

**THE APPELLATE TRIBUNAL FOR ELECTRICITY  
AT NEW DELHI**

**(APPELLATE JURISDICTION)**

**APPEAL NO. 114 OF 2019 & IA NOs.183 & 184 OF 2019**

**Dated: 30<sup>th</sup> June, 2021**

**Present: Hon'ble Mrs. Justice Manjula Chellur, Chairperson  
Hon'ble Mr. Ravindra Kumar Verma, Technical Member**

**In the matter of:-**

**Lanco Amarkantak Power Limited**

Lanco House

Plot No. 397, Phase-III

Udyog Vihar, Gurgaon-122016

Haryana

Through its Authorized Signatory

**...Appellant**

**Versus**

**1. Haryana Electricity Regulatory Commission**

Bays No. 33-36, Sector-4

Panchkula-134109

Through its Secretary

**2. PTC India Limited**

2<sup>nd</sup> Floor, NBCC Tower

15, Bhikaji Cama Place

New Delhi- 110066

Through its Chairman and Managing Director

**3. Haryana Power Purchase Center**

(On behalf of M/s Haryana Power  
Generation Corporation Ltd.)

2<sup>nd</sup> Floor, Shakti Bhawan

Sector-6, Panchkula

Through its Chief Engineer

**... Respondents**

**Counsel for the Appellant(s) : Mr. Deepak Khurana**

Mr. Tejasv Anand  
Mr. Vineet Tayal  
Mr. Abhishek Bansal

**Counsel for the Respondent(s) :** Mr. Amit Kapur  
Mr. Vishrov Mukerjee  
Mr. Janmali Gopal Rao Manikala  
Mr. Rohit Venkat V.  
Ms. RaveenaDhamija  
Mr.Yashaswi Kant  
Ms. Ameya Vikram Mishra  
Mr. Girik Bhalla  
Mr. Pratyush Singh **for R-2**

Mr. M. G. Ramachandran Sr. Adv.  
Ms.RanjithaRamachandran  
Mr. Shubham Arya  
Mr. AnushreeBardhan  
Ms. PoorvaSaigal  
Mr. Arvind Kumar Dubey  
Mr. Pulkit Agarwal **for R-3**

## **JUDGMENT**

**(PER HON'BLE MRS. JUSTICE MANJULA CHELLUR, CHAIRPERSON)**

1. This appeal is filed challenging the legality and validity of the order dated 15.11.2018 (“**Impugned Order**”) passed by the Haryana Electricity Regulatory Commission (“**HERC/State Commission**”) in Case / Petition No. HERC/PRO-54 of 2017 whereby the Respondent-State Commission has refused to decide the Petition filed by the Appellant seeking approval of applicability of the Notification dated 07.12.2015 issued by MoEFCC, for want of jurisdiction.

2. The facts that are necessary for disposing of this appeal, in brief, are narrated here-in-below:

3. The Appellant is a generating company and is operating a 600 MW coal based Thermal Power Project in District Korba, Chhattisgarh, comprising two units of 300 MW each (Unit-1 and Unit-2). This appeal pertains to Unit-2 of the Appellant.

4. Respondent No. 1 is the Haryana Electricity Regulatory Commission. Respondent No. 2-PTC India Limited ("**PTC**") is an inter-state trader of electricity under the Act. Respondent No. 3-Haryana Power Purchase Center ("**HPPC**") is the entity responsible for procurement of power in the State of Haryana.

5. The Appellant and Respondent No. 2-PTC have entered into a Power Purchase Agreement ("**PPA**") dated 19.10.2005 for the sale of 273 MW (net power output) from the Appellant's 300 MW Thermal Power Plant Unit – II situated at Pathadi, Korba, State of Chhattisgarh to Respondent No. 2 at a tariff to be determined in accordance with the applicable CERC Tariff Regulations, subject to capped levelised tariff rate of Rs.2.32 per unit, for onward sale to one or more purchasers.

6. Respondent No.2-PTC entered into a Power Sale Agreement ("**PSA**")- dated 21.9.2006 with Respondent No.3-HPPC for sale of power

purchased from the Appellant. Subsequently, in terms of Clause 3.1.1 (ii) of the PPA, the Appellant entered into an Implementation Agreement dated 01.08.2009 with the Government of Chhattisgarh (“**GoCG**”). In terms of the said PPA, the Appellant was to provide 35% of the net power generated by the Project as home state share to CSPTCL/Chhattisgarh.

