

IN THE APPELLATE TRIBUNAL FOR ELECTRICITY
(Appellate Jurisdiction)

APPEAL No.75 OF 2023

Dated: 14.07.2025

Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member

In the matter of:

M/s. Sneha Kinetic Power Projects Private Limited

Through its Authorized Representative,

15th Floor, Hindustan Times Building,
18-20, Kasturba Gandhi Marg, New Delhi, 110001

Phone: 011-47099999

Email: delhi.office@skvlawoffices.com

... Appellant

Versus

1. Haryana Electricity Regulatory Commission

Through its Secretary,

Bays No. 33-36, Sector 4,
Panchkula, Haryana-134112

Phone: 0172-2582531

Email: secretary.herc@nic.in

2. Haryana Power Purchase Centre

Through its Chief Engineer,

2nd Floor, Shakti Bhawan,
Sector- 6, Panchkula, Haryana-134109

Phone: 0172-2586836

Email: cehppc@uhbvn.org.in; cehppc@gmail.com

... Respondents

Counsel for the Appellant(s) : Sanjay Sen, Sr. Adv.
Parinay Deep Shah
Shikha Ohri
Alisha Gaba

Counsel for the Respondent(s) : Raghujeet Singh Madan
Sonia Madan
Nitin Goyal
Aditya Singh
Aditi Lakhanpal
Ayushi Garg for Res. 2

J U D G M E N T

PER HON'BLE MR. VIRENDER BHAT, JUDICIAL MEMBER

1. The appellant, M/s Sneha Kinetic Power Projects Private Limited is aggrieved by the order dated 02.03.2022 passed by 1st respondent Haryana Electricity Regulatory Commission (hereinafter referred to as “the Commission”) whereby appellant’s petition seeking clarifications with regards to certain clauses of the draft Power Purchase Agreement (PPA) issued by the 2nd respondent Haryana Power Purchase Centre has been rejected. The appellant had raised objections to certain clauses of the draft PPA which did not find favour with the Commission.

2. A brief conspectus of the facts and circumstance giving rise to the instant appeal is noted hereinbelow.

3. The 2nd respondent Haryana Power Purchase Centre (hereinafter referred to as “HPPC”) had issued an invitation of Expression of Interest (Eoi) for long-term procurement of 500MW hydropower from generators for a period

of 35 years subject to levelized ceiling tariff to be indicated by the generator who applies for part capacity reflected in the said EoI.

4. The appellant emerged as one of the successful bidders against the said EoI floated by HPPC with regards to the capacity of 96MW from its Dikchu Hydro Electric Project, Dikchu village, Sikkim along with M/s GMR Bajoli (60MW) and M/s JSW Kutehr (240MW) through competitive bidding.

5. Accordingly, HPPC filed a petition bearing case No.54/2019 seeking approval of the Commission to source 400MW hydropower from the power projects selected through competitive bidding in pursuance to the EoI floated on 03.07.2018. It appears that vide order dated 05.08.2020 passed in the said petition, the Commission delinked the appellant's project on account of lack of sufficient hydrological data including pondage which was an essential criterion stipulated in the EoI dated 03.07.2018. The petition was disposed off by the Commission on 24.09.2020 thereby approving procurement of power only from two sources i.e. M/s JSW Kutehr and M/s GMR Bajoli.

6. Subsequently, vide order dated 29.04.2021, the Commission granted source approval of HPPC for procurement of power from the appellant's power project and further directed HPPC to consider the appellant as L1 bidder as per the original evaluation.

7. Thereafter, in May, 2021 HPPC issued the draft PPA. The appellant found certain terms and conditions of the draft PPA not in consonance with the EoI dated 03.07.2018 and therefore needing revision. The appellant sent a letter dated 26.06.2021 to HPPC highlighting the variations in the draft PPA and seeking corrections / clarifications. Since, it did not receive any favourable response from HPPC, it approached the Commission with the petition No.41/2021 which has been rejected vide impugned order dated 02.03.2022.

8. Thus, the appellant is before us in this appeal.

9. We have heard learned senior counsel appearing for the appellant and learned counsel appearing for the 2nd respondent. We have also perused the impugned order as well as the written submissions filed by the learned counsels.

10. It is the case of both the parties that no contractual relationship has arisen between the parties at the time when the appellant had filed the petition before the Commission as the parties had not reached any consensus with regards to the terms and conditions of the PPA to be executed between them, and thus, terms and conditions were still in the process of negotiation.

11. Having regard to the such admitted position, the issue which arises for our consideration is whether the Commission was right in entertaining the petition of the appellant and in rejecting the objections raised by the appellant to certain clauses of the draft PPA issued by HPPC.

12. The powers and functions of State Electricity Commissions are stated in Section 86 of the Electricity Act, 2003. This provision envisages different roles to be performed by the State Commissions viz. determination of tariff for generation, supply, transmission and wheeling of electricity [clause (a)]; regulation of electricity purchase and procurement process of distribution licensees [clause (b)]; facilitation of inter-State transmission and wheeling of electricity [clause (c)]; issuance of licenses to persons seeking to act as transmission licensees, distribution licensees and electricity traders [clause (d)]; promotion of cogeneration and generation of electricity from renewable sources of energy [clause (e)]; adjudication upon the disputes between licensees and generating companies [clause (f)] etc.

13. Clause (b) of Sub-section (1) of Section 86 is material for our discussion and is extracted hereinbelow:-

“Section 86. (Functions of State Commission): --- (1)

The State Commission shall discharge the following

functions, namely: -

...

