

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 61/MP/2021

**Coram:
Shri P.K.Pujari, Chairperson
Shri I.S.Jha, Member
Shri Arun Goyal, Member
Shri P.K.Singh, Member**

Date of order: 1st May, 2021

In the matter of

Petition under Section 79 (1) (f) and (k) of the Electricity Act, 2003 for adjudication of disputes arising on account of termination of the Power Purchase Agreement dated 31.7.2012 by the Respondent Nos. 1 and 2.

**And
In the matter of**

KSK Mahandi Power Company Ltd.
8-2-293/82/A/431/A, Road No. 22,
Jubilee Hills, Hyderabad-500 033
Telangana

....Petitioner

Vs

1. Southern Power Distribution Company of Andhra Pradesh Ltd.
D.No. 19-13-65/A, Trichanoor Road,
Behind Srinivasa Kalyana Mandapam,
Kesevayanaggunta, Tirupati-517503,
Andhra Pradesh.

2. Eastern Power Distribution Company of Andhra Pradesh Ltd.
P &T Colony, Seethammadhara,
Vishakhapatnam-530 013
Andhra Pradesh.

3. Transmission Corporation of Andhra Pradesh Limited
Vidyut Soudha, Gunadala, Eluru Road,
Vijaywada, Andhra Pradesh - 520 004

....Respondents

The following were present:

Shri M. G. Ramachandran, Sr. Advocate, KMPCL
Shri Anand K Ganesan, Advocate, KMPCL
Shri Ashwin Ramanathan, Advocate, KMPCL
Shri Ardhendumauli Kumar Prasad, Advocate, AP Discoms

Shri Ashish Madan, Advocate, AP Discoms
Shri Sidhant Kumar, Advocate, AP Transco

ORDER

The present Petition has been filed by the Petitioner, KSK Mahanadi Power Company Limited, under Sub-section (1) (f) and (k) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for adjudication of disputes arising on account of termination of the Power Purchase Agreement ('the PPA') dated 31.7.2012 by the Respondent Nos. 1 and 2, Southern Power Distribution Company of Andhra Pradesh Ltd. and Eastern Power Distribution Company of Andhra Pradesh Ltd. (hereinafter referred to as 'the AP Discoms'), *inter alia*, seeking to declare action of AP Discoms in issuing the termination notice dated 19.12.2020 in respect of PPA dated 31.7.2012 as illegal and arbitrary and to set aside the said notice.

2. Brief facts of the case leading to filing of the Petition are that the Petitioner is a generating company as defined in Sub-section (28) of Section 2 of the Act, and is in process of establishing 3600 MW (6×600 MW) coal-based Thermal Power Project (hereinafter referred to as "the Project" or "the generating station") at District Akaltara in the State of Chhattisgarh. Andhra Pradesh Power Coordination Committee ('APPCC'), on behalf of the AP Discoms had initiated a competitive bidding process for procurement of medium term power of 2000 MW (+ 20%) under Case-I bidding process for the period from 15.6.2013 to 16.6.2016. Pursuant to the said bidding process, the Petitioner was declared as a successful bidder for supply of 400 MW and accordingly, the PPA was executed with the distribution companies of erstwhile Andhra Pradesh ('Discoms') on 31.7.2012. Subsequently, post bifurcation of the State of Andhra Pradesh, the said PPA got divided into two PPAs with Telangana

Discoms (215.56 MW) and the remaining two Discoms of Andhra Pradesh i.e AP Discoms (184.44 MW). The said PPA was subsequently amended on 19.12.2014, whereby the AP Discoms agreed to purchase the entire 400 MW from the Petitioner and the duration was extended up to 31.3.2021.

