* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% **Order reserved on: 24.05.2022**
Order pronounced on: 01.06.2022

\+ W.P.(C) 5340/2022, CM APPL. 15969/2022(Interim Direction), CM APPL. 15970/2022(Permission)

BSES RAJDHANI POWER LTD & ANR. ..... Petitioners

Through: Mr. Sandeep Sethi, Sr. Adv. with Mr.Amit Kapur, Mr. Buddy A. Ranganadhan, Mr. Rahul Kinra, Mr.Aditya Ajay, Mr. Aditya Gupta, Ms. Manu Tiwari, Advs.

Versus

NORTHERN REGIONAL POWER COMMITTEE & ORS. ..... Respondents

Through: Mr. Chetan Sharma, ASG with Mr. Kirtiman Singh, CGSC with Mr.Arnav Kumar, CGSC, Waize Ali Noor and Ms. Srirupa Nag, Ms. Kunjana Bhardwaj, Ms.Manmeet Kaur, Advs for UOI.

Mr. Arnav Kumar, CGSC with Mr.Gurdas Khurana, Advs. for UOI

Mr. Sajan Poovayya, Sr. Adv. with Mr. Shri Venkatesh, Mr. Jayant Bajaj, Ms. Kanika Chugh, Mr.Rishabh Sehgal, Mr. Ashutosh K. Srivastava, Mr. Nihal Bhardwaj, Advs. for intervenor.

Mr. C. Aryama Sundaram, Sr. Adv. with Ms. Swapna Seshadri, Ms. Ritu Apurva and Mr. Jai Dhanani, Advs. for NTPC.

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Mr. Rahul Mehra, Sr. Adv. with Mr. Satyakam, ASC and Mr. Anuj Agarwal, ASC, Mr. Chaitanya Gosain, Mr. Sanyam Suri, Advs. for R-5.
Mr. Samir Malik, Ms. Nikita Choukse, Mr. Sahel Sood, Mr.Manoj Kaushik, Mr. Krushnan Kumar, Advs. for R-6.
Mr. Sanjeev Mahajan, Adv. for R-7.

\+ W.P.(C) 6735/2022, CM APPL. 20433/2022(Direction)

TATA POWER DELHI DISTRIBUTION LIMITED ..... Petitioner

Through: Mr. Sajan Poovayya, Sr. Adv. with Mr. Shri Venkatesh, Mr. Jayant Bajaj, Ms. Kanika Chugh, Mr.Rishabh Sehgal, Mr. Ashutosh K. Srivastava, Mr. Nihal Bhardwaj, Advs.

Versus

NORTHERN REGIONAL POWER COMMITTEE & ORS.
..... Respondents

Through: Mr. Chetan Sharma, ASG with Mr. Apoorv Kurup, CGSC with Ms.Nidhi Mittal, Ms. Aparna Arun, Adv. for R-2.
Mr. Basava Prabhu Patil, Sr. Adv. with Mr. Geet Ahuja, Ms. Swapna Deshadri and Ms. Ritu Apurva, Advs. for NTPC.
Mr. Rahul Mehra, Sr. Adv. with Mr. Satyakam, ASC and Mr. Anuj Agarwal, ASC, Mr.Chaitanya Gosain, Ms.Aishwarya Sharma, Mr. Sanyam Suri, Advs. for R-5.

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Mr. Samir Malik, Ms. Nikita Choukse, Mr.Sahel Sood, Mr.Manoj Kaushik, Mr.Krushnan Kumar, Advs. for R-6.
Mr. Sanjeev Mahajan, Adv. for R-7.

CORAM:
HON'BLE MR. JUSTICE YASHWANT VARMA

O R D E R

1. By this order, the Court proceeds to deal with the prayer for vacation of the interim order of 30 March 2022 as addressed on behalf of the respondents. These two writ petitions preferred by the DISCOMS of Delhi lay challenge to an order of 29 March 2022 passed by the **Ministry of Power**[1] allocating the share of the **Government of NCT of Delhi**[2] in the power generated by the **National Thermal Power Corporation Limited**[3] Thermal Power Station named "Dadri-II" to the State of Haryana.

2. The writ petition by BSES came up before the Court on 30 March 2022. On the said date, the Court took note of the submissions addressed on behalf of the petitioners in challenge to the order of 29 March 2022 and proceeded to pass the following interim order: -

> "1. Notice shall issue to the respondents. Since respondent Nos. 1 to 5 and 7 are duly represented by learned counsel, formal notice stands waived. Let learned counsels obtain instructions and address submissions on the date fixed. Dasti notice shall issue to respondent Nos. 6 and 8. Mr. Singh appearing on advance notice and representing the Union respondents prays for the matter being put up on 1 April 2022 in order to

[1] MoP
[2] GNCTD
[3] NTPC

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enable him to obtain instructions.

2. BSES Rajdhani Power Limited, a DISCOM, has petitioned this Court challenging the order of 29 March 2022 passed by the Ministry of Power which alluding to a purported surrender of power generated by the Dadri-II Thermal Power Station by GNCTD has transferred the same to the State of Haryana.

3. Mr. Sethi, learned senior counsel appearing for the petitioners, has submitted that the aforesaid order is wholly without jurisdiction since no power inheres in the respondents to reallocate power that forms part of the allocation made in favour of the petitioner and duly approved by the Delhi Electricity Regulatory Commission. The recital in the impugned order of GNCTD having surrendered power is also disputed with learned counsel drawing the attention of the Court to its communication noticed in the order of 07 October 2021. The surrender which was contemplated in terms of that communication was with respect to the Dadri-I Thermal Power Plant alone. The attention of the Court is also drawn to the order of the Delhi Electricity Regulatory Commission of 30 March 2022 which categorically records that the Commission had not communicated any request to the Ministry of Power to either re-allocate or surrender the share of NCT from Dadri-II to other States. That order also takes note of the Power Purchase Agreement executed between the petitioning DISCOMS with NTPC which are valid up to 30 July 2035. The Court additionally takes note of the changed statutory regime ushered in by virtue of the Electricity Act, 2003 and the jurisdictional and pivotal function assigned to the respective Electricity Regulatory Commissions and more particularly Section 86 of that Act.

4. Mr. Sethi submits that if the order impugned here were to be implemented, 23% of the populace of the National Capital would be deprived of power in the next 24 hours. The Court also takes notes of the averments made in paragraph 5 of the writ petition where the petitioners aver that the impugned order would, if permitted to operate, come into effect from 00:00 hours on Friday 1 April 2022. The resultant deficiency would have to be arranged before 10:00 A.M. on Thursday i.e. 31 March 2022. Matter requires consideration.

Till the next date of listing, there shall be stay of the impugned order of 29 March 2022. “

3. As is evident from the order passed on that date, the Court essentially took into consideration the submission that the allocation of power in favor of GNCTD from out of the total capacity of Dadri-II was essential to

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maintain the required supply in the National Capital Territory. The Court was apprised that in case the impugned order were to come into effect, 23% of the populace of Delhi would be deprived of power in the next 24 hours. It further noted the assertion of the petitioner that the allocated power formed part of the **Power Purchase Agreements**[4] between the petitioner and NTPC and which had been duly approved by the **Delhi Electricity Regulatory Commission**[5]. That PPA admittedly is valid upto 30 July 2035. Bearing in mind the aforesaid facts, the Court had placed the impugned order of 29 March 2022 in abeyance.

4. Pursuant to the notices issued on that petition, the respondents have filed their counter affidavits. Connected W.P.(C) 6735/2022 came to be filed subsequently and was tagged with the main writ petition. That petition too assails the order dated 29 April 2022 on grounds similar to those which are raised in the lead matter. Although learned counsels appearing for respective parties have addressed lengthy submissions on the issues which arise in these two writ petitions, it was agreed that the issue of vacation/modification or affirmation of the interim order of 30 March 2022 be considered and decided at the outset. It is in the aforesaid backdrop that the Court heard learned Senior Counsels appearing for the respective parties and by means of the present order proceeds to deal with the prayer for vacation of the interim order.

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[4] PPA
[5] DERC

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5. Learned ASG appearing for the MoP has submitted that the authority to allocate power from **Central Generating Stations**[6] lies solely and exclusively within the domain of the Union Government. It was contended that the aforesaid power is exercised by the Union Government by virtue of the provisions of Article 73 of the Constitution. Learned ASG contends that neither the DERC nor GNCTD or for that matter the DISCOMS can have any say in respect of the exercise of power by the Union in this regard. According to the learned ASG, a **State Electricity Regulatory Commission**[7] discharging functions and exercising powers under Section 86 of the **Electricity Act, 2003**[8] cannot be recognised to have any jurisdiction to interfere with the exercise of authority by the Union Government. Learned ASG has in support of the aforenoted contention placed reliance on the decision of the Supreme Court in **Central Powers Distribution Company vs. Central Electricity Regulatory Commission**[9] and more particularly paragraph 17 of the report which reads thus: -

> "17. In our view, the aforesaid contention is thoroughly misconceived. Simdahri Station is owned and controlled by NTPC which is a Government of India undertaking. Section 79(1)(a) of the Act contemplates that the Central Commission has jurisdiction over generating companies owned or controlled by the Central Government. In view thereof, the provisions under Section 86 cannot be applied for NTPC station. The various sections under the Electricity Act would clearly show beyond any doubt the powers of Central Commission and jurisdiction in regard to the Grid, the scheduling and dispatch."

