

***IN THE HIGH COURT OF JUDICATURE AT HYDERABAD
FOR THE STATE OF TELANGANA AND THE STATE OF
ANDHRA PRADESH**

*** HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND**

*** HONOURABLE SRI JUSTICE P. KESHA RAO**

**+W.P.Nos.15848 and 19894 of 2015, 7965, 11353, 14254, 22850,
35039, 35386, 35401, 38137, 38140, 38163, 38169, 38217, 45376,
45378 of 2016, 8143, 14033 and 25761 of 2017 and 30274 and
36266 of 2018**

% Date:31-12-2018

W.P.No.15848 of 2015 and batch

#Between:

Eastern Power Distribution Company of
Andhra Pradesh Ltd., represented by its Chairman
And Managing Director, having its registered Office
At P & T Colony, Seethammadhara, Visakhapatnam
And another

... Petitioners

And

GMR Vemagiri Power Generation Ltd.,
A Company registered in accordance with the
Provisions of Companies Act 1956 having its
Registered Office at Skip House 25/1,
Museum Road, Bangalore
Represented by its Managing Director and others

... Respondents

**! Counsel for petitioners : Mr. S. Ravi Sr. Counsel
Mr. S. Niranjana Reddy, Sr. Counsel
Mr. Gopal Chowdary**

**^ Counsel for Respondents: Advocate General (A.P.)
Advocate General (Telangana)
Mr. A. Sudershan Reddy Sr. Counsel
Mr. Vedula Venkata Ramana
Sr. Counsel for CERC
Mr. Y. Rama Rao for TSERC**

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> HEAD NOTE:

? Cases referred

HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN

AND

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W.P.Nos.15848 and 19894 of 2015, 7965, 11353, 14254, 22850, 35039, 35386, 35401, 38137, 38140, 38163, 38169, 38217, 45376, 45378 of 2016, 8143, 14033 and 25761 of 2017 and 30274 and 36266 of 2018

COMMON ORDER: *(per V. Ramasubramanian, J)*

All these writ petitions raise a common question as to whether the disputes that arose between the power generating companies and the power distribution companies before the bifurcation of the State, are liable to be adjudicated either by the Central Electricity Regulatory Commission (hereinafter referred to as CERC) or by the Andhra Pradesh Electricity Regulatory Commission (hereinafter referred to as APERC) or by the Telangana Electricity Regulatory Commission (hereinafter referred to as TSERC).

2. We have heard Mr. Dammalapati Srinivas, learned Advocate General for the State of Telangana, Mr. B.S. Prasad, learned Advocate General for the State of Telangana, Mr. S. Ravi, and Mr. S. Niranjan Reddy, learned senior counsel appearing for the petitioners, Mr. Gopal Chowdary, learned counsel appearing for the petitioners, Mr. A. Sudhershnan Reddy, learned senior counsel appearing for one of the contesting respondents, Mr. Vedula Venkata Ramana, learned senior counsel appearing for Central Electricity Regulatory Commission, Mr. Y. Rama Rao, learned standing counsel appearing for TSERC.

3. There are actually 21 writ petitions on hand. Out of them two writ petitions challenge one order of CERC dated 27-04-2015; one writ petition challenges an order of the CERC dated 15-06-2016; eight writ petitions challenge one order of the APERC dated 28-09-2016; one writ petition challenges a second order of APERC dated 18-02-2017; four writ petitions challenge an order of TSERC dated 31-10-2016; and other five writ petitions are for miscellaneous prayers, including a prayer for a declaration as to which of the Electricity Regulatory Commissions have the jurisdiction to adjudicate upon the disputes between the Power Generating Companies and Power Distribution Companies.

4. Thus, there are actually five writ petitions which do not challenge any order and 16 writ petitions, which challenge five different orders, two passed by CERC, two passed by APERC and one passed by TSERC. The common thread of facts that runs through all these writ petitions can be summarized as follows:

- (i) The Andhra Pradesh State Electricity Board was established in the year 1959, under the provisions of the Electric Supply Act 1948, for the purpose of generating and distributing electricity in the State of Andhra Pradesh.
- (ii) After the Government of India liberalized the policy of regulation of power sector, the State of Andhra Pradesh enacted the A.P. Electricity Reforms Act, 1998 for the purpose of constitution of an Electricity Regulatory Commission, restructuring of the electricity industry and rationalization of the generation,

transmission, distribution and supply of electricity avenues for the participation of private sector in the industry. In terms of the provisions of the State Act, two Corporations, viz., A.P. Power Generation Corporation Limited (APGENCO), and Transmission Corporation of A.P. Limited (APTRANSCO), came to be established on 01-02-1999. A commission known as “Andhra Pradesh Electricity Regulatory Commission” was also established under the Act. Incidentally this State enactment under which a Regulatory Commission was created, came at around the same time when a similar enactment was made by Parliament which came into effect on 25-04-1998.

- (iii) On and from 01-04-2000, the Transmission Corporation of Andhra Pradesh Limited got unbundled into five entities, viz., (1) APTRANSCO; (2) Andhra Pradesh Eastern Power Distribution Company Limited; (3) Andhra Pradesh Southern Power Distribution Company Limited; (4) Andhra Pradesh Central Power Distribution Company Limited; and (5) Andhra Pradesh Northern Power Distribution Company Limited.
- (iv) In the year 2003, the Parliament enacted the Electricity Act, 2003, consolidating the laws relating to generation, transmission, distribution, trading and use of electricity, and for the constitution of a Central Electricity Authority, Regulatory Commissions and an Appellate Tribunal. By this central enactment, the Indian Electricity Act, 1910, the Electricity (Supply) Act, 1948 and the Electricity Regulatory Commissions

Act, 1998 were repealed. Though Section 185 (1) of the Electricity Act, 2003 repealed the Electricity Regulatory Commissions Act, 1998 enacted by the Parliament, it did not repeal any State enactment under which a Regulatory Commission was constituted.

(v) Insofar as the State enactments, such as, A.P. Electricity Reforms Act, 1998, were concerned, Section 185 (3) of the Electricity Act, 2003 made it clear that the provisions of such enactments, which are not inconsistent with the provisions of the Electricity Act, 2003 would continue to apply to the States in which such enactments are applicable. In the Schedule to the Electricity Act, 2003, eight State enactments were mentioned, of which Andhra Pradesh Electricity Reforms Act, 1998 was one. Therefore, by virtue of Section 185(3), the provisions of the Andhra Pradesh Electricity Reforms Act, 1998 were to continue to apply in the State of Andhra Pradesh to the extent they were not inconsistent with the provisions of the Electricity Act, 2003.

(vi) Just as the Electricity Regulatory Commissions Act, 1998 enacted by the Parliament provided for the constitution of one CERC and several SERCS for every State, the Andhra Pradesh Electricity Reforms Act, 1998 provided for the constitution of a State Electricity Regulatory Commission. Therefore, the APERC was actually constituted on 31.03.1999, not under the Electricity Regulatory Commissions Act, 1998 issued by the Parliament,

but under the Andhra Pradesh Electricity Reforms Act, 1998 issued by the State legislature.

(vii) A few power generation and transmission companies located in and outside the composite State of A.P., had entered into Power Purchase Agreements with the erstwhile Andhra Pradesh State Electricity Board. After the creation of the APGENCO and TRANSCO in the year 1998, the rights and liabilities under the Power Purchase Agreements devolved upon these two Corporations. But after the year 2000, with the creation of one transmission company and four distribution companies, the contractual rights and obligations under the Power Purchase Agreements devolved upon the four distribution companies, viz., Eastern, Southern, Central and Northern Power Distribution Companies of the State of Andhra Pradesh. The devolution happened through what were termed as transfer schemes.

(viii) Disputes arose between the power Generation/Transmission Companies and the Distribution Companies during the period 2006 to 2013. All these disputes were raised before APERC and when adjudication was pending before APERC, the composite State of A.P. got bifurcated into the States of Andhra Pradesh and Telangana under the A.P. Reorganization Act, 2014 with effect from 02-06-2014.

