

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 393/MP/2018

Coram:

**Shri P.K.Pujari, Chairperson
Dr. M.K.Iyer, Member
Shri I.S.Jha, Member**

Date of Order: 9th August, 2019

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for direction Respondent No.1, PTC to establish the Payment Security Mechanism in favour of the Petitioner

And

In the matter of

JSW Hydro Energy Ltd
(formerly Himachal Baspa Power Company Ltd)
4th Floor, NTH Complex, A-2,
Shaheed Jeet Singh Marg,
Qutub Institutional Area,
New Delhi- 110067

.....Petitioner

Vs

1. PTC India Limited
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi- 110066

.....Respondent No. 1

2. Ajmer Vidyut Vitran Nigam Limited
Hathi Bhata, City Power House,
Ajmer - 305001

3. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Janpath,
Jaipur-302005

4. Jodhpur Vidyut Vitran Nigam Limited,
New Power House, Industrial Area,
Jodhpur - 342003

5. Haryana Power Purchase Centre
Shakti Bhawan, Sector - 6,
Panchkula, Haryana - 134109



6. Punjab State Power Corporation Limited
The Mall, Patiala - 147001

7. Uttar Pradesh Power Corporation Limited
Shakti Bhawan, 14, Ashok Marg,
Lucknow - 226001

.....Proforma Respondents

Parties present:

Shri Aman Anand, Advocate, JSW
Shri Aman Dixit, Advocate, JSW
Shri Suraj G., Advocate, JSW
Shri Anurag Agarwal, JSW
Shri Parag Tripathi, Senior Advocate, PTC
Shri Ravi Kishore, Advocate, PTC
Ms. Rajshree Choudhary, Advocate, PTC
Shri K.K.Mishra, PTC
Ms. Swapna Seshadri, Advocate, PSPCL
Ms. Ritu Apurva, Advocate, PSPCL

ORDER

The Petitioner, JSW Hydro Energy Limited has filed this Petition seeking the following reliefs:

“(a) Direct the respondent No. 1 to establish the payment security mechanism in favour of the Petitioner in accordance with the provisions of the Agreement; and

(b) Pass any such further order(s) which this Hon’ble Commission may deem just and proper in favour of the Petitioner.”

Background

2. The Petitioner (*erstwhile Himachal Baspa Power Company Limited*) owns and operates the 1000 MW Karcham Wangtoo Hydroelectric power plant (hereinafter referred to as ‘the Project’) comprising four units of 250 MW each in the State of Himachal Pradesh. The Petitioner has on 21.3.2006 entered into Power Purchase Agreement (PPA) with the Respondent No. 1, PTC for purchase of 880 MW of power from the Project. Thereafter, PTC entered into a Power Sale Agreement (PSA) with PSPCL on 1.9.2006; with the discoms of Haryana on 21.9.2006; with UPPCL on 13.9.2006; and with the discoms of Rajasthan (AVVNL, JVVNL and JoVVNL) on



27.9.2006. Subsequently, the Petitioner entered into a Settlement Agreement with the Respondent, PTC on 5.8.2013 and thereafter executed a second Supplementary agreement with PTC on 1.12.2007 for purchase of additional gross power of 176 MW till 13th September, 2023 and thereafter 116 MW till the term of the existing PPA and corresponding energy at the project bus bar. The PPA dated 21.3.2006, the Settlement agreement dated 5.8.2013 and the Supplementary Agreement dated 1.12.2017 form the entire contract between the Petitioner and the Respondent No.1 PTC. The Petitioner, in support of the aforesaid prayer has made the following submissions in this Petition.

Submissions of the Petitioner

3. The Petitioner in this Petition has submitted the following:

(i) In terms of Article 9.5 of the PPA dated 21.3.2006 and Clause 6.2 of the Settlement Agreement dated 5.8.2013, the Respondent No.1, PTC is obligated to establish a Payment Security Mechanism (PSM) in favour of the Petitioner. This obligation has remained unaltered and has in fact been re-affirmed in clause 6 of the Supplementary Agreement dated 1.12.2017.

(ii) In view of the above, it is the express obligation of Respondent PTC to establish a payment security mechanism in favour of the Petitioner in terms of the agreements. However, the said respondent has failed/ neglected to perform this obligation to establish the payment security mechanism, despite repeated reminders from the Petitioner. This has led to dispute involving the Petitioner, in regard to matter connected with the regulation of tariff of the Petitioner by this Commission in terms of Section 79(1)(b) of the Electricity Act, 2003 (hereinafter referred to as the 2003 Act), the jurisdiction to adjudicate the dispute which lies with this Commission under section 79(1)(f) of the 2003 Act. The Petitioner is not seeking any relief against the proforma respondents.

(iii) The Petitioner vide its letter dated 14.7.2017 had called upon PTC to establish the payment security mechanism in accordance with the agreements. However, PTC vide letter dated 17.7.2017 did not deny its liability to establish



the payment security mechanism, but stated that it was taking up the matter with the ultimate beneficiaries and would revert shortly.

(iv) Since PTC was attempting to evade its obligation by suggesting that the performance of establishing PSM is dependent on Respondents 2 to 7, the beneficiary discoms establishing a payment security mechanism in favour of the Respondent PTC, the petitioner vide letter dated 20.7.2017 reminded PTC that the obligation of establishing the payment security mechanism was not dependent on the beneficiaries establishing a payment security mechanism and called upon PTC to comply with its obligation.

