

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 155/MP/2012

Coram:

Dr. Pramod Deo, Chairperson

Shri S. Jayaraman, Member

Shri V.S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 28.8.2012

Date of Order : 16.10.2012

In the matter of

Application under Section 79 of the Electricity Act, 2003 for evolving a mechanism for regulating including changing and/or revising tariff on account of frustration and/or of occurrence of force majeure (Article 12) and/or change in law (article 13) events under the PPAs due to change in circumstances for the allotment of domestic coal by GOI-CIL and enactment of new coal pricing Regulations by Indonesian Government.

And in the matter of

In the matter of:

Adani Power Limited

Petitioner

Vs.

1. Uttar Haryana Bijli Vidyut Nigam Ltd.
2. Dakshin Haryana Bijli Vidyut Nigam Ltd.
3. Gujarat Urja Vikas Nigam Ltd.

... Respondents

Parties Present:

Shri C.A.Sundaram, Senior Advocate for the petitioner

Shri Vikram Nankani, Advocate for the petitioner

Shri Amit Kapur, Advocate for the petitioner

Miss Poonam Verma, Advocate for the petitioner

Ms. Apoorva Mishra, Advocate for the petitioner

Shri Neil Hildreth, Advocate for the petitioner.

Shri Malav Deliwala, APL

Shri Kandrap Patel, APL

Shri M.G Ramchandran, Advocate for GUVNL

Ms Swapna Seshadri, Advocate for GUVNL

Miss Ambica Garg, HPPC



Shri Venkatesh, Advocate for UHBVNL and DHBVNL
Shri Vikrant Saini, HPCC
Shri Vineet Jain,HPCC

Order

The present petition filed by Adani Power Limited under Section 79 of the Electricity Act has its roots in the Power Purchase Agreements (PPAs) signed by the petitioner with the utilities in the States of Gujarat and Haryana. The petitioner has made the following prayers:

- a) *to evolve a mechanism to restore the Applicant to the same economic condition prior to occurrence of Subsequent Events mentioned in respective Part I & II hereinabove by adjudicating the disputes between the Applicant and the Respondent(s) in relation to regulate including changing and/or revising the price/tariff under PPAs dated 7.8.2008 with UHBVNL and DHBVNL and 2.2.2007 with GUVNL;*
- b) *in the alternative, to declare that the Applicant is discharged from the performance of the PPAs on account of frustration of the PPAs due to Subsequent Events in respective Part I & II;*
- c) *this Hon'ble Central Commission be pleased to declare that the revised tariff shall be applicable from the Scheduled Commercial Operation Date (SCoD) of the PPAs;*
- d) *that during the pendency of the present Application Hon'ble Central Commission may direct the Respondent(s) to procure power on the cost plus basis, alternatively, the Hon'ble Central Commission may suspend the operation of the PPAs till the final disposal of the Application;*
- e) *pass such further or other orders as the Hon'ble Central Commission may deem just and proper in the circumstances of the case."*

2. The petitioner, Adani Power Limited (hereafter called 'Adani'), a subsidiary of Adani Enterprises Ltd is in the process of establishing thermal power projects in various

parts of the country. It has already set up a generating station, Mundra Power Project, with a total capacity of 4620 MW at Mundra in the State of Gujarat.

3. On 1.2.2006, Gujarat Urja Vikas Nigam Ltd (GUVNL) issued a public notice inviting bids for supply of power on long-term basis. In response to the notice, Adani submitted its bid quoting a levelised tariff of Rs. 2.3495/kWh. On 4.1.2007, Adani was selected as the successful bidder. The Letter of Intent dated 11.1.2007 was issued in favour of Adani. Subsequently, the Power Purchase Agreement (PPA) dated 2.2.2007 was signed between GUVNL and Adani for supply of 1000 MW of power at the rate of Rs. 2.35/kWh. Adani signed another PPA dated 6.2.2007 with GUVNL for supply of additional 1000 MW of power at Rs. 2.89/kWh. However, the dispute raised in the present petition is limited to the PPA dated 2.2.2007. At the instance of GUVNL, Gujarat Electricity Regulatory Commission (GERC) is said to have adopted the tariff under Section 63 of the Electricity Act. .