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[6] CGS
[7] SERC
[8] 2003 Act
[9] 2007 (8) SCC OnLine 7

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6. Learned ASG further submitted that the power of regulation as conferred upon a SERC cannot extend to it regulating or adjudicating upon the power of the Union to allocate power produced by a CGS. To buttress the aforesaid submission, learned ASG drew the attention of the Court to the following principles as enunciated by the Supreme Court in **Tata Power Company Limited vs. Reliance Energy Limited and Ors.**[10] and more particularly on paragraph 107 which is reproduced hereinbelow: -

> "107. While exercising its power of "regulation" in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section 86(1)(*b*) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament."

7. The attention of the Court was also drawn to the subsequent decision of the Supreme Court in **Energy Watchdog v. CERC**[11] where it was observed as follows: -

> "24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central

[10] (2009) 16 SCC 659
[11] (2017) 14 SCC 80

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> Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State."

8. Learned ASG then submitted that in terms of the **Central Electricity Regulatory Commission (Terms and Conditions for Tariff) Regulations, 2019**[12] and more particularly Note I falling in Chapter 13 of those Regulations, it is manifest that the power to allocate electricity generated from a CGS falls within the exclusive domain and authority of the Union Government. According to the learned ASG, the authority to allocate is exercisable exclusively by the Union Government based on its independent assessment of the needs of various States and regions of the country. Similarly, it was contended, that where a particular State chooses to surrender its share of that allocation, the distribution of the surrendered share is to be undertaken by the Union Government. Notes I and II contained in the 2019 Regulations on which reliance was placed are extracted hereinbelow: -

> "Note 1
> Shares or allocations of each beneficiary in the total capacity of Central sector generating stations shall be as determined by the Central

[12] 2019 Regulations

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

Note 2
The beneficiaries may propose surrendering part of their allocated firm share to other States within or outside the region. In such cases, depending upon the technical feasibility of power transfer and specific agreements reached by the generating company with other States within or outside the region for such transfers, the shares of the beneficiaries may be re-allocated by the Central Government for a specific period (in complete months) from the beginning of a calendar month. When such reallocations are made, the beneficiaries who surrender the share shall not be liable to pay capacity charges for the surrendered share. The capacity charges for the capacity surrendered and reallocated as above shall be paid by the State(s) to whom the surrendered capacity is allocated. Except for the period of reallocation of capacity as above, the beneficiaries of the generating station shall continue to pay the full capacity charges as per allocated capacity shares. Any such reallocation and its reversion shall be communicated to all concerned by the Member Secretary, Regional Power Committee in advance, at least three days prior to such reallocation or reversion taking effect."

9. The learned ASG submitted that undisputedly GNCTD had in terms of the communication of 06 July 2015, permanently surrendered its allocated power from Dadri-II. Referring to the letters of 06 July 2015 and 22 January 2016, it was contended that there was an unequivocal surrender of the allocated power from Dadri-II permanently and for all times to come. In view of the aforesaid, learned ASG submits that it is not open to either

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GNCTD or the DISCOMS to now turn around and allege that the allocation made by the Union in favour of the State of Haryana is either illegal or arbitrary.

10. It was further submitted that consequent to the surrender as made by the GNCTD, the Union had allocated power from Dadri-II on six different occasions without any demur or protest being raised by GNCTD. The attention of the Court was drawn to the following details of allocation of power surrendered by GNCTD as set forth in paragraph 7 of the affidavit which reads thus: -

SI No.	**MoP Letter Number**	**Date**	**Reason for revision in Delhi's firm share**
1.	No.3/8/ 2016-OM	13.04.2016	1 MW allocated each to HYDC Balia and HYDC Bhiwadi
2.	No.3/8/ 2016-OM	01.08.2016	2.72 MW allocated to HYDC Kurukshetra
3.	No.3/8/ 2018-OM	28.09.2018	Additional 2.72 MW allocated to HYDC Kurukshetra (Total : 5.45 MW)
4.	No.3/6/ 2019-OM	30.08.2019	575.8 MW allocated to Andhra Pradesh from 01.09.2019 to 30.09.2019
5,	No.3/8/ 2019-OM(Part-I)	08.12.2020	0.8 MW allocated to HYDC Dadri
6.	No.3/8/ 2019-OM	17.03.2021	Allocation to HYDC Kurukshetra reduced from 5.45 MW to 3.5MW

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11. It was then submitted that post the surrender of power from Dadri-II by GNCTD, the Union had duly published the details thereof on numerous occasions to enable other needy States to avail of the same. It was submitted that the factum of GNCTD having surrendered power and the same being available for allocation by the Union was duly notified by MoP on 06 May 2016, 06 February 2019 and additionally on 07 October 2021. It was submitted that at no point of time, did GNCTD raise any objection to the proposed re-allocation of surrendered power of Dadri-II. It was further contended that in any case GNCTD at no point of time withdrew its original communication of 06 July 2015 and thus it cannot be said that it was either taken by surprise or that the allocation of surrendered power to the State of Haryana suffers from any illegality.

12. Learned ASG lastly contended that the allocation of power from CGS's to various States is in essence an executive decision taken by the Union and constitutes a policy measure. It was submitted that unless it is established that a policy is manifestly arbitrary or unjust, it would warrant no interference by the Court in exercise of its power of judicial review. According to the learned ASG, the petitioners have abjectly failed to establish that the action of the Union suffers from manifest arbitrariness. It was submitted that in view of the above, the interim order of the Court is liable to be discharged forthwith especially bearing in mind the imperative needs of the State of Haryana which were taken into consideration by the Union while making the impugned allocation.

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13. Mr. Sundaram, learned Senior Counsel appearing for the NTPC, submitted that the petitioners have failed to establish any arbitrariness or perversity in the re-allocation of power generated from Dadri-II station and which had originally been allocated to GNCTD. It was submitted that the re-allocation of power by the Union is essentially the exercise of a sovereign function and would merit no interference by the Court, since the power of judicial review does not contemplate Courts substituting their own views for that of the policy maker or the Legislature. The attention of the Court was drawn to the Gadgil Formula named after Dhananjay Ramchandra Gadgil, the then Deputy Chairman of the Planning Commission and which had put in place a methodology for allocation of electricity generated by CGS's way back in 1990. Mr. Sundaram further drew the attention of the Court to the policy documents of 27 April 2000 and 22 March 2021 governing the issue of distribution of power amongst States and contended that it is manifest that such allocation falls within the exclusive domain of the Union Government by virtue of the provisions of Article 73 of the Constitution. Mr. Sundaram submitted that significantly no provision of the 2003 Act regulates or controls the authority of the Union to distribute power generated by CGS's amongst the various States of the Union. According to learned Senior Counsel, this power stands exclusively reserved to be exercised by the Union and is not controlled or subject to any provision of the 2003 Act. According to Mr. Sundaram, the power of the Union Government to allocate power from CGS's is also not subject to review or control by any statutory authority constituted under the 2003 Act. It was submitted that the said decision of the Union Government is neither

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statutorily correctible nor can it by any stretch of imagination be said that the subject is occupied by any part or component of the 2003 Act.

14. Mr. Sundaram would contend that viewed in that backdrop the authority of the Union Government in this respect cannot in any case be interpreted to be controlled or regulated by the DERC. It was submitted that Section 86(1)(b) of the 2003 Act empowers the DERC to only regulate the purchase, procurement and distribution of electricity within the State in accordance with agreements for purchase of power that may be drawn and approved by it. Mr. Sundaram submits that Section 86(1)(b) of the 2003 Act cannot in any case be read as empowering the DERC to regulate the power of the Union to distribute electricity generated by CGS's amongst the various States. Referring to the principles enunciated by the Supreme Court in **Tata Power**, Mr. Sundaram submitted that the Supreme Court has clearly and unequivocally held that the authority to allocate power cannot be subject to regulatory control as conferred upon a SERC under Section 86(1)(b). Reliance was placed on the following passages from the decision in **Tata Power**: -

> "106. The scheme of the Act, namely, the generation of electricity is outside the licensing purview and subject to fulfilment of the conditions laid down under Section 42 of the Act a generating company may also supply directly to consumer wherefor no licence would be required, must be given due consideration. The said provision has to be read with Regulation 24. In regard to the grant of approval of PPA the procedures laid down in Regulation 24 are required to be followed.
>
> 107. <u>While exercising its power of "regulation" in relation to purchase of electricity and procurement process of distribution, it is not permissible for the Commission to direct allocation of electricity to different licensees keeping in view their own need. Section</u>

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86(1)(*b*) read with Section 23 if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who had not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament.

