

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 48/MP/2021

Coram:

Shri P.K.Pujari, Chairperson

Shri I.S.Jha, Member

Shri Pravas Kumar Singh, Member

Date of Order: 01st September, 2021

In the matter of

Petition under Section 79(1)(b) and (k) of the Electricity Act, 2003 read with Regulation 49(C)(a) and (b) of Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 for approval of Station Heat Rate, on actual basis, of Thermal Power Plant (270 MW) located at Village Kasaipali, District Korba, Chhattisgarh.

AND

In the matter of

ACB (India) Limited,
C-102, LGF Surya Enclave,
New Multan Nagar, Rohtak Road,
New Delhi-110056

....Petitioner

Vs

1. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidhyut Bhawan, Race Course,
Vadodara-390007, Gujarat

2. Chhattisgarh State Power Trading Company Limited,
Energy Info Tech Centre, Daganiya,
Raipur-492031

.....Respondents

Parties Present:

Shri Matrugupta Mishra, Advocate, ACB(I) L
Ms. Ritika Singhal, Advocate, ACB(I) L
Shri Vignesh Srinivasan, Advocate, ACB(I)L
Shri M.G.Ramachandran, Senior Advocate, GUVNL
Ms. Anushree Bardhan, Advocate, GUVNL
Ms. Ranjitha Ramachandran, Advocate, GUVNL
Shri S K Nair, GUVNL
Shri Kripal Chudasema, GUVNL



ORDER

The Petitioner, M/s ACB (India) Ltd has filed this petition under Sections 79(1)(b) and 79(1)(k) of the Electricity Act, 2003 (hereinafter referred to as the 'Act') read with Regulations 49(C)(a) and 49(C)(b) of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019 (in short 'the 2019 Tariff Regulations') for approval of Station Heat Rate ('SHR') on actual basis of the 270 MW (2x135 MW), coal reject based Thermal Power Plant at Village Kasaipali, Dist. Korba, Chhattisgarh (hereinafter referred to as 'the Project').

2. The Respondent No.1, Gujarat Urja Vikas Nigam Ltd (GUVNL) purchases electricity in bulk from various generating companies and others, and supplies electricity to the distribution companies in the State of Gujarat to enable distribution and retail supply of electricity by the distribution companies of Gujarat to the consumers and end users. The cost of power purchase of GUVNL is paid by the distribution licensees and consequently passed on to the consumers in the State of Gujarat.

3. Respondent No.2, Chhattisgarh State Power Trading Co. Ltd. (CSPTrdCL) is a trading licensee within the meaning of Section 2(26) of the Act and is engaged in trading in electricity. It procures power for Distribution Licensees in the State of Chhattisgarh.

Submissions of the Petitioner

4. The Petitioner has submitted the following:

(a) This Commission has the exclusive jurisdiction to entertain the present petition and to provide the reliefs as sought for by Petitioner. The Project, situated in the State of Chhattisgarh, is selling power to more than one State in as much as it has PPAs with the Respondents 1 and 2 in the State of Gujarat



and in the State of Chhattisgarh. Therefore, the Petitioner in terms of Section 79(1)(b) of the Act, has a composite scheme for generation and sale of electricity in more than one State. The details of the PPAs executed by the Petitioner are as follows:

PPA	Parties	Procurer	Quantum	Tenure
26.2.2007	Petitioner and GUVNL	Respondent No. 1	200 MW	25 years
5.12.2013	Petitioner and Respondent No. 2	Respondent No. 2	5% of net export of power from the Project	Co-terminus with Plant Life

(b) Unit-I of the Project was commissioned on 13.12.2011 and Unit-II was commissioned on 21.6.2012. Both the generating units have CFBC Boiler and suitable for running on blend of washery rejects and raw coal. The technical parameters guaranteed by the Original Equipment Manufacturer (OEM) are as under:

Turbine Heat Rate: 2025 Kcal/kWh
Boiler Efficiency: 84%
Station Heat Rate: 2411 Kcal/kWh

(c) The Petitioner entered into a Memorandum of Understanding dated 19.6.2006 with the Government of Chhattisgarh and Chhattisgarh State Electricity Board for installation of 250 MW thermal power plant at Korba. In furtherance of this, the Petitioner issued letter dated 22.9.2006 to the Chairman, Screening Committee for Coal linkage ('SCL') for grant of long-term linkage of coal for use at the Project.