4. Haryana Power Generation Company Ltd (HPGCL) on 25.5.2006 issued the Request for Qualification ("RFQ") on behalf of the distribution companies in the State of Haryana, namely, Uttar Haryana Bijli Vitran Nigam Ltd (UHBVNL) and Dakshin Haryana Bijli Vitran Nigam Ltd (DHBVNL) to procure 2000 MW power on long-term basis. Adani participated in the bidding. On 4.6.2007, HPGCL issued the Request for Proposal ("RFP") to the qualified bidders which included Adani. In response, Adani on 24.11.2007 submitted RFP to supply 1425 MW power at levelised tariff of Rs. 2.94/kWh from Mundra Power Project. Adani was declared successful. Accordingly PPAs were

executed between Adani and UHBVNL/DHBVNL on 7.8.2008. Haryana Electricity Regulatory Commission adopted the tariff under Section 63 of the Electricity Act.

5. In the instant petition, Adani has stated that at the time of submission of bid to GUVNL it calculated the tariff considering the commitment made by Gujarat Mineral Development Corporation (GMDC) to supply 4 MTPA of coal from Morga-II coal block. Adani has further submitted that despite the strenuous efforts made at various levels, including at the level of the State Government, GMDC did not sign the FSA for supply of coal. Meanwhile, Adani had signed an agreement dated 15.4.2008 with its holding company, Adani Enterprises Ltd for supply of coal imported from Indonesia to meet its shortfall in fuel supply. Adani by its letter dated 28.12.2009 terminated the PPA dated 2.2.2007 executed with GUVNL on the ground of non-materialization of supply of coal by GMDC. GUVNL, feeling aggrieved by termination of the PPA by Adani, filed a petition, being Petition No 1000/2010 under clause (f) of sub-section (1) of Section 86 and Section 95 of the Electricity Act, 2003 (hereinafter "the Act") before Gujarat Electricity Regulatory Commission(GERC). This petition was allowed by GERC by its order dated 31.8.2010 directing Adani to supply power to GUVNL under the PPA since Adani had already decided to use the Indonesian coal for generation of electricity at Mundra Power Project and had signed agreement for supply of coal by its holding company. An appeal (Appeal No. 184/2010) filed by Adani against the order of GERC dated 31.8.2010 before the Appellate Tribunal was dismissed by the judgment dated 7.9.2011. Adani has filed the second appeal (Civil Appeal No. 11133/ 2011) before the Hon'ble Supreme Court under Section 125 of the Electricity Act and this appeal is

pending. In view of the directions of GERC, also upheld by the Appellate Tribunal, Adani is said to be supplying power to GUVNL since 2.2.2012 on commercial operation of Units 5 and 6 of Mundra Power Project.

6. As regards the PPAs with the distribution companies in Haryana, Adani has submitted that the tariff of Rs. 2.94/kWh was quoted having regard to the Central Government's policy of allocation of coal linkage for the power projects, the market conditions relating to the price and availability of fuel at the time the bids were invited by HPGCL. Adani has stated that after submission of RFP to HPGCL, it made an application to Coal India Ltd on 28.1.2008 for grant of coal linkage and was issued Letter of Assurance (LoA) dated 25.6.2009 for coal linkage equivalent to 70% of the capacity proposed to be supplied to Haryana based on the decision taken by Coal India Ltd to restrict coal linkage to coastal power plants, though prior thereto the Central Government had proposed 100% allocation of coal to the power projects. It has been claimed that under the circumstances it became necessary to secure remaining 30% of fuel requirement for supply of agreed quantum of power to Haryana from other sources and Adani decided to use the coal imported from Indonesia by its holding company, Adani Enterprises Ltd with which Adani already entered into an arrangement on 15.4.2008 for supply of coal.