(ix) Immediately after the bifurcation of the State, the Government of Telangana issued G.O.Ms.No.3, Energy Department, dated 26.07.2014 constituting the Telangana State Electricity

Regulatory Commission. This was done by the State of Telangana in exercise of the powers conferred under Section 82(1) of the electricity Act, 2003 (Central Enactment) read with Section 92 of the A.P. Reorganization Act, 2014.

- (x) Similarly, the Government of A.P. issued G.O.Ms.No.35, Energy Department, dated 01.08.2014 constituting the APSERC. This was also done by the Government of Andhra Pradesh in exercise of the powers conferred by Section 82(1) of the Electricity Act, 2003.
- (xi) Section 68 (1) of the Andhra Pradesh Reorganisation Act, 2014, stipulated that the companies and corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall continue to function in those areas in respect of which they were functioning immediately before that date. The names of all the four Distribution Companies namely Eastern Power Distribution Corporation Limited, Southern Power Distribution Corporation Limited, Central Power Distribution Corporation Limited and Northern Power Distribution Corporation Limited were mentioned at Serial Nos.30 to 33 of the Ninth Schedule to the Act. By virtue of Section 68 of the Act, two Distribution Companies namely Eastern Power Distribution Corporation Limited and Southern Power Distribution Corporation Limited became part of the newly formed State of Andhra Pradesh and the other two companies namely Central and Northern Power Distribution Corporations

Limited became part of the establishment of the State of Telangana.

(xii) Section 92 of the Andhra Pradesh Reorganisation Act, 2014 prescribed that the principles, guidelines, directions and orders issued by the Central Government, on and from the appointed day, on matters relating to coal, oil and natural gas and power generation, transmission and distribution as enumerated in the Twelfth Schedule shall be implemented by the successor States. The Twelfth Schedule accordingly stipulated that APGENCO will be divided on geographical location of power plants and that the Transmission lines of APTRANSCO of 132KV and higher voltage cutting across the successor States shall be deemed as Inter-State Transmission System lines. The Twelfth Schedule also provided that the Districts of Ananthapur and Kurnool that fell within the jurisdiction of the Andhra Pradesh Central Power Distribution Corporation Limited (before bifurcation), will be reassigned to the Andhra Pradesh Southern Power Distribution Corporation Limited. It is further provided in the Twelfth Schedule that the existing APERC shall function as a joint regulatory body for a period not exceeding six months within which time separate SERCs should be formed in the successor States.

(xiii) As stated earlier, after the bifurcation of the State with effect from 02-06-2014, Telangana State Electricity Regulatory Commission was created with effect from 26-07-2014 and

Andhra Pradesh Electricity Regulatory Commission was created with effect from 01-08-2014. Interestingly, it is stated even in the order of APERC dated 28-09-2016 that the joint regulatory body as contemplated in Para-C.3 of the Twelfth Schedule to the Andhra Pradesh Reorganisation Act, 2014, got dissolved from 01-08-2014 by operation of law.

(xiv) As a consequence of the joint regulatory body getting dissolved on 01-08-2014, the fate of the Original Petitions pending on the file of the joint regulatory body (APERC as it existed earlier), became a big question mark.

(xv) However, Section 105(1) of the Andhra Pradesh Reorganisation Act, 2014, gave a clue as to what should be done in such circumstances. According to Section 105 (1), every proceeding pending immediately before the appointed day before any Tribunal, in any area, which on that day falls within the State of Andhra Pradesh should, if it is a proceeding relating exclusively to the territory, which as from that day are the territories of the State of Telangana, stand transferred to the corresponding Tribunal. Taking clue from Section 105(1) of the Andhra Pradesh Reorganisation Act, 2014, the newly constituted TSERC wrote a letter dated 13-11-2014 to the newly constituted APERC seeking transfer of the files pending before APERC relating to the State of Telangana. In response, APERC transferred to TSERC 43 Original Petitions and Review Petitions on 18-11-2014.

- (xvi) Finding that number of petitions transferred were lesser than the number of petitions that ought to have been transferred, the TSERC issued a general circular dated 04-03-2015, making it clear that all the Original Petitions, Review Petitions and Interlocutory Applications filed before the erstwhile APERC and not yet taken on file and all such petitions and applications that will be henceforth filed before the TSERC, will be entertained, enquired into and decided on merits.
- (xvii) The circular dated 04-03-2015 of TSERC also mandated an amendment of the cause title.
- (xviii) However, interpreting the scope of Section 105(1) in a particular way, the APERC appears to have retained majority of petitions pending on its file. These were petitions, which related exclusively to agreements, under which supply had to be made to the companies in both the States.
- (xix) Finding that the transfer of a few petitions to TSERC and the retention of the other petitions by APERC may lead to incongruity, one of the Power Generations approached the CERC by way of a Miscellaneous Petition. The CERC, by an order dated 27-04-2015 held that there was a composite scheme for generation and sale of electricity in more than one State and that therefore, the conditions stipulated in Section 79 (1) (b) of the Electricity Act, 2003 stood satisfied and that those petitions were liable to be adjudicated only by CERC.

- (xx) Challenging the order of CERC dated 27-04-2015 with regard to the question of jurisdiction, the Distribution Companies came up with writ petitions.
- (xxi) On the ground that CERC did not have jurisdiction, the APERC continued to hear the Original Petitions pending on their file (apart from those that were transferred by them to TSERC) and APERC passed an order dated 28-09-2016, holding that except those that are liable to be transferred to TSERC, all other proceedings should continue to be adjudicated only by APERC. Challenging this order of APERC dated 28-09-2016, a few writ petitions have been filed.
- (xxii) However, TSERC passed an order on 31-10-2016 holding that the provisions of Section 79 (1) (b) of the Electricity Act, 2003 are not applicable and that CERC did not have jurisdiction over those petitions pending before the erstwhile APERC. The TSERC held that under Section 86 of the Electricity Act, 2003, it has jurisdiction over all the Distribution Licencees and Transmission Licencees located in the State of Telangana. Accordingly, TSERC held that the right and liabilities under the Power Purchase Agreements involving the generators and two distribution companies and TSTRANSCO should be adjudicated by TSERC to the extent of ratios specified in the Third Transfer Scheme. The TSERC further held that the jurisdiction over the petitions involving the supply of electricity of more than sixty percent to the two distribution companies of the State of

Telangana shall vest with the TSERC. Challenging this order of TSERC, a few writ petitions have been filed.

5. Therefore, we have on hand 16 writ petitions, which challenge two orders of CERC, two orders of APERC and one order of TSERC. Through all these orders, the respective Commissions, have decided only the question of jurisdiction. In other words, all the three Commissions have decided the question of jurisdiction as a preliminary issue and adjourned the main Original Petitions for disposal on merits to a future date. Since each one of the Commissions was asserting its jurisdiction, the parties have come up with the above writ petitions, without allowing the Commissions to adjudicate the disputes on merits.

6. Before we proceed further, we should point out two things. The first is that every order passed by the Appropriate Commission is appealable to the Appellate Tribunal under Section 111 of the Electricity Act, 2003. Therefore, in the batch of cases on hand, we could have directed the parties to file statutory appeals before the Appellate Tribunal. But, the writ petitions were filed in the years 2015 and 2016 and they have been pending on the file of this Court for the past two to three years just on the question of jurisdiction. Therefore, it may not be appropriate at this stage to drive the parties to the Appellate Tribunal.

7. Secondly, Section 105 (2) of the Andhra Pradesh Reorganisation Act, 2014 enables the Commissions to refer the question of jurisdiction to the High Court, in case of any doubt. But

since all the 3 Commissions were so sure, they did not choose to make a reference. Therefore, it is our duty to adjudicate the issue even by virtue of section 105(2) without referring the parties to the Appellate Tribunal.

8. Hence, we shall proceed to examine the core question relating to jurisdiction, with reference to the provisions of the Electricity Act 2003 and the Andhra Pradesh Reorganisation Act, 2014.