7. In the proceedings before the Respondent-HERC for approval of the PSA, the HERC vide its order dated 31.10.2007, refused to approve the PSA, *inter alia*, on the grounds that (a) the 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. However, the Appellant was not a party to the said proceedings before Respondent No.1 nor was the Appellant called upon to participate in the said proceedings. On a Review Petition filed by Respondent No.3 before the HERC, the HERC vide its order dated 06.02.2008 reviewed its earlier order dated 31.10.2007 and approved the PSA subject to reiterating its rejection to the tariff pool mechanism as violative of Section 62 (6) of the Electricity Act, 2003.

8. The primary fuel i.e. coal 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, namely, New Coal

Distribution Policy (“**NCDP**”), the coal linkage was substantially reduced from the actual requirement, and the balance coal requirement could only be met by procuring from alternate sources such as e-auction, open market or imported coal, which ultimately increased the generation cost three to five times of the actual cost. In view of the changed circumstances, the Appellant informed Respondent No.2 that the PPA was impossible to perform. On 13.05.2010, Respondent No. 2 filed proceedings before the Respondent-HERC stating that the PPA was impossible to perform in view of the changed circumstances including force majeure events, NCDP and Implementation Agreement with Chhattisgarh Govt., and requested the HERC to revise the tariff under the PSA. Respondent No. 3-HPPC, while opposing the prayer of Respondent No.2 for revision of tariff under the PSA, simultaneously, filed a Petition seeking a direction qua the Appellant and Respondent No. 2 to comply with their purported contractual obligations in favour of Respondent No. 3 and restraining the Appellant from selling the contracted capacity under the PSA to any third party including and not limited to the State of Chhattisgarh. During the pendency of the proceedings before the HERC, the Appellant on account of non-fulfilment of the condition precedent contained in the PPA, terminated the PPA vide its letter dated 11.01.2011. The HERC vide its order dated 02.02.2011 dismissed the petition filed by Respondent No. 2-PTC and allowed the petition filed by Respondent No. 3-HPPC and proceeded to exercise jurisdiction in respect

of such PPA to restrain the Appellant from revising its price with Respondent No. 2-PTC for sale of power and further restrained the Appellant from selling the contracted power to a third party. Aggrieved by the directions contained in the aforesaid Order dated 02.02.2011 passed by the Respondent-HERC, the Appellant filed an appeal before this Tribunal on 07.02.2011 being Appeal No. 15 of 2011. By way of the said appeal, the Appellant, *inter alia*, contested the jurisdiction of the HERC.

**9.** On 13.03.2011, Respondent No. 3 filed a petition before the State Commission being Case No. HERC/PRO 6/2011 under Section 86(1) (b) and Section 86(1) (f) of the Electricity Act, 2003 challenging the termination of the PPA by the Appellant vide its letter dated 11.01.2011. The said proceedings were subsequently stayed by the Hon'ble Supreme Court vide its order dated 16.12.2011.

**10.** The Appellant filed an Application being IA No. 27 of 2011 in Appeal No. 15 of 2011 seeking stay of the Order dated 02.02.2011 passed by HERC, which was partially stayed by this Tribunal on 23.03.2011. However, this Tribunal did not fix any price/tariff for the supply of power despite noting that the PPA between the Appellant and Respondent No. 2/PTC stood terminated.

**11.** CSPTCL/Chhattisgarh also independently filed an Appeal before this Tribunal challenging the Order dated 02.02.2011 passed by the Respondent-HERC being Appeal No. 52 of 2011 on the ground that the observations and directions in the said order were prejudicial to Chhattisgarh and that the same were passed without hearing them.

**12.** On 04.11.2011, this Tribunal while dismissing Appeal No. 15 of 2011 had allowed Appeal No. 52 of 2011. Aggrieved by the said Order dated 04.11.2011, the Appellant filed an appeal before the Hon'ble Supreme Court vide Civil Appeal No. 10329 of 2011. The Hon'ble Supreme Court passed an interim order dated 16.12.2011 with certain directions. In terms of the liberty granted by the Hon'ble Supreme Court, on 12.01.2012, the Appellant filed an application before the State Commission to fix/approve the tariff for the period in question i.e. for the power supplied from 07.05.2011 to 31.12.2011 and for the power proposed to be supplied during the balance period of the year 2011-12 i.e. 01.01.2012 to 31.03.2012 and for the year 2012-13. On 17.10.2012, the State Commission passed an order holding that the capped tariff of Rs 2.32/kWh will prevail. Challenging the said determination of tariff by the State Commission, the Appellant filed an Application before the Hon'ble Supreme Court being I.A. No. 7 of 2012 in Civil Appeal being CA No. 10329 of 2011. In terms of the liberty granted by the Hon'ble Supreme Court vide order dated 19.10.2013 holding that since Order dated

