

APPELLATE TRIBUNAL FOR ELECTRICITY AT NEW DELHI
(APPELLATE JURISDICTION)

APPEAL NO. 194 of 2016

Dated : 11th October, 2018

PRESENT: HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON
HON'BLE MR. S.D. DUBEY, TECHNICAL MEMBER

IN THE MATTER OF :

Punjab State Power Corporation Ltd.
The Mall, Patiala - 147001

.... **APPELLANT**

Versus

1. **Everest Power Private Limited**
Ground Floor, 145-146,
Udyog Vihar, Phase IV
Gurgaon – 122015

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

3. **Punjab State Electricity Regulatory Commission**
SCO No. 220-221, Sector 34 – A
Chandigarh - 160002

.... **RESPONDENTS**

Counsel for the Appellant(s) : Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Neha Garg

Counsel for the Respondent(s) : Mr. Tarun Johri
Mr. Ankur Gupta
Mr. Ankit Saini for R-1

Ms. Raveena Dhamija
Mr. Vishrov Mukerjee
Mr. Yashaswi Kant for R-2

Mr. Sakesh Kumar for R-3

J U D G M E N T

PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON

1. The present appeal is directed against the order dated 18-12-2015 passed by Punjab State Electricity Regulatory Commission in Petition No. 54 of 2015. The prayer in the said petition was for approval of power purchase from the Respondents. The State Commission held that the petition filed for approval of power purchase is not maintainable.
2. Brief facts that led to the filing of the present appeal are as under:
3. M/s Everest Power Private Limited (EPPL), first Respondent in this appeal is the generating company having Hydro Electric Project with a capacity of 100 MW at Malana-II in Kullu District in the State of Himachal Pradesh. The Appellant, Punjab State Power Corporation Ltd. (referred hereinafter as PSPCL), being a successor company of the erstwhile Punjab State Electricity Board has the responsibility of generation and distribution of power in the State of Punjab. The second Respondent, i.e. PTC India Limited is a trading licensee having inter-state trading license in electricity granted by the Central Commission.

4. EPPL/first Respondent entered into a Power Purchase Agreement (PPA) on 25-7-2005 with the second Respondent/PTC India Ltd. for sale of the entire capacity of electricity generated by the project set up by EPPL. PTC entered into Power Sale Agreement (PSA) with PSPCL/Appellant on 23-3-2006 for sale of the entire electricity generated by the project of EPPL.
5. It is not in dispute that the said PSA indicates determination of tariff by the appropriate Commission based on the completed cost of the project. The erstwhile Board sought approval of PSA for purchase of power from the project of EPPL and determination of tariff and related matters. By order dated 24-1-2007 the State Commission granted conditional approval of the PSA holding that as and when tariff is determined by the appropriate Commission, such tariff or capped tariff referred to in the order of the Commission whichever was lower shall be applicable. It is relevant to mention here that the State Commission further directed that any changes, if required to the PSA at a later stage in respect of the approvals granted by the Commission in the order dated 24-1-2007, shall be subject to the prior approval of the State Commission.
6. It is not in dispute that the project declared commercial operation on 12-7-2012. Meanwhile, PTC filed a petition before the State Commission under Punjab State Conduct of Business Regulations, 2005 for approval to allow the PSPCL (Appellant) to purchase electricity in accordance with the tariff

calculated as per Central Commission Tariff Regulations, 2009. By an order dated 17-8-2012, the State Commission disposed of this petition, after examining the maintainability of the petition, capping of tariff and determination of tariff including status of PSA in respect of which conditional approval was accorded. As per the directions of the State Commission in the order dated 17-8-2012, the parties were to get the PSA suitably amended to incorporate directions of the State Commission issued in the order dated 24-1-2007 and thereafter they can file application for determination of tariff along with the audited accounts of the project cost and other relevant documents. Same came to be communicated to the Appellant (PSPCL) by PTC India Ltd. expressing willingness to make suitable amendments in terms of the directions of the State Commission. In response to the same, PSPCL requested PTC India Ltd. through a letter dated 29-8-2012 to submit amended draft of the PSA which came to be submitted as per the letter dated 21-9-2012. PSPCL accepted all the amendments except the one relating to the determination of the tariff as per Clause 10.1 of the PSA. Therefore, PTC was compelled to file a review petition seeking review of the order dated 17-8-2012 for modification of directions. Both the parties filed a joint submission asking for the same relief that the Clause relating to tariff in the PSA may not be amended as a precondition for filing Petition for determination of tariff. Review petition came to be disposed of on 6-11-2012 directing the parties to suitably amend

the PSA to incorporate the directions issued in the order dated 24-1-2007 except in respect of condition relating to Article 10.1 of the PSA.

7. Subsequently, a tripartite agreement came to be executed between the Appellant PSPCL, EPPL and PTC on 3-1-2013 in compliance of directions in the Review Order dated 6-11-2012. At this point of time, EPPL filed an IA seeking relief of fixing a provisional tariff. The same came to be disposed of on 17-1-2013 fixing the interim provisional tariff at Rs.3.58 per unit to be paid by the Appellant PSPCL to EPPL pending final determination of tariff by the State Commission. In the very same petition, EPPL filed another IA under Section 142 of the Electricity Act 2003 read with State Commission's Conduct of Business Regulations, 2005 to take action against the Appellant PSPCL for breach of interim order dated 17-1-2013 in relation to payment of provisional tariff during pendency of the tariff petition. Ultimately, on 27-11-2013, the State Commission disposed of the tariff petition filed by EPPL and determined the tariff fixed as provisional tariff applicable for supply of electricity by EPPL to the Appellant PSPCL. It is relevant to mention that in this order dated 27-11-2013, the State Commission concluded that the capped tariff is not applicable.
8. An appeal came to be filed by EPPL in Appeal No. 30 of 2014 in this Tribunal challenging the disallowance of the various issues while determining the tariff by the State Commission. The Appellant/PSPCL

aggrieved by the said order filed Appeal No. 35 of 2014 before this Tribunal challenging the order of the Commission that the capped tariff is not applicable. This Tribunal after referring to the earlier order and written submissions, disposed of both the appeals on 12-11-2014.

9. The State Commission was directed to pass consequential order within 30 days from the date of the Judgment. This came to be challenged before the Hon'ble Supreme Court in Civil Appeal No. 3346 to 3347 of 2015. The Civil Appeal was disposed of on 24-4-2015 declining to interfere with the orders of this Tribunal.
10. On 31-8-2015, Punjab State Commission passed final tariff order in petition No. 37 of 2014 for the FY 2012-2013 and 2013-2014. After approval of the tariff, the Appellant PSPCL filed the present petition No. 54 of 2015 before the State Commission seeking appropriate directions granting approval of the purchase of electricity from EPPL under the PSA. On 18-12-2015, the State Commission passed the impugned order opining that the PSA since has already been approved, there is no fresh approval to be granted to the PSA. In other words, Commission dismissed the petition opining that it is not maintainable. Aggrieved by the same, the present appeal is filed.
11. According to PSPCL, the State Commission failed in appreciating the scope of Section 86(1)(b) of the Electricity Act 2003 which empowers the Commission to regulate the entire electricity purchase and procurement

process of distribution licensees including the price at which electricity is purchased by the distribution licensee through the agreements for supply within the State. PSPCL contends that the scope of approval under the above Section/Regulations, the Commission has to examine the cost of power purchase, reasonability of price and terms of the agreement which means actual price as contemplated under Section 61 and working out of the tariff in terms of Section 62 of the Electricity Act. It is further stated that the State Commission in its order dated 24-1-2007 had finally concluded that the tariff being capped was reasonable and therefore, the power purchase came to be approved.