3. On 1.3.2018, Power Grid Corporation of India Limited ('PGCIL') issued notice for regulation of power supply to the Petitioner on account of outstanding dues and on 16.6.2020 regulated the power supply accordingly. The Respondent No. 1 vide its letter dated 4.8.2020 requested the Petitioner to restore the contracted power supply as per the provision of the PPA, failing which it shall be constituted as seller's event of default. In response, the Petitioner vide its letter dated 10.8.2018 informed the Respondent No. 1 that AP Discoms had not paid the Point of Connection ('PoC') charges already paid by the Petitioner for the period of regulation of power supply and it is the responsibility of the procurers to reimburse the PoC charges immediately more so when the regulation of power supply itself was attributable to the failure of AP Discoms in discharging their obligations. Subsequently, the Respondent No. 1 issued show cause notice dated 27.8.2020 to the Petitioner to the effect that as to why the PPA should not be terminated on account of continued default on its part. In response, the Petitioner vide its letter dated 9.12.2020 requested for withdrawal of termination notice and informed that since AP Discoms did not fulfill their obligations specified in the PPA, the Petitioner fulfilled all the payment obligations to PGCIL. Despite making payment, PGCIL has not lifted the regulation which is beyond the control of the seller as envisaged in Article 9.3.1 of the PPA. Subsequently, on 19.12.2020, the Respondent No. 1 terminated the PPA on the ground that the Petitioner has stopped supply of power to AP Discoms from

13.7.2020. Accordingly, the Petitioner has filed the present Petition with the following prayers:

“(a) Issue appropriate order(s)/direction(s) declaring the action of AP Discoms in issuing the termination notice dated 19.12.2020 as illegal and arbitrary and accordingly set aside the impugned notice;

(b) Issue appropriate order(s)/direction(s) to the AP Discoms to grant consent for STOA, and take supply of power from the Petitioner in terms of the PPA;

(c) Pass an ad-interim order restraining the AP Discoms from taking any coercive and/or precipitative action against the Petitioner pending the hearing of the present Petition;

(d) Pass an ex-parte ad-interim order in terms of prayers (a), (b) and (d) above and confirm the same after notice to the Respondents, and/or

(e) Award costs of the present Petition in favour of the Petitioner and against the Respondents No.1 and 2.”

4. Since the Commission was not holding the hearing in terms of the order dated 28.8.2020 of the Hon'ble Supreme Court in Contempt Petition (C) No. 429/2020 in C.A No. 14697/2015, the Petitioner had approached the Appellate Tribunal for Electricity ('APTEL') under Section 121 of the Act vide O.P No. 4 of 2021. APTEL vide its orders dated 24.12.2020 and 12.1.2021 had granted certain interim reliefs to the Petitioner as prayed therein and *inter alia*, also repelled the objections of the AP Discoms regarding the jurisdiction of this Commission. However, the said orders of APTEL were challenged by the Andhra Pradesh State Load Despatch Centre before the Hon'ble Supreme Court in Civil Appeal Nos. 226 and 227 of 2021. The Hon'ble Supreme Court vide its order dated 29.1.2021 observed that the Section 121 of the Act does not give APTEL any power to decide disputes pending before it and consequently set aside the aforesaid orders of the APTEL. In the said order, the Hon'ble Supreme Court also observed that the parties are now free to go back to the Central Commission, who will decide the dispute before it in accordance with the law, including the questions of the jurisdiction.

5. Accordingly, the matter was called out for virtual hearing on 12.3.2021 for admission. During the course of hearing, it was submitted by the learned counsel for the Respondents, AP Discoms, that in terms of the decision of the Hon'ble Supreme Court, the Commission is required to decide the issue of jurisdiction. Accordingly, the Commission may first decide the primary question of jurisdiction. It was further submitted by the learned counsel that in the instant case, the dispute relates to termination of the PPA and not of the determination of tariff. It was submitted that the jurisdiction in the present case lies with Andhra Pradesh Electricity Regulatory Commission ('APERC') as it is the APERC, which is mandated to regulate the electricity purchase and procurement process of AP Discoms through the agreements for purchase of power under Section 86(1)(b) of the Act. In rebuttal, it was submitted by the learned senior counsel for the Petitioner that since the Petitioner has a composite scheme, only this Commission has the jurisdiction to adjudicate upon the dispute involved in the present Petition under Section 79(1)(f) of the Act. Accordingly, the parties were directed to complete their pleadings on the issue of jurisdiction by 9.4.2021.

6. In compliance with the aforesaid directive, Respondents AP Discoms have filed their common reply on 25.3.2021 and the Petitioner has filed its rejoinder thereof on 9.4.2021. The reply and the rejoinder of the parties cover both the jurisdiction as well as the merit aspects of the case. However, since the Commission is only examining the issue of jurisdiction in the instant order, submissions only to extent of jurisdiction have been reproduced and discussed hereafter.