(v) The Respondent PTC neither responded to the said letter nor performed its obligation of establishing the payment security mechanism. Simultaneously, the payments to the Petitioner were being delayed and since the payment security mechanism was not in place, the Petitioner wrote to the Respondent PTC on 5.9.2017 to inter alia establish a payment security mechanism.

(vi) Though the Respondent PTC on 18.9.2017 issued response to other issues raised, there was no response with regard to the demand of establishing a payment security mechanism. Thereafter, the Petitioner on various occasions during meetings and also in writing on 4.4.2018 requested the Respondent PTC to establish the payment security mechanism, but in vain.

(vii) In these circumstances, the Petitioner was constrained to issue a legal notice on 7.12.2018 calling upon the Respondent PTC to establish the PSM. In response, the Respondent PTC on 13.12.2018 has stated that it is in active discussions with the counsel.

(viii) The Respondent, PTC has failed to perform its obligation of establishing a Payment Security Mechanism under the said agreements. The payments to the Petitioner are always delayed and since the PSM is not in place, the Petitioner has been constrained to approach this Commission for protection of its rights and seeking directions on Respondent No.1 PTC for performance of its obligations under the agreements.

In the above background, the Petitioner has filed this Petition with the prayers as stated in para 1 of this order.



4. The Petition was admitted on 7.2.2019 and the Commission issued notice to the Respondents with direction to complete pleadings. The Respondent, PTC vide reply affidavit dated 28.2.2019 has raised the issue of 'maintainability' of the Petition. The Petitioner vide affidavit date 8.3.2019 has filed its rejoinder to the said reply. Thereafter, by affidavit dated 18.3.2019, the Petitioner filed supplementary rejoinder to the reply dated 28.2.2019 of the Respondent PTC.

Submissions of the Respondent No.1 PTC

5. The Respondent, PTC in its reply dated 28.2.2019 has submitted that the petition filed under section 79(1)(f) of the 2003 Act is not maintainable before this Commission as no matter or issue, with respect to 'regulation of tariff' under Section 79(1)(b) of the 2003 Act arises or has been raised by the Petitioner. The Respondent has also submitted that the Petitioner is actually seeking an order towards specific performance of certain clauses of the agreement. The Respondent has further submitted that the Petitioner is aggrieved of a limited contractual issue and is seeking the enforcement of particular clause(s) of the agreement between the parties which pertains to 'Payment Security Mechanism' and is not aggrieved by an issue or matter pertaining to 'regulation of tariff.' The Respondent while reserving its right to make detailed submissions on merits, has stated that the enforcement of a particular clause of the PPA with respect to PSM is not a matter covered under section 79(1)(b) as it does not pertain to 'regulation of tariff' and therefore the invocation of adjudicatory jurisdiction of the Commission under section 79(1)(f) does not arise and therefore this Commission has no jurisdiction to adjudicate the instant Petition. Accordingly, the Respondent has submitted that the present Petition is without jurisdiction and is therefore not maintainable.



Rejoinder of Petitioner

6. The Petitioner vide its affidavit dated 8.3.2019 has submitted that the Petitioner has a composite scheme for generation and sale of electricity in more than one State and falls within the jurisdiction of this Commission under section 79(1)(b) of the 2003 Act in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case (Civil Appeal Nos.5399-5400 of 2016 and others). It has further submitted that the jurisdiction of the Commission is not restricted only to disputes affecting the rate of tariff but includes any dispute relating to terms & conditions of supply including billing, payment, surcharge, early payment rebate, termination of supply, establishment of payment security mechanism etc. The Petitioner has added that the contention of the Respondent PTC that the jurisdiction of this Commission is restricted to disputes which affect the fixed or variable charges payable to the Petitioner and nothing else is misplaced and contrary to the judgments of the APTEL in BSES Rajdhani case (judgment dated 4.9.2012 in Appeal No. 94 & 95 of 2012) and the Judgment of APTEL dated 14.7.2016 in Appeal No. 306/2013. In its supplementary rejoinder dated 18.3.2019, the Petitioner has submitted that non-timely payment and non-establishment of the payment security mechanism as per agreement between the Petitioner and Respondent PTC is a clear contravention of the terms of the trading license of Respondent PTC. It has stated that in the present case, there has been non-compliance of Regulation 7(h) of the Trading License Regulations, 2009 by Respondent PTC and the same amounts to serious contravention under Regulation 14A and needs to be taken cognizance of by this Commission and necessary penal action under Regulation 14B and C of the said regulations deserves to be taken against the Respondent PTC for the said contravention. Accordingly, the Petitioner



has submitted that the objections of the Respondent as regards jurisdiction of this Commission is devoid of merits and may be dismissed.

