Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated: 04th Nov, 2011

Present: Hon'ble Mr. Justice M. Karpaga Vinayagam, Chairperson
Hon'ble Mr.V J Talwar, Technical Member,

In The Matter Of Appeal No. 15 of 2011
&
I.A. Nos.28,29, 169 & 92 of 2011

Lanco Power Limited,
Lanco House, Plot No.397,
Phase III, Udyog Vihar,
Gurgaon-122 016 **... Appellant(s)**

Versus

1. Haryana Electricity Regulatory Commission,
   Bays 33-36, Sector-4,
   Panchkula-134 112,
   Haryana

2. Haryana Power Generation Corporation Ltd.,
   Urja Bhawan,
   C-7, Sector-6,
   Panchkula, Haryana

3. Power Trading Corporation,
   2nd Floor, NBCC Tower,
   15 Bhikaji Cama Place,
   New Delhi

4. Western Regional Load Despatch Centre,
F-3, M.I.D.C Area, Marol,
Andheri (East),
Mumbai-400 093

5. Chhattisgarh State Power Trading Co. Ltd.,
Vidyut Seva Bhavan,
Danganiya,
Raipur-492 013
Chhattisgarh **....Respondent(s)**

Counsel for Appellant(s): Mr. Shanti Bhushan, Sr Adv
Mr. Manu Nair,
Mr. Adit S. Pujari,
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Mr. L. Vishwanathan

Counsel for Respondent(s):Mr. Parag Tripathi, ASG for R-3
Mr. Anand K Ganesan for R-1
Mr. M G Ramachandran for R-2
Mr. Approve Karol for R-2
Mr. Vikrant Saini for R-2
Mr. Chirag Kher for R-2
Mr. Aashish Bernard for R-3
Mr. Varun Pathak for R-3
Mr. Abhishek Mitra for R-3
Ms. Puja Priyadarshini for R-3,
Ms. Swapna Seshadri for R-4
Ms. Suparna Srivastava for R-5
Mr. Sudhir Kathpalia for R-5

In The Matter Of Appeal No. 52 of 2011
&
I.A. Nos.87 and IA 88 of 2011

Chhattisgarh State Power Trading Co. Ltd.,
Vidyut Seva Bhavan,
Danganiya,
Raipur-492 013
Chhattisgarh **.....Appellant**

Versus

1. Haryana Electricity Regulatory Commission,
   Bays 33-36, Sector-4,
   Panchkula-134 112,
   Haryana

2. Haryana Power Generation Corporation Ltd.,
   Urja Bhawan,
   C-7, Sector-6,
   Panchkula, Haryana

3. Power Trading Corporation,
   2nd Floor, NBCC Tower,
   15 Bhikaji Cama Place,
   New Delhi

4. Lanco Power Ltd.,
   Village Pathadi, PO-Tikeja,
   District-Korba,
   Chhattisgarh-495 674 **.....Respondent(s)**

Counsel for Appellant(s): Mr. Ravi Shankar Prasad, Sr. Adv
Ms. Suparna Srivastava,
Mr. Sudeer Kathpalia

Mr Rahul Srivasrva

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Mr. Anand K Ganesan for R-1
Mr. M G Ramachandran for R-2
Mr. Apoorve Karol for R-2
Mr. Vikrant Saini for R-2
Mr. Chirag Kher for R-2
Mr. Abhishek Mitra for R-3
Mr. Ashish Bernard for R-3
Mr. Varun Pathak for R-3
Ms. Puja Priyadarshini for R-3
Mr. Anuj Bhandari for R-3
Mr. Manu Nair for R-4
Mr. Anuj Beri for R-4
Mr. L. Vishwanathan for R-4.

JUDGMENT

PER HON'BLE MR. JUSTICE M. KARPAGA VINAYAGAM, CHAIRPERSON

1. Both the Appeals being Appeal No. 15/2011 and Appeal No. 52/2011 are being disposed of through this common judgment since both the Appellants in these Appeals have challenged the same impugned order dated 2.2.2011 passed by the Haryana Electricity Regulatory Commission (State Commission).

2. Lanco Power Ltd. is the Appellant in Appeal No. 15 of 2011. Chhattisgarh Power Trading Company Ltd. is the Appellant in Appeal No. 52/2011.

3. By the impugned order, the State Commission directed Lanco Power Limited, the Appellant in Appeal No. 15 of 2011 to supply 300 MW power to the Haryana Power Generation Company (R-2) and restrained Lanco Power Ltd. from supplying the power to Chhattisgarh Power Trading Company Ltd., the Appellant in Appeal No. 52/2011. Challenging the same both the Appellants has filed these Appeals. The short facts are as follows:

I. Lanco Power Limited, the Appellant in Appeal No 15 of 2011 is the generating Company. It entered into a Power Purchase Agreement (PPA) dated 19.10.2005 with the Power Trading Corporation (PTC), the Respondent No. 3 for sale of 273 MW (net power output) from 2nd unit of 300 MW of Lanco Amarkantak Thermal Power Project situated at Pathadi, Korba, Chhattisgarh for a period of 25 years.

II. On 03.6.2006, the 2nd Respondent Haryana Power Generation Corporation Ltd. (Haryana

Power) approached the State Commission for approval of purchase of power from the Appellant's project.

III. On 14.7.2006, the State Commission granted in principle approval for purchase of power from the Appellant's project and the same was communicated to Haryana Power (R-2).

IV. On 18.9.2006, after the grant of in principle approval by the State Commission for purchase of power from the Appellant's Plant through PTC (R-3), the Appellant executed an amendment to the PPA recognizing the assignment of the PPA to purchaser of power generated by the Appellant's plant.

V. In pursuance of the said amendment agreement dated 18.9.2006, the Power Sale Agreement (PSA) was executed on 21.9.2006 between the Haryana Power (R-2) and PTC (R-3) for the sale of 273 MW power purchased from the Appellant under the PPA dated 19.10.2005 to the Haryana Power (R-2) for a period of 25 years.

VI. In the meantime the Haryana Power (R-2) approached the State Commission for approval

of the PSA. The State Commission by the order dated 31.10.2007 refused to grant approval to the PSA for the reason that in terms of the tariff policy of Government of India negotiated route for conclusion of the PSA was no longer permissible.

VII. On 15.11.2007, the Haryana Power (R-2) again filed a Petition for review of the order dated 31.10.2007.

VIII. On 6.2.2008, the State Commission on the Review Petition, conducted hearing of all the parties including the Appellant and approved the PSA entered into between Haryana Power (R-2) and PTC (R-3).

IX. On occurrence of certain events including to change in Government policies, it became impossible for the Lanco Power Limited, the Appellant to perform its obligation under the PPA on its existing terms. This was communicated by the Appellant to the PTC, the 3rd Respondent.

X. On 13.5.2010, the PTC (R-3) filed a Petition before the State Commission seeking for the

directions to the Haryana Power (R-2) to purchase electricity at a tariff calculated in accordance with the Central Commission's Regulations, 2009 and the PSA to reflect the revised tariff.

XI. The Haryana Power (R-2) separately filed a petition before the State Commission seeking for a direction against the PTC, the 3rd Respondent and the Appellant to comply its obligation under the PSA in favour of the Haryana Power and for the direction to restrain the Appellant from selling the contracted capacity to any 3rd party. The State Commission entertained the petition and issued notice to the parties concerned including the Appellant.

XII. On receipt of the notice in the said petition, the Appellant filed a reply before the State Commission raising the preliminary objection with regard to jurisdiction of the State Commission over the Appellant.