7. AP Discoms vide its affidavit dated 25.3.2021 have submitted as under:

(a) Since APERC had adopted the tariff and approved the PPA under Section 64(5) of the Act, this Commission does not have the jurisdiction to adjudicate the instant dispute with respect to termination of the PPA between the parties. In terms of paragraph 29 of the judgment of the Hon`ble Supreme Court in the case of Energy Watchdog v. Central Electricity Regulatory Commission reported in [(2017) 14 SCC 80] (hereinafter referred to as 'Energy Watchdog Case'), the present case is squarely covered under Section 64 (5) of the Act. Once jurisdiction of APERC has been invoked with the consent of parties in accordance with the provisions of Section 64 (5) of the Act, the parties to the PPA cannot be allowed to later on claim that the jurisdiction in relation to the disputes arising out of the PPA cannot be adjudicate by APERC on the ground that the generating company has composite scheme i.e. generation and sale of electricity in more than one State.

(b) Section 64 (5) of the Act is a non-obstante clause and it carves out an exception for approval of tariff and PPA consequentially adjudication of disputes by the State Electricity Regulatory Commission, even if the generating company has composite scheme and jurisdiction otherwise lies with this Commission.

(c) If the interpretation and reasoning of the Petitioner is accepted, then the provisions contained under Section 64 (5) of the Act would be rendered as otiose which cannot be an intention of the legislators in any manner whatsoever. In support, the Respondents have relied upon the judgment of the Hon`ble Supreme Court in the case of State of Rajasthan v. Gopi Kishan Sen reported as [1993 Supp (1) SCC 522] wherein it was observed that the rule of harmonious construction of apparently conflicting statutory provisions is well established for upholding the giving effect to all the provisions as far as it may be possible, and for avoiding the interpretation which may render any of them ineffective or otiose. Also, there cannot be a partial jurisdiction between this Commission and APERC.

(d) The jurisdiction of this Commission cannot at all be invoked for adjudication of the present dispute (i.e. termination of the PPA) since the

adjudication of said disputes does not fall within the purview of the functions enshrined under Section 79 of the Act.

(e) From a conjoint reading of the provisions contained under Section 79 (1) (b) and 79 (1) (f) of the Act, it is evident that the jurisdiction of the Commission can be invoked only if the dispute is related to adjustment in tariff of the generating companies (such as upon occurrence of any change in law event or for approval of SHAKTI Scheme which is direct bearing on the tariff) and not otherwise. Since the present dispute is relating to termination of the PPA which is directly related to the procurement of electricity in the State of Andhra Pradesh, the same is squarely falls within the purview of Section 86 (1) (b) read with Section 86 (1) (f) of the Act.

(f) As per Article 14.3 1 of the PPA, the SERC is the Appropriate Commission for resolving the disputes.

(g) There is no provision under Section 79 of the Act akin to the provisions contained under Section 86 (1)(b) of the Act which would enable this Commission to adjudicate the present dispute. Rather the provisions which empowers this Commission to adjudicate dispute i.e. Section 79 (1) (f) is restrictive in nature in so far as it empower this Commission to adjudicate disputes only in regard to matters connected with clauses (a) to (d) of Sub-section (1) of Section 79 of the Act. Therefore, the Petition is not maintainable and deserves to be dismissed at this very stage.

(h) Reliance placed by the Petitioner on the APTEL's judgment dated 31.10.2018 in Appeal No. 230 of 2017 and judgment of the Hon`ble Supreme Court dated 3.12.2018 in Civil Appeal No. 11142 of 2018 is not applicable in the present case. The above judgment of APTEL was in a matter pertaining to compensation on account of change in law events which as a direct bearing on the tariff of the Petitioner. Therefore, the said dispute was covered within the purview of Section 79 (1)(b) read with Section 79 (1)(f) of the Act. Since in the present case, there is no dispute with regard to the regulation or adjustment of tariff, the same does not fall within the purview of Section 79 of the Act.

(i) The issue of jurisdiction *inter-se* parties was raised by AP Discoms before the Hon`ble Supreme Court in Civil Appeal Nos. 100-101, 226-227 of 2021. Vide order dated 29.1.2021, Hon`ble Supreme Court set aside the orders of APTEL dated 24.12.2020 and 12.1.2021 in Original Petition No. 4 of 2021 and directed that the Central Commission will decide the dispute before it in accordance with law including the question as to jurisdiction. Therefore, the issue of jurisdiction is required to be decided by this Commission.