Interpretation of Section 86

111. Section 86(1)(*b*) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine the tariff for generation as also in relation to supply, transmission and wheeling of electricity. Clause (*b*) of sub-section (1) of Section 86 provides to regulate electricity purchase and procurement process of distribution licensees including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements. As a part of the regulation it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement.

120. (1) Activities of a generating company are beyond the purview of the licensing provisions.

(*2*) Parliament therefor did not think it necessary to provide for any regulation or issuance of directions except that which have expressly been stated in the Act.

(*3*) Section 21 occurs in the chapter of "licensing" under which the generating companies would not be governed.

(*4*) As almost all the sections preceding Section 23 as also Section 24 talk about licensee and licensee alone, the word "supply" if given its statutorily defined meaning as contained in Section 2(70) of the Act would lead to an anomalous situation as by reason thereof supply of electrical energy by the generating company to the consumers directly in terms of Section 12(2) of the Act as also by the transmission companies to the consumers would also come within its purview.

(*5*) In a case of this nature the principle of exclusion of the definition of section by resorting to "unless the context otherwise requires" should be resorted to.

(*6*) Section 86(1)(*a*) of the 2003 Act clearly shows the parameters of supply for the purpose of regulation viz. supply of electricity by the distribution company to the consumer.

(*7*) If regulatory clause is sought to be applied in relation to allocation of power, the same would defeat the delicensing

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provisions. Generating companies have the freedom to enter into contract and in particular long-term contracts with a distribution company subject to the regulatory provisions contained in the 2003 Act.

(*8*) PPA for a long term is essential for increasing and decreasing the capacity of generation of electricity by the generating company, which purpose by the 2003 Act must be allowed to be achieved.

(*9*) Duration of the contract in regard to supply of electricity by and between TPC (G) and RInfra prior to coming into force of the contract is of no consequence, particularly when no written long-term or short-term contract had been entered into by and between them.

(*10*) Fairness or otherwise of the supply of electricity to different distribution companies being outside the jurisdiction of the Commission, the same by itself cannot be a ground for bringing back the licence raj, which is not contemplated by the Act.

(*11*) For true and correct construction of the Act, the principle of harmonious construction is required to be resorted to.

(*12*) Recourse to the principle of purposive construction does not militate against the conclusion reached by us and as indicated hereinbefore in fact in terms of the said doctrine the purpose and object of Parliament must prevail over a narrow and/or literal interpretation, which would defeat the purpose and object of the Act.

(*13*) Section 86(1)(*b*) of the 2003 Act clearly shows that the generating company indirectly comes within the purview of regulatory jurisdiction as and when directions are issued to the distributing companies by the appropriate Commission but the same would not mean that while exercising the said jurisdiction, the Commission will bring within its umbrage the generating company also for the purpose of issuance of separate direction……"

15. Turning then to the original PPA's which were executed between the NTPC and **Delhi Transco Limited**[13] dated 21 March 2007, Mr. Sundaram addressed the following submissions. It was submitted that undisputedly, it

[13] DTL

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was the nominal capacity of Dadri-II which was noted in that agreement and recorded to be 980 MW. Mr. Sundaram, drew the attention of the Court to Clause 2.2.1 of that Agreement to highlight the fact that 90% of the power from Dadri-II was decided to be allocated to DTL subject to the signing of an agreement for purchase of power. It was however underlined that the ultimate numerical quantification of power reserved for Delhi and which was mentioned as 882 MW in the aforesaid Clause was with reference to the total nominal capacity of Dadri-II. It was submitted that the allocation as set forth in Clause 2.2.1 was thus identified only against the total nominal capacity of Dadri-II as opposed to a numerical quantity of electricity generated. It is submitted that the ultimate allocation of power was in fact made by the Union in terms of its letter of 08 March 2011 which specified that Delhi would be entitled to 735 MW. It was further pointed out that the above allocation in terms of that communication was made subject to PPA's that may be executed between NTPC and State Power Utilities and any other directives or guidelines issued by the Union Government or the CERC from time to time. It was submitted that the power of the Union to ultimately decide on the question of allocation was clearly recognised in Clause 2.2.1 itself when it came to record that the final allocation of power by the Union Government would form an integral part of the PPA dated 21 March 2007. Mr. Sundaram further pointed out that subsequently and upon the restructuring of electricity utilities and when the subsequent Umbrella PPA of 05 June 2008 came to be executed, the terms of the original PPA were duly adopted.

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16. Mr. Patil, learned Senior Counsel, who also addressed submissions on behalf of NTPC submitted that GNCTD had never withdrawn the letter of 06 July 2015. It was submitted that the aforesaid communication clearly constituted a final and unreserved surrender of the power allocated to GNCTD from Dadri-II. In view of the aforesaid, Mr. Patil would submit that it is not open for GNCTD or the DISCOMS to now question the validity of the action of the Union in allotting the surrendered power to the State of Haryana. Mr. Patil further submitted that the DISCOMS operating in the NCT of Delhi had continually and right from 2016 addressed communications to the Union Government for the reallocation of power from Dadri-II to other needy States. Learned counsel also drew the Court's attention to the communication of 19 January 2016 in terms of which GNCTD had once again written to the Union Government expressing its desire to surrender power allocated to it from Dadri-II. It was pointed that the original letter of 06 July 2015 addressed by the Minister of Power of GNCTD was reiterated right upto 16 March 2021 by the DERC. In view of the aforesaid, learned Senior Counsel submitted that the challenge as raised in the present writ petition is thoroughly misconceived. Mr. Patil also asserted that the surrender of the share of GNCTD in the Dadri-II Station had been notified by the Union Government in 2016, 2019 and again on 07 October 2021. In view of the aforesaid, it was submitted that it cannot be said that the petitioners were taken completely by surprise or were unaware of the GNCTD's share in Dadri-II being available with the Union Government for reallocation. Mr. Patil then submitted that the DERC consistently and as would be evident from its communications of 16 March

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2021, 07 July 2021, 14 October 2021 and 09 October 2021 had written to the Union Government for surrender of the allocated power in favour of GNCTD relatable to Dadri-I. It was submitted that the aforesaid insistence on surrender of the Dadri-I allocation must also and necessarily be viewed in light of the fact that the cost of power of Dadri-I was lower than that of Dadri-II. Mr. Patil drew the attention of the Court to the following Table as appearing in paragraph 11 of the reply filed in these proceedings: -

"

SI No.	station	Capacity (MW)	Capacity Charges (Rs/KWh)	Variable Charges (Rs/KWh)	Total (Rs/KWh)
1.	Dadri-I	840	0.97	3.40	4.37
2.	Dadri-II	980	1.44	3.37	4.81

"

17. Learned Senior Counsel submitted that the fact that the petitioners here as well as GNCTD were insisting upon the surrender of power from Dadri-I clearly belies their contention that the National Capital would be deprived of essential power. It was submitted that the surrender of cheaper power from Dadri-I clearly demolishes the contention of the petitioners of a deficit power position in the National Capital. It was further urged that right from 01 April 2022, while the petitioner, on the one hand, had contended that the National Capital would be faced with disastrous circumstances in case Dadri-II power came to be reallocated, they had been continually selling electricity on the power exchange as per the details carried and disclosed in paragraph 19 of the written submissions. The table as placed therein is reproduced hereinbelow: -

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Jan-22		**Feb-22**		**Mar-22**		**Apr-22**		**May-22**	
VOL (Million Units)	Price Rs/Unit	VOL (Million Units)	Price Rs/Unit	VOL (Million Units)	Price Rs/Unit	VOL (Million Units)	Price Rs/Unit	VOL (Million Units)	Price Rs/Unit
137.61	2.66	91.26	3.21	94.34	5.53	122.78	8.7	51.68	8.61
48.97	3.3	47.52	4.38	60.08	8.67	157.79	9.34	71.04	7.42
186.58	5.96	138.78	7.59	154.42	14.2	280.57	18.04	122.72	16.03

18. Learned counsel representing the **Haryana Power Purchase Centre**[14], while praying for vacation of the interim order of 30 March 2022, has addressed the following submissions. Learned counsel submitted that right from 2015 when NCT of Delhi surrender power permanently, power from Dadri-II had been allocated on various occasions by MOP without the same being opposed by either the petitioners or GNCTD. It was pointed out that it was only on 29 October 2021 that the petitioner for the first time sought to renege from the surrender of power. Viewed in that backdrop, learned counsel would submit that no illegality was committed by the Union Government in allocating power to the State of Haryana.