7. Adani has contended that the provisions of the FSA ultimately signed with Coal India Ltd on 9.6.2012, are unfavourable to Adani and are also contrary to the New Coal Distribution Policy in force since 18.10.2007. Adani has pointed out that under the FSA,

the 'take or pay' commitment has been pegged at 80% of Annual Contracted Quantity, which cannot meet the entire requirement of coal for supply of power at 85% Normative Availability committed in the PPAs with Haryana distribution companies, causing shortfall in meeting the obligation of power supply committed. In order to meet the shortfall, it would have to use the imported Indonesian coal, Adani has averred. It has been further stated that the FSA executed with Coal India Ltd does not ensure even supply of coal of 80% of Annual Contracted Quantity through domestic coal as the FSA provides that Coal India Ltd can meet its obligation to supply coal of 80% of the Annual Contracted Capacity by importing coal in case of shortage of domestic coal, the cost of which is also to be borne by Adani. It has been further stated that in case of failure of Coal India Ltd to meet the committed supply of coal, no penalty is payable by the latter during the initial contract period of three years; and thereafter the meager penalty of 0.01% is imposable. Thus, according to Adani, substantial changes in the conditions of supply of coal since submission of RFP and the signing of the PPAs with Haryana has come to the fore consequent to signing of FSA with Coal India Ltd, the use of the imported coal is bound to increase. According to Adani, these developments have eroded the very foundation of the PPAs signed with the Haryana distribution companies. During the course of the proceeding it has been informed that Adani has synchronized one unit of Mundra Power Project with the Grid during July this year for supply of electricity to Haryana State.

8. The sum and substance of Adani's submissions is that it has to depend upon Indonesian coal imported through its holding company to maintain supply of agreed quantum of power to both, GUVNL and the distribution companies in Haryana.

9. Adani has submitted that on 23.9.2010 Government of Indonesia enacted a new Regulation, 'Regulation of Ministry of Energy and Mineral Resources No. 17 of 2010' ("Indonesian Regulation") under which the coal producers and exporters in Indonesia are required to sell coal at the prices notified by the Indonesian Government based on international prices of coal of equivalent Calorific Value, irrespective of the prices committed by the coal suppliers under the long-term contracts, though earlier all long-term contracts for export of coal were at prices below the spot prices in international market. Consequently, it has been stated, all Coal Supply Agreements for supply of coal from Indonesia have been rendered null and void unless they conform to the Indonesian Regulation. Adani has urged that Indonesian Regulation when implemented has the effect of escalating the cost of generation, making operation of Mundra Power Project unviable and this directly frustrates the performance of the PPAs. Adani has submitted that the events narrated and taken together shake the very foundation of the tariff quoted under PPAs and make impossible the supply of power to the States of Gujarat and Haryana under the PPAs at the agreed tariff. According to Adani, the changed circumstances fall within the *force majeure* clauses under the PPAs and consequently, dispute has arisen between the parties on the question of tariff chargeable/payable, which requires adjudication by this Commission under clause (f) of sub-section (1) of Section 79 of the Act. Accordingly, the present petition has been filed.

10. When the petition was initially heard on 19.7.2012, this Commission directed the respondents to file their replies on maintainability. The respondents have accordingly filed their replies. In the replies filed by the respondents it has been conceded that presently Mundra Power Project is having a composite scheme for generation and sale of electricity in more than one State. The respondents have stated that this Commission would have the jurisdiction under clause (f) of sub-section (1) of Section 79 to adjudicate the disputes not affecting the rights and obligations of the parties under the PPAs. GUVNL has stated that this Commission cannot go into the questions already decided by GERC and the Appellate Tribunal. GUVNL has also placed on record the details of certain petitions filed by Adani before GERC seeking redressal of its grievances arising out of the PPAs to show that as per the understanding of Adani itself, GERC has the jurisdiction to adjudicate the disputes under the PPAs.

11. We have heard the learned counsel for the parties on the question of maintainability.

12. At the hearing, learned senior counsel for the petitioner sought to establish that Mundra Power Project had a composite scheme for generation and sale of electricity in more than one State as it is supplying power to the States of Gujarat and Haryana and therefore the regulation of its tariff falls within the jurisdiction of this Commission by virtue of clause (b) of sub-section (1) of Section 79 of the Act. Learned senior counsel further submitted that by virtue of this Commission's power to regulate tariff of Mundra Power Project under clause (b) of sub-section (1) of section 79, the adjudication of any

dispute relating to tariff of the said Project falls within the purview of this Commission under clause (f) of sub-section (1) of Section 79 of the Act. Learned senior counsel argued that it is not necessary that the composite scheme for generation and supply of power to more than one State should be conceived at the inception stage of the the generating station only but the generating company can enter into the composite scheme at a later stage in which case also this Commission would exercise its jurisdiction to regulate the tariff and adjudicate the dispute between the parties arising out of regulation of tariff. Learned senior counsel pointed out that the existence of the composite scheme on the day the petition was filed was the material fact to invoke the jurisdiction of this Commission as signified by the words "or otherwise have" used in clause (b) of sub-section (1) of section 79 of the Act. Learned senior counsel also relied upon the opinion of learned Attorney General for India rendered on a reference by the Forum of Regulators on the scope of power of this Commission under clause (f) of sub-section (1) of Section 79 of the Act where the State Commissions had already adopted the tariff under Section 63 of the Electricity Act but the generating companies started supplying power to more than one State thereafter.