17.10.2012 is an appealable Order before this Tribunal, the Appellant preferred an Appeal No. 65 of 2013 before this Tribunal challenging the Order dated 17.10.2012 passed by the Respondent-HERC. By its Order dated 03.01.2014, this Tribunal allowed the Appeal filed by the Appellant and set aside the Order dated 17.10.2012 passed by the Respondent-HERC and issued necessary directions to HERC to re-determine the tariff for Unit-II of the Appellant within two months from the date of communication of the judgment. On 13.01.2014, the Appellant again approached the State Commission for interim tariff determination in Case No. HERC/PRO-05 of 2014. After hearing the parties, the State Commission passed the Tariff Order on 23.01.2015, determining the tariff of Rs.2.8875/kWh for FY 2011-12 and Rs.2.9218/kWh for the FY 2012-13 comprising of capacity charges and variable charges.

**13.** Aggrieved by the said Order dated 23.01.2015 passed by the State Commission, Respondent No. 3 filed Appeal No. 107 of 2015 before this Tribunal while the Appellant filed Appeal No. 117 of 2015 seeking enhancement of the tariff determined by the State Commission. Vide its Judgment dated 21.03.2018, this Tribunal disposed of the said Appeals and upheld the Order of the State Commission except on the issue of Operation and Maintenance expenses.



**14.** In terms of the said order passed by Respondent-HERC, the Appellant had become entitled to an amount of Rs.99.30 crore on account of differential tariff, and accordingly had filed an Execution Petition-E.P No. 5/2015 before this Tribunal for recovery of the said amount. By its Order dated 22.12.2015, this Tribunal disposed of the said petition with liberty to the Appellant to approach the Respondent-HERC. Accordingly, the Appellant filed a Petition before the Respondent-Commission for recovery of the said amount. The said Petition was disposed of by Respondent-Commission vide Order dated 12.07.2016 directing Respondent No. 3 to pay the outstanding amount to the Appellant. Certain directions as regards procurement of coal were also issued by the Respondent-Commission.

**15.** On 25.10.2016, the Appellant filed an Application before the Respondent-Commission seeking appropriate orders for procurement of alternate coal. The said Application was disposed of by the Respondent-Commission vide Order dated 18.05.2017 and directions as regards procurement of alternate coal were issued.

**16.** On 19.07.2017, the Appellant filed Petition No. HERC/PRO-54 of 2017 before the Respondent-Commission seeking approval for applicability of the Notification dated 07.12.2015 issued by MoEFCC, whereby the Environment (Protection) Rules, 1986 were amended to set new emissions norms, *inter alia*, for emission of oxides of Sulphur (SO<sub>x</sub>) and Oxides of

Nitrogen (NOx) in Thermal Power Plants as Change in Law within the meaning of HERC Regulations 2008. In order to achieve the said revised norms, additional systems and more particularly Flue Gas Desulphurizer (for SOx) and Selective Catalytic Reduction (for NOx) are required to be installed in 300 MW Unit-II of the Appellant's Thermal Power Plant, which would result in incurring capital expenditure. The Appellant had sought in principle approval of the Respondent-State Commission to the capital cost required to be incurred for installation of the said systems as well as the O & M cost to be incurred on the said systems. The Appellant also sought in principle approval for increase in auxiliary energy consumption resulting from installation and O&M of the additional systems. By filing reply before the State Commission, Respondent No.2 raised an objection as regards the jurisdiction of the Respondent-State Commission on the ground that the Hon'ble Supreme Court in its judgment dated 11.04.2017 in Civil Appeal No. 5399 – 5300 of 2016, titled "**Energy Watch Dog Vs. Central Electricity Regulatory Commission & Ors.**" has laid down that any issue / dispute with regard to generation and sale of power under a composite scheme within the meaning of Section 79(1)(b) of the Electricity Act, 2003 confers exclusive jurisdiction on the CERC and, therefore, the issue raised in the said Petition can only be adjudicated by CERC since the Appellant has two beneficiaries i.e. State of Haryana and State of Chhattisgarh from its Unit-2.