9. Admittedly, the disputes between the parties have actually arisen out of Power Purchase Agreements entered into between the Generations/Transmission Companies on the one hand and the Distribution Companies on the other. All the Power Purchase Agreements, out of which the disputes arose, were entered into, at the time when the State of Andhra Pradesh was a composite State. Many of the Power Purchase Agreements were long term Power Purchase Agreements entered into with the Andhra Pradesh State Electricity Board. The Andhra Pradesh State Electricity Board was constituted in terms of the Electricity (Supply) Act, 1948, way back in the year 1959.

10. However, since 'electricity' is in the concurrent list, the State of Andhra Pradesh issued a special enactment known as "Andhra Pradesh Electricity Reforms Act, 1998". Sections 22 to 25 of the Andhra Pradesh Electricity Reforms Act, 1998, contemplated the reorganisation of the State Electricity Board. To begin with, all the assets and liabilities including those arising under Power Purchase

Agreements were transferred from the Andhra Pradesh State Electricity Board to the Government of Andhra Pradesh. The Government of Andhra Pradesh then retransferred those rights and liabilities in favour of the APTRANSCO.

11. However, APTRANSCO itself got divided into four Power Distribution Corporations with effect from 01-04-2000 and under Sections 23 and 24 of the Andhra Pradesh Electricity Reforms Act, 1998, the distribution business of APTRANSCO devolved upon the four Distribution Companies.

12. It is relevant to point out that each of the four Distribution Companies, which came into existence from 01-04-2000, had an area of operation clearly demarcated. To be precise, the Southern Power Distribution Company of Andhra Pradesh Limited had its operations in the Districts of Krishna, Guntur, Prakasam, Nellore, Chittoor and Kadapa, which now form part of the new State of Andhra Pradesh and Eastern Power Distribution Company of Andhra Pradesh limited had its operations in five Districts namely Srikakulam, Visakhapatnam, Vizianagaram, East Godavari and West Godavari all of which now form part of the State of Andhra Pradesh. But the Northern Power Distribution Company of Andhra Pradesh Limited had its operations in five Districts namely Warangal, Karimnagar, Khammam, Nizamabad and Adilabad all of which now form part of the State of Telangana and the Central Power Distribution Company of Andhra Pradesh Limited had its operations in seven Districts namely Mahabubnagar, Nalgonda, Medak, Ranga

Reddy, Hyderabad, Kurnool and Ananthapur, the first five of which now form part of the State of Telangana and the last two of which now form part of the State of Andhra Pradesh.

13. But, after the bifurcation of the State, the Districts of Kurnool and Ananthapur, in which Central Power Distribution Company Limited had its operations, have been transferred to the Southern Power Distribution Company of Andhra Pradesh Limited.

14. Therefore, in effect, the Southern and Eastern Power Distribution Companies have now gone to the State of Andhra Pradesh and the Northern and the Central Power Distribution Companies have gone to the State of Telangana (except two Districts, which got transferred from Central Power Distribution Company to Southern Power Distribution Company after bifurcation).

15. It appears that from February 1999 to June, 2005, APTRANSCO was a single buyer of electricity from various generators and they sold the same to four Distribution Companies. Keeping in mind the transition and devolution that have taken place from the time when the Generating and Transmission Companies entered into Power Purchase Agreements with the State Electricity Board, up to the time when the disputes arose, let us now examine the statutory provisions.

16. As we have stated earlier, Electricity is in Entry 38 of the concurrent list. Until the advent of the Electricity Act, 2003, the Electricity Supply Industry was governed by three enactments namely, the Indian Electricity Act, 1910, the Electricity (Supply) Act,

1948 and the Electricity Regulatory Commission Act, 1998. The Indian Electricity Act, 1910 envisaged the role of Electricity Industry through private licences. The Act provided for the grant of licences to supply electricity in specified areas. Therefore, the industry was in the private sector. But the Electricity (Supply) Act, 1948 provided for the creation of State Electricity Boards, which were vested with the responsibility of arranging the supply of electricity. The State Electricity Boards, through successive Five Year Plans, undertook rapid expansion of electrification.

17. But, over a period of time, the State Electricity Boards ran into severe debt traps, on account of lack of autonomy. Cross subsidies reached unsustainable levels and hence, the Parliament enacted the Electricity Regulatory Commissions Act, 1998. This Act provided for the creation of a Central Electricity Regulatory Commission and State Electricity Regulatory Commissions.

18. But some States such as Orissa, Haryana, Andhra Pradesh, Karnataka, Rajasthan and Uttar Pradesh, enacted Reforms Acts, with the object of unbundling the State Electricity Boards into separate Generation, Transmission and Distribution Companies through transfer schemes. The State of Andhra Pradesh enacted the Andhra Pradesh Electricity Reforms Act, 1998.

19. In fact, the Central enactment namely the Electricity Regulatory Commissions Act, 1998, received the assent of the President on 25-04-1998 and it was published in the Gazette on

02-07-1998. But, the Act was deemed to have come into force on 25-04-1998.

20. However, the Andhra Pradesh Electricity Reforms Act, 1998 received the assent of the President on 21-10-1998 and it was published in the Gazette on 29-10-1998. Section 56 (1) of the Andhra Pradesh Electricity Reforms Act, 1998, declared that except as provided in Section 57, the provisions of the State enactments shall prevail over the Indian Electricity Act, 1910 and the Electricity (Supply) Act, 1948, to the extent provided in Section 56(3), notwithstanding any inconsistency between the State Enactment and the two Central Enactments.

21. There was no mention in the Andhra Pradesh Electricity Reforms Act 1998 about the Electricity Regulatory Commissions Act, 1998, despite the fact that the latter received the assent of the President and was also gazetted at least a few months before the State Enactment receiving the assent of the President. But, by virtue of the Article 254 (2) of the Constitution, the Andhra Pradesh Electricity Reforms Act 1998 shall prevail, over the Central Enactment (Act, 14 of 1998), since the State enactment was reserved for the consideration of the President and also received the assent of the President. Though Section 52 of the Central Act 14 of 1998 conferred overriding effect for the Act upon the provisions of any other enactment, Article 254 (2) and a subsequent development that took place, steered clear of any doubt.

22. By virtue of the power conferred by Section 3 (1) of the Andhra Pradesh Electricity Reforms Act, 1998, the State Government established the Andhra Pradesh Electricity Regulatory Commission, with effect from 31-03-1999.

23. But in the year 2001, the Government of India introduced the Electricity Bill 2001 as a comprehensive self-contained legislation, for regulating the Electricity Supply Industry. The bill was passed in 2003 and the Electricity Act, 2003 received the assent of the President on 26-05-2003. All the provisions of the Act except Section 121 came into force on 10-06-2003.

24. The Electricity Act, 2003 repealed (1) the Indian Electricity Act, 1910, (2) The Electricity (Supply) Act, 1948 and (3) The Electricity Regulatory Commissions Act, 1998 (Central Act, 14 of 1998). But Section 185 (3) of the Electricity Act, 2003 declared that the provisions of the enactments specified in the Schedule, not inconsistent with the provisions of the 2003 Act, shall continue to apply to the States in which such enactments were applicable. The Andhra Pradesh Electricity Reforms Act, 1998 was one of the State enactments included in the Schedule to the Electricity Act, 2003.

25. Therefore, it is clear that despite the availability of a power under the proviso to clause (2) of Article 254 of the Constitution, the Parliament did not choose to repeal the Andhra Pradesh Electricity Reforms Act, 1998. On the contrary, Section 185 (3) of the Electricity Act, 2003 saved the applicability of the provisions of the Andhra

Pradesh Electricity Reforms Act, 1998, to the extent they were not inconsistent with the provisions of the Electricity Act, 2003.

26. As we have stated earlier, the Andhra Pradesh State Electricity Regulatory Commission was constituted with effect from 31-03-1999 in exercise of the powers conferred upon the State by Section 3 (1) of the Andhra Pradesh Electricity Reforms Act, 1998. This Commission continued to function and exercise the jurisdiction vested in it by the State enactment, even after the issue of the Electricity Act, 2003, until the reorganisation of the State with effect from 02-06-2014.

27. Section 11 (1) of the Andhra Pradesh Electricity Reforms Act, 1998 enlisted the functions to be discharged by the APERC.