19. Insofar as the allocation of power to the State of Haryana is concerned, it is submitted that an application for allocation of 728.68 MW from Dadri-II for the period April 2022 to October 2022 was submitted for the consideration of MoP on 24 March 2022. It was submitted that it was pursuant to the aforesaid request as submitted that power was allocated to the State of Haryana. Reference is also made to the critical power supply position which the State of Haryana is facing. The attention of the Court

[14] HPPC

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was invited to the communication of 05 April 2022 addressed to the Union Government on the basis of which it was contended that the said State was likely to face a severe power crisis unless the reallocation was upheld and the interim order vacated. The aforesaid letter is reproduced hereinbelow: -

"From

Chief Engineer
HPPC, Panchkula

To

Shri Ghanshyam Prasad
Joint Secretary/ OM, R & R
Ministry of Power, Govt. of India
Room no. 408, 4th Floor,
Shram Shakti Bhawan, Rafi Marg
New Delhi -110001
E- mail- g.prasad67@nic.in

Memo No Ch-102/HPPC/SE/C&R-1/XEN-LTP-1/NTPC/SP

Dated: 05.04.2022

Subject: Re-allocation of 728.68 MW Power to Govt. of Haryana out of surrendered share by Govt. of Delhi in Dadri-11 Station of NTPC regarding

This is in response to letter from Director (O.M), MoP, GoI dated 02.02.2022 whereby it has been requested to indicate the projected shortage or power during the period 01.04.2022 to 31.10.2022 if reallocation to Haryana is withdrawn from Dadri-II .

In this regard, it is submitted that Haryana State is experiencing critical power supply position due to outage of several generating stations with whom long term power purchase agreements exist for the capacities tabulated below:

Sr. No.	Name of Plant	Capacity in MW	Reason
1.	Adani	1424	Adani Power has expressed the non-viability or unit no. 7, 8 & 9 on 06.05.2021,01.07.2021& 25.08.2021 respectively.

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2.	CGPL Mundra	380	Non-viability expressed by CGPL and shut down its all units since 18.09.2021
3.	FGPP	432	FGPP units are generally under shut down due to nonavailabilityi of APM Gas"
4.	RGTPP-2	600	RGTPP-Unit 2 of 600 MW is under shut down since 19.09.2020 and there is uncertainty about the availability of the same.
	Total Outage	2836 MW	

Due to outage of ibid capacities, Haryana is deficit in power from the month of April 2022 lo October 2022 to the extent mentioned below:

Peak Demand Vs Availability Scenario for FY 2022-23 as on 29.03.2022

(Figures in MW)

Month	**Peak Demand in MW**	**Norative Availability as per PLF in MW**	**Normative Availability W/o Adani (1140), FGPP (367), RGTPP-2 (510) & CGPL (304) in MW**	**Banking arrangements in MW**	**Power through DEEP Portal in MW**	**Surplus (+)/ Deficti (-) in MW**
April' 22	9028	8963	6642	0	0	-2386
May' 22	9872	9256	6935	0	300	-2638
June' 22 (1st to 15th)	12026	10003	7682	0	400	-3944
June' 22 (16th to	12026	10003	7682	229	400	-3715

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30th)						
July' 22	12698	10123	7802	317	400	-4179
Aug' 22	11990	10272	7951	380	420	-3238
Sep' 22	12162	9700	7379	288	510	-3985
Oct' 22	9356	8816	6495	0	150	-2711

> From the above, it emerges that Haryana shall face shortage of power during summer/paddy season in FY 2022-23 to the tune of2300 MW to 4100 MW in various time slots of the day even after availing power through banking arrangements and short term power purchase; and this deficit is expected to be met from Exchange at high price. In order to meet the demand, HPPC had floated tender for procurement of power (750MW) on short term basis through DEEP portal from May'22 to Oct'22 wherein out of 750MW, approx. 400MW has been accepted by the prospective bidders. From the above, it is evident that there is very less power available with generators, which are willing to sell power in short term tenders.
>
> In view of above, Haryana may face shortage of power during forthcoming summer season therefore, it is humbly requested to make suitable arrangements of power for Haryana at the earliest."

20. Learned counsel further submitted that as per the petitioners, the peak load of Delhi as on 02 July 2021 was disclosed to be 7323 MW and likely to reach a maximum of 8200 MW. In contrast to the above, it was pointed out that the peak load in the State of Haryana as on 11 May 2022 was 9566 MW. It was pointed out that from the various disclosures made in the communication addressed to the Union Government and which have also been placed on the record, it is manifest and evident that the requirement of the State of Haryana is far more compelling than that which is allegedly faced by GNCTD. Learned counsel further referred to the disclosures made

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in its affidavit and the written submissions filed to contend that GNCTD is selling power on the exchange as would be evident from the particulars appearing on the website of the **Northern Region Load Dispatch Centre**[15]. According to learned counsel, this itself constitutes irrefutable evidence of the falsity of the case as set out by the petitioners.

21. Reverting to the disclosures made in its reply filed in these proceedings, it was pointed out that HPPC had floated short-term tenders for procurement of 750 MW power through the DEEP portal. It was pointed out that the weighted average rates discovered in that process ranged from Rs.4.83/KWH to Rs.5.47/KWH. It was also disclosed that even though another short-term tender for procurement for the months of April to October 2022 was floated, the State of Haryana received only one bid for a total quantum of 50 MW. In view of the aforesaid facts, it was submitted that very little power is available with generators who may be willing to sell the same by way of short-term tenders. Learned counsel also submitted that if the impugned allocation is not restored, the State of Haryana would be compelled to purchase power from the open market where the rates for peak hours are significantly higher and touch almost Rs.20 per unit. It was also pointed out the CERC has kept the price of sale of power through the exchange at Rs.12/KWH.

22. Learned counsel argued that based on the allocation that was made in its favour by the Union Government, the State of Haryana had already factored in the said allocation and the purchase of power from Dadri-II had

[15] NRLDC

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been dully approved by the Steering Committee for Power Planning in its 64th meeting held on 28 March 2022. The attention of the Court was also drawn to the petition filed before the Haryana Electricity Regulatory Commission on 29 March 2022 for approval being accorded to the proposed procurement of 728.68 MW from Dadri-II. Learned counsel submitted that if the State of Haryana were to be deprived of this shortage during the forthcoming summer months, it would face a staggering shortage of power during the summer/paddy season to the tune of 2300 MW to 4100 MW.

23. Mr. Sethi, learned Senior Counsel appearing for BSES, asserted that the impugned order is wholly without jurisdiction since it interferes with a subsisting contract between the petitioners and NTPC namely the PPA dated 05 June 2008 which is valid till 30 July 2035. According to Mr. Sethi, the impugned order insofar as it impacts the rights which are secured in favour of BSES under the PPA is liable to be viewed as being wholly without jurisdiction and authority in law. It was submitted that once the power from Dadri-II stood appropriated in a PPA, the Union clearly stood denuded of any authority to reallocate the power comprised in that agreement or to deprive BSES of the rights flowing therefrom. It was submitted that in terms of the provisions made in Section 86(1)(b) of the 2003 Act, it would be the SERC alone which must be recognised as having the authority to approve a surrender of power or any part of power secured under a PPA being hived off or deleted therefrom. Mr. Sethi submits that no power which stands reserved in terms of the aforenoted PPA could be

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surrendered or reallocated without the concurrence and approval of the DERC.

24. Mr. Sethi submitted that the communication of 06 July 2015 must be viewed in light of the position which prevailed at that time and at a stage when Delhi was, in fact, power surplus. Mr. Sethi drew the attention of the Court to the demand and supply position as per the data available on the portal of the SLDC to submit that the same would clearly demonstrate the catastrophic effect of Dadri-II power being withdrawn from GNCTD. The table which is relied upon is extracted hereinbelow: -

"

BSES Demand Supply Position			
Particulars	**2015-16**	**2020-21 (With Dadri-2)**	**2020-21 (Without Dadri-2)**
Annual			
Demand in MW	2676	3178	3178
Availability in MW	3223	3297	2628
Shortage(-)/Surplus(+)	547	119	-550
Summer			
Demand in MW	3204	4020	4020
Availability in MW	3195	3474	2805
Shortage(-)/Surplus(+)	-10	-545	-1214
Winter			

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Demand in MW	2149	2336	2336
Availability in MW	3252	3120	2451
Shortage(-)/ Surplus(+)	1104	784	115
#based on DTL SLDC demand and availability			

"

25. Mr. Sethi submits that both the Union as well as NTPC have acted wholly arbitrarily while seeking to reallocate power which stood reserved under a PPA which was valid upto 30 July 2035. It was contended that the DISCOMS were never placed on notice of the intended de-allocation nor were they provided any opportunity to place relevant facts and data for the consideration of the MoP. Mr. Sethi further drew the attention of the Court to the petitioners' communication of 29 October 2021 as well as that of DERC dated 14 October 2021 to submit that MOP had been duly apprised of the power position in NCT of Delhi and the imperative need to continue the supply of power from Dadri-II. It was submitted that the temporary allocation and surrender of Dadri-II power which occurred between 2015 and 2020 cannot be viewed as a permanent surrender of power by the DISCOMS. Mr. Sethi submitted that the said temporary surrenders were made in the exigencies of situations as they obtained at the relevant time and are not liable to be viewed as conclusive evidence of Delhi being either power surplus or being in a position to meet its demand without the power generated and allocated to it against Dadri-II.

