

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Coram:
Shri P.K.Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of order: 6th of June, 2018

Petition No. 305/MP/2015

In the matter of

Petition for Section 79 of the Electricity Act, 2003 read with the provisions of the Power Supply Agreement dated 5.1.2011 for directions to make energy charge as pass-through based on the actual fuel cost incurred by the petitioner.

And

In the matter of

Adhunik Power and Natural Resources Ltd.
9B, 9th Floor,
Hansalaya Building,
15 Barakhamba Road, Connaught Place,
New Delhi-110 001

....Petitioner

Vs

1. West Bengal State Electricity Distribution Company Ltd.
Vidyut Bhawan, 7th Floor, DJ-Block, Sector-II,
Salt Lake City , Kolkata -700 091

2. PTC India Ltd.
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi-110 066

....Respondents

Petition No. 255/MP/2017

In the matter of

Petition under Section 79 (1)(b) and 79 (1)(f) of the Electricity Act, 2003 read with Article 10 of the PPA seeking compensation on account of events pertaining to "Change in Law" as per the Power Purchase Agreement (PPA) dated 25.3.2011 executed between the Petitioner and the Respondent No. 2 and as per the terms of

the Power Supply Agreement (PSA) dated 5.1.2011 executed between Respondent No.1 and Respondent No. 2.

**And
In the matter of**

Adhunik Power and Natural Resources Ltd.
9 B, 9th Floor,
Hansalaya Building,
15 Barakhamba Road, Connaught Place,
New Delhi-110 001

... **Petitioner**

Vs.

1. West Bengal State Electricity Distribution Company Ltd.
Vidyut Bhawan, 7th Floor, DJ-Block, Sector-II,
Salt Lake City , Kolkata -700 091

2. PTC India Ltd.
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi-110 066

3. Tamil Nadu Generation and Distribution Corporation Ltd.
NPKAR Maligai, 6th Floor, Eastern Wing,
144, Anna Salai, Chennai-600 002

4. Jharkhand State Electricity Board
(Jharkhand Bijli Vitan Nigam Limited)
Engineer`s Building, HEC, Dhurwa, Ranchi,
Jharkhand-834 004

...**Respondents**

Parties present:

Shri S.B. Upadhayay, Senior Advocate, APNRL
Shri Nishant Kumar, Advocate, APNRL
Shri Anish Chakraborty, APNRL
Shri Vishrov Mukherjee, Advocate, WBSEDCL
Shri Janmali M., Advocate, WBSEDCL
Ms. Catherine Ayellore, Advocate, WBSEDCL
Shri Aashish Anand Bernad, Advocate, PTC India
Shri Paramhans, Advocate, PTC India
Shri M.G. Ramachandran, Advocate, Prayas
Ms. Ranjitha Ramachandran, Advocate, Prayas
Ms. Anushree Bardhan, Advocate, Prayas
Shri S. Vallinayagam, Advocate, TANGEDCO

ORDER

The Petitioner, Adhunik Power and Natural Resources Limited (APNRL) has filed Petition No. 305/MP/2015 and Petition No. 255/MP/2017 seeking certain relief under Change in Law in terms the Power Sale Agreement dated 5.1.2014 between PTC and West Bengal Electricity Distribution Company Limited (WBSEDCL) and back to back Power Purchase Agreement dated 25.3.2011 between the Petitioner and PTC for supply of 100 MW power from the Petitioner's 540 MW (2x270 MW) thermal power plant located at Saraikela, Kharswan, Jharkhand.