13. Learned counsel for the respondents relied upon the submissions made in the replies filed by them and already summarized at para 10 above.

14. In the light of the submissions of the parties, the following questions arise for our examination:

- (a) Whether the instant petition is maintainable under clause (f) read with clause (b) of sub-section (1) of Section 79 of the Electricity Act?
- (b) Whether the fact that Adani had not approached this Commission at any stage prior to filing of the instant petition and the fact that the tariff had been previously adopted by the respective State Commissions under Section 63 of the Electricity Act impinges on the jurisdiction of this Commission to adjudicate the dispute now raised?
- (c) Whether the present petition is barred in view of the judgment of the Appellate Tribunal in Appeal No. 184/2010 (M/S Adani Power Limited Vs Gujarat Electricity Regulatory Commission and others)?

Re: Issue at (a)

15. First we examine the question of jurisdiction of this Commission based on the submissions of the respondents. The respondents have not disputed that presently Mundra Power Project has a composite scheme for generation and sale of electricity in more than one State. The respondents have rather conceded that a composite scheme has emerged after Adani entered into an agreement with Haryana for supply of power and this Commission has the jurisdiction to adjudicate the disputes connected with the composite scheme. However, the respondents have submitted that PPAs signed by Adani with Gujarat and Haryana are sacrosanct and therefore, any dispute between the parties can be adjudicated by this Commission with regard to the composite scheme without affecting the rights and obligation of the parties under the PPAs. The relevant portions of the replies are extracted below:

GUVNL

“4. In terms of section 79(1)(b) of the Electricity Act the Hon’ble Commission can exercise jurisdiction to the extent of composite scheme for generation and sale of electricity in more than one state. Accordingly to the extent the Petitioner seeks to raise issues of composite nature affecting the generation and supply of power in more than one State, outside the PPAs dated 2.2.2007 and 6.2.2007 entered into with GUVNL and PPA dated 7.8.2007 entered into with the Haryana Utilities and without affecting the rights and obligations of the respective parties under these PPAs, the Hon’ble Commission may entertain the said petition for resolving such issues. Such a proceeding before the Hon’ble Commission under Section 79(1)(f) in so far it does not affect the rights and obligations of the parties under the PPAs mentioned herein above, can be considered as matters relating to Section 79(1)(b), namely, in regard to matters connected with the composite scheme for generation and sale of electricity in more than one State,,,,,,”

“5. GUVNL submits that the Hon’ble Commission may consider in the present petition filed by the Petitioner only those matters which are not arising out of the rights and obligations of the parties under the PPAs dated 2.2.2007 and 6.2.2007 such as in regard to the provisions of Article 12 of the PPAs dated 2.2.2007 and 6.2.2007 dealing with Force Majeure, Article 13 of the said PPAs dealing with the Change in Law, Article 3 of the PPAs dealing with the condition precedents, Articles of the PPAs dealing with the Tariff Terms and Conditions etc. Further, discharge of the Petitioner from the performance of the PPAs, declaration sought for the frustration of the PPAs, declaration sought for the obligation of the Petitioner to supply power only from the Scheduled Commercial Operation Date are outside the scope of the jurisdiction under Section 79(1)(f) of the Electricity Act, 2003.”

“8. GUVNL respectfully submits that the Petitioner cannot be allowed to raise issues in the petition which have already been adjudicated by the State Commission of Gujarat and by the Hon’ble Appellate Tribunal.”

UHBVNL & DHBVNL

“4. At the outset it is submitted that the obligations of the Petitioner will be strictly in accordance with the Terms and Conditions of the PPA dated 02.08.2008 and that PPA between the parties i.e. Petitioner who is Generator and Answering Respondents who are distribution licensees within the State of Haryana is sacrosanct and that no part should be allowed to go outside the terms and conditions of the PPA.”

