

**Before the Appellate Tribunal for Electricity
(Appellate Jurisdiction)**

Appeal No. 71 of 2008 & IA No. 102 of 2008

Dated : 21st October, 2008

**Coram : Hon'ble Mrs. Justice Manju Goel, Judicial Member
Hon'ble Mr. H. L. Bajaj, Technical Member**

Lanco Amarkantak Power Pvt. Ltd.
Plot No. 130, 2nd Floor, Road No.2,
Banjara Hills,
Hyderabad – 500 034

... Appellant(s)

Versus

1. Madhya Pradesh Electricity Regulatory Commission
4th & 5th Floor, "Metro Plaza"
E-5, Arera Colony, Bittan Market,
Bhopal – 462 016

2. M. P. Power Trading Co. Ltd.
Shakti Bhawan, Vidyut Nagar,
Jabalpur – 482 008 (M.P.)

3. PTC India Ltd.
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi – 110 066.

4. M. P. State Electricity Board
Shakti Bhavan, Rampur,
Jabalpur = 482 008 (M.P.)

... Respondent(s)

Counsel for the appellant(s) : Mr. Shanti Bhushan, Sr. Adv.
Mr. Manu Nair, Mr. Sanjai
Pathak, Mr. L. Vishwanathan
and Mr. Amit Jain

Counsel for the Respondent(s) : Mr. M. G. Ramachandran,
Mr. Anand K. Ganesan and
Ms. Swapna Seshadri for
MPPTC

Mr. Vikas Singh, Sr. Adv. With
Mr. Amit Kapur, Mr. Rahul
Dhawan, Mr. Mansoor Ali
and Ms. Shobana Masters for
PTC

Mr. G. Umapathy

J U D G M E N T

Ms. Justice Manju Goel, Judicial Member

Introduction:

1. This appeal is directed against the order of the Madhya Pradesh Electricity Regulatory Commission dated 06.05.08 by which the Commission directed the appellant (developers) to file a petition for determination of generation tariff with full particulars as required as per CERC norms and MPERC Regulations by 30.06.08. The order was passed in Petition No. 138 of 2005 in the matter of approval of Power Sale Agreement between PTC India Ltd. and Madhya Pradesh Electricity Board for sale of power from Lanco

Amarkantak Thermal Power Station being set up at Patadi, Korba in Chhattisgarh.

Facts in brief:

2. The Lanco Amarkantak Power Pvt. Ltd., the appellant is an electricity generating company having a coal based thermal power station in District Korba, Chhattisgarh. By a Power Purchase Agreement (PPA for short), between the appellant and the respondent No.3, dated 11.05.05 the appellant and the respondent No.3 contracted to sale and purchase of 300 MW of power. On 30th May, 2005, the respondent No.3 entered into Power Sale Agreement (PSA for short) with the respondent No.2 which is also a trading company in the State of Madhya Pradesh. On 16.11.05, the predecessor of respondent No.2 filed a petition before Madhya Pradesh Electricity Regulatory Commission (the Commission for short) for approval of power supply agreement between respondent No.3 and respondent No.2. Vide an order dated 14.12.05, the Commission opined that fixation of cost of generation of a generator situated outside the State of Madhya Pradesh is not within its purview. Nonetheless, it directed that the appellant's generating station should voluntarily submit itself to the jurisdiction of Commission and submit its Detailed Project Report for scrutiny. The appellant vide its letter dated 19.01.06, addressed to the

respondent No.3, expressed its willingness to supply information and clarifications required by respondent No.3 to be submitted to the Commission and also expressed its willingness to abide by the direction of the Commission generally and with the overall guidelines of the Central Electricity Regulatory Commission.

3. Vide an order dated 07.03.08, the Commission granted conditional and provisional approval to the PSA between respondent No.3 and respondent No.2 subject to the fulfillment of certain conditions. One of the conditions was that the appellant would submit to the jurisdiction of the Commission. It further directed that the appellant would file a petition for determination of tariff under the PPA.