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26. Controverting the allegations that the petitioners had been selling allocated power on the exchange, Mr. Sethi submitted that the data as collated and presented is incorrect and misleading since NTPC had added the price per unit sold by the petitioners so as to inflate the reflected price at which power was sold on the exchange during ***"****off peak hours"*. Mr. Sethi drew the attention of the Court to the following data as extracted from the portal of the Northern Region Power Committee and the State Load Dispatch Centre to submit that Delhi in fact was a net purchaser of power on the exchange. The said chart is extracted hereinbelow: -

"

Net Purchase-Sale	January 2022	**February 2022**	**March 2022**	**April 2022**	**(till 15th May 2022) #**	**Total**
	MUs	**MUs**	**MUs**	**MUs**	**MUs**	**MUs**
BYPL	-79	-65	-53	-11	-23	-232
BYPL	160	141	182	78	124	686
BSES	81	76	129	67	100	453

"

27. It was also submitted that the petitioner receives pooled power from 47 sources. It was contended that 60% to 70% of its power demand is shored up on a long-term basis whereas for the remaining requirement, the petitioner enters into short-term transactions such as power banking, bilateral transactions and purchases on the exchange subject to relevant prudence checks run by the DERC. Mr. Sethi submits that it is incorrect to suggest that Delhi is profiteering from the power allocated to it and the

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sales on the exchange are explained as being those which were affected during off peak times. Mr. Sethi also placed reliance on the unique power scenario and demand load which is faced by Delhi and referred to the disclosures made in the additional submissions which were filed in these proceedings.

28. Mr. Poovayya, learned Senior Counsel appearing in the connected writ petition, while addressing submissions on similar lines, argued that admittedly no codified policy stands framed by the Union and which may guide the issue of allocation of power from CGS's. It was submitted that the guidelines of 22 March 2021 framed by MoP itself would indicate that a surrender of power by a State or a DISCOM is subject to the approval of the concerned State Commission. Mr. Poovayya submits that undisputedly neither of the two DISCOM had made any request to DERC for surrender of power generated by Dadri-II and allocated to NCT of Delhi. Viewed in that backdrop, it was contended that the action of the Union respondents is clearly arbitrary and illegal. Mr. Poovayya also referred the Court to the 2014 and 2019 Regulations framed by the CERC and argued that, even in terms of the Notes appended to Regulation 55 thereof, the issue of surrender of allocated power is duly regulated. Learned Senior Counsel would submit that the procedure as enumerated therein was also not adhered to.

29. Mr Mehra, learned Senior Counsel representing GNCTD, submits that it has been the consistent stand of the Union Government keeping in mind the letters issued in the last seven years between 2015-2022 before the

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passing of the impugned order that the power allocated to Delhi from Dadri-II would remain intact and unchanged. While drawing the attention of the Court to the "Resources Adequacy Plan and Load Generation Balance Report 2022-23" Mr Mehra states that as on 28 February 2022, 728.7 MW has been considered as the power availability for Delhi by the MoP. In view of this, Mr. Mehra would contend that the sudden action of the MoP to suo moto reallocate power to some other State is wholly unjustified and unreasonable. He further submits that the claim of Haryana over the share of power from Dadri-II had only been communicated by way of their letter of 24 March 2022 and evidently just a few days prior to the passing of the impugned communication. This according to him makes the deallocation of 728.68 MW of Delhi's share of Dadri-II arbitrary, made in haste and bad in law. Mr Mehra further submits that while heavy reliance has been placed on the communication of 07 October 2021 by the Union, that submission is made without bearing in mind the fact that the said letter only mentions Dadri-I which is not even the subject matter of the present petition.

30. Having noticed the rival submissions addressed and before the Court proceeds to deal with the principal questions which arise, it would be pertinent to note that while elaborate submissions were addressed by respective sides on the exit by DISCOMS from Dadri-I as well as the judgment rendered by APTEL on 08 February, 2022 upholding the same, the Court does not propose to enter any observation in respect of that dispute since an appeal is stated to have been preferred before the Supreme Court against the order passed by APTEL. The exit from Dadri-I as well as

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the decision of APTEL which forms subject matter of challenge before the Supreme Court is liable to be noticed only to the following limited extent. The exit of the petitioner from Dadri-I was highlighted by NTPC as well as the Union since it was claimed that the power purchase cost from Dadri-I was lower than that of Dadri-II and yet the respondents had chosen to exit from that PPA and not source any power from that CGS. The other aspect which merits notice is that before APTEL parties appear to have acceded to the authority of the Union Government to allocate power from CGS's amongst different States. This appear to flow from paragraph 37 of that decision which is reproduced hereinbelow:

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

31. That then takes the Court to the principal question which has been addressed and which turns on the authority of the Union to allocate power amongst States. It becomes pertinent to note that the PPA of 21 March, 2007 had in Clause 2.2.1 clearly stipulated that the final allocation of power by MoP would form an integral part of that agreement. The PPA of 21 March 2007 and the terms thereof were duly adopted in the Umbrella PPA of 05 June 2008. The ultimate allocation which was made by the Union on

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08 March, 2011 essentially divided the power likely to be generated by Dadri-II amongst the States of Delhi and Uttar Pradesh in the ratio of 75% and 10%. 15% of the installed capacity of Dadri-II (980 MW) was kept reserved and earmarked as unallocated. The Union in terms of this order had allotted 735 MW to Delhi. The allocation of power by the Union has been explained by NTPC as owing its genesis to the Gadgil Formula which was approved on 11 October 1990 by the National Development Council. The Gadgil Formula appears to have been formulated to guide the Union Government in allocation of power generated by CGS's amongst the States/U.T's. The said formula is explained as contemplating reservation of 10% of the output of the central thermal power plant in favor of the State in which the project is located. This is described as the *"Home State Share"*. 75% of the power of that particular CGS is then available to be allocated to States including the Home State based on the energy consumption and the Central Plan Assistance during the preceding five years with equal weightage being accorded to both. 15% of the plant capacity is envisaged to be retained by the Union to meet urgent and seasonal requirements of individual States.

32. On 27 April 2000, MoP issued an Office Memorandum dealing with the allocation of power from new central sector power stations. The aforesaid O.M. stipulated that the original allocation as made in terms of the Gadgil Formula would remain unchanged. It further provided that power from new central sector power stations would be made in accordance with PPA's to be signed between those stations and the State/Union Territory or the authorized agency/board. That memorandum is extracted hereinbelow:

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"No.8/1/96-OM
Government of India
Ministry of Power,

New Delhi, the 27th April, 2000

To

1. Chief Secretaries/All the State Govts/UTs
2. All the State Govts. (Power Deptts.)
3. State Electricity Boards/State Power Sector Companies
4. All Central Power Sector Utilities

Subject: *Formula for allocation of power from Central Sector Generating Stations to the State/UTs-regarding.*

Sir,

The allocation of power foam the central sector power stations to the States/Union Territories of the region is governed by a formula evolved in late seventies, in case of thermal/nuclear power stations, and early eighties, in case of hydel power stations. The formula was evolved at a time when the power sector was served almost fully by the public sector and the central power sector utilities (CPSUs) were entirely supported by the budgetary allocation of the Central Government or by external assistance. With Independent Power Producers (IPP) entering the power industry in larger numbers, the operational environment of power sector changing very fast and the role of Central Government being substantially reduced, the allocation of power from new projects of CPSUs to the beneficiary States has lost its original relevance.

2. In recent times, allocation of power from the new projects tends to be guided by necessity and capacity to pay more than any other factor. In the context of cash and carry scheme and pressure of financial institutions on the utilities to recover their dues, the factors which have gained predominance over others are the necessity and financial capability of bulk consumers. Likewise, the surplus power in the Eastern Region is already being exported to Southern, Western and Northern regions.

3. In view of the background explained above, it has been decided to treat the present "formula" as "guidelines" for new central sector power stations. The implications of this change are enumerated below:

(i) It will not disturb the allocation already made under the "formula". There will be no change in the contents of formula.

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(ii) Power from the new central sector power stations will be made in accordance with power purchase agreements (PPAs) to be signed between the CPSU and the State/UT or any of their authorised agency/Board.

(iii) First offer for purchase of power shall be made by the CPSU to each constituent (State/UT or their authorised agency) of the region as per their entitlement.

(iv) In case any constituent of the region does not buy its share, or part thereof, the CPSU shall have the right to sell that power to any other State/UT in accordance with the PPA to be entered into by them. However, such offer by the CPSU shall first be made to the State(s)/UT(s) within the region (where power station is located) before diverting the power to State(s)/UT(s) outside the region.

(v) Where there are more than one claimants to the surplus power, so offered, weightage in allocation shall be given to the power sector reforming State(s)/UT(s).