7. The Petition was heard on 28.5.2019 and the Commission vide its interim order dated 6.6.2019 directed the following:

“9. Thus, in terms of Article 9.5 of the PPA dated 21.3.2006, Payment Security Mechanism in the form of monthly revolving irrevocable LC is to be provided to the Petitioner by PTC. Also, in terms of Regulation 7(h) of the Trading License regulations, a statutory obligation is cast on PTC to carry out trading in accordance with the terms and conditions and to take such safeguards as considered necessary, with regard to Payment Security Mechanism. Admittedly, in the present case, the Respondent PTC has not established any Payment Security Mechanism in favour of the Petitioner in line with the above provisions. Therefore, pending adjudication of the dispute, we direct the Respondent PTC to open a monthly revolving irrevocable LC without linkage to back to back LCs in favour of the Petitioner on or before 4.6.2019 and to inform the same to the Commission by an affidavit. Accordingly, the LCs received from the beneficiaries Rajasthan and Punjab, stated to have been handed over to the Petitioner, may be returned by the Petitioner to PTC.”

8. Aggrieved by the above order, the Respondent, PTC filed W.P.(C) No. 6819/2019 before the Hon’ble High Court of Delhi and the Hon’ble Court vide order dated 19.6.2019 disposed of the said Writ Petition as under:

“The learned counsel for the petitioner states that they will file a reply to the petition filed by the respondent No.2 by 30.6.2019 and the petitioner shall not take any adjournment before the commission when the main petition is listed for argument.

Taking the above said statement on record, the present petition stands disposed of. All pending applications, if any, also stands disposed of.

The Central Electricity Regulatory Commission is requested to dispose of the main petition expeditiously, preferably, if possible, within six weeks from today.”

9. During the hearing of this Petition on 2.7.2019, the learned counsel for the Petitioner and the learned Senior Counsel for the Respondent PTC made detailed submissions on ‘maintainability’ of the Petition on the issue of ‘jurisdiction’ and on ‘merits’. The learned counsel for PSPCL submitted that it has established Letter of Credit (LC) as payment security mechanism in favour of PTC for the quantum of power contracted under the PSA. At the request of the learned counsel for the parties, the Commission after directing the parties to file their written submissions



reserved its order in the Petition. In compliance with the above direction, the Petitioner and the Respondents PTC and PSPCL have filed their written submissions in the matter.

Written submissions of Petitioner

10. The Petitioner in its written submissions dated 9.7.2019 has mainly submitted the following:

(a) APTEL in its judgment dated 4.9.2012 in Appeal Nos. 94 & 95 of 2012 (BRPL & BYPL v DERC & anr) and judgment dated 14.7.2016 in Appeal No. 306/2013 (Maithon Power Ltd v DERC & ors) had held that the adjudication of disputes covered under clauses (a) & (b) of Section 79(1) read with Section 79(1)(f) would necessarily involve all terms related to tariff such as billing, payment, consequences of early payment by way of grant of rebate, payment of surcharge, termination & suspension of supply, payment security mechanism such as opening of LC, etc. The Petition is, therefore, maintainable.

(b) The existence of a 'composite scheme' for generation and sale of electricity in more than one State for the purpose of jurisdiction under section 79(1)(b) has not been disputed by Respondents. The judgments of APTEL dated 7.4.2016 in Appeal No. 100/2013 (UHBVNL vs CERC & ors) and the Hon'ble Supreme Court in Energy Watchdog case on composite scheme, cannot control the decision on merits of a dispute under Section 79(1)(f) of the 2003 Act.

(c) The contention of PTC that PSM clause under the PSAs is identical or mirror the PSM clause under the PPA is wrong. A bare reading of PSM clause under the PPA and PSAs would reveal that the two are totally distinct. The PPA envisages opening of one LC by PTC in favour of the Petitioner whereas under the PSAs, PTC has agreed to receive four LCs in its favour from downstream beneficiaries. Similarly, PTC is obligated to provide monthly revolving LC to the Petitioner under the PPA, whereas the beneficiary discoms have option of opening a monthly revolving LC or a weekly revolving LC in favour of PTC. Moreover, there is a three layered PSM under the PPA viz (i)



monthly revolving LC, (ii) lien on revenue collection account and (iii) obligation of PTC to invoke PSM under PSAs at the Petitioner's instruction. In contrast, PSM under the PSA has only two layered security mechanism i.e. LC and creation of escrow facility, with right to PTC to invoke either in any order of precedence.

(d) Even otherwise, the obligations of PTC to establish PSM in favour of the Petitioner cannot be contingent upon the discoms establishing LC in PTC's favour. Even though the PSM clause under the PPA is not expressly stated to be contingent on the downstream procurers creating PSM under the PSAs in favour of PTC, such a contingency should be implied to give commercial efficacy to the transaction, considering that PTC is only a trader.

(e) Regulation 7(h) of Trading License Regulations, 2009 recognizes safeguards against payment receivable by PTC from the buyers and the safeguards to be created by PTC for securing payments due from it to the sellers. While the former is discretionary, the latter is a mandatory obligation of the trading licensee. In terms of the said regulation, PTC is obligated to ensure timely payment of dues to the Petitioner either through LC or any other appropriate mechanism mutually agreed between parties.

(f) The APTEL in its judgment dated 20.7.2012 in Appeal No. 130 of 2011 (JPVL v HERC & ors) had observed that the PPA and the PSA are not back to back agreements.

