

Before

UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

In the matter of:

Petition under Section 86(1)(f) of the Electricity Act,2003, for adjudication of dispute between M/s PTC India Ltd., Swasti Power Engineering Ltd., Uttarakhand Power Corporation Ltd. and Punjab State Power Corporation Ltd.

AND

In the matter of:

PTC India Ltd.

...Petitioner

AND

In the matter of:

M/s Swasti Power Engineering Ltd.

...Respondent No. 1

Uttarakhand Power Corporation Ltd.

...Respondent No. 2

Punjab State Power Corporation Ltd.

...Respondent No. 3

Coram

Shri Jag Mohan Lal Chairman

Shri C. S. Sharma Member

Shri K. P. Singh Member

Date of Hearing: 09th January 2014

Date of Order: 26th March 2014

ORDER

The present Petition was filed by M/s PTC India Ltd. (hereinafter referred to as Petitioner) against letter dated 09.03.2011 issued by Swasti Power Engineering Ltd. (hereinafter referred to as Respondent No.1) terminating its power purchase agreement dated 24.08.2005 (hereinafter referred to as PPA) entered into with the Petitioner.

2. The Petitioner submitted that it has suffered huge financial losses due to the illegal termination of PPA by Swasti Power. The Petitioner has prayed the following before the Commission:
 - (1) That the termination letter dated 09.03.2011 issued by Respondent No. 1 be declared as illegal, arbitrary, unsustainable and bad in law;
 - (2) To direct Respondent No. 1 to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Respondent No.1 and Petitioner;
 - (3) To direct Respondent No.1 to cancel any agreement executed for supply to Uttarakhand Power Corporation Ltd. (UPCL) (hereinafter referred to as Respondent No.2) and also any other agreement that it may have entered into with any other utilities for supply of power generated from the project in derogation of the terms of the PPA dated 24.08.2005;
 - (4) In the alternative and if prayer (i) and (ii) as mentioned hereinabove is not granted, then Petitioner may be awarded damages in accordance with the provisions of the PPA dated 24.08.2005;
 - (5) To direct Respondent No.1 to pay to the Petitioner damages for the loss of business due to illegal termination of the PPA by Respondent No.1;
 - (6) Pass any order(s) as this Hon'ble Commission may deem fit and proper in the facts and circumstances of the case as well as in the interests of justices.
3. A motion hearing was fixed in the matter on 26.11.2013 to examine maintainability of this Petition. The Petitioner alongwith the Respondents were directed to be present in person or through their authorised representatives on the stipulated date and time to present their case before the Commission. The Petitioner alongwith the Respondents were directed to make their submission, if any, by 24.11.2013.
4. Due to unavoidable circumstances the above motion hearing was postponed and was subsequently held on 09.01.2014 at 12:30 Hrs in the Commission's office.

Background of the Case:

5. The Petitioner signed PPA dated 24.08.2005 with Respondent No.1 for purchase of power from its generating station Bhilangana Hydro Power Project (BHPP) (3 x 7.5 MW), excluding the free power to be given to the Government of Uttarakhand (GoU). Respondent No.1 also signed a Power Wheeling Agreement with Power Transmission Corporation of Uttarakhand Ltd. (hereinafter referred to as PTCUL) on 30.09.2005 for wheeling of power from the place of generation up to the Central Transmission Utility (CTU) grid. It also entered into a MoU with PTCUL on 12.06.2007 with regard to use of PTCUL's system for evacuation of power up to the delivery point at CTU grid.
6. The Petitioner further signed a Power Sale Agreement (PSA) dated 23.03.2006 with Punjab State Power Corporation Ltd. (hereinafter referred to as Respondent No.3) for supply of the said power.
7. The Respondent No.1 filed an application with this Commission on 10.08.2009 in respect of its Bhilangana Hydro Power Project (BHPP) (3 x 7.5 MW) generating station for grant of Open Access for evacuation of power upto the CTU Grid.
8. Meanwhile, on 10.08.2009 the Commission sought GoU's views on the issue of sale of power outside the State by the developers in light of Clause 4 of the "Implementation Agreement" entered into by GoU with the small hydro developers.
9. Taking note of the reply furnished by GoU, the Commission passed an Order dated 30.12.2009 denying open access to the generators. The relevant extract of the said Order is reproduced below:

"10. The clarification from Government has been received and, in its letter dated 10.11.2009 (enclosed as Annexure 2), the Government has informed the Commission that the State is having power shortages and HUPL has proposed to sell the electricity generated to PTC, which is a trading company and does not fall within the category of consumer and, hence, the Government is of the view that it would not be appropriate to consider the open-access proposal of the developer. Accordingly, the Commission has passed a detailed Order dated 30.12.2009 in the matter of M/s HUPL. In this Order, based on clarification given by the Government, the Commission has concluded that as per Clause 4 of the Agreement the sale of

electricity outside the State is not permissible to a licensee. Copy of the said Order may be sent to the Applicant alongwith this Order. The clarification of the Government is applicable to all similarly placed generators including the Applicant."