(vi) This does not affect allocation of 10% of the power to the State where the central thermal power plant is located and the 12% free power from Central hydel power stations to the State(s)/UT(s) of the regions (including the state where the hydel project is located)."

33. The guidelines in respect of allocation by the Union were further revised and set out in a subsequent Office Memorandum of 22 March 2021. This O.M. made the following provisions:

"2. Based on the comments received in this ministry, the following Guidelines for enabling the Discoms to either continue or exit from the PPA after completion of the term of the PPA i.e. beyond 25 years or a period specified in the PPA and allow flexibility to the Generators to sell power in any mode after State/ Discom exit from PPA have been framed for the compliance for all the concerned stakeholders.

I. The first right to avail power from the Central Generating Stations developed under section 62 of the Electricity Act (eligible CGSs), even beyond the term of PPA i.e. on completion of 25 years from the date of commissioning of the plant or a period specified in the PPA will continue to be with the States/ Discoms with whom the PPA was signed.

II. Willing State/Discoms may relinquish their share from eligible CGSs after expiry of the term of the PPA i.e, on completion of 25 years from the date of commissioning of the plant or a period

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specified in the PPA The request for relinquishment of such power from CGSs may be submitted only after the approval of the State Commission who would ensure the adequacy of power i tied up with the Discoms to meet the demand of electricity for all the consumers under such Discoms.

III. a) The States/ Discoms having Long-term PPAs with the Central Generating stations, which are due to expire in the near future can opt to relinquish the entire allocated power (firm and unallocated share) from such eligible CGSs post completion of the PPA tenure i.e. on completion of 25 years from the date of commissioning of the plant or a period specified in the PPA by giving six months advance notice for their intention to relinquish such power.

b) For the Stations, which have already completed 25 years, States may exit from the PPA of such eligible CGS after giving six months of notice of relinquishment of such power.

IV. The relinquishment of such power will be considered only after the State/ discoms have cleared all the past dues. The State/Discoms shall continue to be liable to make all the eligible payments/ dues as per the prevailing rules/regulations to the Generators whose share of power has been relinquished till final settlement.

V. In all such cases of relinquishment of share from power stations, the power allocation, if any, made by the Central government to the State from that power station would be treated as withdrawn. Intimation to this effect will be required to be given by either the generating company or the State to the Ministry of Power.

VI. States may also relinquish the entire unallocated power from the CGSs (except some specific allocations e.g. power which has been bundled with solar etc). Part relinquishment of share from unallocated pool of power shall not be feasible and accordingly shall not be allowed.

VII. Any share for Central Generating stations, once relinquished by the State, will not be allowed to be taken back by the State under the same PPA conditions.

VIII. In case of Bulk Power Supply Agreement (BPSA) also, the state / discoms may relinquish entire allocated power from such projects which have completed 25 years since commissioning of the project. Power supply from other projects shall continue as per the terms of the PPA.

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IX. For Nuclear Power Generating Stations, the mechanism of relinquishment of power after completion of term of PPA shall be as decided by the Department of Atomic Energy as the tariff of Nuclear Power Generating Stations is determined by the Department of Atomic Energy on recommendation of CEA.

X. The central generating stations, whose power gets relinquished by States, would be free to sell such relinquished power under the various avenues such as:

a) Tie up with any other buyers desiring to go for long term PPAs or Medium term PPAs (upto 5 years) or short term PPAs through competitive bidding route.

b) Sell power in the power exchanges including Day-ahead, Real-time market and Term-ahead markets, etc.

c) Get the power reallocated to the willing buyers, if any, as per the extant provisions of reallocation of power from CGSs."

34. The aforesaid recordal of facts clearly seems to suggest that the allocation of power generated by CGS's was historically controlled and decided by the Union Government. That power continued to be reserved to be exercised by the Union as would be evident from the O.M. of 22 March 2021. All that appears to have happened between the advent of the Gadgil formula and the issuance of the office memorandum of 22 March, 2021 is a recognition of the paradigm shift in the generation and distribution of electricity as was ushered in by the 2003 Act. The subsequent O.M.'s appear to recognize the change in the regime of supply and distribution of electricity being now governed by PPA's.

35. On a fundamental plane it would be relevant to note that the allocation made by the Union Government is principally made to a State of the Union and not to any DISCOM or other legal entity within a particular State which may be engaged in transmission or distribution of electricity.

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The allocation once made by the Union in favor of a State, is then available to be appropriated by distribution companies/entities situate in that State. The structure set in place enables the DISCOMS to then approach the CGS whose production capacity or available generated power has been allotted to that particular State. The next stage consists of the DISCOM drawing out a PPA with the CGS which is then placed for the consideration and approval of the SERC.

36. Significantly, however, and as this Court reads the provisions made in the 2003 Act, the subject of distribution of electricity produced by CGS's is not shown to be controlled or regulated by any statutory provision engrafted therein. Section 2(5) while defining the expression "*appropriate government*" stipulates that the same would mean the Central Government in respect of a generating company wholly or partly owned by it. The Central Government is also defined to be the appropriate government in relation to any inter-State generation, transmission, trading or supply of electricity, in respect of the **National Load Dispatch Centre**[16], the **Regional Load Dispatch Centre**[17] and in relation to any work or electric installation belonging to it or under its control.

37. Section 79 envisages the constitution of the CERC. The functions of the CERC are spelt out in Section 79. While the said provision empowers that Commission to regulate inter-State transmission of electricity, that body is not shown to be vested with any authority to rule on the issue of

[16] NLDC
[17] RLDC

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allocation of power generated by CGS's. While, undoubtedly, the CERC is also empowered to advice the Union Government on all matters including in relation to the formulation of the National Electricity Policy, that advisory jurisdiction, prima facie, cannot be recognized as extending to, controlling or regulating the power of the Union to allocate electricity generated by CGS's.

38. Prima facie the Court would be inclined to accept the submission advanced by Mr. Sundaram who had contended that the power of the Union to allocate would thus flow from Article 73 of the Constitution. The Court also bears in mind the fact that the policy of liberalization and the unshackling of generating stations which was ushered in by the 2003 Act enables those stations to then adopt a market oriented approach in finding an appropriate DISCOM which may source its requirement from that CGS. It is at the stage of finalization of the PPA that parties are required to approach the concerned SERC and seek its approval. It is at this stage that the power of regulation as conferred upon a SERC comes into play. The Court notes that Section 86(1)(b) empowers a SERC to regulate the procurement, purchase and distribution of electricity in a particular State. The power to regulate conferred on the SERC appears to be restricted to the procurement, purchase and distribution of electricity in a particular State. Clause (b) of Section 86(1) in any case cannot and at least prima facie be recognised as empowering the SERC to regulate the power of the Union to allocate electricity generated by a CGS. It must be borne in mind that the power of the SERC essentially stands confined to intra State issues pertaining to purchase and distribution of electricity. Recognising a power

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vested in it to regulate or rule on distribution of CGS electricity would amount to acknowledging it having jurisdiction to decide on issues which may have inter-state implications. That prima facie does not appear to be the scope of Section 86(1)(b). The allocation of a share of the electricity generated by a CGS to a particular State, prima facie, appears to be a process independent of and unconnected with its assignment to a particular PPA that may be executed between a CGS and a DISCOM. The SERC thus, does not appear to have been assigned any role, advisory or adjudicatory, under the 2003 Act insofar as the distribution of CGS power amongst respective States is concerned.

39. The Court also notes that no provision of the 2003 Act appears to control or regulate the power of the Union to apportion the power generated by a CGS amongst States. The submission of the respondents thus that the 2003 Act does not occupy this particular field would prima facie appear to have force. If that be the correct appreciation of the position under the 2003 Act, the lack of power inhering in the SERC to regulate the power of the Union to apportion and distribute power available with a CGS would follow as a logical corollary.

40. Additionally, the Court observes, and as was aptly pointed out by Mr. Sundaram, the original PPA in express terms provided that the final allocation of power by the Union would constitute an integral part of the PPA. Regard must be had to the fact that while the PPA was executed on 21 March 2007, the final allocation of power was made only 08 March 2011. The aforesaid original PPA was what was inherited by BSES in terms of the

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Umbrella PPA of 05 June 2008. This would and till such time as this matter is heard finally, constitute an additional ground to reinforce the position of the Union Government when it comes to allocation of CGS power.

41. Regard must also be had to the fact that in the absence of any specific provision having been engrafted in the 2003 Act, the power of the Union would be liable to be recognised as being absolute and, in any case, not subject to regulatory or adjudicatory control under the provisions of the 2003 Act. The power, thus exercised by the Union Government by invocation of Article 73 of the Constitution would be entitled to be recognized as operating in a field which is not occupied. The Court has already noticed that the allocation of power by the Union Government is made to a particular State or Union Territory. It is not made to a particular DISCOM or any other body engaged in the supply or distribution of electricity in a particular State. This too would appear to suggest that the allocation of power by the Union Government is based on a separate and distinct regime falling outside of the scope and ambit of the 2003 Act. The Union would necessarily while exercising its power of distribution and allocation thus have the authority to take into consideration the needs and demands of the various States forming part of the Union and to allocate the same on fair and equitable principles in exercise of its executive power.