Written submissions of the Respondent PTC

11. The Respondent, PTC vide affidavit dated 9.7.2019 has filed its written submissions and contended as under:

(a) Though the Petition has been filed under Section 79(1)(b) of the 2003 Act based on a composite scheme, the Petitioner has sought relief only against PTC and the same is not covered under provisions of sections 79(1)(b) & 79(1)(f). The supply of power by the Petitioner to the beneficiary discoms through PTC is stated to be a 'composite scheme' by the Petitioner, which is attracted under Section 79(1)(b) in terms of Energy Watchdog case. Therefore, PTC alone cannot be made liable without a similar reciprocal



action given on part of the beneficiaries for PSM.

(b) The dispute sought to be raised by the Petitioner does not, in any manner, attract the provisions of section 79(1)(b) as the same does not relate to 'regulation of tariff'. The PPA and the PSAs are back to back arrangements as the PSAs had specific reference to the PPA and incorporated the terms and conditions of the PPA. Therefore, the PPA and PSAs are inter-dependent and inter-connected.

(c) One of the conditions precedent in the PPA was that PTC should have executed PSA with the purchasers, which specifically shows that conditions precedent in the PPA have to be duly satisfied, pursuant to which PSA will become effective. Moreover, PPA is attached as annexure to the PSA, thereby implying that PPA is an integral part of the PSA.

(d) Clause 9.5.8(c) of the PPA pertaining to PSM provides that in the event that the company is unable to realize the payments due from PTC under this agreement, PTC shall be obliged to invoke the payment security mechanism under the power sale agreement and discharge its payment obligation under this agreement. It is evident from this clause that the Petitioner was aware and recognized the fact that discoms will necessarily establish the PSM in favour of PTC and PTC may invoke the same in case of non-payment to the Petitioner. The payment clauses in the PPA and PSAs are such that PTC has to make payments to the Petitioner only after receipt of the same from the purchasers.

(e) The role of PTC is only of the trader without assuming any of the financial risks. The Hon'ble supreme Court in *Satya Jain v Anis Ahmed Rushdie* [(2013) 8 SCC 131] had observed that in addition to the words in a commercial instrument, the Court must consider the commercial purpose of the instrument and in considering that purpose, must rely upon its own experience of contracts of similar nature.

(f) The trader is only a link in the whole of transaction of flow of electricity from the generating company to the ultimate consumer and in any transaction, the risk and liabilities cannot stop at the door of the trader as it



will derail the whole scheme of the transaction. Accordingly, if a direction is issued only to PTC to open LC without directing the discoms to open similar LC, it will not be in line with the scheme of the Act as then PTC would remain remediless, more so when the discoms have been made party to this Petition by the Petitioner itself.

(g) As the role of the trader is defined and the margin is also regulated, the trader does not have the capacity to take upon itself disproportionate risk, when the transactions are on back to back basis.

(h) In terms of Regulation 7(h), the Petitioner being a trading licensee has a statutory right to be safeguarded by way of a payment security mechanism from the buyers/ discoms. It is well settled principle of interpretation that Courts, while interpreting statues must interpret the provisions which are in consonance with the legislative intent.

(i) It is an agreed position that payment and payment security mechanism bring on a back to back basis, that PTC is under an obligation to establish the payment security mechanism and make the payment on receipt of the same from the Respondent discoms in terms of the Trading License Regulations and accepted provisions of the PPA and PSA.

(j) As per directive of MOP, GOI dated 28.6.2019, the distribution licensees/ Procurers of power are obligated to open LC. PTC is not the Procurer of power but the Respondent discoms are the Procurers of power and are therefore obligated to open the LC.

(k) The role of PTC as a conduit in the entire transaction has also been noted in number of judgments viz. PTC v JPVL [2012 (130) DRJ 351], PTC v UERC & ors [2011 ELR (APTEL) 81], Lanco Power Ltd v HERC & ors. [2011 ELR (APTEL) 1714], PTC v UERC [2016 ELR (APTEL) 1176], MB Power (MP) Ltd v UPPCL [Petition No. 224/MP/2018], BSPHCL v PFC [Petition No. 88/AT/2019]

(l) In the present case, the Petitioner has sought relief against the trader PTC without involving the discoms and in such scenario, the provisions of Sections 79(1)(b) & (f) are not attracted.



Accordingly, the Respondent PTC has submitted that the Petition is not maintainable and the prayer of the Petitioner for establishment of PSM may not be granted without a back to back establishment of PSM.

Written Submissions of the Respondent PSPCL

12. The Respondent vide affidavit dated 9.7.2019 has submitted that it has entered into PSA dated 1.9.2006 with the Respondent, PTC for supply of power from the project for a quantum of 200 MW. It has also submitted that the obligation of PSPCL is confined to clauses 4.2 and 9.5 of the said PSA and in terms of this, PSPCL vide letter dated 7.3.2019 duly issued LC for an amount of ₹12.66 crore in favour of the Respondent PTC covering the period 7.3.2019 to 6.3.2020. The Respondent, PSPCL has further submitted that it has discharged its obligations qua the PSM as per its PSA with Respondent PTC and any attempt on the part of PTC to transfer the liability as accruing upon itself onto PSCPL is patently wrong and against the contracts entered into between various stakeholders.

Maintainability

13. Based on the submissions of the parties and the documents available on record, the first issue to be considered by us is '*whether the dispute raised by the Petitioner is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003*'.

