

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

Quorum

Shri Bhaskar Chatterjee, Chairman

Shri Rohtash Dahiya, Member

Shri Ram Pal, Member

CASE NO. HERC / PRO 6/2011

DATE OF HEARING : 09/08/2011
DATE OF ORDER : 25/08/2011

In the matter of:

Haryana Power Generation Corporation Ltd.
Urja Bhawan, Sector – 6, Panchkula.

..... Petitioner

VERSUS

1. Jaypee Karcham Hydro Corporation Limited
Juit Complex, Waknaghat, P.O. Tumehar Bani
Kandaghat, District - Solan
Himachal Pradesh – 173 215

..... Respondent – 1

2. PTC India Limited
2nd Floor, NBCC Tower
15 Bhikaji Cama Place
New Delhi – 110066

.....Respondent – 2

3. Northern Region Load Dispatch Centre
18 – A, Qutab Institutional Area
Katwaria Sarai
New Delhi - 16

.. Respondent - 3

Counsel for Petitioner: Shri Vinod Bhardwaj, Advocate
Shri D.C. Arya, FA/Hqr, HPGCL

Counsel for Respondent(s):
Shri Shanti Bhusan, Sr. Advocate for R-1
Shri Manu Nair, Advocate for R-1
Shri Anuj Berry, Advocate for R-1
Shri Aashish Bernard, Advocate for R-2
Shri Rahul Srivastava, Advocate for R-3

ORDER

1. Haryana Power Generation Company Limited (HPGCL) a State Government owned company presently representing the two power distribution licensees in the State of Haryana i.e. Uttar Haryana Bijli Vitran Nigam Limited (UHBVNL) and Dakshin Haryana Bijli Vitran Nigam Limited (DHBVNL) is the petitioner.

2. Brief Facts of the Case:

The petitioner in the instant case is a deemed distribution licensee under Section 14 of the Electricity Act, 2003 presently representing the two distribution licensees i.e. UHBVNL and DHBVNL in Haryana. On 18/06/2003 R-1(Jaypee Karcham Hydro Corporation Limited) which is a

power generating company as defined under section 1(2)(28) of the Electricity Act, 2003 had entered into an MOU with R-2 (PTC) which is a power trading company operating as a power trader under a trading licensee issued to them by the Central Electricity Regulatory Commission (CERC). Subsequent to the MOU R-2 further entered into MOUs with the various state power utilities including the petitioner for sale of power.

3. Having identified the buyers R-2 entered into a Power Purchase Agreement (PPA) with R-1 on 21/03/2006 for onward sale of 704 MW of contracted power for a period of 35 years from the date of COD of the project. As per the provisions of the PPA R-2 was to enter into suitable arrangement with one or more purchasers for sale of the contracted power from R-1. Hence R-2 in order to meet with the conditions specified in the PPA entered into a Power Sale Agreement (PSA) on 21/09/2006 for sale of 200 MW power to the petitioner. The Haryana Electricity Regulatory Commission (HERC) vide its letter no. HERC/Teesta-III/Karcham Wangtoo/PSA/637 dated 21/06/2007, on a reference made by the petitioner, approved the PSA between the petitioner and R-2 for 200 MW power from the proposed project of R-1 for a period of 35 years.
4. R-1 vide its letter dated 17/12/2009 conveyed to R-2 that the PPA dated 21/03/2006 has been rendered void as the procedure contemplated in the said agreement for determination of tariff could not be enforced in view of the CERC order dated 26/10/2009 in petition No. 153/2009 consequently the contract for purchase of 704 MW power by R-2 from Jaypee Karcham Hydro Corporation Limited (R-1) stood terminated.

5. Aggrieved by the conduct of R-1 the petitioner has filed the instant appeal under Section 86(1)(b) and Section 86(1) (f) of the Electricity Act, 2003, seeking specific relief mentioned hereunder:-

i) Direct R-1 and R-2 to comply with their contractual obligation in favor of the petitioner with regard to 200 MW power.

ii) Restrain R-1 and R-2 from selling the contracted capacity to any third party.

iii) Direct R-3 to ensure flow of contracted capacity to the appellant & also pay for the infirm power from the UI pool account to them retrospectively.

vi) Pass such order further or consequential as the Commission may deem fit, proper and just in the circumstances of the case.

6. Public Proceedings:

The Commission scheduled a hearing on the instant petition on 9/08/2011. Accordingly all the parties were issued notice of hearing vide Case No. HERC/PRO-10 of 2011/1267 dated 22/07/2011 directing them to appear in person or through an authorized representative.

7. Shri Shanti Bhushan, Ld. Senior Advocate appearing for the respondent (R-1), submitted that they have moved an application on the issue of jurisdiction of HERC in deciding the instant case and requested that the same may be taken first before hearing the arguments on merit. The Ld. Advocate for the petitioner (HPGCL) & respondent no. 2 (PTC), (no one was present on behalf of respondent no. 3), did not voice any objection.