10. Aggrieved by the Commission's Order dated 30.12.2009, the Petitioner preferred an appeal before the Hon'ble APTEL.
11. Hon'ble APTEL vide its Order dated 11.01.2011 set aside the said Order of the Commission and directed the Commission to grant Open Access to Respondent No.1 after it files an application for granting Open Access on the distribution/transmission system of Respondent No.2/PTCUL before the Commission.
12. Respondent No.1 vide letter dated 09.03.2011 issued a notice to the Petitioner for termination of PPA stating that it had previously, vide letter dated 08.07.2009, intimated the Petitioner of an event of force majeure on account of which it was unable to get inter-connection and Open Access from Respondent No 2/PTCUL which prevented it to supply power to the Petitioner and from performing its obligations under the signed PPA. In order to avoid bottling up of generation, Respondent No.1 stated that it had no other choice but to enter into a PPA with Respondent No.2 on 03.07.2009.
13. The Petitioner approached Punjab State Electricity Regulatory Commission (PSERC) for adjudication of dispute with regard to termination of PPA by Respondent No.1 and to direct Respondent No.1 to specifically perform its obligations under the PPA dated 24.08.2005. PSERC vide its Order dated 02.09.2013 dismissed the petition filed by the Petitioner stating that it did not have jurisdiction to go into the merits of the dispute and that the Petitioner may approach the appropriate authority/forum for redressal of its grievance(s).
14. Accordingly, the Petitioner has filed the present petition for adjudication of dispute with regard to termination of PPA by Respondent No.1.
15. The motion hearing was held by the Commission in the matter on 09.01.2014. The Petitioner, Respondent No.1 and Respondent No.2 were present during the hearing.

16. The Petitioner strongly contended that since the generating station of Respondent No.1 is located within the State of Uttarakhand, this Commission has the jurisdiction to adjudicate the present dispute. The Petitioner further stated that since the cause of action had taken place within the jurisdiction of the Uttarakhand State as such this dispute squarely falls within the Regulatory jurisdiction of this Commission. The Petitioner also stated that this Commission has the jurisdiction with respect to Respondent No.1 & Respondent No.2 who are acting in concert to defeat the contractual rights of both the Petitioner and Respondent No.3. He further submitted that this Commission has jurisdiction in light of the fact that the reliefs sought by the Petitioner as such cannot be granted by any other Electricity Regulatory Commission. In support of its contention that the present dispute between the Petitioner and Respondent No.1 lies within the Regulatory jurisdiction of this Commission, the Petitioner cited numerous decisions/judgments of Hon'ble Supreme Court, Hon'ble APTEL, and other State Electricity Regulatory Commissions.
17. During the hearing Respondent No.1 submitted that under Section 86 (1) (f) of the Electricity Act, 2003 (hereinafter referred to as Act) this Commission is entitled to adjudicate upon any dispute between the trading licensee and the generating companies besides also to refer such disputes for adjudication by the mode of arbitration under the Act. Respondent No.1 further cited the case of Gujrat Urja Vikas Nigam Ltd. Vs. Essar Power Ltd wherein Hon'ble Supreme Court has held that after the notification of the Act, the adjudication of any dispute between the licensees and generating companies can only be done by the State Commissions constituted under the Act. He also submitted that as per the aforesaid judgment the disputes that can be adjudicated by the Hon'ble Commission may not only be restricted to the issues mentioned in Section 86(1) (a) to (e) and (g) to (k) of the Act, but disputes of any nature existing between the licensee and the generating company can be adjudicated by the State Commissions.
18. Respondent No.1 also stated that since its Small hydro project is situated in the State of Uttarakhand and transaction of sale of power under the PPA has concluded within

the territorial jurisdiction of the State of Uttarakhand and power generated from the project was to be delivered at the delivery point within the State of Uttarakhand the cause of action has arisen in the jurisdiction of this Commission hence, this dispute falls within the Regulatory jurisdiction of this Commission.

