

**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 11/2011

**DATE OF HEARING : 10/08/2011
DATE OF ORDER : 25/08/2011**

In the matter of:

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

..... Petitioner

VERSUS

1. Lanco Green Power Private Limited
Lanco House, Plot No. 397
Phase III, Udyog Vihar
Gurgaon - 122016

..... Respondent – 1

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

.....Respondent – 2

Counsel for Appellant: Shri Vinod Bhardwaj, Advocate
Shri U.K. Agarwal, XEN, HPGCL
Shri Satish Kr. Garg, GM/Finance, UHBVNL

Counsel for Respondent(s):
Shri L. Vishwanathan Advocate for R-1
Shri Abhinav Kansal, Rep of PTC

ORDER

1. Haryana Power Generation Company Limited (HPGCL) a State Government owned company acting on behalf of 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 in the instant case.
2. The petitioner (HPGCL) 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 21/09/2006 the petitioner had entered into a Power Sale Agreement (PSA) with the Respondent No. 2 (PTC India Ltd) which is an inter – state trading licensee for sale of entire power i.e. 70 MW to be generated by the 1st respondent i.e. Lanco Green Power Private Limited (LGPPL), which is a company incorporated under the provisions of the Indian

Companies Act, 1956 and is a Generating Company under the provisions of the Electricity Act, 2003

Brief Facts of the Case:

3. R-1 (LGPPL) is setting up 2 X 35 MW Hydro Power Project near village Bharmour, Tehsil Chamba, Himachal Pradesh. The petitioner entered into a Power Sale Agreement (PSA) with R-2 (PTC) on 21/09/2006 for procurement of entire power to be generated by R-1 (Budhil Project). While on 30/03/2005 R-2 had entered into a Power Purchase Agreement (PPA) with R-1 for the entire power to be generated for 35 years for onward sale. An amendment to the PPA was signed on 23/03/2006. The Commission vide its order dated 7/06/2007, in reference to the petitioner's Memo No.Ch-83/CE/PPM/SE/T/L-39 dated 24/05/2007, approved the PSA with the condition that the trading margin shall be fixed by CERC from time to time subject to the maximum of 5 paisa / unit for the first 12 years and 10 paisa/unit for the subsequent period of the said PSA and PTC/CTU may obtain approval of the additional incidence of transmission charges as to be determine by CERC.
4. The R-1 (LGPPL) vide its letter dated 17th December, 2008 conveyed that the effect of the events of Force Majeure has fundamentally altered the initial circumstances under which LGPPL and PTC had entered into the PPA. In the absence of effective remedies to the events of Force Majeure it has

become impossible to perform its obligations under the PPA as originally envisaged. Further, in view of Clause 15.3 of the PPA which provides that a party may terminate the PPA in case force majeure event continues un – remedied for 12 continuous months, LGPPL gave notice of termination of the PPA from 26th December, 2009.

5. Aggrieved by the above action of R-1 the petitioner has filed the instant case seeking following specific relief:-

i) The alleged termination of PPA dated 13/12/2009 by R-1 be declared illegal and invalid.

ii) That both R-1 and R-2 be directed to comply with their obligations qua the petitioner.

iii) That both R-1 and R-2 be directed to place on record all the correspondence exchanged between them with respect to PSA/PPA so that the petitioner could make additional submissions, if required.

iv) Such other further orders be passed as the Commission may deem fit and proper.

Public Proceedings:

6. The Commission, in order to have the benefit of the views of the parties, issued a notice of hearing to them vide Notice No. HERC/454 to 458 /2011. Accordingly hearing of the parties was held on 20/05/2011 in the court room of the Commission. All the parties were present in the hearing. After hearing the parties the Commission passed an order which was conveyed to the parties vide Memo No. 596-98/HERC dated 27/05/2011. The operating part of the order dated 20/05/2011 is reproduced below:-

“Today, the petition was fixed for arguments of the parties. Sh. Vinod Bhardwaj, Advocate for the petitioner argued at length. The learned Counsels of R-1 and R-2 submitted that they had received the notice about 10 days back and hence requested the Commission to give them time to submit their written reply. Acceding to their request, the Commission directs the respondents to submit their written replies by 3rd June, 2011 with a copy to other parties and further directs the petitioner (HPGCL) to file rejoinder, if any, on the replies submitted by the respondents by 10th June, 2011. Thereafter, the Commission shall fix next date of hearing”.

