conferred under Section 3, the Central Government has issued the National Electricity Policy, National Electricity Plan and Tariff policy and the 1st respondent, Commission, is obviously guided by the said policy, plan and tariff policy. The scope of these policies cannot be read so as to overturn the statutory provisions of the 2003 Act. But the construction placed by the 1st respondent on such policy/plan as set out in reply and written arguments cannot be sustained in the light of our discussions. The Central Government is very much aware of the scope and purpose of these policy/plan and it has nowhere provided so, as sought to be contended by Mr. Dhingra.

49. One another provision which was relied upon by 1st respondent is Section 63, under which Central Government has issued guidelines with respect to process of bidding. Section 63 is an exception to Section 62 and the guidelines will operate only when an appropriate Commission

adopt the bidding process for tariff and such tariff is determined by transparent process of bidding in accordance with the guidelines. The guidelines issued have no relevance nor does it have a bearing on the present case. It is a misconception to rely upon guidelines issued by Ministry of Power in terms of Section 63, which apply only when tariff is to be determined by bidding process. .

50. It is a settled law that the statutory rule / Regulation which does not confirm to the provisions of the statute under which it is made or does not come under the scope of rule making power is void. It is equally the settled legal position that the rule, regulation or notification validly made under the Act should be regarded as a part and parcel of the statute and should be regarded as one contained in the Act itself.

51. In *ITW Signode India Ltd. v. CCE, (2004) 3 SCC 48 : (2003) 158 ELT 403,* the Hon'ble Supreme Court held a rule framed under the primary act even in case of conflict must give way to the substantive provisions of the statute. In case of a conflict between a substantive Act and delegated legislation, the former shall prevail in as much as delegated legislation must be read in the context of the primary / legislative Act and not vice versa.

52. In St. *Johns Teachers Training Institute v. Regional Director, NCTE, (2003) 3 SCC 321 : AIR 2003 SC 1533: (2003) 2 SLR 301*, the Hon'ble Supreme Court has laid and explained the scope and nature of subordinate legislation :

"Rules and regulations are all comprised in delegated legislation. The power to make subordinate legislation is derived from the enabling Act and the delegate on whom such a power is conferred has to act within the limits of authority conferred by the Act. Rules cannot be made to supplant the provisions of the enabling Act but to supplement it. What is permitted is the delegation of ancillary or subordinate legislative functions, or, what is fictionally called, a power to fill up details. The legislature may, after laying down the legislative policy confer discretion on an administrative agency as to the execution of the policy and leave it to the agency to work out the details within the framework of policy. The need of delegated legislation is that it is framed with care and minuteness when the statutory authority making the rule, after coming into force of the Act, is in a better position to adapt the Act to special circumstances. Delegated legislation permits utilization of experience and consultation with interests affected by the practical operation of statutes. Rules and regulations made by reason of the specific power conferred by the statutes to make rules and regulations establish the pattern of conduct to be followed.

Regulations are in aid of enforcement of the provisions of the statute. The process of legislation by departmental regulations saves time and is intended to deal with local variations and the power to legislate by statutory instrument in the form of rules and regulations is conferred by Parliament. The main justification for delegated legislation is that the legislature being overburdened and the needs of the modern-day society being complex, it cannot possibly foresee every administrative difficulty that may arise after the statute has begun to operate. Delegated legislation fills those needs. The regulations made under power conferred by the statute are supporting legislation and have the force and effect, if validly made, as an Act passed by the competent legislature."

53. Let us also not forget the dichotomy maintained between statutory provision in the Act rules and regulations on the one hand, and the policy guidelines/tariff and administrative instructions issued by the government on the other. It is useful to refer to the pronouncement of the Hon'ble Supreme Court in *Sukhdev Singh v. Bhagatram Sardar Singh Raghuvanshi, (1975) 1 SCC 421:*

"Broadly stated, the distinction between rules and regulations on the one hand and administrative instructions on the other is that rules and regulations can be made only after reciting the source of power whereas

administrative instructions are not issued after reciting source of power. Second, the executive power of State is not authorized to frame rules under Article 162. The Supreme Court held that the Public Works Department Code was not a subordinate legislation [see G.J. Fernandez v. State of Mysore, (1967) 3 SCR 636: AIR 1967 SC 1753]. The rules under Art. 309 on the other hand constitute not only the constitutional rights of relationship between the State and the government servants but also establish that there must be specific power to frame rules and regulations."