2. Brief facts of the case leading to filing of Petition No.305/MP/2015 are that the Petitioner was allocated Ganeshpur coal block in the State of Jharkhand jointly with Tata Steel. On account of delay in operationalization of coal block, the Petitioner approached PTC to take up the matter with WBSEDCL to make coal cost as pass-through till full operationalization of the coal block. PTC vide its letter dated 13.5.2013 informed the Petitioner that its proposal with regard to coal cost pass-through is not acceptable to WBSEDCL. Subsequently, the Hon`ble Supreme Court vide its judgments dated 25.8.2014 and 29.4.2014 cancelled the Ganeshpur coal block. Government of India, Ministry of Power approved fuel pass-through for short supply of quantum of coal by Coal India Limited and vide letter dated 31.7.2013 directed Electricity Regulatory Commissions to take necessary action to implement the decision with regard to impact on tariff in the concluded PPA due to shortage of domestic coal availability. Accordingly, the Petitioner has been raising supplementary bills for the power supplied to WBSEDCL based on actual energy charge *vis-a-vis* the PPA energy charge of Rs. 0.951/kWh with request to take up the cost escalation with WBSEDCL/WBSERC and to make fuel as pass-through based

on the directions of Government of India. Subsequently, the Petitioner vide its letters dated 31.1.2014, 31.3.2014, 1.6.2015, 19.10.2015 and 20.11.2015 raised the bills to WBSEDCL for supply of power. However, WBSEDCL vide its various communications, rejected the Petitioner's claim on the ground that the claim of additional fuel cost is not in terms of the PPA dated 5.1.2011. PTC vide its letter dated 23.9.2014 advised the Petitioner to approach appropriate Regulatory Commission to resolve the issue. Accordingly, the Petitioner has filed the present petition before this Commission seeking the following reliefs.

- “(a) Declare that the petitioner is entitled to recover energy charges on the basis of actual landed cost of coal from alternate sources, in terms of the CERC (Terms and Conditions of Tariff) Regulations, 2009;
- (b) Direct that the petitioner be compensated for an amount of Rs. 187.08 crore towards energy charges on the basis of actual landed cost of coal from alternate sources, for the period of electricity supplied from 8.7.2013 to 31.10.2015, in accordance with the supplementary bills raised by the petitioner;
- (c) Direct the parties to amend the PPA to reflect the change in calculation of energy charges, if considered necessary;
- (d) Direct the respondents to pay energy charge under the PPA and PSA based on the actual landed cost of coal received from alternate sources, calculated in terms of CERC (Terms and Conditions of Tariff) Regulations, 2009
- (e) Direct the respondents to pay surcharge dues for late payment as per the provisions of the PPA/PSA in order to compensate the petitioner for the average rate of interest incurred on the cost of loans owing to the increase in tariff;
- (f) Condone any shortcoming/deficiencies in the Petition and allow PTC/WBSEDCL to pay as per the prayer of the petitioner;
- (g) Grant an expeditious hearing of this petition; and
- (h) Pass such and further orders, as the Hon`ble Commission may deem fit and appropriate keeping in view the facts and circumstances of the case.”

3. In Petition No.255/MP/2017, the Petitioner has sought relief under Change in Law in terms of the PSA dated 5.1.2011 and PPA dated 23.5.2011 with the following prayers:

“A. Declare and adopt that the following events/notifications are change in law events within the meaning of Article 10 of the WBSEDCL PSA dated 5.1.2011 and APNRL PPA dated 25.3.2011 and allow compensation thereof:

(i) Additional expenditure incurred by the Petitioner due to change/increase in Royalty, Contribution to District Mineral Foundation and levy of contribution towards National Mineral Exploration Trust Vide Notification, being numbered as 349 dated 10.5.2012 (Annexure E), Notification No. GSR 792 (E), dated 20.10.2015 (Annexure F), Notification No. GSR 837 (E) (Annexure G) and Notification No. GSR No. GSR 632 (E) dated 14.8.2015 (Annexure I) issued under the provisions of Mines and Mineral (Development and Regulation) Act, 1957;

(ii) Additional expenditure incurred by the Petitioner due to increase in clean energy cess, which was later named as clean environment cess(Annexure K, L, and M) and levy of GST Compensation Cess under GST (Compensation to States) Act, 2017 w.e.f 01.07.2017 (Annexure N);