14. The Respondent PTC has submitted that the prayer of the Petitioner in the Petition is for a direction on the Respondent PTC to establish PSM in favour of the Petitioner and as such the dispute does not in any manner relate to the regulation of tariff and the provisions of Section 79(1)(b) are not attracted. Accordingly, the Respondent PTC has submitted that the present Petition filed under Section 79(1)(f) is not maintainable before this Commission. *Per contra*, the Petitioner has



contended that the jurisdiction of this Commission under Section 79(1)(f) to adjudicate disputes arising out of contractual terms in situations where tariff is regulated by this Commission under Section 79(1)(a) or (b) is no longer *res integra*. The Petitioner has referred to the judgments of APTEL in BSES Rajdhani Power Ltd v DERC & anr (judgment dated 4.9.2012 in Appeal Nos. 94& 95/2012), BSES Rajdhani Power Ltd v CERC (judgment dated 24.1.2013 in Appeal Nos. 82 & 90/2012) and MPL v DERC & ors (judgment dated 14.7.2016 in Appeal No. 306/2013) and has submitted that it has been settled in these decisions that all the terms related to tariff such as billing, payment, consequences for delay in the payment of surcharge, rebate for payment, termination of supply including establishment of payment security mechanism etc. are matters connected with regulation of tariff and any dispute regarding these terms will fall within the exclusive jurisdiction of this Commission under Section 79(1)(f) of the 2003 Act.

15. The matter has been considered. Section 79 of the 2003 Act provides for the following functions of the Commission:

“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,”

16. Sub-section (b) of Section 79(1) of the 2003 Act provides that this Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a ‘composite scheme’ for generation and sale of electricity in more than one State. Section 79(1)(f) is concerned about adjudication of disputes involving generating company or transmission licensee in respect of clauses (a) to (d) of the said Section. On a plain reading of this provision, it emerges that the dispute must concern the regulation and determination of generation tariff of the generating stations owned or controlled by the Central Government or those having a composite scheme for generation and supply to more than one State, determination of tariff for inter-State transmission of electricity and regulation of inter-State transmission of electricity.

17. In the present case, the Petitioner has entered into Power Purchase Agreement (PPA) with the Respondent, PTC on 21.3.2006 which in turn has executed separate Power Supply Agreements (PSAs) with the Respondent discoms situated in the State of Haryana, Uttar Pradesh, Punjab and Rajasthan (Respondents 2 to 7 herein) respectively. It is, therefore, evident that the Petitioner is supplying electricity to multiple States from the same generating station and such supply is governed by binding arrangements, namely the PPA & the PSAs. Recital (E) & (F) of the PPA dated 21.3.2006 is extracted hereunder:

“(E) PTC will enter into suitable arrangements with one or more Purchasers, for sale of contracted power from the Project.

(F) A petition for approval of tariff, if required, for sale of the generated power in accordance with this Agreement shall be filed by the Company before the Appropriate Commission and PTC shall extend all possible assistance and cooperation to the Company for the same. The tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the Contracted Power and Contracted Energy”



18. The Hon'ble High Court of Delhi vide its judgment dated 15.5.2012 in OMP No. 677/2011 (PTC (I) Limited v JPVL) had held that when power is supplied by a generating company to a distribution licensee through a trading licensee for ultimate consumption of consumer, the tariff would be subject to the jurisdiction of the Regulatory Commission. In this case, electricity is being supplied from the generating station of the Petitioner to distribution licensees located in various States through the Respondent PTC based on the PPA and the PSAs. Accordingly, the Commission by its order dated 30.3.2017 had determined the tariff of the generating station for the period 2014-19 in terms of the provisions of the 2014 Tariff Regulations, ostensibly under Section 79(1)(b) of the 2003 Act. Therefore, the adjudication of the dispute is within the jurisdiction of this Commission under Section 79(1)(f) of the 2003 Act. Section 79(1)(f) has got a wider scope and is not merely confined to the determination of tariff. The APTEL in its judgment dated 4.9.2012 in Appeal Nos. 94 & 95 of 2012 had concluded that billing, payment, rebate, surcharge, payment security mechanism etc. are terms and conditions of supply of electricity. The relevant para of the judgment is extracted as under:

“32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing but terms and conditions of supply.

19. The Respondent PTC has submitted that the aforesaid judgment in BRPL case is not applicable to the present case since the dispute therein was between the generator (who are Central utilities) and the discoms, without the involvement of



any trader. The Respondent PTC has added that since the Petitioner in this case has sought relief against the trader PTC without the involvement of discoms, who are only proforma parties, the provisions of Section 79(1)(b) and 79(1)(f) are not attracted. This submission of the Respondent is misplaced. In the said judgment, APTEL had observed the following with regard to the jurisdiction of this Commission under Section 79(1)(f) of the 2003 Act. The relevant para of the judgment dated 4.9.2012 is extracted below:

“34. Section 79(1) (f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act.”

20. Though the said judgment has been rendered in the context of supply of power by NTPC to BRPL & BYPL from its generating stations whose tariff is determined by this Commission under Section 79(1)(a) of the 2003 Act, the jurisdiction of the Commission also extends to regulating the tariff of generating companies making inter-State supply of power through mutually negotiated PPA or other contractual arrangements under Section 79(1)(b) of the said Act.