12. Under Section 86(1)(b), power to regulate is much wider than the power to determine the tariff is the stand of PSPCL and for this proposition, relies upon the judgment of the Apex Court quoting *Energy Watchdog Versus CERC & Ors.* (2017) 4 SCC 80. PSPCL further contends that the determination of tariff under Section 62 will not remove the scope or mandate under Section 86(1)(b) of the Act. It is stated that determination of tariff under Section 62 is a precondition for consideration of approval under Section 86(1)(b). Therefore, the State Commission has an obligation to decide whether the power is to be purchased or not in terms of Section 86(1)(b). It is further contended that the power under Section 86(1)(b) is vested with State Commission for protection of public interest at large since the power purchase cost is ultimately passed on to the consumers for the

entire period of PPA. Therefore, the State Commission has an obligation to look into various aspects and decide whether power purchase is to be approved or not to be approved which includes the exercise to consider that the power at the cost quoted is not necessary since it may be available at cheaper price elsewhere. He refers to Tamil Nadu Generation and Distribution Corporation Limited Versus Penna Electricity Ltd. & Ors. in Appeal No. 112 of 2012 dated 10-7-2013 so also Rithwik Energy Generation Private Ltd. Versus Karnataka Power Transmission Corporation Ltd. in Appeal No. 51 of 2011 dated 21-10-2013 to contend that Section 86(1)(b) confers vital power on Commission and therefore, the PPA is not valid, if approval is not granted under Section 86(1)(b). He also refers to Tata Power company Ltd. Versus Reliance Energy Company Ltd. (2009) 16 SCS 659 to contend that PPA is subject to grant of approval by the Commission and the Commission has a duty to check if the allocation of power is reasonable or not. According to PSPCL, primary consideration for approval under Section 86(1)(b) being the price, the same can be considered only after the price is fixed. Since the only consideration of power purchase under Section 86(1)(b) was enumerated in the order dated 24-01-2007 wherein all requirements and reasonability of the price was gone into on the specific and basic premise that the tariff was capped and the capped tariff was found reasonable, since the same is removed now, fresh approval is required as the said condition of capped tariff ceases to exist as on today.

13. PSPCL further contends that at the time of tariff determination, the contention of the PSPCL was that the Order dated 24-1-2007 is binding and needs to be followed. But the Commission as well as this Tribunal held that the said order is inoperative and cannot be relied upon. Therefore, now the Respondents, EPPL and PTC cannot rely upon the order dated 24-1-2007 to contend that approval was already granted, hence none of the parties can wriggle out of the terms of the said order. Since approval of PSA was a conditional one, i.e. upon the capped tariff of electricity being available to the consumers, the State Commission approved the agreement as purchase of power by the Appellant was prudent. The condition in the said order is to the effect that tariff has to be determined on regulatory basis and once tariff is determined, the determined tariff or the capped tariff whichever is lower was to be made applicable. This order was not subject matter of any challenge in any proceedings, therefore, it is final and binding is the stand of PSPCL. Now the State Commission is required to examine whether the power purchase at the current tariff is competitive and how the same is competitive when compared to other PPAs entered into by the Appellant PSPCL between 2007 and 2015. A list of PPAs approved by the Commission during the above said period is also furnished. These details were never gone into by the Commission and petition came to be dismissed at the threshold on the question of maintainability which is totally wrong according to the Appellant. Since capped tariff ceases to have any effect,

the Appellant PSPCL had to approach the State Commission seeking direction for purchase of electricity from the first Respondent EPPL, as the order dated 24-1-2007 does not hold good any more.

14. PSPCL further contends that in the petition filed by the first Respondent, EPPL seeking removal of the capped tariff, the Commission opined that the contract between the parties will not come in the way of the State Commission exercising jurisdiction for determination of tariff. There was no discussion on the approval in the order dated 17-8-2012 of Section 86(1)(b). The review petition filed by PTC was limited to the last paragraph of the order dated 17-8-12 wherein it was held that tariff would be as determined by the State Commission. A tripartite agreement was also signed by the parties. Therefore, in the review order also according to the Appellant, the above position was not altered except that the State Commission would determine the tariff. Therefore, the Appellant PSPCL contends that since the only approval under Section 86(1)(b) by order dated 24-1-2007 is no longer good, hence, reliance cannot be placed on the said approval since it is inoperative. Since capped tariff is removed, order dated 24-1-2007 granting approval under Section 86(1)(b) cannot survive in isolation since all other portions of the order have become non est. The subsequent orders of this Tribunal in Appeal Nos. 30 and 35 of 2014 were on the merits of the tariff determined under Section 62 made by the State Commission in 2013. This Appellant at that stage strongly contended that

approval dated 24-1-2007 was binding and capped tariff alone would apply. Therefore, since capped tariff is removed and the order dated 24-1-2007 being the basis of capping, automatically approval comes to an end. Therefore, PSPCL strenuously contends that the orders dated 17-8-12 and 6-11-12 cannot be equated with the approval under Section 86(1)(b).

15. Further, the Appellant contends that the Appellant being the distribution company, only the PSPCL has to seek approval. According to the Appellant PSPCL, it has to include all its costs including the power purchase costs from EPPL in the Annual Revenue Requirement and tariff filings. Therefore, all the amounts sought by EPPL have to be necessarily included in the ARR as the only source of funding for the Appellant is the revenue requirement and the consumer tariff. This will not make the petition non maintainable before the State Commission. Subsequent tariff orders dated 27-11-2013 or the judgment of this Tribunal dated 12-12-2014 were also on the merits of the tariff determination under Section 62 and not on the approval under Section 86(1)(b). The Appellant since pursued its legal rights bona fide, its attempt cannot put any embargo on the Appellant from maintaining the petition before the Commission.
16. Appellant/PSPCL submits, contention of the Respondents that the Appellant PSPCL is trying to wriggle out of capped tariff is also misconceived. The approval in order dated 24-1-2007 was on specific basis

that the tariff would not exceed Rs.2.64 per unit, since same being economical to the consumers. Therefore, only after consideration of merits of the matter by considering the earlier orders, the Commission could have come to conclusion on the merits of the petition. The Commission ought not to have refused to entertain the merits of the petition since such exercise would be in the public interest.

17. Learned counsel for the Appellant submits in the order dated 19-1-2011 in Petition No. 15 of 2009, the State Commission opined that procurement of 100 MW of power from Baglihar Hydro Electric Project by the Appellant PSPCL at Rs.3.65 per unit to be substantially high and therefore, same cannot be approved. Therefore, price being the only consideration for approving the power purchase, there has to be fresh power purchase since State Commission has removed the capped price. With these submissions, learned counsel for PSPCL strongly asserts that there is total misconception of the entire facts on the part of the Commission, hence the impugned order deserves to be set aside.
18. As against this, EPPL contends that since the Commission has already exercised its jurisdiction under Section 86(1)(b) and has approved the PSA with certain conditions in the order dated 24-01-2007 which came to be modified or amended by subsequent orders of the State Commission which resulted in amendments to PSA, therefore approval is not required. They

further contend that nowhere either in the Act or Regulations provide that the approval under Section 86(1)(b) is to be made only when the tariff is certain and therefore, the assumption made by the Appellant that fresh approval is required is not correct. They further contend that the entire premises on which the Appellant filed his petition before the Commission is barred by principles of Constructive *Res Judicata* since the approval under Section 86(1)(b) was already raised and decided in the earlier proceedings which has reached finality.

19. The second Respondent, PTC contends that the order dated 24-1-2007 has attained finality which was admitted by PSPCL on more than one occasion. They further contend that the order dated 24-1-2007 has directed for modification of PSA and the same has been modified and approved by Punjab Commission by order dated 17-8-2012 which came to be reviewed by the order dated 6-11-2012. In terms of 2007 order, the State Commission had modified by a review order, the last paragraph of the order dated 17-8-2012 holding that the tariff of the project would be such as would be determined by the Punjab State Electricity Regulatory Commission. Since the Commission itself has approved the said modification, there is no requirement of fresh approval of PSA. The contention of PSPCL that only one condition of PSA pertaining to the capped tariff has been modified, therefore, entire PSA is to be approved afresh by the State Commission is wrong is the stand of PTC. It is further

contended that PSPCL never raised the issue of fresh approval of PSA prior to filing of the present Petition before the State Commission. A tripartite agreement dated 3-1-2013 came to be entered into without any objection to the validity of approval granted to the power procurement process. In Petition No. 71 of 2015, the Appellant PSPCL has taken a stand that tripartite agreement is binding between the parties. Therefore, the Appellant cannot contend that approval already granted to the power purchase process is no longer valid. It is also submitted by PTC that the Appellant/PSPCL has been seeking approval for the power purchase cost from EPPL in its Annual Revenue Requirement (ARR) and tariff petitions are filed year after year right from 2013-2014 to 2015-2016. In these proceedings the Appellant/PSPCL never raised dispute about validity of PSA and fresh approval. Therefore the present objection is not sustainable. They also contend that the present proceedings initiated by the Appellant/PSPCL are hit by principles of Constructive *Res Judicata*. According to the second Respondent/PTC, the Appellant/PSPCL has been making payments as per the tariff determined for the procured power without any reservations. Therefore, the Appellant is now estopped from contending that the order dated 24-01-2007 is no longer valid and the PSA requires fresh approval. With these submissions, they have sought for dismissal of the Appeal.

