

**HARYANA ELECTRICITY REGULATORY COMMISSION
BAYS No. 33-36, SECTOR-4, PANCHKULA- 134112, HARYANA**

CASE NO. HERC/PRO – 12 of 2010

DATE OF HEARING : 29.10.2010

DATE OF ORDER : 02.02.2011

IN THE MATTER OF:

1. Petition dated 12th May, 2010 filed by PTC India Limited, 2nd Floor, NBCC Tower, 15 Bhikaji Cama Place, New Delhi – 110066 under sections 86 (1) (b) and 86 (1) (k) of the Electricity Act, 2003 and regulation 87 of the Haryana Electricity Regulatory Commission (Conduct of Business) Regulations, 2004 seeking appropriate directions to amend the Power Sale Agreement between Haryana Power Generation Corporation Limited and PTC India Limited and in respect of power purchase from M/S Lanco Amarkantak Power Private Limited, Chhattisgarh.

2. Petition dated 22nd July, 2010 filed by Haryana Power Generation Corporation Limited, Urja Bhawan, Sector-6, Panchkula under section 86 (1) (b) of the Electricity Act, 2003 seeking indulgence of the Commission to restrain:

(i) M/S Lanco Amarkantak Power Private Limited and PTC India Limited from revising the agreed tariff under Power Purchase Agreement dated 19th October, 2005,

(ii) M/S Lanco Amarkantak Power Private Limited from selling the contracted power in favor of HPGCL to a third party and

(iii) Western Region Load Dispatch Centre from making payment of Unscheduled Interchange charges to M/S Lanco Amarkantak Power Private Limited and direct payment of the same to the HPGCL.

Parties:

1. PTC India Limited : Petitioner (and respondent in HPGCL's petition)
2. Haryana Power Generation Corporation Limited Petitioner
(and respondent in PTC petition)
3. M/S Lanco Amarkantak Power Private Limited
Respondent
4. Western Region Load Dispatch Center Respondent

Present:

- | | |
|----------------------------|----------|
| 1. Shri Bhaskar Chatterjee | Chairman |
| 2. Shri Rohtash Dahiya | Member |

On behalf of the Petitioner

1. Shri Meet Malhotra, Sr. Advocate, PTC
2. Shri R. C. Chaudhary, Sr. Vice President. PTC
3. Dr. Ashwani Kumar, Sr. Advocate, HPGCL
4. Shri S. P. Chinda, Director (G), HPGCL

On behalf of Respondents:

1. Shri J. J. Bhatt, Sr. Advocate, Lanco
2. Shri Philip Chacko, Director, Lanco

ORDER

Brief facts of the case:

M/S Lanco Amarkantak Power Private Limited (LAPPL), a generating company within the meaning of the Electricity Act, 2003, has set up 1300 MW thermal power project at Chhattisgarh. The second unit of the gross capacity is of 300 MW. PTC India Limited (PTC), an inter – state electricity trading licensee of the Central Electricity Regulatory Commission, entered into a Power Purchase Agreement (PPA) with LAPPL on 19th October, 2005 for purchase of the entire power generated from the second unit of the power project for a period of 25 year.

As per the above agreement PTC India Limited (PTC) was authorized to sell the entire power purchased under PPA to one or more purchasers. Accordingly PTC entered into a back to back Power Sale Agreement (PSA) dated 21st September, 2006 for the entire power with HPGCL, a power generating company being authorized by the distribution licensees in Haryana to purchase power on their behalf.

The said PSA was approved by the Commission vide order dated 6th February, 2008 at levelled tariff of Rs. 2.32 / kWh at Generators' bus for the entire term of the agreement i.e. 25 years.

1. PTC vide their petition dated 12th May, 2010 submitted that due to certain unavoidable and extraordinary developments the tariff approved by the Commission has made the PPA including the contracted capacity impossible to perform. Hence requested the Commission to amend the Power Sale Agreement between Haryana Power Generation Corporation Limited and PTC India Limited and in respect of power purchase from M/S Lanco Amarkantak Power Private Limited, Chhattisgarh. The specific grounds for seeking the amendment, which has been dealt by the Commission at relevant places in the instant order, includes:-

(a) Occurrence of Force Majeure Event i.e. Earthquake in China & Changes in VISA Policy of India.

(b) New Coal Distribution Policy.

(c) Implementation Agreement signed with the Chhattisgarh Government.

(d) Jurisdiction of this Commission - under Section 86(1) (b) read with 86(1)(k).

2. In response to the petition filed by PTC, HPGCL, the respondent, vide their letter dated 22nd July, 2010 submitted that the petition of PTC cannot be accepted by the Commission without revisiting the contractual price agreed between PTC and the generating company i.e. LAPPL. As LAPPL is not a party to PSA and have not submitted nor can be brought within the jurisdiction of the Commission in terms of the relevant provisions of section 86 of the Electricity Act. Therefore, the Commission is requested to decline jurisdiction.

3. PTC in their reply received in Commission on 30th August, 2010 submitted that they have approached the Commission to seek guidance in dealing with the issues and **as to how best the said PPA and the PSA can be made workable** in view of the changed circumstances as explained in their petition dated 12th May, 2010. Additionally, relying on the provisions of **section 56 of the Indian Contract Act, 1872 PTC submitted that** section 56 of the Indian Contract Act, 1872 provides that a contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful. **The Commission has to adjudicate as to whether the circumstances mentioned in Section 56 have arisen in the present case or not, in context of the changed**

circumstances. Thus the issues raised in the petition **are not to be dealt with pure legalistic parameters but a holistic approach** has to be taken particularly in view of the fact that the State is power deficit State. Further while admitting that **the PPA forms a part of PSA** which has been approved by the Commission, PTC is seeking a direction against HPGCL to purchase power at a tariff calculated in terms of the CERC (Terms and Conditions of Tariff) Regulations, 2009 and enter into amendments to the PSA to reflect the revised understanding of the parties. There cannot be any dispute that the Commission has the jurisdiction to grant the relief sought in the petition especially in view of **clause 16.9 of the PSA.**

4. LAPPL in their rejoinder received in Commission on 30th August, 2010 submitted that reliefs that are being sought are to amend the PSA to which LAPPL is not a party. **The Commission does not have the jurisdiction under the Electricity Act, 2003 over the PPA as this is a sale of power between a generating company situated outside Haryana and an inter-state trading licensee,** a fact admitted by HPGCL. LAPPL in its letter dated 12th March, 2010 to the PTC India Limited has, in adequate detail, set out the circumstances which have led to the impossibility of performance under the PPA and also clearly set out the manner in which these events have affected performance of the PPA by them.

Additionally, it is incorrect to state that the title to all power, including infirm power passes on to the PTC. Recital C of the PPA states that the agreement is for the PTC to purchase power from LAPPL “for a period of twenty five (25) years after the COD of the Project”. **Clearly, the PPA contemplates that prior to the COD, LAPPL have no obligation to supply power to the PTC.**

Further, **Paragraph 1.1.4 of Schedule E** of the PPA provides that the **Regulated Tariff Payment under the PPA shall commence from the COD.** It also provides that from the Synchronization Date to the COD, **LAPPL shall be paid fuel charges for energy output,** “to the extent such Electricity Outputs are scheduled and notified by the Company on day by day basis”. It is clear from the wording of the clause that it is LAPPL which has the option to supply infirm power to the PTC. It is only if LAPPL supply infirm power and notifies PTC, do they have the obligation to accept such power and pay fuel charges for the same. There is absolutely no obligation under the said clause which **compels LAPPL to schedule infirm power.** However, if they schedule such power, PTC is obligated under

Article 6.13 of the PPA to off take such infirm power “subject to technical feasibility”. **Regulation 11 of the CERC Tariff Regulations also provides that it is the generating station which is entitled to UI charges for supply of infirm power to the power grid subject to the fact that any revenue earned by the generating company from sale of infirm power after accounting for the fuel expenses shall be applied for reduction in capital cost**”. In any event the Commission does not have the jurisdiction to determine issues with respect to payment of UI charges to a power plant in Chhattisgarh, which is within the exclusive jurisdiction of the Central Electricity Regulatory Commission.

5. HPGCL in a separate petition dated 22nd July, 2010 has submitted that as per **clause 4.1 of the PSA**, PTC India Limited is obligated to deliver the power output and energy output generated from the second unit of M/s Lanco Amarkantak Power Private Limited at the delivery point to HPGCL **in accordance with the terms of the PPA**. The said obligation of the PTC India Limited is also specified in clause 4.1 (i) and 4.3 of the PSA. HPGCL is also obligated under clause 6.8 of the PSA to absorb the infirm power and energy and **make fuel payment for the same and applicable trading margin in accordance with clause 10.1 (a) of the PSA**.

Further Under Article 4.3.1 of the PPA M/s Lanco Amarkantak Power Private Limited is obligated to sell power output and energy output to PTC India Limited at the delivery point i.e. the nearest 400 KV sub-station of the Power grid Corporation of India Ltd where the Power Output from the Project is delivered to the CTU or 400 KV Bus of the Project’s switchyard where loop in and loop out (LILO) of transmission line of the CTU occurs within the project site, at which the risk and title to the Energy Output and Power Output shall pass from the company to PTC. Therefore, the title of the power passes from the M/s Lanco Amarkantak Power Private Limited to PTC India Limited at the delivery point and the said title is further immediately and simultaneously transferred to the HPGCL through the triggering of the PSA, in terms, inter alia, of clause 4.1 read with definition of “delivery point” in clause 1.1 S.No.37 of the PSA. In terms of Article 4.3.2 of the PPA M/s Lanco Amarkantak Power Private Limited is **prohibited from selling to any third party the contracted power without prior written consent of PTC India Limited**.

In the light of the above HPGCL has requested the Commission to direct M/S Lanco Amarkantak Power Private Limited and PTC India Limited to comply with their contractual obligations in favour of HPGCL with regard to its claim to the power contracted for **and direct WRLDC to make payments of UI charges to the HPGCL.**

HPGCL has further requested the Commission to direct M/S Lanco Amarkantak Power Private Limited to return the UI charges wrongfully received from WRLDC **or adjust the same in future billing and restrain them from selling the contracted capacity** to any third party including and not limited to State of Chhattisgarh.

6. To the above averment made by HPGCL PTC filed a rejoinder received in Commission on 30th August, 2010 stating that as per the PPA dated 19.10.2005 PTC India Limited is required to off take electrical output generated prior to Commercial Operation Date of the project and which in turn is to be scheduled to the HPGCL in accordance with the clauses of the PSA dated 21.9.2006. Further M/S Lanco Amarkantak Power Private Limited is not liable to receive anything over and above the cost of fuel for off take of such electrical output generated prior to COD.

In order to assist the Commission in appreciating the issue involved in the petition PTC produced the following clauses of the PPA and PSA:

A. Relevant clauses of the PPA:

“1.1 Definitions:

“CERC Norms” – means the tariff fixation and other relevant regulations as announced by CERC from time to time;

“Law” – means, in relation to this Agreement, all law in force, statute, decree, ordinance, regulation, notice, circular, code, rule or directions, or any interpretation of any of them by a Governmental Instrumentality and includes all applicable rules, regulations, orders, directions, notifications by a Governmental Instrumentality pursuant to or under any of them;

“6.13 Evacuation of Output until COD of the Project

At all times during start-up, preliminary testing or other operations of the Project for achieving the COD and during the Initial Performance Tests, PTC shall off take such energy subject to the technical feasibility. PTC's obligation to the Company in such regard shall, be limited to the payments that PTC may receive for the sale of such Power Output. However such obligation shall under no circumstances exceed the Fuel Payments for such Power Output during the Project Capacity Test, as set out in Schedule E”.

