

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 253/MP/2012

Coram:

Shri V.S. Verma, Member

Shri M. Deena Dayalan, Member

Date of Hearing: 27.8.2013

Date of Order : 28.10.2013

In the matter of

Petition under section 79 of the Electricity Act, 2003 pertaining to adjudication of issues relating to Power Purchase Agreement between PTC India Limited and Lanco Budhil Hydro Power Pvt. Ltd

And in the matter of

PTC India Ltd.

Petitioner

Vs

1. Lanco Budhil Hydro Power Pvt. Ltd.
2. Haryana Power Generation Corporation Ltd

Respondents

Parties Present:

1. Shri Ravi Prakash, Advocate, PTC
2. Shri Varun Pathak, Advocate, PTC
3. Shri Suyash Gura, Advocate, PTC
4. Shri Vikas Mishra, Advocate, Lanco Budhil
5. Shri Akil Sibal, Advocate, Lanco Budhil
6. Shri Deepak Khurana, Advocate, Lanco Budhil
7. Shri Ankush Bajoria
8. Shri Apporve Karol, HPPC
9. Shri Haridas Maiti, BYPL
10. Shri Prabhat Shrivastava, Lanco Budhil

ORDER

The petitioner seeks the following reliefs, namely -

- “(i) *The termination of PPA by Lanco vide letter dated 18.12.2009 be declared illegal and invalid as PTC has throughout performed the entirety of its obligations under the PPA dated 30.03.2005 and has always been ready and willing to perform all its obligations under the said PPA;*

- (ii) *Direct Lanco to specific perform its obligations under the PPA dated 30.03.2005;*
- (iii) *In the alternative, direct Lanco to compensate PTC in accordance with Article 15.6.1 of the PPA along with interest calculated from the date of termination upto the date of payment along with other payments due to PTC in accordance with the provisions of the PPA dated 30.03.2005;*
- (iv) *Direct Lanco to pay/ reimburse PTC for any charge/ claim which HPGCL may claim from PTC;*
- (v) *Direct Lanco to pay to PTC, damages for the loss of business due to the illegal termination of the PPA by Lanco;*
- (vi) *Such other further orders are passed as this Hon'ble Court may deem fit and proper."*

2. Lanco Green Power Private Ltd, a company of Lanco group, (Lanco), was allotted Budhil Hydro Power Project (2 X 35 MW) (power project) by the State Government of Himachal Pradesh under letter dated 4.8.2004 to develop on Build, Own. Operate and Maintain (BOOM) basis. By letter dated 9.9.2004 Lanco is said to have expressed a desire to enter into a long-term bankable PPA with the petitioner for sale of electricity at the power project and, after a series of meetings, a Memorandum of Understanding dated 3.11.2004 (MoU) was executed between the parties. The MoU was succeeded by the Power Purchase Agreement dated 30.3.2005 (PPA), valid for a period of 35 years from the date of commercial operation, under which the entire saleable power and energy from the power project was to be purchased by the petitioner. The PPA was subsequently amended on 23.1.2006.

3. In keeping with the provisions of the PPA, the petitioner entered into the Power Sale Agreement dated 21.9.2006 (PSA) with Haryana Power Generation Corporation Ltd (HPGCL), the second respondent, for further sale of the power

purchased from Lanco as a back-to-back arrangement and informed Lanco accordingly. The PSA was approved by Haryana Electricity Regulatory Commission (the State Commission) by its order dated 7.6.2007.

4. Lanco terminated the PPA under its letter dated 18.12.2009 on various grounds, reference to which is not considered necessary for the purpose of the present order. The termination of the PPA led to dispute between the parties who continued negotiation to settle the issue. However, the dispute could not be mutually resolved between the parties.

5. After termination of the PPA by Lanco, HPGCL who is stated to have been kept informed of the developments regarding termination of the PPA by Lanco, filed a petition before the Haryana Electricity Regulatory Commission (the State Commission) praying that notice of termination of the PPA by Lanco be declared illegal and that Lanco and the petitioner be directed to supply power to Haryana in accordance with their obligations under the PPA and the PSA. In its reply before the State Commission, Lanco raised a preliminary objection on maintainability of the petition on the ground of jurisdiction of the State Commission to go into the dispute of termination of the PPA since HPGCL was not a party to the PPA between Lanco and the petitioner. The State Commission in its order dated 25.8.2011 upheld its jurisdiction holding that the PPA and the PSA are inseparable and inter-dependent.