XIII. The matter was heard on 29.10.2010 by the State Commission. After hearing the parties, the order was reserved by the State Commission in

both the Petitions filed by the PTC (R-3) and as well as by the Haryana Power (R-2).

XIV. In the meantime i.e on 1.8.2009, Lanco Power Ltd., the Appellant had entered into an Implementation Agreement with the Government of Chhattisgarh. By this Implementation Agreement, Lanco Power Ltd. had to provide 35% of the Net Power generated by the Amarkantak Project at variable charges to any person nominated by the Government of Chhattisgarh. In furtherance of this arrangement, the Lanco Power Ltd. received a letter on 3.1.2011 from Chhattisgarh State Power Trading Company Ltd., asking the Appellant to sign the PPA for supply of 35% of the power from Unit-2 to the Chhattisgarh Power Trading Company failing which, the Government of Chhattisgarh would be constrained to withdraw all facilities and concessions provided for the Lanco Power generating plant which is situated in Chhattisgarh.

XV. Under those circumstances, pending orders reserved by the State Commission, the

Appellant Lanco Power Ltd. terminated the PPA between the Appellant and PTC (R-3) by the letter dated 11.01.2011 on the reason that PTC (R-3) had failed to comply with one of the mandatory Conditions Precedent of the said PPA. Thereupon, it executed the PPA with Chhattisgarh Power Trading Company Limited for supply for 35% of the Net Power generated by the Appellant's project.

XVI. At that stage, the State Commission passed the impugned order dated 2.2.2011 holding that it has got the jurisdiction. It further directed Lanco Power Ltd, the Appellant to supply 300 MW power from Unit-2 to Haryana Power (R-2) and restrained the Appellant from selling the same to Chhattisgarh State Power Trading Company, the 3rd party.

4. Aggrieved over the finding in this order dated 2.2.2011 regarding the jurisdiction, the Appellant Lanco Power Limited has filed this Appeal in Appeal No.15 of 2011. Similarly, aggrieved over the portion of the order preventing the Chhattisgarh State Power Trading Company Limited, the 3rd party from getting the supply on the basis of the

implementation agreement, has filed the Appeal No.52 of 2011 before this Tribunal.

5. The Learned Senior Counsel for the Appellant in Appeal No.15 of 2011 i.e. Lanco Power Limited has challenged the impugned order only on the ground that State Commission has no jurisdiction to deal with the dispute and to give any direction to the Appellant. The contentions urged by the Appellant assailing the impugned order are as follows:-

(a) The Appellant is a generating Company having its plant in Chhattisgarh and having its Head Office in Hyderabad. The PTC (R-3) is an Inter-state Trading Licensee. It is having its Head Office at New Delhi i.e. outside the jurisdiction of the Haryana State Commission. The PPA specifies that the Delivery Point for the power out put under the PPA is located in the State of Chhattisgarh. The Power purchase agreement which has been executed between the Appellant and PTC at New Delhi which is outside the jurisdiction of the State Commission. Therefore, the entire transactions of the sale of electricity under

the PPA have taken place outside the State of Haryana.

(b) The Appellant (Lanco Power Ltd.) has not entered into an agreement with the Haryana Power (R-2). On the other hand, the Appellant had a contract only with PTC (R-3) which is an inter-state trading Licensee, operating under license granted by the Central Commission and not by the State Commission.

(c) In a similar case this Tribunal rendered judgment in Appeal No.71 of 2008 and Appeal No.07 of 2009 holding that the State Commission has no jurisdiction in respect of an agreement between a generating Company and an inter-state trader which applies to the present case.

(d) In the present case, the PPA and PSA were two distinct and separate agreements executed between two different sets of parties. The Haryana Power is not the party to the PPA. Similarly, the Appellant is not a party to the PSA. Therefore Section 86 (1)(b) does not

confer jurisdiction to the State Commission to issue any directions as against a generating Company in the absence of an agreement between the generating Company, the Appellant and the 2nd Respondent Haryana Power , the deemed licensee.

6. In reply to the above ground urged by the Appellant in Appeal No.15 of 2011, the Learned Senior Counsel for the Respondents namely Haryana Power and PTC has made the following submissions:

(a) The "Clear and Present Nexus" between the PPA and PSA has been made out from various clauses of the PPA and amendment Agreement to the PPA. As per the terms of the PPA, the PTC (R-3) was required to enter into PSA with the Purchaser for onward sale of the power from the Appellant's plant. The requirement to execute the PSA was an intrinsic and material provision of the PPA as the performance of the PPA is completely based upon the execution of the PSA. As such these two documents are inter-dependent on one another.

(b) In fact, clause 16.3.4 of the PPA requires the PTC (R-3) to provide to the Appellant Lanco Power Limited with the contract details of the person concerned as the Purchaser to whom copies of communication are required to be sent under the PPA.

(c) Article 16.13.2 of the PPA also makes a specific provision for recording the details of the purchaser. That apart, the Appellant on its own had approached the Government of Haryana and communicated its desire to sell the power through PTC (R-3) to the utilities of Haryana.

(d) There is a formal amendment of the PPA on 18.9.2006 which specifically mentions that the PTC (R-3) proposes to include the purchaser as an affiliate specifically in the event that the PPA is sought to be assigned directly to the Purchaser.

(e) The right of the Purchaser (R-2) who is a party to the PSA is recognized under the PPA. Therefore, the PPA and PSA are inter dependent and inter-connected. Further, the Appellant has itself made admissions regarding inseparability

and nexus between the PPA and PSA in various statements made by the Appellant before the State Commission.

(f) In review petition for approval of PSA, the State Commission had heard all the concerned parties including the Appellant. In that process, the Appellant (Lanco Power Limited) pleaded that the sale of power by the Appellant to the Haryana Power (R-2) through the PTC is permissible through the negotiated route under the tariff policy. On that basis, the State Commission approved the purchase of power by the order dated 6.2.2008. During the said proceedings the Appellant had categorically stated that PPA and PSA are inter-related and the Appellant is an important party to PSA. That apart it actively participated in the proceedings and enabled the State Commission to pass an order on 6.2.2008 approving the PSA. There is no challenge to the above proceedings and orders. Therefore, impugned order, holding that it has got jurisdiction, is perfectly valid.

7. The Learned Senior Counsel for the Appellant (the 3rd party) in other Appeal No.52 of 2011 would strenuously contend that the impugned order dated 2.2.2011 directing the Lanco Haryana Power Limited (Appellant in Appeal 15/2011) not to supply the 35% of the contractual power to the Chhattisgarh State Power Trading Company, the Appellant in Appeal No.52 of 2011 is erroneous for the following reasons:

(a) The State Commission cannot adjudicate upon the validity of the implementation agreement and contractual agreement entered into by the Chhattisgarh State Power Trading Company Limited (the Appellant in Appeal 52/2011) with Lanco Power Limited, the Appellant in Appeal No.15 of 2011 when both these parties are situated in the State of Chhattisgarh i.e. outside the state of Haryana.

(b) The findings of the State Commission that the PPA entered into by the Appellant Lanco Power Ltd. and Chhattisgarh State Power Trading Company by seeking 35% of the contractual power is in violation of PPA between Lanco Power and PTC is beyond its jurisdiction when

the Chhattisgarh State Power Trading Company has never been a party either to the PPA between the Lanco Power and PTC nor has it been made as a party to the proceedings before the State Commission in relation to the said PPA.

(c) The contractual arrangements between the Appellant Lanco Power Limited (Appellant in Appeal No.15 of 2011) and 3rd party (the Appellant in Appeal No.52 of 2011) do not come under the jurisdictional purview of the State Commission so as to empower the State Commission to pass the orders affecting the right of the obligation arising out of the said contractual arrangements.

