



**TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
HYDERABAD.
5th Floor, Singareni Bhavan Lakdikapul Hyderabad 500004**

O. P. No. 8 of 2017

Dated: 01.11.2018

Present

Sri. Ismail Ali Khan, Chairman

Between

M/s. Shree Cement Limited
114 Hans Bhawan 1-Bahadur Shah Zafar marg,
New Delhi – 110 002

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
Corp Off: 6-1-50, Mint compound
Hyderabad - 500 063, Telangana

2. Vedanta Limited (previously known as Sesa Sterlite Limited)
Banjari Village, P. O. Sripura,
Jharsuguda Dist Odisha – 786202

...Respondents

3. Bharat Aluminium Company Limited
Balco Nagar, Korba Chhattisgarh – 495 684

...Respondent.

(deleted as per order dated 09.07.2018 In I. A. No. 23 of 2018)

This petition came up for hearing on 20.06.2017, 13.11.2017, 30.04.2018, 02.06.2018, 30.06.2018, 07.07.2018 and 18.08.2018 in the presence of Sri. M. Abinav Reddy Advocate representing Sri. P. Vikram, Advocate for the petitioner and Sri. Y. Rama Rao, Standing Counsel along with Sri. B. Vijaya Bhaskar for R-1 and no representation for R-2 and R-3 on 20.06.2017, Sri. M. Abinav Reddy Advocate representing Sri. P. Vikram, Advocate for the petitioner and Sri. Y. Rama Rao, Standing Counsel along with Sri. Sai Vihari and Ms. M. Pravallika, Advocate for R-1 and no representation on 13.11.2017, Sri. M. Abinav Reddy Advocate representing Sri. P. Vikram, Advocate for the petitioner and Sri. Y. Rama Rao, Standing Counsel along with Ms. M. Pravallika, Advocate for R-1, Sri. K. Gopal Choudary, Advocate for R-2 appeared on 30.04.2018, Sri. M. Abinav Reddy Advocate representing Sri. P.

Vikram, Advocate for the petitioner and Sri Y.Rama Rao, Standing Counsel along with Ms.Pravallika, Advocate for R-1, Sri. N. Sai Phanindra Kumar, Advocate representing Sri. K. Gopal Choudary, Advocate for R-2 & 3 appeared on 02.06.2018, Sri. Buddy A. Ranganadhan, Senior Advocate along with Sri Abhinay Reddy, Advocate representing Sri. P. Vikram, Advocate for the petitioner, Sri. Y. Rama Rao, Standing Counsel for R-1 and Sri. K. Gopal Choudary, Advocate for R-2 and 3 appeared on 30.06.2018, Sri. Buddy A. Ranganadhan, Senior Advocate representing Sri. P. Vikram, Advocate for the petitioner, Sri. Y. Rama Rao, Standing Counsel for R-1 and Sri. K. Gopal Choudary, Advocate for R-2 and 3 appeared on 07.07.2018 and Sri Buddy A.Ranganadhan, Senior Advocate along with Sri P.Vikram and Ms.Ahana, Counsel for the petitioner, Sri Y.Rama Rao, Standing Counsel for R-1 and Sri. K. Gopal Choudary, Advocate for R-2 on 18.08.2018 are present and the petition having stood over for consideration to this day, the Commission passed the following:

ORDER

This petition is filed under 86 (1) (f) of the Electricity Act, 2003 seeking (a) direction to respondent No.1 to pay Rs.1,58,68,078/- with 18% interest p.a. till date of payment (b) to hold the respondent no.2 is liable to pay Rs.78,47,421/- and also pay interest amount of Rs.7,27,021/- together with 18% p.a. future interest with the following material averments:

(a) The petitioner is a licensed inter-state trader under license no. 45 / Trading / CERC dated 16.03.2010 issued by the Central Electricity Regulatory Commission (CERC). The respondent no.1 floated a tender for purchase of power on behalf of Telangana DISCOMs for the period from 01.06.2015 to 30.05.2016 which was later changed to 29.05.2015 to 26.05.2016 vide corrigendum dated 06.08.2014 to the tender notification no. TSSPDC / IPC 01/14-15. The power was to be procured at the SR periphery (delivery point) and the rates were to be quoted on that basis.

(b) As per clause (D) (e) of the tender document PoC injection losses and charges up to delivery point shall be to the account of the bidder / trader / seller. Clause (H) (first bullet point) provides that the PoC injection charges and losses (including) STU / CTU transmission charges, etc., up to the delivery point have to be borne by the trader / seller. Even open access

charges beyond delivery point also have to be paid by the trader/seller. However, reimbursement of open access charges beyond the delivery point will be made on the submission of open access bill by TSPCC.