4. Vide a letter dated 14.03.08, the appellant terminated the PPA. The time allocated to the appellant for submission of the tariff petition was extended first upto 30.04.08 and then to 04.10.08. The High Court of Madhya Pradesh at Jabalpur stayed the termination of the PPA vide an order dated 31.03.08 in WP No. 4103 of 2008. The appellant vide an affidavit dated 30.04.08 submitted before the Commission, disputed the Commission's jurisdiction in the matter of fixing tariff of the appellant under the PPA.

Impugned Order:

5. Vide an order dated 06.05.08, the Commission held that it had the jurisdiction to determine the tariff for the PPA and that it had the jurisdiction to examine and redetermine the levelised tariff contractually stipulated in the PPA. The Commission further directed that till such time the tariff was determined a provisional tariff of 95% of the levelised tariff indicated in the PPA would be leviable.

The grounds for challenge and decision:

6. The sole challenge to the impugned order is based on the plea that the Commission did not have jurisdiction to direct the appellant to file a tariff petition. The respondent No.3 in its reply to the appeal has opposed the appeal. However, the respondent No.3 concedes the objection of the appellant that the Commission could not have directed the appellant, which is a generating company, to submit its petition for fixation of tariff for supplying to the respondent No.3, PTC which is a power trading licensee. The respondent No.2 on the other hand has filed a counter affidavit supporting the direction of the Commission and contending that the Commission had the jurisdiction to pass the impugned order.

7. This Tribunal has already gone into the issue in the case of Gajendra Haldea Vs. Central Electricity Regulatory Commission & Others in Petition No.1 of 2005 reported in 2008 Energy Law Reporter (APTEL 203). This Tribunal went into the interpretation of Section 62 of the Act which is as under:

“62. Determination of tariff:

(1) The Appropriate Commission shall determine the tariff in accordance with the provisions of this Act for–

- (a) supply of electricity by a generating company to a distribution licensee: PROVIDED that the Appropriate Commission may, in case of shortage of supply of electricity, fix the minimum and maximum ceiling of tariff for sale or purchase of electricity in pursuance of an agreement, entered into between a generating company and a licensee or between licensees, for a period not exceeding one year to ensure reasonable prices of electricity;*
- (b) transmission of electricity;*
- (c) wheeling of electricity;*
- (d) retail sale of electricity;*

PROVIDED that in case of distribution of electricity in the same area by two or more distribution licensees, the Appropriate Commission may, for the promoting competition among distribution licensees, fix only maximum ceiling of tariff for retail sale of electricity.”

8. Issue before the Tribunal as framed in that judgment was as under:

“9. The issue is whether the Electricity Regulatory Commissions can fix tariff for sale of electricity by; (i) a generator to a trader or intermediary, (ii) a distributor to a trader and (iii) by a trader to any other person.”

9. The Tribunal interpreting Section 62 held as under:

“26. Thus, we cannot alter the provisions of Section 62(1) of the Act by a process of interpretation requiring the Appropriate Commission to determine the tariff for supply of electricity by a generator to an intermediary or to a trader or supply of electricity by a distributor to a trader or supply of electricity by

a trader to any other person, especially when it is not stated in Section 62(1) of the Act that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a trader or an intermediary etc. rather what is stated is that the Appropriate Commission shall determine tariff for supply of electricity by a generator to a distributor. We cannot rewrite the provisions. The clear language employed in the statute is the determinative factor of the legislative intent.”

10. The learned counsel on behalf of the respondent has drawn our attention also to Section 79 which determines the functions of the Central Electricity Regulatory Commission. One of the functions of the Central Commission is to adjudicate disputes involving Generating Companies. The relevant provision is extracted below:

“79. Functions of Central Commission:

- (a) ...
- (b) ...
- (c) ...
- (d) ...
- (e) ...

- (f) *to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;*
- (g) ...
- (h) ...”

11. Similar provision exists in Section 86(f) which deals with functions of the State Commission. It is contended that the Commission could fix the tariff of the appellant for sale to the respondent No.3 in exercise of the adjudicatory function.