(d) The State Commission in its impugned order dated 2.2.2011 had framed the specific issue relating to the 3rd party sale. The said issue is as follows:

"Whether any relief can be granted to the Lanco Power Limited in terms of the reduction in contract capacity in view of the implementation of agreement signed by them with Chhattisgarh Government ?".

(e) While deliberating upon the said issue, the State Commission has arrived at a curious finding that there has been a "violation of agreement" by the Government of Chhattisgarh as against the agreement entered into between the Haryana Power,PTC and Lanco Power Limited. This finding has been given by the State Commission as to the validity and enforceability of the Implementation Agreement entered between the Lanco Power and Chhattisgarh Government without making them as a party and without giving opportunity to them before passing the adverse orders as against Chhattisgarh State Power Trading Company (the Appellant in Appeal No.52 of 2011).

(f) There has been a complete violation of principle of natural justice as regards the Chhattisgarh State Power Trading Company as it has not been made a party to the proceedings leading to the passing of the impugned order nor any notice has been served upon it by the State Commission. Without doing that, an ex-parte order has been passed by the State Commission

against the Chhattisgarh State Power Trading Company thereby its subsisting contractual rights have been seriously prejudiced in complete violation of the principles of natural justice. Therefore, the impugned order with regard to the said portion of the order is liable to be set aside.

8. In reply to the contentions urged by the Chhattisgarh State Trading Haryana Power Limited, the Appellant in Appeal No.52 of 2011, the Learned Counsel for the Respondents have made the following submissions:

a) The rights and obligations being contractual in nature are subjected to any prior contract entered into by any of the contracting parties and subsequent contracting party cannot take away the rights of the contracting parties envisaged in the prior contract. By entering into a contract with PTC, much before the MOU with Government of Chhattisgarh dated 7.9.2008, the Lanco Power Limited had already parted with the right to sell the power which has been contracted to PTC. Lanco did not have any further capacity for contracting with other

person. In other words, the Lanco Power Limited could not have vested with the Government of Chhattisgarh what it did not have it at the time when the MOU was entered. Therefore, it is for the Government of Chhattisgarh to proceed against the Lanco Power Limited for getting 35% of the capacity from other units in a separate proceeding.

b) As regards the violation of principles of natural justice, the State Commission of Haryana was adjudicating on prior rights of Haryana Power and PTC in respect of Lanco Power Ltd. Therefore, it was not necessary for the State Commission to hear the Government of Chhattisgarh or Chhattisgarh State Power Trading Company.

9. In the light of the above contentions urged by the learned Counsel for the parties in both these Appeals, the following two questions would arise for consideration:

(i) Whether the State Commission has got the jurisdiction to go into the dispute in question between the parties in the facts and

circumstances of the present case as required in the Electricity Act, 2003? (Appeal No. 15/2011)

(ii) When the Chhattisgarh State Power Trading Company has not been made a party to proceedings before the State Commission nor has any notice been served upon it by the State Commission, whether any adverse order could be passed as against the Chhattisgarh State Power Trading Company in complete violation of the principle of natural justice? (Appeal No. 52/2011)

10. Let us now discuss the above questions one by one.

11. The first issue relates to jurisdiction raised by the Appellant in Appeal No. 15/2011.

12. According to the Appellant Lanco Power Limited, the jurisdiction of the State Commission can be invoked only in respect of the PSA between the PTC (R-3) and Haryana Power (R-2) and it cannot extend its jurisdiction to the PPA between the Appellant and PTC (R-3). In short, the case of the Appellant is that the State Commission has no jurisdiction to adjudicate on the dispute between the Appellant

generating Company having its plant in Chhattisgarh and the 3rd Respondent PTC which is a inter-state Trading licensee especially when there is no nexus or privity in respect of the PPA dated 19.10.2005 entered between the Appellant Lanco Power Limited, and the PTC (R-3) and the PSA dated 21.9.3006 entered into between Haryana Power (R-2) and PTC (R-3).

13. At the outset, it shall be stated that, it can not be debated that when there is no nexus and privity between the PPA and PSA, jurisdiction of the State Commission cannot be invoked. Therefore, in order to decide about the issue of jurisdiction, we have to first find out as to whether there is any nexus or privity in respect of the PPA entered into between the Appellant Lanco Power Limited and PTC (R-3) and PSA entered into between the PTC (R-3) and Haryana Power (R-2).

14. While dealing with this question, it would be proper to analyse the legal position with reference to the functions of the State Commission. Section 86 (1) (f) of the Electricity Act, 2003 (the Act) provides as under:-

(86) "*Functions of State Commission*

(1) *The State Commission shall discharge the following functions, namely:-*

.....

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

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

The State Commission regulating the tariff of the consumers of the State will be in a better position to adjudicate on such dispute taking into consideration the interest of the consumers of the State.

16. If a generating Company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such consumers. This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the Appropriate Commission to exercise jurisdiction. If the sale and purchase of power has a nexus to the State, the concerned State Commission will have jurisdiction notwithstanding the fact that there is no direct contractual arrangement between the generating company and the distribution licensee. In this context, it would be worthwhile to refer to Section 64 (5) of the Electricity Act, 2003 which is as under:

> "*(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under*

this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor".

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

18. The trading activity has been recognized as a distinct activity under the Act. The statement of objects and reasons of the Act provides as under:

"(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary".

19. The term trading has been defined in Section 2 (71) of the Act as under:

"(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1)(j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:

"66.Development of market.

The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard"

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not

functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

22. The above aspects is clear from Section 86 (1) (b) of the Electricity Act which reads as under:

> ***" 86.Functions of State Commission***
>
> *(1) 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;"*

23. As per the above Section, the purchase of electricity is being dealt as a procurement process of the distribution licensee which would include through agreements for purchase of power for distribution. It is not confined to a single aspect of an Agreement. Thus the purchase of electricity by the Haryana Power (R-2), for distribution within the state of

Haryana through another intermediary trader (R-3) and the supply of the same by the generating Company (Appellant) through such intermediary trader (R-3) is a process within the meaning of the Section 86(1)(b) of the Act.

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

25. According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the

Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).

26. Now let us see as to whether there has been nexus between the PPA and PSA.

27. It is not disputed that both the PPA dated 19.10.2005 as amended on 18.9.2006 between the Lanco Power (Appellant) and PTC (R-3) and the PSA dated 21.9.2006 between PTC (R-3) and Haryana Power (R-2) duly recognize the jurisdiction of the Appropriate Commission to determine the tariff both under the PPA and PSA. They also recognize the approval of such tariff by the Appropriate Commission as a condition precedent.

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

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

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

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

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

31. In order to establish this aspect, the Learned Senior Counsel for the Respondent has brought to our

notice the following events which took place after the PPA dated 19.10.2005 entered into between the Lanco Power, the Appellant and PTC (R-3) through some documents.

32. The first document is the Letter dated 28.7.2006. The perusal of the letter dated 28.7.2006 sent by PTC (R-3) to the Appellant would show that the PTC identified the Haryana Power (R-2) as the purchaser of entire 300 MW. It also mentions about the confirmation of the sale of entire power to Haryana Power (R-2) and in principle approval granted by Government of Haryana. Its letter also refers to the draft PSA being finalized by the State Commission.

33. The second document is the Amendment Agreement dated 18.9.2006 . This shows that after grant of in principle approval by the State Commission and approval of Government of Haryana for the purchase of power from PTC purchased from the Appellant's project, the Appellant executed an amendment to the PPA. The amendment agreement recognized the assignment of the agreement to the purchaser with the following terms:

> ***"6. A new Article 16.6.5 of the PPA in Amendment Agreement shall be as follows:***

16.6.5 Notwithstanding the provisions of this Article 16.6, in the event that a default under the PPA does not have the likelihood of being cured and the PPA is likely to be otherwise terminated, PTC may assign its rights and transfer its obligations under this Agreement to the Purchaser provided that the Purchaser expressly assumes all obligations of PTC under this Agreement and is in a position to perform them".