(iii) Introduction of Excise Duty on Coal vide Central Government Notification No. 1/2011 (Annexure O), further increase in such excise duty vide CIL/S&M/GM(F)/2331 dated 17.03.2012 (Annexure P) and notification no. 14/15 of 2015 dated 01.03.2015 (Annexure Q);

(iv) Change in the components of Central Excise Duty vide Notification No. SECL/BSP/S&M/Sr.ES/1253 dated 07.06.2012 issued by the South-Eastern Coal Fields Ltd. (Annexure R) Notification No. SECL/BSP/S&M/504 dated 08.03.2018 (Annexure S);

(v) Increase in Sizing and Crushing charges vide Notification No. CIL/S&M/GM (F)/Pricing/2784 dated 16.12.2013 (Annexure U);

(vi) Increase in coal surface transportation charges vide Notification No. CIL/S&M/GM(F)/Pricing/2340 dated 13.11.2013 (Annexure V);

(vii) Increase in base freight of coal transportation vide Rate Circular No. 7 of 2012 dated 05.03.2012, RC 6 of 2013 dated 22.03.2013, RC 29 of 2013 dated 04.10.2013, RC 20 of 2014 dated 20.06.2014, RC 8 of 2015 dated 16.03.2015 and Corr. 4 to RC 8 of 2015 [Annexure W (Colly)];

(viii) Increase in levy of Busy Season Charges and Development Surcharge vide rate Circular No. 58 of 2007 dated 29.05.2007, RC No. 38 of 2011 dated 12.10.2011, RC 28 of 2012 dated 27.09.2012 and RC 24 of 2013 dated 18.09.2013 [Annexure X (Colly.)];

(ix) Levy and subsequent increase in Service tax rate vide circular No. 27 of 2012 dated 26.09.2012, corrigendum 3 to RC 29 of 2012 dated 27.05.2015, corrigendum 5 to RC 29 of 2012 dated 12.11.2015 and corrigendum 6 to RC 29 of 2012 dated 31.05.2016 [Annexure Y (Colly)]; and

(x) Increase in Total Transportation Cost.

B. Direct the Respondent to make a payment of Rs. 70.29 Crore to the Petitioner, which amount has accrued on account of the Change in Law events, till 31.03.2017 (Annexure Z);

C. Direct the Respondent No. 1 to continue to make payments accrued in favour of the Petitioner on account of Change in Law events mentioned in prayer (A), post 01.04.2017, in terms of the protocol/formula envisaged in Annexure AA of the Petition, till the validity of the WBSEDCL PSA dated 05.01.2011 and APNRL PPA dated 25.03.2011;

D. In the interim, grant prayer (B); and

E. Approve the methodology, as provided in the present petition, for computation of the impact of Change in Law for the balance term of the PSA and PPA.”

4. The Petitioner has submitted in both the petitions that this Commission has the jurisdiction to adjudicate the disputes between the Petitioner and WBSEDCL since the Petitioner, besides supplying power to WBSEDCL, has entered into PPAs with Jharkhand Vidyut Vitaran Nigam Limited (JBVNL) and Tamil Nadu Generation and Distribution Company Limited (TANGEDCO) for supply of power from its generating station and therefore, has a composite scheme for generation and supply of power in more than one State in terms of Section 79(1)(b) of the Electricity Act, 2003 (the Act). The Petitioner was directed to implead JBVNL and TANGEDCO and the parties were directed to file reply on maintainability of the petitions.

5. WBSEDCL has filed its reply opposing the maintainability of the petition before the Commission, primarily on the ground that the Petitioner has approached the Jharkhand Electricity Regulatory Commission for determination of tariff for supply of power under the PPA with JBVNL and therefore, the Petitioner should approach the West Bengal Electricity Regulatory Commission (WBERC) under Section 64(5)

of the Act for resolution of dispute qua WBSEDCL. The Petitioner has filed its rejoinder refuting the contention of WBSEDCL and has submitted that in respect of the supply of power to WBSEDCL and TANGEDCO, the Petitioner has a composite scheme under Section 79(1)(b) of the Act. TANGEDCO and JBVNL have not filed any replies.

