

Appellate Tribunal for Electricity
(Appellate Jurisdiction)

Dated:03rd Jan, 2014

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

APPEAL No.65 of 2013

IN THE MATTER OF

**Lanco Amarkantak Power Ltd.,
Lanco House, Plot No.397 Phase III,
Udyog Vihar, Gurgaon-122016.**

..... Appellant(s)

Versus

- 1. Haryana Electricity Regulatory Commission
Bays No.33-36, Sector-4
Panchkula 134 112
Haryana.**
- 2. M/s Haryana Power Generation Corporation Ltd.,
Urja Bhawan, C-7, Sector 6
HPGCL, Panchkula 134009.**
- 3. PTC India Ltd.,
2d Floor, NBCC Tower, 15
Bhikaji Cama Place,
New Delhi-110066.**

4. **Chhattisgarh State Power Trading Co. Ltd.,
Vidyut Seva Bhawan, Danganiya
Raipur-492013,
Chhattisgarh.**
5. **Western Regional Load Dispatch Centre
F-3, MIDC Area, Marol,
Andheri(East),
Mumbai-400093**
6. **Central Electricity Regulatory Commission
34d & 4th Floor, Chanderlok Building,
36, Janpath,
New Delhi-110001.**

....Respondent(s)

Counsel for Appellant(s):

Mr. Akhil Sibal
Mr. Deepak Khurana,
Mr. Vikas Mishra,
Mr. Archit Virmani
Mr. Sakya Singha Chaudhari
Ms. Aditi Sharma
Mr. Syed Siam

Counsel for Respondent(s):

Mr. M.G.Ramachandran
Mr. K. Gandhi for R-2
Mr. Abhishek MitraMr.
Apoorve Karo & Mr. Chirag
Kher for R-2
Ms. Suparna Srivastava for
CSPTCL
Mr. Varun Pathak for PTC
India Ltd.

Mr. Ravi Prakash &
Ms. Puja Priyadarshini for R-3
Mr. Suyash Mohan Guru for
R-3
Mr. Anooja Srivastava

JUDGMENT

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

1. Lanco Amarkantak Power Limited is the Appellant herein. This Appeal has been filed by the Appellant challenging the impugned order dated 17.10.2012 passed by the Haryana Electricity Regulatory Commission ('State Commission') in the Application filed by the Appellant for tariff determination pursuant to the Remand order passed by the Hon'ble Supreme Court.
2. The short facts are as follows:-
 - a) The Appellant is a generating Company. It has established a Coal based thermal power project in Korba District, Chhattisgarh.
 - b) The 1st Respondent is the State Commission.

- c) The Haryana Power Generation Corporation Ltd (Haryana Power) is the 2nd Respondent which is a Government of Haryana undertaking operating and maintaining generating stations in the State of Haryana.
 - d) The PTC India Ltd., is the Respondent No.3. It is licensed by the Central Electricity Regulatory Commission to undertake trading in electricity as an Inter-State electricity trader.
 - e) Chhattisgarh State Power Trading Company Ltd., is the 4th Respondent. It is an authorized representative of the Government of Chhattisgarh, a successor company of the erstwhile Chhattisgarh State Electricity Board. As a deemed licensee, it is engaged in the business of trading in electricity.
3. The factual background giving rise to the present Appeal is given below:-
- i) The Appellant, Lanco Amarkantak Power Limited, the generating Company and PTC India Ltd., the trading Company (R-3) had entered into a PPA dated 19.10.2005 for sale of 273 MW from the Thermal Power Plant unit 2 of the Appellant in Chhattisgarh for a period of 25 years from the Commercial Operation Date of the

Project to PTC at a levelised capped tariff rate of Rs.2.32 per unit, for onward sale to one or more purchasers.

- ii) The PTC India Ltd,R-3, thereupon, entered into Power Sale Agreement (PSA) with Haryana Power,R-2 on 21.9.2006 for onward sale of power purchased from the Appellant for a period of 25 years from the date of Commercial Operation of the Power Project.
- iii) Thereupon, Haryana Power,R-2 filed a Petition before the State Commission for approval of the Power Sale Agreement(PSA), in which the State Commission held the hearing on 01.10.2007.
- iv) Ultimately, the State Commission refused to approve PSA through its order dated 31.10.2007 on the ground that:- (a) PSA does not qualify for exemption from clause 5.1. of the Tariff Policy and (b) that the tariff pool mechanism provided under the PSA was in violation of Section 62(6) of the Electricity Act,2003.
- v) However, on 15.11.2007 Haryana Power(R-2) again filed a Petition for review of the order dated 31.10.2007 on the basis of the certificate obtained from Power Finance Corporation certifying that the PSA qualifies for exemption from clause 5.1. of the National Tariff Policy.

- vi) In view of the above, the State Commission by the order dated 6.2.2008 reviewed its earlier order dated 31.10.2007 and approved the PSA on the basis of the certificate submitted by the Haryana Power(R2) issued by the Power Finance Corporation.
- vii) Thereafter, the Appellant on 01.8.2009 signed an Implementation Agreement with the Government of Chhattisgarh and Chhattisgarh State Power Holding Company Ltd. In terms of the said Implementation Agreement, the Appellant was required to supply 35% of the capacity from its Unit-2 Plant to the Government of Chhattisgarh.
- viii) The primary fuel was defined in the PPA to mean domestic coal supplied in accordance with the Coal Supply Agreement by the Coal Company. However, due to subsequent change in the Central Government's policy regarding distribution of coal, the coal linkage was substantially reduced from the actual requirement which has significantly increased the generation cost.
- ix) In view of the change of circumstances, the Appellant communicated to the PTC(R-3) through letter dated 3.2.2010 that the PPA entered into between them was impossible to be performed.

- x) Due to the above development, PTC(R-3) on 13.5.2010 filed a Petition before the State Commission seeking for the directions to the Haryana Power, R-2 to purchase electricity at a tariff calculated in accordance with CERC Regulations,2009 and enter into amendments to the PSA to reflect the revised tariff in view of the force majeure events and requested the State Commission to revise tariff under the PSA.
- xi) However, the Haryana Power,R-2 opposed this prayer for revision of tariff under the PSA. Simultaneously, the Haryana Power(R-2) also filed a Petition on 22.7.2010 before the State Commission seeking for the directions against both the PTC(R-3) and Lanco, the Appellant to comply with their purported obligations in favour of the Haryana Power and to restrain the Appellant from selling the contracted power under the PSA to any third party including the State of Chhattisgarh.
- xii) The matter was heard in the said proceedings and the orders reserved.
- xiii) In the meantime, i.e. during the pendency of pronouncement of final orders in the above proceedings by the State Commission, the Appellant terminated the

PPA through its letter dated 11.1.2011 on account of non-fulfilment of the conditions precedent contained in the PPA.

- xiv) Immediately after termination on 12.1.2011, the Appellant entered into a PPA with Chhattisgarh State Power Trading Company Ltd for supply of 35 % share of Government of Chhattisgarh in view of the obligations under the Implementation agreement earlier entered into.
- xv) At that stage, on 2.2.2011, the State Commission dismissed the petition filed by the PTC(R3) and allowed the petition filed by the Haryana Power(R2) and restrained the Appellant from revising its price and also further restrained the Appellant from selling contracted power to a third party by holding that the PPA and PSA cannot be construed as two separate agreements.
- xvi) Aggrieved by the directions issued in the said order dated 2.2.2011 passed by the State Commission, the Appellant filed an Appeal before this Tribunal on 7.2.2011 in Appeal No.15 of 2011 mainly questioning the jurisdiction of the State Commission besides assailing the conclusion arrived at by the State Commission.

- xvii) At that stage, Haryana Power(R-2) filed a Petition before the State Commission challenging the termination of the PPA by the Appellant through its letter dated 11.1.2011.
- xviii) During the pendency of the Appeal in Appeal No.15 of 2011 before this Tribunal, the Chhattisgarh Power Trading Company also filed a separate Appeal in Appeal No.52 of 2011 challenging the order dated 2.2.2011 passed by State Commission on the ground that the impugned order contained directions prejudicial to the Chhattisgarh Power Trading Company even without hearing it in the said proceedings.
- xix) Both the Appeals were entertained by this Tribunal. During the pendency of the proceedings, Lanco, the Appellant sought for stay of the order dated 2.2.2011 through its interim application in I.A. No.27 of 2010 in Appeal No.15 of 2011. This Tribunal, on 23.3.2011 taking note of the fact that PPA already stood terminated through the letter dated 11.1.2011, passed the interim order during the pendency of the Appeal No. 15 of 2011 granting a partial stay of the order dated 2.2.2011 and directing the Appellant to supply 35% of the power to Chhattisgarh Power Trading Company and

to supply the balance power to the PTC(R-3) so that the PTC(R-3) could supply to the Haryana Power(R-2) which could be used for meeting the needs of the people of Haryana State.

