

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

APPEAL No.188 OF 2011

Dated:9th Aug, 2012

**Present : HON'BLE MR. JUSTICE M KARPAGA VINAYAGAM,
CHAIRPERSON
HON'BLE MR. RAKESH NATH, TECHNICAL MEMBER**

In the Matter of:

**M/s. Lanco Budhil Hydro Power Private Ltd.
(formerly Lanco Green Power Private Limited)
Lanco House, Plot No.397,
Phase-III, Udyog Vihar,
Gurgaon-122 016**

...Appellant

Versus

- 1. Haryana Electricity Regulatory Commission
Bays No.33-36,
Sector-4,
Panchkula-134 112**
- 2. Haryana Power Generation Corporation Limited
Urja Bhawan,
C-7, Sector-6,
HPGCL, Panchkula
Haryana-134 109**
- 3. PTC India Limited
2nd Floor, NBCC Tower,
15, Bikaji Cama Place,
New Delhi-110 066**

...Respondent(s)

Counsel for the Appellant(s) : Mr. Akhil Sibal
Mr. Adit S Pujari
Mr. Salim A Inamdar
Mr. Anuj Berry

Counsel for the Respondent(s): Mr. Anand K Ganesan for R.1

Mr. M G Ramchandran for R-2
Ms. Apoorve Karole for R-2
Mr. Chirag Kher for R-2
Mr. Vikrant Saini for R-2
Mr. U K Aggarwal for R-2

Mr. Parag Tripathy, Sr Adv R-3
Mr. Ravi Prakash for R-3
Mr. Varun Pathak for R-3
Mr. Abhishek Mitra for R-3
Mr. Shadan Farasat for R-3

J U D G M E N T

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

1. “Whether the Haryana State Commission has the jurisdiction to go into the dispute with regard to validity of the Notice of Termination of the PPA issued by the Appellant to PTC (R3) raised in the Petition filed by the Haryana Power (R2) seeking for the enforcement of the PPA entered into between the Appellant and PTC (R3) to which the Haryana Power (R2) was not the party”?

2. This is the question posed for consideration in this Appeal.
3. The short facts are as follows;-
 - a) M/s. Lanco Budhil Hydro Power Private Limited (LANCO Budhil), is the Appellant herein. It is a Generating Company which has been authorised by the Government of Himachal Pradesh to establish and operate a 2x35 MW Hydro Power Project in Himachal Pradesh.
 - b) Haryana State Electricity Regulatory Commission (State Commission) is the First Respondent.
 - c) Haryana Power Generation Corporation Limited (Haryana Power), a generating company owned by the Government of Haryana is the 2nd Respondent.
 - d) PTC India Limited (PTC), an Inter State Trading Licensee, is the 3rd Respondent.
 - e) On 30.3.2005, a Power Purchase Agreement (PPA) was entered into between the Appellant, LANCO Budhil, Generating Company and PTC (R-3), an Inter State Trading Licensee for sale of entire power i.e. 70 (2 x 35) MW to be generated by the Appellant.
 - f) Thereupon, on 21.9.2006, PTC (R-3) entered into a Power Sale Agreement (PSA) with Haryana Power

(R-2) to sell the power generated from the project of the Appellant to the Haryana Power. This was approved by the Haryana State Commission on 7.6.2007.

(g) Since the Appellant was unable to perform its obligations under the PPA by supplying power to PTC due to Force Majeure Events, the Appellant on 17.12.2008, issued a notice of Force Majeure to PTC (R-3) conveying the difficulty due to the nature of the Force Majeure Events.

(h) Since the Force Majeure Events described in its letter dated 17.12.2008 continued unremitted for a period of 12 consecutive months, the Appellant as provided in the PPA on 18.12.2009, sent a Notice of Termination of the PPA to PTC effective from 26.12.2009.

(i) Thereupon, the Appellant on 2.2.2011 entered into a Power Purchase Agreement with National Energy and Trading Services Limited for sale of power from the project. Till then, neither the PTC (R3) the party to the PPA (R-3) nor the Haryana Power (R-2) party to the PSA took steps to challenge the Notice of Termination of PPA issued on 18.12.2009 in any Forum.

(j) Suddenly on 4.4.2011, the Haryana Power (R-2) filed a Petition U/S 86 (1) (b) and 86 (1) (f) of the 2003 Act before the Haryana State Commission seeking for the relief praying that (1) Notice of termination of PPA issued on 18.12.2009 by the Appellant to the PTC be declared illegal (2) both the Appellant and PTC be directed to supply power to Haryana Power and to comply with their obligations as per the PPA and PSA.

(k) After entertaining this Petition, the State Commission issued notice to both the Appellant and the PTC.

(l) On receipt of the notice, the Appellant filed its reply on 2.6.2011, raising preliminary objection questioning the maintainability of the said Petition as well as the jurisdiction of the State Commission to go into the dispute with regard to the PPA in which Haryana Power, was not a party. In view of the fact that the maintainability of the Petition and the jurisdiction of the State Commission was questioned, the State Commission decided to go into the jurisdiction issue first before deciding the merits of the matter as requested by the parties. Accordingly, all the parties were heard with regard to the issue of jurisdiction.

(m) After hearing the parties, the State Commission passed the impugned order dated 25.8.2011 holding that the petition filed by Haryana Power before the State Commission was maintainable and the Haryana State Commission has got the jurisdiction since the PSA and PPA are inseparable and inter dependent on each other. Thereupon, the State Commission proceeded to conduct enquiry to consider the merits of the matter.

4. At this stage, LANCO Budhil, the Appellant has filed this Appeal challenging the impugned order dated 25.8.2011, deciding the jurisdiction issue.
5. Assailing the said order, the Learned Counsel for the Appellant urged the following points to show that the impugned order is not sustainable under law:

(a) The State Commission has no jurisdiction to consider the Petition filed by Haryana Power (R-2) as against the Appellant as there was no privity of contract between them.

(b) The State Commission has wrongly assumed the jurisdiction without considering the fact that the Haryana Power (R-2) who was not a party to the PPA has no rights to enforce the provisions of the PPA or to

claim any relief as against the validity of notice of termination of the PPA dated 18.12.2009 issued by the Appellant to PTC (R-3) in accordance with the provisions thereof as there is no nexus between PPA and PSA.

(c) The State Commission failed to appreciate, that following the termination of the PPA with effect from 26.12.2009, the lawful third party rights had already been created by the Appellant by entering into PPA with 3rd party on 2.2.2011 in respect of same matter of the PPA and that therefore, the State Commission ought to have desisted from entertaining the Petition filed by Haryana Power (R-2), which would interfere with the 3rd party rights.

6. In reply to the above grounds, the Learned Counsel for the Haryana Power(R-2) has made the following submissions:

(a) The very same issue relating to the dispute between another Company of the Appellant's group namely Lanco Amarkantak Power Limited on one side and Haryana Power (R-2) and PTC(R-3) on the other side had already been decided by this Tribunal in Appeal No.15 and 52 of 2011 by the judgment dated 4.11.2011 holding that Haryana Commission has got the jurisdiction. The said dispute relating to another

Company of Lanco Group where the sale of power was proposed by the said Company at or about the same time is squarely covered by the reasoning and the conclusions reached by this Tribunal in the above judgment. This would apply to the present case as well.

(b) After signing of the PPA with PTC (R-3), the Appellant's Group Company approached State of Haryana for sale of power from its generating stations through PTC(R-3). In fact, in the letter addressed by the Lanco Amarkantak Limited to the Government of Haryana, it had given the details of the Appellant's Group project also which included 70 MW Hydro Electric Project being set up at Budhill in the State of Himachal Pradesh. At the same time, both the Lanco Amarkantak Power Limited and the Appellant had entered into their respective Power Purchase Agreements with PTC agreeing to sell the contracted capacity of 300 MW and 70 MW to PTC(R-3) respectively with specific stipulation that the power is intended for resale to others, namely, the 'Purchaser' as defined in the respective agreements. Thus, the PPA entered into between the Appellant and PTC (R-3) in the present case and PPA entered into between Lanco Amarkantak Power Limited (Appellant's Group)

and PTC(R-3) in the other case, are substantially similar. Therefore, the judgment rendered by this Tribunal in Appeal No.15 and 52 of 2011 dated 4th Nov, 2011 would apply to the present case as well.

(c) In view of the fact that there are various letter correspondence between the Appellant and Haryana Power (R-2) in which both the parties informed and communicated with respect to the various issues like transmission charges pertaining to the Appellant, there is nexus of the sale of power by the Appellant to the Haryana Power(R-2) through the PTC (R-3).

(d) The State Commission has approved the PSA entered into between the Haryana Power and PTC which was based upon the present PPA which was annexed to the PSA. Therefore, it necessarily follows that the State Commission has approved the PPA also. Even though the Haryana Power(R-2) was not the party to the PPA dated 30th March, 2005, the parties to the PPA have intended that the power sold under the PPA to PTC (R-3) to be further sold to the Haryana Power(R-2). The recital of the PPA would indicate that both the PSA and PPA are back to back Agreements.

(e) Admittedly, the consumers in the State of Haryana were the ultimate beneficiaries. Therefore, the

Haryana State Commission alone has the jurisdiction to go into the present dispute arising out of the inextricably linked PPA and PSA under Section 86 (1) (b) read with Section 86 (1) (f) of the Electricity Act, 2003.

7. The learned Senior Counsel for PTC (R-3) has submitted the reply which is as follows:

- (a) This Tribunal has held in the recent judgment in Appeal No.15 and 52 of 2011 dated 4.11.2011 that the existence of a contractual relationship between a generating company and a licensee is not a pre-condition for exercise of jurisdiction under section 86 (1) (f) of the Electricity Act, 2003 and this will apply to the present case.

- (b) The dispute between the Generating Company and a 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. In the said judgment this Tribunal has held that the State Commission regulating the tariff of the consumer of the State will be in a better position to adjudicate on such a dispute taking into consideration the interest of the consumers of the State.

(c) The PPA and PSA in the present case are back to back agreements. They are the part of a single transaction. This Tribunal has held earlier that a trader has to be treated as an intermediary and that when a trader deals with the distribution company for resale of electricity; he is doing so as a conduit between generating company and distribution licensee.

(d) When the PTC, a 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. In this case, the entire quantum of the power purchased from the project of the Appellant was for consumption by the consumers of the State of Haryana. Therefore, there is intermediary linkage and nexus between the PPA and PSA.

(e) Before execution of the PPA, the Appellant and the PTC (R-3) entered into a Memorandum of Understanding dated 3.11.2004 for sale of power from the Appellant. The said Memorandum of Understanding was ultimately converted into PPA entered into between the parties. The Memorandum of

Understanding clearly recorded the understanding of the parties that the terms of the Power Purchase Agreement to be entered into between the PTC and Appellant was to be finalised in consultation with the beneficiary States to which the ultimate power was being sold. Thus the purchaser of the contracted power was always important in the entire transaction and both the PPA and PSA were intended to be back to back in nature with the non-signatories like Haryana Power being beneficiary of the PPA and Lanco being the beneficiary of the PSA. Therefore, the PPA and PSA are clearly inter-dependent.

(f) The Linkage of PSA with the PPA is established by the fact that the PPA cannot be terminated by PTC(R-3) without the prior consent of the Haryana Power(R-2). Admittedly, there was no obligation on PTC (R-3) to supply power to the Haryana Power(R-2) from other sources if the Appellant fails to honour the PPA. Thus, the PPA and PSA are completely inter-dependent on each other.

(g) At any rate, the State Commission has got a jurisdiction to adjudicate with reference to the issues concerning the PSA transaction entered into between Haryana Power and PTC. In respect of the issue

relating to PPA, the Central Commission will have the jurisdiction.

8. In the light of the rival contentions urged before us by the parties, the question which has to be considered is reiterated herein:

“Whether the Haryana State Commission has the jurisdiction to go into the dispute with regard to validity of Notice of Termination of the PPA issued by the Appellant to the PTC (R-3) raised in the Petition filed by the Haryana Power (R-2) seeking for the quashing of the said termination notice and for consequent enforcement of the PPA entered into between the Appellant and PTC to which the Haryana Power was not a party?