6. The petitions were heard on maintainability on 19.4.2018. Both Petitioner and WBSEDCL advanced detailed arguments on maintainability of the petitions and have filed written submissions.

7. With regard to the maintainability of the petitions, the Petitioner has submitted the following:

(a) Tariff determination is done by an Appropriate Commission either under Section 62 or Section 63 of the Act. The jurisdiction as to which Commission would deal with tariff, either under Section 62 or Section 63, is governed by Sections 79(1)(b), 64(5) and 86(1)(b) of the Act. Under Section 79(1)(b), the jurisdiction for determination of tariff is vested with this Commission for generators having composite scheme and under Section 86(1)(b), the jurisdiction for determination of tariff vests with respective State Commission in the event there is no composite scheme. Section 64(5) is an exception to both the above provisions since the language of Section 64(5) is “notwithstanding anything contained in Part X” and both Sections 79(1)(b) and 86 (1)(b) fall in Part X of the Act. Therefore, the jurisdiction of the State Commission can be invoked under Section 64(5) of the Act in case both the Discom and the generator agree to the same, notwithstanding that the jurisdiction is with the Central Commission. This position has been settled by

the Hon`ble Supreme Court judgment in Energy Watchdog Vs. Central Electricity Regulatory Commission and others {(2017) 14 SCC 80}, particularly in para 29 of the said judgement.

(b) The jurisdiction qua those PPAs wherein there is no mutual agreement between the generator/Petitioner and the distribution licensees (namely, WBSEDCL and TANGEDCO as the case may be) rests with this Commission. The contention of WBSEDCL is that since the Petitioner has approached JSERC qua Jharkhand Discom is accepted, the present petition has to be adjudicated by WBSERC. If this contention is accepted, the words “upon application made to it by the parties” in Section 64(5) of the Act would be rendered ineffective/otiose. This will vitiate all change in law orders issued by this Commission under the composite scheme till date as a number of generators have variable charge PPAs with their home State wherein energy charges have been determined their respective State Commissions.

(c) Under Rule 8 of the Electricity Rules, 2005, once the tariff is determined by this Commission, the State Commission need not determine the same. Under Rule 8, the precedence of tariff determined under Section 79(1)(a) or (b) is only restricted to section 86(1)(a) or (b), but the said Rule does not give overriding effect to Section 79 over Section 64(5). Therefore, in the present case, the tariff issue decided by this Commission would govern those Discoms where the parties (generator and Discoms) have not consented to approach the State Commission under Section 64(5) and the

tariff issue decided by a State Commission under Section 64(5) would govern the parties who have consented under the said provision.

8. The gist of submissions of WBSEDCL with regard to maintainability of the petitions is as under:

(a) Where the Commission exercises power under Section 62 read with Section 64 for tariff determination or Section 63, the plenary/regulatory power is under Section 79(1)(b) of the Act which has been clarified by the Supreme Court in para 20 of the judgement in Energy Watchdog Case. Therefore, the contention of the Petitioner that Section 64(5) is applicable notwithstanding Section 79(1)(b) of the Act is without merit.

(b) Section 64 is a procedural provision and the said section neither creates nor confers any jurisdiction de hors Section 79(1)(b)/86(1)(b) of the Act. The present proceedings are not in the nature of tariff determination and therefore, Sections 62 and 64 are not applicable in these cases.

(c) The Petitioner has contended that there are Change in Law orders passed by this Commission which would get vitiated since a number of generators have variable charges PPAs where energy charges have been determined by the State Commissions. Such a contention is not factually correct as the Petitioner has not provided a single example where part tariff has been determined by the State Commissions and part tariff by this Commission, apart from the same being contrary to Rule 8 of the Electricity Rules, 2005.