- xx) Pursuant to the termination of the PPA between the Appellant and the PTC(R-3) the PTC on 25.3.2011 invoked the arbitration clause in terms of the PPA and commenced arbitration. The said arbitration proceedings are pending.
- xxi) The Tribunal after hearing the parties in Appeal No.15 of 2011 and 52 of 2011 delivered the judgment on 4.11.2011 dismissing the Appeal No.15 of 2011 filed by Lanco, the Appellant upholding the jurisdiction of the State Commission and allowing the Appeal No.52 of 2011 filed by Chhattisgarh Power Trading Company by remanding the matter to the State Commission to hear the Chhattisgarh Power Trading Company on the issue of the entitlement to be supplied i.e. 35% of the power generated from the Project in the light of the PPA entered into between the Appellant and Chhattisgarh Power Trading Company. In the said order, it was directed that the interim order earlier passed by the

Tribunal on 23.3.2011 will be in force till the final orders are passed by the State Commission.

- xxii) Aggrieved by the judgment of this Tribunal dated 4.11.2011 dismissing the Appeal in Appeal No.15 of 2011, the Appellant filed an Appeal before the Hon'ble Supreme Court questioning the finding of the Tribunal upholding the jurisdiction of the State Commission.
- xxiii) The Appellant also filed interim application seeking for the stay of the operation of judgment of the Tribunal dated 4.11.2011 in Appeal No.15/2011 pending the Appeal in Supreme Court. In that Application, the Appellant raised the issue of change of circumstances in the PPA as well as viability of the Project in the light of constraint in the supply of coal especially when the capped tariff as per PPA i.e. Rs. 2.32 Kwh was not sufficient to meet the cost of fuel/generation.
- xxiv) After hearing both the parties, the Hon'ble Supreme Court passed the interim order on 16.12.2011 directing the Appellant to continue to supply the electricity as per the interim order dated 23.3.2011 passed by this Tribunal to PTC(R-3) and further directed that without prejudice to the rights of the parties and pending further orders, the Appellant shall approach the State

Commission for tariff fixation and the State Commission shall fix the tariff for sale and purchase of power for the disputed period between Lanco and PTC. In the very same order, the Hon'ble Supreme Court stayed the proceedings initiated by the Haryana Power (R2) challenging termination of the PPA before the State Commission till the final disposal of the Appeal. By virtue of this order, the Appellant was directed to supply 65% of the power generated by it to PTC(R3) and balance power i.e 35% to Chhattisgarh Government Company without specifying any tariff for supply of power.

xxv) Accordingly, in terms of the interim order dated 16.12.2011 pending the Appeal proceedings before the Hon'ble Supreme Court, the Appellant on 12.01.2012 filed a Petition before the State Commission to fix/approve the tariff for the period in question i.e. 7.5.2011 to 31.12.2011 and for power proposed to be supplied for the balance period of FY 2011-12 and for the FY 2012-13. In the said Petition, the State Commission directed all the parties to file their response.

- xxvi) Ultimately, the State Commission on 17.10.2012 passed the impugned order after hearing all the parties concerned holding that capped tariff in the PPA i.e. Rs.2.32 per unit shall prevail.
- xxvii) Challenging the said determination of tariff of the State Commission, the Appellant filed another interlocutory Application dated 27.12.2012 before the Hon'ble Supreme Court in the Appeal proceedings which was already pending. This Application was taken up for enquiry. After hearing the parties concerned, the Hon'ble Supreme Court felt that since the order passed by the State Commission on 17.10.2012 determining the tariff is appealable order before this Tribunal, the party concerned shall approach the Tribunal by filing the Appeal.
- xxviii) Accordingly, the Hon'ble Supreme Court disposed of the said interlocutory application by its order dated 19.2.2013 directing the Appellant to file statutory Appeal before this Tribunal against the said order dated 17.10.2012 passed by the State Commission.
- xxix) The Hon'ble Supreme Court in the said order requested the Tribunal to entertain the said Appeal to be filed by

the Appellant and dispose of the said Appeal as expeditiously as possible. The said order is as follows:-

“I.A. No.7 of 2012 has been filed in the appeal, interalia, challenging the determination of Tariff by the Haryana Electricity Regulatory Commission, in terms of the order passed by this Court on 16th December, 2011, directing that, without prejudice to the rights and contentions of the parties and pending further orders, the State Electricity Regulatory Commission, Haryana, would fix/approve the Tariff for sale and purchase of power for the period about which there is a dispute between the appellant and the Respondent No.3, P.T.C. India Limited.

The State Commission has since decided the matter and has followed its earlier decision that Rs.2.32p. per unit would be the Tariff for the period in dispute.

The order of the State Commission would, ordinarily, be appealable under the Electricity Act, 2003, since the question of Tariff determination is involved. This application appears to have been made since the determination was done in terms of the aforesaid order passed by this Court. However, the subject-matter of the pending appeal is not the question of determination of Tariff, but who has a right to make such determination. The subject-matter of the appeal is, therefore, the jurisdiction of either the Central Electricity Regulatory Commission or the State Electricity Regulator Commission, Haryana, to determine the Tariff.

In the said circumstances, we dispose of I.A. No.7 of 2012 by granting leave to the appellant to file a statutory appeal against the determination of the Tariff, as made by the State Commission by its order dated 17th October, 2012.

Since the appeal would now be barred by limitation, leave is given to the appellant to file such appeal within a period of two weeks, and if an application for condonation of delay is made, the same should be considered and disposed of, keeping in mind the fact that the matter was pending in this Court.

- xxx) Thus, through its order dated 19.2.2013 the Hon'ble Supreme Court made it clear that any observations made in the said order should not influence the Appellate authority while disposing of the said Appeal.
- xxxi) Accordingly, the Appellant has filed this Appeal before this Tribunal as against the impugned order dated 17.10.2012 passed by the State Commission.
4. In the light of Hon'ble Supreme Court's order, we entertained the Appeal and heard the parties concerned.
5. The learned Counsel for the Appellant has made the following submissions while assailing the impugned order.
- i) The Hon'ble Supreme Court directed the Appellant to continue to supply electricity despite the termination of PPA as an interim arrangement. It

also stayed the proceedings challenging the termination of PPA, pending before the State Commission. Therefore, the supply of power after the date of termination of PPA was on adhoc basis and not under the terms of PPA.

- ii) The interim order of the Hon'ble Supreme Court by which the State Commission was directed to fix the tariff for the disputed period could not apply to the tariff in terms of the PPA.
- iii) As a matter of fact, the interim order was passed by the Hon'ble Supreme Court only on the basis of the submission made by the Appellant that on account of the increasing burden due to coal costs, the capped tariff in terms of the PPA was unviable and tariff of Rs.2.32 Kwh was not sufficient to meet the cost of fuel and as such the project has become commercially unviable.
- iv) While Hon'ble Supreme Court passed the said interim order it took note of the facts that already Lanco had terminated the PPA with PTC through its letter dated 11.1.2011. Therefore, the State Commission should have determined the tariff without applying the levelised capped tariff as per

PPA at the rate of Rs.2.32 per KWh. Therefore, the State Commission ought not to have enforced the conditions agreed under PPA for the purpose of determination of tariff in view of the Remand order dated 16.12.2011 of the Hon'ble Supreme Court. The Tariff determination as directed by the Supreme Court ought to have been undertaken de hors the terms of the PPA and without enforcing the levelised capped tariff under the PPA.

- v) The very fact that the Hon'ble Supreme Court expressly stayed the proceedings of challenge to the termination of the PPA initiated by the Haryana Power before the State Commission would show that the State Commission shall fix the tariff de hors the terms of the PPA including the capped tariff by directing it to carry out its tariff determination uninfluenced by its previous orders.
- vi) The Appellant specifically pleaded before the Hon'ble Supreme Court regarding the issue of reduced linkage quantity of coal, viability of the Project, financial hardship, etc; and in the light of the said specific pleadings the Hon'ble Supreme Court passed order dated 16.12.2011, keeping in

view the contention of the Appellant that the capped tariff is commercially unviable for supply of power by the Appellant to PTC.

- vii) The Appellant filed a tariff petition before the State Commission as per the CERC tariff Regulations,2009. The Haryana Power(R2) also took a stand before the State Commission that CERC Tariff Regulations alone should apply. The PTC contended before the State Commission that the tariff should be determined as per the provisions of the Electricity Act,2003 and Regulations framed thereafter. Even the terminated PPA provided for the applicability of the CERC tariff Regulations. However, the State Commission has applied the State Commission's Regulations,2008 for certain components and applied CERC Regulations for operation and maintenance component. Thus, the State Commission adopted a pick and choose policy while determining the tariff. The only reason given by the State Commission in not uniformly applying the CERC Tariff Regulations is that the Hon'ble Supreme Court had remanded the matter only to

State Commission and not the Central Commission and that therefore, the State Commission could not adopt CERC Regulations. This approach is quite wrong.