(c) In response to the tender, the petitioner (for short SCL) addressed the respondent no. 2 (earlier Sesa Sterlite Ltd) who is the generator and got acceptance for supply of power as per the terms of tender through letter dated 14.08.2014. In pursuance to the said acceptance, the petitioner participated in the bid and the respondent no.1 issued LOI and on this basis the petitioner entered into PPA dated 29.10.2014 with the respondent no. 1 under which the petitioner has agreed to supply of power procured from the respondent no. 2 to the respondent no. 1. Under the PPA as per clause 3.2, the generator, PoC injection charges and losses etc., up to the delivery point will be borne by the petitioner while withdrawal PoC charges etc., shall be borne by the TS DISCOMS. As per clause 3.4 of PPA, the petitioner shall apply for corridor booking under MTOA / STOA. The power shall be scheduled and dispatched as per the relevant provisions of the CERC open access in transmission regulations and CERC sharing regulations, 2010 as amended from time to time. As per clause 3.10 of PPA, in case of revision / cancellation of MTOA / STOA, the party seeking such revision / cancellation shall bear the entire cost on its account due to such revision / cancellation as per the applicable CERC regulations as per MTOA / STOA.

(d) Immediately after executing PPA, the petitioner entered into back to back PPA with the respondent no. 2 on 31.10.2014.

(e) The present dispute pertains to the payment of point of connection (PoC) charges. There are two sets of disputes between the parties to the transaction, the first being MTOA (Medium Term Open Access) and the second one is STOA (Short Term Open Access).

(f) The dispute regarding MTOA which is

- i. After PPA the petitioner through letter dated 29.10.2014 applied for grant of MTOA for supply of power from respondent no.2 to the respondent no. 1.
- ii. On 10.12.2014, PGCIL rejected the MTOA application

- iii. On 30.04.2015, the petitioner again applied for MTOA for supply of 300 MW from respondent no. 2 to respondent no. 1 for the period from October 2015 to May 2016. This application was rejected.
- iv. The power was supplied by respondent no. 2 to the respondent no. 1 through STOA between May 2015 and March 2016
- v. PGCIL granted MTOA under application dated 29.10.2014 for the period commencing from 29.05.2015 up to various dates with varying capacities.
- vi. On 04.03.2016, PGCIL informed that MTOA was operationalized and about 62 MW of power was supplied from 01.04.2016 to 26.05.2016 to the respondent no. 1 from the respondent no. 2.

(g) The first claim:

- i. In spite of the petitioner booking transmission corridor for the entire open access capacity, the respondent no. 1 on several occasions revised the schedule and reduced the quantity of power procured. Apart from this, at many times, the RLDC curtailed the schedule of supply relating to MTOA.
- ii. As per clause 3.10 of PPA the respondent no.1 is liable to pay the entire cost on account of reduction and curtailment. The total amount of PoC charges for the said quantum is Rs. 23,75,082/-. The respondent no. 1 has paid only Rs. 11,87,541/-.
- iii. Under clause 3.10 of PPA, respondent no.1 is liable to pay the balance amount of Rs. 11,87,541/- to the petitioner.

(h) Second claim:

- i. The claim is for 50% of PoC charges for the total quantum of power scheduled as per the regional energy accounts in MTOA amounting to Rs. 1,56,94,243/-.
- ii. As per clause 3.2 of the PPA, the respondent no. 1 claims that it is liable to pay 50% of PoC charges for withdrawal of power beyond the delivery point leaving the balance 50% charges payable by the respondent no.2 up to delivery point.
- iii. As per the claim of the respondent no. 2, in view of amendment to CERC sharing regulations vide third amendment and CERC order dated 14.07.2015 on PoC charges, the respondent no. 1 is liable to pay 100% of such charges and therefore the respondent no. 2 refused to pay any part of such charges.

- iv. According to the petitioner, though CERC sharing regulations amendment merged PoC charges into withdrawal charges, such merger is only for the purpose of computation and if concerned PPA provides for sharing of charges up to delivery point by the seller and beyond such delivery point by the buyer, the parties would have to be paid as per such proportion and therefore the respondent no. 1 & 2 have to share the charges equally.
- v. Either respondent no. 1 or 2 are liable to pay the balance 50% of the PoC charges amounting to Rs. 78,47,121/-.

(i) Dispute relating to STOA:

- i. As per the terms of PPA, the petitioner booked STOA for supply of power by the respondent no.2 to respondent no.1.
- ii. On several occasions the respondent no.1 reduced the power to be drawn in STOA.
- iii. As per clause 3.10 of PPA, the respondent no. 1 is liable to pay the entire cost on account of having reduced / curtailed its off-take of power. The amount of such charges respondent no. 1 is liable to pay on this account is Rs.53,10,342/-.
- iv. The dispute being purely commercial in nature, the petitioner is entitled to pendente lite and future interest at 18% per annum till payment with Rs.6,99,422/- being interest on overdue amounts till date of petition.
- v. In a transaction of sale of power by a generator in one state to a distribution licensee in another state, even through a trader, it is the Commission having jurisdiction over the DISCOM which would have jurisdiction to adjudicate and determine the dispute between the generator, trader and the DISCOM. The PPA between the generator and trader and also the PPA between the trader and licensee should be back to back which is so in the present case.