42. From the material placed on the record and on a prima facie evaluation of the provisions of the 2003 Act, it would further appear that once the Union Government allocates power to a particular State, it is only then that DISCOM situate and operating in that particular State would be

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granted the right to enter into a PPA with the CGS. The structure and the process appears to suggest that the allocation by the Union to a particular State would be the *sine qua non* for a DISCOM entering into a PPA with the CGS. It is only once the said step is taken that the centrally allocated power capacity of a particular CGS may come to form part of a PPA.

43. SERC's are constituted in terms of Section 82 of the 2003 Act. Their functions are defined in Section 86. The submissions addressed before this Court essentially turned upon the provisions contained in Section 86(1)(b). As this Court reads that provision it is evident that the same empowers the SERC to regulate electricity purchase and the procurement process of distribution licensees or from other sources through agreements for purchase of power for distribution and supply within the State. Clause (b) of Section 86(1) would thus seem to indicate that the SERC would be entitled to initiate steps for regulation only once the question of procurement of electricity commences subsequent to a particular DISCOM having identified a generating company. This since the SERC is essentially concerned with the distribution and supply of electricity within a particular State. It is in the aforesaid context that its power to regulate would be liable to be recognized and appreciated. The Court also notes the pertinent observations as were entered by the Supreme Court in **Central Power Distribution Company** which while ruling upon the jurisdiction of the SERC had observed that the provision of Section 86 cannot be applied to a NTPC power station. More pertinently in **Tata Power** while enunciating upon the power of a SERC and the ambit of Section 86, the Supreme Court had observed that generation of electricity is outside the licensing purview

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and subject to fulfillment of conditions laid down under Section 42. It went on to significantly observe that a SERC while exercising its power of regulation in relation to purchase of electricity and a procurement process of distribution, could not direct allocation of electricity. The Supreme Court observed that if Section 86(1)(b) were to be interpreted differently it would amount to recognizing the authority or jurisdiction of a SERC to even issue directions to a generating company to supply electricity to a licensee. It held that such a proposition would be wholly unsustainable under the 2003 Act. It further held that if the regulatory provision were to be interpreted otherwise it would defeat the delicensing provisions in respect of generating companies which had been ushered in by the 2003 Act. **Tata Power** further went on to hold that while a generating company may indirectly come within the purview of the regulatory jurisdiction as and when directions are issued to distributing companies by the appropriate Commission, the same would not empower the Commission to bring within its ambit a generating company also for the purposes of issuance of separate directions.

44. The Court however cannot lose sight of the fact that once the CGS power allocated to a particular State comes to be adopted and factored in a particular PPA, a subsequent de-allocation of power earmarked for that State by the Union and which may have constituted an integral part of the PPA would undoubtedly have an impact on the working of that pact. It is perhaps to take care of such a contingency that the guidelines of 27 April 2000 and 22 March 2021 contemplate the approval of the Commission being obtained. However, it could perhaps be legitimately argued that the

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power of oversight as accorded to a SERC to that extent may not extend to the appropriate commission ruling upon the exercise of power by the Union itself. The Court desists from entering any final verdict on this issue till such time as the writ petition is taken up for final disposal.

45. Undisputedly the controversy raised in the present writ petitions emanates from the letter of the Ministry of Power, GNCTD dated 06 July 2015 carrying an unambiguous intent to surrender power allocated to GNCTD from Dadri-II. The Court notes that NTPC in its reply has disclosed that Dadri-II was one of Thermal Power Stations which had been established under the Islanding Scheme of the Union Government in order to secure the electricity requirements of the NCT of Delhi. It was based on the aforesaid letter of the MoP that the surrendered component of Dadri-II came to be notified and published by the Union Government on 06 May 2016. The letter of 06 July 2015 was preceded by a communication of the petitioner to GNCTD seeking to convey its request for the surrender of power of Dadri-II for the period October 2015 to March 2016. This is evident from a perusal of the letter of the petitioner dated 15 June 2015. Close on the heels of the aforesaid letter came another communication of the petitioner dated 30 June 2015 for permanent surrender of 187 MW from the concerned Thermal Power Station during October 2015 to March 2016. A temporary surrender of Dadri-II was again conveyed by the petitioner in terms of its communication of 24 September 2015 for the period 1 October 2015 to 31 March 2016. On 19 January 2016, GNCTD again held out that it was power surplus and that it had requested MoP for surrender of surplus power allocated to Delhi and thus relieving consumers from the burden of

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fixed cost of surplus power. Pursuant to the aforesaid communications which were received, a revised allocation from Dadri-II was published with the share of Delhi being pegged at 74.794 MW. The share of Delhi from Dadri-II was again revised by the Northern Regional Power Committee to 74.516%.

46. On 19 August 2016, the Delhi SLDC placed a request with MoP for temporary surrender and consequential reallocation of Dadri-II to the extent of 547 MW for the period October 2016 to March 2017. GNCTD yet again on 06 October 2017 wrote to MoP for temporary reallocation of 365 MW from Dadri-II during the period November 2017 to March 2018. Acting on the requests which were submitted by the petitioner and the GNCTD, MoP published a list of surrendered power on 06 February 2019 with a view to enable interested States and Union Territories to apply for reallocation based on their demand. Dadri-II and the surrender of allocated was specifically mentioned in this notification. MoP on 30 August 2019 again reallocated 575.8 MW power from Dadri-II to Andhra Pradesh for the period 1-30 September 2019. On 07 October 2021, MoP again published a list of plants for which respective States/beneficiaries had submitted communications for surrender of their respective shares in CGS's. Though this communication refers to Dadri-I, it did not enlist Dadri-II. The Court reserves its comments on this aspect presently.

47. Proceeding further it would be worthwhile to note that on 14 October 2021 DERC wrote to the MoP and apprised it of the need for CGS's to ensure availability of power to Delhi as per its allocation especially from

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Hydro Power Plant, Dadri-II and Aravali (Jhajjar). It is this communication which for the first time and post 2015 indicated an imperative requirement for the Dadri-II allocation being preserved for NCT of Delhi. On 07 October 2021, NTPC is stated to have issued a letter listing out the surrendered component of its Thermal Power Plants and called upon interested States to apply for allocation. Responding to the aforesaid communication, the petitioner on 29 October 2021 apprised NTPC that it had never surrendered or sought reallocation of power from Dadri-II. It further asserted that power from Dadri-II is essential to ensure the energy security of Delhi. NTPC was also apprised that the PPA in respect of power from Dadri-II remained valid and subsisting. It was further asserted by the petitioner in its letter that the list of surrendered power as published by NTPC appeared to be at variance with the list which was published by the MoP. It may at this juncture be noted that Dadri-II and the factum of surrender by GNCTD of its share of power generated by that plant had already been published by the MoP on 06 February 2019. It is perhaps on that score that the said surrender was not notified all over again by the MoP on 07 October 2021. The various notifications which were issued by the Union Government appear to be periodical publications based on letters received by respective States/Union Territories informing it of their intent to surrender allocated power. NTPC appears to have published a comprehensive list along with its letter of 7 October 2021.

48. DERC on 09 December 2021 addressed yet another communication to the Department of Power, GNCTD on the subject to reallocation of surrendered power of various NTPC stations. In paragraph 4 of this

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communication, it advised GNCTD to consider the permanent reallocation of its share in the Anta Gas Power Station, Dadri Gas Power Station and Auraiya Gas Power Station. Referring to the letter of NTPC of 07 October 2021 and insofar as it related to Thermal Power Stations it went on to significantly write that power allocation to Delhi from Unchahar-I, Farakka-I&II and Kahalgaon-I would be required to be continued and maintained at present. Significantly DERC in this communication does not refer to Dadri-II.

49. On 06 January 2022, GNCTD forwarded this communication of the DERC to MoP. Even in this letter, GNCTD did not flag the allocation related to Dadri-II. On 28 February 2022, DERC addressed another communication to the Northern Regional Load Dispatch Centre as well as to SLDC on the subject of reallocation of surrendered power of NTPC stations. Even this communication only referred to the earlier letter of 17 December 2021 and as noted hereinabove failed to underline or emphasize the need for continued allocation of Dadri-II. These communications noticed above in any case did not seek recall or review of the position which was conveyed to MoP through the letter of 06 July 2015. The Court further notes that as late as on 16 March 2021, the letter of 6 July 2015 written for and on behalf of GNCTD was reiterated by DERC. Even this communication did not clarify or seek a recall of the permanent surrender which was communicated by that letter.