“6. At the very outset it is humbly submitted that the present relief sought by the Petitioner is to be addressed strictly in accordance with the Terms and Conditions of the PPA dated 07.08.2008.”

“8. Therefore, in view of the above quoted relevant extracts of the PPA and in view of Section 63 of the Act, it is humbly submitted that the present Petition is not maintainable before this Hon’ble Commission. It is submitted that once the Tariff is adopted under Section 63 of the Act the same is not subject to re-determination of Tariff under Section 62 of the Act. It is further submitted that relief sought by the Petitioner will have to be considered in view of the Terms and Conditions of the PPA dated -7.08.2008. It is humbly submitted that the Petitioner could invoke the Jurisdiction of the Hon’ble Commission under Section 79(1)(b) of the Electricity act, 2003 as a composite scheme only for issues which are not squarely covered under the Terms and Conditions of the PPA with the Answering Respondent. It is further submitted that this Hon’ble Commission has jurisdiction on matters which concerns the Petitioner qua its multiple PPA’s.”

16. From the above contentions of the respondents, it is evident that the dispute raised by Adani is to be decided in accordance with the provisions of the PPAs. The dispute raised in the present petition falls within the purview of the PPAs signed by Adani within Gujarat and Haryana. The clauses in the PPAs discharge the parties, the petitioner as well as the respondents, of their obligations on occurrence of one or more of the *force majeure* events. Adani has contended that changes in the terms of the FSA signed with Coal India Ltd for supply of power to Haryana and promulgation of the Indonesian Regulations which makes the generation of power for supply to Gujarat and Haryana costlier and unviable, are the events of *force majeure* under the PPAs. In view of Adani’s contentions, the question is required to be decided whether or not the dispute falls within the scope of the *force majeure* as defined in the PPAs and requires adjudication. Further Adani has prayed for a declaration that is discharged from the performance of the PPA on account of frustration of the PPA on account of subsequent events. . Therefore, the question that will require adjudication on merits is whether or

not Adani stands relieved of its obligation to supply power under the PPAs on ground of frustration in view of the supervening circumstances set out by Adani in the petition. The adjudication of these issues being within the scope of the PPAs, the maintainability of the petition before this Commission on the respondents' own pleas cannot be denied.

17. Now we examine the question of maintainability based on the statutory provisions of sub-section (1) of Section 79 of the Electricity Act and independent of the pleas raised by the respondents. The clauses of sub-section (1) of Section 79 so far as they are relevant are extracted hereunder:

(1) The Central Commission shall discharge the following functions, namely:-

(a)

(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;

(c)

(d)

(e)

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration.

18. Under clause (f) of sub-section (1) of Section 79, this Commission has jurisdiction to adjudicate disputes

(a) involving the generating company or the transmission licensee,

(b) connected with clauses (a) to (d).

19. Undisputedly, Adani is a generating company. Therefore, adjudication of the dispute involving Adani is within the jurisdiction of this Commission in case other conditions of clause (f) are satisfied. It is the case of Adani that the dispute connected with regulation of tariff of Mundra Power Project falls within clause (b). Therefore, what is to be seen is whether Adani has entered into or otherwise has the composite scheme for generation and sale of electricity in more than one State so that its tariff is regulated by this Commission under clause (b). According to clause (b), this Commission is empowered to regulate the tariff of the generating companies (and not just of a generating station) on meeting the following conditions, namely-

(a) The generating companies are not owned or controlled by the Central Government,

(b) The generating companies enter into or otherwise have the composite scheme for generation and sale of electricity, and

(c) Sale of electricity is in more than one State.

20. As already observed, Adani is a generating company. It is neither owned nor controlled by the Central Government. In order that the tariff of Adani is regulated by this Commission, the question that requires closer examination is whether Adani has the composite scheme for generation and sale of electricity in more than one State. The

expression 'composite scheme' is not defined anywhere under the Electricity Act. Therefore, it is considered appropriate to consider the dictionary meaning of the word 'composite'. One of the dictionary meanings of the word 'composite' as given in Chambers Third International Dictionary is 'something that is made up of diverse elements'. The expression 'composite scheme' therefore means the scheme comprising more than one element. It is clear from clause (b) of sub-section (1) of Section 79 that two elements of the composite scheme should be generation and sale of electricity. There is no doubt that Adani generates electricity and sells the electricity generated. So, the second condition of clause (b) of having the composite scheme of generation and sale of electricity is met. Adani is currently selling electricity generated at Mundra Power Project to more than one State, the States of Gujarat and Haryana. Therefore, the condition of sale of electricity in more than one State' is duly met. All the three conditions of clause (b) are duly satisfied. Therefore, as at present Adani has entered into or otherwise has the 'composite scheme' for generation and sale of electricity in more than one State. Regulation of tariff of Adani is within the jurisdiction of this Commission.