21. Also, the jurisdiction of this Commission would lie in the present dispute in terms of the judgment of APTEL in Lanco Amarkantak Power Pvt. Ltd V MPERC [2010 ELR (APTEL) 161], wherein, APTEL had considered the following question:

“13...Whether the Madhya Pradesh State Commission has got jurisdiction to adjudicate upon the disputes between the Appellant, a generating company situated outside Madhya Pradesh and the Respondent (PTC) which has not been granted license by the Madhya Pradesh State Commission?”

22. Interpreting Section 86 (1)(f) of the 2003 Act, APTEL held as follows:

“14. (ii) The above provision with the opening words the State Commission, must be construed in the context of the territorial jurisdiction of the Regulatory Commission of each State. The word “the licensee” as referred to in Section 86(1)(f) has to be construed to mean such licensees which have been granted a trading licence or such licensee who has been granted a trading licence by the particular State Commission seeking to assume jurisdiction over the dispute. This



means, the State Commission can assume jurisdiction in respect of the disputes arising between a generating company and an electricity trader operating under a trading licence granted by it.....”

23. APTEL held that the State Commission can assume jurisdiction in respect of the dispute arising between a generating company and an electricity trader operating under a trading licensee granted by the concerned State Commission. In this case, the inter-State trading license has been granted by this Commission to the Respondent PTC based on which PPA dated 21.3.2006 was executed with the Petitioner. Since, the Respondent PTC has entered into the said PPA on the strength of the license issued by this Commission, the Respondent PTC cannot be said to operate as a trading licensee under a license issued by any State Commission in so far as the transaction involving the present dispute is concerned. Based on the said decision of APTEL, we hold that this Commission is competent to adjudicate the dispute between the Petitioner and the Respondent PTC. In the above background and considering the fact that supply of electricity by the Petitioner to the Respondent PTC, is an inter-State supply and the dispute regarding establishment of PSM relate to the terms and conditions of supply of electricity, this Commission will have the jurisdiction to adjudicate the dispute between the Petitioner and the Respondent, PTC. The Petition is therefore ‘maintainable’ and the Commission has the jurisdiction to adjudicate the dispute in terms of Section 79(1)(f) read with Section 79(1)(b) of the 2003 Act.

Payment Security Mechanism

24. Having decided that the Petition is maintainable, the next issue for consideration is *‘whether the Respondent PTC is liable to establish Payment Security Mechanism in terms of the PPA without reciprocal action on part of the Respondent discoms to establish PSM’*. The Petitioner has submitted that in terms



of Article 9.5 of the PPA dated 21.3.2006 and Clause 6.2 of the Settlement Agreement dated 5.8.2013, the Respondent PTC is obligated to establish a PSM in favour of Petitioner. The Petitioner has submitted that it is the express obligation of the Respondent PTC to establish PSM in favour of the Petitioner in terms of the above said agreements and the failure of the said respondent to perform this obligation has led to the present dispute. According to the Petitioner, the existence of a composite scheme for generation and sale of electricity in more than one State under Section 79(1)(b) does not mean that all obligations of the Respondent PTC automatically become contingent on the Respondent discoms first performing their obligations under the PPAs. Per contra, the Respondent PTC has mainly contended that the PPA and PSAs are on a back to back basis and accordingly the Respondent PTC cannot be made liable to establish the PSM in the absence of a similar/ reciprocal action on the part of the Respondent discoms (the Respondents 2 to 7) herein. It has further submitted that the transaction for supply of power to various discoms through the Respondent PTC is a 'composite scheme' under Section 79(1)(b) as interpreted by the Hon'ble Supreme Court in Energy Watchdog case, and hence the Petitioner is not entitled to take recourse against PTC only.

25. The matter has been examined. While the Petitioner has submitted that the performance of obligations of the Respondent PTC in terms of the PPA is not contingent upon the Respondent discoms first performing their obligations, the Respondent PTC has argued that there is nexus between the PPA and the PSAs. As stated earlier, the Petitioner has executed PPA with the Respondent PTC and the Respondent PTC had entered into separate PSAs with the Respondents 2 to 7 for onward sale of the contracted power. Therefore, in terms of Section 79(1)(b) of the



2003 Act read with the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the Petitioner has a composite scheme for generation and sale of power to more than one State. However, the existence of a composite scheme, in our view, do not automatically follow that the obligations of the Respondent PTC under the PPA is contingent upon the performance of obligations by the Respondent discoms under their respective PSAs. As rightly pointed out by the Petitioner, the jurisdiction of this Commission under Section 79(1)(b) of the 2003 Act cannot control the decision on merits of a dispute under Section 79(1)(f) of the 2003 Act. In other words, even if there exists a composite scheme with back to back arrangements for the purpose of determination of tariff, it needs to be examined for the purpose of adjudication of the present dispute, whether the provisions of the PPA and PSAs, particularly the provisions relating to PSM, are inextricably interconnected or independent of the other.