34. The above article in the amended PPA would clearly show that the PTC (R-3) may assign its rights and transfer its obligation to the Purchaser.

35. The 3rd document is execution of PSA dated 21.9.2006. This document shows that in pursuance of the Amendment Agreement dated 18.9.2006, the PSA was signed on 21.9.2006 between the PTC (R-3) and Haryana Power (R-2). The PSA specifically referred to the purchase of power by PTC from the Appellant's project as per PPA. One of the conditions precedent for the effectiveness of the PPA between the Appellant and PTC was fulfilled with the execution of the PSA on 21.9.2006.

36. The next document is the letter dated 15.2.2006 by the Appellant to the State Government of Haryana. As pointed out by the learned Counsel for the Respondents, even before the Amendment

Agreement dated 18.9.2006 and the PSA dated 21.9.2006, the Appellant on its own approached the Government of Haryana to persuade them to purchase power from the Appellant's project through PTC.

37. After execution of the PPA as well as the PSA, Haryana Power(R-2) approached the State Commission for approval of the PSA between the R-2 and R-3. In this proceeding, the State Commission, not only heard the Respondent Haryana Power (R-2) and PTC (R-3) but also the Appellant and only on the basis of statement made by the Appellant, it approved the PSA by the order dated 6.2.2008. The relevant extract of the order dated 6.2.2008 relating to the role played by the Appellant is as follows:

> *"Consequently, HPGCL, Power Trading Corporation (PTC) and Lanco Amarkantak Power Private Ltd., were directed to appear before the Commission on 04.01.2008 for making their presentation. Lanco Amarkantak Power Private Limited was also considered a concerned party since they are the generator with whom long term PPA has been signed by PTC India Ltd for supply of power and the same PPA was Annexure-I to PSA which has been put up for approval of this Commission. The hearing took place as scheduled".*

".....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 levelised cap tariff of Rs.2.32/kWh at Generator's bus bar for the entire term of the agreement".

38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those clauses are reproduced herein:

"(C) *The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project* ***for onward sale by PTC.***

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, ***for sale of such power from the Project.***

(F) ***A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission*** *and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement". {emphasis added}*

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

40. As indicated above, the purchaser in the present case namely the Haryana Power (R-2) has been specifically identified before the execution of the final PSA and the said information was conveyed to the Appellant by PTC (R-3) through its letter dated 28.7.2006. It was only thereafter, that an amended PPA was executed between the PTC (R-3) and the Appellant on 18.9.2006 whereby a new article bearing No.16.6.5 was added. Under this amendment, the PTC may assign its right and transfer its obligations under the PPA to the Purchaser namely Haryana Power (R-2).

41. The above amendment was carried out keeping in mind that the ultimate purchaser, Haryana Power (R-2) had been identified by PTC (R-3) for sale of power from Unit-II of the project in terms of the PPA dated 19.10.2005.

42. Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.

43. The Appellant has contended that the State Commission approved only the PSA by the order dated 6.2.2008 and not the PPA and therefore they are unconnected documents. This contention is misconceived. It is to be pointed out that the fundamental basis on which the PSA was approved by the State Commission was that the PSA is based upon the PPA and PPA was annexed to PSA. Thus in approving PSA, State Commission has also approved the PPA as an Annexure to PSA. The PSA deals with the sale of electricity by PTC (R-3) to Haryana Power (R-2) based upon the purchase of electricity by PTC (R-3) from Lanco Power Ltd, the Appellant.

44. As indicated above, the order dated 6.2.2008 was passed by the State Commission only after involving the Appellant as a party. The contents of the order dated 6.2.2008 would reveal that the Appellant had

confirmed that PFC had commenced the project appraisal in October, 2005 (before notification of Tariff Policy on 6.1.2006) and as such PPA/PSA signed between the Appellant – PTC- Haryana Power qualifies for exemption under clause 5.1 of the Tariff Policy. As a matter of fact, this order dated 6.2.2008 is a review of the earlier order passed by the State Commission dated 31.10.2007 in which the State Commission originally refused to grant approval for the reason that in terms of the tariff policy of Government of India, the negotiated route for conclusion of the PSA was not permissible.

45. During the hearing on the review petition filed by the Haryana Power (R-2), the State Commission directed all parties to submit their written submissions. The Appellant in its written submission dated 12.1.2008 requested the State Commission to approve the PSA with reference to the sale of the power from the Appellant's project to the Haryana Power (R-2). The relevant extracts of the said letter dated 12.1.2008 sent by the Appellant to the State Commission are reproduced below:

1. Background:

Lanco Amarkantak Power Pvt Ltd (LAPPL) and PTC signed PPA on 19.10.2005. PTC in turn entered into onward Power Sale Agreement with HPGCL on 21.9.2006, ***wherein the PSA's Annexure I has PPA (signed between LAPPL and PTC) and hence, PPA forms an integral part of PSA. Thus, LAPPL is an important party in the PSA for supply of power to the Haryana State as per the agreement.***

*During the hearing, it was submitted that PPA/PSA of LAPPL-PTC-HPGCL qualifies for exemption under clause 5.1 of the Tariff Policy, as PFC commenced the project appraisal in October, 2005 (before notification of Tariff Policy on 6.1.2006); and submitted, copies of relevant communication from PFC were already furnished to PTC/HPGCL".****{emphasis added}***

46. From bare reading of the above letter it is clear that the Appellant had specifically pleaded before the State Commission that the PPA forms integral part of PSA and the Appellant is an important party to the PSA for supply of power to the Haryana State. The Appellant in the said letter also affirmed that the sale of power by the Appellant to Haryana Power through PTC was a negotiated route which is permissible under the Tariff Policy as effective steps were already taken prior to the cut off date mentioned therein. On the basis of this affirmation, the State Commission passed the order dated

6.2.2008 giving approval to the PSA. The relevant extracts of which is as follows:

> *"The Commission after initial examination of the review petition, considered it appropriate to hear the concerned parties before taking a final decision in this case. Consequently HPGCL Power Trading Corporation (PTC) and Lanco Amarkantak Power Private Ltd, were directed to appear before the Commission on 4.1.2008 for making their presentation Lanco Amarkantak Power Private Limited was also considered a concerned party since they are the generator with whom long germ PPA has been signed by PTC India Ltd, for supply of power and the same PPA was Annexure-I to PSA which has been put up for approval of this Commission. The hearing took place as scheduled.*
>
> *……After a detailed hearing of the parties the Commission directed all of them to submit their views and their response to the query (ies) raised by the Commission during the course of hearing in writing by 14.1.2008. The parties complied with the direction within the stipulated date*
>
> ***…..**However, M/s. Lanco Amarkantak Power Private Ltd. in its letter LAPPL/PTC/403/7817 dated 12.01.2008 filed in response to the direction given by the Commission at the time of hearing on 04.01.2008 has submitted that the operation of the pool account cannot be a notional one as per the PSA .*
>
> *……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 capitalization tariff of Rs.2.32kWh at Generator's bus bar for the entire term of the agreement**...**"*

47. So, the above order would clearly show that the purchase of power on the strength of PSA was approved by the State Commission mainly on the basis of the admissions made by the Appellant before the State Commission.