20. On consideration of various orders, arguments advanced on behalf of the parties, the Tribunal now proceeds to consider the appeal on merits.

20.1 Questions of Law raised in the appeal are as under:

- A. Whether under Section 86(1)(b) of the Electricity Act, 2003, it is not the duty of the State Commission to go into the aspect of price of electricity to grant approval especially when the entire power purchase cost of the Appellant is passed on to consumers in the State?
- B. Whether the Order dated 24.01.2007 of the State Commission having been held to be inoperative by the State Commission itself and approved by this Tribunal and the Hon'ble Supreme Court, can it be said that the approval under Section 86(1)(b) accorded by the Order dated 24.01.2007 continues to have effect?
- C. Whether in any of the previous Orders of the State Commission including the Orders dated 17.08.2012, 06.11.2012 or 27.11.2013 or the Judgment dated 12.11.2014 of the Hon'ble Tribunal, the issue of price vis a vis approval of power purchase under Section 86(1)(b) of the Electricity Act, 2003 has indeed been decided?

- D. Whether when a conditional order is passed by an authority and the conditions itself stand modified, can it be said that the Order would still have effect?
- E. Whether the State Commission under any circumstances could have held the petition to be not maintainable?

20.2 The first and foremost that is relevant for consideration of the matter is the order dated 24-1-2007 whereby the Commission approved Power Purchase Agreement and the conclusion portion reads as under:

“3.3 The approach followed by the Commission in examining the PSA included an examination of the following key issues which are set out in the following paragraphs of this order:

- i. Need for power*
- ii. Scope of Approval*
- iii. Cost of Power Purchase*
- iv. Trading Margin*
- v. Dispute Resolution Mechanism*
- vi. Term of the PSA*
- vii. Consequences of Default and Termination*

3.5.1 In this petition, PSEB has requested the Commission to approve the PSA signed between PSEB and PTC. As mentioned earlier in this Order, the Commission has undertaken the examination and approval of the PSA under Section 86(1)(b) of the EA 03. This section empowers the Commission to regulate the electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.

3.5.2 In light of the above provision of the EA 03, the Commission is not required to approve the entire PSA but only limit its approval to aspects of the purchase and procurement process including reasonability of price and the conditions on which electricity is being procured by PSEB from PTC.

3.6.1 In accordance with the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005, the Commission has to ensure that power purchase by PSEB is undertaken in an economical manner and at a fair

and reasonable price. The Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 state as under:

Clause 46(1): In accordance with the provisions of the Act and the Licence conditions, every Distribution Licensee shall purchase and procure electricity required for the Licensed Business of the Distribution Licensee in an economical and efficient manner and under a transparent power purchase and procurement process and generally based on the principles of purchase of electricity at the least cost.

46(4a): The Distribution Licensee shall satisfy the Commission as to the need for additional power procurement on a long term basis.

46(6a): The Distribution Licensee shall satisfy the Commission that the electricity procured under long term power purchase otherwise than through a competitive bidding process or any short term power purchase is economical in the prevalent circumstances and that the Distribution Licensee has made prudent and best efforts to minimise the cost of purchase.

4.1 The Commission is enjoined to balance the interests of all stakeholders including the licensee and the consumers. It is, therefore, necessary to ensure that power is purchased by PSEB in an economical manner.

4.2 The above discussion brings out that there is clearly a requirement for purchase of additional power and that such requirement is likely to continue for the entire term of the PSA. An analysis of the Merit Order in which PSEB currently purchases power and is likely to do so for next 20 years or so also indicates that the price at which power is proposed to be purchased from PTC is fair and reasonable. An additional positive feature of the PSA is that although payments to PTC may vary on account of tariff credits or mitigation of hydrological risk, such payments would never in any given year exceed the capped tariff as per the agreement. Once this capped tariff is found reasonable then no variation on account of subsequently determined tariff or hydrological risk makes any material difference.

4.3 Accordingly in exercise of the powers vested in the Commission under the EA 03 and subject to the Petitioner complying with the directions of the Commission given in this order, the Commission hereby grants approval to the electricity purchase and procurement process of PSEB including the capped tariff at which the electricity shall be procured through the PSA between PSEB and PTC for supply of power from the 100 MW Malana-II Hydro Electric Project in District Kullu in the State of Himachal Pradesh being developed by Everest Power Private Limited.

4.4 ... The Commission further reiterates that, any changes if required to be made at a later stage in respect of the approvals granted by the Commission in this Order, shall be subject to the prior approval of the Commission.”

20.3 Order dated 19-1-2011

The second order is dated 19-1-2011 in Petition No. 15 of 2009 filed for approval of draft of Power Sale Agreement to be signed between PSPCL and PTC for purchase of 100 MW power from Baglihar Hydro Electric Project and related matters. In this petition, approval was not given since the Commission opined it was not economical. This is nothing to do with the project in question.

20.4 **Order dated 17-8-2012**

The next relevant order is in Petition No. 34 of 2011 filed for approval to allow Respondent No. 1 therein (PSPCL) to purchase electricity in accordance with the tariff calculated as per the CERC Tariff Regulations, 2009. The petition was filed under Section 86(1)(b), 86(1)(k) of the Electricity Act, 2003 as well as Regulation 69 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 by PTC praying for the following, amongst other reliefs:

- “(i) *Allow the present Application/Petition and thereby permit the Respondent No. 1 to purchase electricity from the Applicant/Petitioner as per this Petition and at a tariff calculated (based upon the final completion cost of the Project by Respondent No.2) in accordance with the applicable provisions/norms in the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009 and as per the revised interconnection and delivery point directed by the Central Govt. in order to balance the risks among the stakeholders;*
- “(ii) *Permit the Respondent No. 1 to enter into amendments to the Power Sale Agreement (PSA) dated 23.03.2006 to reflect that the tariff payable by it to the Petitioner is in accordance with Prayer (i) above, ...”*

20.5 PTC India’s case was summarized in the petition as follows:

- “(i) *The tariff payable by the Respondent No. 1 to the Petitioner should be based on the principles of tariff determination as per Section 61 of the Act to provide a*

balance with regard to providing a sound return on investment to the developer while protecting the consumer interest.

