

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No. 30 of 2013
Date of Order: 02.09.2013**

In the matter of: Petition under Section 86 (1) (f) of the Electricity Act, 2003 seeking declaration of the termination letter dated 09.03.2011 issued by Swasti Power Engineering Limited as illegal, arbitrary and bad in law.

AND

In the matter of: PTC India Ltd., 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi-110066

Versus

1. Swasti Power Engineering Limited, Plot No. 111, Road-72, Jubilee Hills, Hyderabad-500033.
2. Punjab State Power Corporation Ltd. [erstwhile PSEB (before unbundling)], Patiala.

Present: Smt. Romila Dubey, Chairperson
Shri Virinder Singh, Member
Shri Gurinder Jit Singh, Member

ORDER

The petitioner PTC India Ltd. (PTC) has filed this petition before Punjab State Electricity Regulatory Commission (Commission) seeking declaration of the termination letter dated 09.03.2011 issued by respondent no. 1 Swasti Power Engineering Ltd. (SPEL) as illegal, arbitrary, unsustainable and bad in law and to direct respondent no. 1 to specifically perform its obligations under the Power Purchase Agreement (PPA) dated 24.08.2005 as signed with the petitioner. Alternatively, the petitioner has prayed for award of damages in accordance with the provisions of the PPA dated 24.08.2005. The petitioner has also prayed to cancel the PPA dated 03.07.2009 entered into by SPEL with Uttarakhand Power Corporation Limited (UPCL) or any other agreement it may have entered into with other utilities for supply of power generated from the 3x7.5 MW Bhilangana Hydro Power Project

(BHPP). The petitioner has further prayed for direction to SPEL to pay/reimburse PTC for any charges/claims which Punjab State Power Corporation Ltd. (PSPCL) [erstwhile PSEB (before unbundling)], Power Grid Corporation of India Ltd./other transmission utility may raise and to pay damages for loss of business due to termination of PPA by SPEL.

2. The Commission, after hearing the counsel of the petitioner on 04.06.2013 decided to admit the petition only after hearing PSPCL & SPEL and issued notice to them to file reply by 25.06.2013 with copy to petitioner and each other. It was further decided by the Commission that the petition shall be taken up for admission on 02.07.2013 wherein the parties shall be heard on the issue of jurisdiction of this Commission to hear and decide this petition under the facts and circumstances of the case. On 02.07.2013, PTC requested for more time to file the rejoinder to the reply filed by SPEL, which the Commission allowed to be filed by 23.07.2013 with copy to the respondents in its Order of the same date and further decided to hear the arguments on the question of jurisdiction of this Commission on 30.07.2013. After hearing the parties at length on 30.07.2013, the Commission vide its Order dated 05.08.2013 directed them to file written submissions on the issue of jurisdiction of this Commission by 20.08.2013. The Commission also held that after considering the written submissions of the parties, next date of hearing, if required, shall be fixed and conveyed to the parties.

3. In this regard the Commission observes as under:

- i) The petitioner (PTC) signed PPA dated 24.08.2005 with SPEL for purchase of power from BHPP excluding the free royalty power to be given to the Government of Uttarakhand (GoU) from 16th year after date of Commercial Operation. PTC further signed a Power Sale Agreement (PSA) dated 23.03.2006 with PSPCL for supply of the said power. PSPCL filed a petition (no. 9 of 2006) in the Commission seeking approval of the said PSA. The Commission examined the PSA in accordance with section 86 (1)(b) of the Electricity Act, 2003 (Act) which requires the State Commission to regulate electricity purchase and procurement process of the distribution licensees including the price. The Commission, while approving the electricity purchase and procurement process of PSPCL through the said PSA, gave its findings in its Order dated 31.07.2007.
- ii) SPEL filed an application with Uttarakhand Electricity Regulatory Commission (UERC) on 10.08.2009 praying that it be permitted to sell power to PTC

consistent with the PPA dated 24.08.2005 entered into with PTC and also direct UPCL and Power Transmission Corporation of Uttarakhand Limited (PTCUL) to give connectivity and open access on their system for evacuation of power upto the Central Transmission Utility grid.

- iii) UERC, after taking advice from the GoU, dismissed the said application of SPEL vide its Order dated 30.12.2009 denying open access to SPEL in view of the clarification given by GoU that it would not be appropriate to consider the proposal of the generating company for allowing open access to sell power to PTC, as there is a severe shortage of power in the State and PTC being a trading company, does not fall in the category of consumer.
- iv) Aggrieved by the said decision of UERC, PTC preferred an Appeal before the Hon'ble Appellate Tribunal for Electricity (APTEL) titled as Appeal No. 88 of 2010 praying interalia for setting aside the aforementioned Order of UERC dated 30.12.2009.
- v) Hon'ble APTEL vide its Order dated 11.01.2011, set aside the Order dated 30.12.2009 and directed UERC to grant open access to SPEL after it files an application for granting open access on the distribution/transmission system of UPCL/PTCUL.
- vi) Instead, SPEL vide letter dated 09.03.2011 issued a notice for termination of the PPA stating that it had informed PTC vide letter dated 08.07.2009 of an event of force majeure on account of which it was unable to gain interconnection and open access from PTCUL, which prevented it to supply power to PTC and from performing its obligations under the ibid PPA. It was further stated by SPEL that it was given no choice by UPCL but to enter into a PPA with UPCL to sell power and SPEL entered into a PPA with UPCL on 03.07.2009.
- vii) PTC has stated that the letter dated 08.07.2009 is not an intimation of a force majeure event and in no way qualifies for the procedural formalities laid down by Article 11.3 of the PPA dated 24.08.2005. It has been further submitted by PTC that SPEL, in derogation of the direction given by Hon'ble APTEL in its Order dated 11.01.2011 to UERC for granting open access to SPEL after it files an application for the same, issued the alleged notice for termination of the PPA, which is wrong and illegal.

