

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 162/MP/2020

Coram:

Shri P.K.Pujari, Chairperson

Shri Arun Goyal, Member

Shri P.K.Singh, Member

Date of order: 7th August, 2021

In the matter of

Petition under Section 79(1) (f) of the Electricity Act, 2003, read with Regulations 20 and 21 of the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 seeking appointment of Sole Arbitrator for adjudication of disputes between the parties herein terms of clause 3.13 (b) of the Agreement dated 31.10.2014.

And

In the matter of

Shree Cement Limited,
Bangur Nagar, Post Box No. 33,
Bewari-305 901 (Rajasthan)

....Petitioner

Vs

1. Vendanta Limited,
1st Floor, 'C' Wing, Unit 103,
Corporate Avenue, ATUL Projects,
Chakala Andheri (East),
Mumbai-400093 (Maharashtra)

2. Southern Power Distribution Company of Telangana Limited,
6-1-50, MINT Compound,
Hyderabad-500 063 (Telangana)

....Respondents

The following were present:

Shri Kumar Mihir, Advocate, SCL
Shri Hemant Singh, Advocate, Vedanta
Shri Lakshyajit Singh Bagdwal, Advocate, Vedanta
Shri Harsha Peechara, Advocate, TSSPDCL

ORDER

The present Petition has been filed by the Petitioner, Shree Cement Limited who is an inter-State trading licensee in terms of trading licence granted by this Commission, under Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') read with Regulation 20 and Regulation 21 of the Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010 (hereinafter referred to as 'the 2010 Sharing Regulations') with the following prayer:

“Appoint a sole arbitrator for adjudication or to adjudicate itself of the disputes and difference that have arisen under the Agreement between the Applicant/Petitioner and the Respondent herein.”

Brief Background

2. Brief facts of the case leading to filing of the Petition are as follows:

(a) On 30.7.2014, Southern Power Distribution Company of Telangana Limited ('TSSPDCL') invited bids for purchase of power at Southern Region periphery (delivery point) on behalf of distribution companies of Telangana for the period from 29.5.2015 to 26.5.2016. In respect of the said bid, Respondent No.1, Vedanta Limited (formerly known as Sesa Sterlite Limited) authorised the Petitioner vide its letter dated 14.8.2014 for supply of 300 MW power from 29.5.2015 to 26.5.2016 to TSSPDCL. Accordingly, the Petitioner submitted its bid and was selected as successful bidder. Pursuant to issuance of Letter of Intent ('LOI') by TSSPDCL, the Petitioner entered into a Power Purchase Agreement ('PPA') dated 29.10.2014 with TSSPDCL for supply of power procured from the Respondent No. 1.

(b) As per Clause 3.2 of the PPA dated 29.10.2014 between the Petitioner and TSSPDCL, the generator Point of Connection ('PoC') injection charges and losses upto the delivery point were required to be borne by the Petitioner while withdrawal PoC charges and losses were required to be borne by TSSPDCL.

(c) The Petitioner and Vedanta Limited (Respondent No. 1) entered into a PPA dated 31.10.2014 for supply of 300 MW RTC power from the generating station of Respondent No. 1 to TSSPDCL (through Petitioner as a trader) for the period from 29.5.2015 to 26.5.2016. As per Clause 3.2 of the PPA dated 31.10.2014, the generator PoC injection charges and losses upto delivery point were to be borne by Respondent No.1, whereas Telangana PoC drawal charges and losses etc. were to be borne by the Petitioner.

(d) As per Clause 3.4 of the PPA dated 29.10.2014, the Petitioner made various applications to CTU for grant of Medium Term Open Access ('MTOA')/ Short Term Open Access ('STOA'). For the period between May 2015 and April 2016, the power was supplied to TSSPDCL under STOA.

(e) On 4.3.2016, CTU informed about operationalization of MTOA. Accordingly, the Petitioner supplied around 62 MW to TSSPDCL for the period from 1.4.2016 to 26.5.2016 under MTOA. Pursuant to supply of power under MTOA for the period from 1.4.2016 to 26.5.2016, PGCIL raised Point of Connection ('PoC') bill of Rs.1,53,94,243/- on the Petitioner in terms of provisions of the 2010 Sharing Regulations.