- (ii) *The caps were put on the tariff voluntarily as decided mutually between the Petitioner and Respondent No.2 and not imposed by Respondent No.1. Conversely, had the caps not been put voluntarily, the uncapped tariff would still have been acceptable to Respondent No.1 and the Commission.*
- (iii) *As per the Policy followed by Govt. of India, the large Hydro Power Projects are required to obtain project cost approval from the Central Electricity Authority (CEA) which initially approves the estimated project cost vide Techno-Economic Clearance/Concurrent and later approves the "Completed Project Cost" upon completion of the project, which is to be taken as base for computing the tariff for the project. The same methodology in principle is proposed to be followed for this project and may be permitted by the Commission.*
- (iv) *Revised Project Cost as approved by IIT, Roorkee may be allowed. IIT, Roorkee assessed the revised cost as Rs.673.45 crore excluding Interest during construction (IDC) and Financing charges to be determined by the Lead Lender – Rural Electrification Corporation (REC). The same was computed by the Lenders viz. REC and Punjab National Bank (PNB) and State Bank of Patiala (SBP) estimated to be Rs.146.22 crore considering the completion date by end December, 2010. The total cost aggregated to Rs.819.67 crore which was parallel appraised by WAPCOS (A Govt. of India Company), being the Lender's Engineer, who fixed the project cost as Rs.826 crore. As per the re-scheduled completion of the project by end of June 2011, the IDC +FC are estimated to be Rs.190.10 crore i.e. final project cost to be Rs.863.55 crore. The original project capital cost was estimated as Rs.598 crore by the lenders and Rs.633.47 crore in Techno Economic Clearance by Himachal Pradesh State Electricity Board i.e. there is an increase of Rs.265.55 crore and Rs.230.08 crore in project capital cost respectively. The reasons for the increase in project capital cost are geological surprises, change in method for determination of tariff, mandatory discharge, additional free power to the home State, new cess i.e. additional 1% labour cess, increase in minimum wages, local area development fund, delay in forest clearance, increase in cost of cement and steel/taxes and duties, change in transmission of power scheme.*

The Central Transmission Utility Pooling Sub-station at Panarsa has been deferred by Power Grid Corporation of India Ltd. (PGCIL), the original delivery point at Panarsa is now changed to Chhore (20 km from Panarsa) where the developer will have to set up a 132/220 KV sub-station and the evacuation will now be through 220 KV line of Allian Duhangan Hydro Power Private Limited (ADHPL) as per CEA minutes of meeting dated 10.4.2008. The cost of evacuation of power beyond Chhore will have to be borne by Respondent No. 1 till Panarsa sub-station is reverted as project delivery point.

- (v) *Tariff to be paid by Respondent No. 1 be allowed on the basis of completed capital cost of the project as per CERC Tariff Regulations 2009 at "Chhore sub-station" of Respondent No.2, in the interest of the consumers. The tariff so calculated by the Petitioner and Respondent No. 1 based on CERC Regulations 2009 shall be subject to prudent check by the Hon'ble Commission.*

- (vi) *The tariff so calculated on the basis of the revised capital cost is within the Merit Order Schedule of Respondent No.1. On the basis of CERC Tariff Regulations 2009, with a project capital cost of Rs.863.55 crore, the revised levellised tariff at 90% Dependable for 40 years comes to Rs.4.66 per kWh at Chhore Sub-station excluding Petitioner's trading margin."*

20.6 Relevant portions of the summary submission of the present Appellant as Respondent No.1 in Petition No. 34 of 2011 are as follows:

- (i) *Petitioner negotiated and signed a PPA with the Respondent No. 2 on 25.7.2005 wherein tariff parameters were specified in Schedule – E. The Petitioner then signed a PSA with Respondent No. 1 on 23.3.2006 on back to back basis defining tariff as "Tariff payable in accordance with the PPA". PPA dated 25.7.2005 is an Annexure to the PSA and thus an integral part of the PSA. Respondent No. 1 was required to pay the tariff as stipulated in PSA.*
- (v) *The provision of price caps on tariff viz. 264 paise per unit during 1st to 5th year 247 paise per unit during 6th to 11th year and 231 paise per unit during 12th to 40th years is the most important provision of PPA. The practical implication is that the developer is taking the risk of capital cost escalation which is practically reflected in the price cap. The price cap mechanism is a system where the purchaser is to take the risk of capital cost escalation upto the price cap specified in the PPA, and for further capital cost escalation (tariff coming more than the price cap) that risk is taken by the developer. The price cap mechanism is therefore a system of sharing the risk of capital cost escalation. Upto the price cap the risk is on purchaser (Respondent No. 1) and beyond that the risk is of the developer (Respondent No.2). The Petition filed by Petitioner amounts to shifting the entire risk of capital cost escalation on the purchaser (Respondent No.1) which is against the basic principle of price cap contained in PPA/PSA.*
- (vii) *The price cap mechanism as contained in PPA/PSA has two basic features. First, it puts a limit on the risk of capital cost escalation that can be passed on to the purchaser (Respondent No.1). Second, the price cap mechanism gives relief from front loading of tariff in initial years. The price cap limits the front loaded tariff in initial 5 years to 264 paise per unit which is recovered in subsequent years. Practically, it implies that during first 5 years, the tariff as per PPA/PSA would be more than 264 paise per unit, but Respondent No.1 would make a payment limited to 264 paise per unit, whereby corresponding amount would accumulate in the poor account, which would be recovered in subsequent years."*

20.7 Relevant portions of the written argument by the Petitioner (PTC) in the said petition are as follows:

- (i) *In the Petition No.11 of 2006 filed before the Commission by the Respondent No.1 for approval of PSA, the Petitioner was not a party. It was not even known*

to the Petitioner nor was the same intimated by Respondent No.1 to the Petitioner even after more than five years from the date of passing of the Order dated 24.1.2007.

- (iii) *Petitioner had specifically informed Respondent No.1 vide its letter dated 22.4.2009 about the various factors and the circumstances which have resulted in the increase in capital cost of the Project and submitted revised tariff proposal to Respondent No.1 and requested vide letter dated 23.3.2011 to file a Petition before the Commission for revision of the PSA. Respondent No. 1 did not pay any heed to the requests of the Petitioner, therefore the Petitioner was left with no option but to file this Petition.*
- (vii) *Tariff cap as contended by Respondent No. 1 is not sacrosanct. Such an interpretation would render the provisions of both PSA and PPA redundant and the same would render the provisions of the PPA, namely Articles 5, 11, 12, Schedule-E etc. pertaining to force-majeure, construction of the Project, geological surprises, approval of capital cost by the Commission etc. as completely meaningless and the same is impermissible in law.”*

20.8 Relevant portions of the contentions of PSPCL as Respondent No. 1 in the said petition are as follows:

- “(i) *The instant petition filed by Petitioner is on behalf of Respondent No.2. Event of force-majeure, change in law, geological surprises, increase in Project cost, maintaining all reserves and flow etc. are the issues relating to the generating company (Respondent No.2) and not to the trading company (Respondent No.2) and not to the trading company (Petitioner). Respondent No.2 never raised the said issues or in alternate sought any remedial recourse that may be available to it. PPA clearly defines force-majeure event and non force-majeure events, which have not been invoked by Respondent No.2.*
- (iii) *The magna-carta of the entire list is the PPA. A structure capped tariff formula was accepted by Respondent No.2 as per the prevalent norms and by the MoU route. As per project cost estimate submitted by Respondent No.2 structure capped tariff was approved in accordance with the regulations in force at the said point of time. There is no provision under the PPA (Schedule-E) for revision/re-determination of tariff.”*

20.9 Relevant portion of the Observations of the Commission are as follows:

- “(i) *In the various submissions, pleadings and arguments put forth by the Petitioner, Respondent No.1 and Respondent No.2, there is no doubt that the Petitioner and in-turn Respondent No.2 have the intention and willingness to supply the entire contracted power to Respondent No.1 who has the intention and willingness to purchase the same.*
- (ii) *However, the Petitioner and Respondent No.2 want to supply the power at the tariff to be determined by the Commission considering the completed capital cost*

of the project whereas the Respondent No.1 wants to purchase the power at the capped rates approved by the Commission in its Order dated 24.1.2007.