(d) In terms of Section 79(1)(b) of the Act, only those generating stations which have a composite scheme for generation and supply of electricity to more than one State shall fall under the regulatory jurisdiction of this Commission. In Petition No. 305/MP/2015, the Petitioner has failed to establish that it has a composite scheme for generation and sale of electricity in more than one State. In Petition No.255/MP/2017, the Petitioner has arrayed TANGEDCO, JBVNL and WBSEDCL as respondents and has claimed it has a composite scheme under Section 79(1)(b) for supply of power to more than one State. However, no relief has been claimed against TANGEDCO and JBVNL.

(e) The jurisdiction of this Commission and the State Commissions are mutually exclusive. The Act does not provide for concurrent jurisdiction of this Commission and the State Commissions. Therefore, the Petitioner could either approach the different State Commissions or this Commission for determination of tariff and/or adjudication of disputes in relation to tariff. The conduct of the Petitioner of approaching the JSERC for tariff determination is evidence of the fact that there is no composite scheme. Since, the Petitioner has chosen to approach JSERC in terms of Section 64(5), the Petitioner is bound by the consequence of the same and accordingly, the Petitioner has to approach the respective State Commissions under Section 86(1)(b) of the Act.

(f) Hon'ble Supreme Court's judgement in Energy Watchdog Case does not deal with the issue of concurrent jurisdiction of this Commission vis-a-vis the State Commissions. What the said judgement states is that the parties may approach State Commission under Section 64(5), notwithstanding the

fact that it has a composite scheme. Having exercised the option, the Petitioner is precluded from contending that this Commission would continue to have concurrent jurisdiction.

WBSEDCL has prayed that in the light of its submissions, the petitions be dismissed since they are not maintainable before this Commission.

Analysis and Decision

9. The Petitioner has set up a 540 MW thermal power plant (generation project) in District Saraikela, Kharsawan in Jharkhand consisting of two units of 270 MW each. The units of the project of the Petitioner were put under commercial operation on 21.1.2013 and 19.5.2013, respectively. The Petitioner has the following PPAs/arrangement to supply power from its generation project:

Date of execution of PPA between the Petitioner and PTC	Date of execution of PSA between PTC and Discoms	Procurer of power	Quantum	Tenure
25.3.2011	5.1.2011	WBSEDCL	100 MW RTC power	25 years
19.12.2013	18.12.2013	TANGEDCO	100 MW RTC power	15 years
28.9.2012 (PPA between APNRL and JSEB (now JBVNL))		JSEB/JBVNL	122.85 MW	25 years

10. The Petitioner has approached JSERC for determination of tariff under the PPA qua JSEB/JBVNL and has approached this Commission for relief under change in law in terms of the PPA/PSA qua WBSEDCL. It is pertinent to mention that the Petitioner also approached this Commission for amendment of the PPA/PSA qua TANGEDCO for change in quoted tariff consequent to allocation of coal block under SHAKTI scheme. According to the Petitioner, it can approach this Commission for adjudication of the disputes in respect of the PPA/PSA for supply of power to

WBSEDCL and TANGEDCO since it satisfies the conditions of Section 79(1)(b) for generation and supply of power in more than one State. However, under Section 64(5) of the Act, it can approach JSERC alongwith JBVNL for determination of tariff notwithstanding the fact that the jurisdiction is otherwise vested in this Commission. WBSEDCL has submitted that there cannot be concurrent jurisdiction of both Central Commission and State Commissions for supply of power from the same generating stations to the distribution companies located in different State. According to WBSEDCL, once the Petitioner has approached JSERC, it has per force to approach the respective State Commissions under Section 64(5) of the Act i.e. WBSERC qua the PPA/PSA with WBSEDCL and TNERC qua the PPA/PSA with TANGEDCO. Therefore, the petitions are not maintainable.