“4.3.5 Subject to Law, the Company shall not, during the Term of Agreement, use any electricity generated by the Project, except for the purpose of meeting the Project’s Auxiliary Consumption”.

Schedule E of the PPA in Clause 1.1.4 further states that:

“..... Provided further that from the Synchronization Date of the Project until the Commercial Operation Date of Project, the Company shall be paid Fuel Payment corresponding to the average of Station Heat Rate specified in Paragraph 4.2 of Schedule F for coal and the specific Fuel Oil Consumption specified in Paragraph 4, for the Energy Output to the extent that such Energy Outputs are scheduled and notified by the Company on day by day basis”.

8.8 “..... If the Unscheduled Interchange charges become payable by either PTC or the Purchaser(s) due to reasons attributable to the Company, any such payment payable by PTC or the Purchaser(s) shall be reimbursed forthwith by the Company to PTC or the Purchasers, as the case may be. Any payments in respect of Unscheduled Interchange charges received by PTC or the Purchaser on account of generation from the Project shall be passed on to the Company as and when such payments are actually received by PTC”.

“16.9 Severability – The provisions of this Agreement are severable, and if any portion of this Agreement is deemed legally invalid or unenforceable, the remained of this Agreement shall survive and remain in full force and effect; provided that, if a provision is held to be invalid or unenforceable, the Parties shall negotiate in good faith to adopt a replacement provision to carry out, in effect, the Parties original intention to the extent permitted by applicable Laws”.

B. Relevant Clause of the PSA:

“1.1 Definitions:

“CERC Norms” – all relevant norms, orders, regulations or any other such pronouncements of CERC including Tariff Regulations and CERC Interstate Transmission Regulations;

“CERC Tariff Regulations” means the CERC regulations titled “Central Electricity Regulatory Commission (Terms and conditions of tariff) regulations, 2004”, or applicable amendments and substitutions.

“Law” – means, in relation to this Agreement, all law in force, statute, decree, ordinance, regulation, notice, circular, code, rule or direction, or any interpretations of any of them by a Governmental Instrumentality and includes all applicable rules, regulations, orders, directions, notifications by a Governmental Instrumentality pursuant to or under any of them;

“16.9 Severability – The provisions of this Agreement are severable, and if any portion of this Agreement is deemed legally invalid or unenforceable, the remainder of this Agreement shall survive and remain in full force and effect; provided that, if a provision is held to be invalid or unenforceable, the Parties shall negotiate in good faith to adopt a replacement provision to carry out, in effect, the Parties original intention to the extent permitted by applicable Laws”.

In view of the above provisions of PPA and PSA PTC India Limited has submitted that admittedly the PPA and the PSA are based on CERC Norms which includes Central Electricity Regulatory Commission (Terms and conditions of Tariff)

Regulations, 2004 and its subsequent amendments. The said CERC Tariff Regulations 2004 were amended vide the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Fourth Amendment) Regulations, 2007 substituting Regulation 19 of the Tariff Regulation 2009 which dealt with sale of infirm power i.e., sale of power before commercial operations. The relevant provision reads as under:

“19. Sale of Infirm Power: Infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional / State UI pool account at the applicable frequency-linked UI rate. Any revenue earned by the generating company from sale of infirm power shall be applied for reduction in capital cost and shall not be treated as revenue”.

Thus, as per the said substituted regulations the sale of infirm power is to be accounted as Unscheduled Interchange (UI) and the money realized therefrom is to be paid to generator, who is required to use it for reduction of capital cost and not to treat it as revenue. Further, the said regulation has been further retained in Central Electricity Regulation Commission (Terms and conditions of tariff) Regulations, 2009 which has substituted the Tariff Regulation 2004 for the period of 2009-2014. The aforesaid Regulations are applicable in view of the fact that M/S Lanco Amarkantak Power Private Limited is supplying the power to two different states.

Further, with regard to the sale of infirm power reliance was also placed on accompanying proposals for amending Tariff Regulations 2004, relevant parts of the said explanatory memorandum have been produced below:

“6. The infirm power (as its name itself signifies) is generated according to the requirements of trial operation of a generating unit, and its generation cannot be predicted on any firm basis. It is implied that the generation of infirm power cannot be scheduled in advance. As of now, the actual infirm power injection is included in the schedule of a generating station post facto, which leads to post facto changes in the schedules of the beneficiaries as well. Such post facto changes dilute the sanctity of the scheduling process and, therefore, should be avoided”.

PTC India Limited has submitted that in view of the above quoted clauses of the PPA, PSA and also the relevant CERC regulations Article 6.13, is rendered

inapplicable and legally invalid in view of the changed legal position and has placed reliance at Article 16.9 of the PPA and PSA which provides that if any portion or article of the PPA or PSA is legally invalid then the remainder of the agreement shall survive. Since as per the amended CERC Tariff Regulations 2004, as also the present CERC Tariff Regulations, the sale of infirm power is now treated as an Unscheduled Interchange. **Therefore the obligation of PTC to off take the electrical output before COD cannot be enforced in view of the changed legal position.**

PTC India Limited has in its reply made reference to the observations / findings of the Hon'ble Supreme Court of India with regard to the status of the regulation framed by Central Electricity Regulatory Commission under Section 178 of the Electricity Act, 2003 in the matter of **PTC India Vs Central Electricity Regulatory Commission reported as (2010) 4 SCC 603**, which has held as under:

“58..... Further, it is important to bear in mind that making of a regulation under Section 178 became necessary because a regulation made under Section 178 has the effect of interfering and overriding the existing contractual relationship between the regulated entities. A regulation under Section 178 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreements which have got to be aligned with the regulations under Section 178 and which could not have been done across the board by an order of the Central Commission under Section 79(1)(j)”.

PTC India Limited has submitted that in the present case the Tariff Regulations have been framed by the CERC in exercise of its powers under Section 178 of the Electricity Act, 2003 and in view of the said judgment of the Hon'ble Supreme Court the PPA and PSA cannot be at variance with regulations of CERC and in the event of any clause being at variance with said regulation the same will have to read down in view of the Article 16.9 of the PPA and the PSA.

PTC India Limited also made a reference to another such incident wherein the ultimate off taker wanted to take the infirm power, WRLDC orally intimated PTC that in terms of CERC Regulations that the UI settlement can be done by WRLDC only with the generator. The said position was explained to the

ultimate off taker (Purchaser) and the off taker dropped its claim towards infirm power in view of the changed legal scenario.

PTC India Limited has submitted that the present petition has been filed under Section 86(1)(b) which empowers this Hon'ble Commission to regulate the power procurement by distribution licensee including the price at which the said power is being procured. However, the power to adjudicate dispute is specifically provided under Section 86(1)(f) wherein this Hon'ble Commission's jurisdiction to adjudicate dispute is restricted to disputes arising between licensees and generating companies only. In the present case both PTC and the Petitioner is a licensee and hence this Commission does not have the jurisdiction adjudicate upon disputes arising between two licensees.

PTC India Limited has requested that in view of the facts stated and legal grounds as submitted in the foregoing paragraphs the present petition maybe rejected and dismiss the same in limine (at the threshold) or pass any other order as it may deem fit in view of the facts and circumstances of the case.

7. LAPPL in their reply dated 30th August 2010 to the averments made by HPGCL submitted that the present petition is not maintainable and ought to be dismissed in limine. They are a generating company which has entered into a Power Purchase Agreement dated October 19, 2005 with PTC India Limited an inter-state trading licensee. The Commission does not have jurisdiction under the Electricity Act, 2003 or the regulations thereunder, over M/S LAPPL and the PPA and the reply is being filed without prejudice to its the rights and remedies under the PPA.

The PSA and PPA are separate and distinct agreements and M/S Lanco Amarkantak Power Private Limited is not a party to the PSA. HPGCL has wrongfully invoked the jurisdiction of the Hon'ble Commission under Section 86(1)(b) of the Electricity Act, 2003 which gives the regulatory Commission the power to *"regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from sources through agreements for purchase of power for distribution and supply within the state"*. In the present case, M/S LAPPL has not entered into an agreement with the HPGCL nor does it has any contract with a distribution licensee. Since Section 86(1)(b) is

applicable only with respect to agreements with distribution licensees the same is not applicable in the present case and the Commission therefore cannot pass any directions qua the M/S Lanco Amarkantak Power Private Limited. This has been upheld by APTEL in Lanco Amarkantak Power Pvt. Ltd. Vs. Madhya Pradesh Electricity Regulatory Commission, 2009 ELR (APTEL) 878. In this case Lanco Amarkantak Power Private Limited had entered into a power purchase agreement with PTC India Limited. PTC India Limited had in turn entered into an agreement for sale of power with MP Power Trading Company Limited (MPPTC). Since the conditions under the PPA between the Appellant and PTC India Limited had not been fulfilled, the Appellant had terminated the PPA. PTC India Limited had inter alia, filed a petition before the Madhya Pradesh Electricity Regulatory Commission (MPERC) challenging the termination of the PPA by the Appellant. The MPERC had found that it has jurisdiction to deal with the disputes between the Appellant and PTC India Limited with respect to the termination of the PPA. In appeal, the Hon'ble Appellate Tribunal for Electricity found that the MPERC lacked jurisdiction with respect to the PPA between the Appellant and PTC India Limited and held that:

“..... the PPA as also the rights and obligations arising thereunder has no nexus with the State of Madhya Pradesh so as to confer any jurisdiction upon the Madhya Pradesh State Commission to adjudicate the disputes arising out of the said agreement...”

“..... it is clear that this Madhya Pradesh State Commission has no jurisdiction to decide a dispute between the Appellant and R-2 which relates to the termination of their contract which was entered into between them in the form of a PPA”.

Further, the Supreme Court, in Tata Power Company v Maharashtra Electricity Regulatory Commission, 2009 ELR (SC) 246, rejected the power of the regulatory commission, to pass directions on the generating company and held that:

“If by reason of a provision of a statute the generating companies are excluded from licensing provisions, one of the principal tools of interpretation is that the mischief sought to be remedied should not be brought back by a side door”.

HPGCL has not sought to assert or enforce rights under the PSA, to which it is a party and in that case the Commission does have jurisdiction but none of the reliefs sought in the petition are with respect to the PSA.

M/S Lanco Amarkantak Power Private Limited has further submitted that their Project is situated in Korba, Chhattisgarh. The PPA specifies that the "Delivery Point" for power output under the PPA is located in the state of Chhattisgarh. The entire transaction of sale of electricity under the PPA takes place outside the State of Haryana and is not within the territorial jurisdiction of the Commission. PTC India Limited is an inter-state trading licensee which has been granted a trading licensee by the Central Electricity Regulatory Commission and is not subject to the jurisdiction of State Electricity Regulatory Commissions. The Commission being the Electricity Regulatory Commission for the State of Haryana has no jurisdiction under any provision of the Electricity Act, 2003 or any applicable law over M/S Lanco Amarkantak Power Private Limited and the PPA.

In its reply filed with the Commission in the Petition filed by Ms PTC India Limited HPGCL is seeking directions with respect to the tariff for purchase of power under the Power Sale Agreement and has submitted and admitted that the Commission does not have jurisdiction over the M/S Lanco Amarkantak Power Private Limited. HPGCL has also admitted that it has a contractual relationship only with PTC India Limited as such is not open for them to argue otherwise.