12. In the case of Gajendra Haldea (supra) it was, *inter alia*, pleaded that the Commission could determine the tariff of a generating company for sale to a trader in view of clause (a) of Section 79(1) which provided that one of the function of the Central Commission was to regulate tariff of the Generating Companies owned by the Central Govt. as well as other Generating Companies. The relevant provision is as under:-

- (a) *to regulate the tariff of generating companies owned or controlled by Central Government;*

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;”

13. Similarly, Section 86(1)(a) assigns the State Commission with the function to:

“(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State;
(c) 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;”

14. This Tribunal examined this plea and held that the general words in Section 79(i)(b) and 86(a) must take colour from the words used in Section 62(1) particularly Section 62(1)(a) and discarded the theory that by virtue of the provision of Section 79(1)(a) and (b) and

86(1)(a)&(b) a Regulatory Commission has the capacity to determine the tariff of a generating company for supply to a trader. We can extract below the findings of this Tribunal as below:

“34. It appears to us that the general words in Sections 79(1)(a) & (b) and 86(1)(a) must take colour from the words used in Section 62(1), particularly Section 62(1)(a). Otherwise, it is not possible to reconcile the provisions of Section 62(1) on the one hand and Section 79(1)(a) & (b) and Section 86(1)(a) on the other. It is well established principle of construction of statutes that as far as possible the provisions of a statute on the same subject must be harmonized. Sections 79(1)(a) & (b) require regulation of tariff for generation. They must be construed in the context of Section 62(1)(a), which provides for determination of tariff by the Appropriate Commission for supply of electricity by a generating company to a distribution licensee. Similarly, Section 86(1)(a), which requires determination of tariff, inter alia, for ‘supply and generation of Electricity’ must be construed with reference to section 62(1), particularly 62(1)(a) and accordingly are to be interpreted to mean that the State Commission is empowered to determine tariff

for supply of electricity by a generating company to a distribution licensee and cannot be construed to mean that the State Commission is possessed of the jurisdiction to fix the tariff for sale of electricity by a generator to trader or an intermediary or supply of electricity by a trader to any person. In case Section 79(1)(a) & (b) and Section 86(1)(a) are not construed in this manner, a grave difficulty would arise for determination of tariff.”

15. The basic provision for determination of tariff is given in Section 62. So far as the question of tariff is concerned, Section 62 has to be read as the principal provision and the other provisions have to be read as supportive provisions. Sections 62, 79 & 86 have to be read harmoniously. Just as clauses (a) & (b) of sections 79 & 86 could not empower the Commissions to determine tariff for sale by a Generator to a trader, clause (f) of Sections 79 & 86 cannot empower the Commissions in this regard.

16. In any case, the impugned order is not passed by way of adjudication of dispute. The mere fact that the question of jurisdiction was heard by the Commission while passing the impugned order does not mean the Commission was performing the function of adjudication. Further even if the Commission has

power to adjudicate upon the dispute involving a generating company it does not mean the Commission in such a process of adjudication can pass an order which it has no jurisdiction to pass. In our opinion reference to Commissions' power to adjudicate is an excuse to fix the tariff in question is entirely misplaced.

17. We have also been taken through provision of 94 of the Electricity Act 2003 which lays down certain powers of appropriate Commissions which are required for conducting proceedings before it. One such power is calling for discovery and production of any document.

“94. Powers of Appropriate Commission

(1) The Appropriate Commission shall, for the purposes of any inquiry or proceedings under this Act, have the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908) in respect of the following matters, namely:-

- (a) summoning and enforcing the attendance of any person and examining him on oath;*
- (b) discovery and production of any document or other material object producible as evidence;*
- (c) receiving evidence on affidavits;*

- (d) *requisitioning of any public record;*
- (e) *issuing commission for the examination of witnesses;*
- (f) *reviewing its decisions, directions and orders:*
- (g) *any other matter which may be prescribed”*

18. It is contended that in view of this power, the Commission can call for any document and information and, therefore, the Commission could also call for all the information which could be relevant for fixation of tariff. In our opinion, the argument is entirely misplaced. The power of discovery and production has been given for the purpose of conducting some proceedings or enquiry pending before the Commission. If the Commission undertakes the proceeding for fixation of tariff, the Commission can certainly call for any document or information required for the purpose of fixing of tariff. However, the power to call for discovery and document cannot be used for the purpose of fixation of tariff if the Commission has not been given that power by any other provision.