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

...”

14. Perusal of the said Section 86(1)(b) of the Electricity Act, 2003 would reveal that the State Commission is entrusted with the power and jurisdiction to regulate not only the procurement process of power by the distribution licensees but also “price” or “tariff” at which such procurement is to take place. This provision empowers the State commission to regulate the electricity purchase and procurement process undertaken by the distribution licensee for distribution of supply of power within the state, such procurement being invariably through agreement for purchase of power. Thus, the Commission regulates the electricity purchase based on the agreement that may be reached between the generator and the distribution licensee irrespective of the mode of tariff determination i.e. whether under Section 62 or Section 63 of the

Electricity Act, 2003 or by way of generic tariff order issued by the Commission.

15. It is well settled that a valid contract requires that the parties have reached consensus *ad idem* regarding its terms i.e. parties to the agreement have the same understanding of the terms thereof. It is also not in dispute that electricity being a commodity capable of being sold and purchased, an agreement to sell or purchase electricity (generally known as Power Purchase Agreement) also needs to fulfil all the prerequisites of a valid contract envisaged under the Indian Contract Act, 1872, to be enforceable.

16. Section 2(h) of the Indian Contract Act, 1872 defines contract as “an agreement enforceable by law”. Prerequisites for an enforceable contract are explained in Section 10 of the Indian Contract Act, 1872, which is extracted hereinbelow: -

“10. What agreements are contracts.—All agreements are contracts if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.

Nothing herein contained shall affect any law in force in India and not hereby expressly repealed by which any contract is required to be made in writing or in the presence of witnesses, or any law relating to the registration of documents.”

17. It is seen that “free consent” is one of the basic and necessary pre-requisites of a valid contract. The term “free consent” is defined in the Contract Act as under”-

“14. “Free consent” defined.—Consent is said to be free when it is not caused by—

(1) coercion, as defined in section 15, or

(2) undue influence, as defined in section 16, or

(3) fraud, as defined in section 17, or

(4) misrepresentation, as defined in section 18, or

(5) mistake, subject to the provisions of sections 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such

coercion, undue influence, fraud, misrepresentation or mistake.”

18. The only distinction between the Power Purchase Agreements and other agreements is that the former does not become binding upon the parties even though being a valid contract, unless approved by the concerned State Electricity Commission under Section 86(1)(b) of the Electricity Act, 2003.

19. Hence, the regulatory oversight of the Commission would come into play only after the generator and the distribution licensee have reached an agreement with regards to the terms and conditions of the sale/purchase of power, which agreement has to be in accordance with the law i.e. the provisions of the Electricity Act, 2003 as well as the rules and regulations framed thereunder. It is only after the generator and the distribution licensee negotiate the terms and conditions of the sale of power by generator to the distribution licensee and finalise the PPA, proceedings under Section 86(1)(b) are initiated by the distribution licensee on such proposed PPA. The Commission, while exercising its regulatory power under Section 86(1)(b), primarily considers following two main aspects: -

(a) Whether the distribution licensee is genuinely in need of the quantum of power proposed to be purchased through the PPA?

(b) Whether the price at which the power proposed to be purchased by the distribution licensee is conducive to the interest of consumers in the State?

20. The first aspect can be considered and determined by the Commission prior to execution of a PPA between the generating company and distribution licensee. In the instant case, undisputedly the need of 2nd respondent HPPC for the quantum of power to be purchased from the appellant was found justified by the Commission vide order dated 29.04.2021 passed in case No.54/2019 thereby granting source approval to HPPC for procurement of power from the appellant's power project. Therefore, the next step was for the appellant and HPPC to sit down and formulate the terms and conditions of sale of power and to finalize the PPA to be submitted to the Commission for its approval. It is the draft of such PPA mutually agreed between the generator and the distribution licensee which is submitted to the Commission for its approval under Section 86(1)(b) of the Electricity Act, 2003.

21. In the case at hand, as we see, the parties were still negotiating the terms and conditions of sale of power when the appellant approached the Commission with its petition. The parties were yet to reach any consensus *ad idem* upon the terms and conditions of the draft PPA to be submitted to the

Commission for approval. Therefore, clearly there existed no contractual relationship between the parties. HPPC had only issued a draft PPA to be considered by the appellant. The appellant had raised certain objections to some of the clauses of the draft PPA, which were not acceptable to HPPC. In these circumstances, it cannot be said that the parties had come to an agreement about the terms and conditions of the sale of power from the appellant's power project to the HPPC. At this juncture the Commission had no power or jurisdiction to step in and adjudicate upon the objections raised by the appellant to certain clauses of the draft PPA.

22. Finalizing the terms of a PPA is the commercial decision of the parties i.e. generator and the distribution licensee. It is for them to finalize the PPA with free consent and without any force or influence. The Commission obtains jurisdiction only when the PPA agreed to by both the parties is submitted to it for its approval under Section 86(1)(b) of the Electricity Act, 2003.

23. Hence, the petition filed by the appellant before the Commission was premature and totally misconceived and ought not to have been entertained by the Commission. The Commission has erred in entertaining the petition and adjudicating upon the objections raised by the appellant to the draft PPA issued by HPPC. Accordingly, the impugned order passed by the Commission

is *non est ab initio*, and therefore, not binding upon the parties. Same is hereby set aside.

24. The appeal stands allowed.

Pronounced in the open court on this the 14th day of July, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member (Electricity)

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REPORTABLE / NON-REPORTABLE

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