HPGCL is not a party to the Power Purchase Agreement and can claim no rights thereunder. The Commission has no jurisdiction over the PPA and does not have the jurisdiction to pass directions in relation thereto. M/S Lanco Amarkantak Power Private Limited has submitted that the following circumstances have occurred after the execution of the PPA which made the PPA impossible to perform.

- (i) increase in capital costs due to delay in commissioning as a result of force majeure events-the earthquake in China and changes in the visa policy;
- (ii) the increase in cost of fuel as a result of the New Coal Distribution Policy; and

- (iii) the requirement to supply power under the Implementation Agreement signed with the Chhattisgarh Government entered into in compliance with the provisions of the 'Power Purchase Agreement.

These events were not foreseeable and were outside the control of the M/S Lanco Amarkantak Power Private Limited. As a result the capital cost for the Project has increased by about Rs.182 crores and the levelled fuel cost is expected to increase by atleast 51paise per unit (depending upon the price at which coal can be procured). Thus it has become impossible for the M/S Lanco Amarkantak Power Private Limited to supply electricity at the capped price specified in the Power Purchase Agreement. M/S Lanco Amarkantak Power Private Limited is a special purpose vehicle and cannot continue to conduct its business unless it is able to recover costs of generation from the sale of power. It is submitted that it is settled law that supervening circumstances can lead to frustration of contract if it results in the obligations of contracting party becoming impossible to perform. It would be unjust and inequitable to expect PTC India Limited to continue to perform obligations under the PPA which have become incapable of performance. M/S Lanco Amarkantak Power Private Limited has strongly denied that they are seeking to wriggle out of its obligations under the PPA.

Regarding UI M/S Lanco Amarkantak Power Private Limited has submitted that HPGCL has wrongfully asserted that in terms of the PSA, the infirm power belongs to them. On the contrary as per the present regulations of the CERC, the sale of infirm power to the grid is treated as UI and the generating company is entitled to receive UI charges with respect to the same. Under the CERC (Terms and Conditions for Determination of Tariff) Regulations, 2009, infirm power is defined as "electricity injected into the grid prior to the commercial operation of a unit or block of a generating station". Regulation 11 of these regulations specifies that supply of infirm power shall be accounted as UI and UI charges are payable with respect to the same. In these regulations "Unscheduled Interchange" have been defined as follows:

"Unscheduled Interchange in a time-block for a generating station or a seller means its total actual generation minus its total scheduled generation and for a beneficiary or buyer means its total actual drawal minus its total scheduled drawal".

In view of above HPGCL is not entitled to infirm power generated by the M/S Lanco Amarkantak Power Private Limited Power Plant. Under the PPA, there is no obligation on M/S Lanco Amarkantak Power Private Limited to supply infirm power to PTC India Limited. Recital C of the PPA states that the agreement is for HPGCL to purchase power from PTC India Limited for a period of twenty five (25) years after the Commercial Operation Date which clearly means that M/S Lanco Amarkantak Power Private Limited has no obligation to supply power to PTC India Limited prior to Commercial Operation Date.

Further, Paragraph 1.1.4 of Schedule E of the PPA states that the Regulated Tariff Payment under the PPA shall commence from the Commercial Operation Date. It also provides that from the Synchronization Date to the Commercial Operation Date, the M/S Lanco Amarkantak Power Private Limited shall be paid fuel charges for energy output, to the extent such Electricity Outputs are scheduled and notified by the Company on day by day basis. Thus M/S Lanco Amarkantak Power Private Limited has the option to supply infirm power to only if it schedules infirm power and notifies PTC India Limited, does they have the obligation to accept such power and pay fuel charges for the same. Under Article 6.13 of the PPA, PTC India Limited is obligated to off take such infirm power only if the M/S Lanco Amarkantak Power Private Limited schedules such power and “subject to technical feasibility”. PTC India Limited may have obligations with respect to infirm power under the PSA with which the M/S Lanco Amarkantak Power Private Limited is not concerned.

As per CERC UI regulations “the infirm power (as its name itself signifies) is generated according to the requirements of trial operations of a generating unit, and its generation cannot be predicted on any firm basis. It is implied that the generation of infirm power cannot be scheduled in advance.....”

Further, article 4.1(i) of the PPA provides that “Notwithstanding anything to the contrary specified in the Agreement... the Company shall always be in compliance with Law....” Clause 7.1.1 of the PPA further states that: “The Company shall be responsible, at its own expense, for ensuring that the Project is operated and maintained in accordance with the Indian Electricity Grid Code, the Law, Electricity Laws....” Therefore, M/S Lanco Amarkantak Power Private Limited is contractually obligated to comply with extent regulations with

respect to infirm power, which requires that the power be supplied to the grid as UI.

Similarly regulation 5 of the CERC UI Regulations it is the generator which is entitled to payment of UI charges. This regulation provides that “the charges for the Unscheduled Interchanges for all the time blocks shall be payable for over drawal by the buyer or the beneficiary and under-injection by the generating station or the seller and receivable for under-drawal by the buyer or the beneficiary and over injection by the generating station or the seller.....”

Regulation 11 of the CERC Tariff Regulations provides that “Supply of infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional or State UI pool account at the applicable frequency-linked UI rate.

Provided that any revenue earned by the generating company from sale of infirm power after accounting for the fuel expenses shall be applied for reduction in capital cost”.

Even the regulation 14 Haryana Electricity Regulatory Commission (Terms and Conditions for Determination of Generation Tariff) Regulations, 2008, which regulations are not applicable to M/S Lanco Amarkantak Power Private Limited, provides that “Supply of infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional or State UI pool account at the applicable frequency-linked UI rate.

Provided that any revenue earned by the generating company from sale of infirm power after accounting for the fuel expenses shall be applied for reduction in capital cost....”

HPGCL has also admitted, in Para 2(xix), (xx) and (xxi) of the petition that under the CERC UI Regulations infirm power is treated as UI and UI charges are payable with respect to the same. Therefore the applicability of the CERC Regulations to the payment of UI charges for supply of infirm power is not in dispute since it is admitted by HPGCL

In view of above it is abundantly clear that it is the generating station which is entitled to UI charges for supply of infirm power to the power grid.

M/S LAPPL, in their written submission, has denied the following contents of HPGCL petition that:

1. the PPA and the PSA are “back to back”. The PSA and the PPA are distinct and independent contracts and there is no privity between the M/S Lanco Amarkantak Power Private Limited and HPGCL.
2. the PPA and PSA are two separate contractual arrangements M/S Lanco Amarkantak Power Private Limited is not a party to the PSA and the provisions of the PSA are of no concern to them. Similarly HPGCL is not a party to the PPA. The sale and purchase of power under each of the said arrangements are separate and distinct transactions. Therefore, the M/S Lanco Amarkantak Power Private Limited is not concerned with the passage of title from PTC India Limited to the HPGCL. M/S Lanco Amarkantak Power Private Limited is only concerned with the passage of title to PTC India Limited and once the title passes to them, it becomes their obligation to sell the electricity to a third party.

The Hon’ble Appellate Tribunal for Electricity in the case of Lanco Amarkantak Power Private Limited v Madhya Pradesh Electricity Regulatory Commission, (Judgment in Appeal No. 7 of 2009) held that:

“The resale of power procured under PPA takes place under the Power Sale Agreement (PSA) between the R-2 and R-3. The Appellant is not a party to this transaction”.

3. HPGCL cannot rely on the provisions of the PPA. The question of obtaining the consent of the HPGCL, who is not a party to the PPA, with respect to sale to a third party under the PPA does not arise. Further, M/S Lanco Amarkantak Power Private Limited has not entered into any new contract with any third party for sale of infirm power. They are only supplying power to the grid in accordance with the UI regulations of the Central Commission and this power is being utilized by states which have the requirement for electricity. Conceivably, this power may be used by the State of Haryana as well. As such there is no violation of the provisions of the PPA and HPGCL is only trying to mislead the Commission and trying to side track it from the main issue raised by PTC India Limited in their petition i.e. the revision of the tariff under the PSA.

4. The State Commission has no jurisdiction with respect to the PPA or the M/S Lanco Amarkantak Power Private Limited obligations thereunder. Further, PTC India Limited was informed of certain circumstances which have rendered the PPA incapable of performance. It is settled law that supervening circumstances can lead to frustration of contract if it results in the obligations of contracting party becoming impossible to perform. It would be unjust and inequitable to expect the M/S Lanco Amarkantak Power Private Limited to continue to perform obligations under the PPA which have become incapable of performance.

5. M/S Lanco Amarkantak Power Private Limited is looking to unjustly enrich itself to public detriment. M/S Lanco Amarkantak Power Private Limited has requested PTC India Limited that the tariff under the PPA be determined in accordance with the principles specified in the CERC Tariff Regulations. The said regulations are fair and transparent and consistent with the principles of determination of tariff as specified in the Electricity Act, 2003. Under no circumstances can a tariff determined in accordance with the CERC Tariff Regulations be held to lead to unjust enrichment, particularly since, even after revision, such tariff shall be lower than the tariff being paid by WRLDC to new projects in Haryana. All central generating stations are being paid tariff which are determined in accordance with the CERC Tariff Regulations and it would be incorrect to suggest that all such stations are being “unjustly enriched”.

Indeed one of the stated objectives of the Electricity Act, 2003 seeks to encourage private investment in generation. [See *Tata Power Company v Maharashtra Electricity Regulatory Commission*, 2009 ELR (SC) 246]. The National Tariff Policy, 2006 states that one of its objectives is to “Ensure financial viability of the sector and attract investment”. The Policy clearly states that it is essential to attract adequate investment in the power sector by providing appropriate return on investment as existing resources of the Central and State Governments are incapable of providing requisite funds. This objective will be defeated if generators are expected to perform obligations which have become impossible to perform.

6. The Commission has no jurisdiction with respect to the PPA or the M/S Lanco Amarkantak Power Private Limited obligations thereunder. Reliance of HPGCL on Article 4.3.4 of the Power Purchase Agreement is misplaced and is irrelevant. Article 4.3.4 applies to increase in capacity of the project and not to a compulsory obligation to supply power imposed by a Governmental Authority, as is the case under the Implementation Agreement. Article 4.3.4 does not state that PTC India Limited could supply power to the Government of Chhattisgarh only upon expansion of capacity of the project. It is submitted that the M/S Lanco Amarkantak Power Private Limited was obligated to enter into the Implementation Agreement because of express terms of the PPA. It is the action of a governmental authority, which is beyond the control of M/S Lanco Amarkantak Power Private Limited which, along with the other factors has made it impossible to perform obligations under the PPA

M/S LAPPL has admitted that infirm power from their power plant is being supplied to the grid in compliance with applicable laws and regulations of the Central Electricity Regulatory Commission as well as their obligations under the PPA.

8. WRLDC in their reply dated 30th August, 2010 of to the petition filed by HPGCL has submitted that under Section 79 (c) and (f) of the Electricity Act, 2003, the Central Electricity Regulatory Commission has jurisdiction to regulate inter-state transmission of electricity and Haryana Electricity Regulatory Commission does not have the jurisdiction to admit the petition filed by HPGCL, **particularly in respect of prayer regarding direction to WRLDC to make payment of UI charges to HPGCL for the infirm power of the second unit of M/S LAPPL.**

The activities of WRLDC Centre is governed by the Indian Electricity Grid Code (IEGC) and the regulations of the Central Electricity Regulatory Commission issued and amended from time to time. Regulation 11 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff), Regulations 2009 provides as under:

“Supply of infirm power shall be accounted as Unscheduled Interchange (UI) and paid for from the regional or State UI pool account at the applicable frequency-linked UI rate:

Provided that revenue earned by the generating company from sale of infirm power after accounting the fuel expenses shall be applied for reduction in capital cost”.