- viii) Admittedly, the power was supplied by the Appellant to both PTC(R-3) and Chhattisgarh Company(R-4) in terms of the interim order dated 23.3.2011 passed by this Tribunal as directed by the Hon'ble Supreme Court. Thus, Lanco was simultaneously supplying power to more than one State. Therefore, the principles to be applied for the determination of tariff for such plant supplying power to more than one State ought to be in terms of Tariff Regulations framed by the CERC only.
- ix) Merely because the Hon'ble Supreme Court directed the State Commission to make tariff determination for the disputed period and not the Central Commission, the State Commission could not exclude the application of the CERC Tariff Regulations, especially when the facts of the case otherwise call for the applicability of such Regulations. The Hon'ble Supreme Court did not observe anything to preclude the State

Commission from applying CERC tariff Regulations. In any event, even the terminated PPA on which heavy reliance is placed by the State Commission, itself provides for applicability of the Central Commission's Regulations,2009. Therefore, the approach of the State Commission in applying CERC Tariff Regulations,2004 only for one component and applying the State Commission's Regulations for other component is blatantly illegal.

- x) It is also clear from the order of the Hon'ble Supreme Court by which the State Commission was directed for impleading the Central Commission also as a proper and necessary party which also would prove that the Appellant is entitled to tariff determined as per the CERC tariff Regulations,2009.
- xi) The tariff determination carried out by the State Commission is not only not in accordance with the directions issued by the Hon'ble Supreme Court but also is completely erroneous and contrary to the facts and applicable law.
- xii) The State Commission while determining the capital cost of the Project has applied its own

unspecified benchmark norms not contained either in the CERC tariff Regulations or State Commission's tariff Regulations. The adoption of such norms is clearly arbitrary.

- xiii) The Appellant, in fact, submitted a certificate from its statutory auditors certifying the amount of capital cost of the Project but the State Commission without considering the same has taken the estimated project cost, based on the detailed Project Report which was prepared as far back as in 2005.
- xiv) The impugned order does not reflect any prudence check by the State Commission as understood in law. Similarly, the State Commission arbitrarily chose to adopt the debt equity ratio as per the purported original scheme of 80:20. This is contrary to all the Regulations.
- xv) Similarly, in respect of interests on loan, the State Commission wrongly fixed tariff without following any of the Regulations either the Central Regulations or State Regulations. Thus, in respect of various charges, the State Commission

has made an erroneous determination which is not based upon the reasons.

6. On the basis of the above grounds, the Appellant has prayed for setting aside the impugned order dated 17.10.2012.
7. In reply to the above submission, learned Counsel for the Haryana Power(R2) in justification of the impugned order elaborately argued that the State Commission has considered all the aspects of the matter and passed the valid order by taking note of the directions issued in the Remand order passed by the Hon'ble Supreme Court and as such all the grounds urged by the Appellant are not tenable and therefore, the Appeal is liable to be dismissed.
8. In the light of the rival contentions made by the learned Counsel for the parties, the following questions would arise for consideration:-

- (i) Whether, in view of the Remand Order dated 16.12.2011 passed by the Hon'ble Supreme Court, it was open to State Commission to enforce the levellised capped tariff agreed under the PPA for the purpose of determination of tariff?**
- (ii) Whether State Commission ought to have applied CERC Tariff Regulations, 2009 alone for tariff**

determination, in the peculiar facts of the present case which involve supply of power from the Power Station of the Appellant to more than one State?

(iii) Whether there is any infirmity/illegality in the tariff determined by the HERC?

9. Before dealing with these questions, it would be proper to reiterate some of the relevant events which took place prior to the Remand order dated 16.12.2011 passed by the Hon'ble Supreme Court.

- i) The PPA was executed on 19.10.2005 between the Appellant and the PTC(R3).
- ii) As per the PPA, the levelised capped tariff was fixed at Rs.2.32 per unit.
- iii) After the execution of the PPA, the PTC(R-3) executed a Power Sale Agreement(PSA) with Haryana Power(R-2) for sale of 273 MW power purchased from the Appellant to Haryana Power.
- iv) Thereupon, Haryana Power filed a Petition before the State Commission for approval of the said PSA but by the order dated 31.10.2007, the State Commission refused to approve the PSA on the main ground that

PSA does not qualify for exemption from clause 5.1. of the Tariff Policy.

- v) However, Haryana Power,R-2 after getting a certificate from the Power Finance Corporation to the effect that PSA qualifies for exemption from clause 5.1. of the National Tariff Policy, filed a Review Petition before the State Commission to revise the earlier decision.
- vi) This time, the State Commission by the order dated 06.02.2008 revised the earlier decision and approved the PSA on the basis of a certificate issued by the Power Finance Corporation to Haryana Power.
- vii) In the year 2009, the Appellant informed PTC(R-3) and highlighted the circumstances that led to the escalation of Project cost and therefore, it would not be viable for the Appellant to sustain the Project at the approved levelised capped tariff.
- viii) In view of the constraints highlighted by the Appellant, PTC(R-3) filed a Petition dated 13.5.2010 before the State Commission seeking for directions to the Haryana Power,R-2 to purchase electricity at a tariff calculated in accordance with the CERC Regulation,2009 and further to enter into the amendments to the PSA to reflect the revised tariff, but the Haryana Power,R-2 filed a reply

before the State Commission prayed outright dismissal of the Petition filed by the PTC.

- ix) Besides this reply, Haryana Power, R-2 filed a separate Petition seeking for direction to PTC,R-3 as well as Lanco, the Appellant to comply with the purported obligations in favour of the Haryana Power, R-2 and sought directions to restrain Lanco from selling contracted capacity to any other third party. The jurisdiction of the State Commission was questioned by Lanco Appellant in its reply.
- x) These Petitions were heard by the State Commission and orders were reserved.
- xi) At that stage, before the pronouncement of the final orders in those Petitions, the Appellant terminated the PPA entered with PTC(R3) on 11.01.2011 on the ground of non-fulfilment conditions precedent.
- xii) In the meantime, the Appellant entered into Implementation Agreement with Chhattisgarh State Power trading Company to sign a PPA for supply of 35% share and accordingly the PPA was signed on 12.01.2011.
- xiii) Thereafter, the State Commission passed the final order in the Petitions filed by the Haryana Power,R-2

and PTC,R-3 on 02.2.2011 holding against the Appellant.

- xiv) As against this order dated 2.2.2011 passed by the State Commission, the Appellant filed an Appeal in Appeal No.15 of 2011 before this Tribunal.
- xv) At this stage, Haryana Power(R-2) on 13.3.2011 filed a Petition before the State Commission challenging the termination dated 11.1.2011 of the PPA between the Appellant and PTC,R-3.
- xvi) In the meantime, the Chhattisgarh Power Company challenging the order dated 2.2.2011 passed by State Commission, making observations and directions prejudicial to the Chhattisgarh Power Company even without hearing it filed a separate Appeal in Appeal No.52 of 2011. Both the Appeals were pending before this Tribunal.
- xvii) During the pendency of these Appeals, the Tribunal keeping in view the fact that the PPA stood terminated, passed the interim order on 23.3.2011 granting partial stay of the order dated 2.2.2011 of the State Commission by directing the Appellant to continue to supply the power to PTC(R-3) and permitting the

Appellant to supply 35 % power to the Chhattisgarh Power Company.

- xviii) After hearing the parties in both these Appeals, the Tribunal on 04.11.2011 delivered the judgment dismissing the Appeal in No.15 of 2011 filed by Lanco, the Appellant and allowing the Appeal No.52 of 2011 filed by Chhattisgarh Power Trading Company by remanding the matter to the State Commission to pass an order in respect to the supply of 35% of power to the Chhattisgarh Power Trading Company after hearing the said Power Company.
- xix) In the said judgment dated 04.11.2011 this Tribunal directed that the interim order dated 23.3.2011 passed by this Tribunal shall continue till the final order is passed by the State Commission.
- xx) Against this Judgment, the Appellant, Lanco filed an Appeal before the Hon'ble Supreme Court. During the pendency of the Appeal, the Appellant sought stay of the Remand order dated 04.11.2011, by raising the issue of change of underlying circumstances of PPA as well as viability of the Project in the light of the constraints in supply of coal.