Accordingly, the parties submitted their written replies / rejoinders etc. which has been taken on record. The Commission posted the case for final arguments on 10/08/2011

and informed the parties vide Notice No. HERC/1114-18/2011 dated 11/07/2011. The hearing was held in the Commission's court room as per schedule.

7. The Ld. Advocate for the petitioner Shri Bhardwaj argued at length and pointed out that PPA and PSA are the shadow of each other. The petitioner (HPGCL) had signed the PSA with R-2 (PTC) based on the PPA wherein R-1 (LGPPL) had categorically and unconditionally accepted certain obligation qua the petitioner. In support of his arguments he referred to Article (s) 3.1.3, 6.17, 8, 11.6, 15.7 and 16.14.4 of the PPA. Thus the petitioner was a necessary party and the real beneficiary to the PPA. In order to establish the jurisdiction of the Haryana Electricity Regulatory Commission (HERC) the Ld. Advocate quoted the functions of the State Commission as enshrined in Section 86(1) of the Electricity Act, 2003 and pointed out that a perusal of the various provisions of the said section reveals that HERC has the exclusive jurisdiction under section 86(1)(b) as the power was sourced through agreement for distribution and supply within the State of Haryana. HERC had on 7/06/2007 approved the PSA which included the PPA as annexure which was known to R-1 in view of the provision of Article 3.1.3 (vii) of the PPA which is reproduced below:-

“the Appropriate Commission shall have regulated the tariff for sale of electricity from the Project or the purchase of electricity by the purchaser from PTC, as applicable”.

He further argued that in view of the approval of HERC the jurisdiction has already been established and agreed to by all parties including R-1. Additionally, the Ld. Advocate brought to the notice of the Commission 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. Additionally under Section 86(1) (b) and Section 86(1) (f) of the Electricity Act, 2003 the exclusive jurisdiction is that of 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.”

Summing up, on the issue of jurisdiction, the Ld. Advocate submitted that HERC in the matter of Lanco Amarkantak vide its order dated 02/02/2011 has already held that the Commission (HERC) has exclusive jurisdiction in such like matter. Thus R-1 is not entitled for the termination of the agreement in view of the provisions of Article 14.4 of the PPA and both R-1 and R-2 are under legal obligation to comply with their obligations and the reasons cited in the impugned termination letter are not a force majeure at all.

8. The Ld. Advocate for R-1 submitted that at the outset the Commission should decide the threshold issue of jurisdiction before going into the merits of the relief sought by the petitioner as the petition suffers from lack of jurisdiction and maintainability and the same deserves to be dismissed with cost.

The Commission, acceding to the request of R-1 and the fact that the petitioner did not voice any objection, agreed to hear the parties on the issue of jurisdiction first.

On the issue of maintainability, the Ld. Advocate for R-1 argued that the PPA is a contract between R-1 and R-2 and the

petitioner is not a party to the same. Article 16.2 of the PPA provides as under:

The agreement “.....shall not be construed as creating any duty, standard of care or any liability towards any third person”

Thus he submitted that there is no privity of contract between the petitioner and R-1 under the PPA. Hence the petitioner has no right to question the legality of termination of the PPA.

Dwelling at length on the issue of lack of jurisdiction of HERC, the Ld. Advocate argued that the PPA is a contract between a generating company situated outside Haryana (R-1) and an inter – state trading licensee of the Central Electricity Regulatory Commission (R-2) hence HERC has no jurisdiction to sit in judgment over such case. In support of his contention he referred to the Judgment dated 6th August, 2009 of the Hon’ble APTEL in Lanco Amarkantak Power Pvt Limited Versus Madhya Pradesh Electricity Regulatory Commission (MPERC) wherein it was held that PPA and PSA are two separate and distinct agreements between two different parties and as such purchase of power under PPA cannot be construed to be within the jurisdiction of (MPERC).