19. Respondent No.1 further submitted that Hon'ble APTEL has in its various judgments held that if there was a nexus between the power purchase agreement entered into between the trading licensee and the generating company on one hand and the power sale agreement entered into between the trading company and the distribution licensee on the other hand, then the State Electricity Regulatory Commission which regulates the power procurement process of the distribution licensee would be the competent Commission to adjudicate upon the disputes arising between the parties of the said power purchase agreement and power sale agreement. Respondent No.1 also submitted that the judgment passed by Hon'ble APTEL in Appeal No. 130/2011 titled M/s Jai Prakash Power Ventures Ltd. Vs. Haryana Electricity Regularity Commission & Ors. as completely applicable to the facts and circumstances of the present case and stated that the PPA and the PSA in the present case are two distinct and separate agreements on a principal to principal basis and the common party namely the Petitioner does not act as an agent of Respondent No.1 or Respondent No. 3. Respondent No.1 also submitted that as such there is no privity of contract between the Respondent No.1 (generator) and Respondent No. 3 (Punjab Discom) and therefore, Punjab State Electricity Regulatory Commission regulating the procurement process of Respondent No.3 does not have any jurisdiction over any dispute arising under the PPA dated 24.08.2005 between the Petitioner and the Respondent No.1. The only Commission under whose jurisdiction the present dispute falls is Uttarakhand Electricity Regulatory Commission.
20. Respondent No.1 further contended that the Petitioner has prayed for cancellation of long term power purchase agreement executed between itself and Respondent No. 2 and since Respondent No. 2 is a distribution licensee whose power procurement

process under the Act is regulated by this Commission this dispute squarely falls within the adjudicatory jurisdiction of this Commission.

21. Respondent No. 2 i.e. UPCL contended that since the residences of the parties to the PPA were situated in Delhi, stamp paper were purchased in Delhi and the said PPA was executed outside Uttarakhand, this Commission has no jurisdiction to enforce the PPA executed between the Petitioner and Respondent No.1 and accordingly, the present petition filed by the Petitioner does not fall within the Regulatory jurisdiction of this Commission. Respondent No.2 further submitted that the remedy for breach of contract, if established, only entitles the affected party for the remedy provided in the agreement itself, but the same has to be decided and adjudicated by the competent Civil Court. Therefore, the PPA between Petitioner and Respondent No.1 does not fall within the jurisdiction of this Commission, hence, no right under the said PPA can be enforced by this Commission.
22. Respondent No.2 further averred that it is apparent from para (viii) on page 4 of the Order dated 02.09.2013 of PSERC that the Petitioner had asserted before PSERC that the Punjab Commission had the jurisdiction to adjudicate the dispute between itself and Respondent No.1, as the PPA and PSA form an integral part of each other and the transaction was a seamless transaction, with the Petitioner acting as only a conduit between Respondent No.1 and Respondent No.3. According to Respondent No.2 as the submission of the Petitioner was not appreciated by PSERC the Petitioner should have approached Hon'ble APTEL for remedy instead of filing a Petition before the Commission for the same reliefs. Respondent No.2 further submitted that in para 4 on page 5 of aforesaid Order dated 02.09.2013 PSERC has mentioned that ... *"the real issue to be decided is with regard to inaction on part of SPEL to implement the order of Hon'ble APTEL in Appeal No. 88 of 2010"*... and para 5(i) on page 6 of the said Order wherein PSERC has held that *"This Commission cannot issue any direction with regard to inaction on part of SPEL to implement the directions of Hon'ble APTEL in its order dated 11-01-11..."* According to Respondent No.2 since the Order of Hon'ble APTEL dated 11.01.2011 was not followed by Respondent No.1, the Petitioner should have approached appropriate forum/Court for redressal of its grievance(s).

23. Respondent No.2 further averred that declaratory relief and relief of cancellation of document have to be granted by competent Civil Court in accordance with the provisions of the Specific Relief Act, 1963. The Commissions, under Section 86(1)(f) of the Electricity Act, are only vested with the power to adjudicate dispute that may arise between the parties.

Findings of the Commission:

24. The Commission in this Order is examining the maintainability of the Petition before this Commission. The maintainability of the Petition before this Commission would depend upon whether this Commission has jurisdiction to decide the dispute raised in the Petition. For the purpose of considering this question the Commission would be looking only to the averments in the Petition and the documents filed by the Petitioner alone. The Commission, whilst considering as to whether the dispute raised in the Petition falls within the jurisdiction of this Commission, would not be advertent to the defence of the Respondents on the merits of the case. Such an approach is in consonance with the principles laid down by the Hon'ble Supreme Court of India in Ramesh Desai Vs Bipin Vadilal Mehta (2006) 5 SCC 638. The relevant portion of which reads as under:-

"13. It may be mentioned here that in view of Rule 6 of the Companies (Court) Rules, the provisions of the Code of Civil Procedure will be applicable in proceedings under the Companies Act (See Sangramsingh P. Gaekwad vs. Shantadevi P. Gaekwad (2005) 11 SCC 314 2005 Indlaw SC 58).