(d) The Petitioner executed PPA with GUVNL on 26.2.2007 (hereinafter referred to as 'the GUVNL PPA'), for supply of 200 MW of power at GETCO periphery, on tariff discovered through case-II competitive bidding. The fuel arrangement as provided by the Petitioner in the PPA was of 1 million MT raw coal and 1.4 million MT washery rejects.

(e) The Petitioner vide letter dated 27.10.2010 to Chairman, SCL once again requested for grant of long-term coal linkage for the Project, since the Project was in advanced stage of erection, with unit-I being scheduled for commissioning in February 2011 and Unit-II in May 2011.



(f) Thereafter, the Petitioner vide its letter dated 11.1.2011 to the Secretary (CPD), Ministry of Coal and thereafter by letter dated 12.4.2011 to Joint Secretary (LA), Ministry of Coal, requested to grant long term coal linkage for the Project on priority, as the commissioning of both the units depended on allocation of coal. Subsequently, Ministry of Power, GOI vide OM dated 6.6.2011 requested the Ministry of Coal, GOI to consider coal linkage as supplementary fuel, to washery rejects based power plants, including the Project.

(g) Ministry of Coal, GOI revised the policy for grant of coal linkage to various thermal power plants and vide its notification dated 22.05.2017, issued the Scheme for Harnessing and Allocating Koyala Transparently in India, (hereinafter referred to as 'the Shakti scheme') and decided that all future coal linkages shall be given under the Shakti scheme.

(h) The Petitioner successfully participated in the e-auction in the Shakti scheme Round-1 in 2017. The Petitioner got 2 lakh MT G-12 grade of coal at 3 paise/kWh discount in the levellised quoted tariff. Accordingly, a Letter of Assurance (LOA) dated 21.12.2017 was issued by South Eastern Coalfields Ltd. to the Petitioner. In terms of the Shakti scheme, Supplementary Power Purchase Agreements (in short 'SPPA') were executed by the Petitioner with GUVNL on 2.2.2018 and 17.3.2018 for incorporating addendum in Schedule 10 of the GUVNL PPA and the same were approved by the Gujarat Electricity Regulatory Commission (GERC) vide orders dated 2.2.2018 and 15.3.2018. A Fuel Supply Agreement (FSA) was also executed between the Petitioner and SECL on 29.3.2018.

(i) The Petitioner also participated in e-auction in long term linkage scheme of the Shakti Scheme Round-2 in 2020 for CEA approved quantity of 10,72,701 MT. But coal quantity offered by CIL for e-auction, from SECL mine was 6,78,388 of G-11 grade coal only. The Petitioner participated in the Shakti Scheme Round-3 and got 2,44,100 MT of G-11 coal at discount of 7 paise/kWh. Accordingly, LOA dated 10.7.2020 was issued by SECL in favour of the Petitioner.



(j) GERC vide its order dated 12.10.2020 in Petition No. 1885 of 2020 had approved the draft Supplementary PPA to be incorporated in Schedule 10 of the GUVNL PPA. It further directed the parties to execute the supplementary PPA (SPPA) and noted that there was agreement between the Petitioner and GUVNL on the Schedule 10 of the Supplementary PPA.

(k) Pursuant to this, the Petitioner and Respondent GUVNL executed third SPPA on 26.10.2020. In the said SPPA, GUVNL had agreed that the Petitioner shall pass on calculated levelized discount of 7.02 paise/kWh, the yearly rebate on the energy generated and delivered after accounting for actual quantity of coal linkage, actual average of GCV of coal as received and actual auxiliary consumption of plant, subject to a ceiling of 10% as approved by GERC vide its order dated 12.10.2020.

(l) GUVNL in terms of SPPA dated 26.10.2020 agreed that the Petitioner will pass on yearly discount on the basis of actual energy generated by the Project. The said SPPA, executed pursuant to the order passed by GERC, is final and binding on both the parties.