Relief sought:

- i. A direction to respondent no.1 to pay Rs.1,58,68,078/- to the petitioner with future interest @ 18% per annum pending the OP from the date of order till payment.
- ii. Hold that the respondent no. 2 is liable to pay Rs. 78,47,121/- to the petitioner with interest of Rs.7,27,021/- with future interest @ 18% per annum pending the matter from the date of order till payment.

2. The respondent No.1 filed counter with the following material averments:
- (i) The petitioner is seeking adjudication of multiple disputes with different parties under a single petition which may not be permissible in law.
 - (ii) During the month of July 2014, TSSPDCL on behalf of TSDISCOMS has floated a tender on e-procurement platform for 2000 MW under short term basis for the period from 29.05.2015 to 26.05.2016 in which the petitioner (trader) had participated in the tender process for supply of power from two sources of new grid (northern, eastern and western grids) viz., M/s. Sesa Sterlite Ltd, Odisha (300MW) and M/s. SCL plant, Rajasthan (140MW).
 - (iii) The TSSPDCL has placed purchase order on 13.10.2014 on the petitioner for supply of 300 MW power sourcing from the respondent no. 2 (generating source located in Odisha) against the said tender.
 - (iv) The purchase order period was completed on 26.05.2016. The PO was the basis for billing and claiming monthly energy charges by the petitioner.
 - (v) As per the terms & conditions of purchase order, PoC injection charges and losses (including STU/CTU transmission charges, SLDC / RLDC operating charges, application fee, annual fee, PGCIL application fee, SRLDC application fee and SRLDC operating charges, etc., UPTO DELIVERY POINT have to be borne by the trader / seller and beyond the delivery point charges such as PoC withdrawal charges and losses at SR periphery, TSSLDC application fee, operating charges, annual fee and TSTRANSCO transmission charges shall be borne by the TSDISCOMS (respondent no. 1).
 - (vi) With a view to facilitate inter-state corridor booking (MTOA) by seller in terms of PO, a PPA was also signed by the respondent no.1 with the petitioner on 29.10.2014 which was required by the PGCIL for processing MTOA application filed by the petitioner. This application of the petitioner filed before PGCIL was rejected due to non-availability of required corridor. However, PGCIL granted MTOA on 10.09.2015 on the application dated 29.10.2014 subject to certain conditions duly permitting varied quantum of power during different time slots as detailed herein.

29.05.2015 to 26.05.2016 62.0 MW

29.05.2015 to 31.12.2015 93.3 MW

29.05.2015 30.11.2015 144.7 MW

(vii) PGCIL on 04.03.2016 informed the petitioner regarding operationalization of the corridor for 62 MW against MTOA already granted w.e.f 01.04.2016 to 26.05.2016 for evacuation of power.

(viii) The petitioner supplied power to TSSPDCL to the extent of corridor approved quantum (MW) from the generator M/s. Sesa Sterlite Ltd (present Vedanta Ltd), the respondent no. 2 under STOA against PO dated 13.10.2014 for the period from 29.05.2015 to 31.03.2016. Under MTOA, the power was supplied from 01.04.2016 to 26.05.2016 against the PO dated 13.10.2014.

(ix) The power supplied under STOA, open access charges beyond the delivery point were admitted for payment while for the power supplied under MTOA, 50% of PGCIL open access charges bill amount was admitted for payment due to CERC order merging PoC injection charges with PoC withdrawal charges as per clause 10 of latest CERC order dated 14.07.2015. It is to be noted that prior to this order, PoC charges were being separately notified for injection and withdrawal with parties obligated to share their respective portions i.e., generator/ seller to bear PoC injection charges up to delivery point while purchaser / DISCOM to bear PoC withdrawal charges beyond the delivery point. Consequent to the CERC order dated 14.07.2015, the respondent no. 1 shared PoC charged equally and the balance shall be borne by the trader / petitioner as both the PoC charges got merged into a single sum.

(x) The petitioner has claimed amounts on the basis of PPA dated 29.10.2014 entered with TSSPDCL without mentioning about short term purchase order dated 13.10.2014 based on which the petitioner supplied from 29.05.2015 to 31.03.2016 under STOA and also from 01.04.2016 to 26.05.2016 under MTOA deliberately misleading the Commission.

(xi) There cannot be two simultaneous agreements in force on the petitioner for supply of power for the same period and with same terms and conditions. A short-term purchase order was issued to the trader / petitioner on 13.10.2014 covering all terms and conditions. At the request of trader / petitioner a PPA was also entered into on the same terms and conditions to facilitate the grant of MTOA by the power grid (PGCIL). Since the petitioner

has made claim of monthly energy bills based on short term purchase order, the PPA dated 29.10.2014 become redundant and hence the PPA should not be taken into cognizance in the present claims dispute. Therefore, all such claims shall be made by the petitioner as per the terms & conditions of short term purchase order dated 13.10.2014 only, but not as per PPA as claimed by the petitioner, which is untenable.