21. Learned counsel for GUVNL contended that the tariff for supply to Haryana is to be determined by HERC in view of sub-section (5) of Section 64 of the Electricity Act.

Sub-section (5) of Section 64 enacts as under:-

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the

State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor.”

22. The words “be determined under this section” have been used in sub-section (5) in the context of determination of tariff on the basis of application made under sub-section (1) made by the generating company virtue of clause (a) of sub-section (1) of Section 62 of the Electricity Act. Therefore, in order to attract sub-section (5) of Section 64, an application for determination of tariff must have been made by the generating company. In the present case, no such joint application has been made for determination of tariff before the concerned State Commission under section 64(5) of the Act. The tariff in the present case has been arrived at pursuant to competitive bidding process undertaken under Section 63. As such, sub-section (5) of Section 64 is not attracted. Accordingly, we do not find any force in the submission of GUVNL.

23. The discussion in the preceding para leaves unanswered the crucial question whether it is necessary that sale of electricity to more than one State should be conceived at the very beginning. clause (b) of sub-section (1) of Section 79 does not prescribe so. The dictionary meanings of the phrase ‘enter into’ include ‘to participate in, engage in take an active role or interest in; to form a constituent or component or part or ingredient of; to become party to’. The starting point for participation or engagement or performance of active role for sale of electricity to more than one State can be any time after conception of the generating station. The generating company can be said to have entered into the composite scheme of generation and sale of electricity in more than one State once it commits sale of electricity in more than one State. Such a stage is

reached when the generating company makes the binding commercial arrangement for supply of electricity to more than one State, that is, when it executes the PPAs in more than one State or enters into any other similar arrangement. To say that the composite scheme should be only at the inception stage will amount to frustrating the legislative intent of the Act. Such a course is not open while interpreting a statutory provision. Further, such an interpretation will defeat the legislative mandate since in that case jurisdiction of this Commission can be ousted at the whims of the generating company. To illustrate this point, the generating company may initially sell electricity to one State and later on it may supply power to another State. Another situation is that the generating station may be commissioned as captive power plant but at subsequent stage the generating company may enter into the arrangement for sale of power to more than one State. If it is held that the composite scheme should be at the inception stage, such like cases would be taken out of the jurisdiction of this Commission. This could never be the intention of enacting clause (b) of sub-section (1) of Section 79. Therefore, it is our considered opinion that a generating company may enter into the composite scheme for generation and sale of electricity in more than one State at any time during the life of the generating station(s) owned by it. Any other interpretation will also impinge on the policy of common approach on the matters of tariff of the generating companies supplying electricity to more than one State enshrined in clause (b) of sub-section (1) of Section 79. In this view of the matter, it is concluded that Adani entered into composite scheme for generation and sale of electricity in more than one State on 7.8.2008 when it signed PPAs with the distribution companies in the State of Haryana. Adani has also stated that it is in the process of establishing generating stations in

different States. For this reason also, Adani as a generating company, has the composite scheme for generation and sale of electricity in more than one State. Therefore, regulation of tariff of Adani as a generating company is within the jurisdiction of this Commission.

24. The Hon'ble Supreme Court in Mohankumaran Nair Vs Vijayakumaran Nair (AIR 2008 SC 213) held that the question of maintainability is to be considered on the date of institution of the proceeding as inferred from the following observation:

“11. Ordinarily, the rights and obligations of the parties are to be worked out with reference to the date of institution of the suit. See Jindal Vijayanagar Steel (JSW Steel Ltd.) v. Jindal Praxair Oxygen Company Ltd. [2006(8)SCALE 668]. Determination in regard to maintainability of the suit, it is trite, must be made with reference to the date of the institution of the suit. If a cause of action arises at a later date, a fresh suit may lie but that would not mean that the suit which was not maintainable on the date of its institution, unless an exceptional case is made out therefor can be held to have been validly instituted.”