28. Similarly, Sections 76 and 82 of the Electricity Act, 2003 provided respectively for the constitution of a Central Electricity Regulatory Commission and State Electricity Regulatory Commission. Wherever State Electricity Regulatory Commissions had been constituted under the Central Act, 14 of 1998 (Electricity Regulatory Commissions Act, 1998), they were allowed to function as State Commissions, by virtue of the first proviso to sub-section (1) of Section 82. Section 86 (1) of the Electricity Act, 2003 also enlisted the functions of the State Commissions.

29. In order to understand the scope of the functions entrusted to the State Electricity Regulatory Commissions, under the Andhra Pradesh Electricity Reforms Act, 1998 and the Electricity Act, 2003, they are presented in a tabular column as follows:

Functions entrusted to the State Commission under	
The A.P. Electricity Reforms Act, 1998	The Electricity Act, 2003
Sec.11 (1) <i>(1) Subject to the provisions of this Act, the Commission shall be responsible to discharge amongst others, the following functions, namely:</i> <i>(a) to aid and advise, in matters concerning electricity generation, transmission, distribution and supply in the State;</i> <i>(b) to regulate the working of the licensees and to promote their working in an efficient, economical and equitable manner including laying down standards of performance for the licensees in regard to services to consumers;</i> <i>(c) to issue licences in accordance with the provisions of this Act and determine the conditions to be included in the licences;</i> <i>(d) to promote efficiency, economy and safety in the use of the electricity in the State including and in particular in regard to quality, continuity and reliability of service and enable to meet all such reasonable demands for electricity;</i> <i>(e) to regulate the purchase, distribution, supply and utilisation of electricity, the quality of service, the tariff and charges payable keeping in view both the interest of the consumer as well as the consideration that the supply and distribution cannot be maintained unless the charges for the electricity supplied are adequately levied and duly collected;</i> <i>(f) to promote competitiveness and progressively involve the participation of private sector, while ensuring fair deal to the customers;</i> <i>(g) to collect data and forecast on the demand and use of electricity and to require the licensees to collect such data and forecast;</i> <i>(h) to require licensees to formulate prospective plans and schemes in co-ordination with others for the promotion of generation transmission, distribution and supply of electricity;</i> <i>(i) to regulate the assets, properties and interest in properties concerning or related to the electricity industry in the State;</i> <i>(j) to lay down a uniform system of</i>	Sec. 86: Functions of the State Commission: <i>1. The State Commission shall discharge the following functions, namely:--</i> <i>a. determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:</i> <i>Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;</i> <i>b. regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;</i> <i>c. facilitate intra-State transmission and wheeling of electricity;</i> <i>d. issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;</i> <i>e. promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;</i> <i>f. adjudicate upon the disputes between the licensees and generating companies and to refer any dispute for arbitration;</i> <i>g. levy fee for the purposes of this Act;</i> <i>h. specify State Grid Code consistent</i>

<i>accounts among the licensees; (k) to regulate working of licensees and promote their working in an efficient economical and equitable manner; and (l) to undertake all incidental or ancillary things.</i>	<i>with the Grid Code specified under clause (h) of sub-section (1) of section 79; i. specify or enforce standards with respect to quality, continuity and reliability of service by licensees; j. fix the trading margin in the intra-State trading of electricity, if considered, necessary; k. discharge such other functions as may be assigned to it under this Act.</i>
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30. As could be seen from the above table, the functions entrusted to the State Commission under Section 86 (1) of the Electricity Act, 2003 are wider in scope than the functions entrusted to the State Commission under the State enactment. The words “State Commissions” appearing in Section 86 (1) of the Electricity Act, 2003 is defined in Section 2 (64) to mean only the State Electricity Regulatory Commission constituted under Section 82 (1) and a Joint Commission constituted under Section 83 (1). Even the expression “Appropriate Commission” is defined in Section 2 (4) of the Act to mean only the Central Regulatory Commission referred to in Section 76 (1) or the State Commission referred to in Section 82 or 83 of Electricity Act, 2003.

31. Therefore, it is clear that the Electricity Act, 2003 did not interfere with the State Commission constituted under the Andhra Pradesh Electricity Reforms Act, 1998, but actually saved its continuance, through Section 185 (3) of the Electricity Act, 2003. However, on account of the very nature of the difference in functions entrusted under the State enactment and the Central enactment, the

State Governments, which had created their own Commissions under the State enactments, had to fall in line and create a State Commission in terms of the Electricity Act, 2003, if such Commissions wanted to exercise the functions conferred by Section 86 (1) of the Electricity Act, 2003. In other words, a State Commission constituted under the Andhra Pradesh Electricity Reforms Act, 1998 could exercise only those limited functions enlisted in Section 11 (1) of the State enactment, if the said State Commission wanted to continue only under the provisions of the State enactment, by taking advantage of Section 185 (3) read with Schedule to the Electricity Act, 2003. But, if the State Commission had to exercise wider functions as enumerated in Section 86 (1) of the Electricity Act, then such a State Commission should have been constituted only under Section 82 or 83 of the Electricity Act, 2003. This conundrum was removed by section 76(2) and the first proviso to section 82 (1) of the Electricity Act, 2003 by creating a deeming fiction, which we shall see later.

32. However, the Andhra Pradesh Electricity Regulatory Commission constituted with effect from 31-03-1999 under the Andhra Pradesh Electricity Reforms Act, 1998 continued to be in existence even after the advent of the Electricity Act, 2003 and its continuance had the sanction under Section 185 (3) read with Schedule to the Electricity Act, 2003.

33. But, then came the Andhra Pradesh Reorganisation Act, 2014. Part VII of the Andhra Pradesh Reorganisation Act, 2014

comprising of Sections 68 to 75 contained provisions relating to certain Corporations. Section 68 (1) provided that the Companies and Corporations specified in the Ninth Schedule constituted for the existing State of Andhra Pradesh shall continue to function, on and from the appointed day, in those areas in respect of which they were functioning immediately before that date. The Ninth Schedule to the Act contained a list of about 89 Companies and Corporations, in existence as on the appointed day. The names of all the four Distribution Companies found a place at Serial Nos.30 to 33 of the Ninth Schedule.

34. Section 69 of the Andhra Pradesh Reorganisation Act, 2014 empowered the Central Government to issue certain directions, after consultation with the Governments of the successor States, wherever it was found that the existing arrangement in regard to the generation or supply of electric power or supply of water was likely to be modified to the disadvantage of any area by virtue of the fact that the power stations and other installations or the catchments area or reservoirs came to be located outside the State.

35. On matters relating to Coal, Oil and Natural Gas and Power Generation, Transmission and Distribution, Section 92 of the Andhra Pradesh Reorganisation Act, 2014 stipulated that the principles, guidelines, directions and orders issued by the Central Government, as enumerated in the Twelfth Schedule, shall be implemented by the successor States. The Twelfth Schedule to the Andhra Pradesh Reorganisation Act, 2014 was divided into three

parts, the first relating to coal, the second relating to oil and natural gas and the third relating to power. Section 92 of the Act reads as follows:

“92. Successor States to follow principles, guidelines, etc., issued by Central Government.—The principles, guidelines, directions and orders issued by the Central Government, on and from the appointed day, on matters relating to coal, oil and natural gas, and power generation, transmission and distribution as enumerated in the Twelfth Schedule shall be implemented by the successor States.”

36. Part-C.3 of the Twelfth Schedule reads as follows:

“C. Power:

1. Units of APGENCO shall be divided based on geographical location of power plants.
2. Existing Power Purchase Agreements (PPAs) with respective DISCOMS shall continue for both on-going projects and projects under construction.
3. The existing Andhra Pradesh Electricity Regulatory Commission (APERC) shall function as a joint regulatory body for a period not exceeding six months within which time separate SERCs will be formed in the successor States.
4. The existing State Load Despatch Centre (SLDC) shall function for both successor States for a period not exceeding two years within which time separate SLDC shall be set up for each successor State. During this period, the existing SLDC shall function under the direct administration and control of the Southern RLDC at Bengaluru.
5. Transmission lines of APTRANSCO of 132 KV and higher voltage cutting across the successor States shall be deemed as Inter-State Transmission System (ISTS) lines. The transmission lines falling within the territory of each successor State shall be transferred to the respective State Transmission Utilities. The maintenance of ISTS lines shall also be done by successor States in their respective jurisdictions.
6. The power of the Central Generating Stations will be allotted in such ratio to the State of Telangana and the State of Andhra Pradesh based on the actual energy consumption of the last 5 years of the relevant DISCOMS in the respective successor State.
7. For a period of ten years, the successor State that has a deficit of electricity shall have the first right of refusal for the purchase of surplus power from the other successor State.
8. The districts of Anantapur and Kurnool which fall within the jurisdiction of the A.P. Central Power Distribution Company Ltd. will now be reassigned to the AP South Power Distribution Company Ltd.”