48. When the Appellant actively participated in the proceedings, and induced all the parties concerned to act upon its representation that it would abide by the sale of power needed by Haryana Power for distribution to its consumers and particularly when the Appellant acted upon those agreements namely PSA and PPA entered into between the parties and in the absence of the challenge to the above proceedings and the orders passed by the State Commission on 6.2.2008 by the Appellant, can the Appellant be permitted to take a different stand? The answer is emphatic "No".

49. This aspect could be viewed from yet another angle.

50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC

was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant's project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA. They are as follows:

> *"RECITAL C. The Company has requested PTC to purchase the contracted capacity and power output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operations Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operations Date of the Project* ***for onward sale by PTC" (emphasis supplied)***
>
> *"RECITAL E. PTC will enter into a Power Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project".*
>
> *"RECITAL F. A petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable* ***for purchase and sale of the***

above power by PTC *based on the CERC norms, subject to the ceiling as agreed upon by the Parties in this Agreement"* ***(Emphasis supplied).***

"3.1.3 Conditions Precedent that may be waived by mutual consent:

The following are the Conditions Precedent, which may be waived by mutual written consent of both the Parties:

(vii) PTC shall have executed the Power Sale Agreement with the Purchaser*."*

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

16.13.4 Within seven (7) days of signing the PSA, PTC shall provide the Company with contact details of the person concerned at the Purchaser to whom copies of communication are required to be sent under this Agreement by the Company".

52. With an intention to tie-up with power utilities for sale of power from the Appellant's project through PTC, as mentioned earlier, the Appellant itself approached the Government of Haryana and voluntarily communicated its desire to sell the power

through PTC to the utilities of Haryana through its letter to the Government of Haryana dated 15.02.2006. Thereafter, the PTC through its letter dated 28.7.2006, informed the Appellant that the entire power from the 300 MW Unit-II of the Project has been offered for sale to the Haryana Power and that Haryana Power (R-2) has been given in principle approval for purchase of its power by the Haryana Government. Through this letter, the PTC also informed the Appellant that the draft PSA had already been filed by the Haryana Power before the State Commission for finalization and approval.

53. In view of these developments as mentioned above, the amendment of the PPA was carried out on 18.9.2006. This amendment specifically mentions in Recital-C(i) that Respondent No.3, PTC has proposed to "include the purchaser as an affiliate specifically in the event that the PPA is sought to be assigned directly to the purchaser in the event that a termination process is set in motion under the PPA. This amendment was carried out keeping in mind the identification of Haryana Power (R-2) as a Purchaser. In that context, the Appellant approached the Government of Haryana directly and

expressed its desire to supply entire power to Haryana. At this stage, it would be useful to refer to the insertion of new article 16.6.5 which is quite relevant. The same is as follows:

> *" 6. A new Article 16.6.5 of the PPA shall be as follows:*
>
> *16.6.5 Notwithstanding the provisions of this Article 16.6.5 in the event that a default under the PPA does not have the likelihood of being cured and the PPA is likely to be otherwise terminated, PTC may assign its rights and transfer its obligations under this Agreement to the Purchaser provided that the Purchaser expressly assumes all obligations of PTC under this Agreement and is in a position to perform them.*
>
> *The Company shall, in a form and manner acceptable to the Company, PTC and the Purchaser, execute the consent to such assignment, if required, or the required acknowledgement of the creation of such assignment in accordance with this Article 16.6.5, as is reasonably requested by PTC to give effect to such assignment"*

54. This would clearly indicate that in the present case, the Appellant was not only aware that he was bound to honour the assignee of PTC in the PPA, but also aware as to the identity of such a purchaser of power as per the PPA, namely Haryana Power (R-2).

55. It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:

> *"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 the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the "Project"), for a period of twenty five (25) years from the Commercial Operation Date of the Project".*

56. In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down

in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC's obligation to participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.

57. As per clause 4.2 (i), it was the purchaser's obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2).

58. Now, we will recall the instances wherein the Appellant itself made categorical admissions regarding the inseparability of the nexus between the PPA and PSA, which are referred to in earlier paragraphs.

59. As mentioned above, the PSA was submitted by Haryana Power (R-2) before the State Commission for its approval. Though it was rejected by the State Commission on 31.10.2007 it was approved only in the Review petition filed by the Haryana Power, on the basis of the plea by the Appellant recognizing the nexus between the PPA and PSA. In fact, Appellant sent the letter to the Commission on 12.01.2008 with regard to the above aspect. In that letter it was admitted by the Appellant that it was an important party in the PSA for the supply of power to the Haryana State as per the agreement. The relevant portion from the letter dated 12.1.2008 is as follows:

> *"1. Background:*
>
> *Lanco Amarkantak Power Pvt Ltd (LAPPL) and PTC signed PPA on 19.10.2005. PTC in turn entered into onward Power Sale Agreement with HPGCL on 21.9.2006, wherein the PSA's Annexure I has PPA (signed between LAPPL and PTC)* ***and, hence, PPA forms an integral part of PSA. Thus LAPPL is an important party in the PSA for the supply of power to the Haryana State as per the agreement.***
>
> *....."* ***(emphasis supplied)***

60. In view of the admissions made by the Appellant it cannot be permitted for the Appellant to say that there is no nexus between the PPA and PSA.

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.

62. In other words, while interpreting the provisions of the Act, the entire Act will have to be looked into totality as one integral whole and not in an isolated manner. That is why; the Act itself does not seek to look at the electricity industry and the consumer interest on a segmented or fragmented basis but as cohesive whole. It is for this reason that the Act has been given in Section 174 overriding effect over all

the other legislations which are inconsistent with the provisions of the Act.

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

64. At the risk of repetition, it is to be stated that the Appellant itself began to negotiate with the Government of Haryana for sale of the capacity available under the PPA entered into with PTC for Haryana. This is clear from the letter of Appellant sent to the Government of Haryana on 15.12.2006. The relevant portion of the letter is a as follows:

> *"Power Purchase Agreement (PPA) with PTC India Limited for purchase of entire power from the first & second 300MW units.*
>
> .....
>
> ***We intend to tie up with power utilities for sale of power from the above project through PTC and look forward to enter into a long-term PPA. Keeping in view the merits of coal fired base load project and growing power requirements of Haryana, we feel there could be win-win situation for both of our organizations. We***

therefore look forward for mutually beneficial long-term association" {emphasis supplied}

65. The above letter would reveal that the Appellant had intended to sell the power to an ultimate beneficiary i.e. the State of Haryana. The use of the expression 'that the capacity is available for sale through PTC', would clearly show that the Appellant, instead of PTC communicating to the State of Haryana about the purchase power, has directly approached the Government of Haryana and made a representation on the status of the project. Thus, the Appellant on its own approached the Government of Haryana for sale of 300 MW capacity to the State of Haryana through PTC. On this basis, in principle approval was granted by the State Government. After getting approval from the Haryana Government, the Appellant and PTC executed an amendment to the PPA. Through this amendment to PPA, the assignment of the agreement by the PTC to the Purchaser has been recognized. In other words, only in pursuance to this amendment, the PSA was signed between the Haryana Power (R-2) and PTC (R-3). Only thereupon, on the basis of the in principle approval granted by the Haryana

Government, Haryana Power (R-2) approached the Commission for approval of the PSA.