25. In the light of above dictum of the Hon'ble Supreme Court, after Adani executed PPAs with the distribution companies in Haryana, the power to regulate its tariff came to be vested in this Commission. Therefore, when the present application was made for adjudication of the dispute, this Commission was already clothed with the jurisdiction. Accordingly, adjudication of the dispute relating to tariff involving Adani as a generating company is within the jurisdiction of this Commission under clause (f) of sub-section (1) of Section 79.

Re: Issue at (b)

26. This issue flows from the fact that neither the generating company nor the procurers approached this Commission for adoption of tariff under Section 63 of the Electricity Act.

27. We have already held that Adani entered into the composite scheme for generation and sale of electricity in more than one State after it signed PPAs with the Haryana distribution companies. We on further interpretation of the statutory scheme laid down under clauses (b) and (f) of sub-section (1) of Section 79 of the Electricity Act have held that the regulation of tariff of Adani and consequently adjudication of disputes connected with regulation of tariff are within the jurisdiction of this Commission. It is established law that there cannot be estoppel against the statute. As held by the Hon'ble Supreme Court in Faquddin Vs Tajuddin [AIR 2008 SC (Supp) 478], **“a jurisdictional fact would not attract the principle of estoppel as there can be no estoppel against statute”** (Para 38 of the judgment) . A similar view was expressed by the Hon'ble Supreme Court in Ram Saran Vs Pyare Lal (AIR 1996 SC 2361), wherein it was held that

*“ 24. The Rent Act is a special statute governing and regulating tenancy and sub-tenancy. Such provisions in the special statute supersede the general law of tenancy if the provisions of the special statute are incompatible with the general law of tenancy. Under Section 14 of the Rent Act, mere knowledge of the landlord about occupation of the tenanted premises by the said registered society and acceptance of rent for the tenanted premises tendered by the tenant in the name of the registered society, will not create a sub-tenancy unless induction of a sub-tenant is made with the written consent of the landlord. It is nobody's case that the landlord has given any written consent for induction of sub-tenant. **There is***

no estoppel against statute. Hence, even if the landlord has accepted payment of rent for the disputed premises from the said society, such acceptance of rent will not constitute legal and valid sub-tenancy in favour of the registered society. Consequently, landlord will not be estopped from claiming eviction of unauthorised sub-tenant along with the tenant for indulging in inducting sub-tenant without lawful authority.” (emphasis supplied)

28. Since, as already held, under the Electricity Act, this Commission has the function of regulation of tariff of Adani and resultantly adjudication of dispute arising in that connection, there is no legal bar on this Commission for adjudication of dispute for the fact that the State Commissions had adopted the tariff under Section 63 of the Electricity Act.

29. It also bears notice that by use of word ‘shall’ in Section 63, the Appropriate Commission has been mandated to adopt the tariff if such tariff has been determined through the transparent process of bidding in accordance with the guidelines issued by the Central Government, without any further proceeding. Under the guidelines issued by the Central Government the procurer has to approach the Appropriate Commission for adoption of tariff under Section 63. The procurers, GUVNL and the distribution companies in the State of Haryana approached the respective State Commissions under Section 63 of the Electricity Act and the tariff was adopted by those Commissions. The procurers did not approach this Commission for adoption of tariff. This could perhaps be for the reason that two States invited bids at different points of time and independently of each other. Considering the statutory scheme of clause (b) of sub-section (1) of Section 79 of the Electricity Act, the fact of adoption of tariff by the

respective State Commissions under Section 63 at the instance of procurers cannot derogate this Commission from discharging its statutory functions Commission under sub-section (1) of Section 79. The fact that this Commission was not approached is not considered sufficient to divest this Commission of the jurisdiction otherwise vested under the law.

30. We, however, consider it necessary to highlight one aspect. In the present proceedings it has been strenuously argued on behalf of Adani that it entered into or had the composite scheme for generation and sale of electricity in more than one State since execution of the PPAs with the distribution companies in Haryana way back in 2008. Yet, it did not place this fact on record before this Commission after signing of the PPAs or did not approach this Commission for any matter arising under clause (b) of sub-section (1) of Section 79 of the Electricity Act. We have taken a serious note of this tendency of Adani.