(xii) Regarding 2nd claim (MTOA) claim no. 2, the petitioner / trader sought directions to the TSSPDCL to pay PoC charges as per the understanding of their generator (respondent no. 2) who claimed that the entire PoC charges have to be borne by the TSSPDCL as per CERC latest order, which view is contrary to the terms & conditions of the short term purchase order. The respondent no. 1 is obligated to pay 50% of PoC charges in view of merger of PoC injection and withdrawal charges under MTOA and therefore, the 2nd claim of petitioner for 100% reimbursement of MTOA PoC charges is not tenable.

(xiii) On the claim of the petitioner under 1st (MTOA) and 3rd (STOA) for refund of the entire PoC charges (even for PoC injection and other charges before delivery point) due to the reduction / curtailment (backing downs) given by TSSLDCL, it is the obligation of SPDCL to reimburse PoC charges and other charges beyond delivery point only and not before delivery point in terms of short term purchase order provisions and any claim other than the agreed terms is contrary to the purchase order agreed and energy supplied and hence these claims should not be permitted.

(xiv) On the claim of the petitioner for interest / surcharge, it is permissible on the outstanding amounts only for more than 30 days from the date of receipt of bills but it is not obligated without any bill for such claim and much less from due date in terms of the short term purchase order. There are no merits in the petition and it is liable for rejection.

3. The petitioner filed rejoinder to the counter of the respondent no.1 with the following material allegations:

(i) The only relevance of the purchase order for the purpose of the billing is mentioned in clause 'G' of the tender floated by TSSPDCL for procurement of 2000 MW power from 29.05.2015 to 26.05.2016 which deals with billing

procedure. This provision would not overwrite the PPA entered into between the parties which is a contract between the parties governing their rights and obligations.

(ii) After the CERC order dated 14.07.2015, PoC injection and withdrawal charges are to the beneficiary's account i.e., respondent no. 1. The merger of injection and withdrawal charges as per CERC sharing regulations amendment is only for the computation purpose. The PPA in question provides sharing of charges upto delivery point by the seller and beyond delivery point by the buyer and thus both the respondents 1 & 2 being buyer and generator should share expenses equally.

(iii) The PPA entered into between the parties shall govern the terms and conditions whether in the short term or the medium term. The purchase order issued by TSSPDCL is only an offer extended on the bids submitted by the petitioner which culminated into contract between the parties by PPA. The attempt by the TSSPDCL to resile from the terms of PPA is against law and practice.

(iv) The petitioner as a trading licensee is entitled to receive PoC charges from either respondent no. 1 or 2.

(v) The petitioner entered into PPA with respondent nos. 1 & 2 on back to back basis. The terms of PPAs mirror one another. It is clear from clause 3.10 of PPA that in case of revision / cancellation of MTOA / STOA, the party seeking revision/cancellation shall bear the entire cost on its account due to such change as per the applicable CERC regulations.

(vi) The petitioner is seeking refund of penal charges from TSSPDCL levied by PGCIL as per regulations on account of the conduct of TSSPDCL.

4. The respondent no.2 filed counter with the following material averments:

(i) The petition has no merits and it is not maintainable.

(ii) The respondent nos. 1 and 2 have no contract and therefore no rights or obligations against each other. The petitioner is not a licensee and therefore this Commission has no jurisdiction to adjudicate the present dispute under S 86(1) (f) of the Electricity Act, 2003. The petition is not maintainable for misjoinder of parties (Note: the respondent no.3 is deleted from the array of the parties to the petition).

- (iii) The PPA between the petitioner and the respondent is not a back to back contract. The contract / PPA is between the petitioner and the respondent no. 2 which is a separate contract in fact and in law which is distinct from the contract between the petitioner and the respondent no. 1. Both the PPAs are separate and distinct.
- (iv) The respondent no.2 paid PoC injection charges relating to STOA up to 31.03.2016. The respondent is not required to pay any PoC charges in respect of supply after operationalisation of MTOA from 01.04.2016 and consequent application of CERC 3rd amendment w. e. f 01.05.2015 read with CERC order dated 14.07.2015 merging PoC injection and withdrawal charges resulting in a single PoC payable only by the withdrawing entity.
- (v) The 2nd claim against the respondent no.2 is only is misconceived, untenable and incorrect.
- (vi) There is nothing either in the regulations or PPA or LOI regarding parties bearing 50% each. The CERC 3rd amendment read with its order dated 14.07.2015 makes it clear that PoC injection charges are merged with withdrawal charges resulting in PoC charges payable only by the withdrawing entity.
- (vii) It is absurd to suggest that since withdrawing entity / TSSPDCL accepts only 50% liability, the respondent no. 2 is liable to pay the balance 50% liability. The respondent no. 2 is not liable to pay any PoC charges as per the amended provisions of CERC read with its order dated 14.07.2015.
- (viii) The claim of the TSSPDCL that the merger of PoC charges is only for the purpose of computation is misconceived. The PPA between the petitioner and respondent no.2 clearly mentions that CERC regulations as amended from time to time would apply. There is no concept of proportion or sharing of charges in the contract or in the regulations.
- (ix) Back to back contracts, as per the law declared by Hon'ble Supreme Court, is one where the two contracts contain explicit provisions and covenants whereby all the parties have mutual rights and obligations as between all of them and the main contract acknowledges obligations arising out of the other contract and vice versa such that a tripartite agreement has evolved. Merely because a contract is entered into to enable performance of another contract, it does not mean that the two contracts are back to back