(f) When it came to reimbursement of the aforesaid PoC charges, TSSPDCL claimed that as per Clause 3.2 of the PPA dated 29.10.2014 executed between the Petitioner and TSSPDCL, it is liable to pay 50% of PoC charges for drawal of power beyond the delivery point leaving the balance 50% charges payable by the Respondent No.1 up to delivery point.

(g) The Respondent No.1, relying upon the 3rd Amendment to the 2010 Sharing Regulations and the Commission's order dated 14.7.2015 determining PoC rates and transmission losses for the period of May and June 2015, took the position that since TSSPDCL was liable to pay 100% of such charges (as PoC injection charges were merged into withdrawal charges), the Respondent No. 1 refused to pay any such charges.

(h) Since the said charges were not being paid to the Petitioner, the Petitioner approached Telangana State Electricity Regulatory Commission

('TSERC') through Petition being OP No. 8 of 2017. TSERC vide its order 1.11.2018 observed that TSERC has no jurisdiction to implement the terms of PPA dated 31.10.2014 executed between the Petitioner and Respondent No. 1 (the generator) since any dispute under that PPA was triable only in the courts at New Delhi. TSERC had also observed that once the liability to pay remaining 50% of PoC charges was on the generator (Respondent No. 1 herein), it was for the Petitioner herein to pay and collect the same from the generator as per the terms of PPA dated 31.10.2014 and that the liability to pay such charges was definitely not on the distribution company of Telangana. If such is the case, it is the liability of the Petitioner to bear 50% of the injection PoC charges and recover that from the generator as per the terms of PPA dated 31.10.2014.

(i) In terms of afore-mentioned order of TSERC dated 1.11.2018 read with the provisions of Clause 3.2 of the PPA dated 31.10.2014, the Petitioner repeatedly requested the Respondent No.1 to comply with its liabilities specified in the PPA dated 31.10.2014. However, the Respondent No.1 did not accept its liability to pay the said dues.

(j) Aggrieved by the action of the Respondent No.1, the Petitioner, in terms of Clause 3.13 of the PPA dated 31.10.2014 issued Notice of Invocation of Arbitration to the Respondent No. 1. In response to Arbitration Notice, Respondent No.1 further denied its liability to pay the dues and stated that the order dated 1.11.2018 passed by TSERC is not applicable to it and that there is no dispute between the parties.

(k) Pursuant to order of TSERC dated 1.11.2018, the Petitioner, on 27.8.2019, filed Petition under Section 11 of the Arbitration and Conciliation Act, 1996 being Arbitration Petition No. 788 of 2019 before the Hon'ble High Court of Delhi seeking appointment of a sole arbitrator to constitute the Arbitral Tribunal for resolving the disputes between the parties. During the hearing of the matter before the Hon'ble High Court, the Respondent No.1 raised the objection on maintainability of the Petition and argued that it would be appropriate for the Petitioner to approach the Central Commission for appointment of arbitrator in terms of the judgment of the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd. v. Essar Power Ltd. [(2008)

4 SCC 755]. Accordingly, the Petitioner sought permission from the Hon'ble High Court of Delhi to withdraw its Petition to enable the Petitioner to approach the Central Commission for appointment of an arbitrator. Accordingly, the Hon'ble High Court vide its order dated 4.12.2019 allowed the Petitioner to withdraw the Petition and to approach the Central Commission for appointment of sole arbitrator for adjudication of the disputes. Accordingly, the Petitioner has filed the present Petition.

3. Replies to the Petition have been filed by the Respondents. The Respondent No. 1, Vendanta Limited, in its reply, has raised objection as regards maintainability of the Petition. Respondent No. 2, TSSPDCL, has not raised any objection on the maintainability of the Petition.

Maintainability of the Petition

4. As the Respondent No. 1 has contended that this Commission does not have jurisdiction to adjudicate the dispute, we are only dealing with maintainability of the Petition in this order.

Reply of Respondent No. 1

5. The Respondent No. 1 its reply dated 24.8.2020 has submitted the following on maintainability of the Petition:

(a) Instant Petition involves a commercial dispute between a generating company and a trading licensee, which cannot be adjudicated by this Commission under Section 79 of the Act. Since the adjudicatory power of this Commission is derived from Section 79(1)(f) of the Act, the Commission can only adjudicate disputes in relation to matter related to Section 79(1)(a) to (d) of the Act.