14. Sub-rule (2) of Order XIV Rule 2 CPC lays down that where issues both of law and of fact arise in the same suit, and the Court is of opinion that the case or any part thereof may be disposed of on an issue of law only, it may try that issue first if that issue relates to (a) the jurisdiction of the Court, or (b) a bar to the suit created by any law for the time being in force. The provisions of this Rule came up for consideration before this Court in Major S.S. Khanna vs. Brig. F.J. Dillon AIR 1964 SC 497 1963 Indlaw SC 321, and it was held as under:-

"Under O. 14 R. 2 where issues both of law and of fact arise in the same suit, and the

Court is of opinion that the case or any part thereof may be disposed of on the issues of law only, it shall try those issues first, and for that purpose may, if it thinks fit, postpone the settlement of the issues of fact until after the issues of law have been determined. The jurisdiction to try issues of law apart from the issues of fact may be exercised only where in the opinion of the Court the whole suit may be disposed of on the issues of law alone, but the Code confers no jurisdiction upon the Court to try a suit on mixed issues of law and fact as preliminary issues. Normally all the issues in a suit should be tried by the Court: not to do so, especially when the decision on issues even of law depends upon the decision of issues of fact, would result in a lop-sided trial of the suit."

Though there has been a slight amendment in the language of Order XIV Rule 2 CPC by the Amending Act, 1976, but the principle enunciated in the above quoted decision still holds good and there can be no departure from the principle that the Code confers no jurisdiction upon the Court to try a suit on mixed issue of law and fact as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a preliminary issue.

15. The plea raised by the contesting respondents is in fact a plea of demurrer. Demurrer is an act of objecting or taking exception or a protest. It is a pleading by a party to a legal action that assumes the truth of the matter alleged by the opposite party and sets up that it is insufficient in law to sustain his claim or that there is some other defect on the face of the pleadings constituting a legal reason why the opposite party should not be allowed to proceed further. In *O.N. Bhatnagar vs. Smt. Rukibai Narsindas and others* (1982) 2 SCC 244 1982 Indlaw SC 122 it was held that the appellant having raised a plea in the nature of demurrer, the question of jurisdiction had to be determined with advertence to the allegations contained in the statement of claim made by respondent 1 u/s. 91(1) of the Act and those allegations must be taken to be true. In *Roop Lal Sathi vs. Nachhattar Singh Gill* (1982) 3 SCC 487 1982 Indlaw SC 105, it was observed that a preliminary objection that the election petition is not in conformity with S. 83(1)(a) of the Act i.e. it does not contain the concise statement of the material facts on which the petitioner relies, is but a plea in the nature of demurrer and in deciding the question the Court has to assume for this purpose

that the averments contained in the election petition are true.

Reiterating the same principle in Abdulla Bin Ali and others vs. Galappa and others (1985) 2 SCC 54 1985 Indlaw SC 521, it was said that there is no denying the fact that the allegations made in plaint decide the forum and the jurisdiction does not depend upon the defence taken by the defendants in the written statement. In Exphar Sa and another vs. Eupharma Laboratories Ltd. and another (2004) 3 SCC 688 2004 Indlaw SC 160, it was ruled that where an objection to jurisdiction is raised by way of demurrer and not at the trial, the objection must proceed on the basis that the facts as pleaded by the initiator of the impugned proceedings are true. The submission in order to succeed must show that granted those facts the court does not have jurisdiction as a matter of law.

In this case the decision of the High Court on the point of the jurisdiction was set aside as the High Court had examined the written statement filed by the respondents in which it was claimed that the goods were not at all sold within the territorial jurisdiction of Delhi High Court and also that the respondent No. 2 did not carry out business within the jurisdiction of the said High Court. Following the same principle in Indian Mineral & Chemicals Co. and others vs. Deutsche Bank (2004) 12 SCC 376 2004 Indlaw SC 461, it was observed that the assertions in a plaint must be assumed to be true for the purpose of determining whether leave is liable to be revoked on the point of demurrer.

16. The principle underlying Cl. (d) of Order VII Rule 11 is no different. We will refer here to a recent decision of this Court rendered in Popat and Kotecha Property vs. State Bank of India Staff Association (2005) 7 SCC 510 2005 Indlaw SC 512 where it was held as under in para 12 of the report:

"Cl. (d) of Order 7 Rule 7 speaks of suit, as appears from the statement in the plaint to be barred by any law. Disputed questions cannot be decided at the time of considering an application filed under Order 7 Rule 11 CPC. Cl. (d) of Rule 11 of Order 7 applies in those cases only where the statement made by the plaintiff in the plaint, without any doubt or dispute shows that the suit is barred by any law in force."

It was emphasized in para 26 of the reports that the statement in the plaint without addition

or subtraction must show that it is barred by any law to attract application of Order 7 Rule 11 CPC. The principle is, therefore, well settled that in order to examine whether the plaint is barred by any law, as contemplated by sub-rule (d) of Order VII Rule 11 CPC, the averments made in the plaint alone have to be seen and they have to be assumed to be correct. It is not permissible to look into the pleas raised in the written statement or to any piece of evidence. Applying the said principle, the plea raised by the contesting respondents that the Company Petition was barred by limitation has to be examined by looking into the averments made in the Company Petition alone and any affidavit filed in reply to the Company Petition or the contents of the affidavit filed in support of Company Application No. 113 of 1995 filed by the respondents seeking dismissal of the Company Petition cannot at all be looked into.