11. The jurisdiction of this Commission to regulate the tariff of the generating companies derive from section 79(1)(a) and (b) of the Act and to adjudicate the dispute from Section 79(1)(f) of the Act. The said provisions are extracted as under:

“Section 79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-
(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
(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;
xx
(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;”

Under Section 79(1) (b), the Central Commission can have the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those generating companies have composite scheme for generation and sale of electricity in more than one State. The Hon’ble Supreme

Court in Energy Watchdog Case has dealt with the issue of composite scheme under Section 79(1)(b) as under:

“22. 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 sub-sections (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 sub-clauses (a), (b), and (d), and “intra-state” in sub-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 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.”

12. As per the above findings of the Hon’ble Supreme Court, the State Commission’s jurisdiction is only where the generation and supply takes place within the State. The moment the generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. Dealing with the case of Adani, Hon’ble Supreme Court has held that since the generation and sale is in more than one State, Section 86 is not attracted. Hon’ble Supreme Court has ruled that, the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State. Applying the test in the instant case, had the Petitioner been supplying power only to JSEB/JBVNL, it would have been generation and supply within the State and

the jurisdiction of the JSERC would have been attracted. It is, however, seen that prior to entering into PPA with JSEB/JBVNL, the WBSEDCL had entered into PSA with PTC on 5.1.2011 and PTC in turn had entered into PPA with the Petitioner on 25.3.2011. In other words, prior to the PPA with JSEB/JBVNL, the Petitioner had an arrangement for inter-State supply of power. The Petitioner subsequently had an arrangement in December 2013 for supply of power to TANGEDCO. The entire scheme of generation and supply of power unmistakably indicates that the Petitioner has a composite scheme for generation and supply of power in more than one State.

13. It is pertinent to mention that in case of Adani, it had the arrangement to supply power to Gujarat alone prior to entering into PPAs with Haryana Utilities. In fact, GERC had not only adopted the tariff of Adani, it had also adjudicated certain change in law claims of Adani. After Adani approached this Commission pleading composite scheme on account of its supplying power to GUVNL and Haryana Utilities, this Commission ruled that Adani's case fulfills the requirement of Section 79(1)(b) the moment it entered into PPAs with Haryana Utilities and the jurisdiction came to be vested in this Commission. Hon'ble Supreme Court in Energy Watchdog Case has upheld that Adani has a composite scheme for generation and sale of power in more than one State. Similar is the case with GMR Kamalanga which had a section 62 PPA with GRIDCO for supply of power from its project in Odisha. Subsequently, GMR Kamalanga entered into Section 63 PPAs with Haryana (through PTC) and Bihar. This Commission held that GMR Kamalanga has a composite scheme for generation and supply of power in more than one State. The jurisdiction of this Commission in GMR Kamalanga case has also been upheld by the Hon'ble Supreme Court in Energy Watchdog case. Therefore, merely because the generating company is supplying part of its power to the home State where the

plant is located does not mean that the jurisdiction of the State Commission is attracted, particularly when the generating company has the PPAs/arrangement to supply power to other States. Therefore, we are of the view that where the generating company has the PPAs/arrangement to supply power from its project to more than one State including the home State where the plant is located, this Commission shall have the exclusive jurisdiction to regulate the tariff in terms of Section 79(1)(b) of the Act and the State Commission will not have the jurisdiction to determine the tariff in respect of the PPA with the home State. The Act does not envisages for concurrent jurisdiction of both Central Commission and State Commission in the matter of regulation of tariff of a generating company.

14. The Petitioner has argued that Section 64(5) is an exception to Section 79(1)(b) since the language used in Section 64(5) is “notwithstanding anything contained in Part X” and Section 79(1)(b) falls in Part X of the Act. Therefore, the jurisdiction of the State Commission can be invoked under Section 64(5) of the Act in case where both the Discom and the generator agree to the same, notwithstanding that the jurisdiction is with the Central Commission. WBSEDCL has submitted that since the Petitioner has invoked the jurisdiction of JSERC under Section 64(5), it has to necessarily adopt the same course to invoke the jurisdiction of the concerned State Commission in respect of the PPA/PSA with WBSEDCL and TANGEDCO. In order to resolve this controversy, we have to examine the provisions of Section 64(5) of the Act which is extracted 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.”