**17.** After hearing learned counsel for the parties, the Respondent-State Commission on 15.11.2018 passed an Order disposing of the Petition filed by the Appellant for want of jurisdiction without any reasoning or justification. Aggrieved by the said order, the Appellant has approached this Tribunal seeking for the following reliefs:

- (i)** “Stay the effect and operation of the impugned Order dated 15.11.2018 passed by the Respondent No. 1 Commission and direct the Commission to decide the Petition being Case No. HERC/PRO-54 of 2017 on merits;
- (ii)** Pass such other and further order or orders as this Hon’ble Tribunal may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”

**18.** Learned counsel for the Appellant has filed written submission, which in brief, is as under:

Learned counsel contends that the Appellant is supplying 95% of 300 MW capacity from Unit-2 of its 600 MW Thermal Power Plant (300 X 2) located in Chhattisgarh to Haryana Discoms/HPPC- Respondent No. 3 through PTC India Ltd-Respondent No.2. The said supply of power is as per interim directions issued by this Tribunal vide Order dated 23.03.2011 and continued by the Hon’ble Supreme Court’s Order dated 16.12.2011 in

Civil Appeal No. 10329 of 2011. The balance 5% power is supplied to Chhattisgarh as Home State share as per the tariff determined by the CSERC. So far as Unit-1, the entire 300 MW is being supplied to MP Discoms through PTC-Respondent No.2 as per the tariff determined by the MPERC pursuant to the Order dated 19.08.2020 passed by this Tribunal in Appeal No. 327 of 2018 and batch. Admittedly, tariff for the aforesaid supply to Haryana has been determined by Respondent-State Commission. Thus, in so far as supply to Haryana is concerned, the HERC is the concerned Commission having jurisdiction, in terms of the aforesaid Orders and this position has been accepted and implemented by the parties right from the beginning.

**19.** The Appellant filed a Petition before the Respondent-State Commission seeking approval of applicability of MoEF Notification dated 07.12.2015 as change in law as per Regulation 13 of the HERC Regulations and to approve the resultant capital cost etc. for installation of FGD & associated systems. Regulation 13 of the Tariff Regulations reads as under:-

*“13. **Additional capitalization.** - (1) The capital expenditure, mentioned below, within the original scope of work actually incurred after the date of commercial operation and up to the cut off date may be admitted by the Commission, subject to prudence check:*

<i>1</i>	<i>Deferred liabilities</i>
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2	<i>Works deferred for execution</i>
3	<i>Procurement of initial capital spares in the original scope of work, subject to ceiling specified in regulation 12</i>
4	<i>Liabilities to meet award of arbitration or the satisfaction of the order or decree of a court</i>
<u>5</u>	<b><u>On account of change in law</u></b>

(emphasis supplied)

**20.** As per the above Regulation, the additional capitalization towards installation of FGD & associated systems on account of change in law i.e. MoEF Notification dated 07.12.2015 is clearly covered under the Regulations. According to the Appellant, inasmuch as the tariff for supply of power has been determined by the State Commission as per its Regulations pursuant to Hon'ble Supreme Court's Order, and when all issues between the parties have been agitated and decided by the State Commission, it clearly had the jurisdiction to entertain the above Petition. When tariff is determined by the State Commission, this particular Petition would also lie in the jurisdiction of State Commission and not before the CERC, otherwise it would result in an anomalous situation.

**21.** However, Respondent No.2- HPPC raised an objection in terms of Energy Watchdog judgment of the Hon'ble Supreme Court contending that since the Appellant was supplying power to more than one state i.e.,

Madhya Pradesh and Chhattisgarh apart from Haryana, jurisdiction lies with Central Commission-CERC and not with State Commission-HERC. The said objection was accepted by the State Commission, without assigning its own reasons.

**22.** Learned counsel for the Appellant contends that Energy Watchdog judgment would not apply to the present case, inasmuch as there is an Order passed by the Hon'ble Supreme Court i.e. Order dated 16.12.2011 whereby jurisdiction of the State Commission-HERC has been fixed. Admittedly, the arrangement put in place by the Hon'ble Supreme Court on 16.12.2011 is still continuing and being implemented by the parties including the State Commission even after Energy Watchdog judgment dated 11.04.2017. HERC has passed Orders on various issues relating to supply of power, even after the judgment in Energy Watchdog's case dated 11.04.2017. Therefore, learned counsel submits that when the Order dated 16.12.2011 of the Hon'ble Supreme Court is in force, State Commission-HERC continues to have jurisdiction in the matter. Even otherwise, the Appellant does not have a composite scheme of generation and sale of power in more than one State, as laid down by the Hon'ble Supreme Court in **Energy Watchdog** judgment. Contending that the Hon'ble Supreme Court has expressly relied upon the definition of Composite Scheme contained in Para 5.11 (j) of the National Tariff Policy, which requires a long

term PPA, learned counsel submits that in the instant case, the Appellant is supplying power to Haryana from its other 300 MW Unit on ad-hoc interim basis based on Hon'ble Supreme Court's interim order dated 16.12.2011 and not in terms of the long term PPA for which State Commission-HERC is determining the tariff. This is evident from the following:-