26. The Petitioner has referred to the judgment dated 20.7.2012 of APTEL in Appeal No.130/2011 (JPVL Vs HERC & ors) and submitted that APTEL, after examining the terms of the PPA dated 21.3.2006 and the Haryana PSA dated 21.9.2006 had concluded that the PPA and PSAs are not back to back agreements. Whereas, the Respondent PTC has submitted that the issue before APTEL was whether HERC had the jurisdiction to decide the dispute between a generating company and the inter-State trading licensee (Respondent PTC). We notice that the case before APTEL related to the jurisdiction of the Haryana Electricity Regulatory Commission (HERC) to adjudicate the disputes between the generating company (the Petitioner herein) and the distribution licensee (Respondent HPPC) in terms of Section 86(1)(b) read with Section 86(1)(f) of the 2003 Act. APTEL while deciding that HERC had no jurisdiction in the matter had also observed that the PPA dated



21.3.2006 and the Haryana PSA dated 21.9.2006 were not back to back agreements and that there was no privity of contract between the Petitioner and the Haryana discoms. In the present case, the prayer is for adjudication of disputes under the PPA dated 21.3.2006 between the Petitioner and Respondent PTC. Accordingly, we examine if Article 9.5 of the PPA relating to the establishment of PSM by the Respondent PTC is impliedly contingent upon reciprocal action by the Respondent discoms.

27. With regard to the Payment Security Mechanism under Article 9.5 of the PPA, the Petitioner has submitted that a bare reading of the PSM clause under this Article and those under the PSAs would reveal that these are totally different clauses and are not identical. Referring to Article 9.5 of the PPA, the Settlement Agreement dated 5.8.2013 and the Supplementary Agreement dated 1.12.2017, the Petitioner has contended that the PSM available to PTC under the PSAs do not mirror the PSM to be provided by PTC under the PPA and the obligation of PTC under the PPA is not contingent upon PTC first receiving the security from the Respondent discoms. It has submitted that the issue has to be adjudged with reference to the terms of the PPA only.

28. Per contra, the Respondent PTC has submitted that the PPA and the PSAs are back to back arrangements, as the PSAs have specific reference to the PPA and also incorporates the terms and conditions mentioned in the PPA. Referring to the various clauses of the PPA and PSAs, the Respondent PTC has submitted that there is a clear nexus between the transaction under PPA entered into by the Petitioner with PTC and the transaction under PSAs entered into by PTC with the Respondents. Accordingly, Respondent PTC has submitted that PTC in terms of Article 9.5 of the PPA was under a contractual obligation to open a Letter of Credit



(LC) only on receipt of the same from the Respondent discoms in terms of the PSA and provide the same to the Petitioner.

29. In the light of the above said contentions, we now examine if the provisions of PSM in the PPA and PSAs are interlinked to each other. Article 9.5 of the PPA and PSA relating to Payment Security Mechanism is extracted hereunder:

“Article 9.5 of the PPA

9.5 Payment Security Mechanism

9.5.1 PTC shall provide to the Company a monthly revolving and irrevocable Letter of Credit opened and maintained by PTC which may be drawn upon by the Company in accordance with Articles 9.5.2 in respect of all payments due under this Agreement. :

9.5.2 By one (1) Month prior to the COD of the first (1st) Unit, PTC shall through a scheduled bank at Delhi, open a monthly. revolving and irrevocable Letter of Credit valid for one(1) year, in favour of the Company, to be made operative from the COD of the first (1st) Unit under this Agreement. Notwithstanding PTC's obligations under Article 9.5.1, the value of L/C will be computed separately for each half year period on the basis of the Contracted Energy figures for the respective half year period in accordance with Schedule D. Such value of L/C for each half year shall be one (1) Month's peak Monthly Bill for that half year.

xxxx

Provided that the Company shall not draw upon such Letter of Credit prior to the Due Date, unless such drawal is made on the request of PTC in accordance with Article 9.3.5;

9.5.3 PTC shall require the scheduled bank issuing the irrevocable Letter of Credit to intimate the Company regarding establishing of such irrevocable Letter of Credit to the Company in writing.

9.5.4 If PTC fails to pay a Monthly Bill or part thereof within and including the Due Date, then, the Company may draw upon the Letter of Credit for an amount equal to such Monthly Bill or part thereof plus Payment Surcharge, if applicable, by presenting to the scheduled bank, issuing the Letter of Credit, the following documents:

- a) a copy of the Monthly Bill which has remained unpaid by PTC;***
- b) a certificate from the Company to the effect that the bill at item (i), or specified part thereof, above has remained unpaid beyond the Due Date; and***
- c) calculations of applicable Payment Surcharge in accordance with Article 9.3.6.***

9.5.5 PTC shall ensure that the Letter of Credit shall be renewed not later than 30 Days prior to its expiry.

9.5.6 All costs relating to opening and renewal of the Letter of Credit, including commitment and usance, negotiation and drawal of bills against such Letter of Credit shall be borne by PTC. If confirmation of the Letter of Credit is



required by the Company, charges towards the same shall be borne the Company.

9.5.7 By mutual agreement between the Company and PTC, the Letter of Credit may also be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument.

9.5.8 (a) PTC shall ensure that payments due from the Purchaser under the Power Sale Agreement shall be received in a Bank Account (hereinafter referred to as the "Revenue Collection Account"), maintained by PTC in a scheduled Bank at New Delhi ("Designated Bank").