- xxi) The Hon'ble Supreme Court after hearing the parties took note of the various circumstances and passed interim order on 16.12.2011 directing the Appellant to continue to supply of power as per the interim order dated 23.3.2011 passed by this Tribunal and further directed the Appellant to approach the State Commission, which in turn will fix the tariff for sale and purchase of power for the disputed period between Lanco, the Appellant and PTC(R-3). By the same order of Hon'ble Supreme Court the proceedings in challenge to termination initiated by Haryana Power(R2) before the State Commission was stayed.
- xxii) Accordingly, the Appellant approached the State Commission and in terms of the Remand order of the Hon'ble Supreme Court, the State Commission ultimately passed the impugned order dated 17.10.2012 holding that the tariff would remain at capped rate of Rs.2.32 per unit, which is referred to in the PPA.
- xxiii) As against this order of the State Commission, the Appellant filed an Interim Application before the Hon'ble Supreme Court in the pending Appeal seeking for quashing of the said order.

xxiv) However, the Hon'ble Supreme Court directed the Appellant to approach this Tribunal and file a statutory Appeal as against the order dated 17.10.2012 passed by the State Commission as it is an appealable order. Accordingly, the Appellant filed this Appeal as against the impugned order dated 17.10.2012 passed by State Commission fixing the levelised capped tariff at Rs.2.32 per unit as per the PPA.

10. Bearing the above facts in our mind, we shall now analyse each of the questions framed above.
11. The first question is with reference to the impugned order passed by the State Commission enforcing capped tariff agreed under PPA for the purpose of determination of tariff which is stated to be not in consonance with Remand order dated 16.12.2011 passed by the Hon'ble Supreme Court.
12. According to the Appellant, the State Commission did not pass the impugned order by following the Remand order dated 16.12.2011 of the Hon'ble Supreme Court in letter and spirit and on the other hand it fixed the rate as per the PPA, which has already been terminated and that therefore, the impugned order fixing the rate as per the PPA is liable to be set aside.

13. According to the Haryana Power(R-2), the impugned order fixing the tariff rate in terms of the PPA is perfectly justified.
14. In the light of the rival contentions, we have to examine the question as to whether the State Commission has followed the Remand order passed by the Hon'ble Supreme Court in letter and spirit and fixed the rate as directed by the Hon'ble Supreme Court.
15. At the outset, it shall be stated that the tariff determination which resulted in impugned order was undertaken by the State Commission only in pursuance to the interim order dated 16.12.2011 passed by the Hon'ble Supreme Court. The plain reading of the Remand order dated 16.12.2011 of Hon'ble Supreme Court would clearly indicate that the directions to the State Commission to fix tariff was as a part of an interim arrangement which would balance equities of the both parties in the facts and circumstances of the case pending further orders in the Appeal before the Hon'ble Supreme Court.
16. In other words, the Hon'ble Supreme Court through its order dated 16.12.2011 directed the Appellant to supply to the Respondent in terms of the interim order dated 23.3.2011

passed by this Tribunal, which is admittedly an interim arrangement while passing partial stay order of the earlier impugned order dated 2.2.2011 passed by the State Commission in the earlier Appeal filed by the Appellant.

17. Thus, the Hon'ble Supreme Court did not go into the merits of the matter but it passed the said interim order on 16.12.2011 after taking into account the supply obligations to Chhattisgarh Power Company as also the other circumstances highlighted by the Appellant.
18. Let us quote the interim order of Remand dated 16.12.2011 passed by the Hon'ble Supreme Court pending main Appeal before it.

“Permission to place additional documents, facts and grounds is granted.

Issue show cause notice to the respondents as also to the Union of India.

Service of notice is waived on the represented parties.

Liberty is given to the appellant to implead Central Electricity Regulatory Commission [‘CERC’, for short] within two weeks from today and notice be also issued to the CERC.

Pending hearing and final disposal of the appeal, we issue following directions:

- (i) *The appellant will continue to supply electricity as per the interim Order of the Tribunal dated 23rd March, 2011;*

(ii) Without prejudice to the rights and contentions of the parties and pending further orders, the State Electricity Regulatory Commission, Haryana will fix/approve the tariff for the period in question about which there is a dispute between the appellant and PTC.

The State Electricity Regulatory Commission, Haryana will decide the dispute uninfluenced by the observations made in the impugned orders passed before today, by the Appellate Tribunal and/or any other Authority in this case. All arguments on both sides are kept open. Liberty is given to the parties to make a proper application supported by relevant documents before the State Electricity Regulatory Commission, Haryana, within four weeks

(iii) Prayer `c' at Page 1165 of the Paper Book Vol.IV, which is reproduced hereinbelow, is granted, subject to further orders given below:

"Issue an ad-interim order staying further proceedings pending before Respondent No.1 in the Termination Petition being Case No.HERC /PRO 6/2011 till the outcome of the present proceedings"

Granting of above-quoted prayer `c' would not mean that appellant would discontinue supply of electricity in the State of Haryana in terms of the order of the Appellate Tribunal."

19. The above Remand Order was passed on the basis of the pleadings and prayer made by the Appellant. The pleadings of the Appellant in the Hon'ble Supreme Court seeking for the

interim order pending Appeal before the Hon'ble Supreme Court are as quoted below:-

*“(f) **The Appellant terminated the PPA vide letter dated 11.1.2011.** This termination has been challenged by Respondent No. 3 by invoking the arbitration clause in the terminated PPA vide a notice of arbitration dated 25th March 2011. The Arbitral Tribunal has been constituted and the pleadings have been completed and subsequent hearings have been fixed. **The Arbitral Tribunal has not passed any order staying the termination of the PPA.** In the circumstances when the issue of termination of the PPA was not an issue in the appeal before the Appellate Tribunal, the Appellate Tribunal ought not to have been continued the operation of the interim order by way of the Impugned Order directing supply of power under the PPA which has since been terminated and separate proceedings are pending in connection with the termination of the PPA.*

2. As has been stated above, the Appellate Tribunal has continued the interim arrangement put in place by way of its Interim Order dated 23.03.2011 till the Respondent No.1 hears and disposes of the objections of Respondent No. 5 (appellant in Appeal No. 52 of 2011). The Appellate Tribunal has directed Respondent No.1 to accord Respondent No. 5 a hearing to the extent its rights stand affected by the order dated 02.02.2011, which has been upheld by way of the Impugned Order. It is reiterated that by way of the Interim Order dated 23.03.2011, the Appellate Tribunal had directed the Appellant to supply 65% of the power from Unit-II of its Project to Respondent No. 3 and the balance power was to be supplied to Respondent NO. 5. Though the PPA with Respondent No. 3 stood terminated on 11.1.2011, the Appellant in deference to the direction passed by the Appellate Tribunal vis-a-vis the Interim Order and purely on the understanding that the Interim order will continue till the final order and complied with the said Interim Order during the pendency of the proceedings before the Appellate

*Tribunal and in terms of the Impugned Order dated 04.11.2011 is continuing to comply with the said order. **The Appellant has been supplying power in terms of the Interim Order dated 23.3.2011 to Respondent No. 5 and Respondent No. 3 in spite of the hardships being faced by it with regard to the adequate availability of coal for running the power plant due to change in governmental policies pertaining to coal allocation for entities like the Appellant.** The Appellant craves leave to refer to and rely upon the government policy and direction issued by the Government in this regard.*

*As there is severe shortage in the coal supply from the sources allocated to the Appellant, the Appellant is running the plant and supplying power to Respondent No. 5 and Respondent No. 3 by **procuring coal from alternate sources, the cost of which is three to four times higher than the cost of coal from the sources allocated to the Appellant as indicated in the table below:-***

<i>Fuel Type</i>	<i>Landed Price Rs. / Metric Ton</i>
<i>Linkage Coal</i>	946
<i>e-action Coal</i>	3161
<i>Imported Coal</i>	6058
<i>Open Market</i>	3455

3. In the absence of any rate for supply of power fixed in the Interim Order dated 23.3.2011 by the Appellate Tribunal and continued by way of the Impugned Order, the power being supplied by the Appellant to respondent No. 5 and Respondent No. 3 is being charged at a price arrived based on the Central Electricity Regulatory Commission (CERC) Regulations / Norms, which is a fair mechanism widely used in India for purchase of power by distribution licensees/state utilities from generating

*stations of State and Central sectors. **The Appellant states that on the one hand, for the 35% power supplied the Respondent No. 5, is paying the Appellant in terms of the CERC norms and on the other hand Respondent No. 3 is only paying Rs. 2.32 per kwh, which is the rate contained in the terminated PPA.** This issue was raised before the Appellate Tribunal orally during the course of the hearing of the arguments, however, the Appellate Tribunal paid no heed to the submissions of the Appellant and went onto even continue the interim arrangement even after rendering the final order. The conduct of Respondent No. 3 in not paying the Appellant in terms of the invoices being raised; is neither supported by the Impugned Order and/or the Interim Order dated 23.03.2011 and is in fact severally prejudicing the interests of the Appellant. As has been stated above and in the accompanying appeal, the Government of Chhattisgarh requires the Appellant to supply power in consideration of the various facilities and benefits granted to the Appellant to set up the plant in Chhattisgarh and **the Appellant apprehends that if it is not in a position to supply power due to non-payment by Respondent No. 3, the Appellant may have to suspend generation** which may lead to withdrawal of benefits by the Government of Chhattisgarh thereby putting the whole project in jeopardy.*

4.The payments being made by Respondent No. 3 are not even allowing the Appellant to recover its fuel cost leave alone the entire cost of generation of power. The following table indicates the grave prejudice being caused to the Appellant:

.....