As per recital C of the PPA M/S LAPPL is required to supply power to PTC India Limited ‘for a period of twenty five (25) years after the Commercial Operation Date of the Project’. The unit-2 of M/s LAPPL has not yet been declared under commercial operation and the power being supplied by this unit is of infirm nature.

The PPA between LAPPL and the PTC India Limited has placed reliance on ‘CERC norms’ as would be clear from recital F of the PPA. The CERC norms suggest accounting of infirm power as Unscheduled Interchange (UI). Infirm power is being supplied by M/s LAPPL to the grid for which payment is being made to them in accordance with the CERC norms. Article 8.8 of the PPA clearly states that the UI charges shall be paid to M/S Lanco Amarkantak Power Private Limited without reference to PTC India Limited or HPGCL. **Hence WRLDC is rightly making UI payments to M/S LAPPL and there is no ambiguity in this regard.**

7. Hearing of the Parties:

After going through the contents of the petitions of PTC India Limited and HPGCL, the replies of both the petitioners to each other’s petitions and rejoinders of PTC India Limited, M/S Lanco Amarkantak Power Private Limited and WRLDC to the replies of HPGCL, the Commission considered it appropriate to hear all the parties before taking a final decision on the petitions.

Accordingly the matter was listed for hearing on 11th August, 2010 and notice of hearing was served to all the parties vide letter No. HERC / 2010 / 1198 -1203 dated 21st July, 2010. On request of the parties the hearing was adjourned and fixed for 10th September, 2010 and a fresh notice of hearing was issued vide letter No. HERC / 1666-69 / 2010 dated 3rd September, 2010. However, on request of the parties the hearing was adjourned and listed for 29th October, 2010. Notice of hearing was issued

to all the parties vide letter No. HERC / Tariff (E) /PTC / Lanco / Hearing / 1830-33 dated 17th September, 2010. The hearing was held on 29th October, 2010 in which representatives of all the parties were present. The learned counsel (s) appearing on behalf of PTC, HPGCL & LAPPL made detailed submissions on their claims and counter – claims. It was brought to the notice of the Commission that the parties were not in a possession of copies of all the petitions / additional information / documents / rejoinders etc. filed by each other. Hence they were directed to provide the requisite documents to each other and submit rejoinders, if any, by 22nd November, 2010. It was, however, made clear to the parties that no further hearing in the matter shall be held and the Commission shall pass order on the basis of the records already available with it including the written rejoinders, if any, submitted by the parties.

Written submission:

As directed by the Commission the Parties submitted their respective written submissions on the following dates:

<u>Name of the party</u>	<u>Date of submission</u>
1. PTC India limited	13 th November, 2010
2. HPGCL	22 nd November, 2010
3. M/S Lanco Amarkantak Power Private Limited	20 th November, 2010

In the written submissions, all the parties have reiterated their written submission made in petitions / replies / rejoinders and oral submission made during hearing on 29th October, 2010. However, some of the points which have been highlighted in these written submissions by the parties are summarized below:

(A) Written submissions of PTC India Limited:

PTC submitted that as per Government of India communication dated 11th January, 2009, copy of which was filed during hearing, addressees were requested to take necessary steps to tie-up the import of coal by the end of February, 2010 and name of HPGCL is indicated at Sr. No. 1. Further,

Government of India vide letter No. 11th June, 2010, circulated minutes of meeting dated 1st June, 2010 regarding review of import of coal by power utilities during 2010-11. The said meeting was attended by HPGCL representatives as well. As per Government of India letter dated 6th July, 2010 LAPPL was requested to expedite the placement of order for import of coal. Government of India vide letter dated 24th June, 2010 has imposed Clean Energy Cess as excise duty on coal, lignite and peat. Copy of this letter was filed during hearing.

2. The implementation agreement has to be signed in accordance with the respective State Government policies failing which the State Government would not allow execution of the power project. Necessary provision in this regard is there in the PPA.

(B) Written submissions of HPGCL:

1. The Commission has jurisdiction qua RLDC considering that WRLDC's obligation to make payment to LAPPL would be defined by the relevant clauses of PSA, the interpretation of which is squarely within the jurisdiction of the Commission.

2. CERC regulations have prospective effect and cannot affect the concluded contracts. HPGCL has made a reference to the Supreme Court judgment in case of Anil Kumar Goel vs. Kishan Chand Kaura (AIR 2008 SC 899) in which it has been held that all laws that affect substantive rights generally operate prospectively. The said CERC regulations would apply where tariff has not been finally determined which is not true in this case as the tariff has been determined vide Commission's order 6th February, 2008 in which Commission rejected the generator's pleas to apply CERC notifications.

3. PTC's Counsel has admitted before the Commission during hearing that the facts relating to force majeure have not been verified by them. Even if it is admitted that force majeure events happened as per article 11.6 of the PPA such happenings entitle a party only to seek extension of time for performance of its obligations. **The delay of 5 months occurred due to force majeure events is not a ground under article 11 for terminating / renegotiation the PSA.**

4. Escalation in cost due to delay in commissioning of the project due to changes in visa policy is not acceptable because clause 6.7 of PSA and article

6.12 of PPA provides for payment of rebate on account of delay in commissioning and not for increase in tariff.

5. Regarding raise in tariff due to increase in fuel cost, clause 6 of Schedule J of PPA provides that “in the event of Coal Supply Agreement (CSA) being for supply of coal from a linked mine, the CSA **should provide for alternate arrangements for supply of coal** in the event of non supply of coal from the linked mines.....”. Therefore, there is no reason for seeking increase in tariff on this account.

6. Lanco cannot be permitted to enter into subsequent agreement with any other entity when subsisting and enforceable contractual arrangements have previously been entered into with HPGCL. Lanco can offer 30% of the aggregate capacity of the project in terms of clause 3.1 of the Implementation Agreement.

(C) Written submissions of M/S Lanco Amarkantak Power Private Limited:

M/S LAPPL has reiterated its submission made through reply / rejoinder to the HPGCL petition as well as oral submission during hearing. Some of the points made in these written submissions are however highlighted below:

1. As per clause 5.3 (h) (4) of the National Tariff Policy, by which the Commission shall be guided as per section 86 (4) of the Act, uncontrollable costs should be recovered speedily. M/S Lanco Amarkantak Power Private Limited is seeking only reimbursement of actual fuel charges which has to be treated as a pass through. Tariff orders of the Commission also rightly allow fuel costs as pass through. If the situation of coal supply improves in future then there will not be a cost increase.

2. Regarding application of res judicata in this case M/S Lanco Amarkantak Power Private Limited has submitted that the present petition is based on new facts and changed circumstances. A reference to the judgment of Bombay High Court in case of S. Jannabhai v. Krishna Rabba Ridhe 1992 94 BOMLR 33 and Madhya Pradesh High Court in case of Rehana Parveen v. Naimuddin AIR 2000 MP 1 and various other judgment has also been made to support the above averments of M/S Lanco Amarkantak Power Private Limited.

3. Clause 1.1.5 of Schedule E of the PPA provides that method of determination of tariff shall be in accordance with CERC regulations except as specifically provided in Schedules, E, F and G. **Therefore, PPA already contemplates tariff as per CERC regulations except the cap on tariff of Rs. 2.32 per kWh as per clause 2.1.**

4. As per letter dated 30th April, 2009 HPGCL has acknowledged that the supervening event have led to extension of the schedule for Unit - 2 of the project and requested that all the parties should resolve issue urgently. This means that HPGCL has agreed to the impact of force majeure events. Further, as per article 11.1.2 (xii) of the PPA "Acts of government or compliance with such acts, which directly affects such parties ability to perform its obligations hereunder" are force majeure events.

5. Contention of HPGCL that coal policy has not been implemented by Government of India is not tenable and supporting documents according to which coal policy has been implemented, have already been filed with the Commission.

6. Regarding powers of the Commission for revisiting contractual terms of the PPA a reference to Supreme Court judgment in case of Transmission corporation of Andhra Pradesh v. Sai Renewable Power Pvt. Limited has been made according to which the Commission not only draws its powers from the Acts, Rules and Regulations but also from the provisions of the executed agreements. Therefore the Commission has the jurisdiction to revisit the tariff of PSA

7. Regarding jurisdiction of the Commission M/S Lanco Amarkantak Power Private Limited has submitted that HPGCL has already admitted that Commission has no jurisdiction with regard to PPA. In support of its argument a reference to APTEL judgment in case of LAPPL v. MPERC and Ors. 2008 ELT APTEL 878 and APTEL judgment dated 6th August, 2009 has been made by M/S Lanco Amarkantak Power Private Limited.

8. Commission's Order:

The Commission has examined the petitions filed by PTC and reply of the respondents i.e. LAPPL and WRLDC on the issues raised therein. Additionally, the Commission has considered the petition of HPGCL claiming certain relief and directions and the replies submitted by the respondents i.e. PTC and LAPPL & WRLDC. As both the matter relates to the interpretation of the Power Purchase Agreement signed between LAPPL and PTC and Power Sales Agreement signed between PTC and HPGCL for power supply from Unit – 2 powerhouse of LAPPL in Chhattisgarh State, the Commission disposes of both the petitions by the instant common order.

After detailed examination of the PPA, PSA, petitions and rejoinders filed by the parties as well as their oral submissions in the hearing, the Commission has framed following issues for its consideration and order.

- 1) Whether the Commission has jurisdiction vis – a – vis Power Purchase Agreement signed between a generator located in a different state and an Inter – State Electricity Trader on the one hand and Power Sale Agreement signed between an Inter – State Electricity Trader and HPGCL on the other hand.**

The Ld. Senior Counsel(s) Shri Bhatt and Shri Chacko appearing for M/s LAPPL argued at length that they had entered into a PPA with PTC who hold an inter – state trading license issued by the CERC for trading in electricity, and hence, the State Commission has no jurisdiction under the Electricity Act, 2003 or policy / guidelines / regulations framed under it. The Ld. Counsel further pressed his point by stating that PPA and PSA are two separate and distinct agreements and that HPGCL has wrongly invoked the jurisdiction of the State Commission under section 86(1) (b) of the EA, 2003 as they had entered into an agreement with PTC and, as such, it has no contractual relationship / agreement with the distribution licensees and hence section 86(1)(b) of the Act, which is applicable only with respect to agreements with distribution licensee is not applicable in the present case. In support of his argument the Ld. Counsel relied upon a judgment of the Hon'ble Appellate Tribunal for Electricity namely **Lanco Amarnatak Power Pvt. Ltd. Versus Madhya Pradesh Electricity**

Regulatory Commission, 2009 ELR (APTEL) 878 and a judgment of the Hon'ble Supreme Court in **Tata Power Company Versus Maharashtra Electricity Regulatory Commission, 2009 ELR (SC) 246**. The Ld. Counsel further argued that the entire transaction of sale of Electricity under PPA takes place outside state of Haryana and as such, the Haryana Electricity Regulatory Commission has no jurisdiction to entertain the Petition filed by HPGCL and he has relied upon a judgment of Hon'ble Appellate Tribunal For Electricity in the matter of **Lanco Amarkantak Power Private Limited Vs Madhya Pradesh Electricity Regulatory Commission, (Judgment in Appeal No. 7 of 2009)**. It has been highlighted by the Ld. Counsel that the Petitioner HPGCL itself, in its reply filed with this Commission in the Petition filed by M/s PTC India Limited has admitted that this Commission does not have jurisdiction over M/s LAPPL. While advancing his arguments further, he has stated that as HPGCL has not signed the PPA and as such, it is not privy to the above said contract. Lastly, the learned counsel by referring to Article 16.2 of the PPA has submitted that as per above article there would be no third party beneficiary to the agreement i.e. PPA.