6. Lanco filed appeal (Appeal No 188/2011) before the Appellate Tribunal challenging the State Commission's order dated 25.8.2011. The petitioner as a party respondent *inter alia* urged before the Appellate Tribunal that in respect of the issues

relating to termination of the PPA, this Commission had the jurisdiction as the dispute was with an inter-State electricity trader and thereby it involved inter-State transmission of electricity. The Appellate Tribunal in its judgment dated 9.8.2012 allowed the appeal, set aside the order of the State Commission, holding that the State Commission did not have jurisdiction to go into the dispute raised in the petition by HPGCL. The Appellate Tribunal, however, did not decide on the question raised by the petitioner regarding jurisdiction of this Commission in the matter. The petitioner has filed the appeal (Civil Appeal No. 32017/2012) before the Supreme Court against the judgment of the Appellate Tribunal dated 9.8.2012 and the appeal is pending. Meanwhile, the present petition has been filed.

7. Lanco vide affidavit dated 11.3.2013 has raised preliminary objections to the maintainability of the present petition before this Commission. Lanco has submitted that in the Appeal filed by the petitioner before the Supreme Court it has taken stand that the State Commission has the jurisdiction and during the pendency of appeal it cannot approach this Commission since the Appellate Tribunal's order would not *ipso jure* confer jurisdiction on this Commission. Lanco has further submitted that the petitioner cannot invoke jurisdiction of this Commission under clause (c) of sub-section (1) of Section 79 of the Electricity Act urging that for invoking the jurisdiction it is necessary that one of the parties to the dispute must be the transmission licensee but in the present dispute neither of the parties is a transmission licensee.

8. We have heard learned counsel for the parties on maintainability of the present petition.

9. Learned counsel for the petitioner argued that once the Appellate Tribunal has held that the State Commission does not have the jurisdiction it *ipso facto* follows that the dispute falls within the jurisdiction of this Commission since otherwise it would leave a regulatory vacuum. Learned counsel further submitted that the question of termination of the PPA has not been heard and decided on merits by any of the forums but only the question of jurisdiction has been considered and therefore nothing came in the way of this Commission to adjudicate the dispute on merits. Learned counsel also urged that the petitioner always maintained that this Commission and the State Commission had concurrent jurisdiction but Lanco always evaded adjudication of the dispute at both the forums by raising the question of jurisdiction of regulatory forum.

11. The limited question that arises for consideration at this stage is whether it would be proper for this Commission adjudicate the dispute on merits when the appeal filed by the petitioner against the order of the Appellate Tribunal on the question of jurisdiction is pending before the Supreme Court. The basic issue that has been raised in the appeal before the Supreme Court is the maintainability of the petition filed by HPGCL before the State Commission. The petitioner has pointed out that in case the State Commission is found to be lacking jurisdiction then this Commission has the jurisdiction since otherwise the situation of regulatory vacuum would be created. Since the Supreme Court is already *in seisin* of the question of jurisdiction, the judicial propriety demands that this Commission should not proceed with the adjudication of the dispute on merits since the question of jurisdiction goes to the root of the dispute. Even otherwise, it is not considered proper for this Commission to enter into the merits of the dispute. In case the Supreme Court upholds the jurisdiction of the State Commission, adjudication of the dispute by this

Commission on merits would prove to be an exercise in futility. On these considerations, we refrain ourselves from entertaining the petition at this stage. We are of the considered view that the petitioner must await the outcome of its appeal before the Supreme Court. At the same time it is not desirable to keep the present petition pending till disposal of the appeal by the Supreme Court.

12. Accordingly, the present petition is disposed of with the observation that the petitioner may decide its future course in the light of the decision of the Supreme Court and shall be at liberty to approach this Commission in accordance with law in case the Supreme Court rules in favour of jurisdiction of this Commission.

sd/-

(M Deena Dayalan)
Member

sd/-

(V.S. Verma)
Member