9. Before dealing with the question framed above, it is worthwhile to quote the relevant discussion and findings of the State Commission in the impugned order on this point. They are as follows:-

“In view of 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 favour 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, Article 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 recognised 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 Article 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 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.

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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 recognised in the PPA. This clearly establishes an interest of HPGCL in the PPA.

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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”.

10. The crux of the findings given by the State Commission in the impugned order as referred to above is as follows:-

(1) Article 16.2 of the PPA needs to be looked into. 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 favour of a third party i.e. respective successors and permitted assignees.

(2) The State Commission has examined in great details the terms of the PPA and PSA. On such examination, the Commission finds that there are number of provisions in the PPA which show their interdependent nature. Article 3.1.3 of the PPA provides that PTC (R-3) shall have executed PSA with the Purchaser for entire contracted power. Further, the Appropriate Commission shall regulate the tariff for sale of electricity from the project or the purchase of electricity by the purchaser from PTC and Long

Term Open Access for supply of power to purchaser shall have been obtained.

(3) The various Articles such as 6.17, 11.6, 15.7, 16.14.4 contained in the PPA, which is self explanatory, provide sufficient evidence to show that the purchaser/beneficiary once identified by PTC i.e. Haryana Power in this case would become necessary party to the PPA despite the fact that Haryana Power was not a signatory to the same.

(4) PPA had been entered into between Lanco Budhil and PTC. Through this PPA, PTC agreed to purchase 70 MW power from the Lanco Budhil to be generated from its Budhil project. Now the same power has been agreed to be sold by PTC to Haryana Power through PSA. In case of failure of Lanco Budhil to supply to PTC the above said power, the PTC is not bound to supply power from other sources to the Haryana Power under the PSA. This fact clearly spells out that the PSA is wholly dependent on the PPA.

(5) Further, section 4.1 (v) of PSA provides that, “not to 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 Haryana Power, the purchaser, which again goes to prove that both PPA and PSA are fully interdependent.

(6) At the time of approval of PSA, the State Commission had gone through the PPA and PSA and

approved both PPA and PSA keeping in mind that the PPA was annexed with its petition by Haryana Power seeking for the approval of the PSA.

(7) In the instant case, the entire power purchased by PTC for a period of the 35 years under the PPA has to be resold to the Haryana Power by it and that too for the entire period so much so that PTC is not bound to supply power under the PPA from other sources if the Appellant 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.

(8) The PPA between Lanco Budhil and PTC cannot stand in isolation because it is obvious from PPA that power is being procured by PTC not for its own self consumption or distribution but being purchased by PTC for onward sale to the distribution licensees in Haryana.

(9) As per the PSA, PTC cannot terminate the PPA without the written consent of the Haryana power. This establishes the intervention of Haryana Power in the PPA.

Hence, the State Commission has jurisdiction to go into the dispute in question and decide the same in this proceeding.

11. As mentioned earlier, in the impugned order, the State Commission gave a finding only on the aspect of jurisdiction and deferred the matter for enquiry to consider the merits of

the matter. Hence, we are concerned only with the issue of jurisdiction of the State Commission.

12. Let us now deal with the question framed in this Appeal, relating to the jurisdiction of the State Commission.
13. It is the case of the Appellant, that the present case is covered by the judgments rendered by this Tribunal in Appeal No.71 of 2008, Appeal No.7 of 2009 and the Judgment of Hon'ble Supreme Court reported in 2009 Vol-16 SCC 659, according to which the State Commission has no jurisdiction to adjudicate upon the dispute in question.
14. On the contrary, it has been submitted by the Haryana Power (R-2) that those judgments would not apply to the facts of the present case and that the present case is covered by the judgements rendered by this Tribunal in Appeal No.200 of 2009 (Pune Power Case) and in Appeal No.15 of 2011 (Lanco Amarkantak case) in which it has been held that the State Commission has got the jurisdiction.
15. While dealing with this rival contention with regard to the question as to which of the judgement would apply to the present case, it is worthwhile to refer to the principles and the ratio decided by this Tribunal in the judgements cited by both the parties while adjudicating upon the similar disputes

between the parties. The principles reflecting the ratio are as follows:-

(a) The basic provision for determination of tariff is given in section 62 of the Electricity Act. The above section is to be read as the principal provision along with other sections namely 79 and 86 being the supportive provision harmoniously. Section 79 and 86 cannot empower the Commissions to determine the tariff for sale by a generator to a trader.

(b) The State Commissions derived the jurisdiction from the Electricity Act. The parties through PPAs cannot confer jurisdiction to the State Commission, when the State Commission does not have the jurisdiction under the Act. The State Commissions cannot direct the generating company to submit to its jurisdiction for the purpose of determination of tariff under the PPA and to file a tariff petition.

(c) One of the primary objectives of 2003 Act was to free the generating companies from the shackles of license regime, including freedom from tariff regulations, when the generating company supplies power to a trader or directly to the consumer.

(d) Section 86(1)(b) provides power to the State Commissions for regulatory purview whereas 86(1)(f) confers jurisdiction to State Commission for adjudication. Section 86(1)(b) takes within its fold agreements between the generating companies and the licensees or other sources. On the other hand, Section 86(1)(f) covers disputes only between the licensees and the generating companies and does not cover disputes with “other sources”. The PSA between the distribution licensee and the trading licensee falls within the ambit of 86(1)(b). Therefore, the dispute between the parties who are neither the generating company nor the licensee of the State Commission can not be adjudicated under section 86(1)(f).

(e) In a case where there is a PPA between the generating company and the Inter State trader and subsequent PSA between the said inter state trader and the distribution licensee, the general rule ought to be that State Commission has no jurisdiction to entertain a dispute regarding the PPA between generating company and Inter State Trader at the instance of the distribution licensee of that State.

(f) When there is no nexus or privity of contract between the PPA and PSA, the jurisdiction of the State

Commission can not be invoked. If a generating company enters into the agreement for sale of power generated by it knowing the place or the purchaser where or to whom the power generated is going to be supplied and consumed, then the generating company will have nexus to the purchasers or the consumers.

(g) Even though distribution licensee being party to the PSA was not the party to PPA, if the parties to PPA have intended that the power sold under PPA to the trader to be further sold to the distribution licensee, the ultimate beneficiary for the purpose of distribution to the consumers of the State, then the distribution licensee is entitled to enforce the terms of PPA in the State Commission of that State.

(h) When the ultimate purchaser, i.e. the distribution licensee had been identified by the trader for sale of power from the project by the generating company in terms of the PPA, then it means that both the PSA and PPA are back to back arrangements as the PPA between generating company and the trader got firmed up with the execution of PSA entered into between the distribution licensee and the trader.

(i) If the Power supplied by the trader under PPA which identifies the purchaser at the time of execution

of PPA, then the conduct of the generating company and the trader would reflect the intention to be bound to the purchaser and in that event the conclusion would be that there is nexus.

(j) If the PPA was executed outside the purview of the State Commission in question; if the generating station was situated outside the State Commission's limits; if the delivery point for power output from the power plant of the generating company was located outside the State Commission's limits and that if the trader is not a trading licensee of the State Commission as an intra state trading licensee but it holds a license obtained from the Central Commission for inter-state trading, then the PPA and PSA can not constitute back to back agreements as these two agreements are separate and between different parties. In that case, State Commission can not have jurisdiction to adjudicate upon the disputes between the parties to the PPA.

(k) All purchasers of electricity from the persons including the trading licensee who has been given licence by the Central Commission falls under the regulatory jurisdiction of the State Commission. The scope of Section 86 (1) (f) is very wide as it covers all

disputes of the licensee which relate to regulatory jurisdiction of the State Commission.

16. Bearing the above ratio laid down by this Tribunal as well as the Hon'ble Supreme Court, in our mind, we shall now deal with the issue of the jurisdiction of the State Commission in relation to the dispute in question in the light of the facts of the present case.
17. At the outset, we are to remind ourselves about the specific stand taken by each of the parties.
18. According to the Appellant, the State Commission has no jurisdiction as there is no nexus between the PPA and PSA especially when the PTC (R-3) not being the licensee of the Haryana State Commission had not acted as an agent of the Appellant while executing PSA with Haryana Power (R-2).
19. According to Haryana Power (R-2), there is a nexus between the sale of power by the Appellant and purchase of power by the PTC which was intended for the purpose of distribution in the state of Haryana and as such Haryana State Commission alone will have jurisdiction and no other Commission including Central Commission will have the jurisdiction. It is the further contention of Haryana Power (R-2) that though the PPA was only between the Appellant

and PTC (R-3) and not with Haryana Power, the existence of privity of contract between the Appellant and Haryana Power (R-2) is not a pre-condition for exercise of jurisdiction by the Haryana State Commission over the Appellant's sale of power from its project when it is intended for distribution in the State of Haryana.

20. However, the PTC(R-3), one of the parties of PSA has taken a stand which is contrary to the stand of the Haryana Power (R-2). In the reply filed in this Tribunal, PTC has stated in one place that the plea of the Appellant that State Commission has no jurisdiction is mala-fide and without any basis. At the same breath, the PTC has stated in another place in the reply that in case of inter State supply of the electricity like the present case, only the Central Commission has got the jurisdiction. The relevant extract of the reply by PTC is as follows:

"It is considered view of PTC that in cases of inter-state transmission of electricity only CERC will have jurisdiction and the same is in accordance with the view of this Tribunal in its judgment dated August 6, 2009 in Appeal No.7 of 2009. It is submitted that wherever a central trading licensee is involved in a transaction only the CERC should have jurisdiction.

.....
The dispute between the generating company and a 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. This Tribunal further held that 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 and that 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. It is submitted that the plea of the Appellant that it is not subject to the jurisdiction of the Ld. HERC is malafide and without any basis. It is submitted that the Ld. HERC has jurisdiction to adjudicate with respect to the issues concerning the PSA. However, it is submitted that in cases of interstate transmission, CERC will have jurisdiction.”

21. Thus, it is the case of the PTC (R-3) that if it is held that the State Commission does not have the jurisdiction, then the Central Commission will have jurisdiction in the matter, since the PTC, the inter state trading licensee, is involved in this dispute.
22. As indicated above, the specific stand of the Appellant is that the State Commission has no jurisdiction. Similarly, specific stand taken by the Haryana Power(R-2) is that State Commission alone has jurisdiction. But, strangely, the stand of the PTC is that if it is held by the Tribunal that the State Commission does not have jurisdiction to adjudicate upon the present dispute, the Central Commission will have the jurisdiction to adjudicate the same. It is not stated by the

PTC as to what is to be held with regard to the jurisdiction of the State Commission. This shows that no specific and consistent stand has been taken by PTC (R-3).

23. On going through the reply in entirety, it can be assumed that PTC has in a way admitted in its reply that the State Commission may not have jurisdiction to deal with the instant dispute and Central Commission alone will have the jurisdiction. Through this stand, taken before this Tribunal, the PTC (R-3) indirectly seeks for a declaration from this Tribunal that the Central Commission alone has got the jurisdiction to go into the dispute in question.
24. In fact, the stand of the PTC taken before this Tribunal that Central Commission has got the jurisdiction is contrary to the stand taken by it before the State Commission. It never sought for any declaration from the State Commission that Central Commission alone has got the jurisdiction. In fact, that was not the issue framed by the State Commission.
25. This must be looked at from yet another angle. If it is the specific stand of the PTC, that the Central Commission alone has got jurisdiction, then it must mean as indicated above, that PTC admits that State Commission has no jurisdiction. If that is so, the said admission by the PTC is as against the finding rendered by the State Commission in the impugned order to the effect that it has got jurisdiction.

In that case, the PTC must have filed cross Appeal or Appeal challenging the said finding of the State Commission. No such Appeal has been filed before this Tribunal. In the absence of any cross Appeal, we can not go beyond the question which has been framed by this Tribunal on the basis of the findings given by the State Commission on the issue raised before the State Commission.