25. In the present Petition, the Petitioner has inter alia pleaded as under:-

Para 5

*...“Whereas, Respondent No.3 is the distribution licensee of the State of Punjab and is the downstream purchaser **under Power Sale Agreement dated 23.03.2006** (hereinafter referred to as “PSA” for sake of brevity) which was executed solely on the basis of the PPA.”*

Para 7 b

“That on 23.12.2003, being desirous of selling the generated power generated from the Project of PTC to be further sold to Punjab State Electricity Board (hereinafter referred to as “PSEB” for sake of brevity), Swasti signed a Memorandum of Understanding (hereinafter referred to as “Swasti MoU” for sake of brevity) with PTC. It is clearly ascertainable from Swasti MoU signed between that PPA and PSA were both interdependent and that Swasti was aware that the power purchased by PTC under the PPA would be sold to the State of Punjab under the PSA. It is submitted that the intention of the parties was always clear that power from the Project would be supplied through PTC to the State of Punjab. It is further submitted that Swasti MoU envisaged that the terms and conditions as specified under the PPA would be framed in consultation with the beneficiary State. The relevant clauses of the said Swasti MoU have been reproduced herein below:

i) *That SPEL shall furnish a detailed proposal indicating the provisional tariff alongwith all supporting calculations and other details of the project as may be required by PTC to arrange for the prospective buyers of power from the project.*

...

vi) *That PTC will purchase power generated from the project on the terms and conditions as stipulated in the **Power Purchase Agreement to be mutually agreed and signed between PTC and SPEL in consultation with beneficiary States. PTC shall enter into suitable Power Sale Agreement (PSA) with beneficiary states for purchase of power by them***” (Emphasis supplied).”

Para 7 d

*“That PTC, upon hearing from Swasti, held a meeting with PSEB on 21.04.2004 apprising them of the capped tariff decided with the developer, i.e. Swasti, vide minutes of meeting (read MoU) dated 23.12.2003. **It is pertinent to note that PTC was only playing the role of an intermediary and acting as a channel for flow of communications between the developer and the final purchaser and that there was full transparency and co-ordination between the concerned parties i.e. PTC Swasti and PSEB.**”*

Para 7 e

“That vide letter dated 03.05.2004, Swasti requested for a copy of the Memorandum of Understanding as signed between PTC and PSEB (hereinafter referred to as the “PSEB MoU” for sake of brevity) with a view to study it and take necessary steps i.e. to draft the terms of the PPA on the lines of the PSA to be executed by PTC.”

Para 7 f

“That in light of its effort to achieve finalization of PPA with the buyer, Swasti, issued a letter on 03.05.2004 to PTC, proposing a firm-tariff-for-all-energy, detailing the inherent advantage to PTC/off-taker upon acceptance of the same.”

Para 7 g

“That on 22.07.2004, Swasti wrote a letter to PTC revising the firmed up and frozen project cost as suggested vide their earlier letter dated 03.05.2004 upon final review of their designs

and project cost. Once again, Swasti requested PTC to furnish them with a copy of the PSEB MoU with regard to sale of power from the project."

Para 7 h

"That on 24.08.2004, Swasti wrote a letter to PTC confirming receipt of the PSEB MoU and gave justifications for the tariff proposed."

Para 7 k

"That on 07.01.2005, PTC sent a letter to PSEB specifying that the tariff for the Project shall be under the jurisdiction of Punjab State Electricity Regulatory Commission (hereinafter referred to as "PSEB" for sake of brevity) since it will be the sole purchaser of power.

Para 7 m

*"That in its continued efforts to act as a **conduit between the developer and the purchaser**, PTC, on 07.02.2005, sent a letter to PSEB noting PSEB's preference for the single part tariff and further informing them that on this very basis, PTC would be taking up structuring of the PPA with the developer and shall forward the draft of the PSA between PTC and PSEB soon thereafter."*

Para 7 n

*"That in furtherance of the above and **on the basis of the tariff as approved by the final purchaser i.e. PSEB**, Swasti signed a PPA dated 24.08.2005 with PTC for sale of entire power generated at the Bhilangana generating station excluding the free royalty power of 18% to be given to the Government of Uttarakhand from the 16th year after Date of Commercial Operation (hereinafter referred to as "COD" for sake of brevity)."*

Para 7 o

"That after having signed the PPA with Swasti, on 20.09.2005, PTC sent the draft PSA to be signed between PTC and PSEB and also a copy of the PPA as already signed between PTC and Swasti and further unequivocally stated that the said PPA shall form part of the PSA."