54. It is also a settled law that while making subsidiary law the delegate or legislation cannot widen or restrict the scope of Act or the policy there under. In A*gricultural Market Committee v. Shalimar Chemical Works Ltd., (1997) 5 SCC 516,* the Hon'ble Supreme Court held thus :

"*The power of delegation is a constituent element of the legislative power as a whole under Article 245 of the Constitution and other relative articles and when the legislatures enact laws to meet the challenge of the complex socio-economic problems, they often find it convenient and necessary to delegate subsidiary or ancillary powers to delegates of their choice for carrying out the policy laid down by the Acts as part of the Administrative Law. The essential legislative function consists of the determination of the*

legislative policy and the legislature cannot abdicate essential legislative function in favour of another. Power to make subsidiary legislation may be entrusted by the legislature to another body of its choice but the legislature should, before delegating, enunciate either expressly or by implication, the policy and the principles for the guidance of the delegates. These principles also apply to taxing statutes. The effect of these principles is that the delegate which has been authorized to make subsidiary rules and regulations has to work within the scope of its authority and cannot widen or constrict the scope of the Act or the policy laid down there under. It cannot, in the garb of making rules, legislate on the field covered by the Act and has to restrict itself to the mode of implementation of the policy and purpose of the Act."

55. In the light of the above pronouncements of Hon'ble Supreme Court, we are unable to sustain the contention advanced on behalf of 1st respondent as well as its claim that it has the jurisdiction or authority or it is obligatory for it or it should impose the condition as imposed in Para 17(a) of the impugned order, since it runs counter to statutory provisions of The Electricity Act, 2003 as well as legislative the policy and mandatory provisions of the Act as reflected in the objects/objectives extracted supra.

56. What has been contemplated or provided for in Section 79 1(b) is to regulate the tariff of generating companies, if such a contingency arises for fixation of tariff for such generating companies in case of a generating company having a composite scheme of generation and sell electricity in more than one State. This obviously means that when sale of power takes place by the generator and with whom should the said utility / Discom, should have a uniform purchase price for such Discoms / utilities, the legislature has enabled the Central Commission to regulate the tariff of such generating companies and not otherwise.

57. The sales by a generating company takes place at the bus bar of the generating company and in some cases depending upon the terms of the contract where the sale takes place depends upon the contract / PPA entered between the generator and the Discom or trader or transmitter. There is time enough to examine the same as and when a contingency arises.

58. Further the reliance placed by the first respondent on the Government's clarification also in no way advance the contention advanced on behalf of the 1st respondent. Such a clarification, assuming to support the first respondent it is not legally sustainable as the first respondent, a statutory authority, is bound to exercise powers in terms of statutory

powers contained in The 2003 Act only. Already Government has issued Tariff Policy, National Electricity Policy, it is not known as to what required the 1st respondent to seek for clarifications. Seeking such clarification is not permissible nor it is provided for in The Electricity Act, 2003 nor is it open to statutory authority like first respondent to seek such clarification and abdicate its authority and power, which it has to exercise as a statutory Quasi Judicial Authority.

59. We have already referred to the statutory provisions of part II & III of the Act. While interpreting the provisions of the said two parts, every endeavor has to be made to discover the true legislative intent. In this respect, in *Nathi Devi v. Radha Devi Gupta, (2005) 2 SCC 271 : AIR 2005 SC 648* a five Judges Bench of the Hon'ble Supreme Court, after analyzing the entire case law, held thus :

"The interpretative function of the court is to discover the true legislative intent. In interpreting a statute the court must, if the words are clear, plain, unambiguous and reasonably susceptible to only one meaning, give to the words that meaning, irrespective of the consequences. Those words must be expounded in their natural and ordinary sense. In such a case no question of construction of statute arises, for the Act speaks for itself. Literal interpretation should be given to a statute if the same does not lead

to an absurdity. Even if there exists some ambiguity in the language or the same is capable of two interpretations, it is trite that the interpretation which serves the object and purport of the Act must be given effect to. In such a case the doctrine of purposive construction should be adopted. Courts are not concerned with the policy involved or that the results are injurious or otherwise, which may follow from giving effect to the language used. If the words used are capable of one construction only then it would not be open to the courts to adopt any other hypothetical construction on the ground that such construction is more consistent with the alleged object and policy of the Act. In considering whether there is ambiguity, the court must look at the statute as a whole and consider the appropriateness of the meaning in a particular context avoiding absurdity and inconsistencies or unreasonableness, which may render the statute unconstitutional. Moreover, effort should be made to give effect to each and every word used by the legislature. The courts always presume that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. A construction which attributes redundancy to the legislature will not be accepted, except for compelling reasons such as obvious drafting errors."

60. We have already extracted the object with which the 2003 Act was brought in and also refer to substantive provisions of the Act by which

the legislature has introduced innovative measures in the field of generation, transmission and distribution of electric energy, besides enabling the private sector to come forward to engage itself in the generation, transmission as well as distribution of electric energy and trade. While construing the statutory provisions, we are bound to construe the provisions after ascertaining the legislative intent and the context and scheme of the Act.