(m) The design SHR, at the time of commissioning of the Project was 2411 kCal/kWh which has increased to around 2600 kCal/kWh for both the units. Increasing the design SHR, after 9 years of commissioning of the Project, while computing energy generated from the Project, will be detrimental to the Petitioner.

(n) Regulation 49 of the 2019 Tariff Regulations provides the norms of operation of thermal generating station wherein sub clause (C) provides normative SHR applicable to projects with different generating sources. Proviso 8 of Regulation 49(C)(b)(i) of the 2019 Tariff Regulations specifically states that SHR for coal rejects based generating stations, shall be approved by this Commission on a case to case basis.

(o) The Petitioner is being forced to give discount upon consideration of hypothetical units of energy considering design SHR instead of actual SHR. The Petitioner participated in third round of e-auction under the Shakti Scheme and quoted discount of 7 paise/kWh, on the assumption that the actual SHR will



be considered while working out the energy generated from the Project since the same is specifically provided in the 2019 Tariff Regulations. Non-consideration of actual SHR while computing rebate on the monthly energy bill amounts to letting the Petitioner, pass on discount on hypothetical energy generated (which is more than the actual energy generated, as required to be considered under the PPA, amended PPA and vide the order of GERC).

(p) Under Section 61(d) of the Act, the Petitioner is entitled to recover its cost in a reasonable manner. It is, thus, imperative that actual SHR of the Project is considered, the same being in line with the SPPA, while computing the energy generated by the Project so that the Petitioner is able to recover its cost in a reasonable manner. This would also ensure that discount of 7 paise/kWh as contemplated under the SHAKTI scheme, is passed on realistically.

(q) This Commission may, therefore, approve the actual SHR for the Project and direct Respondent GUVNL to consider the same while calculating the energy generated by the Petitioner's Project.

5. Based on the above, the Petitioner has filed the present petition with the following prayer:

"a. approve the SHR of the Units of the Petitioner's 2 x 135 MW Thermal Power Plant, on actual basis, in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2019"

Hearing on 4.6.2021

6. During the hearing of the Petition on 'admission' on 4.6.2021, the learned counsel for the Petitioner reiterated the submissions made in the petition. The learned Senior counsel for the Respondent GUVNL raised preliminary objections with regard to the 'jurisdiction' of this Commission to entertain the petition. He pointed out that in terms of Section 64(5) of the Act read with the observations in the judgment dated 11.4.2017 of the Hon'ble Supreme Court in Energy Watchdog case, the parties had approached GERC, which had approved the SPPA. Therefore, all issues arising out of the said SPPA will have to be decided only by GERC. The



learned Senior counsel, however, sought time to file its 'preliminary objections' on the 'maintainability' of the petition.

7. The learned counsel for the Petitioner clarified that since the Petitioner has a composite scheme for generation and sale of electricity in more than one State i.e. State of Gujarat and State of Chhattisgarh, this Commission has the jurisdiction under Section 79(1)(b) of the Act. He also submitted that though the Petitioner was a party to the proceedings before GERC for approval of the SPPA in terms of Section 64(5) of the Act, the same does not prevent the Petitioner from approaching this Commission under Section 79(1)(b) read with Section 79(1)(f) of the Act.

8. The Commission, after directing the Respondent GUVNL to file its preliminary objections, reserved its order on 'maintainability' of the petition, on the issue of 'jurisdiction'. In compliance with the directions, the Respondent GUVNL vide affidavit dated 22.6.2021 has filed its 'preliminary objections' and the Petitioner has filed its rejoinder to the same vide affidavit dated 17.7.2021.

Preliminary Objections of the Respondent GUVNL

9. The Respondent, GUVNL in its 'preliminary objections' on the maintainability of the petition has submitted the following:

(a) The Petitioner, in the present petition, has raised issues in regard to the Station Heat Rate (SHR) for the purpose of the computation on aspects related to SPPA. When SPPA was considered and approved by GERC, the issues arising thereof, should be appropriately be considered by the said Commission. In fact, the Petitioner had raised the issue of SHR even before GERC in the petition for approval of SPPA, but was not considered for the reason that the petition had been filed for approval of SPPA and not for adjudication of disputes and GERC had directed parties to consider the issue mutually. Thus, the Petitioner had admitted to the jurisdiction of GERC and it is not open to the



Petitioner to now approach this Commission. The Petitioner cannot raise the same issue before different forums.