Para 7 r

*“That as a **back to back arrangement** for onward sale of power purchased under the PPA, PTC entered into PSA dated 23.03.2006 for sale of power purchased from BHPP to PSEB.”*

Para 7 s

“That after signing the PSA with PSEB on 27.03.2006, PTC informed Swasti that they had signed the said PSA for onward sale of power in terms of the PPA. It was further informed that PSEB would shortly be filing a petition before the Hon'ble Punjab State Electricity Regulatory Commission for approval of its terms and conditions which would include the tariff. In light of the same, a request was made to Swasti to make available all information and documents, as and when required, for the efficient conduct and conclusion of the approval process before the Hon'ble PSERC.”

Para 7 t

“That the power generated at the BHPP was to be evacuated through the existing system of UPCL till the completion of 220 kV Ghanshali-Chamba line being constructed by Power Transmission Corporation of Uttarakhand Limited (hereinafter referred to as “PTCUL” for sake of brevity) and thereafter through the Uttarakhand system upto the CTU grid. The relevant meetings were held for resolving the issues of power evacuation.”

Para 7 v

*“That on 12.06.2007, a Memorandum of Understanding was signed between Swasti and PTCUL with regard to the use of their system for evacuation of power **to the delivery point at the CTU grid.**”*

Para 7 w

“That on 31.07.2007 the Hon'ble PSERC approved the PSA executed between PTC and PSEB.”

26. The Commission has taken cognisance of the sequence of events submitted by the Petitioner in the Petition and the same are summarized below:

- (1) The Petitioner has stated that it was acting only as an intermediary for the sale of generation by Respondent No.1 and Respondent No.2 while procuring such generation;
 - (2) The Petitioner further stated that the power generated by Respondent No.1 was meant to be purchased by Respondent No.3 for the benefit of the consumers in Punjab;
 - (3) The Petitioner also stated that the PSA between Respondent No.3 and itself specifically refers to the Power Purchase Agreement entered into between itself and Respondent No.1. In fact, the PSA is titled "PSA for Bhilangana Hydro Power Project". The Petitioner has categorically stated that the PPA between itself and Generator is in fact an annexure to the PSA;
 - (4) The Petitioner has also stated that the PSA has been approved by the Punjab Commission;
 - (5) The Petitioner has also stated that the entire transaction is meant for the exclusive benefit of the consumers of Respondent No.3 and the consumers of Respondent No.2 have nothing whatsoever to do with the dispute;
 - (6) Referring to the terms of the PPA the Petitioner in its pleadings has categorically stated that the PSA and PPA are a back to back agreement and in fact the PPA was a part of the PSA which was approved by the Punjab Commission. The Petitioner has also categorically stated that the PPA forms an integral part of the PSA.
27. Given the aforesaid pleadings by the Petitioner in the petition before this Commission, the Commission is of the view that it does not have the jurisdiction to decide the dispute as raised in the petition. This inter alia, because:-
- (1) The PPA and PSA are admittedly inextricably intertwined and one cannot be read without reference to other;
 - (2) The ultimate beneficiary of the power generated in Uttarakhand by Respondent No.1 is the Punjab Discom i.e. Respondent No.3 and its consumers.

- (3) The location of the selling parties (in this case the generator is in Uttarakhand) is irrelevant. Reference may be had to the Judgment of the Hon'ble Tribunal for Electricity in Appeal No.200/2009 Pune Power Development Ltd Vs. Karnataka State Commission and Others. The relevant paras are reiterated below:

“ The location of the selling party is irrelevant. In this context, it would be worthwhile to refer to a decision rendered by this Tribunal in the case of Lanco Kondapalli Power Private Limited Vs. Haryana Electricity Regulatory Commission reported in 2010 ELR (APTEL) 36. In this case, this Tribunal has upheld the jurisdiction of the Haryana State Commission to adjudicate upon the dispute under Section 86(1)(f) between the Distribution Licensee in Haryana and Generating Companies in the State of Orissa.”

...

“32 In view of the above dictum laid down by this Tribunal as referred to above, the supplier of electricity being at a different place does not in any manner oust the jurisdiction of the State Commission u/s 86(1)(f) to adjudicate upon the disputes between the parties. So, we answer the 1st question in favour of the Respondent. Accordingly, we reject the contention of the Appellant regarding the jurisdiction.”

- (4) Under Section 64(5) if a generating company enters into an agreement for sale of power generated by it knowing the destination the power generated is to be consumed, the power so generated by such generating company would have a nexus with that consumer. In the instant case, no nexus with consumer of Uttarakhand exists and thus jurisdiction of this Commission is not attracted.
- (5) The delivery of the power under the PPA was to be at the inter connection of the transmission system of the CTU, hence the same was in fact intended to be beyond the transmission system of the State.
- (6) The above details do not support the contention taken by the Petitioner that this Commission has the jurisdiction to consider the disputes raised in the present petition.