61. In *Reserve Bank of India v. Peerless General Finance & Investment Co. Ltd., (1987) 1 SCC 424 :* a Division Bench of the Hon'ble Supreme Court held thus :

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual. A statute is best interpreted when we know why it was enacted. With this knowledge, the statute must be read, first as a whole and then section by section, clause by clause, phrase by phrase and word by word. If a statute is looked at, in the context of its enactment, with the glasses of the statute-maker, provided by such context, its scheme, the sections, clauses, phrases and words may take colour and appear

different than when the statute is looked at without the glasses provided by the context. With these glasses we must look at the Act as a whole and discover what each section, each clause, each phrase and each word is meant and designed to say as to fit into the scheme of the entire Act. No part of a statute and no word of a statute can be construed in isolation. Statutes have to be construed so that every word has a place and everything is in its place".

62. In interpreting the legislation, it has been held that a delegated legislation should be read in a manner so as to give effect to the statute. The Hon'ble Supreme Court in *Ramesh Mehta v. Sanwal Chand Singhvi, (2004) 5 SCC 409* held thus :

"A subordinate or delegated legislation must also be read in a meaningful manner so as to give effect to the provisions of the statute. In selecting the true meaning of a word regard must be had to the consequences leading thereto. If two constructions are possible to adopt, a meaning which would make the provision workable and in consonance with the statutory scheme should be preferred."

63. In the light of the above binding precedents and the law laid down by Hon'ble Supreme Court the interpretation placed and contentions

advanced on behalf of the 1st respondent, in our considered view is not sustainable and the contentions advanced and interpretation placed by the counsel appearing for the appellant on various provisions of 2003 Act deserves to be sustained. We are not pursued to accept the arguments advanced by Mr. Dhingra, Chief (Law) appearing for 1st respondent, Commission, who vociferously strained himself in advancing many novel contentions and untenable interpretations of his own.

64. In fact we do not find such reasoning on the face of the order and whatever sought to be advanced at the time of hearing and set out in the counter, is a special pleading of Mr. Dhingra and ex-facie we do not find such a consideration or reference or view by the first respondent Commission, much less in detail with specific reference to policy. Be that so, the interpretation placed on a substantive provision of the Act as well as Regulation 17 and the Electricity Policy, Tariff Policy and Plan by the first respondent in no way cannot be sustained and they support the contentions advanced on behalf of the 1st respondent and we repel the same untenable.

65. The first respondent in pares 15 to 17 of the order dated 22.6.06 was satisfied and has accepted the claims of the second respondent on

merits, which would unhesitatingly enable the second respondent to have an order as prayed for.

66. Further, as rightly point out the condition 17 (a) imposed by first respondent has neither been disclosed nor discussed nor the parties were put on notice of the proposal to impose such a condition at any stage of the proceeding by first respondent. This is an obvious procedural irregularity and error, which also stares at the impugned proceedings passed by the first respondent as violating the fair procedure.

67. The contention advanced on behalf of the first respondent that condition 17 (a) is just a regulatory, measure cannot be sustained as such a regulation is not contemplated either under 79 (1)(a) or 79 (1) (b) under any other provision of the Act. Therefore, it not necessary to advert to the various pronouncements relied upon by Mr. Dhingra in this respect to the facts of this case. It is not a regulation relating to sale that is contemplated by Sec. 79 (1) (b) of The Act.

68. Before parting, we allow the amendment of cause title prayed for in appeal No. 230 of 2006 and the contentions of the first respondent that the appellant in appeal No. 230 of 2006 has no license to trade is not

acceptable and the claim advanced by the appellant in the said appeal deserves to be sustained.

69. In the result, in the light of our discussions, we answer the points as under:

i) On Point A, we hold that the condition imposed by the first respondent in Para 17 (a) of its order is ordered to be set aside as it is in-excess of jurisdiction, without authority and it is ordered to be deleted apart from setting aside the consequential directions set out in Para 18 and 20 of the impugned order of the first respondent.

ii) On Point B we hold that the IPPs cannot be directed or compelled to enter into PPA directly with distribution utilities exclusively and restriction imposed with respect to sale of power to licensed trader is set aside. The condition imposed in Para 17 (a) is not sustainable, apart from being not in conformity with the provisions of The Electricity Act 2003.

iii) On Point C, the Regulation 17 of CERC Regulations in no way enables or confer power on the said first respondent commission to impose such conditions while passing orders in a petition filed by second respondent under sec. 79 (i)(b) of The Electricity Act 2003.

iv) Point D is answered in favour of the appellant holding that there is violation of fair procedure and it is an irregularity.

v) On Point E, we hold that the provisions of The Electricity Act, 2003, the regulations framed by CERC, the National Electricity Policy and Plan and National Tariff Policy neither provides nor contemplates imposition of condition 17(a) as well as consequential directions as order by the first respondent.

vi) On Point F, we allow both the appeals as prayed for but without costs.

Pronounced in the open court on this 23rd day of November, 2006.

(Mr. H. L. Bajaj)
Technical Member

(Mr.Justice E Padmanabhan)
Judicial Member