66. As stated above, the State Commission initially did not grant approval on the reason that negotiated route for conclusion of the PSA was no longer permissible. But in the Petition for the Review on the refusal order filed by the Haryana Power(R-2) the State Commission felt that the Appellant, Lanco Power Limited also was a necessary party to the PSA and thereby impleaded the Appellant for proceeding for considering the grant of the PSA. Accordingly, the Appellant appeared before the State Commission through its representative. The Appellant specifically represented before the State Commission that the Appellant's project and the sale of power by the Appellant to the Haryana Power (R-2) through the PTC (R-3) through negotiated route is permissible under the tariff policy as effective steps were taken even prior to the cut off date. Even in the written submissions filed by the Appellant before the State Commission in these proceedings, the Appellant brought out the status of the project and requested the State Commission to approve the sale of power from the Appellant's

project to Haryana. This plea of admission made by the Appellant before the State Commission would confirm that the PPA forms an integral part of the PSA. Though the Appellant was not a party to the PSA, it became an important party in the proceedings before the State Commission for the approval of the PSA. On that basis, the State Commission approved the PSA through its order dated 6.2.2008. In its order, the Commission ahs observed as under:

> *"The Commission after initial examination of the review petition, considered it appropriate to hear the concerned parties before taking a final decision in this case. Consequently HPGCL Power Trading Corporation (PTC) and Lanco Amarkantak Power Private Ltd, were directed to appear before the Commission on 4.1.2008 for making their presentation Lanco Amarkantak Power Private Limited was also considered a concerned party since they are the generator with whom long term PPA has been signed by PTC India Ltd, for supply of power and the same PPA was Annexure-I to PSA which has been put up for approval of this Commission. The hearing took place as scheduled."*

67. The relevant observation of the Commission as referred to above would clearly indicate that the Appellant itself admitted that the Appellant will be willing to accept the tariff fixed by the appropriate

Commission. Only on the basis of the said stand, the State Commission approved the PSA. If such a stand had not been taken by the Appellant before the State Commission, it is quite possible that the State Commission would not have approved the PSA. In other words, in case the Appellant had taken a stand before the State Commission that the PSA and PPA are two distinct documents, and as such the Commission has no jurisdiction to adjudicate between the two, the Commission would not have approved the PSA.

68. Therefore, the Appellant's present stand that they are two distinct documents is quite contrary to the earlier stand taken by the Appellant.

69. Let us now examine various provisions of the PPA and PSA to determine whether two documents are interrelated and dependant on each other?

70. Recital E to the PPA, Clause 3.1.3, Clause 3.3.1 and 3.3.2 would deal with PSA and it necessity in implementation of PPA. These are reproduced below:

> *"(E) PTC will enter into a Power Sale Agreement ("PSA') with one or more Purchaser, for sale of such power from the Project."*

71. Clause 3.1.3 inter alia, read as under:

> ***"3.1.3 Conditions Precedent that may be waived by mutual consent***
>
> *The following are the Conditions Precedent, which may be waived by mutual written consent of both the parties.*
>
> .....
>
> - *PTC shall have executed the Power Sale Agreement with the Purchaser."*

72. Clause 3.3.1 provides for the consequences of condition precedent being not satisfied as under:

> - **"Right to terminate**
>
> *If the conditions Precedent listed in Article 3.1 are not duly satisfied or waived by PTC or the Company, as the case may be, within twelve (12) months of the date of execution of this Agreement, or such extended time as may be mutually agreed between the parties in writing, either Party may terminated this Agreement by giving a written notice of termination to the other party, not earlier than twelve (12) months from the date of execution of this Agreement; and this Agreement shall stand terminated twelve (12) months from the date of such notice unless the Conditions Precedent outstanding are duly satisfied or waived.*
>
> *3.3.2 Neither Party shall have any liability whatsoever to the party as a result of the termination of this Agreement pursuant to this Article."*

73. The perusal of these provisions would clearly indicate that the PPA between the Appellant and the 3rd Respondent PTC would not have become effective at all and would have been automatically terminated but for the PSA executed between the Haryana Power (R-2) and PTC (R-3) later. It is, therefore, clear that the Appellant itself envisaged for entering into the PSA for the sale of power by PTC (R-3) to Haryana Power (R-2) as a condition precedent. The inter-linking of the PPA with PSA is therefore a basic feature of the PPA.

74. Let us now see the relevant clauses indicating the price at which the power will be sold by the Appellant to PTC (R-3). Recital 'F' and clause 3.1.3 (vii) of the PPA is relevant in this regard. As per these clauses the appropriate Commission would fix the tariff for purchase and sale of power by the PTC (R-3). Recital 'F' and clause 3.1.3 (vii) are reproduced below:

> *"(F) A petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and* ***the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC*** *based on the CERC norms.*

Subject to the ceilings as agreed upon by the Parties in this Agreement"

3.1.3 (vii) ***the Appropriate Commission shall have regulated the tariff for the purchase of electricity from the Project by PTC;" {emphasis added}***

75. The above Recital F clearly provides that the petition for approval of tariff for sale of the power shall be filed before the appropriate Commission and the tariff as approved by such appropriate Commission will be applicable for purchase by PTC. From this, it is quite evident that tariff for purchase by the PTC and sale of power by the PTC are inter related as PTC being a inter-state trading licensee is entitled for the margin fixed by the Central Commission.

76. The question now arises as to who has to file the petition for approval of tariff. The answer would be that generating Company (the Appellant) alone has to file the Petition for approval of the Tariff with full details as per prevalent regulations of the appropriate Commission for tariff approval. The PTC (R-3) being a trading licensee cannot file the petition as it will not have any details.

77. The next question arises which would be the Appropriate commission. The answer to this would

be the State Commission in whose jurisdiction the power is likely to be consumed through the concerned distribution licensees in terms of sub-section 5 of Section 64 of the Act. In the present case, the Power purchased by PTC (R3) from the Appellant would be distributed to the consumers through the Haryana Power (R2) in the State of Haryana. Therefore, it is the Haryana Electricity Regulatory Commission who would approve the tariff for sale of power to the PTC from the Appellant's project.

78. As indicated above, as per clause 3.1.3 dealing with Conditions Precedent, the fixation of tariff by the Appropriate Commission is an essential condition precedent and non-fulfillment of the condition could have terminated the PPA itself.

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

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

81. The Learned Counsel for the Appellant cited the judgement of Hon'ble Supreme Court in Tata Power v. Maharashtra State Commission reported in 2009 (16) SCC 659 in which it is held that the State commissions, in exercise of powers under Section 86 (1) (b) do not have the powers to pass directions against a generating company in the absence of a contract between distribution licensee and the generating company. He also cited two other decisions of this Tribunal in Appeal No.71 of 2008 and Appeal No.7 of 2009. In these decisions, it is held that the dispute between the generating Company and inter-State trading licensee are outside the purview of the State Electricity Regulatory Commission. On the strength of these decisions, it is contended by the Appellant that the State Commission has no jurisdiction.

82. On the other hand, the Learned Counsel for the Respondent contended that the facts of the present case are entirely different from the facts of those decisions as such the ratio decidendi in those Appeals will have no application to the present facts of the case. The Learned Senior Counsel for the Respondent in support of his plea cited the judgment of this Tribunal rendered in Appeal No.200/2009 in the matter of Pune Power Development Private Limted v. Karnataka Electricity Regulatory Commission. In this case, the Tribunal has held that the Karnataka State Commission has got the jurisdiction as there has been a clear and present nexus between the trading licensee and the distribution licensee of Karnataka.

83. We have gone through the decision cited by the parties. On going through these decisions we are of the view that Appeal No.71 of 2008 and Appeal No.7 of 2009 would not apply to the facts of the present case. In Appeal No.71 of 2008, the issue before the Tribunal was as to whether the State Commission had the power to determine the tariff for a generating company which is situated outside its jurisdiction and selling power to PTC, an inter-state

trading licensee. In this case, it was merely held that the State Commission does not have powers to fix the tariff of generating company situated in a different state selling power to a trading licensee. That is not the case here.