26. Therefore, we must make it clear that we would limit ourselves to the question as to whether the Haryana State Commission has got the jurisdiction to adjudicate upon the dispute in question between the parties in these proceedings.
27. In that view of the matter, it would be appropriate to reiterate the relevant facts of this case in order to decide as to whether the finding given by the State Commission in the impugned order with regard to the jurisdiction is legally valid or not.
28. As narrated in the facts mentioned above, the Appellant entered into a Power Purchase Agreement (PPA) on 30.3.2005 with the PTC(R3) which is a inter-state trading licensee for sale of entire power i.e. 70 MW(2x35 MW) to be generated by the Appellant from its generating company which is situated in Himachal Pradesh. Subsequently, PTC (R3) entered into a Power Sale Agreement (PSA) with

the Haryana Power(R2) on 21.9.2006 having agreed to sell the said power purchased from the Appellant to the Haryana Power (R-2). This Power Sale Agreement (PSA) was presented before the Haryana State Commission for approval. Accordingly, the Haryana State Commission by the order dated 7.6.2007 approved the PSA.

29. Since there were Force Majeure events which prevented the Appellant from generating the power, the Appellant as contemplated under the PPA, sent a notice of Force Majeure on 17.12.2008 informing the PTC(R3) that due to the said Force Majeure events mentioned in the notice, it had become impossible for the Appellant to perform its obligations under the PPA to supply the power to PTC(R3) and that in the light of the nature of those Force Majeure events, the Appellant was not certain as to when these events will cease to continue. This notice sent by the Appellant, was received by the PTC (R3).
30. Since the Force Majeure events as mentioned in the notice dated 17.12.2008 continued for a further period of 12 months, the Appellant ultimately sent the notice of termination of the PPA to the PTC on 18.12.2009, informing the circumstances warranting the said termination. This notice was also received by the PTC. However, the PTC did not take any steps to challenge the said termination notice.

After about one year the Appellant i.e. on 02.2.2011, entered into a Power Purchase Agreement (PPA) with the third party namely National Energy and Trading Service limited for sale of power from the project.

31. At that stage, the Haryana Power(R-2), which was not a party to the PPA, filed a petition before the Haryana Commission on 4.4.2011 under section 86(1)(b) and 86(1)(f) of the Act,2003 challenging the said termination notice and seeking for the consequential directions. The prayers are:-

(1) The termination notice of PPA dated 18.12.2009 issued by the Lanco Budhil (Appellant) to the PTC be declared as illegal and (2) both the Lanco Budhil (Appellant) and PTC(R-3) be directed to comply with the obligations by supplying the power to the Haryana Power (R-2) as per the PPA and PSA.

32. The State Commission entertained the said petition and issued notice to the parties including the Appellant. On receipt of notice, the Appellant appeared before the State Commission and raised the preliminary objection regarding the jurisdiction of State Commission contending that the Petition filed by the Haryana Power seeking for the enforcement of PPA was not maintainable since the PPA was a contract between the Appellant and PTC and not between the Appellant and Haryana Power. The State

Commission, as requested by the parties agreed to hear the submissions of the parties with regard to the preliminary objection raising the question of jurisdiction of the State Commission and to decide the said preliminary objection first, before considering the merits of the matter.

33. Accordingly, the State Commission heard the parties and finally passed the impugned order dated 25.8.2011 holding that it has got the jurisdiction to go into the dispute raised in the petition filed by Haryana Power (R-2) and posted the matter for hearing on merits on a future date. At that stage, the Appellant has filed this Appeal challenging the impugned order.

34. The State Commission in the impugned order, as indicated above, has rejected the preliminary objection of the Appellant on the following grounds:

i) PPA provides sufficient evidence to show that the purchaser namely Haryana Power (R-2) was identified by the PTC (R-3). Therefore, the Haryana Power (R-2) was necessary party to the PPA even though the Haryana Power was not the signatory to the PPA.

ii) The PPA and PSA are inseparable and inter-dependent upon each other.

iii) There are materials to show that there is a nexus between the PPA and PSA. Hence, State Commission has the jurisdiction to go into the dispute in question.

35. These findings are assailed by the Appellant in the present Appeal.
36. In this Appeal, as mentioned above, we are now called upon as to whether the State Commission has jurisdiction to decide the validity of the notice of termination of PPA issued by the Appellant to the PTC (R-3) that too, at the instance of Haryana Power(R-2) which was not the party to the PPA.
37. The main point urged by the Appellant is that the finding rendered by the State Commission that the PPA and PSA are inseparable and inter-dependent is totally wrong. It is also pointed out by the Appellant that in view of the fact that there are number of provisions available in the PPA which would indicate that the Appellant has no control over the PTC (R3) after the sale and as per the PPA, the PTC has absolute right to sell the power supplied by the Appellant to any third party, the finding of the State Commission that both the PPA and PSA are inter-dependent is contrary to the Articles of PPA.

38. We have already laid down the ratio earlier in several cases as quoted above, to the effect that even though distribution licensee was not a party to the PPA, if there is existence of nexus between the PPA and PSA, then the State Commission will have a jurisdiction to adjudicate upon the dispute between the generating company and a distribution licensee of the State. In other words, when there is no nexus or privity of contract between the PPA and PSA, the jurisdiction of the State Commission can not be invoked. Thus, 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 between the Appellant and PTC and in respect of PSA between the PTC and the Haryana Power.
39. In this process, we have to refer to some of the Articles of the PPA. They are as follows:

Article - 4: Principal Obligations of the Parties

Article 4.3.1: *The Company undertakes to sell to PTC, and PTC undertakes to purchase and pay the tariff in accordance with this Agreement for the Billable Power and Billable Energy supplied to the PTC from the Project.*

Article 4.3.2: *PTC shall have a right to sell the Billable Power and Billable Energy to a party other than the purchaser. This shall not relieve PTC's obligation to off take Billable Power and Billable*

Energy from the Project and to make tariff payments to the Company.

40. The perusal of these Articles would clearly show that the Appellant has no control over the PTC in respect of purchaser or entities, to whom it chooses to sell its power purchased from the Appellant.
41. That apart, Article 16.7.1 permits assignment of the PPA by either party by mutual agreement between the Appellant and PTC in writing. Similarly, clause 16.7.2 of PPA permits assignment of PPA by either party to its lenders. These clauses would give out the following factors:-
- i) There can be an assignment of the PPA in favour of Haryana Power by mutual agreement between the Appellant and PTC.
 - ii) The legal consequence of the said assignment is that the assignee becomes a party to and beneficiary under the relevant contract by virtue of such agreement.
 - iii) Until such assignment actually takes place with the express consent of the relevant parties to the contract, the purported assignee has no right or interest whatsoever under the contract.

42. In the present case it is noticed that there has been no assignment of PPA in favour of the Haryana Power (R-2). In other words, the Appellant and PTC(R-3) have not expressly consented for assignment of the PPA in favour of the Haryana Power.
43. Admittedly, Haryana Power (R-2) is neither the lender of the Appellant or the PTC nor their affiliate.
44. In the absence of mutual express consent of the parties namely, Appellant and the PTC(R-3) for the assignment of PPA in favour of the Haryana Power (R-2), there cannot be any situation under which the Haryana Power can be covered under the expression "Permitted Assignee". Hence the finding of the State Commission that Haryana Power is the "permitted assignee" is factually incorrect. Similarly, the State Commission has again committed an error by construing the clause 4.1(5) of the PSA, pursuant to which PTC has undertaken not to terminate PPA without prior consent of the purchaser namely Haryana Power.
45. According to State Commission, this clause is an example to establish PPA and PSA are fully inter-dependent. This observation, in our view is totally wrong since the right of the Appellant to terminate the PPA in accordance with the clause of the PPA is independent of the obligations of the PTC towards the Haryana Power under the PSA while

exercising its right to terminate PPA. In other words, the obligations undertaken by the PTC towards the Haryana Power under the PSA in respect its right to terminate the PPA cannot be read as circumscribing the right of the Appellant to exercise its rights to terminate the PPA.

46. The close reading of the various clauses of the PPA would clearly establish that the obligation of the Appellant to supply power output under PPA was solely to PTC which was independently entitled to sell the said power to one or more purchasers of its choice. Thus PTC (R-3) was independently responsible and liable for the supply of power to the said purchasers.
47. It is a general rule that in a case where there is a PPA between the generating company and Inter-State Trader and there is a subsequent PSA between the inter-state trader and the distribution licensee, the State Commission has no jurisdiction to entertain dispute regarding the PPA at the instance of the distribution licensee which is not a party to the PPA. The exception to this general rule is that where the relevant nexus between PPA and the state in question has been established, then jurisdiction can be invoked. Therefore, nexus test has to be applied strictly without giving any room for inference.

48. The PPA between the Appellant being the generating company and PTC, being inter-state trader does not come directly within the regulatory purview of the State Commission in terms of section 86(1)(b). However, the PSA in the instant case between the PTC and Haryana Power is an agreement for purchase of power for distribution for supplying in the State which falls within the purview of section 86(1)(b). The PPA in question between the Appellant and PTC(R-3) is not such an agreement. That apart, as mentioned earlier, the distribution licensee (R-2) was not a party to the PPA. As such, there is no agreement between the distribution licensee of the State and the generating company. In other words, the PPA in the present case does not contemplate distribution and supply within any particular state.
49. There is one more aspect to be noticed in this context. The State Commission while accepting the arguments of the Haryana Power observed that the Haryana State Commission earlier, while approving the PSA approved the PPA also. This observation is totally wrong. In the instant case, it was the approval of PSA between Haryana Power (R-2) and PTC (R-3) that was sought for from the State Commission by the Haryana Power and the same was granted. There is no prayer by the Haryana Power to the State Commission to approve PPA also. There cannot be

such a prayer and if there was such a prayer, the State Commission would have to call the Appellant to hear before deciding the approval of PPA to which the Appellant was the main party.

50. Admittedly, the Appellant in the present case was neither called upon to participate nor did it participate in the proceedings for the approval of the PPA before the State Commission. As such, the State Commission was not called upon to approve the PPA, which in any event would not have been done without notice to the Appellant. Merely because the Haryana Commission approved the PSA by the order dated 21.9.2008 on the request of Haryana Power (R-2), it does not automatically mean that PPA also stood approved. Similarly, just because the PPA had been annexed to the PSA as indicated earlier, it cannot be said that the PPA also was sought to be approved or approved. In exercise of approving the PPA, as indicated above, it could not be possible for having carried out the said process without notice to the Appellant. Admittedly, the Appellant had never made any application before the State Commission seeking approval of PPA or PSA nor participated in the proceedings for approval of the PSA. It is clear, therefore, that only the PSA that was placed before the State Commission was sought to be approved and the

State Commission granted approval only for PSA and not the PPA.