- (iii) *The conduct of all the parties concerned viz. the Petitioner, Respondent No.1 and Respondent No.2 has been lackadaisical bordering irresponsibility during the period of signing the PSA till the filing of this Petition.*
- (iv) *Respondent No.1, after getting the PSA approved from the Commission as per the terms of the PSA by filing Petition No.1 of 2006, failed to convey the approval of the Commission to the Petitioner, which inter-alia was subject to compliance of the directions of the Commission. This was desirable especially in the circumstances that Respondent No.1 had not, at that time arrayed the Petitioner as a Co-Petitioner/Respondent. The directions of the Commission were required to be incorporated in the PSA to make it implementable.*
- (v) *The Petitioner also did not make any efforts on its part to enquire about the approval of the PSA granted by the Commission, which as per Conditions Precedent was required within 12 months of the signing of the PSA. The Petitioner who is a Public Sector Undertaking and acting as a trader between the Generator (Respondent No.2) and the Purchaser (Respondent No.1) can't escape its responsibility for this lapse.*
- (vi) *As has been observed in Para 3.6.6 of the Order of the Commission dated 24.1.2007, the tariff for sale of power has to be determined by the Appropriate Commission. In Para 3.6.5 of the said Order, it has been further observed that the starting point for the determination of such tariff will be the availability of the 'completed capital cost of the Project approved by the Appropriate Commission'. As per 'Purchaser's Obligations' clause 4.2 (ii) of the PSA, Respondent No.1 is required to file a Petition for approval of tariff for the project to obtain the Tariff Order. This Petition is to be based on the technical, financial and commercial data with respect to completed cost of the project to be furnished by the Petitioner for filing of the tariff petition as provided in the 'Petitioner's Obligations' clause 4.1 (v) of the PSA. The Respondent No.1 did not file the said Petition upto May 2011, despite having been requested by the Petitioner in various written communications to do so since April 2009."*

20.10 Findings and decision of the Commission is to the effect that the Petition filed by the trader and not the generator is also maintainable.

20.11 With regard to reopen and renegotiate the terms of PSA, the Commission answered as under:

- (i) *Regarding the issue of re-opening of the PSA, the law as it stands today is that the Commission is empowered under the provisions of the Electricity Act, 2003 to re-open Power Purchase Agreements and re-determine the tariff. Tariff determination has to be made in terms of the guidelines provided in Section 61 of the Act, read with applicable regulations. In matters of tariff the contractual*

terms between the parties is not binding on the Commission. The Commission is guided by the terms of the statute and regulation. Having said that, if there are terms that allocate risks which favour consumer-interest, the Commission can take judicial notice of the same.

- (ii) *Regarding directing the parties to re-open / re-negotiate the terms of PSA on the basis of determined tariff and whether it is the right stage to determine the tariff, it is clear that the Commission can direct parties to re-open and re-negotiate the contract. However, while issuing such directions, the Commission is required to consider all aspects on the basis of the guidelines provided in Section 61 of the Act. Tariff can always be granted on the basis of the documents filed and verified by the Commission, subject to a true up once the audited accounts are finalized. Therefore, the Commission can ask for several supporting documents pending finalization of audit for determining tariff. Such documents will include bank related documents, to confirm drawl of debt, infusion of equity, Lender's Engineer's report, report of chartered accountant, affidavits etc. Since the audited accounts of Malana-II Hydel Project being executed by Respondent No.2 are not available before the Commission, although the COD of the project has taken place on 12.7.2012, the Commission can start tariff determination only after complete documents are submitted to it along with audited accounts.*
- (iii) *Regarding the issue of time and cost over-run, the Commission holds that under the cost plus regime applicable to hydro projects (unlike a procurement under the competitive bidding route), all genuine costs have to be considered. The power to examine costs is under Section 62 read with 86 (1) (b) of the Act. However, while allowing costs, the Commission has to balance the short term and long term interests of consumers. The principle enumerated in Section 61 of the Act provides guidance to the Commission. It is necessary to bear in mind that for determination of tariff the Commission is guided by the statute and the regulations and not so much by the Contract between the parties. In this context, the terms of the PSA including those relating to capping etc. will not come in the way of the Commission's exercise of jurisdiction for determination of tariff.*

.....

From the aforesaid, it is quite clear that the Commission has modified the terms of the PSA. Before proceeding to deal with the status of the PSA, it needs to be clarified that in issuing the Order dated 24.01.2007 the Commission has exercised jurisdiction vested under the statute. The said Order has not been challenged and is presently valid and subsisting. The Order passed by the Commission in proceedings held under the Electricity Act, 2003 read with Regulation 57 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 cannot be set aside and ignored in a collateral proceeding. Since, the Order dated 24.01.2007 is valid and subsisting, it is necessary for the parties to ensure that the said Order is complied with and the inter se agreement is suitably amended and incorporate the directions of the Commission issued vide its Order dated 24.1.2007. In any event, it cannot be said that the Order dated 24.1.2007 is without jurisdiction or suffers from any patent infirmity.”

20.12 Petition 55 of 2012 came to be filed by PTC India Ltd. to review the Order dated 17-8-2012. The relevant portions of the order dated 6-11-2012 are as under:

“During hearing for admission of the petition, all the three parties namely EPPL (Generator), PTC (Petitioner) and PSPCL agreed to file joint written submissions which were filed after the hearing as under:-

“Written Submissions by M/s PTC India Limited, M/s PSPCL and M/s Everest Power Limited.

- 1. That in compliance with the order passed by the Commission in Petition No.34/2011 dated 17.08.2012, the aforementioned parties had agreed to all the amendments in Power Sale Agreement except amendment relating to tariff.*
- 2. That the parties are now agreeable in respect of the condition No.10.1 related to tariff of the electricity generated by 100 MW Malana-II, HEP of EPPL and represent that the following amended provision to be incorporated in the Power Sale Agreement in place of 10.1 :-*

“The Tariff of the project would be such as would be determined by the Punjab State Electricity Regulatory Commission”.

Respectfully prayed accordingly to file amended PSA.”

The Commission had passed Order dated 17.08.2012 in Petition No.34 of 2011, last para of which is as under:-

“In view of the above findings and decisions of the Commission, Respondent No1 and Petitioner need to get the PSA suitably amended and incorporate the directions of the Commission issued vide its Order dated 24.1.2007. Thereafter, the Petition may be filed along with audited accounts of the project cost and other relevant documents for 100 MW Malana-II Hydro Electric Project before this Commission for determination of the tariff under the relevant provisions of the Act and Regulations.”

In view of agreed written submissions dated 06.11.2012 filed jointly PTC, PSPCL and EPPL, the Commission modify the last para of the Order dated 17.08.2012 as under:

“In view of the above findings and decisions of the Commission Respondent No.1 and petitioner need to get PSA suitably amended and incorporate the directions of the Commission issued vide its Order dated 24.01.2007 except in respect of the condition No. 10.1 related to tariff of the electricity generated by 100 MW Malana-II, HEP of EPPL which shall be now amended to incorporate in the power Sale Agreement as under:-

‘The tariff of the Project would be such as would be determined by the Punjab State Electricity Regulatory Commission’.

Accordingly, the petition may be filed along with audited accounts of the project cost and other relevant documents for 100 MW Malana-II Hydro Electric Project before this Commission for determination of tariff under relevant provisions of the Act and Regulations.”

20.13 Subsequent to the above order, a tripartite agreement came to be executed between PSPCL, EPPL and PTC in compliance with the order dated 17-8-2012 read with Review Order dated 6-11-2012. The relevant portion of the tripartite agreement is as under:

“AND WHEREAS by order dated 17.08.2012 read with the order dated 6.11.2012, the Hon’ble Punjab State Electricity Regulatory Commission (Commission) has decided on the aspects of tariff payable by the PSPCL to PTC as per the terms of the PSA and the parties have signed the following:

Subsequent to the above at the hearing on 6th November 2012 the PSERC recorded the following submissions of the parties:

“Written Submission by M/s PTC India Limited, M/s PSPCL and M/s Everest Power Limited.

- 1. That in compliance with the order passed by Hon’ble Commission in Petition no. 34/2011 dated 17.8.2012, the aforementioned parties had agreed to all the amendments in Power Sale Agreement except amendment relating to tariff.*
- 2. That the parties are now agreeable in respect of the condition no. 10.1 related to tariff of the electricity generated by 100 MW Malana-II, HEP of EPPL and represent that the following amended provision to incorporated in the Power Sale Agreement in place of 10.1:-*

“The Tariff of the Project would be such as would be determined by the Hon’ble Punjab State Electricity Regulatory Commission”.

Respectfully prayed accordingly to file amended PSA.”

AND WHEREAS in pursuance of the above the parties have finalised the amendment to the PSA and have agreed that consequential amendments shall be made to the PPA.