37. Section 101 of the Andhra Pradesh Reorganisation Act, 2014 empowered the Appropriate Government of the successor States, to make such adaptations and modifications of any law made before the appointed day, whether by way of repeal or amendment, before the expiration of two years from that date. In exercise of the power so conferred by Section 101 of the Andhra Pradesh Reorganisation Act, 2014, the Governor of Telangana issued an order known as "Telangana Adaptation of Laws Order, 2016, under G.O.Ms.No.45 Law (F), dated 01-06-2016. Paragraph 5 of the said Order declared that the Acts/Regulations specified in the First Schedule to the Order will continue to be in force in the State of Telangana with the only modification that the words "Andhra Pradesh" wherever they occurred, would be substituted by the word "Telangana". The Andhra Pradesh Electricity Reforms Act, 1998 was included at Serial No.139 of the First Schedule to the Telangana Adaptation of Laws Order, 2016.

38. Therefore, the power to constitute a State Electricity Regulatory Commission conferred by the Andhra Pradesh Electricity Reforms Act, 1998, was inherited by the successor State of Telangana by virtue of the Adaptation Order and hence, the Government of Telangana could have constituted a Telangana State Electricity Regulatory Commission in exercise of the power conferred by Section 3 (1) of State Act 30 of 1998.

39. But, interestingly, the Government of Andhra Pradesh dissolved the APSERC constituted under Section 3 (1) of the A.P.

Electricity Reforms Act, 1998, with effect from 01-08-2014 and constituted in its place, a new State Commission, under G.O.Ms.No.35, dated 01-08-2014, in exercise of the power conferred by Section 82 (1) of the Electricity Act, 2003. This is despite the fact that Para-C.3 of the Twelfth Schedule to the Andhra Pradesh Reorganisation Act, 2014, allowed the existing APERC to continue to function as a joint regulatory body for a period not exceeding six months, within which time separate State Commissions were to be formed in the successor States.

40. Another interesting development that took place was the issue of G.O.Ms.No.3 Energy Department dated 26-07-2014 by the State of Telangana constituting a Telangana State Electricity Regulatory Commission with effect from 26-07-2014. This happened despite two facts namely (1) that the existing APERC was actually continuing on that date (namely 26-07-2014) as a joint regulatory body by virtue of the statutory prescription and (2) that there was power available to the State of Telangana under Section 101 of the Andhra Pradesh Reorganisation Act, 2014 even to repeal the Andhra Pradesh Electricity Reforms Act, 1998, thereby terminating the mandate of APERC.

41. Be that as it may, both the State Governments chose to constitute State Commissions only in exercise of the powers conferred by Section 82 of the Electricity Act, 2003 and not in exercise of the powers conferred by Section 3 of the Andhra Pradesh Electricity Reforms Act, 1998, which was also adapted by

the State of Telangana as such, in terms of Section 101 of the Andhra Pradesh Reorganisation Act, 2014. Therefore, it is clear that APERC, which was constituted with effect from 31-03-1999 under Section 3 (1) of the Andhra Pradesh Electricity Reforms Act, 1998, and which continued to be in existence even after the advent of the Electricity Act, 2003 and which also continued as a joint regulatory body from 02-06-2014 up to 31-07-2014, was laid to rest (perhaps without state honours) on 01-08-2014. What was born in the State of Telangana on 26-07-2014 and in the State of Andhra Pradesh on 01-08-2014 were State Commissions whose DNAs had to be traced to Section 82 (1) of the Electricity Act, 2003. To put it differently, the lineage of the Andhra Pradesh Electricity Regulatory Commission and the Telangana Electricity Regulatory Commission, which are in existence today, has to be traced to the Electricity Act, 2003, since a gene mutation had taken place after the reorganisation of the States. As a consequence, the resolution of the issues on hand may have to be done on the basis of the provisions of the Electricity Act, 2003, with reference to the provisions of the Andhra Pradesh Reorganisation Act, 2014.

42. Section 76(1) of the Electricity Act, 2003, requires the constitution of a Commission known as Central Electricity Regulatory Commission, to exercise the powers conferred on and discharge the functions assigned to it under the Act. But since the Electricity Regulatory Commissions Act, 1998 (Central Act 14/1998) itself contemplated the creation of a Central Electricity Regulatory

Commission and a Commission had been duly constituted under the 1998 Act, sub-section (2) of Section 76 of the Electricity Act, 2003, provided for the continuance of the same Central Electricity Regulatory Commission with a deeming fiction that the Central Commission constituted under the 1998 Act will be deemed to be the Central Commission for the purposes of the Electricity Act, 2003. Section 76(2) created another deeming fiction insofar as the Chair Person, Members, the Secretary and other officers and employees are concerned and provided that they shall be deemed to have been appointed under the Electricity Act, 2003. Section 79(1) of the Electricity Act, 2003, enlisted the functions of the Central Commission. It reads as follows:

“79. (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;

(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;

(c) to regulate the inter-State transmission of electricity;

(d) to determine tariff for inter-State transmission of electricity;

(e) to issue licenses to persons to function as transmission licensee and electricity trader with respect to their inter-State operations.

(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters

connected with clauses (a) to (d) above and to refer any dispute for arbitration;

(g) to levy fees for the purposes of this Act;

(h) to specify Grid Code having regard to Grid Standards;

(i) to specify and enforce the standards with respect to quality, continuity and reliability of service by licensees.

(j) to fix the trading margin in the inter-State trading of electricity, if considered, necessary;

(k) to discharge such other functions as may be assigned under this Act.”

43. Section 82(1) of the Electricity Act, 2003, obliged every State Government to constitute a State Commission within six months from the appointed date. But the first proviso to Section 82(1) created another deeming fiction, holding that the State Electricity Regulatory Commissions constituted under Section 17 of the Electricity Regulatory Commissions Act, 1998 (Central Act 14/1998) shall be deemed to be a State Commission constituted for the purposes of the Electricity Act, 2003. Apart from the State Electricity Regulatory Commissions constituted under the Central Act 14/1998, the State Electricity Regulatory Commissions created under certain State enactments listed in the Schedule to the Electricity Act, 2003, were also declared by the first proviso to Section 82(1) to be State Commissions for the purposes of the Electricity Act, 2003. As we have pointed out earlier, the Andhra Pradesh Electricity Reforms Act, 1998 is one of the enactments specified in the Schedule to the Electricity Act, 2003. Therefore, by virtue of the first proviso to Section 82(1), the Andhra Pradesh

State Electricity Regulatory Commission constituted with effect from 31-3-1999 under the A.P. Electricity Reforms Act, 1998, was deemed to be the State Commission constituted under the Electricity Act, 2003. By virtue of the same first proviso to Section 82(1), the Chair Person and other Members of the Andhra Pradesh Electricity Regulatory Commission appointed under the A.P. Electricity Reforms Act, 1998, were allowed to continue to hold office on the same terms and conditions on which they were appointed under the State enactment.

44. The functions of the State Commission were indicated in Section 86(1) of the Electricity Act, 2003, which reads as follows:

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

(1) The State Commission shall discharge the following functions, namely: -

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State:

Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

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

(c) facilitate intra-State transmission and wheeling of electricity;

(d) issue licences to persons seeking to act as transmission licensees, distribution licensees and electricity traders with respect to their operations within the State;

(e) promote co-generation and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee;

(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;

(g) levy fee for the purposes of this Act;

(h) specify State Grid Code consistent with the Grid Code specified under clause (h) of sub-section (1) of section 79;

(i) specify or enforce standards with respect to quality, continuity and reliability of service by licensees;

(j) fix the trading margin in the intra-State trading of electricity, if considered, necessary; and

(k) discharge such other functions as may be assigned to it under this Act.”