(b) The submission of the Petitioner that this Commission has exclusive jurisdiction to entertain the present Petition is erroneous and contrary to the actions of the Petitioner. Not only had the Petitioner not raised any objection to the jurisdiction of GERC in the proceedings related to approval of SPPA but had entered into agreements with Respondent GUVNL recognizing the approval of the same by GERC. Accordingly, both the Petitioner and GUVNL had agreed on the jurisdiction of GERC with regard to SPPA within the scope of Section 64(5) of the Act and other conditions specified in the said section are also duly satisfied. It is not open to the Petitioner to now claim that this Commission has exclusive jurisdiction.

(c) It was only based on such SPPAs as approved by GERC that the Petitioner was eligible for coal supply under the Shakti Scheme. The communication dated 22.5.2017 providing for the Shakti Scheme inter alia reads as under:

“(b) Accordingly, PPA may be amended or supplemented mutually between the developer and procurer to pass on the discount to the procurer and the approval of the Appropriate Commission obtained, as per the provisions of the PPA or Regulations.

“(c) FSA shall be signed with the successful bidders after the terms and conditions for signing of the FSA are met and the Appropriate Commission has approved the amendment or supplement to the PPA”

(d) The Shakti scheme refers to the Appropriate Commission and not the State Commission. However, as admitted by the Petitioner, the approval in case of the Petitioner was to be obtained from GERC and CSERC respectively. Thus, the Petitioner has admitted that the Appropriate Commission is the respective State Commission.

(e) FSA with SECL also recognizes the ‘amended PPA’ as the PPA approved by the appropriate Regulatory Commission. Thus, FSA and coal supplies to the Petitioner have proceeded on the basis of SPPA as approved by GERC. It is not possible for Petitioner to now claim that the GERC has no jurisdiction. The Hon’ble Supreme Court in Amar Singh v Union of India (2011)



7 SCC 69 and Joint Action Committee of Air Line Pilots' Assn. of India v DG of Civil Aviation, (2011) 5 SCC 435, has settled the principle that a party cannot approbate and reprobate.

(f) The Petitioner is wrongly interpreting the decision of the Hon'ble Supreme Court dated 11.4.2017 in the Energy Watchdog v Central Electricity Regulatory Commission (2017) 4 SCALE 580. The Petitioner has failed to appreciate that the Hon'ble Court has recognized the jurisdiction of the State Commission under Section 64(5), if both parties agree to such jurisdiction. In instant matter, both the parties had accepted the jurisdiction of GERC with regard to SPPA and, therefore, Section 64(5) of the Act applies as per the decision of the Hon'ble Supreme Court.

(g) The Hon'ble Supreme Court has interpreted the existing law and recognized the jurisdiction of the State Electricity Regulatory Commissions even in cases of inter-state supply or composite scheme for sale of power to more than one state. Therefore, even assuming, but not admitting, that the Petitioner has a composite scheme for sale of power to more than one State, GERC would continue to have jurisdiction by virtue of Section 64(5) of the Act. This is particularly when the Petition relates to issues arising out of SPPA, which has been approved by GERC.

(h) This Commission, has, on numerous occasions, entertained the Petitions for approval of SPPA, for generating companies with composite scheme, under Section 79(1)(b) of the Act, and in particular, SPPA relating to the allocation of coal under the Shakti Scheme, which is similar to SPPAs for which approval was sought by the Petitioner from GERC. If the contention of the Petitioner that such approvals for Supplementary PPA can only be given by State Commission is accepted, then the approvals given by this Commission would be rendered *non est* and further the acceptance of such approvals by the Ministry of Coal/ Coal India Limited and its subsidiaries for allocation of coal would be contrary to the Shakti scheme.