51. As mentioned above, the regulatory power under section 86(1) (b) and adjudicatory power under section 86(1) (f) are distinct. In the instant case, we are only concerned with the jurisdiction under section 86(1) (f) and not with the scope of 86(1)(b). Section 86(1)(b) takes within its fold the agreement between distribution licensee and generating companies, licensees or “**other sources**”. But section 86(1)(f) covers dispute only between the licensees and generating companies and does not cover the disputes with “**Other sources**”. In other words, the PSA between the Haryana Power(R-2) and the PTC(R-3) fall within the ambit of 86(1)(b) as it comes under “**other sources**’. But the dispute involving PTC (R-3) and the Appellant cannot be adjudicated under section 86(1)(f) on account of the fact that PTC(R-3) is neither a generating company nor the licensee of the State.
52. The Haryana Power(R-2) has placed much reliance on some of the documents showing the identification of the purchaser of the State in order to establish that there was a nexus with the State of Haryana. But these documents on scrutiny do not establish the material nexus to the State for the following reasons:-

i) Admittedly, in this case, the identification of Purchaser was not reflected in the PPA. The mere identification of the purchaser just prior to the execution of the PSA after the execution the of PPA is not sufficient. It is essential for the parties to PPA to conceptually act in pursuance thereof. In any case, the purchaser has to be identified before execution of PSA without which the PSA cannot take place.

ii) This identification must be made at the time of PPA with an intention to be bound by the same in order to establish that the generating company had identified the purchaser through PPA and therefore there was nexus between the generating Company and the said purchaser. In other words, the identification of purchaser is relevant for establishing nexus only with the parties which had acted in pursuance of the said identification by incorporating the details on the said purchaser in the PPA or by way of an amendment to the PPA. This aspect, admittedly, is absent in this case.

iii) The mere fact of identification of the purchaser at some point of time i.e. post PPA, cannot be sufficient to bind PPA signatory party to said purchaser with

whom there is no direct contractual arrangement. It would be a different matter altogether if the said purchaser had been expressly identified at the time of entering into PPA with an intention to be bound by the said purchaser of the State. Admittedly, in the instant case the identification of purchaser was much after PPA and the said identification has not resulted in the amendment of the PPA thereafter.

iv) Thus, even assuming the said purchaser was identified shortly prior to the PSA, it does not follow that the relevant nexus is thereby established. In other words, the identification of purchaser is relevant for establishing nexus only when the parties had acted in pursuance of the said identification by incorporating of such purchaser in the PPA.

53. In view of the above reasons, it shall be held that identification of purchaser just prior to the execution of PSA without reference to the said identification in the PPA or in the amendment of PPA, cannot be construed to be “nexus”.

54. It has already been decided in the earlier cases by this Tribunal that the **jurisdiction of the State Commission is attracted only in the event that there exists a direct nexus between (a) Generating company with the State in which power produced by it is going to be**

consumed of (b) direct nexus between the PPA and PSA.

55. In the instant case there has been neither any mention about the nexus in the letter correspondence between the Appellant and the PTC with reference to the consent for the right of assigns in PPA in favour of the Haryana Power nor that the Appellant issued any similar communications or representation either to the Haryana Power (R-2) or to the State Commission regarding the sale of power generated by it from its Power Project at Bhudhil to the Purchaser at Haryana under the jurisdiction of the Haryana State Commission.
56. It cannot be disputed that, in the present case at the time of execution of PPA, the Appellant did not have prior knowledge as to the State to which power generated by it was going to be supplied. That apart, the relevant clause of the PPA pertaining to the termination of the PPA does not envisage creation of any third party rights whatsoever, upon termination of the said PPA by either party thereof.
57. According to the Appellant, the Appellant never individually made any representation to the State Government of Hayana as its sister company made it in the other case. The letter cited by the Respondent dated 15.2.2006 would indicate the representation made by the other Group

Company to the State of Haryana for the purchase of power from 300 MW power plant in Chhatisgarh. In fact, it is pointed out by the Appellant that Appellant never addressed any letter or made any representation on behalf of the Appellant to the State Government of Haryana. In fact, on going through letter dated 15.2.2006 it is evident that it did not contain any mention of Appellant power projects at Bhudhil being available for sale to the state of Haryana. That apart, the PPA, in the present case defines the term "Purchaser" as "one or more purchasers" with whom PTC may enter into PSA for onward sale of power from the Appellant's project. Therefore, the letter dated 15.2.2006 cited by the respondent is of no use.

58. As we have already referred to, **there was no direct contractual relationship or privity of contract between the Appellant and Haryana Power (R-2).** It is true that we have held earlier that even when there is no direct relationship between the Generating Company and the Distribution Licensee, the State Commission which has approved the PSA on the strength of the PPA can have the jurisdiction. This would apply only when there is nexus between the PPA in which the Distribution Licensee was not the party and PSA in which Generating Company was not the party. But, in this case, the specific stand taken by the Appellant is that there is no nexus between the PPA

and PSA. If this is true, then the question arises as to whether the State Commission could give any direction as against the Appellant which was not a party to the PSA that too at the instance of the Haryana Power (R-2) who was not a party to the PPA.

59. It is settled law that the Regulatory Commission does not have the powers to issue directions to the Generating Company at the instance of the distribution licensee in the absence of the direct contract between the said distribution licensee and generating company as held by the Hon'ble Supreme Court in 2009 ELR (SC) 2496 i.e. Tata Power Vs Maharashtra Electricity Regulatory Commission. The relevant observation of the Hon'ble Supreme Court is as follows:

“91. The generation company, thus, exercises freedom in respect of choice of site and investment of the generation unit; choice of counter party buyer; freedom from tariff regulation when the generating company supplies to a trader or directly to the consumer....

118...Section 86 (1) (b) read with Section 23, if interpreted differently would empower the Commission to issue direction to the generating company to supply electricity to a licensee who has not entered into any PPA with it. We do not think that such a contingency was contemplated by Parliament”.

60. The above observations made by the Hon'ble Supreme Court would make it clear that the State Commission

cannot issue directions to the Generating Company to supply electricity to a licensee with whom the generating company had not entered into a PPA. In that context, the existence of the nexus in the present facts of the case becomes essential element to decide this issue of jurisdiction.

61. At this stage, it has to be taken note of the following admitted factual aspects (1) The power plant of the Appellant is situated in Himachal Pradesh (2) The delivery Point for sale of power under PPA is also located in Himachal Pradesh (3) The entire transaction for sale and purchase of power pursuant to the PPA takes place in Himachal Pradesh i.e. outside the State of Haryana (4) The PTC (R-3) is admittedly, an Inter State Trading Licensee which has been granted a Trading License by the Central Commission and not by the State Commission.
62. These aspects would clearly indicate that the dispute between the PTC (R-3), the inter State Trading licensee who is under the jurisdiction of the Central Commission and the generating Company whose plant is situated in Himachal Pradesh from where the power is generated and supplied to the PTC from the Bus Bar of the Project, cannot be adjudicated upon by the Haryana State Commission especially when it is claimed by the Appellant

that there is no nexus between the generating company and the State of Haryana or the nexus between the PPA and PSA. In the light of the above claim, let us now make a further analysis with regard to the nexus.

63. In the process of finding out as to whether there is any nexus, we have to take note of the following factors:

(a) The Power Purchase Agreement was entered into between the Appellant and PTC (R-3) on 30.3.2005. Thereupon, the PSA was entered into between the PTC (R-3) and Haryana Power (R-2) on 21.9.2006. The PSA was approved by the Haryana State Commission on 7.6.2007 in the application filed by the Haryana Power (R-2) praying for the approval of the PSA. On 17.12.2008, the Appellant sent a Force Majeure notice to PTC. On 18.12.2009, the Appellant terminated the PPA by sending the notice of termination on the ground that the Force Majeure events have continued to prevail and that therefore, it had become impossible for the Appellant to generate and supply power to the PTC (R-3) as per the PPA. This termination notice was received by the PTC.

(b) On receipt of the notice, i.e. after about 3 months, the PTC sent a reply letter to the Appellant on 16.3.2010 demanding the Appellant to withdraw the

said notice or else it will exercise its right to challenge the said notice of termination of the PPA at an appropriate Forum and to seek remedy available under the law.

(c) Even though through the said letter, the PTC indicated to the Appellant that PTC was aggrieved over the termination and as such it proposed to challenge the said notice of termination of the PPA in an appropriate forum, the PTC did not take steps to challenge the said termination before any Forum. On the other hand, the Haryana Power (R-2) which was not a party to the PPA filed a petition before the Haryana State Commission on 4.4.2011 seeking for quashing of the said termination notice dated 18.12.2009 issued to PTC and for consequent direction to the Appellant as well as PTC to supply power to Haryana power as per the PPA and PSA.

(d) Thus, PTC (R-3), a party to the PPA who is really aggrieved over the termination of the PPA, had not chosen to challenge the said termination notice before an appropriate forum even though they did not accept the termination notice and asked for its withdrawal through their letter dated 16.3.2010. But, the Haryana Power (R-2) which was not a party to the PPA, had

chosen to challenge the termination notice issued under PPA to PTC (R-3) before the Haryana Commission on being aggrieved over the non performance of the obligation of the PTC as per the PSA. PTC in fact, has filed reply to the above Petition before the State Commission that the Haryana State Commission has got the jurisdiction in respect of dispute between the parties arising out of the PSA. Thus, it is clear that the PTC (R-3) against whom the direction was sought for by the Haryana Power (R-2) has taken a stand before the State Commission that the State Commission has got the jurisdiction in regard to PSA only. Now the PTC (R-3) has taken a stand before this Tribunal that when there is no nexus established, it is the Central Commission who is the appropriate authority to go into the dispute arising out of the PPA. This means that the PTC has not taken a specific stand either before the State Commission or before this Tribunal to the effect that the State Commission alone has got the jurisdiction as there is nexus between the PPA and PSA.

(e) As mentioned earlier, a close reading of the PPA in the present case would establish that the obligation of the Appellant to supply power/energy output under the PPA was solely to PTC. The PTC was

independently entitled to sell the said power to one or more purchasers of any place or any State. Thus, the PTC was independently responsible for the supply of power to one or more purchasers whom it chooses.

(f) As indicated earlier, if the generating company enters into the PPA for the sale of power generated by it, knowing the State or the place where the power generated is going to be consumed, then the generating company acts with a nexus to the consumers of that State. In other words, even though the Haryana Power was not the party to the PPA if the parties to PPA have intended that the power is sold under the PPA to PTC to be further sold to Haryana Power namely ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana, then the Haryana Power is entitled to enforce the terms of the PPA. But in this case, these elements are absent.

(g) One other factual aspect is to be noticed at this juncture. After execution of the PPA between the Appellant and PTC on 30.3.2005, the Appellant applied for Long Term Open Access for supply of electricity from its project to the Power Grid Corporation of India Limited. On the said application, the Power Grid requested the Appellant through several letters for

information about the intended purchasers namely the ultimate beneficiary from its project. The Appellant however, did not provide any such details of the said purchasers. On the other hand it withdrew its application for Long Term Open Access. This fact is established from the letters dated 2.8.2005, 26.8.2005, 13.12.2005 and 13.5.2006. These letters would make it clear that no single purchaser had been identified at that time despite the fact that the Power Grid Corporation had requested the information as regards the beneficiary.

64. While taking note of the above factors, it is to be reiterated that the PPA did not have any amendments recognising the right of PTC to assign the PPA in favour of Haryana Power, the purchaser. The present PPA contains a specific clause namely Clause 16.2 that mandates that the PPA was for the benefit of only the parties thereto and shall not create any duty towards any third person. The relevant Article 16.2 is extracted below:

“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 any liability towards any third person”.

65. The perusal of this Article would make it evident that no third party could make claim under this PPA. If an express clause in the contract between the Appellant and PTC reflecting a clear intention not to be bound to any third party beneficiary then it is for the Haryana Power or the PTC to establish that the said express clause had been given a go-by thereby establishing a clear intention to be bound to third party namely Haryana Power in canvassing such nexus. No such material had been furnished in the present case.
66. It cannot be debated that the Appellant independently has not sent any communication to the State of Haryana or any Institution having a nexus to the ultimate purchaser with regard to sale of power from its project. As mentioned earlier, the letter dated 15.12.2006, sent by the other Group Company to the State Government pertains to the said Company alone and not with reference to the project of the Appellant. A mere reference to other project being taken up by Lanco Group which would include the project of the Appellant in the said letter cannot whatsoever lead to the conclusion that the Appellant has also made representation requesting the State of Haryana to purchase power from its project at Budhil.