- viii) PTC has submitted that in light of the submission made in the petition, this Commission has the jurisdiction to entertain the present petition and grant the reliefs as prayed stating that PPA and PSA form an integral part of each other and this transaction is a seamless transaction with PTC acting as only a conduit between the SPEL and PSPCL.
- ix) SPEL in its reply dated 24.06.2013 to the petition restricted the same only to the issue of maintainability of the petition and jurisdiction of this Commission. It raised preliminary objections that the petition is not maintainable as this Commission has no jurisdiction to try and adjudicate the disputes raised by the petitioner in the aforementioned petition. The petitioner is not a trading licensee of the State Commission, rather it holds the licence from Central Commission for inter-state trading of electricity. SPEL has no generating station within the territory of State of Punjab and BHPP developed and commissioned by SPEL is located outside the jurisdiction of this Commission as also the PPA dated 24.08.2005 was executed outside the jurisdiction of this Commission. The interconnection point where the power generated from BHPP was agreed to be supplied and delivered to PTC is situated outside the State of Punjab. There is no relation between the PPA dated 24.08.2005 executed between PTC & SPEL and the PSA dated 23.03.2006 executed between PTC & PSPCL. PTC not being a licensee of this Commission has not acted as an agent of PSPCL. The PPA and PSA have been executed on principal to principal basis between the parties therein. SPEL has also brought out relevant Articles of the PPA such as 4.3.1, 4.3.2, 16.2, 16.7.1, 16.7.2, definition of 'Purchaser' etc. in its reply. In the hearing on 30.07.2013, SPEL advanced the argument relying upon the judgement dated 20.07.2012 passed by Hon'ble APTEL in Appeal No. 130 of 2011 (Jai Parkash Power Ventures Limited Vs. Haryana Electricity Regulatory Commission and others) that this Commission has no jurisdiction in a dispute between PTC and SPEL arising out of PPA which is on principal to principal basis. Written submissions in this regard have been made by SPEL vide letter dated 20.08.2013.
- x) PSPCL in its preliminary reply dated 28.06.2013 on the question of jurisdiction of this Commission to the petition stated that adjudication of the present dispute raised by PTC is within the exclusive jurisdiction of this Commission. It has been submitted that SPEL cannot either claim that it had no knowledge of the beneficiaries or that the PPA and PSA had no correlation with each other. Also that so long there is a nexus between the PPA and PSA

and the sale of electricity by SPEL to PTC is linked to the sale of electricity by PTC to PSPCL, the power to adjudicate upon disputes is within the exclusive jurisdiction of this Commission where the distribution licensee being the ultimate consumer is located. In the hearing on 30.07.2013, PSPCL reiterated that this Commission has the jurisdiction to hear and adjudicate the dispute. Written submissions in this regard have been made by PSPCL vide letter dated 22.08.2013.

- xi) PTC in its rejoinder dated 24.07.2013 reiterated that on the basis of submissions in the petition and in the rejoinder, this Commission has the jurisdiction to adjudicate the present dispute. Further, vide an application dated 24.07.2013, PTC requested to put on record the judgement dated 11.01.2011 passed by Hon'ble APTEL in Appeal No. 88 of 2010 as Annexure A-32 to the petition and regretted the inadvertent error of submitting the judgement dated 30.08.2011 in Appeal No. 88 of 2009 annexed as Annexure A-26 to the petition, which was allowed by the Commission in its Order dated 05.08.2013.

4. On the issue of jurisdiction, the Commission finds that the submissions by the parties and references to various judgements of higher judicial authorities in support thereof may not be applicable as the same are with regard to the supply of electricity by a generating company located in one State to a distribution licensee in another State through an inter-state trading licensee where the issue to be decided is as to which of the State Commissions has the jurisdiction out of the States where the generating company is located or where the distribution licensee is located. However, the Commission is of the view that in the present petition, the real issue to be decided is with regard to inaction on the part of SPEL to implement the Order of Hon'ble APTEL in Appeal No. 88 of 2010 filed by PTC wherein, on denial of open access by UERC to SPEL, directions were issued by Hon'ble APTEL to UERC to grant open access to SPEL on filing an application by SPEL for supplying power as per PPA dated 24.08.2005 to PTC. Before filing of the application dated 10.08.2009, the SPEL, had already entered into a PPA with UPCL dated 03.07.2009 and had informed PTC vide letter dated 08.07.2009 of an event of force majeure on account of which it was unable to gain interconnection and open access from UPCL/PTCUL. The contesting issue has arisen as a consequence of inaction on the part of SPEL after the directions of Hon'ble APTEL were issued in the Appeal filed by PTC against the decision of UERC.

5. Keeping in view all facts and circumstances of the case, the Commission is inclined to say that it does not have the jurisdiction to decide this particular issue on the following grounds:

- i) This Commission cannot issue any direction with regard to inaction on part of SPEL to implement the directions of Hon'ble APTEL in its Order dated 11.01.2011, which were issued against the decision of UERC.
- ii) This Commission cannot direct the distribution licensee of the State of Uttarakhand i.e. UPCL, not to insist with the generating company i.e. SPEL, to enter into a PPA with UPCL for supply of power from its said project, which is also located in that State.
- iii) The aforementioned PPA dated 03.07.2009 entered into between SPEL and UPCL is under the regulatory control of UERC.

6. The Commission is of the considered opinion that the petitioner needs to approach the appropriate authority/forum for redressal of its grievance(s). Accordingly, the petition is not maintainable in view of above and therefore, not admitted. The petition is dismissed, as such.

Sd/-
(Gurinder Jit Singh)
Member

Sd/-
(Virinder Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 02.09.2013