5. As is evident from the table above, since the tariff paid by the Respondent No. 3 is not compensating the cost of fuel, the Appellant is subjected to grave hardship in continuing the generation and supply in terms of the Impugned Order. **Thus, in**

case the Respondent No. 3 does not pay the tariff claimed based on CERC Norms, an irreparable loss will be caused to the Appellant and the Appellant's power project may become a Non Performing Asset.

*6. Thus, in view of the above it is imperative that this Hon'ble Court stays the operation of the Impugned Order failing which the Appellant will continue to face severe financial prejudice, which may ultimately lead to a situation wherein the Appellant may not be in a position to continue supplying power and **may even have to shut down its plant.***

Alternatively and strictly without prejudice to the above, it is submitted that to enable the Appellant to run the power plant and supply power in compliance with the interim order as continued by the Appellate Tribunal in the Impugned Order, the Respondent No. 3 may be directed to pay the tariff arrived based on CERC Norms.

.....

The Interim Order of the Appellate Tribunal as continued by the Impugned Order is in itself is a restraint on the right of the Appellant to sell power to any party in as much as the PPA stands terminated. Whilst termination of the PPA is subject matter of the ongoing arbitration between Respondent No. 3 and the Appellant, the termination itself has not been stayed by the Arbitral Tribunal or any judicial forum or authority.....”

20. The gist of the contents of the pleadings, contained in the Interim Application filed by the Appellant as referred to above are as follows:-
- i) On account of the increase in burden due to coal costs and in view of the reduced quantities of coal being

supplied from the sources allocated to the Appellant, the capped tariff in the terminated PPA was unviable.

- ii) The tariff of Rs.2.32 KWh was not sufficient to meet the costs of fuel/generation. The Project has become commercially unviable and it is on the verge of being declared a Non Performing Asset by its lenders thereby leading to its possible shutdown.
 - iii) The tariff should be determined as per CERC Regulations which is a fair mechanism.
 - iv) The PPA was terminated and there was no stay of termination by any Authority.
 - v) It is prayed that the proceedings initiated by Haryana Power, R-2 before the State Commission challenging the termination should be stayed.
21. According to the Appellant, the interim order dated 16.12.2011 was passed by the Hon'ble Supreme Court only after taking into consideration of the peculiar facts and circumstances of the present case including the fact that Lanco, the Appellant had already terminated its PPA with PTC(R3) through its letter dated 11.1.2011 and also after taking note of the fact that the interim order was passed by the Tribunal on 23.3.2011 directing the Appellant to supply

65% of the power to the PTC(R3) and 35% to Chhattisgarh Power Trading Company which was to be continued.

22. As pointed out by the learned Counsel for the Appellant, the specific circumstances pointed out by the Lanco, the Appellant before the Hon'ble Supreme Court are as follows: **“Lanco, the Appellant was facing severe hardship with regard to adequate availability of domestic coal from coal companies for running the power Plant at the contracted levels of performance due to a change in the Governmental policy regarding allocation of coal to power Projects. As a consequence of this reduced quantity of coal, the Appellant was constrained to procure coal from alternate sources such as e-auction, open market or imported coal, etc which is costly with higher cost which is three to five times than the cost of coal from the sources allocated to the Appellant. However, PTC(R-3) was only paying capped levelised tariff of Rs.2.32 kWh. In the above situation, the Appellant had to face grave hardship in running its plant on such tariff.”**
23. When the Appellant explained the above circumstances to the Hon'ble Supreme Court while seeking for interim directions, the Hon'ble Supreme Court felt it appropriate to

issue interim directions. Accordingly, it directed through the Remand order to the State Commission to fix tariff as an interim arrangement during the pendency of the Appeal before the Hon'ble Supreme Court.

24. It is argued by the Appellant that, inspite of this the State Commission fixed the levelised capped tariff of Rs. 2.32 per unit as mentioned in the PPA which is not in consonance with the order of the Hon'ble Supreme Court.
25. It is further contended by the Appellant that the levelised capped tariff as mentioned in the PPA cannot be considered as an interim arrangement as directed by the Hon'ble Supreme Court. The reasons pointed out by the Appellant as follows:-
 - i) The PPA under which the capped tariff was agreed between the parties already stood terminated by Lanco.
 - ii) Without there being any stay of the effect and operation of termination of PPA, the terms and conditions of the PPA cannot be enforced that too in the light of the direction to continue supply in terms of the interim Order of this Tribunal dated 23.3.2011 by the Supreme Court through interim Order dated 16.12.2011.
 - iii) The power supplied after the termination of the PPA was in the nature of ad-hoc supply under judicial orders

for which tariff is required to be determined by the State Commission.

26. These reasonings highlighted by the Appellant are, in our view, sound. In fact, the State Commission itself in the impugned order has observed that Hon'ble Supreme Court's order mandated the State Commission to make a de novo/fresh tariff determination. Despite this, the State Commission has simply held that the capped tariff under the PPA of Rs.2.32 kWh has to be applied. This finding, in our opinion, would be contrary to the object and intent of the order of the Hon'ble Supreme Court.
27. Applying the levelised capped tariff at Rs.2.32 per unit as per the PPA by the State Commission, despite the order of stay of the proceedings to challenge the termination of the PPA would amount to circumventing the Hon'ble Supreme Court's order.
28. In fact, the Hon'ble Supreme Court remanded the matter to State Commission only for a limited purpose to fix and determine the tariff as an ad-hoc arrangement to balance the equities pending consideration of the Appeal taking note of the various circumstances pointed out by the Appellant.

29. According to the Haryana Power, R-2, no direction was given by the Hon'ble Supreme Court for determination of tariff dehors the PPA.
30. We are unable to accept this contention in view of the fact that the tariff determination process was undertaken by the State Commission only on the basis of direction given by the Hon'ble Supreme Court after taking into consideration the various difficulties being faced by the Appellant. In other words, interim order of the Hon'ble Supreme has to be interpreted, having regard to the context in which it was passed.
31. Even the Haryana Power, R-2 admits that the interim order passed by the Hon'ble Supreme Court dated 16.12.2011 has to be interpreted in the context of the pleadings contained in the Interim Application filed by the Appellant.
32. Strangely, the Haryana Power(R-2) has now contended that there was no reason for the State Commission to ignore the terms of PPA while determining the tariff for the Project. This contention is not tenable. If the terms of the PPA had to prevail, then there was no purpose for the Hon'ble Supreme Court to direct the State Commission to undertake the tariff determination exercise as PTC/Haryana Power Utilities were already paying capped tariff as contemplated in the PPA.

33. To put it in a nut-shell, the Remand order dated 16.12.2011 passed by the Hon'ble Supreme Court has to be interpreted in the context of the pleadings made by the Appellant in its Interlocutory Applications made before the Hon'ble Supreme Court.
34. According to the Haryana Power(R-2) the PPA is enforceable as the Appellant had terminated the PPA not on the ground of events of defaults of PTC and Haryana Power, but it terminated on the ground of unviability of the Project, which cannot be the ground for termination. This submission is factually incorrect.
35. As correctly pointed out by the Appellant, the PPA was terminated on account of event of default of PTC,R-3 which is contemplated under the PPA. The grounds for termination of the PPA as mentioned in the termination letter are as follows:-
- i) the non-fulfilment of conditions precedents of obtaining of Long Term Open Access as per Article 3.13(x) of the PPA and;
 - ii) material breach of PTC's obligations under Article 4.2(iv) and (v) of the PPA.
36. Admittedly, the proceedings initiated by the Haryana Power(R2) before the State Commission against the

termination alone have been stayed but the effect of termination has not been stayed by the Hon'ble Supreme Court.