On the other hand the Ld. Senior Counsel Shri Ashwani Kumar appearing on behalf of the Petitioner HPGCL while assailing the above submissions of LAPPL on the issue of jurisdiction submitted that PPA and PSA are back to back agreements and both these agreements are fully interdependent . He has further argued that while approving the PSA in question this Commission had gone through both PPA as well as the PSA and that being so PSA approved by this Commission is a mirror image of the PPA. It has been further highlighted by the Ld. Counsel of HPGCL that the entire contracted Power of unit No.2 of the Project of M/s LAPPL is to be supplied to the Petitioner HPGCL in the State of Haryana where the same is to be utilized and as such , HPGCL is the main beneficiary both under the PPA and PSA.

At this stage the rival contentions of the parties regarding jurisdiction of this Commission are required to be looked into. The question of jurisdiction is a legal issue and the same is to be decided as

per law and it is a well settled law that jurisdiction of courts can neither be created nor the same can be taken out by way of mutual consent of the parties . Consequently, admission of HPGCL regarding jurisdiction of this Commission is not of much relevance and carries no weight while deciding the issue of jurisdiction.

The second plea taken by LAPPL is that PPA and PSA are separate and distinct agreements and that HPGCL is not a party to PPA and as such, it is not privy to the above said contract. By referring to Article 16.2 of the PPA, the Ld. Counsel of LAPPL has taken a stand that the above article does not recognize any third party beneficiary and as such, HPGCL is not competent to file Petition before this Commission for enforcement of PPA in any manner whatsoever as it is a stranger to the PPA . On the other hand , the Ld . Counsel of HPGCL has stoutly controverted the above contentions of LAPPL and argued that PPA and PSA are back to back agreements and both these agreements are fully interdependent and that the same were taken into consideration by this Commission at the time of approval of PSA so much so that PPA formed part of the Petition filed by HPGCL and that being so PPA is part and parcel of order dated 6.02. 2008 passed by this Commission vide which PSA was approved and as such, this Commission has jurisdiction to entertain the Petition filed by HPGCL.

A perusal of the records / orders available in the Commission establishes the fact that the Commission, on an application filed by HPGCL had gone into the details of PPA / PSA while approving the PSA between HPGCL and PTC. This was the last power purchase procurement based on a mutually agreed tariff that qualified for consideration and approval of the Commission before the competitive bidding based procurement as per the National Tariff Policy came into vogue. There is no denying the fact that PSA approved by the Commission was a mirror image of the PPA and hence mutually interdependent. Thus the tariff in PSA is an outcome of the tariff agreed upon by the parties in the PPA subject to payment of trading margin as determined by the CERC to PTC in its capacity as an inter – state trading licensee.

In order to answer the first issue framed by us the provisions of the relevant sections of the Electricity Act, 2003 were examined:

Section 62 (1) and 62 (1) (a): “The appropriate Commission shall determine the tariff in accordance with the provisions of this Act for –

(a) “supply of electricity by a generating company to a distribution licensee.”

Section 79 (1) and 79 (1) (b): “The Central commission shall discharge the following functions, namely: -

(b) “ to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have composite scheme for generation and sale of electricity in more than one State”

Section 86 (1) and 86 (1) (b): “The State Commission shall discharge the following functions namely: -

(b) “regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.”

There is no provision in the Act which provides for determination of tariff by the Appropriate Commission for supply of electricity by generator to a trading licensee. All the relevant provisions provides for regulating / determination of tariff for supply by a generating company to a distribution licensee.

In this connection following provisions of the PPA and PSA and order dated 6th February, 2008 of the Commission are quite relevant which are reproduced below:

Provisions of PPA:

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 shall 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.”

Definition of “Tariff”: “means the tariff payable in accordance with Schedule E”

Clause 1.1.3 of schedule E: “It is agreed between the Parties that the overall Tariff Payments made over the Term of Agreement, will be subject an overall limit equal to the cumulative of the levelled tariff for the first twelve years at the rate of Rs. 2.25 / kWh and over the Term of Agreement at the rate of Rs. 2.34 / kWh. The process for achieving the same is set out in Schedules E, F and G.”

Provisions of PSA:

Recital (B): the Purchaser is a Generating Company as defined in the Electricity Act, 2003 and is designated by the Government of Haryana to buy power and to sell the same to distribution licensee (s) in Haryana.

Recital (C): “PTC has entered into a Power Purchase Agreement (hereinafter referred to as “PPA”) on 19th October, 2005 as amended further vide an amendment agreement dated 18th September 2006 with M/S Lanco Amarkantak Power Private Ltd. (the “Company”), a Generating Company as defined under the Electricity Act, 2003 and which is implementing a coal based thermal power station at Pathadi village, Korba District, Chhattisgarh, India, to purchase the energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be setup (the “Project”), for a period of twenty five (25) years from the Commercial Operation Date of the Project.

Recital (D): “PTC has offered to sell the above capacity of 300 MW, Phase II to the Purchaser from the Project at the Delivery Point for a period of Twenty five (25) years from the Commercial Operation Date of the Project.”

Definition of Tariff: “means the tariff payable in accordance with the PSA”

Section 4 (1) (ix) (PTC's Obligations); "to participate and require the Company to participate in the Tariff determination process, as may be required by the Appropriate Commission."

The Commission accordingly ordered that :

".....Consequently in accordance with Para 1.1.3 of schedule E of the PPA, as amended vide amendment No. 1 dated 19.10.2005 which is part of Annexure – 1 to Power Sale Agreement (PSA), the Commission approves levellised cap tariff of Rs. 2.32 / kWh at Generator's bus bar for the entire term of the agreement.

We approve the instant PSA subject to the above observations and direct HPGCL to submit its final copy to the Commission...."

It emerges from the above that the Generating Company or the distribution licensee shall file application for determination of tariff before Appropriate Commission. The role of trading licensee is limited to arrangement of sale and purchase of power for the generator who is offering power and a buyer in this case the distribution licensee. In the present case before signing PSA, HPGCL filed an application before HERC for approval of the same. *The PSA was approved by the Commission vide order dated 6th February, 2008 subject to payment of levellised tariff of Rs. 2.32 per kWh, this being the mutually agreed tariff between al the contracting parties including. M/S Lanco Amarkantak Power Private Limited.* It is also a fact that the tariff adopted by the Commission was not challenged by any of the parties either to the PPA or PSA before any appellate authority or competent court.

Before arriving at any conclusion on the issue of jurisdiction, the Commission thought it appropriate to examine all other relevant provision in the PPA/PSA. The Commission examined Clause 16.2 of the PPA as this has been relied upon by the respondent(s) in support of their contention that there would be no third party beneficiary to the PPA. Clause 16.2 is reproduced below:-

“This Agreement is solely for the benefit of the parties and their respective successors and permitted assignees and shall not be construed as creating any duty, standard of care or liability towards any third person”.

A simple reading of the above provision establishes the fact that the PPA may be assigned by the parties i.e. LAPPL and PTC in favor of a third party in this case HPGCL acting on behalf of the distribution licensees in the state. Additionally, as per section 4.1(V) of PSA, PTC has agreed not to terminate the PPA except with prior written consent of the beneficiary i.e. HPGCL. All these support our premises of considering PSA and PPA as interdependent and one the former does not survive without the latter.

Further, LAPPL has relied upon two judgments of the Ld. Appellate Tribunal for Electricity and a Judgment of the Hon’ble Supreme Court in support of their contentions. The Commission has carefully examined them in reference to the instant case. The first judgment cited by LAPPL is Lanco Amarkantak Power Pvt. Ltd. Versus Madhya Electricity Regulatory Commission (MPERC) & Others reported in ELR(APTEL)878. The operational portion of the judgment at Para No. 23 is reproduced below:-

“Even if we keep the purchaser in view, the purchaser was also a trading licensee. PPA in question cannot be read as an agreement to sell power by a generator to a distribution licensee. Accordingly, the argument that the PPA was between a generator and a distribution licensee and that the Commission can fix tariff under this PPA in exercise of power vested under Section 62 must fail”.

A perusal of the above judgment makes it clear that the Commission cannot determine tariff under section 62 of the Act for sale of power by a generator to a trading licensee. In the present case the Commission observes that the purchaser i.e. HPGCL (a Government owned company) on being authorized by two Government owned distribution companies / distribution licensees acting on their behalf entered into purchase agreement. Hence it was not a transaction between a generator and a trader. Additionally, as previously observed by the Commission it was also not a case of tariff determination by

the Commission under section 62 of the Act. The tariff was agreed upon between the parties i.e. LAPPL, PTC and HPGCL and the same, being one of the last MOU route power purchase transactions, was approved by the Commission with slight modification to the payment mechanism i.e. 'pool tariff' mechanism was done away with so that the recovery of tariff by the distribution licensee from the consumers / beneficiaries is in conformity to section 62(6) of the Act. Thus given the difference in the nature of transactions, the Commission is of the considered view that the aforesaid judgment cited by LAPPL in support of their contention is not applicable in the instant case.

The second judgment relied upon by LAPPL is that of Ld. Appellate Tribunal dated 6/08/2009 in Appeal No. 7/2009 in the matter of Lanco Amarkantak Power Pvt. Ltd. Versus MPERC & Others. In this case the Ld. Appellate Tribunal held that MPERC had no jurisdiction to decide a dispute between a generating company and an Electricity Trader who had not been granted a license by MPERC. The plea that PPA and PSA constituted back to back arrangement was also rejected with an observation that the resale of power procured under PPA takes place under PSA between PTC and M.P. Power Generation and the appellant (Lanco Amrkantak Power Pvt. Ltd.) is not a party to this transaction and as such purchase of power under the PPA cannot be construed to be within the jurisdiction of MPERC since there is no certainty whatsoever that the power would be resold by PTC to Madhya Pradesh.

The Commission observes that the crux of the above cited judgment is a dispute between a generating company and an electricity trader and the fact that the ultimate beneficiary / purchaser was not identified. As contrary to this, in the present case the entire power purchased by PTC for a period of 25 years under the PPA has been sold to HPGCL acting on behalf of the distribution licensees in Haryana and in overall public interest as the state faces acute power shortages. Further, PTC cannot terminate the PPA without written consent of HPGCL (section 4.1(V) of the PSA). Additionally, the Commission approved the PSA in the light of the PPA. The order of the Commission is reproduced below:-

“Consequently, in accordance with Para 1.1.3 of schedule E of the PPA, as amended vide amendment no. 1 dated 19/10/2005 which is part of Annexure – 1 to Power Sale Agreement (PSA), the Commission approves levelled cap tariff of Rs. 2.32/kWh at Generator’s bus bar for the entire term of the agreement”

In the light of the above facts and circumstances the Commission observes that the judgment cited by LAPPL in support of their contention is not directly relevant to the instant case.