contracts. The judgments of appellate tribunal are different on facts and the law declared by the Hon'ble Supreme Court governs the appellate tribunal orders.

(x) This Commission has no jurisdiction to entertain and adjudicate upon a dispute between the petitioner as an inter-state licensee and the respondent no. 2 as a generating company. The petitioner is not entitled to any relief from respondent no. 2. The petition is liable for dismissal.

5. The petitioner filed rejoinder to the counter filed by respondent no.2 with the following averments:

(i) The petitioner is not concerned with the inter-se disputes between the respondent nos. 1 & 2. According to the law lay down by the decision of APTEL is that in a contract for sale between a generator in one state and Discom in another state (even though a trader on a back-to-back basis), the Commission having jurisdiction over the DISCOM will have jurisdiction to decide any dispute arising there from since section 86 (1) (f) of EA 2003, expressly provides for adjudication of disputes between licensees or between licensees and generating companies. Licensees do not mean that those licensed by the State Commission only. The transactions between the petitioner and the respondents were in the nature of a single inseparable and individual back to back transactions. The cause of action between these parties cannot be divided. It is just and necessary that all disputes between parties should be decided at one go rather than having multiple decisions in multiple fora.

(ii) A perusal of two PPAs would show that they are completely back to back contracts. The petitioner never suggested that the two PPAs constituted tripartite arrangements. It is submitted that after CERC order dated 14.07.2017, the PoC injection and withdrawal charges are to the beneficiaries account and the merger of PoC charges is only for the computation purpose. The PPA signed between the parties provides that PoC charges shall be shared up to the delivery point by the seller and beyond the delivery point by the buyer with each party sharing the charges equally at their end.

6. I have heard the arguments of the petitioner and the respondents 1 and 2.
7. The issues to be decided based on the record, facts and contentions are as follows:
- (i) Whether sharing of PoC charges up to delivery point by the seller (Petitioner) and beyond the delivery point by the buyer (R-1) as per the PPA is affected by the decision of the Hon'ble CERC dated 14.07.2015 in the matter of determination of Point of Connection rates and transmission losses for the period of the transaction by the 3rd amendment to The Sharing of inter-state transmission charges and losses Regulations, 2015 stating that the PoC injection charges are merged with PoC withdrawal charges in respect of withdrawing DICs.
 - (ii) Whether the Commission has the jurisdiction to decide the dispute between the petitioner and the 2nd respondent on the ground of the two PPAs being back to back contracts contrary to terms of PPAs entered between the parties?
 - (iii) Whether the petitioner is entitled to a direction to the respondent no. 1 & 2 to pay Rs. 1,58,68,078/- with future interest @ 18% p.a. from the date of order till payment?

Issue - II.

8. Since the jurisdiction of this Commission to decide the matter relating to the dispute between the petitioner and respondent no. 2 is raised by the learned counsel for the respondent no. 2, it is being taken up in the first instance.
9. The petitioner is a licenced inter-state trader dealing in electricity. He was a successful bidder in the tender raised by the respondent no.1(TSSPDCL) for the period from 29.05.2015 to 26.05.2016 as corrected by the corrigendum dated 06.08.2014 to the tender notification. The power was to be procured at the SR periphery (delivery point) and rates were to be quoted on that basis. The petitioner had entered into PPA dated 29.10.2014 with the respondent no. 1 under which the petitioner has agreed to supply power procured from respondent no.2 to the respondent no. 1. The petitioner had a separate PPA with the respondent no. 2 (generator) on 31.10.2014. The petitioner claims this separate PPA as back to back PPA and thereby the petitioner can sue respondent no. 1 under the PPA dated

29.10.2014 and the respondent no.2 under the PPA dated 31.10.2014. It is clear from the contention of the learned counsel for the respondent no. 2 that the PPA dated 31.10.2014 is only between the petitioner and respondent no. 2 and R-1 is not a party and therefore when a dispute arose between the petitioner and R-1 under PPA dated 29.10.2014, the petition against R-2 is not competent as there is no lis between R-2 and the R-1 to bestow jurisdiction on the Commission to decide the dispute.