37. As pointed by the Appellant, the tariff determination as directed by the Hon'ble Supreme Court, in our view, ought to have been undertaken de hors the terms of the PPA and without enforcing levelised capped tariff under the PPA. The reasonings are as follows:-

- (i) The Hon'ble Supreme Court Order dated 16.12.2011 is to be interpreted in the context of the pleadings and the prayers contained in the interim application filed by Lanco, the Appellant along with its Civil Appeal, in which the said Order of the Hon'ble Supreme Court was passed;
- (ii) In the interim application filed by Lanco, the Appellant specifically set out the hardship being faced in running the project, the unviability of the tariff, and the possibility of an imminent shut down which has since occurred;
- (iii) In the interim application filed by Lanco, the Appellant specifically referred to the termination of the PPA on 11.1.2011, independent of the proceedings by Haryana Power(R2) challenging the said termination. The

proceedings were stayed but the effect of termination was not stayed;

- (iv) The interim application filed by Lanco, the Appellant expressly contended that the interim Order of this Tribunal dated 23.3.2011, while directing supply, had not fixed any tariff for such supply;
- (v) The Hon'ble Supreme Court did not expressly stay the impugned judgment of the Tribunal dated 4.11.2011 and it allowed to continue the interim Order of the Tribunal dated 23.3.2011, by which it had partially stayed the impugned Order of State Commission dated 2.2.2011 and permitted supply of 35% power to Chhattisgarh Power Company, while directing the balance power (65%) to be supplied to Haryana Power(R2), after taking note of the termination of the PPA dated 11.1.2011, and without stipulating any tariff for such supply;
- (vi) The Hon'ble Supreme Court did not leave it open to State Commission to consider whether or not to fix/approve the tariff for the period in question but directed that State Commission "will" fix/approve the tariff. This is in spite of the fact that the State

Commission had already approved the capped tariff at the time of approval of the PSA;

- (vii) The direction to State Commission to fix the tariff was in the specific context of the dispute between the Appellant and PTC in this regard which is evident from the express wording of the Order requiring State Commission to fix the tariff *“for sale and purchase of power for the period in question about which there is a dispute between the appellant and PTC”*;
- (viii) Admittedly, the dispute between PTC(R3) and the Appellant was to the effect that PTC was paying at the capped tariff rate as per the PPA, and the Appellant was raising invoices in terms of applicable CERC Tariff Regulations, 2009. As such, there was no occasion for the Remand order to direct for a fresh tariff determination, if the levellised capped tariff under the PPA was to be enforced;
- (ix) There was no necessity for the tariff determination by the State Commission, but for the direction issued by the Hon’ble Supreme Court;
- (x) A tariff determination capped at the rate agreed under the PPA is misconceived in the facts and circumstances

of the case, in as much as PTC/Haryana Power Utilities were already paying at the capped rate. While interpreting the order of the Supreme Court, it is necessary to give the real meaning and purpose of direction of the Hon'ble Supreme Court and not render it meaningless;

- (xi) It is improper to suggest that the Supreme Court passed an interim order which was an exercise in futility, without proper application of mind, merely because the Appellant sought such an order, without fully appreciating its ramifications;
- (xii) It is evident that the Hon'ble Supreme Court was fully conscious of the effect, scope and purpose of its order inasmuch as it specifically directed the State Commission that the determination by the State Commission would be carried out *“uninfluenced by the observations made in the impugned Orders passed before today, by the Appellate Tribunal and/or any other Authority in this case”*. Such a direction was issued precisely to overcome the kind of argument now being canvassed by Haryana Power(R2) to the effect that State Commission has already held the PPA to be binding and enforceable vide its order and judgment

dated 2.2.2011 and which judgment has been upheld by this Tribunal, and that therefore, there is no question of overlooking in any manner the levellised capped tariff under the PPA;

- (xiii) To put the matter beyond the pale of doubt, the Supreme Court expressly stayed the proceedings of the challenge to the termination of the PPA by Haryana Power before the State Commission. If the Hon'ble Supreme Court had intended that the PPA is to be strictly enforced and followed by State Commission while determining the tariff as directed, there was no occasion to stay the proceedings initiated by Haryana Power challenging the termination;
- (xiv) The direction to the State Commission to fix the tariff was clearly intended as a limited tariff determination exercise without prejudice to the rights and contentions of the parties in the Appeal, pending further orders in the Appeal, and not intended to be a de novo adjudication on all disputes between Haryana Power and Lanco. This is again made clear by the fact that the said direction was issued expressly in the context of the dispute between PTC and Lanco over the tariff for the supply;

(xv) The interim Remand Order of the Supreme Court dated 16.12.2011 struck a middle path and balanced the equities keeping in view that:

- (a) the question of jurisdiction, which goes to the root of the power of State Commission to pass any such orders, was under consideration in the final disposal of the Appeal before the Supreme Court;
- (b) the PPA for different reasons altogether was terminated by Lanco on 11.1.2011, against which there were two independent proceedings, by PTC and Haryana Power, challenging such termination one before the State Commission and another before the Arbitration Authority. There is no stay of the said termination. This would ordinarily mean in law that Lanco was not obligated to supply power in terms of the PPA, unless the termination was stayed or set aside;
- (c) Lanco, in fact specifically contended in its interim application before the Hon'ble Supreme Court that the PPA capped tariff

was unviable and there was danger of an imminent shutdown;

(d) On the other hand, State Commission and this Tribunal had decided against Lanco but allowed the interim order of this Tribunal dated 23.3.2011 to continue throughout whereby part supply was being made to Haryana Power/PTC and part supply to Chhattisgarh;

(xvi) Thus, the Supreme Court by way of ad hoc interim arrangement, pending further orders in the Appeal, directed the State Commission to fix the tariff for supply of power by Lanco to Haryana Power to enable the State Commission to do so de hors the terms of the PPA including the capped tariff by directing it to carry out its determination uninfluenced by any of the previous orders. It further directed Lanco to continue to supply in terms of the interim order of the Tribunal dated 23.3.2011, and stayed further proceedings in the petition filed by Haryana Power before State Commission challenging the termination of the PPA by Lanco;

- (xvii) In short, Lanco was directed to continue the supply, not in terms of the PPA tariff but as per the tariff to be determined by State Commission, which consequently could not have been subject to the levellised capped tariff as provided in the PPA;
- (xviii) It is not the contention of the Appellant, as wrongly characterised by Haryana Power, that the Hon'ble Supreme Court held the termination of the PPA to be valid. But, it is the contention of the Appellant that the Hon'ble Supreme Court, keeping in view the termination, as also other facts and circumstances of the case regarding viability as pointed out by the Appellant, directed supply to continue but at a viable tariff as an interim arrangement to be determined by State Commission, and not as per the PPA;
- (xix) On the other hand, the interpretation of Haryana Power ignores the contents of the application in which the Remand Order was passed and further ignores the express terms of the Remand but wrongly proceeds on the basis that the PPA is fully binding and enforceable notwithstanding the termination of the PPA which has not been stayed.

38. In view of the above reasonings, we are constrained to conclude that the tariff determination as per the PPA which has already been terminated is not in consonance of the Hon'ble Supreme Court Remand order dated 16.12.2011. As such, we hold that the tariff determination is wrong and consequently the same is liable to be set-aside.
39. The second question is this –**“Whether the State Commission ought to have applied Central Commission Tariff Regulations,2009 alone for tariff determination in the peculiar facts and circumstances of the present case?”**
40. The Appellant filed a Petition before the State Commission for the tariff determination as per the CERC Regulations,2009. Haryana Power,R-2 also pleaded before the State Commission that CERC Tariff Regulations,2004 would apply subject to capped tariff. On the other hand, PTC(R-3) contended that the tariff should be determined as per the provisions of the Electricity Act,2003 and the Regulations framed thereafter.
41. However, the State Commission instead of applying CERC tariff Regulations,2009 as claimed by the Appellant has applied State Commission Regulations, 2008 for certain components and for some other components applied CERC

Tariff Regulations,2004.

42. According to the Appellant, the State Commission adopted a pick and choose policy while determining the Tariff which is not a correct approach. It was the case of the Haryana Power, R-2, the contesting party that CERC tariff Regulations were to be applied for determining tariff for supply of power. The terminated PPA also provided for applicability of CERC tariff Regulations.
43. However, the State Commission chose to selectively apply the State tariff Regulations for some components and Central Commission's Regulations for other components. The reason given by the State Commission in not uniformly applying the CERC tariff Regulations is that the Hon'ble Supreme Court had remanded the matter only to State Commission and not to Central Commission and that therefore the State Commission would not apply CERC tariff Regulations. The relevant portion of the impugned order on this point is reproduced below:-

12. On the issue of applicability of CERC norms the Commission finds that the Petitioner has vehemently argued for adoption of norms in accordance with CERC 2009 Regulations while the respondents are pressing for adoption of norms as per CERC 2004 Regulations. The Commission observes that the tariff in dispute was agreed upon by the

parties prior to the provisions of National Tariff Policy notified by the Ministry of Power, Government of India in pursuance of the provisions of Electricity Act, 2003, came into force. Further, the said PPA (and by default the PSA) which specified all the normative details as well as the agreed upon tariff was unilaterally terminated by LAPPL.