Now therefore by this agreement the parties agree as under:

- 1. AMENDMENT TO ARTICLE 3.1 OF THE PSA*

Article 3.1 providing for Conditions Precedent in regard to the approval of the tariff by the Commission shall be substituted as under:

“The parties agree that the Commission shall determine the tariff for the sale of the contracted capacity by PTC to PSPCL and consequently the tariff for the sale of the contracted capacity by EPPL to PTC in terms of the Regulations of the Commission and as per the orders dated 17.8.2012 and 6.11.2012 passed by the Commission in Petitions No. 34 of 2011, 55 of 2012. Such tariff shall be the applicable tariff for the sale and purchase of the electricity under the PPA and the PSA. The requirement to obtain the approval by the State Commission of the tariff shall not be a condition precedent as per Article 3.1 of the PSA for its implementation, but shall be the applicable tariff for the sale and purchase of the contracted capacity under the PPA and PSA as provided in Article 10.”

2. **AMENDMENT TO ARTICLE 10.1 OF THE PSA**

Article 10.1 shall be substituted as under:

“The tariff for the contracted capacity payable by PSPCL to PTC including all aspects of tariff element would be determined by the Commission and also trading margin, and other charges payable additionally to PTC shall be as per the decision and approval of the Commission.”

4. **AMENDMENT TO ARTICLE 14.3, 14.4, 14.5, 14.6 and 14.7 OF THE PSA SHALL STAND DELETED AND THE FOLLOWING SHALL STAND SUBSTITUTED IN THEIR PLACE AS ARTICLE 14.3**

“The parties agree that the Punjab State Electricity Regulatory Commission shall be the Appropriate Commission in regard to adjudication of all disputes arising both under the PPA and PSA in view of the nexus existing on the sale of the contracted capacity by EPPL to PTC and by PTC to PSPCL. EPPL hereby accepts such nexus.”

6. *In addition to the applicable tariff as mentioned in clause 2 herein above, the trading margin to PTC shall be as per the decision and approval of the Commission.*

7. *The PPA and PSA shall be read with the above modification. Except for the above, all the terms and conditions of the PPA and PSA shall continue to apply with full effect and subject to the decision and orders of the Commission.”*

20.14 Thereafter, a petition came to be filed under Section 62(2) of the Electricity Act 2003 read with the State Regulatory Commission Regulations by EPPL, the present first Respondent in Petition No. 54 of 2012. The same came to be disposed of on 27-2-2013. In this Petition, the issue was with regard to fixation of tariff. The Commission, after referring to the order dated 17-8-2012, Review Order dated 6-11-2012 and tripartite agreement dated 3-1-2013 opined as under:

“This Commission also passed an Order dated 17.01.2013 in the Interlocutory Application filed in Petition No. 54 of 2012 under Section 94 (2) of the Electricity Act, 2003 for grant of interim / provisional tariff. The interim / provisional tariff has been worked out as 358 paise per kwh by the Commission whereas the capped tariff for first 5 years from COD had been fixed at Rs.2.64 / KWh. The last part of para (4) on page 8 of this Order is as under:-

“Accordingly, to ensure that this Project does not become a NPA, the Commission directs respondent No.1 to forthwith make payment of the pending bills at the aforesaid tariff and also continue to make payment(s) at the same rate for the electricity supplied / to be supplied and billed by respondent No.2 as an interim measure, till the disposal of the petition, subject to final adjustments”.

From the conjoint reading of above orders of the Commission, it is concluded that capped fixed tariff shall have no application / relevance henceforth and the tariff as determined by the Commission shall be payable by PSPCL to PTC for the electricity supplied. This applies in case of interim / provisional tariff also. To remove any doubt, it is clarified that capped fixed tariff wherever mentioned in the PSA shall have no application whatsoever, so far as PSA dated 23.03.2006 as amended is concerned.”

20.15 An appeal came to be filed by EPPL in Appeal No. 30 of 2014 in this Tribunal challenging the disallowance of the various issues while determining the tariff by the State Commission. The Appellant/PSPCL aggrieved by the said order filed Appeal No. 35 of 2014 before this

Tribunal challenging the order of the Commission that the capped tariff is not applicable.

20.16 This Tribunal after referring to the earlier order and written submissions, has disposed of both the appeals on 12-11-2014.

In both the appeals, orders read as under:

“Appeal No.35 of 2014

(a) *The conjoint reading of the various orders passed by the State Commission would reveal that the capped tariff has no application or relevance to the present tariff as determined by the State Commission which shall be payable by PSPCL to PTC for the electricity supplied.*

(b) *We do not find merit in the contention of PSPCL that Everest Power is not entitled to additional cost in determination of completed Capital Cost for the purpose of tariff determination on account of geological surprises encountered during the execution of the project.*

(c) *We feel that failure of HRT during trial run is due to lack of investigation and diligence during the construction of the project. Therefore, the cost of repairs of HRT and IDC & FC for the period the power plant was shut down for repairs due to damages in HRT and other components of the project till the COD of the project has to be disallowed.*

(d) *The interest rate has been decided by the State Commission as per its Regulations.*

Appeal No.30 of 2014

(a) *The State Commission’s Regulations would be applicable to determination of tariff of the Appellant’s power project.*

(b) *There is no merit in the claim of the Appellant for IDC & FC for the period October, 2011 to July 2012 as we have held that damage to the HRT was not beyond reasonable control of the Appellant.*

(c) *The escalation to the EPC contractor due to delay in accounting of the Environment and Forest Clearance has to be allowed as per the terms of the contract.*

(d) *There is no merit in the claim of the Appellant regarding roads and bridges against geological surprises.*

- (e) PPA and PSA indicate that 'Change in Law' caused by Govt. of Himachal Pradesh shall not be treated as Change in Law'. We, therefore, find no merit in the claim of the Appellant for the claim towards Local Area Development Fund.
- (f) We do not find any infirmity in the State Commission disallowing the cost of change in construction methodology in HRT, Surge Shaft and Pressure Shaft.
- (g) We do not find any infirmity in the disallowance of damage to the dam protection works. This issue is decided against the Appellant.
- (h) There is no infirmity in the finding of the State Commission that extra expenditure of Rs.3.32 Crores towards rectification of power plant after synchronisation of units is not admissible. This issue is also decided against the Appellant.
- (i) We do not find any reason to interfere with the travel expenses allowed by the State Commission.
- (j) We do not find any infirmity with the State Commission deducting Rs.89.63 lacs as 15% of the cost of temporary buildings as per the CEA guidelines from the Capital Cost.
- (k) Appellant is entitled to transmission charges that have been actually paid by the Appellant to AD Hydro Power for using the transmission lines during testing period prior to COD. However, the amount will be subjected to adjustment on outcome of the Appeal pending before the Hon'ble Supreme Court regarding sharing of transmission charges on AD Hydro's transmission lines.
- (l) The transmission charges and losses payable to AD Hydro have to be passed through to the Appellant due to effectuating of 'Change in Law' due to change in evacuation scheme of the power plant as per the directions in Paragraph 190.
- (m) The issue regarding change in Law on account of mandatory 0.5 cumecs discharge is decided in favour of the Appellant. Thus, the design energy of the Appellants may be decided after accounting for the mandatory 0.5 cumecs environmental discharge.
- (n) We do not find any infirmity in the findings of the State Commission regarding 12% free power.
- (o) We do not find any merits in the claim of the Appellant regarding IDC on equity in excess of 30%.
- (p) We do not find any infirmity in the State Commission's decision in reduction of interest on UI receivables from AFC which has been done as per the Regulations.

- (q) *The issue regarding O&M expenses is decided against the Appellant.*
- (r) *There is no infirmity in the findings of the State Commission in regard to interest on loan.*
- (s) *We find that the rate of 75 paise/KWh for secondary energy is reasonable.*
260. *In view of the above, Appeal No. 30 of 2014 and 35 of 2014 are allowed in part.”*

20.17 In this order as stated above, the State Commission was directed to pass consequential order within 30 days from the date of the judgment. A Civil Appeal challenging the orders of the Tribunal came to be filed before the Apex Court. The same came to be dismissed on 24-4-2015. On 31-8-2015, final tariff order fixing the tariff for FY 2012-2013 and 2013-2014 came to be passed in petition No. 37 of 2014.