10. A perusal of PPA dated 29.10.2014 clearly shows that Article 3.15 places jurisdiction for dispute with the courts at Hyderabad, Telangana State. Under Section 86 (1) (f) which is as follows:

“Adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;”

which makes it amply clear that the Commission has jurisdiction to decide the dispute between the petitioner acting in the place of a generator and R-1 by virtue of the PPA dt. 29.10.2014. Thus, even as per the terms of PPA dated 29.10.2014 this Commission gets jurisdiction to decide the dispute between the petitioner and the licensee / TSSPDCL.

11. The petitioner has a separate PPA dated 31.10.2014 with R-2, generator. Article 3.16 of this PPA relating to law of jurisdiction clearly mentions dispute resolution will be courts at New Delhi. As per Article 3.18 of this PPA under the head Governing law, it is agreed “all matters arising out of or in conjunction with this agreement shall be governed by and construed in accordance with India law and the courts of New Delhi shall have exclusive jurisdiction on all such matters”. Thus, under the PPA dated 31.10.2014 any dispute between the petitioner and R-2 has to be resolved in courts at New Delhi. Thus two separate PPAs entered between petitioner and R-1 (dated 29.10.2014) and between petitioner and R-2 (dated 31.10.2014) and the contents thereon are not in dispute.

12. The learned counsel for petitioner stressed on the point that both the PPAs are back to back contracts and therefore the Commission has jurisdiction to decide the dispute. The petitioner has invoked the terms of PPA dated 29.10.2014 entered with the R-1 and is seeking some relief against the R-2. In the first instance, it can be said that in spite of the claim of the petitioner that both the PPAs mirror each other in

terms and therefore, they are back to back contracts which can be enforced by this Commission, it is to be noted that the contract / PPA dated 31.10.2014 has been entered between the petitioner and R-2 separately with separate terms, liabilities and responsibilities with also the place for resolving of disputes as in the courts at New Delhi about which R-1 is neither a party to the contract nor has any liability under its terms.

13. The learned counsel for the R-2 contended that this Commission has no jurisdiction to decide under PPA dated 31.10.2014 between the petitioner and R-2 and relied on a decision rendered by the Hon'ble Supreme Court reported in (1975) 2 SCC 47 (*Md.Serajuddin and Ors. vs. The State of Orissa and Ors.*), wherein the Hon'ble Supreme Court in para 61 observed that "one important criteria in order to determine as to whether the contract of sale between the appellant and STC occasioned the export is to find whether STC could divert the goods supplied by the appellant for a purpose other than the export to the foreign buyer. If the answer be in the negative, it would necessarily follow that the contract between the appellant and STC resulted in the export of chrome concentrates". This criterion has to be applied when there is no specific contract regarding the parties fixing a place for resolving disputes. As in the present case, when the PPA specifically provides for cases to be resolved only in the courts at New Delhi and when the licensee is not a party to the PPA, then the question of jurisdiction to resolve the dispute between the petitioner and R-2 would arise as per the terms of PPA dated 31.10.2014 and the petitioner has to approach the appropriate forum to resolve the dispute with R-2.

14. The learned counsel for the Respondent No.2 has relied on a decision rendered by the Hon'ble Supreme Court reported in (2015) 13 SCC 680 (*Zonal General Manager, IRCON International Limited Vs. Vinay Heavy Equipment*) wherein it was held as follows: "The Law on Subcontracts and the liability of person awarding the contract is amply clear. In the absence of a covenant in the Head Contract to the contrary, the rules in relation to privity of contract will mean that the jurial relationship between the party awarding the Head Contract and the Head Contractor on the one hand and between the subcontractor and head contractor and the head contractor on the other will be quite distinct and separate" in support of his contention that there is no privity of contract between R.1 and R2 and therefore

the Commission has no jurisdiction to decide the dispute between the petitioner and R2. Similar is the stand of Licensee.

15. On the other hand, the Learned Counsel for the Petitioner contended that the PPAs being mirror images leaving small changes relating to the Petitioner and R2 and the PPA dated 29.10.2014 between the petitioner and R1 make it amply clear that the petitioner was to procure power from R2 and whereas TSSPDCL was agreeable to purchase power through the Petitioner and therefore, PPAs are integral to the Contract in issue and therefore, the learned counsel for the petitioner contended that the petition is maintainable against R2 also which is untenable for the aforementioned reasons. The TSSPDCL (R-1) placed purchase order on the petitioner for supply of 300 MW and the petitioner sourced the supply from the R-2 and entered into separate PPAs with the R-1 and R-2. The petitioner is responsible for booking the open access corridor, whether STOA or MTOA/LTOA for transfer of power from generator (R-2) to the DISCOM (R-1) and pay the relevant charges to the PGCIL. Subsequently, the petitioner gets reimbursed the open access charges both from R-2 and R-1 as reimbursement of POC injection and POC withdrawal charges respectively. As the R-2 refused to reimburse the PoC injection charges referring to the 3rd Amendment to CERC sharing regulation for the energy supplied, this dispute between the petitioner and R-2 has to be resolved in courts at New Delhi.