- (i) Hon'ble Supreme Court's interim Order dated 16.12.2011;
- (ii) Judgment dated 03.10.2014 in Appeal No. 65/2013 between the same parties in respect of the same supply, of this Hon'ble Tribunal holding that subject supply of power is not under PPA and tariff to be determined shall be *dehors* the PPA.
- (iii) Tariff for supply of home state share of power to Chhattisgarh is being determined by the Chhattisgarh State Electricity Regulatory Commission (CSERC) in terms of the provisions of the Tariff Policy issued under Section 3 of the Act.
- (iv) Order dated 19.08.2020 passed by this Tribunal in IA No. 1600 of 2020, in terms whereof tariff is being determined by the MPERC

**23.** The tariff for the remaining supply by the Appellant is determined by the respective State Commissions. i.e., CSERC and MPERC (Unit-1), and if the contention of Respondent No. 2 is accepted, it would create an anomalous and absurd situation wherein, as regards supply to two of the

States (MP & Chhattisgarh), the Commission having jurisdiction is the respective State Commissions, however, in respect of Haryana supply, even though the HERC would be determining tariff, but this particular Petition will have to be filed before the CERC. The other observations of the State Commission-HERC in Para 9 of the impugned Order to the effect that the Order dated 16.12.2011 was limited to tariff determination only, and the existence of PPA and its terms and conditions are to be determined afresh, are irrational. The Petition filed by the Appellant was under the HERC Regulations, which provide for additional capitalization on account of change in law. The Petition was not under any PPA, as entire tariff determination is de hors the PPA.

**24.** Under the above circumstances, the Appellant prays for setting aside the order of the State Commission dated 15.11.2018 and direct the State Commission to decide the Petition expeditiously.

**25.** Learned counsel for Respondent No.3 - HPPC has filed its written submissions stating as under:

**26.** Learned counsel submits that the issue in question relates to the jurisdiction of the Respondent-State Commission to adjudicate upon the Petition filed by the Appellant seeking approval for the applicability of the Notification dated 07.12.2015 issued by Ministry of Environment, Forest and



Climate Change as change in law. Learned counsel further submits that the State Commission, vide order dated 15.11.2018 disposed of the Petition filed by the Appellant for want of jurisdiction holding as under:

“9. ....

*The Commission has examined the contents of the Petition filed/ additional submissions made by the parties and observed that the contention of the Respondent i.e. HPPC regarding the jurisdiction of this Commission to decide the issue, has some force. The Commission has earlier determined tariff for the supply of power by the Petitioner to the Respondents in compliance to the directions of Hon'ble Supreme Court vide its interim order dated 16.12.2011 which was limited to the determination of tariff in accordance with HERC Tariff Regulations, 2008 only. When the power is being supplied under the interim arrangement and tariff is determined de-hors the PPA, the existence of PPA, its terms & conditions including its period are to be determined afresh. Till all these issues are settled, the Commission finds itself unable to decide the issue of jurisdiction.*

**27.** The above reasoning of the State Commission is based on the reliance placed by Respondent No. 2-HPPC before the State Commission on the judgment passed by the Hon'ble Supreme Court in “Energy Watchdog vs Central Electricity Regulatory Commission” (2017) 14 SCC 80, wherein, it has been held as under:

***“24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”***

**28.** Coming to the present case, it is submitted that it is an admitted position that the Appellant’s plant situated in the State of Chhattisgarh is supplying electricity to Utilities in the State of Haryana besides Chhattisgarh for Unit-II. Further, the Generating Station consisting of two units is also supplying to Madhya Pradesh from Unit-1. In any event, the sale of electricity from Chhattisgarh to Haryana is an inter-state sale which has been specifically taken note of by the Hon’ble Supreme Court to be a

composite scheme i.e. composite generation and sale involving two States therefore, the jurisdiction lies with the Central Commission.

**29.** Learned counsel points out that the claim made by the Appellant under Section 64(5) of Electricity Act, 2003 relying of the decision of this Tribunal's judgment dated 19.08.2020 in Appeal No. 327 of 2018 and batch is not correct, in view of there being no consensus between the Appellant and Respondent No.3-HPPC to agree to jurisdiction of the State Commission. Moreover, the contention of the Appellant that the order dated 16.12.2011 passed by the Hon'ble Supreme Court in Civil Appeal No. 10329 of 2011 granting jurisdiction to State Commission will continue to apply for the matter in issue irrespective of the judgment in Energy Watchdog is wrong, since at the earlier time, the Hon'ble Supreme Court had not considered the scope of Section 79(1)(b) and had directed the State Commission to fix the tariff for sale and purchase of electricity. The Hon'ble Supreme Court order dated 16.12.2011 cannot be extended to apply to the issues of change in law including the installation of FGD, for which the Petition was filed by the Appellant subsequent to the passing of Energy Watchdog judgment.