The Ld. Advocate for R-1 further argued that Section 86(1)(b) of the Electricity Act, 2003 gives the State Electricity Regulatory Commission the power to regulate electricity purchase by distribution licensee and Section 86(1)(f) of the Act empowers

the Commission to adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration. In the instant case, the petitioner HPGCL, is not a distribution licensee i.e. it has not been granted a distribution license by HERC and there is no agreement between R-1 and the petitioner. Hence HERC is not empowered to pass any direction qua R-1 as Section 86(1)(b) and 86(1)(f) of the Act are not attracted.

Summing up the Ld. Advocate pointed out that the petition filed by HPGCL almost one and half years after the PPA termination notice was issued by R-1 has become infructuous and is liable to be dismissed. The petitioner was well aware of the termination notice issued by R-1 on 18/12/2009 but took no steps at any stage either to engage with R-1 or to enforce its alleged rights under the PPA. In the intervening period R-1 has entered into a new PPA with National Energy Trading Services Limited on 2/2/2011 for sale of power from the project.

9. R-2 (PTC) India Ltd. in their written response to the issues raised by the petitioner has submitted as under:-

i) At a belated stage and with an oblique motive of wriggling out of the PPA, Lanco (R-1) on the pretext of occurrence of force majeure events issued a termination letter on 18/12/2009.

ii) R-2 has not at any stage accepted the alleged termination and the same is illegal. The reasons given by R-1 in the impugned termination letter do not constitute Force Majeure.

iii) There is a specific provision in the PPA for delayed commissioning of the project under Article 6.14. Thus resorting to Article 11 (Force Majeure) is ignorance of Article 6.14 and is contrary to the scheme of the PPA and the intention of the parties who signed the same especially in view of Article 16.5 which is reproduced below:-

“Where this Agreement provides for any rebate or other remedies for any breach or shortfall in performance, the parties shall not be entitled to make any other claim or pursue other remedies under law”.

iv) 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:

The Ld. Advocate vehemently argued on behalf of R-1 that it has entered into a Power Purchase Agreement dated 30/03/2005 with R-2 i.e. PTC , which is an inter-state trading licensee and that being so, this commission does not have jurisdiction under the Electricity Act, 2003 or regulations there - under over it. He further argued that PPA and PSA are

separate and distinct agreements and that the petitioner has wrongfully invoked the jurisdiction of this commission under Section 86 (1)(b) and 86(1)(f) of the Act as R-1 has not entered into an agreement with the petitioner and, as such, it does not have any contract with a distribution licensee and that being so 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. The Ld. Advocate further argued that under the Electricity Act, 2003, an Electricity Regulatory Commission does not have jurisdiction over a generating company which is not selling power to a distribution licensee. In support of his contention he relied upon a judgment of Hon'ble APTEL (Lanco Amarkantk Power Pvt. Ltd, vs. Madhya Pradesh Electricity Regulatory Commission, 2009 ELR[APTEL] 878.) and also a judgment of the Hon'ble Supreme Court in Tata Power Company VS. Maharashtra Electricity Regulatory Commission, 2009 ELR (SC) 246. It has been further argued that the entire transaction of sale of electricity under PPA takes place outside state of Haryana and as such, the HERC has no jurisdiction to entertain the petition filed by HPGCL. While advancing arguments, the Ld. Advocate has stated that as the petitioner has not signed the PPA and as such it is not privy to the above said contract. Lastly, the Ld. Advocate by referring to Article 16.2 of the PPA has submitted that as per this Article there would be no third party beneficiary to the agreement i.e. PPA. Summing up his arguments the Ld. Advocate submitted in a similar case R-1 aggrieved by the HERC order dated