8. The Petitioner in its rejoinder dated 9.4.2021 has submitted as under:

(a) Issue of jurisdiction raised by the Respondents is not only misconceived and liable to be rejected, but is also an abuse of process in so far as the issue has already attained finality in the Hon`ble Supreme Court *inter-se* the very same parties. Even the APERC consequent to the order of the Hon`ble Supreme Court in the matter of jurisdiction *inter-se* the parties, has already transferred all cases between the parties which were pending before it to this Commission.

(b) Lack of bona fide in the conduct of the Respondents is also evident from the fact that copies of the preliminary notices of sellers event of default dated 27.8.2020 as well as the termination notice dated 19.12.2020, both were sent to this Commission also, in terms of Article 11.3.4, which stipulate that a copy of the notice has to be sent to the Appropriate Commission.

(c) Section 64(5) of the Act has no application whatsoever to the present case. The PPA between the parties was executed pursuant to a competitive bidding process under Section 63 of the Act. Section 64(5) of the Act applies only on application by mutual consent by the parties for determination of tariff under Section 62 of the Act and has no application to the PPAs entered into under Section 63 of the Act.

(d) There is no partial jurisdiction in the present case. On the other hand, the contention of the Respondents on partial jurisdiction applies against the Respondents, inasmuch as there are Petitions in relation to the change in law as well as approval of the tariff and PPA under the SHAKTI scheme which have already been adjudicated by this Commission and the same has been accepted by the Respondents.

(e) After the Hon'ble Supreme Court's judgment in the 'Energy Watchdog Case', all issues arising out of inter-State transactions under the Act are within the sole jurisdiction of this Commission. Hon'ble Supreme Court has categorically held that the jurisdiction of the State Commission would arise only for intra-State transactions, which are only within the State. In the present case, the generating station is located in the State of Chhattisgarh and the supply is on inter-State basis to the Respondents. In addition to the above, the Petitioner also supplies electricity to multiple States, namely, States of Tamil Nadu, Uttar Pradesh and Chhattisgarh.

(f) APTEL's order dated 31.10.2018 in Appeal No. 230 of 2017 is inter-se and under the very same PPA between the parties and on the jurisdiction of this Commission. The above decision was also upheld by the Hon'ble Supreme Court vide judgment dated 3.12.2018 in Civil Appeal No. 11142 of 2018 and specifically stating that the case of the Petitioner was considered. The purported distinction sought to be made by the Respondents on the aforesaid decision of the APTEL is also misplaced. APTEL had considered the very same PPA between the parties and has come to the conclusion that the State Commission would have no jurisdiction in the issues that arise under the PPA.

(g) The reliance on the approval of the PPA by the APERC is also misplaced. Firstly, the approval under Section 86(1)(b) of the Act is of the PPA and the same would not result in ouster of the jurisdiction of this Commission or otherwise confer jurisdiction to the State Commission for adjudication of disputes even where the supply is on inter-State basis. Section 86(1)(b) of the Act is for approval of all PPAs, including where tariff is determined by the Commission. Even in such cases, the dispute resolution is only by this Commission.

(h) The contention that the present case will not fall within the purview of the functions enshrined under Section 79 of the Act is misplaced. The adjudication functions under Section 79(1)(f) of the Act are wide enough to include the disputes under the PPA between the parties.

(i) The contention that the termination of the PPA is in no manner related to tariff and that the only issue of adjudication before this Commission could be on the adjustment of tariff is also misplaced. The issue in the present case is the wrongful termination of the PPA on account of alleged non-supply of power, despite the fact that the tariff has not been paid by the Respondents under the PPA. The primary issue is the non-payment of tariff, which has resulted in the regulation of transmission corridor and consequent inability of the Petitioner to supply power to the Respondents. In addition, the issue is also involving the inter-State transmission of electricity, as the reason for non-supply is the regulation of inter-State transmission corridor. The default on the part of the Respondents is for non-payment of tariff to the Petitioner under the PPA and also non-payment of inter-State transmission charges. All these aspects are regulated by this Commission and are subject to the adjudicatory jurisdiction of the Commission.

(k) It is also wrong and denied that Article 15.3.1 of the PPA defines the 'Appropriate Commission' as the State Commission. In any event, the agreement between the parties cannot vest or oust the jurisdiction of a statutory authority such as this Commission.