Thus the Commission proceeded to hear the arguments on the issue of jurisdiction.

The main arguments advanced by the Ld. Senior Advocate for the respondent (R-1) are as under.

- a) A single Judge of the Hon'ble High Court of Delhi in a petition under Arbitrating and Conciliation Act, 1996 & Hon'ble Division Bench in a appeal thereafter have rejected the prayer of respondent no. 2 (PTC) seeking to restrain R-1 from selling power to third party. In an SLP filed by PTC against the judgment of Hon'ble High Court of Delhi, the Hon'ble Supreme Court had ordered that any agreement for sale of power to third party by R-1 will abide by and be subject to the outcome of the said SLP. It was argued that HERC has no jurisdiction in law to sit in appeal over the judgments of the Hon'ble High Court of Delhi & Hon'ble Supreme Court.
- b) The PPA already stands null & void based on an Arbitral Award given on 28.04.2011 and hence is not enforceable.
- c) The petitioner has relied on Section 86 (1) (f) to invoke the jurisdiction of HERC in this dispute. Section 86 (1) (f), he argued, covers only the disputes pertaining to a licensee who has been granted a license by HERC. In this case R-1 is a generating company and R-2 is an inter-state electricity trading company which has been granted trading license by the Central Electricity Regulatory Commission (CERC). Thus HERC does not have the jurisdiction in this matter. This, he

submitted, has been upheld by the Hon'ble APTEL in appeal no. 7 of 2009, the relevant part of the judgment is reproduced as under:-

“14.....

- ii) The above provision with the opening words the State Commission must be construed in the context of the territorial jurisdiction of the Regulatory Commission of each State. The word “ the licensee” as referred to in Section 86 (1) (f) has to be construed to mean such licensees which have been granted a trading license or such licensee who has been granted a trading license by the particular State Commission seeking to assume jurisdiction over the dispute. This means, the State Commission can assume jurisdiction in respect of the disputes arising between a generating company and an electricity trader operating under a trading license granted by it. In this case, Madhya Pradesh State Commission has assumed jurisdiction in respect of the disputes under the PPA between the Appellant, a generating company which is situated in Chhattisgarh and R-2 who is a trading licensee granted by the Central Commission and not the Madhya Pradesh State Commission.”

- d) The Commission does not have jurisdiction over R-3, NRLDC in view of Section 28 of the Electricity Act, 2003 which provides that the Regional Load Dispatch Centre will comply with the directions issued by the CERC.

e) Summing up the Ld. Senior Advocate submitted that there is no contract between the petitioner and R-1 and accordingly there is no question of any dispute arising between them. As regard any alleged disputes between R-1 & R-2, the petitioner does not have any locus standi to raise any issues nor does this Commission have any jurisdiction over the same.

8. The Ld. Advocate for the petitioner Shri Bhardwaj argued at length pointing out the exclusive jurisdiction of the Commission in awarding the relief sought by them in the present case. He submitted that the conduct of R-2 in seeking stay on the termination of the PPA by R-1 from the Hon'ble Delhi High Court (OMP No. 25/2010) under Section 9 of the Arbitration and Conciliation Act, 1996 was bad in law as with the enactment of the Electricity Act, 2003, the law with respect to electricity has been laid down which had the overriding effect over the existing laws. In support of his contention he cited 2008 (4) SCC in Gujarat Urja Vikas Nigam Ltd. Vs Essar Power Ltd. wherein it is held by the Hon'ble Supreme Court that all the disputes between the licensees and the generating companies can only be resolved by the Appropriate Commission. The operating part of the judgment cited by the Ld. Advocate is presented below:-

“Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and Conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies the State Commission or Central Commission

(as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute”.

Despite the well established law R-2 has invoked arbitration clause and referred the matter to the Arbitral Tribunal comprising of Hon’ble Justice S.P. Bharucha (Retd. Chief Justice), Hon’ble Justice V.N. Khare (Retd. Chief Justice) and Hon’ble Justice Nagender Rai (Retd. High Court Judge).

Both the Hon’ble Delhi High Court as well as the Ld. Arbitral Tribunal has rendered their judgment / award and the matter is now pending before the Hon’ble Supreme Court which on 21/09/2010 has ordered that third party rights, if created, shall be subject to the Judgment of the Hon’ble Supreme Court in the matter.