20.18 Till fixing of final tariff, at no point of time the Appellant PSPCL raised objection to the non-approval of PPA and PSA and for the first time Petition No. 54 of 2015 came to be filed raising the objection.

20.19 Now, the Appellant/PSPCL contends that there has to be fresh approval of PSA since final tariff order is passed.

20.20 The Appellant relies upon several decisions of the Hon'ble Supreme Court. He relies upon the case of **Ramesh B. Desai versus Bipin Vadilal Mehta, (2006) 5 SCC 638** to contend that “ ... *when mixed issues of law and fact are to be tried as a preliminary issue and where the decision on issue of law depends upon decision of fact, it cannot be tried as a*

preliminary issue.” According to learned counsel for the Appellant/PSPCL, the Commission was not justified to dismiss the petition at the threshold and it ought to have proceeded to consider all the issues including the issue of maintainability in the final order. He refers to **(1985) 2 Supreme Court cases 54 in the matter of Abdulla Bin Ali and Others Versus Calappa and Others** to contend that in order to attract jurisdiction of the Civil Procedure Code, in terms of Section 9, “*allegations made in the plaint decide the forum. The jurisdiction does not depend on the defence taken by the defendants in the written statement.*” He also relies upon the case of **Energy Watchdog Versus CERC** in Civil Appeal Nos. 9635-42 of 2016 and 9035 of 2014 to contend that determination of tariff under Section 62 will not remove the scope of mandate under Section 86(1)(b) of the Act. Therefore, determination of tariff is a pre-condition for consideration of approval under Section 86(1)(b). He placed reliance on Appeal No. 112 of 2012 dated 10-7-2013 in the matter of **Tamil Nadu Generation and Distribution Corporation Ltd. Versus M/s Penna Electricity Ltd. & Anr.** wherein this Tribunal opined that the State Commission was justified in opining that the unapproved PPA could not bind the parties. It was a case where the supply of power was set up classified as ‘infirm power’ by the Appellant Board. It was a case where amended PPA dated 25-8-2004 virtually a new PPA executed between the parties. In that the fuel, the location of plant,

technology of power plant and tariff were changed to enable the use of natural gas instead of fuel oil. In that context, this Tribunal opined that the amended PPA dated 25-8-2004 should have been placed before the State Commission by the Electricity Board for obtaining approval of the State Commission in terms of Section 86(1)(b) of the Electricity Act. He also refers to Appeal No. 51 of 2011 in the matter of **Rithwik Energy Generation Private Ltd. Versus Karnataka Power Transmission Corpn. Ltd. & Ors.** This was a case where the State Commission had returned the PPA on 6-6-2007 as the quantum of power purchase by the Respondent No.2 from the renewable sources exceeded the limit of 10% of input energy as stipulated in the Regulations but with the intimation that the State Commission had floated a discussion paper for amending the Regulations following the order from the State Government. The Regulations were amended subsequent to the PPA. Without approaching the State Commission, the Appellant therein signed a PPA with PTC Ltd. for sale of power. It was held that the time taken in the regulatory process to revise the Regulations should not be a reason for the Appellant unilaterally considering the PPA as void and signing another PPA with PTC Ltd. at the back of the second Respondent, when the regulatory process was completed much before commissioning of the project and before signing of PPA with PTC Ltd. The facts in the present case are different.

20.21 **2009 (16) Supreme Court 659** was relied upon to highlight the scope of Section 86(1)(b).

20.22 In order to understand the scope of a litigation, at the very threshold, one has to see the background of the litigation. According to the Appellant, maintainability of the petition ought to have gone into not at the threshold but along with the merits of the petition. The Commission has rightly pointed out that having regard to the past litigation which has been concluded already; maintainability of the petition was relevant. We are of the opinion if at the threshold of the matter one can show that the petition is not maintainable because of settled issues, definitely the same could be decided at the initial stage itself. Since several rounds of litigations and conclusions between the very same parties with regard to the power supply and tariff were placed on record, we find no good reason to find fault with the exercise of the Commission in entertaining the controversy of maintainability as a preliminary issue. On going through several orders, it is very clear that the order of the Commission dated 24-1-2007 led to order dated 17-8-2012 and later review dated 6-11-2012. The Commission was justified in opining that the Commission was aware of prolonged proceedings in the earlier round of litigation. It also pointed out that issue of approval under Section 86(1)(b) was one of the disputes between the parties before the Commission as well as APTEL and the Hon'ble Supreme Court. Therefore, they opined that at the admission stage itself,

maintainability issue could be resolved. Incidentally, they also referred to a Judgment of this Tribunal dated 22-08-2014 in Appeal No. 279 of 2013 which reads as under:

“22. At the outset, it is to be pointed out that the strict Rules of the Civil Procedure Code do not apply to the proceedings before the State Commission and the State Commission is free to decide on its own procedure which satisfies two aspects i.e. (i) Principles of Natural Justice and (2) Transparency.

23. The Electricity Act is an exclusive Code which is not bound by the procedures contemplated under the Civil Procedure Code. The State Commission is well within its rights to adopt the procedure, which would satisfy the above two elements. Therefore, the State Commission decided to issue notice to other parties when it entertained doubt about the maintainability of the Petition at the admission stage itself.

.....
26. In view of the above, there is no infirmity in the procedure adopted by the State Commission in issuing notice to the other side before admission. In order to decide the question of maintainability of the Petition, the State Commission when it entertains the doubt with regard to the maintainability, has got the jurisdiction to get a clarification over the position of law by issuing notice to the other side.

.....
28. Therefore, the procedure adopted by the State Commission in this case by issuing notice to the other side for deciding the question of maintainability of Petition would show that the State Commission followed both principles of natural justice and the transparency to pass the appropriated order on the issue of the maintainability of the Petition before Admission.”

20.23 Therefore, we are of the opinion that Commission was justified in deciding maintainability of the petition as a preliminary issue.

20.24 Section 86(1)(b) of the Electricity Act reads as under:

“The State Commission shall discharge the following functions, namely:-

... ..

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

Reading of Section 86(1)(b) makes it clear that this is a provision of regulating purchase of electricity and the procurement process of distribution licensee. Section 86(1)(b) not only provides to regulate electricity purchase and procurement process of distribution licensees but also the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements. It is well settled that as part of the Regulation, it can also adjudicate if any dispute arises between the licensees and generating companies with regard to the implementation, application or interpretation of the provisions of the PPA.

20.25 There cannot be a second opinion so far as the obligation of the Commission to consider the aspect of price of power while considering the grant of approval. It also has to bear in mind that the entire cost involved in procuring power ultimately passes on to consumers. However, the contention of the Appellant that once tariff is certain, fresh approval of the PSA is required has to be looked into with reference to provisions of

Section 86(1)(b) of the Electricity Act of 2003. Though Section 86(1)(b) refers to price / cost of power as one of the factors to be considered while considering the grant of approval of PSA, but nowhere in the Act it is said there has to be certain and definite tariff to provide approval.