(i) If the Petitioner had composite scheme, then the regulation of tariff would be covered under Section 79(1)(b) of the Act and the approval of SPPA



for incorporating the discount in tariff in terms of the Shakti Scheme could have been exercised by this Commission. However, no such approval was sought by the Petitioner from this Commission under Section 79(1)(b) of the Act. The approval had been sought from GERC, which is permissible by agreement of parties as per Section 64(5) of the Act read with decision of the Hon'ble Supreme Court in the Energy Watchdog Case.

(j) Thus, the Petitioner had agreed to and had knowingly and willingly submitted to the jurisdiction of GERC on multiple occasions. The same was done with the full knowledge of the decision of the Hon'ble Supreme Court in Energy Watchdog Case and, therefore, was a conscious decision. The Petitioner cannot be permitted to pick and choose the Appropriate Commission, as per its own whims and fancies. Having accepted the jurisdiction of GERC, the Petitioner cannot now seek adjudication before this Commission.

(k) The contention of the Petitioner that it is entitled to invoke the jurisdiction of this Commission, even though the approval of SPPA was granted by GERC, is not correct. It is not open to the Petitioner to claim shifting of jurisdiction, depending on the issues it seeks to raise. This is also contrary to the submission of the Petitioner before GERC, that it has the regulatory and adjudication powers (*Para 7.6 of Order dated 12.10.2020 at Page 417*).

(l) The Petitioner has sought to rely on provisions of Section 79(1)(k) of the Act and the 2019 Tariff Regulations of this Commission, which are also not applicable in the present case, as the jurisdiction has been agreed to be of GERC.

Rejoinder of the Petitioner

10. The Petitioner, in its rejoinder to the preliminary objections of GUVNL, has mainly submitted the following:

(a) The present petition is not for tariff determination but filed for determination of SHR of the generating station. The rebate, quoted by the Petitioner under the Shakti Scheme, shall remain intact, as approved for utilizing coal under the Shakti Scheme, while supplying power to both the Respondents. However, for



the purpose of arriving at the rebate on actuals, SHR of the plant has to be considered. There is no ambiguity as to the fact that the Project has composite scheme under Section 79(1)(b) of the Act. Further, the determination of SHR for the purpose of calculating the rebate, if determined by GERC, the same may not be accepted by CSERC. The same project cannot have two different SHRs to arrive at the same rebate, to be applied on the tariff. Therefore, this Commission has the jurisdiction to adjudicate the present matter. Otherwise, the very purpose of having a composite scheme would be futile.

(b) The Hon'ble Supreme Court vide judgment in Energy Watchdog Case has clearly stated that Section 64(5) of the Act comes into operation when the jurisdiction otherwise exists with this Commission under Section 79(1)(b) of the Act. The Hon'ble Court has further laid down that any generation and supply of power in more than one State qualifies as a 'composite scheme' and vests the jurisdiction with this Commission. A bare perusal of the Energy Watchdog judgment further indicates that Section 64(5) of the Act has been carved out as an exception to Section 79(1)(b) of the Act since the same begins with the term "Notwithstanding anything contained in Part X" and that the jurisdiction of State Commission shall trigger on the application of parties in context of any inter-State supply of power, if the parties applying to the State Commission within whose jurisdiction, the parties intend to supply such power.

(c) In the present case, the Petitioner and the Respondent GUVNL jointly submitted to the jurisdiction of GERC, under Section 64(5) of the Act for approval of the SPPAs so that the Petitioner could execute FSA with SECL and generate and supply power to GUVNL. The said petition before GERC was preferred by GUVNL by making the Petitioner herein, a Respondent there and the latter had consented to the jurisdiction of GERC. The said petition cannot be relied upon by the Respondent to submit that this Commission does not have the jurisdiction to adjudicate upon the present Petition. It is a settled principle of law that each proceeding is independent from the other with ensues out of an independent cause of action. Unless, the statute otherwise prohibits, the Respondent GUVNL is wrong to make a submission that due to submission of



jurisdiction for approval of SPPA, subsequently the Petitioner cannot prefer a petition before this Commission, which has, admittedly, the primary jurisdiction.