The Commission examined the judgment of Hon’ble Supreme Court in the matter of Tata Power Company Ltd. Versus Maharashtra Electricity Regulatory Commission & Others reported in ELR (SC) 0246. The issues involved in this case are reproduced below:-

- Whether recourse to section 23 of the Act can be taken for issuance of any direction to the generating company.
- Whether the Commission while applying the provisions of section 86(1)(b) of the Act could also take recourse to sections 23 & 60 thereof.
- Whether equitable allocation of power generated by a generating company is permissible.

A perusal of the issues involved in the above citation makes it amply clear that none of the above has any direct bearing in the instant case. In the present case the petition before the Commission has been filed by HPGCL under section 86(1)(b) for implementation of already concluded PSA/PPA. Under section 86(1)(b) the Commission is fully competent to issue direction in this regard as observed by the Hon’ble Supreme Court in its judgment (Supra). Para 120 of the judgment which is reproduced below:-

“Section 86(1)(b) provides for regulation of electricity purchase and procurement process of distribution licensees. In respect of generation its function is to determine the tariff for generation as also in relation to supply; transmission and wheeling of electricity. Clause (b) of sub section (1) of section 86 provides to regulate electricity purchase and procurement process of

distribution licensee including the price at which the electricity shall be procured from the generating companies or licensees or from other sources through agreements. As part of the regulations, it can also adjudicate upon disputes between the licensees and generating companies in regard to the implementation, application or interpretation of the provisions of the said agreement”.

In view of the above the Commission is of the considered view that given the circumstances and the way events have unfolded the Jurisdiction of the Commission is established vis – a – vis PSA / PPA and raising the same at this stage i.e. after almost four years when the contracted power should have started flowing to Haryana is un – necessary and un – called for. **Hence, in the light of the above discussions the Commission holds that it has jurisdiction vis – a – vis Power Purchase Agreement signed between a generator located in a different state and an Inter – State Electricity Trader on the one hand and Power Sale Agreement signed between an Inter – State Electricity Trader and HPGCL on the other hand, who would be to procuring power on behalf of the distribution licensee(s) intending to distribute electricity and make payment therefor.**

2) The second issue framed for our consideration is whether Force majeure events as claimed by PTC / LAPPL is admissible and what relief is envisaged under the force majeure clause of PSA / PPA :

On the issue of occurrence of force majeure events namely earthquake in China and change in the VISA policy of the Government of India the Ld. Counsel of LAPPL argued that they appointed M/s Dongfang Electric Corporation, China (DEC) as its EPC Contractor to supply main plant equipment such as Boiler, Turbine and Generator (BTG) required for the project and to supervise erection, testing and commissioning of such equipment. Due to the earthquake in China in June 2008, the activities of DEC were severely affected and DEC vide letter dated 22.5.2008 gave a force majeure notice to LAPPL informing that consequent to the damage caused to the manufacturing shops of DEC the supply of BTG components for the Project would be delayed. The delay envisaged was that of about four months. In accordance with the provisions of PSA, PTC informed HPGCL regarding happening of such events vide letters

dated 5.6.2008 and 18.12.2008. LAPPL further submitted that due the new Visa Policy of the Government of India in September 2009 / October 2009, all the Chinese engineers in India including Engineers of DEC, who were supervising the erection, testing and commissioning activities at the Project site, were forced to leave the country on or before 31.10.2009. About 21 Chinese nationals left the Project in September 2009 and the remaining 15 left in October 2009. Consequently despite best efforts the Commissioning of the Project was delayed. In accordance with the provisions of the PPA LAPPL informed vide letter dated 30.12.2009 that due to these events the commissioning of project has been delayed by 5 months and the project which was earlier scheduled to be synchronized in September 2009 could only be synchronized in February, 2010.

The Ld. Senior Counsel of HPGCL denied the pleas of PTC and LAPPL on the grounds that as per article 11.5 of PPA and clause 11.6 of PSA parties to the contract are not entitled to materially alter the terms of the contract and at best the **affected party is entitled to an extension of time for performing the obligation that it may be prevented or delayed in performing as a result thereof.** Further as per clause 11.8 of PSA parties are not relieved of their prior obligations under PSA even upon occurrence of a force majeure event. Further, the statement of PTC India Limited that HPGCL was informed vide letter dated 5th June, 2008 about the occurrence of the force majeure events is wrong. PTC should have initially satisfied themselves about the occurrence of such events and their impact on the commissioning of the project thereafter they should have taken up the issues with HPGCL with convincing reasons. In the instant case PTC has merely acted as an intermediary without playing any positive role which is not expected from them.

Additionally, the contention of M/S LAPPL that due to change in visa policy of Government of India commissioning of the project was delayed due to which they cannot supply contracted power to PTC is untenable and liable to be rejected as no further details have been provided for the delay. **Delay in commissioning of project has been dealt with under article 6.12 of PPA and clause 6.7 of PSA.** As per article 6.12 of PPA in the event of delay in commissioning of project beyond COD LAPPL is required to pay to PTC the amount determined in accordance with **Paragraph 2.2 of Schedule G for each**

day of delay in commissioning. In addition as per Paragraph 3.4 of Schedule G, LAPPL will also reimburse PTC all expenses incurred by it towards open access charges to the grid for evacuation of power output from the delivery point to the point of use for the period of delay. Further, as per clause 6.7 of PSA, in case the commissioning of the project is delayed beyond the required COD of the project **any rebate in tariff** applied pursuant to the PPA shall be passed on to HPGCL by PTC. Further, so far as change in VISA policy is concerned neither PTC nor HPGCL and LAPPL have any say in the matter. None of the parties to the PSA or PPA would have anticipated that there would be a change in the visa policy and that such policy would directly impact the construction and commissioning of the project due to non-availability of Chinese experts.

In view of the rival contentions the Commission observes that although no documentary evidence has been filed either by the PTC or by M/S LAPPL in support of the force majeure events which include earthquake in China in May, 2008 and change in visa policy by Government of India in September / October, 2009, yet the Commission has taken cognizance of the same and examined the issue regarding delay in commissioning of the project as well rise in capital cost amounting by Rs. 182 crores as claimed by LAPPL. The Commission observes that M/S LAPPL had duly informed PTC and in turn PTC had informed HPGCL about the force majeure events in accordance with provisions of PPA / PSA.

As per article 11.5 of the PPA “.....The period allowed for performance by the affected party of its obligations hereunder shall be extended by one day for each day of continuation of an event or events of force majeure.

As per of clauses 11.9 (ii) of the PSA “On the receipt of information in pursuance of Section 11.9.(i) above, the Purchaser may accept or reject a declaration of Force Majeure under the PPA as a Force Majeure event under this Agreement. The Purchaser may reject such declaration of Force Majeure under the PPA as a Force Majeure event under this Agreement only after providing detailed written reasons within sever (7) days of receipt of such information in pursuance to Section 11.9 (i) above to PTC. In case PTC does not receive such reasons from the Purchaser within such seven (7) days, the Purchaser shall be

deemed to have accepted the declaration of Force Majeure under PPA as a Force Majeure event under this Agreement.”

There is no document on record according to which HPGCL has disagreed to the happening of force majeure event within seven days of receipt of information from PTC. As such the Commission, going by the provisions of the PSA, agrees to the submissions of PTC stating that HPGCL did not respond to the information of force majeure events given by them to HPGCL and considers that HPGCL was in agreement to the happening of force majeure events. **Thus the Commission answers the issue in affirmative that force majeure events as claimed by PTC / LAPPL did happen and the same was not disputed by HPGCL**

Having decided as above, the Commission examined the relevant provisions of PSA/PPA to answer the issue of what relief can be claimed under the force majeure clause. The relevant clause(s) are mentioned below:-

Clause 11.5 of the PPA and Clause 11.6 of the PSA deals with the failure or delay caused by Force Majeure events. Clause 11.5 of the PPA provides, that

“Neither party shall be liable for any failure or delay in complying with the obligations pursuant to this agreement to the extent that such failure or delay has been caused or contributed to by one or more events of Force Majeure or their effects or by any combination thereof subject to Article 15.1. The period allowed for the performance by the affected party of its obligation hereunder shall be extended by one day for each day of continuation of an event of Force Majeure. Provided that such extension may be for such additional duration as may be required to compensate for any delay or failure resulting from the time spent on demobilization and remobilization of personnel and restoration of the project, as the case may be after cessation of an event or events of Force Majeure, to the pre – delay condition, assuming diligent compliance by such party”

The Force Majeure Clause 11.6 of PSA is a mirror image of the above and hence is not being repeated here.

A perusal of the above provision makes it clear that in an event of Force Majeure the parties are entitled for some relief in terms of extension in time for carrying out their respective contractual obligations. **As far as the issue of compensating (in terms of tariff hike) for any consequential appreciation in Capital Cost is concerned, the Commission could not find any enabling provision in the PSA / PPA. Hence the second issue of whether any relief other than extension in time due to any Force Majeure event is admissible is answered in negative i.e. no relief other than extension in time as explicitly provided in the PSA/PPA is admissible.**

Further, one cannot lose sight of the fact that the tariff approved by the Commission was a negotiated tariff and hence neither HERC nor CERC or any other appropriate commission has approved the capital cost. While implementing projects of such nature the risk of slippages in terms of time or cost overrun is mostly borne by the project developer, at time cost overrun on one component of the project is made good by cost savings on the other components. **Hence, seeking to pass on the entire risks to the buyer is not acceptable, more so, the concluded contract between the parties has no such provisions.**

HPGCL is well aware that Haryana is a power deficit state and shortages are mitigated by way of expensive short term purchase of power still they did not monitor the happening vis – a – vis Lanco Amarkantak project. They rushed to the Commission only after PTC filed a petition seeking guidance from the Commission to make PPA and PSA workable and the Commission sought a reply on the issues raised therein. Additionally, the Commission had directed that for evacuation and further distribution of 300 MW Lanco Amarkantak power commensurate arrangements should be made by the transmission & distribution licensees. The status of the same is not known. In case such arrangements were made, the transmission / distribution system created for the purpose would have got stranded because of the delay in COD of the project.

3) The third issue framed for our consideration is whether PPA and PSA are two distinct agreements.

The learned senior Counsel for LAPPL submitted that **The PSA and the PPA are distinct and independent contracts and not a “back to back arrangement / agreement”**. He argued that HPGCL is not a party to the PPA and under the express terms of the PPA and hence cannot rely on the provisions thereof. They are not concerned with the passage of title from the PTC to HPGCL. They are only concerned with the passage of title to PTC and deny that the title passes immediately to HPGCL.

The Ld. Counsel for HPGCL argued at length that HPGCL filed a tariff petition before the Commission for the approval of PSA and the Commission vide order dated 6.2.2008 approved the PSA at a levelled tariff of Rs. 2.32 per kwh for the entire contract period. A copy of the PPA signed between Respondent Nos. 2 and 3 was also filed before the Commission, which considered as part of the PSA. In terms of Section 6.13 of the PPA executed between PTC India Limited and M/s Lanco Amarkantak Power Private Limited all power generated from the aforesaid 2nd unit even prior to its commissioning (infirm power) is to be purchased by PTC India Limited from M/s Lanco Amarkantak Power Private Limited and the obligation of PTC India limited for purchase of such power prior to COD is limited to fuel payments. Article 4.3.5 of the PPA also prohibits M/s Lanco Amarkantak Power Private Limited from using any electricity generated from the 2nd unit for any purpose other than for auxiliary requirements.