67. As held above, the Haryana State Commission approved the PSA only and not the PPA which is evident from the letter dated 7.6.2007 sent by the Commission. Admittedly, the Appellant had not made any application seeking approval of the PPA or PSA nor participated in the proceedings for approval of the PSA.
68. In this case, admittedly, there was no identification of the purchaser at the time of the PPA.
69. As stated above, mere identification of the purchaser just prior to the execution of the PSA is not sufficient. It is essential for the parties to the PPA to concertedly act in pursuance of the reference about the identification of the purchaser with an intention to be bound by the same.
70. It would be a different matter altogether if such purchasers had been expressly identified at the time of entering into PPA with the intention of being bound with such purchaser. In the instant case, the identification of the purchaser was much after the PPA i.e. shortly prior to PSA. Therefore, the identification of purchaser is relevant for establishing nexus only when the parties had acted in pursuance of the said identification by incorporating the details of such purchaser in the PPA or at least in the subsequent amendments made in the PPA. This relevant aspect is missing in this case.

71. Admittedly, the PTC was only a trader and not an ultimate consumer of the power from the Appellant's project. At the risk of repetition, it must be stated that at the time of entering into PPA, no purchaser had been clearly identified. In fact, the term purchaser has been defined in the PPA. It expressly contemplates as "one or more purchasers" of the Power to be supplied. The relevant definition is as follows:

***"Purchaser"** means one or more entities to which PTC may sell the power and energy purchased from the Company;"*

72. The re-sale of the power procured under the PPA takes place under the Power Sale Agreement (PSA) between the PTC and Haryana Power (R-2). In this transaction relating to PSA, the Appellant was not a party. At the time of PPA, there was no certainty whatsoever that the power would be re-sold by PTC (R-3) to Haryana Power (R-2) to supply the said power to Haryana consumers. Therefore, the purchase of power under the PPA cannot be construed to be within the jurisdiction of the Haryana Commission.

73. According to the Appellant, this is a case covered under the judgment in Appeal No.7/09 in which it is held that the nexus was absent and therefore, the State Commission has no jurisdiction. On the other hand, the Haryana Power (R-2) has submitted that the present case is distinct from the facts of the case in Appeal No.7 of 2009.

74. According to Haryana Power (R-2), this Tribunal in two other decisions in Appeal No.200 of 2009 and 15 of 2011 had dealt with the aspects of nexus determining the jurisdiction of the State Commission to deal with the disputes arising between the Generating Company and the Distribution Licensees and held that it has got the jurisdiction and that those decisions, on similar facts would apply to the present facts of the case and the same may be followed in this case also.
75. In the light of the above rival contentions, we have to find out which of the judgment would apply to the present case.
76. We shall first consider the judgments of this Tribunal cited by Haryana Power (R-2). Let us now first go into the factual aspects contained in Appeal No. 200 of 2009 i.e. Pune Power Development Private Ltd v. KERC & Ors cited by Haryana Power (R-2) in order to find out whether the facts of this case are similar with that of the present case and whether the ratio decided in that case would apply to the present case.
77. The dispute in that case was raised by the Mangalore Electric Supply Company Limited. This is with regard to the non supply of power by the Pune Power Development Private Ltd in terms of the agreement entered into between the parties. The dispute that was raised before the State

Commission was relating to the claim by the Respondent (Mangalore Electric Supply Company Ltd) therein for compensation from the Appellant (Pune Power) for violation of a contractual arrangement for the banking of power.

78. In that case, the Appellant raised the point that the State Commission has no jurisdiction to enter into the dispute between the Appellant and the Respondent, since Pune Power Development Private Ltd (Appellant) was the trading licensee of the Central Commission and not a licensee of the State Commission. State Commission did not accept the said contention and held against the Appellant. In the Appeal against that order, it was found by this Tribunal that the entire process of power procurement including the price at which the power is to be procured by the Distribution Licensee (Respondent) is subject to the jurisdiction of the State Commission as the jurisdiction extends to the procurement of electricity from the Generating Company or licensees or from other sources under Section 86 (1)(b). The Tribunal has also found in that decision that Section 86 (1)(f) is a very widely worded and covers the entire process of the power procurement of a Distribution Licensee and as such a procurement can be made from any place within or outside the State. In that context, it was held that all the purchases of electricity from the persons including the trading licensees like the Appellant falls under the

jurisdiction of the State Commission, as there was no restriction under Section 86 (1)(f) regarding the nature of license. All disputes relating to the regulatory jurisdiction of the State Commission which involves a distribution licensee or a trading licensee shall have to be adjudicated upon exclusively by the State Commission. In that case, the dispute was between the distribution licensee of Karnataka and the inter State licensee in respect of the agreement entered into between them. The inter State licensee is selling power to the distribution licensee in the State of Karnataka for distribution to the consumers of Karnataka thereby having a nexus to the State of Karnataka. The procurement of power by the distribution licensee of the State from the trading licensee, the Appellant falls within the regulatory jurisdiction of the State Commission of Karnataka under Section 86(1) (b) of the Act. Therefore, the procurement of power has a direct nexus with the State of Karnataka as the supply is to the Licensee of Karnataka State. In that context, this Tribunal in the above case held that the Karnataka Commission has got the jurisdiction by giving the following reasons:

- (a) That the dispute was between a distribution licensee of Karnataka and an inter-state trading licensee.

(b) That the dispute arose out of the sale of power by the inter-State trading licensee to the distribution licensee in Karnataka, through a direct agreement between the said two parties. As such, the relevant nexus with the State of Karnataka was established.

(c) Procurement of power by the distribution licensee from the trading licensee fell within the regulatory jurisdiction of the State Commission of Karnataka under Section 86 (1)(b), since there was admittedly a direct agreement between the distribution licensee and the trading licensee “for purchase of power for distribution and supply within the State” as required by Section 86 (1)(b).

(d) The procurement of power had a direct nexus with the State of Karnataka as the supply was to the Karnataka distribution licensee for the consumption of consumers of Karnataka.

79. This judgment was rendered by this Tribunal in Appeal No.200 of 2009 in the light of the facts of that case. Those facts cannot be said to be similar to the facts of the present case. The instant case is distinguishable.

80. In the present case, the PPA between the Appellant, the Generating Company and the PTC, Inter State Trader does

not come directly within the purview of the State Commission in terms of Section 86 (1) (b). But the PSA in the instant case between the PTC and Haryana Power is certainly an agreement for purchase of power for distribution of supply within the State. Therefore, it can be held that PSA is falling within the purview of Section 86 (1) (b) as admitted by the PTC but not the PPA as this is not such an agreement. As mentioned earlier, the distribution licensee was not the party to the PPA and there was no other agreement between the distribution licensee, Haryana Power (R-2) and Generating Company, the Appellant relating to the distribution and supply within any particular State i.e. Haryana State. Hence, it does not satisfy the term of procurement of power by distribution licensee from a generating company for supply in the within the State as required under Section 86 (1) (b). Therefore, the decision of this Tribunal in Appeal No.200 of 2009 has no application to the facts of the present case.

81. We will now go into the factual aspects contained in the judgment in Appeal No.15 of 2011 cited by Haryana Power (R-2) in support of its submissions in order to find out whether these facts are similar to that of the facts of the present case.

82. According to Haryana Power (R-2), the terms of the PPA in the present case are similar to the PPA in Appeal No.15 of 2011; facts in both the cases are similar; circumstances and conditions based upon which the Appeal No.15 of 2011 was decided on the aspect of nexus are also substantially similar in this Appeal and that therefore, the ratio and principles laid down by this Tribunal in Appeal No.15 of 2011 that Haryana Commission has the jurisdiction would apply to the present case as well.
83. The Learned Counsel for the Haryana Power has pointed out the following principles which have been laid down by this Tribunal in Appeal No.15 of 2011. They are:
- (a) The application of Section 86 (1) (f) of the Electricity Act, 2003 dealing with the adjudication of disputes is not dependant upon existence of any agreement between a generating company and a distribution licensee. In other words, the existence of a contractual relationship or a privity of contract is not a pre-condition for exercise of the jurisdiction.
 - (b) If a generating company is selling electricity which is intended for maintaining the supply to the consumers of the State, the same would be covered by Section 86 (1) (f) of the Electricity Act, 2003. The dispute arising in regard to the same shall be subject to

adjudication by the State Commission regulating the tariff for the consumers of the State where such generated electricity is intended to be supplied.

(c) If a generating company enters into an agreement knowing the place where the power generated is going to be consumed, there will then be a nexus to the consumers of the State.

(d) A trader is an intermediary when he is dealing with a distribution licensee for resale of electricity purchased from generating company, and he is doing so as a conduit between a generating company and a distribution licensee. If a trader is not functioning as a merchant trader with financial and commercial risk but passing on the risk to the purchaser on resale i.e. the distribution licensee, the trader acts as an intermediary linking the company.

(e) The procurement process dealt in Section 86 (1) (b) is not confined to a single aspect of an agreement and would include purchase of electricity through another intermediary trader. In other words, the process is a wider term.

(e) The requirement to execute the PSA was an intrinsic and material provision of the PPA and the

performance of the PPA was dependent upon the execution of the PSA. Under the PPA terms, the copies of communication are to be sent to the purchaser. Hence, PPA and PSA are interdependent documents.

84. According to Haryana Power (R-2), the above aspects are fully present in the present case.

85. In order to establish the aspect of the nexus between the PPA and PSA, the learned Counsel for the Haryana Power(R-2) on the strength of summary of events giving the sequence of facts filed by R-2 has pointed out the following salient aspects. They are:

(a) Prior to the execution of the PPA dated 30.3.2005, there were negotiations between the PTC and the Appellant leading to the Letter dated 9.9.2004 written by the Appellant followed by the execution of the Memorandum of Understanding dated on 3.12.2004. The Memorandum of Understanding, inter alia, recognized that:

(i) The PTC's main function, inter alia, is to carry on the business of purchase of all forms of electrical power for sale to SEBs, Power Distribution Companies, other organizations and bulk power consumers etc, in India and abroad".

(ii) *“That LGPPL (Appellant) shall furnish a detailed proposal indicating the provisional tariff as per current CERC norms along with all supporting calculations and other such **details of the Project as may be required by PTC to arrange for the prospective buyers of power from the Project;***

(iii) *“That sale of power from the Project by PTC to any third party(or parties), including the SEBs/State Power Utilities will be on terms and conditions, including the **terms for power tariff and the payment security structure as may be found acceptable by PTC;***

(iv) *That PTC will purchase power generated from the Project on the terms and conditions as stipulated in the Power Purchase Agreement (PPA) to be mutually agreed and signed between PTC **and LGPPL in consultation with beneficiary states. PTC shall enter into suitable Power Sale Agreement (PSA) with beneficiary states for purchase of power by them; and;***

(v) That LGPPL shall not enter into dialogue or any other memorandum of understanding or agreement with a third party (or parties) or undertake any steps to independently market the electricity from the Project during the period of validity of this MOU.

(b) The above terms of the Memorandum of Understanding clearly establish that from the beginning the intention of both the Appellant and the PTC was to sell the entire saleable power from the Project to a third party namely a distribution company etc, with PTC acting as a conduit or intermediary trading licensee and not that the power purchase by PTC as a merchant trader. The Appellant had empowered PTC to sell to such purchaser of power giving the tariff terms and agreeing to finalization of tariff in consultation with the beneficiary third party purchaser;

(c) The PPA executed on 30.3.2005 refers to the Memorandum of Understanding in Recital D states the entire scheme of back to back arrangement proposed as under:

(i) PTC and the Company have entered into a memorandum of understanding on 3rd November,

2004 for PTC to purchase, from the Company, the entire salable power and energy from the Project at the Delivery Point for a period of thirty five (35) years from the Commercial Operation Date of the Project, from onward sale on long-term basis.

(ii) PTC will enter into suitable arrangements with one or more Purchasers, for sale of such Contracted Capacity, Power Output from the Project.

(iii) 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, subject to the terms and conditions of this Agreement.

86. On the basis of these salient aspects, it is contended by the Learned Counsel for the Haryana Power (R-2) that the present case also has the same recital as in Appeal No.15 of 2011 and those recitals in the PPA in the present case brings out the linkage with the PSA and the intention of the parties to sell the electricity to the purchaser from PTC and

therefore, the ratio decided in Appeal No.15 of 2011 has to be followed in this case.