45. It may be seen from the functions of the Central Commission enumerated in Section 79(1) and the functions of the State Commission enumerated in Section 86(1) that these Commissions are vested with the power to adjudicate upon disputes. While Section 79(1)(f) entrusts with the Central Commission the function of adjudication of disputes involving generating companies or transmission licensee in regard to matters connected with Clauses (a) to (d) of Section 79(1), Section 86(1)(f) entrusts with the

State Commissions, the function of adjudicating upon disputes between the licensees and generating companies. The distinction between Sections 79(1)(f) and 86(1)(f) can be summarized as follows:

(i) To be a dispute falling within the jurisdiction of the Central Commission under Section 79(1)(f), the same should involve generating companies or transmission licensees. But to be a dispute falling within the jurisdiction of the State Commission under Section 86(1)(f), the dispute should be between the licensees and generating companies.

(ii) To fall within the jurisdiction of the Central Commission under Section 79(1)(f), the disputes should not only involve generating companies or transmission licensee, but they should be in regard to matters connected with Clauses (a) to (d) of Section 79(1). On the contrary, Section 86(1)(f) covers all types of disputes between the licensees and generating companies.

46. But one thing is clear. The Central Commission and the State Commissions do not and cannot have concurrent jurisdiction. Therefore, if something falls within the jurisdiction of the Central Commission, the same cannot fall within the jurisdiction of the State Commission also. While the words “generating companies” and “licensee” are used both in Sections 79(1)(f) and 86(1)(f), they are used in different contexts. If there is a dispute involving a generating company, in regard to any of the matters connected with Clauses (a) to (d) of Section 79(1), the same would fall squarely within the

jurisdiction of the Central Commission, irrespective of whether it is a dispute between two generating companies or a dispute between a generating company and anybody else.

47. Three expressions found in Sections 79 and 86 of the Electricity Act, 2003 are of significance. The word “generating company” is defined in Section 2(28) to mean any company or body corporate or association of individuals or artificial juridical person, which owns or operates or maintains a generating station. The expression ‘licensee’ is defined under Section 2(39) to mean a person who has been granted a license under Section 14. The different types of licences that could be granted under Section 14 are – (1) transmission licence; (2) distribution licence; and (3) electricity trading licence. The expression ‘transmission licensee’ is defined in Section 2(73) to mean a licensee authorised to establish or operate transmission lines.

48. Keeping the definitions of the expressions “generating companies”, ‘licensee’ and “transmission licensee” in mind, if we again look at Section 79 (1) (f) and Section 86 (1) (f), it will be clear that to fall within the jurisdiction of the Central Commission under Section 79 (1), the dispute should involve either a generating company or a transmission licensee in regard to the matters connected with Clauses (a) to (d). In other words, the disputes involving either the generating companies or the transmission licensees should be in relation to (1) regulation of tariff of generating companies owned or controlled by the Central Government; (2)

regulation of tariff of generating companies other than those owned or controlled by the Central Government, if such generating companies have a composite scheme for generation and sale of electricity in more than one State; (3) regulation of interstate transmission of electricity; and (4) determination of tariff for interstate transmission of electricity.

49. In contrast, the adjudicatory power of the State Commission is confined only to disputes between the licensees and generating companies. Therefore, what is to be seen is – (1) as to whether the disputes raised by the writ petitioners against their counterparts are merely disputes between the licensees and generating companies, so as to fall within Section 86 (1) (f); or (2) as to whether the disputes raised by the petitioners involve generating companies or transmission licensees in regard to matters connected with regulation of tariff of generating companies owned by the Central Government or of generating companies which have a composite scheme or the regulation of interstate transmission of electricity or determination of tariff for interstate transmission of electricity.

50. The expression “composite scheme” appearing in Clause (b) of sub-section (1) of Section 79 and the expression “interstate transmission” appearing in Clauses (c) and (d) of sub-section (1) of Section 79 are also of significance to break the code. While the expression “composite scheme” is not defined in the Electricity Act,

2003, the expression “Interstate Transmission System” is defined in Section 2 (36) as follows:

2 (36) “Inter-State transmission system” includes –

- (i) any system for the conveyance of electricity by means of main transmission line from the territory of one State to another State;
- (ii) the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such inter-State transmission of electricity;
- (iii) the transmission of electricity within the territory of a State on a system built, owned, operated, maintained or controlled by a Central Transmission Utility.

51. Though the expression ‘composite scheme’ is not defined, it is not very difficult to understand the sense in which the expression is used in Section 79 (1) (b). The expression is used in Section 79 (1) (b) in the context of generation and sale of electricity in more than one State. Therefore, if a generating company had entered into or otherwise have a composite scheme for generation and sale of electricity in more than one State, then the dispute involving such generating company would fall within Section 79 (1) (b). Similarly, if there was conveyance of electricity by means of main transmission line from the territory of one State to another State or the conveyance of electricity across the territory of an intervening State as well as conveyance within the State which is incidental to such transmission of electricity or if there was transmission of electricity within the territory of a State of system built, owned, operated, maintained or controlled by a central transmission utility, then it

becomes interstate transmission within the meaning of Clauses (c) and (d) of Section 79 (1).

52. Therefore keeping in mind the core distinctions between the functions of the Central Commission and the functions of the State Commission clearly demarcated in Section 79 (1) (f) and Section 86 (1) (f), let us have a look at the orders passed by the APERC and the TSERC.

53. The order of the APERC dated 28.09.2016 was by a two member bench comprising of the Chairman and the Member. Interestingly, both of them have rendered separate opinions. However, they were concurrent. The summary of the conclusions reached by the APERC are – (1) that all proceedings pending before the erstwhile APERC functioning as a Joint Regulatory Body till the formation of the State Electricity Regulatory Commissions in the successor States, insofar as they relate exclusively to the territory, which have become the territories of the State of Telangana should be transferred to the TSERC; and (2) that out of the remaining proceedings, those relating exclusively to the territories of the State of Andhra Pradesh and those which may not exclusively relate either to the territory of the State of Andhra Pradesh or to the territory of the State of Telangana should also fall within the jurisdiction of the APERC. This conclusion was reached by APERC, primarily on the ground that all the disputes arise out of single Power Purchase Agreement between the four distribution companies and the generating/transmission licensee and that therefore after sending to

the TSERC under Section 105(1) of the Andhra Pradesh Reorganisation Act, those which relate exclusively to the territory of Telangana, the residuary shall remain only with the successor commission to the joint regulatory body in view of Section 83 read with Section 86 (1) (f) of the Electricity Act.

54. In his independent opinion, the Chairman of the APERC held that an order was passed by the Joint Regulatory Body on 04.07.2014 rejecting the contention regarding the existence of a composite scheme. Since the said common order of the Joint Regulatory Body dated 04.07.2014 was not appealed against, he was of the opinion that the same has attained finality.

55. But unfortunately, what was omitted to be taken note of was the fact that the order of the Joint Regulatory Body dated 04.07.2014 was based upon the decision of the Appellate Tribunal for Electricity in Appeal No.200/2009 and 183/2009. By this order, all that the Appellate Tribunal said was that the disputes which do not fall under Clause (a) to (d) of Section 79(1) are within the jurisdiction of the State Commission.

56. There can be no quarrel about the fact that if the disputes involving generating companies or transmission licensee do not relate to the matters contained in Clauses (a) to (d) of sub-section (1) of Section 79, they would not fall within the purview of the Central Commission. But to test whether or not, the disputes involving generating companies or transmission licensees relate to matters connected with Clauses (a) to (d), one has to find out whether the

generating company involved (not being owned or controlled by the Central Government) had a composite scheme.

57. The only basis on which APERC sustained jurisdiction to itself was that there was single Power Purchase Agreement with four distribution companies and that at the time when the agreement was entered into, those companies were in a single State. Therefore, the logic given by the APERC is that on the date of execution of the Power Purchase Agreement, there was a single State, in which all the four distribution companies were located.