*The order of the Commission dated 02/02/2011 was challenged by LAPPL in the Hon'ble APTEL and subsequently the order of Hon'ble APTEL dated 04/11/2011 in the aforesaid matter was challenged in the Hon'ble Supreme Court, where the matter is still pending final disposal. **In view of this the Commission is of the considered view that if CERC Regulations (which also finds a mention in the PPA/PSA) were to be sacrosanct, the matter could have been referred to the CERC. However, it was not to be and the Hon'ble Supreme Court gave the liberty to LAPPL to file a petition for determination of tariff for the disputed period in HERC and at the same time continued with the allocation of power i.e. 65% to Haryana and 35% to CSPTC. Thus given the peculiarity of the case the Commission is of the opinion that for the disputed period beginning 7th May, 2001 (the date from which supply of power commenced) till the case is finally settled by the Hon'ble Supreme Court, the Commission shall apply its own benchmark norms wherever applicable and for other parameters i.e. capital cost, cost of coal etc. the same shall be reckoned with after applying prudence check in reference to the original scheme of the project that had formed the basis of arriving at the tariff agreed upon by the parties for a period of 25 years.***

.....”

44. The present case is unique case where the jurisdiction of the State Commission is yet to be decided by the Hon'ble Supreme Court in the Appeal pending before it. In that view of the matter, the Hon'ble Supreme Court while remanding the matter for limited purpose directed the State Commission to determine the tariff for supply of power to be made to the PTC(R-3) as an adhoc arrangement without prejudice to the rights and contentions of the parties pending further orders. When the tariff determined by the State Commission in compliance of the interim order of the Hon'ble Supreme Court is an ad-hoc tariff for supply to only PTC for further supply to Haryana Power for meeting the supply to the consumers of the distribution licensee of Haryana and the State Commission decides to determine the tariff for such supply as per its own tariff Regulations, we cannot hold that there is any illegality in the approach of the State Commission. The State Commission has to determine the interim tariff for supply to the distribution licensee in the State according to its own tariff Regulations. But, for any financial and operational parameters, if the State Commission's Regulations do not have any specific provision, then the State Commission has to be guided by the relevant Tariff Regulations of the Central Commission.

However, at this juncture we want to make it clear that the interim tariff determined by the Haryana Commission would not be applicable for supply of power by the Appellant to Chhattisgarh Power Trading Company in Chhattisgarh State.

45. The contention of the Appellant is that the State Commission has failed to uniformly apply any one of the three Regulations in question viz State Commission's Tariff Regulations of 2008, Central Commission's Regulations of 2004 and Central Commission's Regulations,2009 and adopted a pick and choose policy. It is the case of Haryana Power(R2) that there are no significant differences among the three Regulations in question. It is also contended by the Haryana Power(R2) that the State Commission is empowered to frame its own Regulations and it is not open to the Appellant to challenge the State Commission Regulations,2008.
46. As pointed by the Appellant, the Lanco, the Appellant has not challenged the validity of the Regulations but it has challenged only the pick and choose policy of State Commission in applying the CERC Tariff Regulations,2004 for some components and State Commission Tariff Regulations,2008 for other components while determining the tariff.

47. Of course, the State Commission has the power to relax the applicability of its own Regulations under the State Commission's Tariff Regulations, 2008. But the said power could be exercised by the State Commission only after recording the reasons in writing for deviating from the applications of its own Regulations.
48. We reiterate that there cannot be any infirmity if the State Commission applied its own Tariff Regulations for determination of the interim tariff for supply of power by the Appellant to PTC for further sale to Haryana Power. However, where there are no specific financial and operational norms in the State Commission's Regulations, the Central Commission's Tariff Regulations have to be considered. Section 61 of the Electricity Act, 2003 provides that in determining the terms and conditions of tariff the State Commission should be guided by the Central Commission's Regulations. The relevant tariff Regulations of the Central Commission would be 2009 Regulations which are applicable as the power supply has commenced only in the FY 2011-12. As correctly pointed out by the Appellant, the State Commission cannot pick and choose from the Tariff Regulations of the State Commission and the Central

Commission. The second question is answered accordingly.

49. Let us now examine the third question regarding infirmity in determination of tariff.
50. According to the Appellant, the tariff determination carried out by the State Commission is completely erroneous and contrary to the facts in the applicable law.
51. It is pointed out by the Appellant that there is not only erroneous determination of tariff in respect of fixed charges but also in respect of variable charges.
52. The submissions of the Learned Counsel for the Appellant regarding determination of tariff are as under:-
 - i) The State Commission while determining the capital cost of the Project has applied its own unspecified benchmark norms not contained either in Central Commission's Regulations of 2004 and 2009 or even in Haryana Commission's tariff Regulations, 2008. The finding of the State Commission that the levellised tariff approved by the State Commission as based on an aggregate project cost as per the Detailed Project Report is misleading in as much as the order of approval dated 6.2.2008 makes no mention whatsoever

of the DPR and does not approve the DPR figures in any manner.

- ii) The State Commission arbitrarily chose to adopt the debt equity ratio as per the purported original scheme of 80:20. This is contrary to Central and State Commission's Regulations and as per these Regulations the debt equity ratio should have been 75.56 : 24.44.
- iii) The State Commission should have allowed the Return on Equity as per the Central Commission's Regulations of 2009 @15.5% instead of 14%.
- iv) The Appellant had claimed interest on loan based on actual interest payments made to the lenders as per the Central Commission's Regulations. However, the State Commission has allowed 12.10% without following either Haryana's own Regulations or Central Commission's Regulations of 2009.
- v) The Appellant had claimed O&M expenses of Rs.17.88 lakhs/MW and 18.91lakhs/MW for a 300 MW Unit for the years 2011-12 and 2012-13 respectively as per the Central Commission's Regulations. However, the State Commission has allowed O&M expenses of Rs.12.65 lakhs/MW as specified in the Central Commission's

Regulations of 2004 for the year 2008-09. The State Commission has also allowed a lower escalation of 4% as compared to 5.72% as provided in the Central Commission's Regulations of 2009.

- vi) Though the Appellant is not aggrieved by the Calculation of Station Heat Rate as well as auxiliary energy consumption, these are based on the Haryana Commission's Regulations of 2008 instead of Regulations of Central Commission of 2009.
- vii) The State Commission applied its arbitrary benchmarks considering the landed cost of coal assuming 71% coal supply from SECL and balance 29% from e-auction instead of considering the actual in respect of landed cost and GCV of coal as per Central or State Commission's Regulations.
- viii) Although the Appellant is not aggrieved by the finding in respect of income tax/MAT but it is challenging this finding on the principle that the State Commission should have applied the Central Commission's Regulations.
- ix) The State Commission has calculated depreciation amount considering only 90% of the capital cost thus causing grievance to the Appellant by lower

depreciation amount whereas the Central Commission's Regulations,2009 provide for calculation of depreciation amount considering 100% of capital cost of the asset. Further, depreciation is allowed upto maximum of 90% of the Capital Cost of the asset.

53. According to the Appellant, its financial position has become precarious over time due to non recovery of even cost of generation of Unit-2. The Appellant is finding it difficult to procure even the allocated linkage coal and on account of non-operation of the Unit, the Appellant is incurring heavy loss every month.
54. According to Haryana Power(R2), the State Commission has correctly adopted the project cost as per the DPR. He further argued as follows:-
- “Despite specific objection raised by Haryana utilities on non-filing of the requisite accounts, the Appellant chose not to give the specific accounts of the capital expenditure incurred. The State Commission is expected to apply prudence check to the expenditure actually incurred before accepting the capital cost. The State Commission has also correctly applied the debt equity ratio available in the financing plan in the circumstances of the case. Further, the State Commission has correctly taken into account the DPR

and the O&M expenses in accordance with Central Commission's Regulations of 2004 thus allowed O&M expenses higher than as admissible under the State Commission's Regulations of 2008. Regarding landed cost of coal, the State Commission has given a reasoned order.”

55. We have carefully considered the submission made by the both the parties. We have already decided that the State Commission's own Regulations have to be applied for determining the interim tariff. However, as indicated earlier where the State Commission's Regulations do not provide for any specific norm for any operational and financial parameter, the Central Commission's Regulations of 2009 would be considered for the same. In this context, we again make it clear that the adhoc tariff to be determined by Haryana commission will be applicable to procurement of power by Haryana Power utilities and not to procurement of power by Chhatisgarh or any other utility from the Appellant's power plant in any other State.
56. Let us now examine the Haryana Commission's Tariff Regulations of 2008.
57. The Regulation 7(2) of the Tariff Regulations, 2008 of the State Commission stipulates that the State Commission while determining the tariff applicable to generating

companies shall be guided by the principles and methodologies specified by the Central Commission and the terms and conditions of such tariff notified by the Central Commission.