20.26 On perusal of the orders right from 2006 onwards, it is very clear that the order dated 24-1-2007 was subject to carrying out certain amendments to PPA / PSA. When no action was initiated by the Appellant / PSPCL to carry out necessary amendments, PTC filed Petition No. 34 of 2011 invoking Section 86(1)(b). In this, the terms and conditions of PSA came to be discussed and decided by order dated 17-8-2012 and the direction was given to amend and incorporate the directions of the Commission pertaining to Malana-II Hydro Electric Project. Thereafter, they were required to file petition along with audited documents for determination of tariff. Later on, Review Petition came to be filed wherein both the parties submitted that they had agreed to all the amendments in PSA, except amendment relating to tariff but now they are agreeing in respect of conditions at 10.1 relating to tariff of the electricity generated by the project in question and proceeded to amend PSA to read “that the tariff of the project would be such as would be determined by the Punjab State Electricity Regulatory Commission.” Then the Commission directed the parties to suitably amend and incorporate directions of the Commission. By virtue of this, the tariff of the project would be such as would be

determined by the Punjab State Electricity Regulatory Commission instead of “capped tariff”. Accordingly, all the three parties entered into tripartite agreement on 3-1-2013 in terms of order dated 24-1-2007, and suitable amendments came to be incorporated to the PSA. Subsequent to incorporation of amended terms and conditions, conditional approval given by the Commission by order dated 24-1-2007 has become absolute after signing of tripartite agreement by the parties. It is seen that thereafter, Commission proceeded to fix the tariff in terms of Procedure & Regulations. Final tariff was made in Petition No. 54 of 2012 by order dated 27-11-2013. This became subject matter of challenge in two Appeals bearing Nos. 30 and 35 of 2014. Commission made reference to all the earlier events that had happened between 24-1-2007 till fixing of tariff. They further clarified in the said order that from the joint submissions, Clause 10.1 of PSA was agreed to be amended by removing capped tariff replacing the same by tariff that would be determined by the Commission. They once again reiterated that fixed / capped tariff has no relevance since the tariff as determined by the Commission shall be payable by PSPCL to PTC. They also clarified that wherever the word “capped/fixed tariff” mentioned in the PSA, the same shall have no application whatsoever so far as PSA dated 23-3-2006 is concerned. This order came to be challenged in Appeal Nos. 30 and 35 of 2014.

20.27 The orders in Petition No. 54 of 2012 is nothing but a clarificatory order based upon deliberations in Petition No. 34 of 2011. The conditional order dated 24-1-2007 passed by the State Commission granting approval to the procurement was never the subject matter of challenge by any of the parties. Conditional approval alone was granted to the PSA specially subject to carrying out certain amendments which came to be incorporated by filing petitions when PSPCL did not respond to the request of PTC. The Commission approved such amendments which resulted in order dated 17-8-2012 and Review Order dated 6-11-2012. Issue of approval under Section 86(1)(b) for purchase and procurement of power by PSPCL has reached finality by the above said series of Orders. Therefore, the Commission was justified in opining that no case was made out for re-approval of the PSA under Section 86(1)(b).

20.28 Coming to second and third questions of law raised by PSPCL, order dated 24-1-2007 and other proceedings are to be seen. In 2012 proceedings, Commission opined that Commission is empowered to reopen Power Purchase Agreement and re-determine the tariff and the same has to be in terms of guidelines in the Act and relevant Regulations. In that context, it further opined that terms between the parties are not binding on the Commission in the matter of tariff. Commission proceeds to opine that order dated 24-1-2007 is an outcome of jurisdiction vested in the Commission under the Statute and the said order has not been

challenged and the same was valid and subsisting. Therefore, it was imperative for the parties to ensure that the said order was complied with and inter se agreement was directed to be suitably amended to incorporate the directions of the Commission in its order dated 24-1-2007. Further it says that order dated 24-1-2007 does not suffer from any patent infirmity. Commission also pointed out that PSPCL after getting conditional approval of PSA, it failed to convey to PTC that approval was subject to compliance of directions of Commission. Further, EPPL was not a party to the approval proceedings. To make PSA implementable, directions of Commission had to be incorporated in the PSA. It also refers to be laxity on the part of the trader, i.e. PTC. Then Review Petition came to be filed wherein all the three parties agreed to file joint written submissions agreeing that tariff would be such as would be determined by the Punjab State Electricity Regulatory Commission. Direction was to the effect that the above said term with regard to tariff should be incorporated in the PSA. Thereafter, Tripartite Agreement between the parties came to be executed. After such exercise of amendment to PSA by all the parties, Petition No. 54 of 2012 came to be filed for fixation of tariff. In the order dated 27-2-2013, Commission opined that in the place of capped tariff referred to in the agreement, it has to be read as tariff as determined by the Commission. At the cost of repetition, one has to see what exactly the amendments that were brought to the PSA which reads as under:

“1. AMENDMENT TO ARTICLE 3.1 OF THE PSA

Article 3.1 providing for Conditions Precedent in regard to the approval of the tariff by the Commission shall be substituted as under:

“The parties agree that the Commission shall determine the tariff for the sale of the contracted capacity by PTC to PSPCL and consequently the tariff for the sale of the contracted capacity by EPPL to PTC in terms of the Regulations of the Commission and as per the orders dated 17.8.2012 and 6.11.2012 passed by the Commission in Petitions No. 34 of 2011, 55 of 2012. Such tariff shall be the applicable tariff for the sale and purchase of the electricity under the PPA and the PSA. The requirement to obtain the approval by the State Commission of the tariff shall not be a condition precedent as per Article 3.1 of the PSA for its implementation, but shall be the applicable tariff for the sale and purchase of the contracted capacity under the PPA and PSA as provided in Article 10.”

2. AMENDMENT TO ARTICLE 10.1 OF THE PSA

Article 10.1 shall be substituted as under:

“The tariff for the contracted capacity payable by PSPCL to PTC including all aspects of tariff element would be determined by the Commission and also trading margin, and other charges payable additionally to PTC shall be as per the decision and approval of the Commission.”

4. AMENDMENT TO ARTICLE 14.3, 14.4, 14.5, 14.6 and 14.7 OF THE PSA SHALL STAND DELETED AND THE FOLLOWING SHALL STAND SUBSTITUTED IN THEIR PLACE AS ARTICLE 14.3

“The parties agree that the Punjab State Electricity Regulatory Commission shall be the Appropriate Commission in regard to adjudication of all disputes arising both under the PPA and PSA in view of the nexus existing on the sale of the contracted capacity by EPPL to PTC and by PTC to PSPCL. EPPL hereby accepts such nexus.”

6. *In addition to the applicable tariff as mentioned in clause 2 herein above, the trading margin to PTC shall be as per the decision and approval of the Commission.*

7. *The PPA and PSA shall be read with the above modification. Except for the above, all the terms and conditions of the PPA and PSA shall continue to apply with full effect and subject to the decision and orders of the Commission.”*

20.29 It is very clear from the amendments that the existing PPA and PSA have to be read with the modification brought into the PSA and PPA by virtue of tripartite agreement. In the above circumstances, it is clear that validity of PSA was never raised or held as inoperative. On the other hand, terms with regard to capped tariff came to be amended and incorporated into PSA. Hence, fresh approval of PSA does not arise at all.

20.30 During the course of the argument, learned counsel for the Appellant PSPCL contended that so far as Baglihar Hydro Electric Project is concerned, the Commission did not approve the power purchase opining that it was not economical. Respondents before this Tribunal have placed on record a list of several projects and procurement of power from different sources at a much higher price. Approval or non-approval of purchase depends upon consideration of various factors prevailing at the relevant point of time.

20.31 Incidentally, the Commission also referred to certain factual situation in the State of Punjab. In the ARR of FY 2013-2014, the projection of availability of power by PSPCL during most of the months was more than the demand or sale during those months. Having regard to the interest of the State, the Commission seems to have advised in the Order pertaining to FY 2013-2014 to review PPAs with the generators / traders for purchase of power from outside the State of Punjab. An Action Taken Report was

to be submitted to the Commission by PSPCL for 2014-2015 ARR. The PSPCL seems to have engaged Mercadoes, a consultant to study / review the PPAs and the study seems to be in progress. Further during ARR 2015-2016 PSPCL submitted that copies of PPAs were handed over to the consultant and review exercise is in progress. It seems present agreement dated 23-3-2006 was also directed to be reviewed.

20.32 In the light of the above discussion, reasoning and factual situation, we are of the opinion that the impugned order does not require interference at our end. Accordingly, the Appeal stands dismissed.

20.33 Needless to say that the pending IAs, if any shall stand disposed of.

20.34 Parties to bear their own costs.

21. Pronounced in the Open Court on this 11th day of October, 2018.

(S.D. Dubey)
Technical Member

(Justice Manjula Chellur)
Chairperson

✓
REPORTABLE / ~~NON-REPORTABLE~~

tpd