58. But the fact remains that after the bifurcation of the State, two distribution companies have gone to one State and the others have gone to another State. As a consequence, what was otherwise one scheme, became a composite scheme for generation and sale of electricity in more than one State. To put it differently, on and from the appointed day, viz., 02.06.2014, one single scheme which the generating companies had, has become a composite scheme and that scheme was for generation and sale of electricity in two States, viz., the States of Telangana and Andhra Pradesh. Therefore, the APERC was wrong in thinking that there was no composite scheme and that the date of the agreement and the date of the dispute will determine jurisdiction. That APERC had jurisdiction on the date on which agreements were entered into and that the APERC had jurisdiction on the dates on which disputes were raised, are beyond any pale of doubt. But the moment the State was reorganized and the companies, with which the generating companies had

agreements, came to be located in two different States, the nature of the dispute assumed as that of an interstate dispute.

59. It is only in respect of the rights that got vested in parties that the date on which the cause of action arose, could be of consequence. But in respect of matters relating to jurisdiction conferred by special enactments, the date on which the cause of action arose and the date on which the dispute was raised, may not be the sole criteria to determine the continued existence of jurisdiction. A quasi juridical body which had jurisdiction to entertain a dispute at the time when it was referred to it, may lose its jurisdiction, either by operation of law or otherwise. For instance, when the State Administrative Tribunals were created, the writ petitions arising out of service matters pending on the file of the High Court got transferred. A few States subsequently abolished the Administrative Tribunals and the applications filed there, got transferred back to the High Court. Therefore, the continued existence of jurisdiction would depend upon the nature of the dispute.

60. The APERC took a view that in view of Section 105(1) of the A.P. Reorganization Act, 2014, it is only those proceedings which relate exclusively to the newly formed territories of the State of Telangana, that would go before the TSERC and that all other matters should continue to remain with the parent Commission. Let us now take a look at Section 105. It reads as follows:

105. (1) Every proceeding pending immediately before the appointed day before a court (other than High Court), tribunal, authority or officer in any area which on that day falls within the State of Andhra Pradesh shall, if it is a proceeding relating exclusively to the territory, which as from that day are the territories of the State of Telangana, stand transferred to the corresponding court, tribunal, authority or officer of that State.

(2) If any question arises as to whether any proceeding should stand transferred under sub-section (1) it shall be referred to the High Court at Hyderabad and the decision of that High Court shall be final.

(3) In this section—

(a) “proceeding” includes any suit, case or appeal; and

(b) “corresponding court, tribunal authority or officer” in the State of Telangana means—

- (i) the court, tribunal, authority or officer in which, or before whom, the proceeding would have laid if it had been instituted after the appointed day; or
- (ii) in case of doubt, such court, tribunal, authority, or officer in that State, as may be determined after the appointed day by the Government of that State or the Central Government, as the case may be, or before the appointed day by the Government of the existing State of Andhra Pradesh to be the corresponding court, tribunal, authority or officer.

61. A cursory reading of Section 105 (1) would show that the same deals only with the proceedings relating exclusively to the territory, which became part of the State of Telangana on and from the appointed day. But it does not automatically mean that those which do not belong exclusively to the territory of Telangana will continue to remain with the APERC, as though it was a parent body from out of which another entity was created.

62. Moreover ***in cases of this nature, it is not possible to go by the theory of residuary powers. The concept of residuary***

power is actually derived from a federal system. But in a single system, the question of residuary power would not arise.

63. Even in a federal structure, residuary powers are not assumed. This is why our Constitution contains a specific provision in Article 248, which confers exclusive power specifically upon the Parliament to make any law with respect to any matter not enumerated in the Concurrent list or State list.

If the argument of the APERC on the basis of Section 105(1) of the A.P. Reorganization Act, 2014 is correct, then the same logic would have been applied to the Constitution and Article 248 would have become redundant. In fact, Entry No.97 of List-1 of the VII Schedule to the Constitution clearly identifies residuary matters. Section 105(1) of the A.P. Reorganization Act does not say something similar to Article 248 of the Constitution or Entry No.97 of the Union List in the VII Schedule.

64. In **Energy Watchdog v. CERC**¹, the Supreme Court pointed out that under the scheme of the Electricity Act, 2003, it is the Central Government which is involved whenever there is interstate generation or supply of electricity. In paragraph-24 of the report, the Supreme Court made it clear that the moment generation and sale take place in more than one State, the Central Commission becomes the appropriate Commission under the Act. After holding so, the Supreme Court also went into the meaning of the expression “composite” since the expression “composite scheme” was not

¹ (2017) 14 SCC 80

defined. In paragraph-26 of the report, the supreme, Court held that the expression “composite scheme” does not have any special meaning and that it is enough that the generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.

65. Therefore, in the light of the interpretation given by the Supreme Court in *Energy Watchdog*, to the expression “composite scheme” and also to what is interstate and intra State transmission, it is not possible for anyone to contend that the disputes raised by the generating companies in the cases on hand did not fall within any one of the clauses (a) to (d) in sub-section (1) of Section 79.

66. APERC relied upon its own circular dated 01.08.2014 and an order passed by the Joint Regulatory Body on 04.07.2014. But the Joint Regulatory Body stood dissolved either on 26.07.2014 when the State of Telangana created its own SERC or at least when the State of Andhra Pradesh created a fresh SERC on 01.08.2014.

67. Relying upon a judgment of the Supreme Court in **CBI v. Braj Bhushan Prasad**² it was contended by the learned Advocate General of the State of Andhra Pradesh that the word ‘exclusively’ appearing in Section 105(1) may have to be understood as ‘substantially’ and that even if it is so understood, what remained after sending that which was substantial, relating to the territories of Telangana, should continue to remain with the parent body.

² (2001) 9 SCC 432

68. But the above contention proceeds on the presumption that the TSERC was carved out of a single Commission. When something is carved out of a whole, what is not carved out will continue to be with the remaining part of the whole. But this theory does not apply to the case on hand. The composite State of Andhra Pradesh was organized into two separate States under the Andhra Pradesh Reorganization Act, 2014. Under Section 3 of the A.P. Reorganization Act, a new State known as the State of Telangana comprising of certain territories was formed. Under Section 4, the State of Andhra Pradesh was declared to comprise of the territories of the existing State of Andhra Pradesh other than those specified in Section 3. If the interpretation sought to be given to Section 105 (1) is correct, then there was no necessity even to incorporate Section 4. By the logic that the APERC has applied to Section 105(1), Section 3 itself would have taken care of the contingencies. Therefore, the argument on the basis of the theory of residuary powers cannot be accepted. Hence, we are of the considered view that the order of the APERC attempting to exercise jurisdiction over matters involving generating companies, who have a scheme, which has now become a composite scheme and whose transmission which was otherwise intra State, but which has become interstate after reorganization of the State, is unsustainable.

69. Coming to the orders of the TSERC, they went on the basis of the transfer schemes notified under Sections 23 and 24 of the A.P. Electricity Reforms Act, 1998 and came to the conclusion that the

rights and obligations, claims, compensation or any other claim in respect of power supply of any generator should be in accordance with the ratio specified in the third transfer scheme. **In other words the TSERC assumed to itself the role of King Solemn, to say that every Power Purchase Agreement can be split into two parts on the basis of the third transfer scheme, with one part being decided by the TSERC and the other part being decided by the other State Commission.**

70. In other words, the basis of the order of the APERC is the theory of residuary powers under Section 105(1) of the A.P. Reorganization Act, 2014 and the basis of the order of the TSERC is the theory that every dispute can be vertically split into 2 parts and divided between both the Commissions. Both these views are not in accordance with law.

71. The view taken by the Central Electricity Regulatory Commission on the basis of Section 79(1) (f) alone reflects the correct position in law. Therefore in our considered view, the orders passed by the CERC with regard to jurisdiction are liable to be upheld and the orders passed both by the APERC and by the TSERC are liable to be set aside.