50. The State of Haryana responding to the publication of the list of surrendered power addressed a letter of 24 March 2022 to the MoP bringing

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to its attention the critical power supply position being faced by that State. It was acting in response to the aforesaid request that MoP by its letter of 28 March 2022 allocated 728.68 MW to the State of Haryana from Dadri-II w.e.f 1 April 2022 to 31 October 2022. It is pursuant to the aforesaid decision of the Union Government that NRPC proceeded to issue the impugned communication of 29 March 2022.

51. It is only after the issuance of the aforesaid communication that the petitioner wrote to the Union Government on 30 March 2022 bringing to its attention that Dadri-II stood duly factored in the PPA which was executed on 05 June 2008 and which was to remain in force up to 30 July 2035. In terms of this communication, the petitioner sought to explain the surrender of power from Dadri-II during the period 2015-2020 as being based on the situation as it prevailed then and at a time when Delhi was power surplus. The petitioner also referred to the imperative requirement of continuing to have access to power generated by Dadri-II. The petitioner also referred to the fact that it had been regularly scheduling power from that Station and that it had even requested NTPC to declare full capacity of power for Dadri-II.

52. The various communications addressed by GNCTD, DISCOMS and the DERC would seem to indicate that there was a principled renunciation of Dadri-II allocation to NCT of Delhi. Those communications are asserted to have been addressed at a time when the NCT of Delhi was in a power surplus position. The Court further notes that the surrendered power of Dadri-II was on separate occasions allocated to different States during the

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period 2015-2020 by the Union. The power of the Union to make those allocations was never questioned. Of equal significance is the fact that while in this petition it was argued at the behest of the petitioners that surrender of power by a DISCOM must be with the approval of the SERC, the aforesaid communications were not stated to have been issued with the approval of the DERC. There are a series of communications in terms of which the DISCOMS themselves wrote letters periodically for surrender of power from Dadri-II.

53. More significantly, neither GNCTD nor DERC or for that matter the petitioners ever in express terms withdrew the surrender which was conveyed in the letter of 06 July 2015. At least there was no manifest or unequivocal retraction of that communication. The only letters of purported significance and which may be possibly read as embodying a denial of surrender is the communication of 14 October 2021of the DERC and the petitioner's letter of 29 October 2021. The main issue which appears to have been placed in focus by the DERC in its aforenoted letter was the exit from the PPA relating to Dadri-I and in respect of which litigation had gone upto APTEL and an appeal is presently pending before the Supreme Court. It would be pertinent to recall that it was the DERC itself which in a previous communication of 16 March 2021 had specifically reiterated the letter of 06 July 2015. The Court further notes that while DERC forwarded another letter dated 17 December 2021, it only mentioned the Unchahar-I, Farakka- I & II and Khalgaon-I stations as those from which power would be required to be continued at present. It was this very letter which was forwarded by GNCTD along with its communication of 06 January 2022.

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54. Insofar as the letter of BSES is concerned, it only noted that Dadri-II had not been included in the list published by the MoP on 07 October 2021. The respondents have on the other hand contended that there was no reason to mention Dadri-II in this letter since its surrender had already been published earlier. It may be relevant to mention that MoP appears to have followed a practice of publishing the letters received from respective State Governments expressing a desire to surrender the Central allocation of power made in their favor. Perhaps Dadri-II was not mentioned in the chart which was published since it had already been duly notified earlier based on the earlier communications received.

55. While dealing with the communications exchanged between the parties and especially those addressed by the petitioners, DERC and GNCTD, the Court is constrained to observe that the letter of the Minister of Power in the GNCTD dated 06 July 2015 was enclosed along with the letter of 06 May 2016 which was marked as Annexure P/6 of the writ petition. Even in the paragraph of the writ petition which brought that annexure on record, there was no specific mention of the communication of 06 July 2015 noted above. The Court would have expected, at least a public body, of being more candid and forthright in its disclosures.

56. From the above recital of facts, it would be evident that both DERC as well as GNCTD could be said to have permitted a state of ambivalence and indecisiveness to prevail. As would be evident from the facts noticed hereinabove, no formal retraction of the 06 July 2015 letter was conveyed to the Union. The petitioners as well as DERC never raised any objection to

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that communication. The Court however notes that even though temporary surrenders were made by the DISCOMS, the fact that they continued to draw power from Dadri-II during this entire period was not disputed. Consequently and at this preliminary stage of evaluating the submissions addressed by respective parties, the Court fails to find any fault in the Union Government proceeding to exercise its power of reallocation in the aforesaid situation which existed on the record.

57. The controversy unfortunately does not end here. It becomes necessary to record that the power position in the NCT of Delhi and its dependence on Dadri-II was neither denied nor assailed by the respondents. The respondents also did not question or challenge the assertion of the petitioners that they had continued to draw and avail of the power generated by Dadri-II till the time that the impugned order came to be passed and have continued to do so even thereafter pursuant to the interim protection granted by this Court. This position is stated to have remained unchanged notwithstanding the letter of 06 July 2015 and the occasional temporary allocations which were made and have been noticed hereinabove. The data, the facts and figures which were placed on the record by the petitioners has also not been specifically controverted by the respondents. While allegations were levelled against the petitioners of having sold power on the exchange, those aspects are sought to be explained by them as being sales affected during off peak windows. All that deserves to be mentioned at this stage of the proceedings is that there are charges levelled against the petitioner and counter allegations laid against the respondents all of which raise various issues of fact which would warrant examination and further

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consideration. The Court is also faced with a situation where admittedly the letter of the DERC dated 14 October 2021 addressed to the MoP existed on the record of the respondents. Though the letter of the petitioner dated 29 October 2021 addressed to GNCTD was also marked to NTPC, presently it is unclear whether the said communication was brought to the attention of the MoP. These and other allied issues would merit further consideration at the time of final hearing.

58. On the other hand, the Court is faced with the claims raised by the State of Haryana which appears to have responded to the offer of the Union Government to seek allotment of surrendered power. HPPC has placed on the record material and data in proof of the precarious power situation faced by that State. It has also alluded to the numerous unsuccessful attempts made by it to source power in the short term, the non-availability of power and the fact that purchases in the short term would seriously strain its financial resources. It has also referred to a failure to garner short term contracts for purchase of electricity with no viable offers being available. It has placed on the record material to establish the severe shortage that it may face during the summer and cultivation period. The competent statutory authorities of that State appear to have taken preparatory steps to secure the allocated power of Dadri-II having obtained preliminary approvals to proceed with the impugned allocation and having petitioned the appropriate SERC to enter into a PPA with NTPC. Its needs and claims cannot thus be cursorily brushed aside.

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59. From the aforesaid recital of facts, it is apparent that there is an emergent need for an exercise being undertaken to examine, evaluate and balance the interests and requirements of two competing constituents of the Union. This exercise of balancing would necessarily entail evaluation and examination of various factual aspects including the data that may be produced with respect to the demand of respective States, the availability of alternate sources to meet exigencies, the likely cost burden to be borne by the respective States and other germane considerations which may have a bearing on the issue. Both in light of the prima facie conclusions recorded by this Court as well as the MoP by virtue of representing the authority of the Union would appear to be the competent authority to examine and consider the case as set forth by the two competing States for allocation of power generated by Dadri II and pass an appropriate order in respect thereof.

60. In proceeding along these lines, the Court also takes into consideration the fact that while exercising its power of review under Article 226 of the Constitution, it cannot assume or take upon itself the function or the role of the competent executive authority. While dealing with a writ petition, the Court must desist or at least refrain from taking on the mantle or adorning the role of the primary decision maker. Even while applying the Wednesbury test, Courts must remember that they are obliged to play a secondary role with the action of the executive being scrutinized on the grounds of rationality and non-arbitrariness.

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61. Upon an overall consideration of all of the above, it would appear to be expedient to require the MoP to examine the rival claims, consider the validity of the asserted right of the petitioners and GNCTD for continued allocation of Dadri-II power, explore avenues which may safeguard the interests and projected needs of the two States and take an appropriate decision based on a holistic examination of all the facts that may be placed before it. The aforesaid exercise may be undertaken by the MoP after affording an opportunity of hearing to all concerned parties including the petitioners and all the respondents before this Court.

62. Accordingly, the Court passes the following interim directions. Notwithstanding the interim order of 30 March 2022, the Court requests MoP to invite all concerned parties and to proceed further in light of the observations made in paragraph 61 of this order. The interim order of 30 March 2022 shall continue till such time as the MoP takes a final decision in light of the liberty accorded by the Court as noted above. Bearing in mind the urgency and the shortage of power as canvassed by HPPC, the Court further requests the MoP to proceed in the matter with due expedition bearing in mind the fact that the allocation in favor of the State of Haryana is itself restricted to October 2022 and is stated to be facing severe power outages.

63. Though needless to state, it is clarified that the observations as appearing in this order are liable to be read as having been rendered in the context of consideration of the prayer for vacation of the interim order and

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are thus not liable to be construed as a final expression of opinion by the Court.

List on 10.10.2022.

YASHWANT VARMA, J.

JUNE 01, 2022
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