(l) The cases that have been transferred to this Commission by the APERC vide its order dated 19.1.2019 also relates to issues of non-supply of power and related invocation of Bank Guarantee/ Letter of Credit towards the penalty. The Respondents having not contested the same, have come with this argument as a clear afterthought. Also, the issues involving validity of termination of the PPA, non-payment of transmission charges and energy bills fall squarely within the regulatory as well as the adjudicatory jurisdiction of this Commission and not under the jurisdiction of the APERC.

**RE: Jurisdiction
Analysis and Decision:**

9. We have considered the submissions of the Petitioner and AP Discoms. The issue for our consideration at this stage is whether this Commission has jurisdiction

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.”

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.

12. In the present case, the generating station of the Petitioner is located in the State of Chhattisgarh and besides the AP Discoms, is also supplying the power to the distribution companies of the States of Uttar Pradesh, Tamil Nadu and Chhattisgarh. Thus, it is a composite scheme of generation and supply of electricity in more than one State. In the light of the decision of the Hon'ble Supreme Court in the Energy Watchdog case dealing with the jurisdiction of the Central Commission in case of composite scheme for supply of electricity to more than one State, we are of the view 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 adjudicate the disputes raised in respect thereof under Section 79(1)(f) of the Act. Merely because the State Commission had adopted the tariff under Section 63 of the Act or approved the PPA between the Petitioner and AP Discoms under Section 86(1)(b) of the Act, jurisdiction cannot be vested in the State Commission, by overlooking the provisions

of Section 79(1)(b) of the Act and existence of a composite scheme in respect of the generating station of the Petitioner in terms of Hon'ble Supreme Court's finding in Energy Watchdog Case.

13. AP Discoms have submitted that the jurisdiction of the State Commission was invoked under Section 64(5) of the Act at the time of approval of the PPA and adoption of tariff and hence the parties to the PPA cannot deny the jurisdiction later on the ground that the generating company has a composite scheme. It has been submitted by the AP Discoms that Section 64(5) of the Act is a non-obstante clause and the said provision carves out an exception for approval of tariff and PPA and consequent adjudication of disputes by the State Electricity Regulatory Commission. The AP Discoms have referred to the findings of the Hon`ble Supreme Court in the Energy Watchdog Case as regards Section 64(5) of the Act and has contended that the State Commission/APERC only has the jurisdiction in the matter.

14. *Per contra*, the Petitioner has submitted that Section 64(5) of the Act does not have any application whatsoever to the present case. The Petitioner has submitted that the PPA between the parties was executed under Section 63 of the Act and Section 64, by its plain language, applies only on the application by the mutual consent by parties for determination of tariff under Section 62 of the Act and has no application to the PPAs under Section 63 of the Act. The Petitioner has also refuted the contention that the Section 64(5) of Act would be rendered otiose by entertaining the present Petition.

15. We have considered the submissions of the Petitioner and the Respondents. Section 64(5) of the Act provides as under:

“64(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, 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) of the Act 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 jointly before the State Commission having jurisdiction over such distribution licensee for determination of tariff.

16. With regard to Section 64(5) of the Act, the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case had 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.”

In our view, the findings of the Hon'ble Supreme Court on Section 64(5) of the Act do not in any manner support the argument of the Respondents that the State Commission/APERC will have jurisdiction in matters relating to inter-State supply of power. Hon'ble Supreme Court in above paragraph 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) of the Act 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 respect of PPA dated 31.7.2012 and its subsequent amendment dated 19.12.2014, the Respondents, AP Discoms have invoked the jurisdiction of the State Commission/APERC for adoption of tariff under Section 63 of the Act and approval of the PPA under Section 86(1)(b) of the Act. The said Petitions can be construed as a joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Further, there is nothing on record to show that both the Petitioner and AP Discoms had approached the State Commission for determination of tariff under Section 64(5) of the Act. In our view, the case of the Petitioner is not covered under Section 64(5) of the Act, since the generating station of the Petitioner is supplying power to more than one State and therefore, has a composite scheme for generation and supply of power under Section 79(1) (b) of the Act. Consequently, any dispute involving Section 79(1)(b) of the Act can only be adjudicated by the Central Commission under Section 79(1)(f) of the Act. In the light of the above

discussion, we are of the view that even though the tariff discovered under the competitive bid process was adopted by the State Commission under Section 63 of the Act, Section 64(5) has no application in the present case since the generating station is having composite scheme of generation and supply of electricity in more than one State and in terms of judgment of the Hon'ble Supreme Court in Energy Watchdog Case, the jurisdiction for regulating the tariff of the generating station of the Petitioner and adjudication of disputes vest in the Central Commission. Accordingly, the submission of the Respondents, AP Discoms on this count is not sustainable.