72. One of the arguments raised across the bar was that the orders passed by the APERC before the bifurcation of the State, has become the subject matter of petitions for review or the subject matter of orders of remand. Therefore, some of the learned counsel raised an apprehension that if the present APERC is held not to have

jurisdiction, the fate of the review petitions or the fate of the remand orders would become a big question mark.

73. But we do not think that the review petitions and matters remanded back, would pose a great problem. The petitions for review of the orders passed by the APERC before the date of bifurcation of the States would have to be decided only by that Commission, which now has jurisdiction in respect of the disputes covered by such petitions. In other words, if the disputes in respect of which the petitions for review were pending as on the date of bifurcation relate to any of the matters enumerated in Clauses (a) to (d) of Section 79(1) those review petitions should also be heard only by the Central Commission. The principle analogous to the rule applicable to applications for review in Civil Courts as found in Order XLVIII Rule 5 C.P.C., would naturally apply to such proceedings. Under Order XLVII Rule 5, there is an indication that in circumstances other than those covered by the said Rule, the application for review may be heard by some other Judge. This is based on the doctrine of necessity.

74. If a Court, which passed the decree loses jurisdiction over the subject matter, during the pendency of an application for review, there are only two options available, viz., - (1) to dismiss the same as being without jurisdiction with liberty to the applicant to work out other remedies; or (2) to allow the review to be decided by the Court, which assumed such jurisdiction on account of the supervening event. Though the powers of the Central Commission and the State

Commission, respectively under Section 79 and Section 86 are mutually exclusive, the dispute after bifurcation would naturally fall from one basket to another. Therefore, there is no difficulty for the Central Commission to decide the same. Even if it is not possible for the matter to be transferred from the State Commission to the Central Commission, it is possible for the appellate Tribunal to withdraw the same from the State Commission and send it to the Central Commission. This is due to the fact that under Section 111 (6), the appellate Tribunal has a revisional jurisdiction, *suo motu* and otherwise over the State as well as the Central Commissions. In addition, Section 121 of the Electricity Act, 2003 also confers power upon the appellate Tribunal, to issue such orders, instructions, or directions, to any appropriate Commission for the performance of its statutory functions.

75. Therefore, the difficulties posed by the administration of the provisions of the Act with reference to the jurisdiction of the appropriate Commissions, cannot be taken as an excuse for assuming jurisdiction in favour of any one of the Commissions.

76. Therefore, in fine, the writ petitions are disposed of to the following effect:

(i) W.P.Nos.19894 and 15848 of 2015 challenging the orders of CERC, dated 27.04.2015 are dismissed and the CERC is held entitled to decide the disputes covered by the said order, on merits after giving opportunities to all the parties.

(ii) W.P.No.22850 of 2016 challenging the order of the Central Electricity Regulatory Commission dated 15.06.2016 is also dismissed and the CERC is allowed to proceed further with the hearing of the case on merits.

(iii) W.P.Nos.38140, 38137, 38163, 38169, 35386, 35039, 35401 and 25761 of 2017 challenging the order of the APERC dated 28.09.2016 are allowed and the order of the APERC dated 28.09.2016 is set aside. It is declared that the disputes in relation to which APERC passed the order dated 28.09.2016 fall within the exclusive jurisdiction of the CERC and hence APERC shall transfer all such petitions, if not already done, to CERC. One portion of the prayer made in W.P.No.25761 of 2017 by the two distribution companies now located in the State of Telangana seeking to transfer the cases from APERC to TSERC is also dismissed, since that these disputes should be adjudicated by the CERC.

(iv) W.P.No.14033 of 2017 seeking a declaration that APERC alone has jurisdiction to adjudicate their claim in O.P.SR.No.31 of 2016 and also seeking to set aside the order dated 18.02.2017 is liable to be dismissed for the simple reason that the prayer with which they went before the APERC was to direct two distribution companies one located in Andhra Pradesh and another in Telangana, to make payment of differential tariff as fixed by the Joint Regulatory Body in O.P.No.17 of 2006. If two distribution Companies, one located in Telangana and another located in Andhra Pradesh are to be directed to make some payment, a direction can be issued only by the CERC

and not by any one of the State Commissions. Therefore, W.P.No.14033 of 2017 is dismissed.

(v) W.P.Nos.38217, 45376 and 45378 of 2016 and W.P.No.30274 of 2018 are allowed and the order of the TSERC dated 31.10.2016, insofar as it enables the splitting up of the disputes into two parts for the purpose of entertaining petitions, is set aside.

(vi) W.P.Nos.11353 and 14254 of 2016 are allowed and it is declared that the disputes involving generating companies, relating to regulation of interstate transmission of electricity or determination of tariff for interstate transmission, shall be decided only by the CERC. The disputes relating to regulation of tariff of generating companies which have entered into or which otherwise have a composite scheme for generation and sale of electricity in more than one State shall also fall only within the jurisdiction of CERC. The disputes arising out of single Power Purchase Agreement which the generating companies had with the distribution companies in the composite State of Andhra Pradesh, shall be deemed to have become a composite scheme for the generation and sale of electricity in more than one State under Clause (b) of Section 79(1), if those distribution companies have now got located in the bifurcated States.

(vii) W.P.No.36266 of 2018, does not challenge any order of any of the Commissions. The prayer in the writ petition is for a direction to the Eastern and Southern Power Distribution Companies of Andhra Pradesh and Central Power Distribution Company of Telangana to make payment of the rebates allegedly retained by the respondents

against the terms of the purchase orders. The petitioner has chosen to come up with the above writ petition without approaching any of the Commissions on the ground that the APERC lost jurisdiction after the bifurcation of the State. But in such cases the appropriate remedy open to the petitioner is only to go to CERC. Therefore, W.P.No.36266 of 2018 is dismissed giving liberty to the petitioner to approach the CERC for the redressal of their grievances.

(viii) W.P.No.8143 of 2017 is filed challenging the refusal of the Southern Power Distribution Company of Andhra Pradesh to release payments due to them. The problem of the petitioner is peculiar since the petitioner had an agreement with the Central Power Distribution Company, for carrying out high voltage distribution system certificate on the agricultural feeders in Kurnool District. The project was a *turn key project*. After the bifurcation of the State the Central Power Distribution Company became a part of Telangana State, but the District of Kurnool went to the Southern Power Distribution Company of Andhra Pradesh. But the Southern Power Distribution Company has now refused to release payment on the ground that the work so executed in Kurnool District when it was part of the Central Power Distribution Company, has benefitted a company which has now gone to the State of Telangana. But this logic is flawed, as the place where the project is executed is now in Andhra Pradesh. The dispute that the petitioner has, is not one of the disputes covered by Clauses (a) to (d) of sub-section (1) of Section 79. The petitioner does not appear to be a Power Generating Company. Therefore, the dispute

will also not fall within Section 86(1)(f). Therefore, the writ petition is maintainable and the only ground on which the claim was rejected by the impugned letter dated 07.01.2016 is wholly illegal and unconstitutional. Therefore, W.P.No.8143 of 2018 is allowed. The impugned communication is set aside and the matter is remanded back to the 1st respondent for a reconsideration on merits.

(ix) W.P.No.7965 of 2016 is for a declaration that the CERC is the appropriate forum having jurisdiction to decide the disputes between the petitioner and the four distribution companies. In view of our findings, this writ petition is to be allowed. Accordingly it is allowed directing the TSERC and APERC to transfer the pending proceedings to the file of the CERC for adjudication.

As a sequel thereto, miscellaneous petitions, if any, pending shall stand closed. There will be no order as to costs.

V. RAMASUBRAMANIAN, J

P. KESHAVARA RAO, J

Date:31-12-2018

Js/Ksn/Ak

**HONOURABLE SRI JUSTICE V.RAMASUBRAMANIAN
AND
HONOURABLE SRI JUSTICE P. KESHA RAO**

W.P.Nos.15848 and 19894 of 2015, 7965, 11353, 14254, 22850,
35039, 35386, 35401, 38137, 38140, 38163, 38169, 38217, 45376,
45378 of 2016, 8143, 14033 and 25761 of 2017 and 30274 and
36266 of 2018

(per VRSJ)



31 December, 2018

Js