16. In view of the aforementioned discussion, the decision of APTEL, New Delhi dated 31.08.2016 in PTC India Ltd vs Uttarakhand ERC and Ors. to the effect that the PPA between Swasti Hydro power generator and PTC (power trader), PTC entered into power sale agreement with beneficiary states / licensees. The

APTEL held that both the contracts are back to back arrangements and therefore the Commission has jurisdiction to decide the dispute between them. It is to be noted that in the decision nowhere there is any mention about any specific clause relating to jurisdiction of courts agreed by the power generating company or a trader in case of any dispute relating to the contract. Thus, the said decision has no application to the present dispute between the petitioner and R-1 being agitated under S. 86 (1) (f) of EA, 2003 which contemplates resolution of dispute between the generator and licensees only and the petitioner as a trader representing the

Generator as a middleman entered in to contract not as an Agent for a Principal but as an interstate trading Licensee with the DISCOM under a PPA dt 29.10.2014. This is particularly so because the generator (R2) has no contract with the Licensee (R-1) for supply of power. Thus, the contention of R2 that it has no privity of contract with R1 is tenable. In view of the aforementioned reasons and in terms of Articles 3.15 & 3.17 of PPA dated 29.10.2014, the petitioner has to approach the appropriate forum to resolve the dispute between the petitioner and R-2. The issue no. 2 is answered accordingly.

17. **Issue-I** : There is no dispute regarding sharing of PoC charges in this matter as per the terms of PPA dated 29.10.2014. Still the dispute arose regarding payment of Point of connection (PoC) charges. The petitioner claims that there are two sets of disputes regarding MTOA and STOA. The **first claim** is regarding transmission corridor capacity booked by the petitioner not being fully utilised and on the other hand the R-1 revised the schedule and reduced the quantity of power procured several times. Further, RLDC curtailed the schedule of supply relating to MTOA and as per clause 3.10 of PPA, the R-1 is liable to pay the entire cost on account of reduction and curtailment and PoC charges quantified at Rs.23,75,082/-. The petitioner claims that R-1 paid only Rs.11,87,541/- though R-1 is liable to pay the balance amount.

18. Regarding sharing of PoC charges, R-1 claims that it is liable to pay 50% of the PoC charges under clause 3.2 of PPA for withdrawal of power beyond the delivery point leaving the balance 50% charges payable by the petitioner up to the delivery point. The R-2 incidentally claimed that after the 3rd amendment to CERC sharing regulations, R-1 alone is liable to pay 100% PoC charges and thus R-2 refused to bear the burden as per its separate contract. This claim is on the basis that the 3rd amendment to CERC sharing regulations merged PoC injection and withdrawal charges. The petitioner asserted that either R-1 or R-2 are liable to pay the balance 50% of the PoC charges amounting to Rs. 78,47,121/-. Since the dispute between the petitioner and R-2 covered by PPA dated 31.10.2014 is held as a separate and distinct contract and any dispute arising therefrom has to be resolved only in the courts at New Delhi, thus the present dispute has to be decided between the petitioner and R-1 only.

19. A perusal of the summary of the claim in the petition clearly shows that it is based on the premise that the DISCOM is liable to pay 100% of PoC charges as per the CERC (sharing of inter-state transmission charges and losses) (3rd amendment) regulations, 2015. R-1 admitted its liability to pay 50% of PoC charges while the petitioner asserted that as per the 3rd amendment, either R-1 or R-2 has to bear the balance 50% of the PoC charges. As held supra, based on clause 3.2 of PPA dated 29.10.2014 which is between the petitioner and R-1, both should bear 50% of PoC charges one up to delivery point and another beyond delivery point. The petitioner and R-1 are bound by the terms mutually agreed and entered into under PPA dated 29.10.2014 and the petitioner has to bear 50% of PoC charges. This direction does not in any way interfere with the finding of CERC order dated 14.07.2015 merging PoC injection and PoC withdrawal charges into one for the reason that even after merging PoC charges, the liability as to payment based on mutual agreement as in the present case based on PPA dt. 29.10.2014 has to be upheld to maintain the sanctity of PPA dated 29.10.2014 entered between the petitioner and R-1. Even after 3rd amendment, it is significant to note that the parties have not chosen to get PPA dated 29.10.2014 amended to incorporate the liability. Under this circumstance it is clear that once the liability to pay the other 50% of PoC charges payable from the side of generator is on the petitioner to pay and collect from the generator as per the terms of PPA dt. 31.10.2014 the liability to pay is definitely not on R-1. If such is the case, it is the liability of the petitioner to bear 50% of the injection charges and recover 50% from the generator as per the terms of PPA dt.31.10.2014. The issue no. 1 stood answered accordingly.

Issue – III:

20. The petitioner sought a direction to the respondent nos. 1 & 2 to pay the amounts as mentioned below with interest based on various claims in the O.P which are detailed below.