17. The next objection of AP Discoms is that as per Article 14.3 of the PPA, the jurisdiction in the present case lies with APERC since in terms of Article 14.3.1 of the PPA, any legal proceedings in respect of any matter, claims or disputes under the PPA shall be under the jurisdiction of APERC. *Per contra*, the Petitioner has refuted SERC is being the Appropriate Commission for resolving the dispute. The Petitioner has submitted that the agreement between the parties cannot vest or oust the jurisdiction of a statutory authority such as this Commission.

18. We have considered the submissions of the parties. Article 14.3.1 of the PPA provides for dispute resolution by the "Appropriate Commission" which is extracted as under:

"14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

14.3.1.1 (a) Where any Dispute arising from a claim made by any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

(b) Where SERC is the Appropriate Commission, all disputes between the Procurers and the Seller shall be referred to SERC.

14.3.1.2 The obligation of the Procurer(s) under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes among the Procurer(s)."

19. Further the "Appropriate Commission" has been defined in the PPA as under:

"Appropriate Commission" shall mean the CERC, or the SERC, or the Joint Commission referred to in Section 83 of the Electricity Act 2003, as the case may be;"

20. Having held that the generating station of the Petitioner has a composite scheme for supply of power in more than one State under Section 79(1)(b) of the Act, the Commission is of the view that the "Appropriate Commission" in terms of Article 14.3.1.1(a) of the PPA read with the definition of 'Appropriate Commission' is the Central Commission to deal with any of the claims/disputes raised by the Petitioner under the PPA dated 26.2.2014 and the APERC does not have any jurisdiction in the matter. The submissions of the Respondents, AP Discoms are therefore not sustainable on this count.

21. The Respondents, AP Discoms have further submitted that under Section 79(1)(b) read with Section 79(1)(f) of the Act, the jurisdiction of the Commission can only be invoked if the dispute is related to adjustment in tariff of the generating companies and not otherwise. Since in the present case, there is no dispute with regard to adjustment in tariff, rather the dispute is arising out of termination of PPA, which is directly related to the procurement of electricity in the State of Andhra Pradesh, the dispute falls within the purview of the State Commission under Section 86(1)(b) read with Section 86(1)(f) of the Act.

22. *Per contra*, the Petitioner has submitted that the approval of the PPA under Section 86(1)(b) of the Act by the State Commission would not ouster of the jurisdiction of this Commission or otherwise confer the jurisdiction to the State Commission for adjudication of disputes where the supply is on inter-State basis. It has been further submitted that the issue in the present case is the wrongful termination of the PPA on account of alleged non-supply of power despite the fact that the tariff has not been paid by the Respondents under the PPA. The primary issue is regarding non-payment of tariff, which has resulted in the regulation of transmission corridor and consequent inability of the Petitioner to supply power to the Respondents. The default on the part of the Respondents is for non-payment of tariff to the Petitioner and also the non-payment of intra-State transmission charges, all of these aspects are regulated and subject to the adjudicatory jurisdiction of this Commission under Section 79(1)(f) of the Act.

23. We have considered the submissions of the parties. It is now a well settled position that "power to regulate" is very wide and the power to regulate tariff includes any issue incidental or consequential thereto so as to make the 'power to regulate' purposeful and effective. On a plain reading of the provision of Section 79(1)(f) of the Act (supra), it emerges that the dispute must concern the regulation and determination of generation tariff of the generating stations owned or controlled by the Central Government [79(1)(a) of the Act] or those having a composite scheme for generation and supply to more than one State [79(1)(b) of the Act]; determination of tariff for inter-State transmission of electricity [79(1)(c) of the Act] and regulation of inter-State transmission of electricity [79(1)(d) of the Act].