Re: Issue at (c)

31. GUVNL has stated that the issues already decided by GERC and Appellate Tribunal cannot be reopened in these proceedings. This Commission does not intend to undo the matters decided between the parties through judicial forums. However, it is pointed out that the dispute raised in the present proceeding was not raised any other proceeding by GUVNL or Adani.

32. In Appeal No. 184/2010 the Appellate Tribunal framed the following issues in para 16 as noted the judgment dated 7.9.2011:

“16. In the light of the above rival contentions urged by the parties, the following questions may arise for consideration in the present Appeal:

(i) Whether Adani Power Ltd., the Appellant (Seller) had the right to elect to terminate the PPA under Article 3.4.2 of the PPA on his own default at a stage prior to the commercial operation of the Plant?

(ii) If the answer for the above question is in affirmative, then further question which would arise as to whether the Appellant has validly terminated the PPA in terms of its termination notice dated 28.12.2009 in the facts and circumstance of the case?

(iii) Whether the State Commission is correct in directing the Appellant, Adani Power Limited by way of specific performance to perform its contractual obligation and to supply the power to Gujarat Holding Company under the PPA as remedy for the alleged wrongful termination in view of the explicit clauses of the PPA, the provisions of the Electricity Act, 2003 and Specific Relief Act 1963.”

33. The issues before the Appellate Tribunal pertained to the validity of the action of termination of the PPA by Adani. These are not the issues before this Commission in the present matter as is also clear from the prayers made in the petition, which have been extracted above. The impact of the alleged unforeseeable and uncontrollable changes in circumstances of allotment of domestic coal by Coal India Limited; and enactment of the Indonesian Regulation were not the issues either before GERC or the Appellate Tribunal in any of the proceedings. These issues are raised for the first time in the present petition. The questions presently raised were neither raised nor decided. In particular, the Indonesian Regulation was promulgated on 23.9.2010 much after the cancellation of the PPA with GUVNL on 28.12.2009 by Adani. The changed

circumstances involving sale of power to Haryana and the promulgation of the Indonesian Regulation are issues which are not covered by the judgement in Appeal No. 184/2010 decided by the Appellate Tribunal. The cause of action in the proceedings before GERC in Petition No. 1000/2010 and the Appellate Tribunal in Appeal No 184/2010 was different from those raised in the instant petition. Earlier adjudication by the Appellate Tribunal was on the ground of cancellation of the PPAs by Adani because of non-materialisation of the FSA with GMDC. However, the present dispute primarily raises the question of effect of Indonesian Regulation on the obligations of Adani to supply power at the tariff discovered through the competitive bidding process, in addition to the question of deviations in the FSA signed with Coal India Ltd. The first issue is common to both, Gujarat and Haryana. In order to avoid multiplicity of proceedings before different State Commissions it is only logical to adopt a common approach and sort out and find solutions by this Commission on the dispute raising common issues.

34. GUVNL has specifically pointed out that Adani filed certain petitions before GERC during 2011 and 2012, after signing of PPAs with Haryana for redressal of its grievances under the PPA and thus accepted the jurisdiction of GERC: The petitions filed by Adani before GERC are Petition No 1080/2011 (Adjustment of tariff under PPA dated 6.2.2007 with regard to change in law such as increase in customs duty), Petition No 1093/2011 (Obligations to generate and supply before the scheduled commercial operation date) and Petition No. 1210/2012 (Adjustment of tariff under PPA dated

2.2.2007 with regard to change in law such as increase in customs duty). The causes of action in the aforesaid petitions are also different.

35. The fact of some disputes under different set of circumstances and on separate causes of action earlier decided by the Appellate Tribunal or GERC should not come in the way of this Commission to decide the dispute of merits.

36. The above discussion and analysis leave no manner of doubt that this Commission has jurisdiction to entertain the dispute raised in the petition. We accordingly direct that the petition be admitted for adjudication of the dispute on merits.

37. The petition shall be listed for hearing on 6.11.2012.

sd/-
(M DEENA DAYALAN)
MEMBER

sd/-
(V.S. VERMA)
MEMBER

sd/-
(S. JAYARAMAN)
MEMBER

sd/-
(DR. PRAMOD DEO)
CHAIRPERSON