The Ld. Advocate submitted that in view of the judgment of the Hon’ble Supreme Court in Gujarat Urja case referred to above, the judgment(s) of the Hon’ble Delhi High Court is without any jurisdiction and bad in law. Additionally, the constitution of the Arbitral Tribunal is void abinito and so is the award pronounced by them as HERC has exclusive jurisdiction in the matter for adjudication in the present case. He summed up his arguments by pointing out that the definition of delivery point, evacuation of electrical output, rights to electrical output as well as commissioning delay / early as dealt with in the PPA/PSA clearly establishes the fact that the beneficiary of both the contracts is the petitioner and there is no provision for escalation in capital cost or tariff. Therefore the relief / directions sought by them are justified and the same may be granted.

The petitioner, in their rejoinder dated 12/07/2011, submitted to the Commission, reiterated that Section 86(1) (b) and Section 86(1) (f) of the Electricity Act, 2003 exclusive jurisdiction to the State Commission in all such matter which has been settled by the Hon,ble Supreme Court of India in the matter of Tata Power decided on 6/05/2009 (Civil Appeal Nos. 3510 -3511 and 3593 of 2008 , Para 146). The operative part of the judgment 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.”

Additionally the Ld. Advocate pointed out that HERC had vide its order dated 21/06/2007 approved the PSA and simultaneously the PPA which was placed at Annexure C to the PSA. R-1 party to the PPA has willingly and unconditionally under taken certain obligations qua the petitioner and the petitioner had entered into PSA based on the PPA. Hence the petitioner, despite the fact that they were not the signatory to the PPA, is

an essential and integral part of the agreements. The signatories to the PPA have assigned certain rights and obligation to the petitioner and as such by their conduct made the petitioner a party to the PPA which is also demonstrated by almost all identical clauses appearing in both PPA as well as PSA. In view of the fact that HERC on 21.06.2007 approved the PSA & simultaneously PPA as the same was Annexure C to the PPA therefore under section 86 (1) (b), HERC has the exclusive jurisdiction in the matter.

Regarding the order of Hon'ble APTEL in appeal no. 7 of 2009, quoted by the Ld. Senior Advocate for R-1, he submitted that the same is not relevant. He drew attention of the Commission to Para 15 of the order, which he said, indicated that the Madhya Pradesh Electricity Regulatory Commission (MPERC) has framed certain regulations wherein they have restricted their jurisdiction. However, no such regulations have been made by HERC. Therefore the contention of the Ld. Senior Advocate for R-1 that Section 86 (1) (f) covers only the licensees of the State Commission is not tenable.

The Ld. Advocate for the petitioner also quoted a no. of clauses of the PPA to emphasize that the purchaser i.e. HPGCL is a necessary party to the PPA and their identity was to be disclosed to the Respondent R-1 in terms of clause 4.3.2 of the PPA.

9. The Ld. Advocate for R-2 i.e. PTC submitted that as far as PSA is concerned, they are not against the jurisdiction of the Commission.

Commission's Order:

In view of position given in Para 7 above, the instant order is restricted to the issue of maintainability of the petition/ jurisdiction only.

The Commission has considered the various issues raised by the parties regarding jurisdiction of HERC to hear the present petition. HPGCL has filed a petition under section 86 (1) (b) for implementation of PSA and PPA and under section 86 (1) (f) for adjudication upon dispute between a generating company and the licensee. Quoting various provisions of the Electricity Act, 2003 and various case laws including HERC order dated 02/02/2011 (Case No. PRO-12 of 2010) the learned counsel for the petitioner strongly argued that HERC has the sole jurisdiction in the matter. To the contrary, the Id. Senior Advocate of R-1, citing judgments of the Hon'ble Delhi High Court as well as the award rendered by Arbitral Tribunal, argued at length that the PPA has become impossible to perform and hence has become void. He vehemently argued that HERC can neither sit in appeal over the Judgments of the Hon'ble Delhi High Court nor is competent to pass any order against the award of the Arbitral Tribunal appointed by the parties i.e. R-1 and R-2 as per the provisions of the PPA wherein the petitioner is not a signatory. He also brought to the notice of the Commission (HERC) that the order dated 02/02/2011 passed by the Commission holding its jurisdiction vis-à-vis PPA signed between a generator located in a different state and an Inter- State electricity trading licensee on the one hand and PSA signed between the Inter- State electricity trading licensee and HPGCL on the other hand is a subject matter of appeal in the Hon'ble APTEL. The hearings in the case have

been concluded and the judgment awaited. Hence, any order passed by the HERC, at this stage would be premature.