28. The Commission is fortified in the above view **by the common Judgment of the Hon'ble Appellate Tribunal for Electricity of date 4.11.2011 in the matter of Lanco Power Limited, Gurgaon Vs. Haryana Electricity Regulatory Commission, Haryana and Ors. (Appeal No. 15 of 2011) and in the matter of Chhattisgarh State Power Trading Co Ltd, Chhattisgarh Vs Haryana Electricity Regulatory Commission (Appeal No. 52 of 2011).** Some of the relevant portions of the said judgment *vis a vis* the facts of the present case are as under:-

*"15. This provision deals with the adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees. Thus section 86 (1)(f) dealing with adjudication of dispute is not upon any agreement between a generating Company and the Licensee. In other words, the existence of a contractual relationship between a generating company and the licensee is not a pre-condition for exercise of the jurisdiction of adjudication provided under Section 86(1)(f). The dispute between the generating Company and the licensee where such power is generated and sold by the generating company to the licensee is intended for maintaining supply to the consumers at large is covered under section 86(1)(f) of the Act. The Statutory adjudicating power by the Appropriate Commission which regulates the tariff of the consumers, has been specifically provided for under Section 86(1)(f) of Act. **The State Commission regulating the tariff of the consumers of the State will be in a better position to adjudicate on such dispute taking into consideration the interest of the consumers of the State.**"*

29. The present dispute is between Respondent No.1, (generator) located in the State of Uttarakhand and the Petitioner, PTC. Further, the Petitioner has admittedly also entered into an agreement for sale of such power to Respondent No. 3 (Punjab Discom). The following is also extracted from the judgment of Hon'ble APTEL quoted below:

*"16. If a generating Company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such consumers. **This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the Appropriate Commission to exercise jurisdiction.** If the sale and purchase of power*

has a nexus to the State, the concerned State Commission will have jurisdiction notwithstanding the fact that there is no direct contractual arrangement between the generating company and the distribution licensee. In this context, it would be worthwhile to refer to Section 64 (5) of the Electricity Act, 2003 which is as under:

“(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore”.

“17. This provision thus clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission. In the present case, it is not disputed that the electricity generated in the state of Chhattisgarh is intended to be transmitted through the inter-State transmission system to the State of Haryana for distribution to the consumers of the State of Haryana by the distribution licensees of the Haryana. Thus, the present case squarely falls within the provision of Section 64 (5) of the Act.”

30. In the present case as well, it has been pleaded by the Petitioner that the Generator had requested for a copy of the MoU signed between the Petitioner and Respondent No. 3 so as to enable the generator to appropriately structure the PPA with the Petitioner. Accordingly, based on the Petitioner’s own submission, the Generator was aware about the destination of the ultimate consumption of its generation. In this context, relevant extract from the above mentioned order is as follows:-

“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.”

31. In the present case, the Petitioner has itself pleaded that it is acting as an intermediary and as per the averments made by the Petitioners itself, there is a clear link between Respondent No.1 (generator) and Respondent No.3 (Punjab Discom).

"23. As per the above Section, the purchase of electricity is being dealt as a procurement process of the distribution licensee which would include through agreements for purchase of power for distribution. It is not confined to a single aspect of an Agreement. Thus the purchase of electricity by the Haryana Power (R-2), for distribution within the state of Haryana through another intermediary trader (R-3) and the supply of the same by the generating Company (Appellant) through such intermediary trader (R-3) is a process within the meaning of the Section 86(1)(b) of the Act."

32. Based on the above views of the Hon'ble Tribunal, the jurisdiction of this Commission is not attracted in this matter in accordance with Section 86(1)(b) of the Act.

"24. In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for re-sale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA."

"25. According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2)."

...

"27. It is not disputed that both the PPA dated 19.10.2005 as amended on 18.9.2006 between the Lanco Power (Appellant) and PTC (R-3) and the PSA dated 21.9.2006 between PTC (R-3) and Haryana Power (R-2) duly recognize the jurisdiction of the Appropriate

Commission to determine the tariff both under the PPA and PSA. They also recognize the approval of such tariff by the Appropriate Commission as a condition precedent."

"28. Let us see the relevant clauses in PPA dated 19.10.2005:

"Recital 'F' - A petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement".

...

"Clause 3.1.3 (vii) - the Appropriate Commission shall have regulated the tariff for the purchase of electricity from the Project by PTC".

"29. The Appropriate Commission is, therefore, the State Commission which approves the tariff for purchase and sale of power by PTC i.e. the same State Commission and as per definition the State Commission competent to determine the tariff for the project. From the perusal of the above clauses, it is apparent that the State Commission which is deciding on the tariff for the licensee situated in the State of Haryana i.e. the procurement of power being for the consumers in the State is the Appropriate Commission for the purposes of matters raised in the present case."

33. In the present case, it has been pleaded by the Petitioner that the PPA between the Petitioner (PTC) and Respondent No. 1 (generator) and PSA between the Petitioner and Respondent No. 3 were back to back and the entire contracted capacity under the PPA was to be sold to Respondent No.3 under the PSA.