84. As discussed above, we referred to various provisions of PPA and PSA in the present case and held that the purchase of power by PTC and re-sale of power to the Haryana Power for distribution to the consumers of the State of Haryana.

85. As far as Appeal No.7 of 2009 is concerned, it is noticed that the findings have been given by this Tribunal, that Madhya Pradesh Commission has no jurisdiction as the PPA has raised an obligation where no nexus with the State of MP was established to adjudicate the dispute arising about the said PPA. But in this case we have held by referring to various Recitals of the PPA, the PSA, some other documents and conduct of the Appellant to hold that there is a nexus between the PPA and PSA as a result of which the power was intended to be distributed to the consumers of Haryana. Therefore, both the decisions cited by the Appellant would be of no use for the Appellant.

86. On the other hand, it is noticed that a similar question had been raised in Appeal No.200 of 2009 in the matter of Pune Power Development Limited Vs Karnataka State Commission and Ors. On going through the said judgment rendered by this Tribunal, we find that the very issue in question had been decided holding that the Karnataka State Commission has got the jurisdiction as there has been a clear and present nexus between the trading licensee and the State of Karnataka. This ratio in our view would apply to the present facts of the case in all fours. The relevant findings of this Tribunal are reproduced below:

> *"16. The reading of the above provision would reveal that the section is very widely worded and covers the entire process of the power procurement of a Distribution Licensee. The Regulatory jurisdiction of the State Commission extends the procurement of electricity from Generating Companies or licensee or from other sources. Such a procurement can be made from any place within or outside the State, inter-State or Intra State. In other words, all purchasers of electricity from the persons including the trading licensee like the Appellant herein falls under the regulatory jurisdiction of the State Commission.*
>
> *18. A plain reading of the above provision would clearly show that the State Commission has jurisdiction to entertain disputes between the*

licensee and also the Generating Companies. Thus, the scope of Section 86 (1) (f) is very wide as it covers all disputes between the licensee which relate to the regulatory jurisdiction of the State Commission. In other words, there is no restriction in Section 86 (1) (f) regarding the nature of the licensee. Thus, all disputes relating to the regulatory jurisdiction of the State Commission which involves the Distribution Licensee or a trading licensee or a transmission licensee shall have to be adjudicated upon exclusively by the State Commission.

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

"The present case involves a dispute between the Distribution Licensee of Karnataka, the Respondent and the Appellant which is an inter-State licensee. The Appellant is selling power to the Distribution Licensee Respondent in the State of Karnataka, thereby having a nexus to the State. Since the procurement of power by the Distribution Licensee from the Trading Licensee is being done in the State of Karnataka, the Appellant falls within the jurisdiction of the State Commission under Section 86(1)(b) of the Act. The procurement of power has a direct nexus with the

State of Karnataka as the supply is to the Karnataka Distribution Licensee. There is no restriction on the location of the Trading Licensees to determine the jurisdiction of the State Commission. The supply of electricity, namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86(1)(f) to adjudicate upon the dispute between the licensees. ***Therefore, we hold that so long as the Distribution Licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86(1)(f) to adjudicate upon the dispute****."*

87. In the above case, the following principles have been laid down by this Tribunal:

(a) The regulatory jurisdiction of the State Commission extends to the procurement of electricity from the generating Company or licensees or from other sources. Such a procurement can be made from any place within or outside the State (inter State or intra State)

(b) The State Commission has got the jurisdiction to entertain the disputes between the licensees and also the generating companies. The Scope of Section 86 (1) (f) is very wide as it covers all disputes between the licensees which relate to

the regulatory jurisdiction of the State Commission. In other words, there is no restrictions under Section 86 (1) (f) regarding the nature of the license.

(c) There is no restrictions on the location of the Trading Licensee to determine the jurisdiction of the State Commission under Section 86 (1) (f). So long as the Distribution Licensee's procurement power is involved in the State, the State Commission alone will have the jurisdiction under section 86 (1) (f) to adjudicate upon the dispute.

(d) The Appellant is selling power to the distribution licensee Respondent in the State of Karnataka. Therefore, it has got a nexus with the State. Since the procurement of power by the distribution licensee is made from the trading licensee in the State of Karnataka, the Appellant falls within the jurisdiction of that State Commission under Section 86 (1)(f) of the Act. State Commission has got the jurisdiction to entertain the disputes between the licensees and also the generating companies. The procurement of power has a direct nexus with

the State of Karnataka as the supply is to the Karnataka Distribution Licensee. The supply of electricity namely, the Appellant being at a different place does not oust the jurisdiction of the State Commission under Section 86 (1) (f) to adjudicate the dispute between the licensees. Therefore, so long as the distribution licensees are involved in procurement of power in the State, the State Commission alone will have the jurisdiction under Section 86 (1) (f) to adjudicate the dispute.

88. Therefore, as decided by this Tribunal, the ratio decidendi in Pune case in Appeal No.200 of 2009 which will apply to the present facts of the case has to be followed in this case as well. So, we conclude that since a deemed licensee, Haryana Power (R-2) is involved in procurement of the power for the State of Haryana, for further distribution of the said power to the consumers of the State of Haryana, the Haryana Electricity Regulatory Commission alone will have the jurisdiction under Section 86 (1) (f) to adjudicate upon the dispute between the licensee and the generating Company. Accordingly, this point is decided against the Appellant.

89. Now let us come to the 2nd Question relating to the issue raised in Appeal No.52 of 2011 by the Appellant, Chhattisgarh Power Trading Company. The question is "When the Power utility, Chhattisgarh Power Trading Company has not been made a party before the State Commission nor has any notice been served upon it, whether any adverse orders could be passed against the said utility in complete violation of the principle of the natural justice? On this issue, we have heard the learned Senior Counsel for both parties as mentioned above.

90. In the impugned order dated 2.2.2011, while adjudicating upon the claims of Haryana Power Vs PTC India Limited with respect to the purchase of power from the Lanco Power Limited and various contractual arrangements made between them, the State Commission directed the power generated from the power plant of M/s. Lanco Power Limited should be supplied to PTC India as contracted and should not sell the same to a 3rd party i.e. Chhattisgarh State Power Trading Company Limited, the Appellant in Appeal No.52 of 2011. The Appellant in Appeal No.52 of 2011 who is directly aggrieved by the effect of the said order dated 2.2.2011 by which

the restraint order prevented the Appellant namely Chhattisgarh State Power Trading Company Limited from purchasing the power from Lanco Power Ltd, had been passed has filed this Appeal, mainly on the ground that the adverse orders have been passed in that impugned orders as against the Chhattisgarh Power Trading Company without making it as a party to the proceedings and without hearing it. The Appellant in Appeal No.52 of 2011 has assailed the impugned order by pointing out 3 aspects.

(a) neither the Appellant has been a party to the proceedings before the State Commission leading to the passing of the impugned order dated 2.2.2011 nor has any notice been served on it in that behalf.

(b) nor has it been a party to the contractual arrangement which has been the subject matter of adjudication before the Respondent No.1 Commission,

(c) nor has its own contractual arrangement with Lanco Power to Respondent No.4 with respect to the power generated from any of the units of its thermal power plant been the subject matter of

adjudication before the Respondent No.1 Commission.

91. In the light of these 3 aspects it is contended by the Appellant namely Chhattisgarh State Power Trading Company Limited, by the impugned order the rights of the Appellant (Chhattisgarh Trading Company) under MOU dated 17.9.2008, the implementation agreement dated 1.8.2009 and the PPA between the Chhattisgarh Trading Company and the Lanco Power Ltd, dated 12.1.11 by which the Appellant is entitled to get 35% of the power from Lanco Power Limited has been affected by the State Commission's order holding that the said agreement would not over ride the PPA dated 19.10.2005 and the amended agreement dated 18.9.2006 entered between the Lanco Power Ltd, and the PTC. On this point, we have heard the elaborate arguments from both the parties.