The commission has very carefully examined the written submission as well as the oral submissions made during the hearing by the parties as also the various judgments/ orders quoted in the written / oral submissions on the issue of jurisdiction and observes as under:-

i) PPA entered into between JKHCL & PTC and the PSA entered into between PTC & HPGCL are back to back agreements and neither of the two survives/ is viable without the other. The contention of Respondent R-1, that there is no contract between the Petitioner and Respondent R-1 and that there is no question of any dispute arising between them and thus the Commission has no jurisdiction over any alleged disputes, is not tenable. In this context, it would be pertinent to note that PTC, before entering into PPA with JKHCL, signed MOUs with various state utilities for onward sale of contracted 704 MW of power and only after the ultimate buyers were established could the PPA between PTC & JKHCL be signed. Thus it is incorrect to say that HPGCL is not a party to the PPA and so cannot raise any dispute connected with the PPA. In fact ultimate buyers are the most important/ affected parties in the PPA.

ii) Under section 86 (1) (b) read with section 86 (1) (f), the commission has the powers/ jurisdiction to adjudicate upon the disputes between the licensees and the generating companies. This has also been upheld by the Hon'ble Supreme Court in the matter of Tata Power (Civil Appeal Nos. 3510-3511 and 3593 of 2008).

Relevant part of the judgment 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.”

- iii) PSA signed between Respondent R-2, PTC, and the Petitioner, HPGCL, which is entirely based on the PPA and of which PPA is a part, has been approved by the Commission as per the provisions of section 86 (1)(b) of the Electricity Act, 2003 and under the provision of section 86 (1) (f) of the Act, the Commission has powers to adjudicate in the matter as already stated in para (ii) above.
- iv) As per section 79 (1) (f), Central Commission (CERC) has the powers/ jurisdiction to adjudicate upon the disputes involving generating companies and transmission licensees only. In the present case, PPA is between a generating company and PTC, an interstate electricity trader, where as the ultimate buyers are the

distribution licensees including HPGCL, which is also a deemed licensee and represent the two distribution licensees of the state of Haryana. Adjudication upon the disputes connected with this PPA does not come under the jurisdiction of CERC as per section 79 (1) (f). It is, however, an admitted fact that as per Electricity Act, 2003 adjudication upon the disputes involving generating companies and licensees can only be by an appropriate Commission. The procedure to be followed for adjudication of disputes has also been laid down by Hon'ble Supreme Court in the matter of Gujrat Urja Vikas Nigam Ltd v/s Essar Power Ltd {2008(4) SCC}. The relevant portion of the judgment is reproduced as under:-

“ Hence on harmonious construction of the provisions of the Electricity Act, 2003 and the Arbitration and conciliation Act, 1996 we are of the opinion that whenever there is a dispute between a licensee and the generating companies only the State Commission or Central Commission (as the case may be) or arbitrator (or arbitrators) nominated by it can resolve such a dispute, whereas all other deputes (unless there is some other provision in the electricity Act, 2003) would be decided in accordance with Section 11 of the Arbitration and Conciliation Act, 1996.”

As CERC does not have jurisdiction in this matter, so it is only the state Commission which can adjudicate in the matter.

v) A careful reading of section 61 (1) (d) of the Electricity Act, 2003 establishes the fact that one of the primary function of the Commission is to safeguard the interest of the consumers. This section, as has been held by the Hon'ble APTEL in a number of its judgments, confers wide powers on the Commission. Any transaction or agreement or in fact anything which impinges on the tariff determination and thus affects/ prejudices the interest of consumers with regard to tariff payable by them would require to be addressed by the Commission and therefore comes within its purview. In the present case if the PPA between PTC & JKHCL gets terminated, it is only the consumers of the State of Haryana who would be adversely affected. Hence it would be logical that the Commission is empowered in such cases as per the spirit behind the provisions of section 61 (1) (d). It is obligatory on the part of the Commission to ensure that the generating companies who enter into back to back agreements for sale of power, as in this case, do not back out or wriggle out on one pretext or the other in the event of development of unfavorable circumstances or in their endeavor to earn higher profits thus leaving the distribution licensees and their consumers in the lurch.

vi) This issue has earlier also been examined by the Commission in depth in the matter of Lanco Amarkantak Power Limited and the Commission, in its order dated 2.2.2011, had held 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 procuring power on behalf of the distribution licensee (s) intending to distribute electricity and make payment there for”.

vii) The Commission is not inclined to agree with the contention of the learned counsel of Respondent R-1 that Order dated 02.02.2011 passed by the Commission is a subject matter of appeal before the Hon’ble APTEL wherein hearings have been concluded and the judgment is awaited and as such any order passed by the commission at the stage would be premature. The Commission feels that there seems no need to wait for the judgment in the matter when the Hon’ble APTEL has not granted any stay on the Order dated 02.02.2011 of the commission.

In view of the foregoing discussion, it is held that the Commission has jurisdiction in this case and the petition filed by HPGCL is maintainable. The Commission, accordingly, decides to proceed with the hearing of arguments on merit for which date and time will be communicated to the parties separately.

This order is signed, dated and issued by the Haryana Electricity Regulatory Commission on 25th August, 2011.

Date: 25/08/2011

Place: Panchkula.

(Ram Pal)
Chatterjee)
Member
Chairman

(Rohtash Dahiya)
Member

(Bhaskar