(b) Section 79(1)(a) of the Act deals with "regulation of tariff" of generating companies owned or controlled by the Central Government. Since neither party to the present dispute is owned by the Central Government nor is seeking any

regulation of tariff, Section 79(1)(a) of the Act does not apply to the present case.

(c) Section 79(1)(b) of the Act deals with “regulation of tariff” of a generating company, which has a composite scheme for “generation” and “sale” of electricity in more than one State. However, the present dispute does not involve the issue of tariff being determined or regulated qua a generating company having composite scheme. When no regulated tariff is involved, Section 79(1)(b) of the Act cannot be attracted.

(d) Section 79(1)(c) of the Act confers powers to this Commission to regulate inter-State transmission of electricity. As per Section 2(74) of the Act, “transmission” means conveyance of electricity through transmission lines, and as such under Section 79(1)(c) of the Act, this Commission deals with issues relating to denial of inter-State open access in the inter-State grid. This is also not attracted in the present case, as the dispute is not qua any open access issue.

(e) Section 79(1)(d) of the Act deals with determination of “tariff” for inter-State transmission of electricity. This provision is not at all attracted in the present case as the Petition is not for determination of such tariff.

(f) The Respondent No. 1 is a generating company. However, the Petitioner is neither a generating company nor a transmission licensee rather the Petitioner is a trading licensee. Reading of Section 79 of the Act demonstrates that Section 79(1)(e) of the Act has been left out from the scope of adjudication under Section 79(1)(f) of the Act, which clearly means that disputes or issues relating to electricity traders cannot be entertained before this Commission. Therefore, this Commission does not have the jurisdiction to either adjudicate by itself or by appointing an arbitrator in the present case.

(g) Statement made by Respondent No. 1 during the proceedings of ARB Petition No. 788/2019 before the Hon’ble High Court of Delhi that this Commission has the jurisdiction to adjudicate the present petition, cannot

decide the jurisdiction of this Commission, as the same is conferred by statutory provisions.

Rejoinder by the Petitioner to the reply of the Respondent No. 1

6. The Petitioner vide its rejoinder dated 10.11.2020 has mainly submitted as under:

(a) Based on the submissions of the Respondent No.1 before the Hon'ble High Court of Delhi that '*the appropriate for the Petitioner is to approach the Central Commission constituted under Section 76 of the Act for appointment of Arbitrator*', the Petitioner had withdrawn its Arbitration Petition No. 788/2019 filed before the Hon'ble High Court of Delhi. It is extremely irresponsible and contemptuous on part of the Respondent No.1 to now question the jurisdiction of this Commission and render its own statement recorded in the order of Hon'ble High Court of Delhi false and incorrect.

(b) In the proceedings before TSERC, Respondent No.1 had contended that the State Commission had no jurisdiction to adjudicate the dispute between the Petitioner and the Respondent No.1. When TSERC accepted the said contention, the Petitioner had approached the Hon'ble High Court of Delhi, wherein Respondent No.1 once again contended that High Court of Delhi did not have the jurisdiction to adjudicate the dispute and it was only this Commission which had the jurisdiction. Now, when the Petitioner has filed the instant Petition, Respondent No.1, in clear violation of its own statement recorded in the order of the Hon'ble High Court, is once again contesting the jurisdiction of this Commission. If the contention of Respondent No. 1 is accepted, the Petitioner will not have any remedy before this Commission, Hon'ble High Court or even the State Commission, which cannot in any manner be allowed in law.

(c) In the instant case, there was a back-to-back arrangement where the Respondent No.1 as a generating company was delivering the power to the Petitioner, an inter-State trading licensee, at southern regional periphery and thereafter, the said power was being supplied to TSSPDCL. Since the Respondent No.1, a generating company, is generating power in its plant

located in Jharsuguda, Odisha and is supplying power in the State of Telangana, it has a composite scheme for generation and sale of electricity in more than one State. Therefore, in light of the decision of Hon'ble Supreme Court in the case of Energy Watchdog v. CERC and Ors. [2017 (4) SCALE 580], this Commission has jurisdiction to regulate tariff of the generating station and thereby adjudicate the disputes raised in the present Petition in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.