**30.** Under the above circumstances, learned counsel prays for dismissal of the appeal filed by the Appellant.

**31.** In view of the above pleadings and arguments, the point that would arise for our consideration is as under:

**32. “Whether the impugned order deserves to be interfered with? If so, what should be the direction?”**

### **ANALYSIS & DISCUSSION**

**33.** According to learned counsel Mr. Deepak Khurana arguing for the Appellant, subsequent to tariff order dated 23.01.2015, several orders came to be passed by HERC on various issues which arose between the parties herein pertaining to supply of power and the details of such orders are at page 224 of IA No. 1600 of 2020. Therefore, according to him, so far as supply of Haryana Discoms is concerned, till date HERC has passed several orders and the same has been accepted by the parties right from the beginning till date. Therefore, HERC is the concerned Commission having jurisdiction in the dispute on hand.

**34.** So far as the controversy in this Appeal is concerned, it pertains to jurisdiction of the HERC to decide the Petition filed by the Appellant for approval of applicability of MoEF Notification dated 07.12.2015 which amounts to change in law in terms of HERC Regulations and the Appellant / Petitioner sought the approval of the resultant capital costs for installation of FGD & associated system which is already referred to in the previous

paragraphs. Therefore, the Respondent HERC ought to have decided the Petition on merits instead of refusing to entertain the same opining that the Respondent HERC has no jurisdiction to entertain the Petition of the Appellant on the ground that in terms of **Energy Watchdog** Judgment of the Hon'ble Supreme Court wherein the Apex Court has expressed its opinion pertaining to composite scheme. In other words, according to Appellant, right from the beginning till now, tariff for supply of power and various issues having been determined by the Respondent HERC as per its Regulations in pursuance of directions of the Hon'ble Supreme Court of India, there was no justification now for the Respondent HERC to reject the Petition on the ground of want of jurisdiction.

**35.** Learned counsel Mr. Deepak Khurana further contends that in view of all the disputes including supply of power being considered and determined by HERC, if the additional capitalization determination pertaining to installation of FGD and allied systems is brought before the CERC, it would result in anomalous situation which may lead to further complications.

**36.** Learned counsel for the Appellant also brought to our notice that during course of the arguments, it was not the case of HPPC that there is no requirement of installation of FGD and associated systems. He further contended that they also did not object for filing of the Petition as such for seeking approval. The only objection raised by HPPC before the

Respondent Commission and so also before this Tribunal is that HPPC was not certain whether HERC is having jurisdiction or not to decide the issue in view of **Energy Watchdog** Judgment pertaining to composite scheme.

37. According to the Appellant, in view of the directions of the Hon'ble Supreme Court pertaining to HPPC and the Appellant that HERC would dispose of tariff determination in respect of supply of 95% out of 300 MW power from Unit-2, the Commission ought to have entertained the Petition pertaining to additional capitalization.

38. According to the Appellant, in view of the orders passed by the Hon'ble Supreme Court vide Order dated 16.12.2011 fixing the jurisdiction of HERC, the opinion in **Energy Watchdog** would not apply since interim arrangement is being continued by the above said order till date. They further contend that even subsequent to Judgment of **Energy Watchdog** dated 11.04.2017, HERC has passed several orders on various issues between the parties relating to supply of power. Hence, there is no jurisdiction on the part of the procurer to take a stance that HERC has no jurisdiction to entertain the Petition.

39. Learned counsel for the Appellant also contends that **Energy Watch** Judgment for composite scheme would apply to a scenario where CERC is

determining tariff for all the supply from a generating station. According to him, in the present case, since such scenario does not exist, the law laid down in the Judgment of ***Energy Watchdog*** does not apply. The Hon'ble Supreme Court has expressly relied upon the definition of composite scheme as envisaged in the National Tariff Policy at Para 5.11 (j) which requires a long term PPA. Therefore, the Appellant's counsel contends that the Appellant is supplying power to Haryana Discoms from its 300 MW Unit-2 on ad-hoc basis in terms of Hon'ble Supreme Court's interim direction. Therefore, there is no long term PPA for which HERC is determining the tariff.

**40.** Appellant's counsel vehemently contends that the tariff so far as the supply made to Chhattisgarh and Madhya Pradesh, the respective State Regulatory Commissions are determining the tariff, therefore it would be proper to decide the Petition by HERC in order to avoid anomalous and absurd situation. He further contends that if the Petition in question is brought before CERC as held in the impugned order, it would be a solitary Petition before the CERC while all other Petitions are considered and disposed of by State Commission including HERC. The Petition is being filed in terms of HERC's Regulations which provide for additional capitalization in respect of change in law events. Therefore, the Petition not being under any PPA, the entire determination of tariff is de hors the

PPA. Therefore, according to Appellant, this Tribunal has to intervene and decide the issue in question having regard to the precarious position the Appellant is facing.