87. Per contra, the Learned Counsel for the Appellant emphatically submits that the conclusion arrived at by this Tribunal in Appeal No.15 of 2011 to the effect that the Haryana Commission has got the jurisdiction was entirely on the peculiar facts of that case and those facts would not apply to the present facts of the case and as such, the reliance by Haryana Power (R-2) in Appeal No.15/2011 is misplaced. He also pointed out the various dissimilarities between Appeal No.15 of 2011 and the present case.
88. We have considered the rival contentions on this aspect. On going through the judgment of this Tribunal in Appeal No.15 of 2011, we find that this Tribunal has held that the State Commission has got the jurisdiction to adjudicate a dispute between the generating company and the licensee despite the fact that there was no contractual relationship between the parties, on the basis of the two important factors which weighed this Tribunal in rendering such a finding.
89. These two factors were (1) The PPA was amended subsequent to State Commission's in principle approval for purchase of power of generating company's power station from the trading licensee to introduce a clause

relating to assigning of rights and obligations of the trading licensee to purchaser of power under the PPA. At the time of signing the amendment to PPA, the purchaser had been identified (2) the Conduct of the Appellant Generating Company in that matter in participating in the PSA approval proceedings and in making relevant representation made to the State Commission as well as to the State Government and admissions made by the Appellant Generating Company therein reflected a clear intention of the Generating Company to be bound to the purchaser.

90. In the light of the said finding, on the basis of the facts of that case, we have to find out from the facts of this case as to whether the facts in the instant case had disclosed the identification of the Purchaser at the relevant time and the relevant conduct of the Appellant Generating Company reflecting the intention of to be bound to the purchaser which would establish the nexus. Let us now discuss the various relevant features in the light of the factual aspects of this case. They are as follows:

(a) There cannot be any dispute with reference to the settled law that when there is a nexus between the PPA and PSA and the sale of power by the generating Company to the ultimate purchaser, the State Commission has got the jurisdiction to go into the

dispute between the parties. Similarly, it is the settled law that when there was no such nexus or privity between the PPA and PSA, the jurisdiction of the State Commission cannot be invoked.

(b) This Tribunal in Appeal No.15/2011 in the light of the specific admission made by the Appellant generating Company before the State Commission held that there was a direct intention of the Appellant generating Company to sell power from its project to the State of Haryana thereby indicating the clear nexus establishing the jurisdiction of the State Commission.

(c) According to the Appellant, in the present case, the said circumstance regarding manifest conduct of the representation made by the Generating Company in Appeal No.15 of 2011 before the State Commission is absent and that therefore, there is no nexus between the sale of power from the project of the Appellant and the State of Haryana.

(d) In the instant case, the PPA was entered into between the Appellant and PTC on 30.3.2005. The Appellant thereafter applied for Long Term Open Access for supply of electricity from its project to the Power Grid Corporation of India Limited. Thereupon, on several occasions, the Power Grid requested the

Appellant for information with regard to the intended purchasers from its project. The Appellant did not provide those details. On the other hand, it withdrew the application for Long Term Open Access. This would make it clear that the Appellant was not able to give any particulars regarding the purchasers as they had not been identified at that time. Therefore, there was no material to show that either at the time of PPA or at the time of filing application before the Power Grid Corporation, the purchaser or the purchasers had been identified to the Appellant.

(e) The PSA was executed between the PTC (R-3) and Haryana Power (R-2) on 21.9.2006 i.e. one and half years subsequent to the PPA. While seeking to draw a nexus of the present proceedings with that of the facts in Appeal No.15 of 2011, the Learned Counsel for the Haryana Power has submitted that the PSA in Appeal No.15 of 2011 was executed on the same date when the PSA in the present case was executed i.e. on 21.9.2006. Since the Appellant was not a party to the said PSAs, the mere fact that these PSAs were executed on same date as between the Haryana Power and PTC, would not establish a legal nexus to bind the Appellant. It is also contended by the Learned Counsel for Haryana Power that since the sale of power in the

instant case was at or about the same time as in the case of Appeal No.15 of 2011, present case is squarely covered by the said decision. But it is noticed that the PPA in the present case was entered into on 30.3.2005 whereas the PPA in Appeal No.15 of 2011 was entered into on 19.10.2005. Furthermore, the PPAs were entered into for separate and distinct projects; one being a 300 MW thermal project and other being a 70 MW Hydro Power project located in separate States and between two separate entities. Therefore, the contention of the Learned Counsel for Haryana Power cannot be accepted.

(f) The PPA in the present case did not have any amendments recognising the right of the PTC to assign the PPA in favour of the Purchaser. But, in Appeal No.15 of 2011 the amendment to the PPA was entered into on 18.9.2006 and by virtue of that amendment, the PTC was granted the right to assign the PPA to the Purchaser. The PPA in the present case contains a specific clause that mandated that PPA was only for the benefit of the parties thereto and shall not create any duty towards any third party.

(g) As a matter of fact, as mentioned earlier, Article 16.2 of the PPA would clearly provide that the

agreement is solely for the benefit of the parties and shall not be construed to create any duty towards any 3rd party. As per this Article, no such right was assigned through the PPA to the purchaser i.e. the Haryana Power. According to Haryana Power, the PPA in the present case is substantially similar to the PPA in Appeal No.15 of 2011. This contention cannot be correct since there is an important difference between the PPA in Appeal No.15 of 2011 and the PPA in the present case i.e. there was no clause in the present PPA that contemplates assignment of the PPA to the purchaser in the manner of assignment clause contained in article 16.6.5 of the PPA in Appeal No.15 of 2011. In Appeal No.15 of 2011, Article 16.6.5 was added to the PPA in the Amendment Agreement on 18.9.2006 after the in principle approval by the State Commission to purchase of power from Appellant's Power Station from PTC. The Article 16.6.5 introduced in the PPA in Appeal No.15 of 2011 is reproduced below:

“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”.

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”.

As stated above, such article 16.6.5 relating to assignment of PTC's rights and transfer of its obligation to the Purchaser is not available in the PPA in the present case. This is the main clause in the PPA to establish nexus in Appeal No.15 of 2011 which is absent in the present case.

(h) As indicated above, the amendment dated 18.9.2006 granting the right to assign the PPA to the Purchaser is absent in the present PPA. Therefore, merely because certain clauses of the PPA in Appeal No.15 of 2011 are similar to some clauses of the PPA in the present case would not ispo-facto establish a nexus in the light of the fact that there is material difference on some important aspects between the PPA in both the cases as pointed out earlier.

(i) If an express clause in the contract between the Appellant and PTC reflecting a clear intention not to be

bound to any third party beneficiaries is to be given a go by, then the Haryana Power has to adduce the solid evidence establishing a clear intention of the Appellant to be bound to the Purchaser in canvassing such a measure. No such material in the present case has been furnished by the Haryana Power.

(j) According to Haryana Power, the Appellant group Company had approached the State of Haryana for sale of power from its generating stations through PTC and in that correspondence, the Appellant in Appeal No.15 of 2011 had given details of the project of the present Appellant also in its letter dated 15.2.2006. This is stated to be the nexus. This again is wrong. The letter dated 15.2.2006 was sent by the Appellant Group Company in Appeal No.15 of 2011 to the State of Haryana which pertains to the sale of power generated from the 300 MW Thermal Power Plant situated in Chhatisgarh and not from the project of the Appellant situated in Himachal Pradesh. The mere reference to the project of the Appellant being taken up by the Group Company in the said letter cannot lead to the conclusion that the Appellant herein also made representation to the State Government of Haryana requesting to purchase power from its project at Budhil.

(k) The request of the Appellant in Appeal No.15 of 2011 making a request to the State Government cannot have any nexus or relevance to the present dispute as the subject of the letter has been mentioned as “2x300 MW” Lanco Amarkantak Power Project and not with reference to the Lanco Budhil, the Appellant’s power project.

(l) In view of the above, it is not correct to contend that the Appellant in the present case has approached the State of Haryana for sale of power from its Hydro Power project established in Himachal Pradesh to the State of Haryana.

(m) In Appeal No.15 of 2011, in the proceeding before the State Commission for approval of PSA, the the Appellant (Lanco Amarkantak Company) was given an opportunity to make representation with reference to the approval of the PSA and accordingly, the said company admitted the nexus between the PPA and the PSA and prayed the State Commission to approve the PSA. Thus, the State Commission approved the PSA mainly on the basis of the representations made by the Generating Company admitting the nexus, though it was not a party to the PSA. But, in the present case, the State Commission has approved the PSA only as

referred to in its letter dated 7.6.2007 only on the application filed by Haryana Power without hearing the Appellant.

(n) Mere fact that the State Commission approved the PSA dated 21.9.2006, does not mean that the PPA also was approved just because the copy of the PPA was annexed with the PSA. Such exercise cannot be made by the State Commission without notice to the Appellant who was a party to the PPA. As explained earlier, the Appellant, in this case, had not made any application to the State Commission for seeking approval of the PPA and PSA nor participated in the proceedings for approval of the PSA like the Appellant in Appeal No.15 of 2011. It was clear therefore, that it was only the PSA that was placed before the State Commission for approval and approved and not the PPA.

(o) In the judgment in Appeal No.15 of 2011, it was found that there is a nexus between the Appellant in that Appeal and the Haryana power as scheme of sale and purchase of power was on back to back basis and the PPA and PSA are inextricably linked. Contending that this finding would be applicable to the present case, the Haryana power (R-2) has placed reliance on

the identification of the purchaser by the Generating Company in order to establish a nexus with the State of Haryana.

(p) This Tribunal in Appeal No.15 of 2011 held that the nexus had been established in that case in view of the identification of the Haryana Power as the Purchaser and the same information conveyed to the generating company prior to the execution of the PSA coupled with the conduct of the Appellant therein and PTC in pursuance thereof by consequentially amending the PPA by way of amendment dated 18.9.2006. Only after execution of the amendment agreement dated 18.9.2006, the PSA was executed on 21.9.2006. This element is not available in the present case. Mere identification of a Purchaser prior to the execution of the PSA is not sufficient. On the other hand, it is essential for the parties to the PPA to act in pursuance thereof with an intention to be bound by the same and consequently it has to be established that the generating company had identified the purchaser which bears a nexus with the said purchaser.

(q) In PPA and PSA Agreements which involve a trading licensee, it will always be the case that there is a Purchaser who will be identified at some point of time

for the purpose of onward sale. Therefore, mere identification of the Purchaser at some point of time subsequent to the PPA cannot be sufficient to bind that the person who is a signatory party in the PPA, to such Purchaser with whom there is no direct contractual relationship. It would be different matter altogether if such Purchaser had been expressly identified at the time of PPA with the intention of being bound to such Purchaser expressly stated in the PPA or amendment to the PPA.

(r) In the instant case, admittedly, the identification of the purchaser was not at the time of the PPA. Even assuming that such purchaser was identified shortly prior to PSA, it does not follow the relevant nexus is established unless there is an endorsement by the Generating Company for being bound to the Purchaser.

(s) As a matter of fact, in appeal No.15 of 2011, there is much more beyond identification in terms of consequential amendment to the PPA and also in terms of the conduct of the generating Company reflecting its clear intention to be bound.

(t) It is settled law that parties can only be held liable to perform obligation in respect of the contract that the parties had kept in mind at the time of the

execution of the contract. Accordingly, the identification of the Purchaser is relevant for establishing the nexus only if the parties had acted in pursuance of said identification by incorporating the details of the Purchaser either in the PPA or by way of an amendment to the said PPA. This element is absent in this case. Therefore, it cannot be inferred that the Appellant had a nexus either with the State of Haryana or with the distribution licensee of the State merely because the purchaser had been identified shortly before the execution of the PSA.

(u) In the present case, it is quite clear that at the time of entering into PPA and until shortly before the execution of the PSA, no such purchaser had been identified to the Generating Company. As mentioned earlier, the PPA expressly contemplates the definition of Purchaser as it means one or more entities to which the PTC may sell the power purchased from the Appellant. Under those circumstances, merely because the PTC contracts with a single purchaser, the legally binding obligation cannot be created between the generating company and the Purchaser i.e. the distribution licensee especially in the light of the Article 16.2 of the PPA.