(d) The issue whether the supply of power by a generating company to a trading licensee and supply of said power by the trading licensee to distribution companies shall be subject to the regulatory jurisdiction of the Regulatory Commission is no longer *res integra* in view of the judgment of Appellate Tribunal for Electricity ('Appellate Tribunal') in Appeal No.15/2011 (Lanco Power Ltd. v. HERC) and Hon'ble High Court of Delhi in OMP 677 of 2011 (PTC India Ltd. v. Jaiprakash Power Ventures Ltd.). Relying on the aforesaid judgment of Hon'ble High Court, this Commission had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd. to Haryana Utilities through PTC India Ltd. which was upheld by the Appellate Tribunal in its judgment dated 7.4.2016 against which GRIDCO had filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of this Commission.

(e) The dispute in the present case is between the Petitioner (trading licensee) and the Respondent No.1 (generating company) having a composite scheme for generation and sale and the Respondent No.2, a distribution licensee having a back-to-back arrangement with respect to liability of payment of PoC charges which is the part of tariff to be borne either by the generating company or the distribution licensee. Therefore, the said issue is clearly within the jurisdiction of this Commission.

(f) Even otherwise, the issue of liability to pay PoC charges in terms of the 2010 Sharing Regulations is clearly part of the mandate of this Commission under Section 79(1)(c) and 79(1)(d) of the Act which requires this Commission to regulate the inter-State transmission of electricity and to determine the tariff for the same.

Hearing dated 30.7.2021

7. The matter was called out for virtual hearing on 30.7.2021. During the course of hearing the learned counsels for the Petitioner and the Respondent No.1 advanced their submissions on the maintainability of the Petition and reiterated the submissions made in their reply and rejoinder, which are not repeated herein for sake of brevity. The learned counsel for TSSPDCL submitted that taking into account the fact that no relief has been sought by the Petitioner against TSSPDCL and that the order of TSERC has attained the finality as no appeal had been preferred by the Petitioner against the said order, TSSPDCL may be discharged from the proceedings of the present Petition.

Analysis and Decision

8. We have considered the submissions of the Petitioner and the Respondents. The issue for our consideration at this stage is whether this Commission has jurisdiction to deal with the instant Petition under Sub-section (1) (f) of Section 79 of the Act in view of the objections raised by Respondent No.1.

9. The Respondent No. 1 has submitted that dispute involved in the present case does not fall within the ambit of Section 79(1)(a) to (d) of the Act and consequently, this Commission does not have the jurisdiction to adjudicate the dispute under Section 79(1)(f) of the Act. It has been submitted by the Respondent No. 1 that the outcome of dispute does not have any bearing on annual revenue requirement/ tariff of any licensee and the dispute involved is a private dispute between the generating company and a trading licensee. It has been submitted by the Respondent No. 1 that the appropriate Commission in the present case is Odisha Electricity Regulatory Commission.

10. *Per contra*, the Petitioner has submitted that the dispute has arisen in terms of back-to-back arrangement entered into between parties for inter-State supply of electricity. Since the generating station of the Petitioner had composite scheme for generation and supply in more than one State (being located in Orissa and supplying TSSPDCL in Telangana) at the time of dispute, this Commission has the jurisdiction to regulate the tariff of such project under Section 79(1)(b) of the Act and to adjudicate the dispute arisen therein under Section 79(1)(f) of the Act. Also, the issue of liability to pay PoC charges in terms of the 2010 Sharing Regulations is clearly part of mandate of this Commission under Sections 79(1)(c) and 79(1)(d) of the Act, which requires this Commission to regulate the inter-State transmission of electricity and to determine the tariff for the same.

11. Section 79(1) of the Act provides as under:

“79.(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;

(c) to regulate the inter-State transmission of electricity ;

(d) to determine tariff for inter-State transmission of electricity;

.....

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

12. Under clauses (a) to (d) of sub-section 1 of Section 79 of the Act, the Commission is required to regulate the tariff of the generating stations owned or controlled by the Central Government and the tariff of the generating stations which

have composite scheme for generation and sale of electricity in more than one State, to regulate the inter-State transmission of electricity and determine the tariff of inter-State transmission system. Under Section 79(1)(f) of the Act, the Commission has power to adjudicate the dispute involving generating company or transmission licensee in respect of the matters connected with Clauses (a) to (d) of sub-Section 1 of Section 79 of the Act. In other words, the jurisdiction of the Commission for adjudication of the dispute gets activated if the dispute involves either a generating company or a transmission licensee and the dispute pertains to regulation of tariff.

13. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case has dealt with the issue of composite scheme under Section 79(1)(b) of the Act 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.”

14. As per the above findings of the Hon'ble Supreme Court, the moment generation and sale of electricity takes place in more than one State, this Commission is the appropriate Commission under the Act.

15. In the present case, the generating station of the Respondent No. 1 is located in the State of Odisha and at the time of dispute, was supplying power to TSSPDCL in the State of Telangana through the Petitioner. The generation and sale of power in the present case was in more than one State. Thus, for the concerned period, the generating station of Respondent No.1 was having a composite scheme of generation and supply of electricity in more than one State. Hence, in the light of the decision of the Hon'ble Supreme Court in the Energy Watchdog Case, we are of the view that this Commission has the jurisdiction to regulate the tariff of such Project and thereby adjudicate the dispute in relation thereto in terms of Section 79(1)(b) read with Section 79(1)(f) of the Act.

16. The Respondent No. 1 has also contended that Section 79(1)(b) of the Act deals with 'regulation of tariff' of a generating company which has a composite scheme for generation and sale of electricity in more than one State and that the present dispute does not involve the issue of tariff being determined or regulated qua generating company. It has been submitted by the Respondent No. 1 that the jurisdictional fact of the tariff being under regulated category can only happen the event the distribution licensee is involved in the dispute and any outcome of such dispute has a bearing on annual revenue requirement/ tariff, which is not applicable in the present case.

17. It is now well settled that 'power to regulate' is very wide and includes any issue incidental or consequential thereto so as to make the 'power to regulate'

purposeful and effective. While explaining the scope of term 'regulate' under Section 79(1)(a) of the Act, the Appellate Tribunal in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v. BRPL and Ors.) has held as under:

"18. It cannot be debated that Section 79(1)(a) deals with the generating companies to regulate the tariff. The term "regulate" as contained in Section 79(1)(a) is a broader term as compared to the term "determine" as used in Section 86(1)(a). In various authorities, the Supreme Court, while discussing the term "regulation" has held that as part of regulation, the appropriate Commission can adjudicate upon disputes between the licensees and the generating companies in regard to implementation, application or interpretation of the provisions of the agreement and the same will encompass the fixation of rates at which the generating company has to supply power to the Discoms. This aspect has been discussed in detail in the Judgments of the Supreme Court in 1989 Supp (2) II SCC 52 Jiyajirao Cotton Mills vs. M.P.Electricity Board, D.K.Trivedi & Sons vs. State of Gujarat, 1986 Supp SCC 20 and V.S.Rice & Oil Mills vs. State of A.P., AIR 1964 SC 1781, and also in Tata Power Ltd. Vs. Reliance Energy Ltd. 2009 Vol.7, SCALE 513."

18. Though the above observations of Appellate Tribunal are in context of Section 79(1)(a) of the Act, they are squarely applicable to Section 79(1)(b) of the Act, which provides for 'regulation' of tariff of the generating companies having composite scheme for generation and sale of electricity in more than one State. Also, Section 79(1)(b) reads with Section 79(1)(f) has got a wider scope and is not merely confined to determination of tariff. It would also involve the terms and conditions of supply as held by the Appellate Tribunal in its judgment dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (BSES Rajdhani Power Ltd. v. Delhi Electricity Regulatory Commission and Ors.) as under:

"32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement etc. are nothing but terms and conditions of supply.

34. Section 79(1)(f) of the Electricity Act, 2003 provides for adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79(1)(f) of the Act."

19. In the present case, the payment of PoC charges in terms of the agreement entered into between the Petitioner and Respondent No.1 is nothing but part of terms and conditions of supply of electricity and for any dispute arising in relation to the liability of such charges in terms of such agreement. Therefore, this Commission has the jurisdiction to deal with such dispute under Section 79(1)(f) read with Section 79(1)(b) of the Act by itself or by referring such dispute to the arbitration.

20. The Respondent No. 1 has further raised objection that the Petitioner is a trading licensee and that since the Petition involves a commercial dispute solely between a generating company and a trading licensee, it cannot be adjudicated by the Commission. The Respondent No. 1 has submitted that power of the Commission to adjudicate disputes is derived from provisions of Section 79(1)(f) of the Act and that this power is in respect of Sections 79(1)(a) to 79(1)(d) of the Act only. It has submitted that disputes under 79(1)(e) related to trading licensees is not covered under provisions of Section 79(1)(f) of the Act and, therefore, this Commission does not have jurisdiction to adjudicate a dispute involving a trading licensee.