58. The Tariff Regulations, 2008 of the State Commission specify the following norms:-

- i) Capital Cost: Regulation 12 specifies that the actual expenditure incurred on the date of completion of the Project shall form the basis for fixation of final tariff.
- ii) Target Availability/Plant Load Factor: Target Availability/PLF shall be as per Regulations 11(2).
- iii) Sale of infirm power. Any revenue earned by the generating company from sale of infirm power, shall be taken as reduction in capital cost and shall not be treated as revenue.
- iv) Debt equity ratio: As per Regulations 15, in case of generating stations where investment approval was accorded prior to 1.4.2008 and which are to be declared under Commercial Operation during the period from 01.4.2008 to 31.3.2011 or the projects where the investment approval is accorded on or after 01.4.2008, debt equity ratio of

70:30 shall be considered. However, if the deployment of equity is less than 30%, the actual debt and equity shall be considered for determination of tariff.

- v) Interest on loan: As per Regulation 16(i), the interest on loan capital shall be computed loan-wise on the loans arrived at in the manner indicated in Regulation 15.
- vi) Depreciation: As per Regulation 16(ii), the depreciation shall be calculated annually, based on straight line method over the useful life of the asset and the rates prescribed in Appendix-II to the Regulations. The residual life of the asset shall be considered as 10% and depreciation shall be allowed up to 90% of the historical cost of the asset.
- vii) Return on equity: Return on equity shall be computed on the equity base determined in accordance with regulation 15 @ 14% per annum.
- viii) Operation and maintenance expenses: In case of generating station which has not been in existence for three years, or has been commenced after the commencement of the Regulations of 2008, the

O&M expenses shall be considered at 1% of the capital cost as admitted by the State Commission with escalation factor of 4% per annum to arrive at the allowable O&M expenses for the relevant year.

- ix) Interest on Working Capital: The norms for working capital and interest thereon shall be as per Regulation 16(vi).
- x) Income Tax: The tax on income streams of the generating Company from its core business, shall be computed as expense at rates applicable from time to time and shall be recovered from the beneficiaries as per Regulation 16(vii).
- xi) Energy charges: Regulation 17 specifies the method for calculation of energy charges based on actual price and heat value of fuel.

59. Let us now examine the findings of the State Commission regarding various parameters of tariff.

60. The Appellant had claimed capital cost of Rs.1356.77 crores i.e. Rs.1668.37 crores netted off for revenue earned on account of UI as actually incurred and verified by the auditors. The State Commission, however, allowed net capital cost of Rs.1007.731 crores i.e. capital cost of Rs.1340.041 crores as per the Detailed Project Report less

Rs.332.31 crores earned on account of UI. The State Commission has made the following observation in this regard.

“The Commission observes that the levellised tariff approved by this Commission was based on an aggregate project cost as per the Detailed Project Report finalized in accordance with CERC norms which was Rs.1340.041 Crore as against Rs.1356.77 Crore now claimed by the Petitioner. Further, there is no audited account specifically available for Unit-2 of LAPPL from where 300 MW power was contracted to Haryana. Additionally, there is nothing on record available to the Commission to establish the fact that the project developer exercised sufficient prudence to efficiently execute the project within the cost and timeline as originally envisaged. On the contrary the Commissioning of the project was unnecessarily lingered on which also invited adverse comments from the CERC.”

61. The State Commission has deviated from its own Regulations for determination of the capital cost based on the actual expenditure as no audited account was made available for Unit-2 from which power was contracted to Haryana. Further, there was nothing on record to establish that the Appellant exercised sufficient prudence to efficiently

execute the Project within the cost and time line as originally envisaged.

62. Of course, we agree with the Haryana Power(R2) that the State Commission has to apply prudence check in determining the capital cost based on the audited accounts. We find from the impugned order that adequate materials were not available before the State Commission to verify the capital cost incurred on Unit No.2 of the Appellant and to examine that the time and cost overrun was not due to reasons attributable to the Appellant and in the absence of the requisite materials the State Commission approved the capital cost as per the Detailed Project Report.
63. Therefore, we direct the Appellant to submit the necessary details of capital cost for unit No.2 including apportionment of cost of common facilities and detailed reasons for time and cost overrun of the Project before the State Commission to enable the State Commission to apply prudence check and determine the capital cost according to its own Tariff Regulations. The State Commission in turn shall determine the capital cost as per its Regulations after the requisite details are furnished by the Appellant.
64. The State Commission has allowed debt equity ratio of 80:20 as envisaged in the original scheme. Further, the debt as

claimed by the Appellant was 1025.18 cores as against the project cost of Rs.1007.737 crores as approved by the State Commission. Thus, the debt was in excess of the capital cost. As held above, the State Commission has to re-determine the capital cost based on the details to be furnished by the Appellant. Accordingly, the debt equity ratio is also required to be re-fixed according to the Tariff Regulations of 2008.

65. We find that the State Commission has allowed 14% return on equity as per its Tariff Regulations, which is in order.
66. The State Commission has allowed interest rate on term loan and interest on working capital as per the DPR which is not in consonance with the Regulation. We feel that the interest on term loan and interest on working capital should be determined as per its own Regulations.
67. Operation and maintenance expenses have been determined as per Central Commission's Regulations of 2004. We feel that the O&M expenses should be determined as per the Tariff Regulations of the State Commission.
68. The Station Heat rate and auxiliary consumption has been determined as per the State Commission's own Regulations and are in order.

69. For coal cost, the State Commission has considered weighted average cost of SECL coal to the extent of 71% and 29% weightage to cost of coal from other sources. Similarly, GCV has also been taken as per the DPR. This is contrary to the Regulations. The State Commission has to determine the variable charges as per its own Regulations. However, the Appellant has to submit the material that they made bona-fide efforts to secure coal linkage from SECL as envisaged at the Project Planning stage as sought by the State Commission. The Appellant has also to submit the information regarding actual cost of coal and GCV of coal for determination of variable charges as per the Regulations.
70. Accordingly, the State Commission is directed to re-determine the tariff according to its own tariff Regulations.
71. Before parting with this case, it has to be pointed out that the PTC(R-3) who was party to PPA has filed written submissions before this Tribunal on two occasions on 10th April, 2013 and on 6th August, 2013 suggesting that the present Appeal may be allowed to safeguard the viability of the Project. Thus, it is clear that with regard to the submission of the Appellant that the running of the Project under the PPA tariff was unviable, the PTC(R3) who is party to the PPA entered into between the Appellant and the PTC,

itself does not dispute the Appellant's contention with regard to the un-viability of the Project. The PTC has, as indicated above, also prayed this Tribunal to allow the present Appeal to safeguard the viability of the Project. We also take note of this while arriving at a conclusion in this Appeal. The relevant suggestion as contained in the submission is given below:-

“The Respondent No.3 herein has no cavil if this Hon'ble Appellate Tribunal, in the light of justice ad to safeguard the viability of the Project, deems fit to allow the present Appeal.”

72. **Summary of our findings:**

- i) The tariff determined by the State Commission as per the levellised capped tariff of Rs.2.32/Kwh is not in consonance with the Remand order of the Hon'ble Supreme Court dated 16.11.2011. As such the tariff determination is wrong and is set aside.**
- ii) The inter tariff to be determined by the State Commission as per the order of the Hon'ble Supreme Court dated 16.11.2011 has to be in accordance with the State Commission's own tariff Regulations of 2008. However, where no specific**

operational or financial norms have been specified in the State Commission's Tariff Regulations, the provisions of Central Commission's Regulations of 2009 would be considered for such parameters.

iii) The State Commission has to re-determine the interim tariff as per the directions given in this judgment, pending disposal of the Appeal before the Hon'ble Supreme Court.

73. In view of our above findings, the impugned order is set-aside. The Appeal is allowed.

74. Accordingly, the State Commission is directed to re-determine the tariff within two months from the date of communication of this judgment in the light of the directions and finding given by this Tribunal in this judgment by way of interim arrangement de hors the PPA, pending disposal of the Appeal in Hon'ble Supreme Court. However, there is no order as to costs. The Registry is directed to send the copy of this judgment forthwith to the State Commission of Haryana.

(Rakesh Nath)
Technical Member
Dated: 03rd Jan, 2014

(Justice M. Karpaga Vinayagam)
Chairperson

√REPORTABLE/~~NON-REPORTABLE~~