(d) Jurisdiction is a mixed question of fact and law and also a creature of a statute. By virtue of the facts, there is no doubt that the Project has a composite scheme and the jurisdiction is that of this Commission. Further, the statute itself does not restrict the Petitioner from exercising its right to prefer a petition before this Commission for the redressal of its grievances, as stated above. When the jurisdiction is vested by the statute in this Commission, then a mere exercise of consent in another proceeding under Section 64(5), in the absence of any restriction to that effect under the Act, cannot restrict the Petitioner from preferring the present petition before this Commission, for appropriate adjudication in the interest of justice.

(e) The jurisdiction under Section 64(5) of the Act can be invoked pursuant to a joint application by the parties, only in cases where the jurisdiction otherwise vests with this Commission. The same has also been recognized by this Commission in its order dated 1.7.2019 in Petition No. 327/MP/2018 and in order dated 1.5.2021 in Petition No. 61/MP/2021. Section 64(5) is an exception to the exercise of jurisdiction by this Commission under Section 79(1)(b) of the Act and the Respondent GUVNL cannot rely on the former to challenge this Commission's jurisdiction under the latter. An exception cannot override an enabling provision, to restrain the efficacy, applicability and operation of the general rule of which, the said exception is a carve out. If the arguments advanced by the Respondent GUVNL are accepted, the same shall defeat the very objective of Section 64(5) of the Act.

(f) It is wrong on part of the Respondent GUVNL to suggest that, since the supplementary PPA is approved by GERC, any dispute arising out of the said PPA will be exclusively adjudicated by GERC. There is no such restriction under the provisions of the Act nor there is any other provision which has an overriding effect over the jurisdiction of this Commission falling from Section 79(1)(b) of the Act. Further, the issue of SHR has to be decided for the Petitioner's entire plant which is supplying power to two different States.



(g) It is nobody's case that GERC did not have jurisdiction to entertain the petition for approval of SPPA. However, that does not ipso facto restrain the Petitioner from exercising its statutory rights under Section 79 of the Act. A proposition of law is required to be tested by this Commission as to whether by conceding to the jurisdiction in a dispute/ proceeding ensuing out of an PPA under Section 64(5) of the Act, restrains the parties from approaching this Commission under Section 79 of the Act for any issue or dispute arising out of the said SPPA in future. Any effort to answer the aforementioned proposition in affirmative, would tantamount to construing Section 64(5) of the Act in a manner which entirely defeats the enabling provisions of Section 79 of the Act, which is contrary to the principles of internal aid of the interpretation of statute. In the absence of a statutory provision to that effect, an exception to law cannot be interpreted in a manner which defeats the very enabling provision to which it is providing a carve out only.

(h) The Petitioner acceded to GERC's jurisdiction as a one-time measure to ensure the approval of SPPA and fast track the process of executing FSA with SECL. The Petitioner's agreement to subject itself to GERC's jurisdiction, for SPPA approval under Section 64(5) of the Act, cannot be used as a ground to oust the inherent jurisdiction of this Commission under Section 79(1)(b) of the Act. The case laws with regard to approbation and reprobation is not applicable in the present case since the Petitioner is nowhere challenging the jurisdiction of the State Commission in approving SPPA. Further, the present case is a proceeding independent of proceeding for approval of SPPA.

Analysis and Decision

11. We have considered the submissions of the Petitioner and the Respondent GUVNL. The issue for our consideration is whether this Commission has the jurisdiction to deal with the present petition under Section 79(1)(f) of the Act, in view of the objections raised by Respondent GUVNL.



12. The Petitioner has filed the present petition for determination of SHR for calculation of rebate, in terms of SPPAs approved by GERC. The Respondent GUVNL has submitted that the Petitioner had agreed to the jurisdiction of GERC with regard to the approval of SPPAs and, therefore, the Petitioner cannot claim jurisdiction of this Commission in the matter. It has been submitted that the issue of SHR was raised by the Petitioner before GERC in the petition for approval of SPPA, but was not considered by GERC for the reason that the said petition was not for adjudication of dispute. The Respondent GUVNL has stated that the Petitioner had not raised any objection to the jurisdiction of GERC in the proceedings related to approval of SPPA and had also entered into agreements with GUVNL, recognizing such approvals by GERC. It has also been submitted that the Petitioner had agreed and knowingly and willingly submitted to the jurisdiction of GERC and, therefore, Section 64(5) of the Act applies even as per the decision of the Hon'ble Supreme Court in Energy Watchdog case. The Respondent has further submitted that FSA and the coal supplies to the Petitioner have proceeded on the basis of SPPA as approved by GERC and it is not, therefore, possible for the Petitioner to claim that GERC has no jurisdiction. Accordingly, the Respondent GUVNL has submitted that the parties having accepted the jurisdiction of GERC under Section 64(5) of the Act, the Petitioner cannot now seek adjudication of the present petition before this Commission.