2/02/2011 in a the petition dated 22/07/2010 filed by the petitioner (HPGCL) wherein it was held by the HERC that the PPA as amended by the Commission vide order dated 6/02/2008 signed between R-1 and R-2 remains valid has preferred an appeal under section 111 of the Electricity Act, 2003 against the said order passed by the Commission (Appeal No. 15 of 2011 in the matter of HPGCL versus Lanco Amarkantak Power Private Ltd.). By way of said appeal which is under active consideration of the Hon'ble APTEL R-1 has expressly contested the jurisdiction of the State Commission. Hence pending judgment of the Hon'ble APTEL in the aforesaid case, it would be premature for HERC to pass any order / directions to R-1

On the other hand, the Ld. Advocate of the petitioner i.e. HPGCL has strongly opposed the stand of R-1 on the point of jurisdiction. The Ld. Advocate of the petitioner while advancing arguments stated 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 PPA as well as the PSA and that being so PSA approved by this Commission is a shadow of the PPA. It has been further highlighted by the Ld. Advocate that the entire contracted power of 2X35 MW of the Budhil Project of the R-1 is to be supplied to the petitioner in the State of Haryana where the same is to be utilized and as such , the petitioner is the main beneficiary both

under the PPA as well as PSA. They had entered into PSA with R-2 based on the PPA wherein R-1 had categorically and unconditionally accepted certain obligation qua the petitioner. Hence, the petitioner, at this stage cannot be considered as a stranger to the PPA.

The plea taken by R-1 is that PPA and PSA are separate and distinct agreements and that the petitioner 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. Advocate of R-1 has taken a stand that the above article does not recognize any third party beneficiary and as such the petitioner has no privity of contract between R-1 and the petitioner. Hence the petitioner is not competent to seek any relief from this Commission for enforcement of PPA in any manner as it is a stranger to the PPA. On the other hand, the Ld. Advocate of the petitioner has controverted the above contentions of R-1 and strongly 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 had formed part of the petition filed by HPGCL. Hence PPA is part and parcel of order dated 7/06/2007 passed by this Commission vide which PSA was approved.

In view of the above it is to be seen as to whether there is any provision in the PPA or PSA which confers any right upon the petitioner under the former. To resolve this issue , first of all

Article 16.2 of the PPA needs to be looked into as this Article has been relied upon by R-1 in support of its contention that by virtue of this Article there would be no third party beneficiary to the PPA. Article 16.2 reads as under –

16.2 Third Party Beneficiaries.

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

A bare perusal of the above Article clearly spells out that the PPA may be assigned by the parties in favor of a third party i.e. respective successors and permitted assignees.

In order to arrive at any conclusion the Commission has examined in great details the PPA and PSA. The Commission finds that there are number of provisions in the PPA which show their interdependent nature. For example, Articles 3.1.3 (vi to viii) of the PPA provides that PTC (R-2) shall have executed PSA with the Purchaser for the entire contracted power. Further, the Appropriate Commission shall have regulated the tariff for sale of electricity from the Project or the purchase of electricity by the purchaser from PTC. Long term open access in accordance with CERC Interstate Transmission Regulations for the supply of power and energy to the purchaser shall have been obtained. Thus it is evident that the PPA recognized the real beneficiaries i.e. the petitioner who is the purchaser in this case.

Further Article 6.17 of the PPA provides that “In matter relating to this Article 6 (Synchronization, Testing & Commissioning), the Company (R-1) shall send a copy of all communications to the Purchaser”.

Article 11.6 of the PPA (Purchaser to be notified) provides that the Company shall send to the Purchaser a copy of all communication to PTC under this Article 11 (Force Majeure).

Article 15.7 of the PPA (Purchaser to be Notified) provides that “Any party, which issues notice under this Article 15 (Events of Default and Termination) to the other party, shall issue a copy of such notice to the Purchaser”.

Article 16.14.4 of the PPA provides that “within seven (7) days of signing of PSA, PTC shall provide the Company with contact details of the person Purchaser’s personnel to whom copies of communication are required to be sent under this Agreement by the Company.