The petitioner claimed in all Rs.1,58,68,078/- under three heads:

(i) Amount due from TSSPDCL on account of

a) (MTOA claim 1) a) full charges on account of reduction / curtailment of scheduled electricity supply w.e.f 01.04.2016 to 26.03.2016 plus	Rs.11,87,541/-
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b) interest @ 1.25%	Rs.96,630/-
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(ii) Amount due from TSSPDCL / SSL on account

(MTOA claim 2)	
a) of 50% of PoC charges for the full quantum of power drawn through MTOA	Rs.78,47,121/-
b) interest @ 1.25% p.m. due from SSL / TSSPDCL from the due date till the date of filing the present petition	Rs.7,27,021/-

(iii) Amount due from TSSPDCL on account

(STOA Claim 3)	
a) of full PoC charges for the reduction in procured quantum through STOA	Rs.53,10,342/-
b) interest @ 1.25% p.m. from due dare till recovery of the principal amount from SSL in another transaction	Rs.6,99,422/-

21. In **Item (i)**: which is mentioned as first claim in the petition, the petitioner alleged that the total amount of PoC charges Rs. 23,75,082/- under MTOA should be borne by the DISCOM. The petitioner justified this claim on the ground that the 3rd amendment to sharing of interstate transmission charges and losses regulations, 2015 merged PoC injection charges with PoC withdrawal charges. The DISCOM had paid Rs. 11,87,541/- towards 50% of its share the material on record shows. The petitioner is demanding DISCOM to pay balance 50% of PoC charges along with interest @ 18% per annum in the present petition. As discussed supra, based on the terms of PPA dated 29.10.2014 it is the petitioner who has to bear 50% of PoC charges. R-1 had admittedly paid 50% of the balance. Thus, it is the petitioner who has to bear Rs. 11,87,541/- towards its 50% liability. Since the DISCOM had already paid its 50% share on item-II, the petitioner is not entitled to any amount including interest from the R-1 / DISCOM.

Item – (ii):

22. The petitioner sought payment of Rs. 78,47,121/- with interest from R-1 representing 50% of PoC charges for the full quantum of power drawn through

MTOA as per Article 3.2 of PPA dated 29.10.2014. In this matter, the petitioner as well as the DISCOM have to bear 50% of POC charges equally. The amount of claim under this head represents 50% of the total claim. The petitioner is demanding this amount from either R-1 or R-2. Since the Commission has no jurisdiction to decide the dispute between the petitioner and R-2, the claim regarding the liability of R-1 only has to be decided. On this point also, as decided supra, Article 3.2 of PPA operates and the petitioner and R-1 have to share the burden equally. Admittedly, the DISCOM has already paid this amount. The petitioner has to pay this amount towards its 50% liability under Article 3.2 of PPA dated 29.10.2014 with a liberty to collect the amount from the generator. R-1 has no liability to pay this amount.

Item – (iii):

23. The petitioner claimed an amount of Rs. 53,10,342/- on account of full PoC charges for the reduction and curtailment in procured quantum through STOA with interest. Article 3.10 of PPA dated 29.10.2014 contemplates that “Telangana SLDC shall intimate one day in advance regarding any backing down to all the generators as provided in the LOI conditions. In case of revision / cancellation of MTOA / STOA, the party seeking revision / cancellation of MTOA / STOA shall bear the entire cost on its account due to such revision / cancellation of MTOA / STOA as per the applicable CERC regulations for MTOA / STOA. Revision of schedules by Telangana SLDC should be firm and intimated well in advance so as to allow SCL to communicate to SSL.”

This article contemplates payment of entire cost by the party seeking revision / cancellation of MTOA / STOA. The material placed on record shows that in some cases it was the DISCOM which reduced the quantum and in some cases, it was the RLDC which reduced the quantum of MTOA / STOA. In the present case, the DISCOM which has to bear the cost of reduction of supply only when it directed reduction of supply with intimation to the petitioner. How many times the DISCOM has reduced the supply is not on record. The petitioner and R-1 should examine the record, find out how many times the DISCOM curtailed the power MTOA / STOA and based on the material, reconcile the amounts payable and the DISCOM shall bear the cost of curtailment / revision / cancellation of MTOA / STOA initiated by it. Interest @ 6% shall be payable only on the liability of R-1 from the date of this order.

24. In the result and in view of the findings on issues I to III, the petition is disposed of as follows:

- (a) The Commission has no jurisdiction to implement the terms of PPA dated 31.10.2014 between the petitioner and R-2 (the generator) since any dispute under this PPA is triable only in the courts at New Delhi.
- (b) The respondent no. 1 is not liable to pay Rs. 11,87,541/- under MTOA to the petitioner.
- (c) The respondent no. 1 is not liable to pay Rs. 78,47,121/- representing PoC charges based on the terms of PPA dated 29.10.2014 .
- (d) R-1 should bear the cost based on how many times it sought revision / cancellation of STOA initiated by it with interest @ 6% from the date of this order till payment.

This order is corrected and signed on this the 1st day of November, 2018.

**Sd/-
(ISMAIL ALI KHAN)
CHAIRMAN**

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