13. Per contra, the Petitioner has submitted that this Commission has the jurisdiction to adjudicate the present petition as the Project, situated in the State of Chhattisgarh, is selling power to more than one State i.e. Gujarat and Chhattisgarh and thus, has a composite scheme in terms of Section 79(1)(b) of the Act. It has been submitted that the consent by the Petitioner to the jurisdiction of GERC for



approval of SPPA cannot be relied upon by the Respondent GUVNL to oust the inherent jurisdiction of this Commission under Section 79(1)(b) of the Act, since each proceeding is independent from each other based on independent cause of action. The Petitioner has contended that the statute itself does not restrict the Petitioner from exercising its right to file petition before this Commission for redressal of its grievances. It has also been submitted that Section 64(5) of the Act is an exception to the exercise of jurisdiction by this Commission under Section 79(1)(b) of the Act and the Respondent GUVNL cannot rely on the former to challenge the jurisdiction of this Commission under the latter. The Petitioner has further submitted that it had acceded to the jurisdiction of GERC under Section 64(5) of the Act, as a one-time measure, and for the sole purpose of approval of SPPA and to fast track the process of executing FSA with SECL. The Petitioner has pointed out that there is no such restriction under the provisions of the Act nor there is any other provision which has an overriding effect over the jurisdiction of this Commission falling from Section 79(1)(b) of the Act, to decide the issue of SHR for the Petitioner's Project, which is supplying power to two different States.

14. As regards the applicability of Section 64(5) of the Act, the Hon'ble Supreme Court in the Energy Watchdog case has observed the following:

"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."



15. In the above quoted paragraph, the Hon'ble Supreme Court has observed that the non-obstante clause in Section 64(5) of the Act clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding such 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. In the present case, the Petitioner is supplying 200 MW of power to the Respondent GUVNL, in terms of the PPA dated 26.2.2007 subsequent to the tariff discovered through Case-II competitive bidding. It is also supplying 5% of the net export of power to Respondent CSPTrdCL under PPA dated 5.12.2013. There is no doubt that the Project has a 'composite scheme' for the generation and sale of electricity in more than one State and accordingly in terms of the above-quoted judgement of the Hon'ble Supreme Court, this Commission has the jurisdiction to adjudicate the dispute/ claims of the Petitioner under Section 79(1)(b) read with Section 79(1)(f) of the Act. However, the Petitioner, after being successful in Round 1 and Round 3 of the Shakti Scheme, had agreed and submitted itself to the jurisdiction of GERC and obtained approval of SPPAs dated 2.2.2018, 17.3.2018 and 26.10.2020 executed with the Respondent GUVNL. Based on the approval of SPPAs by GERC vide its orders as aforesaid, the Petitioner has signed FSA with SCL for coal supplies. Thus, the Petitioner had knowingly and willingly submitted to the jurisdiction of GERC in terms of Section 64(5) of the Act and obtained approval of SPPAs.

16. Section 64(5) of the Act is reproduced below:



“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.”

17. We note that Section 64(5) of the Act provides for determination of tariff for any inter-State supply, transmission and wheeling of electricity, as the case may be. The prayer of the Petitioner in this petition is to approve SHR of the Units of the Project on actual basis, in terms of provisions of the 2019 Tariff Regulations. This determination of SHR is for the purpose of computing energy charges in terms of SPPAs approved by GERC. Thus, determination of SHR is essentially related to determination of tariff. Section 64(5) of the Act provides for determination of tariff and such determination cannot be in parts i.e. one part of tariff is determined by one Commission while other part by another Commission. Such part determination does not seem to be envisaged under Section 64(5) of the Act. In our view, the Petitioner, by a conscious decision, having consented to the jurisdiction of GERC in terms of Section 64(5) of the Act, cannot now invoke the jurisdiction of this Commission to seek relief, under Section 79(1)(b) read with Section 79(1)(f) and 79(1)(k) of the Act.