A perusal of the above Articles of the PPA, which is self explanatory, provides sufficient evidence that the purchaser / beneficiary once identified by PTC i.e. the petitioner in this case is a necessary party to the PPA despite the fact that they are not a signatory to the same.

Additionally PPA has been entered into between R-2 and R-1 vide which PTC has agreed to purchase 70 MW power from the latter to be generated from its Budhil project. Now the same power has been agreed to be sold by PTC to the petitioner i.e. HPGCL so

much so that in case of failure of R-1 to supply above said power, R-2 is not bound to supply power from other sources to the petitioner under the PSA .This fact clearly spells out that the PSA is wholly dependent on the PPA and without the PPA it is meaningless. In other words it is safe to presume that the PSA shall sink and swim with the PPA and thus both of them are inseparable. Further section 4.1(v) of PSA provides that , **“to not terminate the PPA except with the prior written consent of the Purchaser and subject to the terms and conditions contained in Section 15.1.2 herein”**, hence PTC has agreed not to terminate the PPA except with the prior written consent of the petitioner which again goes to prove that both PPA and PSA are fully interdependent. It is worthwhile to mention here that at the time of approval of PSA , this Commission had gone through the PPA and PSA was approved keeping in mind the PPA which was annexed with its petition by HPGCL seeking approval of the PSA.

Further the R-1 has relied upon two judgments of Hon’ble APTEL and one judgment of the Hon’ble Supreme Court in support of its contention regarding jurisdiction. The first judgment relied upon by it is Lanco Amarkantak Power Pvt. Ltd. Vs Madhya Pradesh Electricity Regulatory Commission (MPERC) and others reported in 2008, ELR (APTEL) 878 wherein MPERC had directed the Appellant to submit to its jurisdiction and to file a petition for determination of tariff under the PPA entered into between the Appellant and PTC. On objection raised by Lanco regarding jurisdiction the Hon’ble APTEL vide its order dated 6.5.2008 held

that it had jurisdiction to determine tariff under the PPA. The above order was challenged by Lanco in the present appeal which was allowed by the Hon'ble APTEL. It is pertinent to mention here that the appeal in question was allowed primarily on the ground that a Electricity Regulatory Commission has no jurisdiction to determine tariff between a Generating Company and an Electricity Trader. During the course of arguments in the appeal in question, it was submitted that the PPA stipulated that the power purchased by the PTC would be sold to MPSEB, a Distribution Licensee and, therefore, the PPA could not be treated an agreement to sell power by a generator to a trader. The above plea was strongly opposed by Lanco. After hearing the rival contentions of parties, the Hon'ble APTEL in para no. 23 of the judgment observed as under-

“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 in Section 62 must fail”.

The present case cannot be examined in the light of the above judgment. The facts of the present case are entirely different from case before the Hon'ble APTEL as the issue involved in the present case is not with regard to the determination of tariff between a generator and a trader. Secondly here the purchasers are distribution licensees whereas the purchaser before the Hon'ble APTEL was a trader. Keeping in view the observations of the

Hon'ble APTEL in para no.23 of the judgment, it can be safely said that had the purchaser before them been a distribution licensee, the position would be different. Therefore, the Commission is of the considered view that the above judgment of the Hon'ble APTEL is not strictly applicable in the present case.

The second judgment relied upon by R-1 is the judgment of the Hon'ble APTEL dated 6.8.2009 in Appeal no. 7 of 2009, Lanco Amarkantak Power Pvt. Ltd. Vs M.P. Electricity Regulatory Commission and others. In that case the Appellant Lanco had entered into a power purchase agreement with PTC and PTC in turn had entered into a power sale agreement with Madhya Pradesh Power Trading Corporation. However subsequently, the Appellant terminated the PPA. Against the termination of the PPA, PTC filed a petition before the M.P. Electricity Regulatory Commission before whom the Appellant raised the issue of jurisdiction. However the State Commission vide its order dt. 25.8.2008 held that it had jurisdiction to deal with the dispute and ordered stay of the operation of the termination letter. The above order of the State Commission was challenged by the Appellant Lanco before the Hon.ble APTEL. The Hon'ble APTEL vide its judgment allowed the appeal and held that M.P. Electricity Regulatory Commission had no jurisdiction to decide a dispute between a generating company and an Electricity Trader who had not been granted a license by M.P. Electricity Regulatory Commission. The plea of PTC and M.P. Power Generation that PPA and PSA constituted back to back arrangement was also not accepted by the Hon'ble APTEL and it held that as per