92. There is no dispute in the fact that the State commission has framed the issue relating to the implementation agreement entered into between the Lanco Power and the Chhattisgarh Power Trading Company and gave a finding as to the validity of the

said implementation agreement. The relevant issue framed by the State Commission is as follows:

> *"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".*

93. While deliberating upon the said issue, the State Commission arrived at a conclusion that there has been a "violation of agreement" by the Government of Chhattisgarh so far as the agreements and arrangements entered into between the Lanco Power Limited on one side and PTC and Haryana Power on the other side. Thus, the State Commission has gone into validity of the implementation of the agreement and held that implementation agreement cannot be given effect to. The relevant findings are as follows:

> *"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 3000 MW including infirm power to HPGCVL. 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 it 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 mentions 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 (Emphasis supplied)".

94. The "third party" as referred to in the impugned order dated 2.2.2011 which relates to the restraint order for sale of power is clearly the Appellant i.e. Chhattisgarh Trading Company. It can not be

disputed that it is an adverse order passed against the Appellant without hearing it and without making it as party.

95. From the perusal of the said order, 3 factual aspects would emerge:

(i) The Appellant (Chattisgarh Power Trading Company) has not been a party to the proceedings before the State Commission leading to the passing of the impugned order dated 2.2.2011 nor has any notice been served on it in that behalf.

(ii) Appellant has not been made as a party to the contractual arrangement which is the subject matter of adjudication between the Lanco Power Ltd. and PTC on one hand and Haryana Power on the other hand before the State Commission,

(iii) It has no contractual arrangement with Lanco Power Limited with respect to the power generated from any of the units of its thermal power plant been which is subject matter of adjudication before the State Commission.

96. In spite of these aspects, the State Commission has passed the impugned adverse orders against the Appellant without hearing it. It is a settled law that when an adverse order is passed against a party that too when the Commission proceeded to go into the validity of the implementation agreement entered into between the Government of Chhattisgarh and Lanco Power Limited and the PPA executed between the Appellant Chhattisgarh State Power Trading Company and Lanco Power Limited, the party to those agreements have to be necessarily heard before passing any order relating to the validity of those agreements. When the Appellant was not a party either to the PPA between the Haryana Power and PTC nor has it been a party to the proceedings before the Commission, the State Commission cannot without hearing the parties concerned hold that there is a violation of the said PPA by the Appellant by going into the question of validity of the implementation of the agreement entered into by the Appellant Chhattisgarh Power Trading Company with Lanco Power Limited. Therefore, we deem it appropriate to set-aside that portion alone relating to restraint order with reference to supply of 35% of the power.

97. Consequently, we deem it appropriate to remand the matter to the Haryana State Commission to decide about the said issue which has been framed as the 4th issue raised by the Commission relating to the implementation agreement and PPA entered into between the Lanco and Chhattisgarh Trading Company after giving an opportunity to the parties concerned and decide the same according to law. Accordingly, while holding that, the State Commission has got the jurisdiction to go into the disputes in question, we direct the State Commission to decide the issue relating to the agreement entered into between the Lanco Power Limited and Chhattisgarh Trading Company and decide the matter, in accordance with law on the basis of the materials furnished by the parties concerned uninfluenced by the earlier findings on this point rendered by the State Commission. We make it clear that we are not expressing any opinion in this regard. Pending the said proceeds before the State Commission, the interim order dated 23.3.2011 passed by us will be in force till the final order is passed by the State Commission.

98. Summary of our findings:-

a) Even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution for State Commission. Recitals to the PPA would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and R-3, PTC got firmed up only with the execution of PSA entered into between Haryana Power (R-2) and R-3 PTC. As such the R-2 is entitled to enforce the terms of PPA by approaching the Haryana State Commission.

b) The fundamental basis on which the PSA was approved by the State Commission was that the PSA is based upon the PPA and PPA was annexed to PSA. Thus in approving PSA, State Commission has also approved the PPA as an Annexure to PSA. The PSA deals with the sale of electricity by PTC (R-3) to Haryana Power (R-2) based upon the purchase of electricity by PTC (R-3) from Lanco Power, the Appellant.

c) From bare reading of the admissions and submission made by the Appellant before the State Commission, it would be clear that the Appellant had pleaded before the State Commission that the PPA forms integral part of PSA and the Appellant is an important party in the PSA for supply of power to the Haryana State. The Appellant affirmed that the sale of power by the Appellant to Haryana Power through PTC was a negotiated route which is permissible under the Tariff Policy as effective steps were already taken prior to the cut off date mentioned therein. On the basis of this categorical admission and affirmation, the State Commission passed the order dated 6.2.2008 approving the PSA. Therefore, from the Amendment Agreement to the PPA and the conduct of the Appellant in approaching the State Government on its own for supply of power for utility in the State of Haryana, it can be safely held that the nexus with Haryana Power (R-2) is established beyond doubt.

d) The Appellant specifically admitted before the State Commission that the Appellant's project

and the sale of power by the Appellant to the Haryana Power (R-2) through the PTC (R-3) through negotiated route is permissible under the tariff policy as effective steps were taken even prior to the cut off date. Even in the written submissions filed by the Appellant before the State Commission in these proceedings, the Appellant brought out the status of the project and requested the State Commission to approve the sale of power from the Appellant's project to Haryana. This plea of admission made by the Appellant before the State Commission would confirm that the PPA forms an integral part of the PSA. Though the Appellant was not a party to the PSA, it became an important party in the proceedings before the State Commission for the approval of the PSA. Only on the basis of the said stand, the State Commission approved the PSA. If such a stand had not been taken by the Appellant before the State Commission it is quite possible that the State Commission would not have approved the PSA. In other words, in case the Appellant had taken a stand before the State Commission that the PSA and PPA are two

distinct documents, and as such the Commission has no jurisdiction to adjudicate between the two, the Commission would not have approved the PSA.

e) In view of the above, it has to be concluded that the PPA and PSA in the present case are two documents are interconnected and inextricably linked to each other and only State Commission has the power to fix the tariff for purchase of power by the PTC from the Appellant for the re-sale to the 2nd Respondent (Haryana Power) under PSA for the distribution to the consumers in the State of Haryana. Accordingly, the Haryana Electricity Regulatory Commission has jurisdiction to adjudicate upon the disputes between the Appellant generating company and the 2nd Respondent Haryana Power being deemed licensee. Thus, the finding on the question of jurisdiction given by the State Commission is upheld. As such there is no merit in Appeal No.15 of 2011.

f) Admittedly the adverse order has been passed by the State Commission without hearing the Chhattisgarh State Power Trading Company, the

Appellant in Appeal No.52/2011. Hence, we deem it appropriate to set aside the portion of the order impugned in this Appeal and remand the matter to the Haryana State Commission to decide about the issue relating to the implementation agreement and PPA entered into between the Lanco Power Limited and Chhattisgarh State Power Trading Company after giving an opportunity to the parties concerned and decide the same on the basis of the materials available on record and in accordance with law uninfluenced by the earlier findings given in the impugned order on this point.

99. As such, the Appeal in Appeal No.15 of 2011 is dismissed and Appeal No.52 of 2011 is allowed. However, there is no order as to costs.

(V J Talwar) **(Justice M. Karpaga Vinayagam)**
Technical Member **Chairperson**

Dated: 04th November, 2011

REPORTABLE/~~NON-REPORTABLE~~