24. However, explaining the scope of term “regulate” under Section 79(1)(a) of the Act, APTEL in its judgment dated 10.12.2009 in Appeal No. 161/2009 (DVC v. BRPL &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.”

Though the above observations of the APTEL are in context of Section 79(1)(a) of the Act, the same is 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.

25. Merely because the adjudication of the dispute relates to termination of the PPA does not in any manner affect the jurisdiction of this Commission. In fact, Section 79(1)(f) of the Act has got a wider scope and is not merely confined to the determination of tariff. It would also involve the terms and conditions of tariff including termination of supply and payments, etc. This has been decided by the APTEL in its judgment dated 4.9.2012 in Appeal No. 94 and 95 of 2012 (BSES Rajdhani Power Limited 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 licensees 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."

26. Besides, such contention of the Respondents is not tenable also on the ground that termination of the PPA has been contested by the Petitioner primarily on the basis of the default on the part of the Respondents in making the tariff payments (energy charges and transmission charges, etc.) in terms of the PPA and consequent regulation of power supply. Therefore, the issue of termination of the PPA in the present case is inevitably linked to payment of tariff and accordingly, squarely falls within the jurisdiction of this Commission under Section 79(1)(f) read with Section 79(1)(b) of the Act. Accordingly, the Commission is of the view that contention of the AP Discoms that the subject matter of the dispute i.e. termination of the PPA does not fall within the scope of Section 79(1)(b) read with Section 79(1)(f) of the Act is not tenable and deserves to be rejected.

27. Reliance placed by AP Discoms on Section 86(1)(b) and Section 86(1)(f) of the Act is also misplaced. As rightly pointed out by the Petitioner, while Section 86(1)(b) of the Act enables the State Commission to regulate the electricity purchase and procurement process of the distribution licensees of the State, it does not in any manner oust the jurisdiction of the Central Commission in respect of the generating companies having composite scheme of generation and sale of electricity in more

than one State under Section 79(1)(b) read with Section 79(1)(f) of the Act. Moreover, as already settled in terms of the Energy Watchdog Case (supra), the jurisdiction of State Commission under Section 86(1)(f) of the Act only attracts when the generation and sale of electricity is only within the State i.e. Intra-State. Admittedly, since in the present case, the generation and supply is inter-State, Section 86(1)(f) of the Act has no application.

28. Further, APTEL vide its order dated 31.10.2018 in Appeal No. 230 of 2017 inter-se parties and under the very same PPA has upheld the jurisdiction of this Commission. The relevant extract of the said decision of APTEL is reproduced as under:

*“5. We heard both learned counsel appearing for the parties at length. It is not in dispute that the impugned order came to be passed prior to the decision of the Hon’ble Supreme Court in the case of **Energy Watdog Vs. Central Electricity Regulatory Commission**, but subsequent to the full bench decision of the Tribunal in Appeal No. 100 of 2013 dated 7-4-2016 in the case of **Uttar Haryana BijiVitran Nigam Ltd. Vs. Central Electricity Regulatory Commission &Ors.** So far as Appellant entering into PPA in the year 2012 with four distribution licensees in the erstwhile undivided State of Andhra Pradesh, there is no dispute. There is no dispute that the generating station of the Appellant is situated in Chattisgarh. It is also not in dispute that Appellant generating company is supplying power not only to the licensees in Andhra Pradesh but also to licensees in the State of Telengana apart from supplying power to the licensees of Tamil Nadu, Uttar Pradesh, and Chattisgarh. It is also not in dispute that pursuant to the law applicable on the question of jurisdiction, Appellant did file petitions raising disputes with the Respondents herein before the Regulatory Commission meant for undivided State of Andhra Pradesh. Apparently, the full bench of the Tribunal in the case of **Uttar Haryana BijiVitran Nigam Ltd. Vs. Central Electricity Regulatory Commission &Ors.** In Appeal No. 100 of 2013 dated 7-4-2016 opined that the mere sale of electricity by a generator to two or more States would mean it is a composite scheme attracting the provisions of Section 79(1)(b), and therefore, it would be within the exclusive jurisdiction of the Central Commission to adjudicate disputes between the parties to PPA.*

*5.1 At Para 24 of **Energy Watchdog** case, the Hon’ble Supreme Court while interpreting what would be a composite scheme and who under what circumstances would get jurisdiction to entertain disputes, whether Central Commission or State Commission, opined that in the case of inter-State sale, it would be a composite scheme for the exclusive jurisdiction of the Central Commission.*

.....
5.3 As against this in reply arguments to the Appellant counsel, Respondent counsel contends that since PPA was approved by the undivided Andhra Pradesh State

Commission and even adjudicated upon certain disputes at that time and OP No. 46 of 2014 was filed in terms of settled law as on that date, the State Commission alone has jurisdiction to entertain the matter; therefore, neither decision of full bench of this Tribunal nor the law laid down in the **Energy Watchdog** case would apply to the facts of the present appeal. Hence appeal deserves to be dismissed.