"30. According to the Respondents, both the parties including the Appellant have acted ad-aidem under the jurisdiction of the State Commission which deals with the purchase of power and therefore, the Appellant also had duly agreed to a nexus i.e. procurement process as a whole."

...

"37. After execution of the PPA as well as the PSA, Haryana Power(R-2) approached the State Commission for approval of the PSA between the R-2 and R-3. In this proceeding, the

State Commission, not only heard the Respondent Haryana Power (R-2) and PTC (R-3) but also the Appellant and only on the basis of statement made by the Appellant, it approved the PSA by the order dated 6.2.2008. The relevant extract of the order dated 6.2.2008."

...

"50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant's project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance".

"51. In fact, clause 16.13.4 categorically requires the PTC (R-3) to provide the Appellant Lanco Power Limited with the contact details of the person concerned as the Purchaser to whom copies of communication are required to be sent under the PPA."

34. In the present case, the PSA contains a clause which incorporates the contact details of the Generator and the PPA is in fact made an annexure to the PSA which prima facie establishes the nexus between the two agreements.

"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."

"62. In other words, while interpreting the provisions of the Act, the entire Act will have to be looked into totality as one integral whole and not in an isolated manner. That is why; the Act itself does not seek to look at the electricity industry and the consumer interest on a segmented or fragmented basis but as cohesive whole. It is for this reason that the Act has been given in

Section 174 overriding effect over all the other legislations which are inconsistent with the provisions of the Act.”

“63. In the present case as indicated earlier, the PPA entered into between the Appellant and 3rd Respondent on 19.10.2005 will not become effective until the PSA is formalized and the tariff is approved for the PSA.”

“77. The next question arises which would be the Appropriate commission. The answer to this would be the State Commission in whose jurisdiction the power is likely to be consumed through the concerned distribution licensees in terms of sub-section 5 of Section 64 of the Act. In the present case, the Power purchased by PTC (R3) from the Appellant would be distributed to the consumers through the Haryana Power (R2) in the State of Haryana. Therefore, it is the Haryana Electricity Regulatory Commission who would approve the tariff for sale of power to the PTC from the Appellant’s project.”

35. The aforesaid principle would apply on all force to the facts of the present case before this Commission.

“79. In view of the above, it has to be concluded that the PPA and PSA in the present case are two inter-dependent documents and only State Commission has the power to fix the tariff for purchase of power by the PTC from the Appellant for the re-sale to the Haryana Power (R-2) under PSA for the distribution to the consumers in the State of Haryana.”

“80. Therefore, we hold that the Distribution licensees in Haryana are involved in procurement of power in the State through Haryana Power (R-2) for distributing the same to the consumers of the State of Haryana and consequently the Haryana Electricity Regulatory Commission alone will have the jurisdiction under section 86 (1) (f) to adjudicate upon the dispute.”

“97. Consequently, we deem it appropriate to remand the matter to the Haryana State Commission to decide about the said issue which has been framed as the 4th issue raised by the Commission relating to the implementation agreement and PPA entered into between the Lanco and Chhattisgarh Trading Company after giving an opportunity to the parties concerned and decide the same according to law. Accordingly, while holding that, the State Commission has got the jurisdiction to go into the disputes in question, we direct the State

Commission to decide the issue relating to the agreement entered into between the Lanco Power Limited and Chhattisgarh Trading Company and decide the matter, in accordance with law on the basis of the materials furnished by the parties concerned uninfluenced by the earlier findings on this point rendered by the State Commission. We make it clear that we are not expressing any opinion in this regard. Pending the said proceeds before the State Commission, the interim order dated 23.3.2011 passed by us will be in force till the final order is passed by the State Commission."

36. Based on the aforesaid findings of Hon'ble APTEL, the mere fact that Respondent No.2 may be an affected party would not by itself be sufficient to enable this Commission to garner jurisdiction over the dispute pleaded in the petition.
37. The Petitioner has brought to the notice of the Commission, the Order passed by PSERC on the Petition filed by the Petitioner in that Commission. The Commission does not find it pertinent to offer any view on the Orders passed by another State Commission under the Electricity Act. Notwithstanding, this Commission has enquired in to the matter that is brought before it on the basis of the pleadings made before it.
38. On the aforesaid premise, the Commission holds that it does not have the jurisdiction to entertain the present dispute raised by the Petitioner. We however, make it clear that we have not rendered any opinion on the merits of the case and that this decision does not inhibits the Petitioner from taking such steps or proceedings as may be available to it in accordance with law.

Accordingly, the Petition, being not maintainable for want of jurisdiction, is not admitted and stands disposed off.

Ordered accordingly.

(K.P. Singh)
Member

(C.S. Sharma)
Member

(Jag Mohan Lal)
Chairman