18. It is pertinent to mention that this Commission, had, on numerous occasions, entertained petitions viz. Petition No. 41/MP/2018 (GMRLKEL v GRIDCO & ors), Petition No. 21/MP/2018 (KSKMPCL v TANGEDO & ors), Petition No. 84/MP/2018 (APNRL v TANGEDCO & ors) and Petition No. 216/MP/2018 (KSKMPCL V TANGEDCO & ors) filed by generating companies having composite scheme in terms of Section 79(1)(b) of the Act for approval of SPPAs related to allocation of coal under the Shakti scheme and the Commission had approved amendments to the relevant PPAs/PSAs therein. No such approval was sought by the Petitioner from



this Commission in terms of Section 79(1)(b) of the Act. Rather the Petitioner chose to invoke provisions of Section 64(5) of the Act in approaching GERC.

19. It is also noticed that the issue of SHR was raised by the Petitioner in the proceedings in Petition No.1885/2020 before GERC while approval of SPPAs was sought, with a request to exercise its regulatory powers to decide the petition. The relevant portion of the order of GERC in this regard is extracted hereunder:

“7.5. Shri H.M. Jain, on behalf of the Respondent submitted that the Petitioner has referred the CERC norms in its rejoinder and as per the annexures submitted by the Petitioner with its rejoinder, the norm for Station Heat Rate as prescribed by CERC is 2273 kcal/kWh and the same was stated in the bidding documents of the Petitioner against which the Respondent quoted the SHR as 2410 kcal/kWh which has been agreed by the Petitioner GUVNL and also agreed that there is de-rating over time in the SHR. The Petitioner has set the SHR as 2273 kcal/kWh which if escalated by 5%, then the same works out to 2385 kcal/kWh which is much less than the SHR originally quoted by the Respondent in its bid submitted to the Petitioner.

.....He also requested the Petitioner for considering ‘Actual’ SHR and Auxiliary consumption or alternatively GUVNL may propose the norms duly taking into account a principle driven approach similar to Tanda and Talcher power projects. He also submitted that the Commission may consider the request of the Respondent regarding actual SHR and Auxiliary consumption.

7.6. Based on the above, he requested that the Commission apart from adjudicatory power is also conferred with regulatory powers and requested that the Commission in exercise of such regulatory powers deal and decide the present Petition also”

20. We note that GERC by its order dated 9.10.2020 had directed the parties to mutually discuss and arrive on agreed terms of the proposed SPPA and thereafter approach GERC for approval. In this background, the submission of the Petitioner that the present case relating to the determination of SHR is an independent proceeding, is misconceived and is not accepted.

21. In view of the above discussion, we are of considered opinion that the Petitioner submitted to the jurisdiction of GERC in terms of Section 64(5) of the Act (i) to obtain the approval of SPPAs; (ii) to avail coal linkage by offering discounts in tariff under the SHAKTI scheme as approved by the State Commission; and (iii) by



raising the issue of SHR (a necessary ingredient of tariff) before the State Commission. Further, both the parties, by the order dated 9.10.2020 of the State Commission were directed to resolve the matter as per the SPPA. We find that when the order of the State Commission did not suit the Petitioner, the present petition was brought before us as a test case. We find and hold that this Commission does not have the 'jurisdiction' to adjudicate the dispute relating to SHR as raised in this petition. Therefore, the prayer of the Petitioner in the present petition is not maintainable.

22. This order is limited to the determination of the issue of jurisdiction of this Commission to adjudicate the dispute and we have not expressed any views on the merit of the issues raised in this petition.

23. In view of the discussion this Petition No. 48/MP/2021 is rejected on preliminary issue of jurisdiction.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(I.S. Jha)
Member

Sd/-
(P.K. Pujari)
Chairperson