91. In the light of the above factual circumstances in the present case, which are separate and distinct from the factual circumstances contained in Appeal No.15 of 2011, we are of the view that the finding rendered by this Tribunal in Appeal No.15 of 2011 would not apply to the present facts of the case.
92. Let us now deal with the other question as to whether the ratio decided in the judgment in Appeal No.7 of 2009 cited by the Appellant holding that the State Commission has no jurisdiction, would apply to the present case as it is stated that the facts in the instant case are similar to the facts of that case of Appeal No.7 of 2009.
93. The main question for consideration in Appeal No.7/2009 was as to whether Madhya Pradesh State Commission had the jurisdiction to adjudicate upon the dispute between the Appellant Generating Company situated outside the Madhya Pradesh and PTC, the inter State Trading Licensee which has not been granted license by the Madhya Pradesh Commission.
94. In that case, it is held that the word "licensee" as referred to in section 86 (1) (f) has to be construed to mean such a licensee which have been granted a trading licensee by the particular State Commission to assume jurisdiction over the disputes. In that case, the PPA was executed outside the

Madhya Pradesh. The Appellant generating station was situated outside Madhya Pradesh; the delivery point for power output from Appellant's power plant to PTC was also located outside Madhya Pradesh; PTC is not a trading licensee under the State Commission but it is holding inter State Trading License obtained from the Central Commission.

95. In the light of the above factors, this Tribunal in that Appeal held that the PPA as also the rights and obligations arising there under bear no nexus in the State of Madhya Pradesh so as to confer jurisdiction upon the State commission to adjudicate upon the dispute arising out of the said PPA. It was argued by the distribution licensee in that case that Madhya Pradesh State Commission has got the jurisdiction over the dispute since the PPA and PSA constitute back to back agreements. This argument was rejected by this Tribunal on the ground that the two agreements are separate and distinct between different parties. It is also held in the said judgment that close reading of the PPA clearly establish that the obligation of the Appellant, the generating Company to supply power under the PPA was solely to PTC which was independently entitled to sell the said power to one or more purchasers of its choice and as such PTC was independently responsible and liable for supply of power to such purchasers. This Tribunal relied

upon clause 16.2 of the PPA in that case to hold that the PPA is distinct and independent of the PSA. In so far as the said clause expressly dis-applies any notion of third party rights and clarifies that the PPA is solely for the benefit of the parties namely the Appellant (generating Company) and PTC only. Thus, this Tribunal in that Appeal concluded that as there is no nexus between the PPA and State, Madhya Pradesh State Commission had no jurisdiction to adjudicate upon the dispute raised in that case.

96. According to the Appellant, all the above factors are clearly present in the instant case as well and hence the same conclusion should follow.
97. On the contrary, the Haryana Power (R-2) has submitted that the present case is separate and distinct from the facts in Appeal No.7/2009 in view of the fact that this Tribunal gave judgment regarding the jurisdiction in that case on the basis of the Regulations framed by the Madhya Pradesh Commission but similar Regulations have not been framed by the Haryana State Commission and as such the conclusion arrived at in Appeal No.7 of 2009 would not apply to the present case.
98. Refuting these contentions, the Learned Counsel appearing for the Appellant has submitted that the State of Haryana

also has enacted similar Regulations namely HERC (licensing of trading, eligibility criteria for grant of trading license, the duties and the terms and conditions of trading license) Regulations, 2005 (“HERC Regulations”).

99. Let us now see whether similar Regulations as referred to in Appeal No.7/2009, as framed by the Madhya Pradesh Commission have been framed by the Haryana State Commission also.

100. We will now quote some of those relevant Regulations framed by the Haryana State Commission which are as follows:

“Regulation 2 (e):

“Licence” means a licence granted under Section 14 of the Act to undertake trading in electricity within the territory of the State of Haryana.

“Regulation 2 (f):

“Licensee” means a person who has been granted a licence under Section 14 of the Act to undertake intra-State trading in electricity within the State of Haryana and includes a person deemed to be a licensee under Section 14 of the Act”.

.....

3. Provision for Inter-State Trading Licensee

(1) A person who has been granted a licence by the Central Electricity Regulatory Commission for inter-state trading shall not be required to take a licence under

these Regulations in respect of sale or purchase of electricity within the State of Haryana. However, such a licensee shall inform in writing as per **Form-1** to the Commission about its intention to trade in the State of Haryana and also abide by the prevailing regulations /codes/orders/guidelines/ directions issued by the Commission from time to time.

24. Terms and Conditions of License

The terms and conditions of license applicable to the Licensee with effect from the notified date shall be as set out in **Form -8**".

101. It is evident from the above that the terms and conditions of the license to undertake Intra State trading within the State of Haryana as contained in Form No.8 have been annexed to the HERC Regulations. At this stage, it would be worthwhile to refer to Article 13 of the said terms and conditions of the license which is as follows:

"13. Dispute Resolution

"The Commission shall adjudicate upon the disputes between the Licensees and Generating companies and may refer any dispute for arbitration as per HERC (Conduct of Business) Regulation 2004".

102. From this Article, it is clear that the adjudication by the State Commission would be of disputes between intra-state licensees and generating companies, and not inter-state trading licensees and generating companies.
103. We will now refer to some of the relevant Regulations of the Madhya Pradesh State Commission Regulations.

104. Regulation 10.2 of the Madhya Pradesh Regulations also provides for dispute resolution which is extracted below:

Regulation 10.2: *The Commission may act as Arbitrator or nominate person(s) as arbitrator(s) to adjudicate and settle disputes between the Trading Licensee, any other licensee or generating companies in pursuance of Clause (f) of sub-section (1) of Section 86 read with Section 158 of the Central Act and Regulations of the Commission.*

105. The term Trading Licensee has been defined in the Regulation 1.4 (f) of the Madhya Pradesh Regulations which is as follows:

“Trading Licensee: *means a person who has been granted a Trading Licence for intra State trading in Madhya Pradesh and does not include a person granted licence by CERC (Central Commission) for inter-State trading or a person granted licence for trading by any other State Commission”.*

106. The term Trading Licence has been defined in the Regulation 1.4(s) of the Madhya Pradesh Regulations which is as follows:

“Trading Licence” *means a licence under Section 14 of the Act to undertake intra State Trading”.*

107. From the comparison of both the Regulations namely between the Haryana State Commission Regulations and

the Madhya Pradesh Regulations, we find similarities which are referred to as below:

(a) That both the Regulations provide that the State Commission shall adjudicate disputes between Licensees and Generating Companies;

(b) Licensees have been specifically defined to mean persons who have been granted a License under Section 14 of the Act to undertake intra-state trading;

(c) That inter-state traders do not ordinarily require a separate trading license to undertake intra-state trading within a State;

(d) However, a State Commission can only exercise jurisdiction in terms of a licensee who has been granted a license under Section 14 of the Electricity Act, 2003 to undertake intra-state trading within the territory of the State concerned.

108. So, from the above comparison, it is clear that the adjudication by the State Commission would be of disputes between the Intra-State Licensee and Generating Companies and not the Inter State Trading Licensees and Generating Companies and as such both the State Commissions have framed similar Regulations on this aspect.

109. In view of the above, the contention of Haryana Power (R-2) that similar Regulations of Madhya Pradesh State Commission which have been taken into consideration in Appeal No.7/09 in relation to the Madhya Pradesh Commission have not been framed by the Haryana State Commission in the present case is untenable.
110. As indicated above, in this case also, the distribution licensee is not a party to the PPA. The generating company is situated in Himachal Pradesh. The Power supply shall be supplied to the PTC at the Bus Bar of the project in Himachal Pradesh. The Appellant was not the party to the PSA. PTC is not a trading licensee under the State Commission but it holds the licence from the Central Commission for Inter State Trading License. As such, there is no nexus between the PPA and PSA.
111. Therefore, we are of the considered opinion that all the features which are present in the Appeal No.7 of 2009 are present in the instant case also. Hence, we find that there is merit in the contention of the Appellant that the ratio decided in the above case should be followed in this case also.
112. Haryana Power, during the course of hearing before this Tribunal in the present proceedings adverted to the purported distinction between the Merchant Trader and

Intermediary Trader and contended that the PTC in this case acted only as intermediary. We are unable to distinguish between a merchant trader and intermediary trader as these terms are not defined and used in the Act or Rules/Regulations or National Electricity Policy/Tariff Policy. However, the Haryana Powers' contention is that PTC was merely a conduit. This contention is misconceived. The PTC cannot be certainly construed to be an intermediary or conduit in any manner whatsoever. PTC has undertaken to off-take the entire saleable power and energy from the Appellant's Power Station for a period of 35 years and pay monthly and supplementary bills in terms of the PPA. PTC has taken the responsibility to enter into or cause the purchaser to enter into a bulk power transmission agreement with CTU for wheeling of power from the delivery point. Accordingly, PTC had applied to CTU to obtain long term open access and has further executed Bulk Power Transmission Agreement dated 18.10.2007 with the Appellant and PGCIL. Through the PPA, the PTC has undertaken upon itself substantial financial and commercial risk such as providing a Payment Security Mechanism by way of undertaking to furnish an irrevocable Letter of Credit. Thus, the PTC has undertaken substantial commercial obligations which distinguishes it from mere intermediary or conduit.

113. In this context, it would be appropriate to refer to the Constitution Bench Judgment of Hon'ble Supreme Court in the case of Md. Serajuddin Vs State of Orissa; (1975) 2 SCC 47 cited by the Appellant in support of his plea that there was no privity of contract as the PPA and PSA are not back to back agreements. In the above case, the Constitution Bench has held that there was no privity of contract in relation to back to back agreements. It is pointed out that in that case, it was held that though the sale by the Appellant to State Trading Corporation, was through a separate contract and thereupon the State Trading Corporation made subsequent sale to the foreign buyers through a different contract, the said sale by the Appellant to Corporation and the purchase of foreign buyers from the said corporation cannot be said to be back to back agreements.
114. We have gone through the judgement rendered by the Constitution Bench of the Hon'ble Supreme Court in the case of Md. Serajuddin Vs State of Orissa. On going through the same, we find that the ratio of the said case before the Hon'ble Supreme Court would apply to the facts of the present case.
115. In that case, the Appellant entered into a contract with the State Trading Corporation for sale. Thereafter, the Trading

Corporation entered into a separate contract with the foreign buyers for the sale. It was argued before the Hon'ble Supreme Court that both these contracts are back to back agreements. The Hon'ble Supreme Court in the said case rejecting the said argument, has held that the sale by the Appellant to the State Trading Corporation through a separate contract is different from the contract which was entered between the State Trading Corporation and foreign buyers for the sale and as such, the sale by the Appellant to State Trading Corporation cannot be treated as a sale to the foreign buyers and therefore, there was no privity of contract between the Appellant and the foreign buyers. The relevant observation is as follows:

“25. The contention on behalf of the appellant that the contract between the appellant and the Corporation and the contract between the Corporation and the foreign buyer formed integrated activities in the course of export is unsound..... The features which point with unerring accuracy to the contract between the appellant and the Corporation on the one hand and the contract between the Corporation and the foreign buyer on the other as two separate and independent contracts of sale.....

.....The Corporation entered on the scene and entered into a direct contract with the foreign buyer to export the goods. The Corporation alone agreed to sell the goods to the foreign buyer. The Corporation was the exporter of the goods. There was no privity of contract between the appellant and the foreign buyer.

The privity of contract is between the Corporation and the foreign buyer.

26.Such contracts for procurement of goods for export are described in commercial parlance as **back to back contracts**. In export trade it is not unnatural to find a string of contracts for export of goods. It is only the contract which occasions the export of goods which will be entitled to exemption. The appellant was under no contractual obligation to the foreign buyer either directly or indirectly.

.....