Article 16.2, the PPA is solely for the benefit of the parties thereto. The Hon'ble APTEL further held that the resale of power procured under PPA takes place under the PSA between PTC and M. P. Power Generation and the Appellant 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 the Madhya Pradesh State Commission since there is no certainty whatsoever that the power would be resold by PTC to Madhya Pradesh.

On examination of the facts of the present case, it transpires that in the instant case in the entire power purchased by PTC for a period of 35 years under the PPA has been resold to the petitioner i.e. HPGCL by it and that too for the entire period so much so that PTC is not bound to supply power under the PSA from other sources if R-1 declines to supply power under the PPA. Hence there is no uncertainty that power purchased under the PPA would not be sold in the State of Haryana. Secondly as per Section 4.1(v) of the PSA , PTC cannot terminate the PPA without the written consent of the petitioner i.e. HPGCL and this right of HPGCL has been recognized in the PPA. This clearly establishes an interest of HPGCL in the PPA.

The above facts and circumstances make a difference between the present case and the cases covered under the judgments of the Hon'ble APTEL.

Lastly the LAPPL R-1 relied upon a judgment of the Hon'ble Supreme Court delivered in Tata Power Company Ltd. Vs. Maharashtra

Electricity Regulatory Commission and others reported in ELR (SC) 0246. In that case the main issues involved were as under –

(A) Whether recourse to Section 23 of the Act can be taken for issuance of any direction to the generating company?

(B) Whether the Commission while applying the provisions of Section 86(1) (b) of the Act could also take recourse to Sections 23 and 60 thereof?

(C) Whether equitable allocation of power generated by a generating company is permissible?

It is worthwhile to mention here that none of the above issues is involved in the present case; therefore, the judgment in question is of no help to R-1. In the present case HPGCL has filed a petition under section 86 (1) (b) for implementation of PSA and PPA and under the above section this Commission is fully competent to issue direction in this regard as observed by the Hon'ble Supreme Court in its judgment referred to above. Para 120 of the judgment is reproduced hereunder:-

“120. 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 licensees including the price at which the electricity shall be procured from the generating

companies or licenses or from other sources through agreements. As a 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”.

The Commission has taken note of the conflicting views of the parties. We make it clear at this stage that mere pendency of a similar case on the same issues before the Hon'ble APTEL is not a sufficient ground to stay all proceedings in the present case. There has been no stay order from any competent court directing the Commission not to proceed further in this case. After going through the facts of the case and hearing the arguments of the parties, we are of the considered view that HERC has the jurisdiction to consider this case on merits. We are convinced that the PPA between R-1 and R-2 cannot stand in isolation because it is evident from PPA that power is being procured by R-2 not for its own self consumption or distribution. The entire power is being purchased by R-2 for onward sale to the distribution licensees in Haryana. Hence we are not in agreement with the Ld. Advocate of R-1 that we should stop at this stage till the decision of a similar case before the Hon'ble APTEL. Since we would like to hear the case on merit, we refrain from going into further details relating to linkage between PPA and the PSA at this stage.

Summing up, we are of the view that the Commission has full jurisdiction to hear the case. Hence a date is fixed for hearing arguments on merits, which will be intimated to all 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.

Sd/-

(Ram Pal)
Chatterjee)
Member
Chairman

Sd/-

(Rohtash Dahiya)
Member

Sd/-

(Bhaskar