21. *Per contra*, the Petitioner has submitted that the dispute has arisen in course of supply of power from the Petitioner's generating station to TSSPDCL through the Petitioner in terms of back to back agreements entered into by the parties and that

the issue whether the supply of power by a generating company to a trading licensee and supply of power by the trading licensee to the distribution companies shall be subject to the regulatory jurisdiction of the Regulatory Commission, is no longer *res integrate* in the view of the judgment of Appellate Tribunal in Appeal No.15/2011 (Lanco Power Ltd. v HERC) and the Hon'ble High Court of Delhi in OMP No. 677 of 2011 [PTC India Limited Vs. Jaiprakash Power Ventures Ltd.]

22. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies through back to back arrangement would be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v Haryana Electricity Regulatory Commission) before Appellate Tribunal for Electricity and in OMP 677 of 2011 {PTC India Limited Vs. Jaiprakash Power Ventures Ltd.] before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Appellate Tribunal, after considering the provisions of Sections 79, 86 and 66 of the Act, in its judgment dated 4.11.2011, has observed as under:

“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company

.....

61. *It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.*"

23. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Appellate Tribunal that Central Commission had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

"52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: "(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a

trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework EA."

64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act."

24. The above judgment was challenged before the Division Bench of the Hon`ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt. Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgment dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides that when power is supplied by a generating company to a distribution licensee through a trading licensee for ultimate consumption of consumer, the tariff would be subject to the regulatory jurisdiction of the Regulatory Commission. Since in this case electricity was supplied from the generating station of the Respondent No. 1 to TSSPDCL

through the Petitioner with back to back arrangement wherein both the PPAs clearly identify source of supply being Respondent No. 1 and end user being Respondent No. 2, such supply of power shall be subject to the regulatory jurisdiction of this Commission including adjudication of any dispute with reference to supply of such power and tariff thereof.

25. It is pertinent to note that during the proceedings in Arbitration Petition No. 788/2019 filed by the Petitioner before the Hon'ble High Court of Delhi, the Respondent No. 1 had itself stated that the Petitioner should approach this Commission for appointment of arbitrator. Such submissions as captured in the order dated 4.12.2019 of Hon'ble High Court of Delhi is extracted below:

"Mr Prashanto Chandra Sen, learned senior counsel appearing for the respondent reiterates his submissions that appropriate for the petitioner is to approach the Central Commission constituted under Section 76 of the Electricity Act, 2003 for appointment of an Arbitrator.

On this submission of Mr. Prashanto Chandra Sen, learned counsel for the petitioner seeks permission to withdraw the present Petition to enable the Petitioner to approach the Central Commission for appointment of an arbitrator.

The petition is dismissed as withdrawn."

26. It is noticed that the Respondent No. 1 had itself submitted before the Hon'ble High Court of Delhi that the Petitioner should approach the Central Commission for appointment of arbitrator, deeming the Central Commission as the appropriate Commission under the Act. Based on the aforesaid submission of the Respondent No. 1, the Petitioner withdrew its Petition before the Hon'ble High Court of Delhi with liberty to approach this Commission. However, Respondent No.1, taking completely opposite stand, has now sought to argue that this Commission does not have the necessary jurisdiction to deal with the present case. The Respondent No.1 has also attempted to justify its change in stand/ position by contending that the statement

made by it before the Hon'ble High Court of Delhi cannot decide the jurisdiction of this Commission as the same is conferred by statutory provisions. In our view, such conduct of Respondent No.1 is completely inappropriate and uncalled for.

27. In the earlier paragraphs, we have already concluded that this Commission has the necessary jurisdiction to deal with the issues involved in the present Petition, under Section 79(1)(f) read with Section 79(1)(b) of the Act.

28. It is clarified that this order is limited to determination of issue of the jurisdiction of this Commission and we have not expressed any view on the merit of the issues raised in the Petition. The parties shall complete pleading in the matter within two weeks of issue of this order. No further extension of time for completion of pleadings shall be permitted.

29. The Petition shall be listed for hearing in due course for which separate notice shall be issued to the parties.

Sd/-
(P.K.Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(P.K.Pujari)
Chairperson