19. This Tribunal in the Gajendra Haldea case (supra) has not only held that the Commissions do not have the power for fixing tariff for a generating company for the purpose of supplying to a

distributor, but has also held that the legislature withheld such functions and power from the Commissions for good reasons.

20. It has been vehemently argued that in this case the PPA clearly stipulated that the power purchased by the PTC will be eventually sold to the MPSEB which is the respondent No.4 which is a distribution licensee and therefore the PPA cannot be treated to be an agreement to sell power by a generator to a trader. According to the learned counsel, the agreement should be construed as one between a generator and a distribution licensee. Our attention has been drawn to certain provisions of PPA. “Purchaser” in this agreement has been defined as :

“means a State Electricity Board or the State Transmission Utility or a Distribution Licensee, or their successors, or a bulk consumer, as defined in the Electricity Laws, to which PTC may sell the power and energy purchased from the Company.”

“Power Sale Agreement” or “PSA” has been defined as:

“means the document containing the terms and conditions for sale by PTC to the Purchaser of power purchased from the Company.”

21. In paragraph 16.13, dealing with 'Notices', the address of the purchaser is given as:

"For Purchaser:

*Address: Madhya Pradesh State Electricity Board
Shakti Bhawan, Vidyut Nagar
Rampur, Jabalpur – 482 008"*

It is argued that the PPA thus stipulated that the MPSEB would eventually purchase the power and so the agreement in effect is an agreement to sell power by a generating company to a distribution.

22. This plea is opposed by the learned counsel for the appellant who points out that the purchaser in the present case is not the respondent No. 4 alone. The definition fully allows the PTC or the respondent No.3 to sell power to anyone although respondent No.4 at the given point of time may have been the intending purchaser. In any case such purchaser was not a party to the PPA. More importantly even the respondent No.4 is not a distribution licensee. The respondent No.4 itself is a trading licensee and the matter before the Commission was for approval of the power sale agreement which was between two traders. In paragraph 2 of the impugned order, the Commission writes:

“2. *MP State Electricity Board (hereinafter referred to as MPSEB) in the capacity of Trading Licensee in Madhya Pradesh, through its authorized representative Shri A.B. Bajpai has filed a petition before the Commission for approval of the power sale agreement executed between M/s. PTC India Limited (hereinafter referred to as M/s. PTC) for sale of power from Lanco Amarkantak Thermal Power Station”*

23. Even if we keep the purchaser in view, the purchaser was also a trading licensee. PPA in question cannot be read as an agreement to sell power by a generator to a distribution licensee. Accordingly, the argument that the PPA was between a generator and a distribution licensee and that the Commission can fix tariff under this PPA in exercise of power vested in Section 62 must fail.

24. It is contended on behalf of the respondent No.2 that the parties themselves had stipulated that the tariff would be fixed by the Commission and so the Commission rightly asked for the tariff petition from the appellant. It is also pointed out that one of the clauses in the agreement related to tariff. “Tariff” was defined as:

“means the tariff payable in accordance with Schedule E;”

Schedule-E gave the formula to fix tariff. In Paragraph “F” of the preamble to the agreement, it is said:

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

25. It is contended on behalf of respondent No.4 that by virtue of this clause the Commission gets the jurisdiction to fix tariff under the PPA. This argument has to be stated to be rejected. The Commission derives this jurisdiction only from the Electricity Act 2003. The parties before the Commission cannot confer jurisdiction by their agreement if the Commission does not have the same under the Act.

26. In view of the above analysis, we have no hesitation to hold that the Commission has exceeded its jurisdiction in asking the appellant to submit to its jurisdiction for the purpose of determination of tariff under the PPA and to file a tariff petition. The

appeal is allowed and the impugned order is set aside but with no order as to costs.

27. Interlocutory Application No. 102 of 2008 also stands disposed of with this judgment.

Pronounced in open court on this **21st day of October, 2008.**

(H. L. Bajaj)
Technical Member

(Justice Manju Goel)
Judicial Member