As per the above provision, the tariff for any inter-State supply, transmission or wheeling of electricity involving the territories of two States may upon application made by the parties intending to undertake such supply, transmission or wheeling may be determined by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor. It is pertinent to mention that in cases of inter-State supply, the jurisdiction of the Central Commission gets attracted. However, Section 64(5) carves out an exception to the jurisdiction of the Central Commission if such inter-State supply involves territories of two States and parties intending to undertake such supply i.e. the generator who intends to supply and the distribution licensee who intends to receive such supply make an application before the State Commission having jurisdiction over such distribution licensee. In our view, this situation can happen only where the generating company is in one State and it is supplying all its power to the distribution company in another State. The jurisdiction of the State Commission where the generating company is situated will not be attracted as there is no generation and supply of power within the State. Accordingly, the State Commission having jurisdiction over the distribution licensee shall determine the tariff in terms of Section 64(5) of the Act. The Petitioner has relied on the observations of the Hon'ble Supreme Court in para 27 of the judgment in the Energy Watchdog case with regard to the applicability of Section 64(5) in support of its action to approach JSERC for determination of tariff qua the PPA with JSEB/JBVNL. Para 27 of the judgment is extracted as under:

“27.....Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State

Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

In the above quoted para, the Hon’ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. “By application of the parties concerned” would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. If the party who intends to make inter-State supply and the party who intends to receive such inter-State supply are located in the same State or the inter-State supply to more than two States, then the requirement of inter-State supply “involving the territories of two States” are not fulfilled and the provisions of Section 64(5) shall not be attracted. In the present case, generation of electricity and supply thereof qua the PPA of JSEB/JBVNL takes place within the same State. Moreover, there is also arrangement for supply of electricity from the project to three States. Therefore, the requirement of inter-State supply involving the territories of two States is not fulfilled in case of supply of power by the Petitioner to JBVNL.

15. WBSEDCL has submitted that as per the judgement in Energy Watchdog’s Case, the parties may approach SERCs under Section 64(5), notwithstanding that the generator has a composite scheme. In our view, such an interpretation is

incorrect, and in fact similar arguments by the respondents in Adani and GMR case have been repelled by the Hon'ble Supreme Court when it held that only the Central Commission had the necessary jurisdiction to deal with the issues raised in those cases. Therefore, we reject the contention of WBSEDCL that the Petitioner would be required to approach each of the State Commissions namely, JSERC, WBERC and TNERC for relief under Section 86(1)(b) of the Act.

16. In view of the above discussion, we hold that the Petitioner has a composite scheme for generation and supply of electricity in more than one State and this Commission has the exclusive jurisdiction under Section 79(1)(b) to regulate the tariff of the Petitioner including adjudication of disputes relating to tariff. Therefore, the Petitioner shall also be required to approach this Commission for supply of power to JBVNL.

17. It is pertinent to mention that the Petitioner had approached this Commission in Petition No. 84/MP/2018 for amendment to the PPA/PSA for supply of power to TANGEDCO in order to pass on the benefits of discount under SHAKTI Scheme. The Commission in its order dated 18.5.2018 in Petition No. 84/MP/2018 has held that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79(1)(b) of the Act and has also approved the amendments to the relevant PPA/PSA.

18. This order is limited to determination of issue of the jurisdiction of this Commission to regulate the tariff of the project of the Petitioner and we have not expressed any view on the merit of the issues raised in the Petitions. Parties are

directed to complete the pleadings on merit by 15.7.2018. No further extension of time for completion of pleadings shall be permitted.

19. Petition No. 305/MP/2015 and Petition No.255/MP/2017 shall be listed for hearing on merit on 21.8.2018.

Sd/-
(Dr. M.K. Iyer)
Member

sd/-
(A.S. Bakshi)
Member

sd/-
(A. K. Singhal)
Member

sd/-
(P.K.Pujari)
Chairperson