**41. Per contra**, 3<sup>rd</sup> Respondent – HPPC contends that the opinion of the State Commission in the impugned order pertaining to want of jurisdiction vide Para 9 is just and proper. According to Mr. M. G. Ramachandran, learned senior counsel arguing for 3<sup>rd</sup> Respondent, the judgment of the Hon'ble Supreme Court in **Energy Watchdog** at Para 24, it is very clear how the issue of jurisdiction has to be determined, since the plant of the Appellant is situated in the State of Chhattisgarh which is supplying electricity to utilities in the State of Haryana besides Chhattisgarh from Unit-2, the law laid down in the **Energy Watchdog** applies. From Unit-1, which is also situated in Chhattisgarh, the power is supplied to Madhya Pradesh. Even otherwise, sale of electricity from Chhattisgarh to Haryana is an interstate sale, therefore it falls under composite scheme wherein there is composite generation and sale of power involving two States. Therefore, the Central Commission alone has jurisdiction to decide the petition on merits. The Appellant is not making consistent stand, since in the earlier proceedings which resulted in the Order dated 16.12.2011 before the Hon'ble Supreme Court of India that CERC alone has jurisdiction. The Appellant cannot rely upon the Judgment of the Tribunal



dated 19.08.2020 pertaining to Appeal No. 327 of 2018, since there is no consensus between the Appellant and HPPC to agree to jurisdiction of the State Commission in the present case.

**42.** The learned senior counsel for the 3<sup>rd</sup> Respondent, Mr. M. G. Ramachandran further contends that in the earlier proceedings between the parties, the Hon'ble Supreme Court had no occasion to consider the scope of Section 79(1)(b), therefore it had directed the State Commission to fix the tariff for sale and purchase of electricity. Hence, the same cannot be extended to additional capitalization as contended by the Appellant in respect of installation of FGD and associated system as change in law.

**43.** The admitted facts in this Appeal are as under:

- (1) The Appellant has two thermal power plants (300 MW x 2) situated in Chhattisgarh.
- (2) From Unit-1, the entire 300 MW capacity of power is being supplied to Madhya Pradesh Discoms through PTC India Ltd.
- (3) Out of the 300 MW capacity from Unit-2, 95% of the capacity of power is being supplied to Discoms of Haryana / HPPC (3<sup>rd</sup> Respondent) through the trader PTC India Limited. The balance 5% power is being supplied to Chhattisgarh as home state share and the tariff is being determined by Chhattisgarh State Electricity Regulatory

Commission.

(4) In terms of interim directions of this Tribunal vide Order dated 23.03.2011 which was continued by Hon'ble Supreme Court of India vide Order dated 16.12.2011 in Civil Appeal No. No. 10329 of 2011, 95% of 300 MW capacity of power from Unit-2 is being supplied to Haryana Discoms as on today.

(5) Tariff for the above said supply of power to Haryana has been determined by HERC in terms of the above said orders of the Hon'ble Supreme Court of India in the Civil Appeal.

(6) HERC in terms of Section 62 of the Electricity Act read with HERC (terms and conditions for determination of generation of tariff) Regulations of 2008, Tariff Order dated 23.01.2015 has been passed.

(7) In the above tariff order, the capital cost of Unit-2 was determined.

**44.** In order to determine the controversy placed before us, we refer to Para 9 of the impugned order dated 15.11.2018, which reads as under:

"9. ....

*The Commission has examined the contents of the Petition filed/ additional submissions made by the parties and observed that the contention of the Respondent i.e. HPPC regarding the jurisdiction of*

*this Commission to decide the issue, has some force. The Commission has earlier determined tariff for the supply of power by the Petitioner to the Respondents in compliance to the directions of Hon'ble Supreme Court vide its interim order dated 16.12.2011 which was limited to the determination of tariff in accordance with HERC Tariff Regulations, 2008 only. When the power is being supplied under the interim arrangement and tariff is determined dehors the PPA, the existence of PPA, its terms & conditions including its period are to be determined afresh. Till all these issues are settled, the Commission finds itself unable to decide the issue of jurisdiction."*

45. In the **case of "Energy Watchdog vs Central Electricity Regulatory Commission" (2017) 14 SCC 80**, the Hon'ble Supreme Court, pertaining to composite scheme while referring to Section 79 and 86, held as under:

*"24. The scheme that emerges from these sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in clauses (a), (b) and (d), and "intra-State" in clause (c).*

*This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. **The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act.** What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. **Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.**”*

**46.** It is not in dispute that the inter se arrangement between the parties vide Order dated 16.12.2011 passed by the Hon'ble Supreme Court, the tariff and associated issues are being determined by HERC. It is also seen that the Respondent HERC has passed various orders on number of issues between the parties pertaining to the very supply of power from Chhattisgarh plant to Haryana Discoms till date. As already discussed above, subsequent to Judgment in **Energy Watchdog**, also the

Respondent HERC had entertained various issues between the parties subsequent to the Judgment dated 11.04.2017. The interim arrangement made by this Tribunal which is being put in place by the Hon'ble Supreme Court of India vide Order dated 16.12.2011 is continued till date. As a matter of fact, the stand of the Respondent HPPC in the earlier proceedings, which resulted in interim arrangement by the Hon'ble Apex Court by order dated 16.12.2011, was that HERC alone has jurisdiction to determine the tariff for supply of power.

**47.** So far as installation of FGD and associated systems, claim of the Appellant is that the MoEF Notification dated 07.12.2015 amounts to change in law as per Regulations 13 of HERC Regulation. Therefore, it is not a situation where HERC has no Regulation to follow the procedure. Even otherwise, in the absence of any Regulations in a particular State, the State Commission is required to refer to Regulations of CERC on a particular issue.

**48.** Admittedly, the capital expenditure claim as additional capitalization is covered within the original scope of work. It is subsequent to cut-off date. Therefore, it amounts to deferred liability. However, in this Appeal, we are not required to decide the issue whether the claim of the Appellant i.e., additional capitalization towards installation of FGD and associated systems amounts to change in law or not. The said exercise has to be

done by the Commission. It is also seen that though two units of the Appellant are situated within the State of Chhattisgarh except 5% of power from Unit-2, balance power is being supplied to outside Chhattisgarh. However, pertaining to the Appellant's units, the respective State Commissions are dealing with determination of tariff till now. So far as Haryana is concerned, in terms of interim direction of the Hon'ble Supreme Court, the arrangement is continued till date and issues which are brought before HERC are disposed of by HERC.

**49.** Apparently, the supply of power from the Appellant to Respondent HPPC is not based on long term PPA. In the Appeal No. 65 of 2013 between these very same parties, this Tribunal opined that the subject 'supply of power' is not under PPA, therefore tariff shall be determined de hors the PPA. So far as the tariff pertaining to supply to home state i.e., Chhattisgarh, it is determined by Chhattisgarh State Electricity Regulatory Commission which is already referred to in the above paragraphs in terms of tariff policy issued under Section 3 of the Act referred to in the Order of this Tribunal dated 19.08.2020 as under:

*"12.15.....It is also relevant to note that for the same home state share from LANCO's project, the Chhattisgarh State Regulatory Commission is exercising its jurisdiction for fixation of tariff since the inception of the generation project. We notice from the records placed before us that in the present case, LANCO is supplying power to*

*Haryana from its other 300 MW unit on ad-hoc interim basis based on Hon'ble Supreme Court interim order dtd. 16.12.2011 and not under a long term PPA. For this supply too, Haryana Electricity Regulatory Commission is determining the tariff as per the order of the Hon'ble Supreme Court. **These facts further supports the case of Appellants.**"*

**50.** As already discussed, all tariff petitions are being decided by the respective State Commissions including HERC so far as the supply of power between the parties. Even the additional capitalization if held to be an event of change in law, the said expenditure has to be made as pass through i.e., Discoms will recover the said expenditure through the tariff alone. Therefore, we are of the opinion that in the light of inter se arrangement between the parties by virtue of Order dated 16.12.2011 passed by Hon'ble Supreme Court of India as interim arrangement, this Petition in which the Appellant has claimed additional capitalization in respect of installation of FGD and associated systems also has to be determined by the Respondent HERC.

**51.** In light of the above discussion and reasoning, the Appeal is allowed. We direct the Respondent HERC to dispose of the Petition filed by the Appellant for change in law event of installation of FGD etc. as early as possible, but not later than one month from today.

**52.** IAs which are pending are disposed of accordingly.

**53.** No order as to costs.

Pronounced in the Virtual Court through video conferencing on this the  
**30<sup>th</sup> day of June, 2021.**

**(Ravindra Kumar Verma)**  
**Technical Member**

**(Justice Manjula Chellur)**  
**Chairperson**

**REPORTABLE / NON-REPORTABLE**

*ts / tpd*