The rights of the appellants were against the Corporation. Similarly the obligations of the appellant were to the Corporation. The foreign buyer could not claim any right against the Appellant nor did the appellant have any obligation to the foreign buyer. All acts done by the Appellant were in performance of the appellant's obligation under the contract with the Corporation and not in performance of the obligations of the Corporation to the foreign buyer.

27. The expression “sale” in Section 5 of the Act has the same meaning as in Sale of Goods Act. String contracts or chain contracts are separate transactions even when there is similarity relating to quantity, quality of goods, shipment, sampling and analysis, weighment and Force Majeure etc. or other similar terms. A contract of sale is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for the money consideration called the price. There were two separate contracts. The price was different in the two contracts. This difference also dissociates the two contracts from each other.....”

116. Thus, the reasoning and the ratio of the judgment of the Hon'ble Supreme Court in the case of Md. Serajuddin, supra, squarely applies to the present case and therefore it cannot be held in this case, that there is any privity of contract between the Appellant and the Haryana Power (R-2) and consequently it cannot be held that the sale of electricity by the Appellant to the PTC (R-3) was a sale by the Appellant to Haryana Power (R-2).
117. In this context, we have to refer to one more aspect pointed out by the learned Senior Counsel for PTC. In this Appeal, we have heard both the parties who argued at length on several dates of hearings and permitted them to file the written submission also. Accordingly, they filed their written submissions. Thereupon, we have reserved the matter on 20.4.2012 for judgment.
118. Before pronouncement of the judgment, the Learned Senior Counsel for the PTC (R-3) mentioned before us about some fresh development subsequently taken place in view of the recent judgment of Delhi High Court to be brought to our notice and requested us to permit the PTC to file the interlocutory application praying to take on record the said recent judgment of the High Court of Delhi on this issue.
119. As requested by the Learned Senior Counsel for the PTC through IA 204 of 2012, we have entertained the said

application and heard both the parties with reference to the issue decided in the said judgment rendered by the High Court and its impact on this Appeal.

120. According to the Learned Senior Counsel for the PTC, the High Court of Delhi has held in the judgment OMP No.677/2011 PTC India Limited Vs Jai Prakash Power Venture Limited dated 15.5.2012 that only the Regulatory Commissions i.e. the State Regulatory Commissions or Central Electricity Commission will have the jurisdiction with respect to the disputes between the licensees and generating companies under the Electricity Act, 2003.
121. On the strength of this judgment, it is pointed out by the PTC (R-3) that the generating Companies cannot claim exclusion from the Regulatory jurisdictions purely because of the agreements with trading licensees since the High Court in the judgment rendered to above has held that in case of Intra State Supply of Electricity, the State Commissions will have the jurisdiction and in the case of Inter State Supply of Electricity, the Central Commission will have the jurisdiction and therefore, the generating Companies like the Appellant, cannot claim any exception or exclusion from the Regulatory jurisdiction and in the light of the decision rendered by the Delhi High Court which

have a direct bearing on the present dispute, the Appeal can be decided accordingly.

122. On the other hand, the Learned Counsel for the Appellant Lanco Budhil would submit that the decision rendered by the Delhi High Court in the Jai Prakash Power Limited case would not apply to the present case in view of the fact that the issues framed in the Jai Prakash judgment have no correlation to the issues that arose in the present matter and therefore, the reliance sought to be placed by the PTC in the above judgment is misconceived.
123. We have carefully considered the submissions made by both the parties and have also gone through the Delhi High Court Judgment. In the Jai Prakash Power Limited case, a dispute arose between the PTC and Jai Prakash out of the PPA executed between them for sale and purchase of power from a project of the Jai Prakash Power. In that case, the PPA between the Appellant and PTC was terminated. PTC did not challenge the same before the State Commission. On the other hand, the Haryana Power with whom the PTC entered into the PSA raised the dispute before the State Commission. The PTC, challenging the termination approached Arbitral Tribunal as per the PPA. After enquiry, the Arbitral Tribunal held that the termination was valid and PPA became void in view of the fact that

PPA was terminated. It is also held in the award that Central Commission had no jurisdiction to determine the tariff. This award was challenged before the Delhi High Court. In that matter, the Delhi High Court has held that the Arbitral Award was not valid in the law and the Central Commission has got the jurisdiction to determine the tariff.

124. According to the Appellant, the ratio of the Jai Prakash judgment does not relate to the issue in question before this Tribunal in the present matter. We find force in this contention. Admittedly, the issue before the Tribunal in this Appeal is whether Haryana Commission has got a jurisdiction or not. Therefore, the decision of the High Court in the above judgment in the context of tariff determination relating to the jurisdiction of the Central Commission would not relate to the present issue with reference to the jurisdiction of the Haryana Commission to go into the present dispute.
125. Jurisdiction of the Regulatory Commission in the context of tariff determination is different from the jurisdiction in the case of the adjudication of the dispute like the present one, since the provisions of the Electricity Act for each of the jurisdiction are distinct.
126. If PTC equates the jurisdiction of the Regulatory Commission in the context of tariff determination with the

jurisdiction in the case of adjudication of the present dispute, then as per the PTC, the Central Commission will have the jurisdiction. But, this is not the issue raised before the Commission which has been considered by the State Commission.

127. The present argument of PTC that the Central Commission has got a jurisdiction by relying upon the Jai Prakash judgment cannot be advanced before this Tribunal as the same was not argued by the PTC before the State Commission and hence it cannot be raised as the issue in the present Appeal. This apart, only issue which is relevant in the present proceedings is as to whether the Haryana Commission has got the jurisdiction in the facts of the present case.
128. At this stage, we have to point out that when the very same issue on the strength of the Jai Prakash judgment had been raised by the PTC in Appeal No.130 of 2011 by M/S Jai Prakash Power Ventures Limited before this Tribunal, we have decided the said issue considering the said judgment of High Court. We have specifically held in the said judgment that the Delhi High Court judgment has no bearing and impact on the said Appeal namely Appeal No.130 of 2011. The relevant portion of the findings in that Judgment in Appeal No.130 of 2011 is as follows:

“139. The main question that was considered by the High Court is with reference to the legality of the Arbitral Award. While going through that question, the High Court had gone into the other aspects with reference to the finding given in the Arbitral Award to the effect that the Central Commission has no jurisdiction for determination of tariff. In that context, the High Court came to the conclusion that finding in the Arbitral Award regarding the jurisdiction of the Central Commission is wrong. Consequently, the High Court directed the Appellant to approach the Central Commission that too, for determination of tariff. Therefore, the finding with reference to the direction of the High Court to the Appellant to approach the Central Commission for determination of tariff and not with reference to the issue in question. Therefore, we have to hold that the said Judgment has no bearing or impact on this Appeal before this Tribunal.

140. As stated above, this Tribunal has discussed the facts in detail and referred to various provisions of the PPA and PSA and also considered the relevant regulations framed by the State Commission and on that basis, as stated in the earlier paragraphs, we have concluded that the State Commission has no jurisdiction. At this juncture, we must make it clear that we are not entering into the question as to which Commission i.e. whether Himachal Pradesh State Commission or Central Commission has got the jurisdiction to adjudicate on the dispute in question. If we enter into the said process we feel that it would amount to crossing our borders. Therefore, we would not do it”.

129. The above findings rendered by this Tribunal in Appeal No.130 of 2011 would squarely apply to this Appeal also.

130. As we have discussed in the earlier paragraphs, we have considered the facts of the present case thoroughly and referred to the provisions of the PPA, PSA as well as the Regulations and on the basis of the said discussions, we have concluded that the State Commission has no jurisdiction. At the risk of repetition, we shall state that we are not entering into the question as to who is the appropriate authority to decide the issue in question. On the other hand, we are called upon to decide as to whether the impugned order passed by Haryana State Commission holding that it has got the jurisdiction in the light of the present facts of the case, is legally valid or not. Therefore, we hold that the judgment of Delhi High Court has no bearing or impact on this Appeal.

131. Accordingly, we reject the interlocutory application in IA No.204 of 2012 filed by PTC as devoid of merits.

132. Summary of Our Findings

(i) Haryana State Commission has no jurisdiction to go into the dispute with regard to the validity of the notice of the termination of the PPA issued by the Appellant to the PTC (R-3) raised in the

Petition filed by the Haryana Power (R-2) praying for quashing of the said termination notice and for consequent enforcement of the PPA between the Appellant and PTC (R-3) especially when the Haryana Power (R-2) was not the party to the said PPA. The jurisdiction of the State Commission is attracted only in the event that there exists a direct nexus between (a) Generating Company with the State in which power generated by it is going to be consumed and (b) direct nexus between the PPA and PSA. In the present case, we find no nexus between the generating company and the State to which the power is going to be consumed and between the PPA entered into between the Appellant and PTC (R-3) and the PSA entered into between PTC (R-3) and Haryana Power (R-2).

(ii) The facts in the judgment rendered by this Tribunal in Pune Power Development Private Limited Vs Karnataka State Commission in Appeal No.200 of 2009 on 23.2.2011 and the facts in Appeal in Lanco Power Ltd Vs Haryana State Commission in Appeal No.15/2011 decided by this Tribunal 4.11.2011, holding that the State Commission has the jurisdiction are different from

the facts of the present case. In Pune Power Case, the dispute was between the Inter State Trader and the Distribution Licensee of Karnataka relating to procurement of power by the distribution licensee of that State on the basis of the agreement entered into with the Trader. In Lanco Power Case i.e. in Appeal No.15 of 2011, Lanco Power, the Appellant in that Appeal appeared before the State Commission in the proceedings for approval of the PSA and requested the State Commission to approve the PSA and only on that basis, the State Commission approved the PSA. In that case, prior to signing of PSA, the amended agreement was entered into between Lanco Power, the Appellant and PTC(R-3) relating to assignment of rights and transfer of obligation of PTC to the purchaser of power in the event of likely termination of PPA, thereby a nexus was established. These elements which establish a nexus are not available in the present case. Therefore, the finding of this Tribunal in Appeal No.200 of 2009 and Appeal No.15 of 2011 regarding the jurisdiction of the State Commission will not apply to the present case. On the other hand, we hold that the salient features present in

the Appeal No.7 of 2009 (Madhya Pradesh Case) decided on 6.8.2009, by this Tribunal and the decision of the Hon'ble Supreme Court in the case of Md. Serajuddin Vs State of Orissa: (1975) 2 SCC 47 holding that there was no privity of contract between the parties, would squarely apply to the present case as the facts in these cases are similar to the facts of the present case.

(iii) PTC in the present case, has taken a different stand from that of the stand taken by the State Commission to the effect that the Central Commission has got the jurisdiction to go into the present dispute. In order to substantiate this plea, the PTC filed an application in IA No.204 of 2012 praying for taking on record the judgment of Delhi High Court dated 15.5.2012 and decide the issue on the basis of the judgment of High Court. On going through the said judgment, it is clear that the High Court did not hold that the Haryana State Commission has got the jurisdiction. The PTC through the said interlocutory application requested this Tribunal to declare that the Central Commission will have a jurisdiction. We must make it clear that we are not called upon to decide the question as to who is the appropriate authority

to decide the dispute in question. On the other hand, we are to decide as to whether Haryana State Commission has got the jurisdiction to go into the dispute in question in the facts and circumstances of the case. We have discussed the facts in the Appeal and referred to various provisions of PPA and PSA and also considered the relevant Regulations framed by the State Commission and on that basis, we have concluded that the State Commission has no jurisdiction. The points raised by both the Respondents have no merit. Consequently, it has to be held that the impugned order suffers from the infirmity.

133. In view of our above findings, we hold that the Haryana State Commission does not have jurisdiction to go into the dispute in question and accordingly we set aside the impugned order.

134. Thus, the Appeal is allowed. However, there is no order as to costs.

(Rakesh Nath)
Technical Member

(Justice M. Karpaga Vinayagam)
Chairperson

Dated:9th Aug, 2012

✓ ~~REPORTABLE/NON-REPORTABLE~~