5.4 Apparently, the impugned order is dated 28-9-2016. As on the date of impugned order, full bench decision of this Tribunal in Appeal No. 100 of 2013 was already pronounced on 7-4-2016. It is needless to say that the opinion of this Tribunal has binding force on the State Commission when it passed the impugned order. In the full bench decision, the Tribunal opined that where generating companies are supplying electricity to two or more States of disputes, cases would fall within the purview of Central Electricity Regulatory Commission. If one were to ask why in the first place the petitions were filed before the Commission, the answer is very simple and straight. As on the date of filing of the two petitions in question, the law was different which came to be reversed by full bench decision of this Tribunal on 7-4-2016. The impugned order alleged to have been pronounced after a long time of conclusion of arguments. Aggrieved by the said impugned order, the present appeal is filed. Meanwhile, the judgment in **Energy Watchdog Vs. Central Electricity Regulatory Commission** came to be pronounced and the relevant paragraphs of the said judgment are at para 24, 25 and 29 which read as under:

.....
5.5 Several issues cropped up for consideration before the Hon'ble Supreme Court and one of the controversy was with regard to composite scheme. If generation and sale of electricity is done by same entity, it would be a composite scheme whereby Central Commission had the necessary jurisdiction to embark upon the disputes. While analyzing Sections 79, 86 and 65, Their Lordship, while interpreting composite scheme opined that the State Commission has jurisdiction only where generation and supply takes place within the State (intra-State). But in a case where the generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. In the present case, the generation of electricity is in the State of Chhattisgarh and sale of electricity is not restricted to either State of Chhattisgarh or State of Andhra Pradesh. The Appellant generating company supplies electricity to other States as well, i.e. Tamil Nadu, Uttar Pradesh and Telengana apart from Andhra Pradesh and Chhattisgarh."

29. The aforesaid decision of the APTEL was challenged by the AP Discoms before the Hon'ble Supreme Court in Civil Appeal No. 11142 of 2018. Vide order dated 3.12.2018, Hon'ble Supreme Court disposed of the said Civil Appeal by observing the following:

"2) We are not inclined to interfere with the order passed by the Appellate Tribunal for Electricity, New Delhi.

3) Accordingly, the Civil appeal is dismissed.

4) However, we make it clear that we have considered only the case of K.S.K Mahanadi Power Company Ltd."

30. Thus, in terms of the above decisions, issue of the jurisdiction of this Commission inter-se the parties and the very same PPA stands settled. However, the Respondents, AP Discoms have sought to argue that the aforesaid judgment passed by the APTEL was in a matter pertaining to compensation on account of change in law events which has direct bearing on tariff, whereas in the present case, dispute involved being termination of the PPA, does not relate to regulation or adjustment of tariff. In the foregoing paragraphs, we have already concluded that under Section 79(1)(f) of the Act, this Commission can also adjudicate upon the disputes relating to the terms and conditions of tariff including termination of supply and payments, etc. and that termination of PPA in the present case is inevitably linked to the payment of tariff. Therefore, we do not find any merit in the contention of the Respondents, AP Discoms that the aforesaid decision of APTEL does not apply to the present case.

In view of the above discussion, we find and hold that this Commission has exclusive jurisdiction to hear the disputes arising between the parties on both counts, the scheme being the composite scheme and dispute is basically related to tariff.

31. It is clarified that 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 Petition. Parties are directed to complete the further pleadings on merit, if any, by 31.5.2021. No further extension of time for completion of pleadings shall be permitted. Interim directions given vide Record of Proceedings for the hearing dated 12.3.2021 shall be continued till further orders.

32. 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/-
(I.S.Jha)
Member

sd/-
(P.K.Pujari)
Chairperson