As per clause 4.1 of the PSA, PTC India Limited is obligated to deliver the power output and energy output generated from the 2nd unit of M/s Lanco Amarkantak Power Private Limited at the delivery point to HPGCL in accordance with the terms of the PPA. The said obligation of the PTC India Limited is also specified in clause 4.1 (i) and 4.3 of the PSA. HPGCL is also obligated under clause 6.8 of the PSA to absorb the infirm power and energy and make fuel payment for the same and applicable trading margin in accordance with clause 10.1 (a) of the PSA,

Under Article 4.3.1 of the PPA M/s Lanco Amarkantak Power Private Limited is obligated to sell power output and energy output to PTC India Limited at the delivery point i.e. the nearest 400 KV sub-station of the Power grid Corporation of India Ltd where the Power Output from the Project is delivered to the CTU or

400 KV Bus of the Project's switchyard where loop in and loop out (LILO) of transmission line of the CTU occurs within the project site, at which the risk and title to the Energy Output and Power Output shall pass from the company to PTC.

Therefore, the title of the power passes from the M/s Lanco Amarkantak Power Private Limited to PTC India Limited at the delivery point and the said title is further immediately and simultaneously transferred to the HPGCL through the triggering of the PSA, in terms, inter alia, of clause 4.1 read with definition of "delivery point" in clause 1.1 S.No.37 of the PSA. Accordingly, all the power generated at the said unit except for auxiliary consumption belongs to the HPGCL and hence PSA and PPA are interdependent.

The Commission has examined the contents of PSA and PPA at length in the light of the rival contentions and observes that the PSA is a mirror image of PPA. Further PPA between a generating company and a trading company is not a conclusive document because trader is a middleman between generating company and a distribution licensee and energy agreed to be purchased by the trader has to be sold by entering into a PSA to a distribution licensees. It is also to be noted that tariff for the energy purchased and sold is to be determined once by the Appropriate Commission and shall remain the same for payment of energy bills by the trader to the generating company and by the distribution licensee to the trader. Trader will get the trading margin. A plain reading of PSA would reveal that it is totally based on PPA. Even recital (F) of the PPA endorses this view by providing that tariff as approved by such Appropriate Commission shall be applicable for purchase and sale of the above power by PTC. **Despite the fact that the parties to PPA and PSA are different, it cannot be denied that PSA has to be read and interpreted entirely in conjunction with the PPA. Hence PSA and PPA cannot be construed as two separate agreements as both the agreements sink or swim together.**

4) The fourth issue framed for consideration and order is whether any relief can be granted to LAPPL in terms of reduction in contracted capacity in view of the Implementation Agreement signed by them with the Chhattisgarh Government.

The Ld. Counsel for LAPPL and PTC argued that as per article 3.1.1 of the PPA it was envisaged right from the beginning that the company **will enter into the implementation Agreement with the Government of Chhattisgarh**, if so required, and hence the Implementation Agreement was something visualized in the PPA itself. However, it was not within the knowledge of the parties that while signing of such an Implementation Agreement the State of Chhattisgarh would seek such a large quantum of power generated by LAPPL. **Further Under the PSA also vide cause 3.1(i) it is acknowledged that the conditions precedent in the PPA have been duly satisfied or waived.** PTC is also in touch with the Government of Chhattisgarh to withdraw its request to purchase 35% of the capacity from this unit and to claim the said 35%, if mandatory, from the other units which are yet to come into COD. The Government of Chhattisgarh has so far not given any assurance on the said request.

Arguing to the contrary the Ld. Senior Counsel for HPGCL submitted that the MOU dated 17th September, 2008 and the implementation agreement dated 1st August, 2009 have been entered into by LAPPL without taking PTC and HPGCL into confidence. **As per article 4.3.4** LAPPL could enter into agreement for sale of power to third party **only upon expansion of the capacity** of the project and subject to the having first right of refusal over additional power generated and in such an event PTC would be entitled to receive rebate in tariff.

Further the implementation agreement nowhere provides that LAPPL shall supply 5% of the capacity from Unit 2 at variable charges and 30% of the capacity from Unit 2 of the project at a rate to be approved by SERC of Chhattisgarh. As per clause 3.1 (iv) of the implementation agreement LAPPL is required to make an offer of purchase of 30% of aggregate capacity of the project i.e. units 2, 3 and 4. Therefore the contention of LAPPL is incorrect and misleading. Other developers in Chhattisgarh have got approval of the State Government to sell power to the State from the sources for which power sale has not been contracted. In this case LAPPL did not deem it necessary to inform HPGCL prior to committing supply of power to Government of Chhattisgarh affecting its vested rights under PSA. Even PTC did not raise any objection to such conduct as its rights vested under PPA were also affected. PTC concealed letter dated 6th October, 2009 where in the capacity of Unit No.

2 was not included by the Chhattisgarh State power Trading Company while calculating 30% power.

In the light of the rival claims the Commission examined the relevant provisions of PPA / PSA in order to find an answer to the above issue. Article 3 of the PPA provides for conditions precedent and Article 3.1.1 provides for the conditions precedent that may be waived by the Company. Article 3.1.1 (ii) provides that “the Company shall have duly executed an Implementation Agreement for this project, if so required, with the Project State Government.” The word “Project” has been defined in the PPA as 300 MW coal fired power generation facility. While, the same i.e. “Project” as per article 1.1.43 of the Implementation Agreement has been defined as M/S Lanco Amarkantak Power Private Limited, thermal power project having an installed capacity of Unit No. II of 300 + Unit NO. III & IV of 660 MW each proposed to be established at Korba District in the state of Chattisgarh, India. The required COD as per PPA is 36 months from the date of financial close however the same as per IA for the first units is 65 or 70 months (applicable as per unit size) from the Effective Date. IA also provides for signing of PPA between the Company and the Purchase Entity of Government of Chhattisgarh.

While PPA was entered into between M/S Lanco Amarkantak Power Private Limited and PTC India limited on 19th October, 2005 and PSA between PTC India Limited and HPGCL on 21st September, 2006 i.e. after almost one year of signing of PPA. Both these agreements provide for sale of 100% power output of 300 MW including infirm power to HPGCL. The implementation agreement was signed between M/S Lanco Amarkantak Power Private Limited and Government of Chhattisgarh on 1st August, 2009 i.e. almost 4 years after the date of signing of PPA. The question which need to be answered is as to why M/S Lanco Amarkantak Power Private Limited signed PPA for sale of 100% power output of its 300 MW Unit II well knowing the fact that it will have to sign implementation agreement with the project State Government and despite having a condition precedent in the PPA that can be waived of. This sheer violation of agreements firstly by M/S Lanco Amarkantak Power Private Limited while offering 100% of 300 MW power for sale to PTC by entering into PPA and secondly by the Government of Chhattisgarh seeking 35% of the already

contracted power is difficult to explain. The power for Unit II was contracted for sale to PTC under a valid agreement 4 years before signing of implementation agreement. The PPA / PSA signed between the parties clearly mention the quantum of power as 300 MW. Thus the IA which is signed subsequent to signing of the PPA and PSA does not take precedent over the latter in view of the fact that the provisions of the PPA which led to signing of IA do not provide for the quantum of energy to be supplied to the Project State Government. Hence the issue is answered in negative i.e. no relief can be granted to LAPPL in terms of reduction in contracted capacity in view of the Implementation Agreement signed by them with the Chhattisgarh Government. At this LAPPPL / PTC cannot deny supplying 300 MW contracted power to HPGCL. The Commission observes that a thermal generating station has a gestation lag of about 36 – 48 months; hence long terms procurement in order to meet the energy requirement is also planned well in advance. Any deviation in the volume of supply of long terms power is likely to create power shortages for the buying state and impose heavy financial burden in case the deficit has to be met from short term sources.

Before arriving at a conclusion, the Commission also examined **Clarification No. 23/11/2004-R&R (Vol – IX) dated 29th November, 2010 by Ministry of Power, Government of India**. The clarification was issued in reference to escalable indices notified by CERC as per the Guidelines for Determination of Tariff by Bidding Process for procurement of power by Distribution Licensees. The relevant portion of the clarification is reproduced below:-

- Power Purchase Agreement (PPAs) entered into by parties are binding on parties to the Agreement as per terms and conditions of the PPA.
- It has already been clarified by the Ministry of Power in consultation with D/o Legal Affairs on 15/02/2008 that the provisions of the Tariff Policy would not alter the legal enforceability of the already concluded contracts, except in accordance with the terms contained in such contracts.

The above clarification lays emphasis on maintaining the sanctity of the concluded contracts. Hence the Commission observes that the PSA/PPA was

concluded contract for sale and purchase of 300 MW of power while Implementation Agreement with the Chhattisgarh Government cited by LAPPL came at much later stage. Accordingly the quantum of power offered by LAPPL/PTC and accepted by HPGCL as per PPA/PSA needs to be delivered. Hence the Commission holds that no relief can be granted to LAPPL in terms of reduction in contracted capacity in view of the Implementation Agreement signed by them with the Chhattisgarh Government.

5) The fifth issue framed for our consideration is whether the New Coal Policy of Government of India entitles LAPPL for any relief in tariff.

The Ld. Counsel for LAPPL argued at length that South Eastern Coalfields Limited issued a Letter of Assurance (LoA) regarding coal linkage to them on 18.9.2006 for supply of 1.445 MTPA of 'F' grade coal. Pursuant to fulfilling the milestones indicated in the LoA, they have been following up the matter with Ministry of Coal, Ministry of Power, Coal India Limited, Central Electricity Authority and South Eastern Coalfields Limited for conversion of the LoA into long term linkage and execution of the requisite Fuel Supply Agreement ("FSA"), however, the same has not be signed till date. On 18.10.2007, a new Coal distribution policy was announced by the Government. Accordingly, the assured quantum of coal supply got reduced to 50-60% of the LOA / linkage quantity. Hence making impossible the Project to achieve the required normative PLF of 85%. LAPPL vide their letter dated 30.12.2009 informed PTC that the tariff in the PPA was arrived at on the assumption that the 100% of the coal requirement of the Project over the entire useful life of 25 years would be met from South Eastern Coalfields at the notified prices of Coal India Ltd. the prevailing rate being Rs. 883 / MT. In order to make up for the shortfall in coal linkage they would be forced to procure coal from other sources such as imported coal, e-auction coal or from the open market at rates significantly higher than the notified coal prices. He presented a comparative statement indicating the prices of coal from these sources:-

S. No.	Source	Landed Cost of Coal (Rs/MT)
1	South Eastern Coalfields Ltd – Procurement through Fuel Supply Agreement under notified price	883

2.	South Eastern Coalfields Ltd – Procurement under e-auction	2255
3.	Traders – Open Market	2410
4.	Imported Coal – South Africa	5747

Further under Article 3.1 (ii) of the PPA, LAPPL was required to execute an implementation agreement with the Chhattisgarh Government. Accordingly, they entered into an Implementation Agreement with the Government of Chhattisgarh and Chhattisgarh State Power Holding Company Limited on 1.8.2009. Under the Implementation Agreement, they are required to supply 5% of the capacity from Unit 2 of the Project at variable charges and 30% of the capacity from Unit 2 of the Project at a rate to be approved by the appropriate Electricity Regulatory Commission. Further, the Chhattisgarh State Power Trading Company Ltd. has, by its letter dated 6.10.2009, sought to exercise its right to purchase 35% of the capacity in the manner specified in the Implementation Agreement. Due to the said condition in the Implementation Agreement, LAPPL will not be in a position to supply the contracted power set out in the PPA.

In the light of the above the Ld. Counsel submitted that it will be impossible to operate the Project if they are not permitted to pass through the fuel price in accordance with CERC Tariff Regulations. The CERC Tariff Regulations have allowed a pass through of fuel prices since the availability of fuel and its costs are not in the control of the generating companies over the plant life of 25 years and it is difficult for the generating company to mitigate such risk. National Thermal Power Corporation (“NTPC”) are also facing similar situations and resorting to procurement of coal from alternate sources as indicated above to bridge the gap between coal required for full capacity plant operations and coal quantity received under FSAs. Since the CERC Tariff Regulations provide for passing on the energy charges (variable charges) to the beneficiaries, NTPC is being permitted to recover the additional expenditure arising out of procurement from alternate sources.

In view of the foregoing arguments, the Ld. Counsel requested as under:

- (a) The Commission may be pleased to direct HPGCL to make payment of tariff in accordance with the CERC Tariff Regulations under the PSA to them being the accepted norm in all cases.

- (b) In order to mitigate the risks which have arisen mainly due to changes in policies of government it would be necessary to amend the PSA to the effect that the tariff is determined in accordance with the CERC Tariff Regulations without any caps or ceiling to balance the risks among the stake holders.
- (c) Calculation of tariff in accordance with the CERC Tariff Regulations would be fair and transparent, and consistent with principles for determination of tariff. Adoption of the CERC Tariff Regulations in the present case would also be in compliance with the provisions of the Act.

HPGCL was informed about the above developments by PTC India Limited vide letter dated 18.3.2010, requesting them to look into the issues and if necessary seek appropriate guidance from the HERC as due to the aforementioned circumstances, which were outside their control and which could not be prevented despite their best efforts, the capital cost for the Project has increased by about Rs.182 crores, and the levelled fuel cost is expected to increase by at least Rs.0.51 per unit, depending upon the price at which coal can be procured. Therefore, supplying electricity at the capped tariff of Rs.2.32/kwh for the entire term of the PPA is not sustainable for them in accordance with the PPA. This would necessitate determination of tariff as per the CERC Tariff Regulations, as agreed to in the PPA but only with a modification that there shall not be any limitation or any cap on tariff under the PPA and consequently the tariff under the PSA would require to be amended. Concluding his arguments the Ld. Counsel of LAPPL submitted that his presentation should not be misconstrued in a negative way. He made it clear that LAPPL has no intention of running away from supplying the contracted power to HPGCL. This is however subject to their additional financial liability being adequately compensated by HPGCL.

Arguing to the contrary the Ld. Senior Counsel for HPGCL submitted that the contention of PTC and LAPPL is not tenable because of the following reasons:

- (i) Coal companies have defacto not implemented the so called New Coal distribution Policy. Resultantly as on today the old policy still continues.

- (ii) Keeping in view the possible increase of coal price in future the tariff of Rs. 2.32 Paisa / Unit was worked out under PPA. The same issue has already been factored in while calculating levelled tariff to be spread over 25 years.

The Commission has examined the contention of LAPPL / PTC that due to new coal policy the quantum of coal linkage has been reduced. Hence in order to run the plant at requisite PLF in order to deliver the contracted capacity expensive coal would have to be purchased. They have also relied on the fact that the Central Commission as well as HERC allows pass through of coal cost on actual basis to the generators under their purview. While there is no denying of the fact that any deviation in the cost of fuel both coal and oil as approved by the Commission on a projected basis and the actual invoiced rate are allowed to the intra – state generator fuel price adjustment mechanism. However, the status of the intra – state generator whose tariff is determined by the Commission and LAPPL is not the same. In the case of LAPPL neither the project cost nor the base fuel cost has been approved by the Commission, hence the question of deviation does not arise. Further LAPPL tariff is governed by the PPA / PSA entered in to by the parties which does not mention any adjustment factor on actual basis which could benefit LAPPL if the same is on the lower side than the rate including annual escalation built in the model for working out a levelled tariff on the contrary if the actual rate turns out to be on the higher side the same puts LAPPL to a disadvantage. At this stage it is difficult for the Commission to visualize what the future (25 years +) holds. Hence in the view of the Commission it is a calculated risk that any project proponent has to bear else the agreements (PPA/PSA) would have made explicit provision for mitigating fuel risk in line with the regulations of CERC / HERC with regard to pass through of fuel price on actual basis. In view of the above arguments **the issue of any relief due to change in coal policy is answered in negative i.e. no relief in tariff can be granted to LAPPL due to New Coal Policy of Government of India.**

6) The last issue framed for our consideration is whether HPGCL (as claimed in their petition) is entitled to infirm energy and payment thereof from the UI pool.

HPGCL, in their petition, has sought for issuing directions to WRLDC for releasing payments for infirm power from the UI pool to them instead of LAPPL.

The Ld. Counsel for HPGCL argued that As per provision of article 4.3.1 of the PPA, LAPPL has undertaken to sell to PTC India Limited all the power output and energy output from the project and PTC India Limited undertook to purchase and pay the tariff agreed in accordance with the PPA at the delivery point, LAPPL is entitled to use power generated from the project only for project's auxiliary consumption. Further, as per clause 4.1 (i) of the PSA (PTC's Obligations), PTC agrees and undertakes to deliver the power output and energy output at the delivery point in accordance with the terms of the PPA. The title of all power including **Infirm Power** passes on to the PTC and immediately thereafter from PTC to HPGCL. Contrary to the provisions of the agreement LAPPL is feeding power to grid and WRLDC is making payment of the said power to them instead to HPGCL. Additionally, PTC India Limited vide letter dated 18th March, 2010 forwarded copy of letter of LAPPL dated 12th March, 2010 refusing to supply contracted power in terms of the PPA. Accordingly PTC conveyed its inability to meet its commitments under PSA

While contesting the claim of HPGCL to the infirm power and hence payment of UI charges in accordance with the PSA/PPA the Ld. Counsel for LAPPL relied on CERC regulations. He further contended that WRLDC is not within the purview of the State Commission and hence HERC does not have power to pass an order directing WRLDC regarding payment of UI charges to HPGCL.

The Commission has examined the relevant regulation and observes that CERC while dealing with generating company has made provision in their regulation that UI shall be passed on to the generator, the generator after retaining the fuel cost and the balance shall be utilized for reduction of capital cost of the project. A reduction in Capital Cost has two cascading effect i.e. the return on equity, depreciation gets reduced thereby the fixed cost component payable by the buyer declines. While in the instant case as the approved tariff (levellised for 25 years) is a single part tariff and the Capital Cost has not been approved by the Commission hence CERC or HERC regulations for that matter cannot be

extended to LAPPL. Additionally, the PSA/PPA signed by the parties explicitly provide for as to how infirm power shall be treated.

The Commission observes that Article 6.13 of the PPA provides that: “At all times during start-up, preliminary testing or other operations of the Project for achieving the COD and during the Initial Performance Tests, PTC shall off take such energy subject to the technical feasibility. PTC’s obligation to the Company in such regard shall, be limited to the payments that PTC may receive for the sale of such power output. However such obligation shall under no circumstances exceed the Fuel Payments for such Power Output during the Project Capacity Test, as set out in Schedule E.”

Further section 10.1(a) of the PSA deals with payment components until COD which is reproduced below:-

“During start up, preliminary testing or other operations of the project until the required COD of the project, and during the initial performance tests, the purchaser shall co-operate fully with PTC and the company to absorb the energy during such operations at the rate of fuel payment and the applicable trading margin”.

It is clear from the above stipulations that the title of energy prior to COD is that of the buyer i.e. HPGCL. It is a fact that infirm power, given its nature, cannot be subjected to scheduling and hence the transactions of such power is to be accounted as unscheduled interchange (UI). Thus any payment received in the UI pool for such power needs to be passed on to HPGCL and not to the generator i.e. LAPPL. Consequently, any payments, so far received by LAPPL, on this account net of fuel cost needs to be passed on to HPGCL as given the nature of the tariff agreed upon there is no scope for reduction in capital cost. PTC has grossly violated provisions of article 6.13 of the PPA by not off taking energy output prior to COD, M/S Lanco Amarkantak Power Private Limited has also not only misled the parties to PPA / PSA but misrepresented facts before the Commission by giving its own interpretations to the provisions of the PPA in order to deny the purchaser its legitimate right to such energy and payments thereto. **In light of the above the Commission holds that HPGCL is entitled for**

payment from the UI pool for the infirm power. The Commission observes that section 28(2) of the Electricity Act, 2003 is quite clear on this issue and accordingly holds that they are to comply with such principles, guidelines and methodologies in respect of wheeling and optimum scheduling and dispatch as the Central Commission may specify in the Grid Code i.e. Indian Electricity Grid Code (IEGC). PTC should take up the issue with WRLDC / CERC so that payment for infirm power is released to HPGCL.

From the facts presented before us in the instant case and our observations thereon as discussed in the preceding paragraphs it emerges that the entire dispute centers around a series of agreement (PPA & PSA) executed between PTC, HPGCL and Lanco Amarkantak Power Private Ltd (LAPPL). The same agreements were approved by the Commission with due modification vide order dated 6th February, 2008 after hearing all the concerned parties. The Ld. Senior Counsel for LAPPL tried to provide practical and workable solution to the problem by safeguarding their financial interest in the form of additional project cost and seeking pass through of coal cost in line with CERC norms for fixation of tariff in total disregard to the order of the Commission on the subject.

The Commission has examined all the relevant points in the case. As mentioned in the earlier paragraphs, the Commission feels that it cannot allow the sanctity of an agreement to be violated with impunity where the Commission itself was a party. The Commission's order dated 6th February, 2008 which was passed after hearing all the parties, have not been challenged in any quarter. In the absence of this the order has attained finality. Hence the Commission agrees with the Ld. Senior Counsel of HPGCL that these agreements cannot be reopened at this stage and the respondents i.e. PTC & LAPPL who have been signatories to these agreements have to abide by their terms and conditions. The Commission is of the considered view that if the agreements signed between the parties cannot be implemented it will give a serious setback to the business confidence and put the entire power scenario in jeopardy. The Commission notes with serious concern that despite the fact that LAPPL Unit – 2 was synchronized long back even after accounting for the

delay under Force Majeure, the COD of the project has not be declared far. Hence they should do so immediately and commence supply of the requisite power to Haryana. They are free to meet their obligation to the State of Chhattisgarh from their other projects.

In view of the above, the petition filed by PTC India Limited and duly supported by M/s Lanco Amarkantak Power Private Limited, Chattisgarh is dismissed. The petition filed by HPGCL is upheld with the following order:-

i) **The Power Purchase Agreement dated 19th October, 2005 as amended by HERC order dated 6th February,2008 remains valid and in force and cannot be revised at this stage.**

ii) **300 MW of contracted power should go to HPGCL and M/s Lanco Amarkantak Private Limited is restrained from selling the same to a third party.**

iv) **WRLDC to make payment for infirm power since the date of synchronization of LAPPL Unit – II from the UI pool to HPGCL instead of M/s Lanco Power Private Limited. HPGCL and PTC should immediately take up the matter with CERC for appropriate directions to WRLDC regarding payment of UI charges to HPGCL since in such cases only CERC has the competence to issue directions.**

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 2nd February, 2011.

Date: - 02/02/2011

Place: - Panchkula

(Rohtash Dahiya)
Member

(Bhaskar Chatterjee)
Chairman