(b) The Company shall during the Term of this Agreement have a lien on the amounts due and received in the Revenue Collection Account. PTC shall give irrevocable instruction in accordance with Article 9.5.2 to the Designated Bank that in the event PTC does not replenish the L/C or if enforceable L/C is not in place to secure payment to the Company at any time for whatever reason, the Designated Bank shall forthwith cease to honour any withdrawal or transfer instructions from PTC, and make only payments due to the Company in accordance with this Agreement. Intimation by the managing director/ chief executive officer of the Company evidencing PTC's failure to replenish the L/C along with the documents set out in Article 9.5.4, shall be taken as final and binding instructions for the Designated Bank to release the amounts due to the Company.

(c) In the event the Company is unable to realize the payments due from PTC under this Agreement by recourse to the Revenue Collection Account, PTC shall be obliged to invoke the Payment Security Mechanism under the Power Sale Agreement and discharge its payment obligations under this Agreement.

Article 9.5 of the PSA

9.5 Payment Security Mechanism

9.5.1 In respect of the Purchaser's payment obligations under this Agreement, the Purchaser shall no later than one (1) month prior to the Required COD of the first Unit, provide PTC with the following Payment Security Mechanism as notified by PTC pursuant to Section 9.5.2 and the Purchaser shall throughout the Term of Agreement, maintain such Payment Security Mechanisms as notified by PTC from time to time pursuant to Section 9.5.2:

- a) Purchaser Letter of Credit (as set out in Section 9.5.3 through 9.5.10); and an
- b) Escrow facility on the receivables of the Purchaser (in accordance with Section 9.5.11).

The Purchaser Letter of Credit and the escrow facility shall be opened and maintained together from the COD till the Expiry Date. If the Purchaser fails to pay a Purchaser Monthly Bill or Purchaser Weekly Bill or a PSA Supplementary Bill on or prior to the PSA Due Date, PTC shall have the right to call upon either the Purchaser Letter of Credit, in accordance with Section 9.5.6, or the escrow facility, in accordance with Section 9.5.11(iv), in any order of precedence as it deems fit on each occasion. However, in the event PTC is unable to fully receive amounts due to it from the



Purchaser on calling either of the above instruments, PTC may call on the other instrument also for the same purpose.

- 9.5.2 During the Term of Agreement, PTC may opt for a Payment Security Mechanism, other than the Payment Security Mechanism then in force as specified at Section 9.5.1 above or any other superior instrument as may be mutually agreed between the Parties. For the avoidance of doubt it is clarified that such right may be exercised by PTC from time to time during the Term of Agreement. Within thirty (30) days of receipt of such notice from PTC, the Purchaser shall provide, the Payment Security Mechanism required by PTC.
- 9.5.3 Pursuant to Section 9.5.1(i) above, the Purchaser shall provide a Payment Security Mechanism to PTC in the form of revolving and irrevocable Purchaser Letter of Credit as specified below:
- a) If the Purchaser exercises the option specified under Section 9.2.1 (i), then
xxxx
 - b) If the Purchaser exercises the option specified under Section 9.2.1 (ii), then
xxxx
- 9.5.4 The Purchaser Letter of Credit shall be drawn on a scheduled bank in favour of PTC, opened and maintained by the Purchaser, which may be drawn upon by PTC in accordance with Section 9.5.2 through 9.5.7. The initial Purchaser Letter of Credit shall be opened not later than one (1) month prior to the Required COO of the first Unit. One month prior to the expiry of the Purchaser Letter of Credit specified at Section 9.5.3 (a)(i) and Section 9.5.3 (b)(i), the Purchaser shall instruct the bank for the continuation of such revolving and irrevocable Purchaser Letter of Credit for a further term of twelve (12) Months and a copy of such instruction shall be given to PTC. Subject to PTC's right to opt for the Payment Security Mechanism pursuant to Section 9.5.2, such Purchaser Letter of Credit shall be maintained throughout the Term of Agreement. The Purchaser shall instruct the bank to notify PTC if the Purchaser is not able to renew or recoup the Letter of Credit, and a copy of such instruction shall be given to PTC.
- 9.5.5 The Purchaser shall cause the scheduled bank issuing the Purchaser Letter of Credit to confirm the bank's acceptance of such Purchaser Letter of Credit to PTC in writing at least one (1) month prior to the Required COO of the first Unit and similarly for each renewal/establishment of the Purchaser Letter of Credit during the remainder of the Term of Agreement.
- 9.5.6 If the Purchaser fails to pay a Purchaser Monthly Bill or Purchaser Weekly Bill or a PSA Supplementary Bill on or prior to the PSA Due Date, PTC may draw upon the Purchaser Letter of Credit for an amount equal to such Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary Bill plus Payment Surcharge, in accordance with Section 9.3.8 above, by presenting to the scheduled bank, issuing the Purchaser Letter of Credit, the following documents:
- (a) a copy of the Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary Bill which has remained unpaid by the Purchaser;



- (b) a certificate from PTC to the effect that the Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary Bill or specified part thereof, has remained unpaid beyond the PSA Due Date; and
- (c) calculations of Payment Surcharge mentioned above in Section 9.3.7.

9.5.7 If at any time, such Purchaser Letter of Credit amount fails short of the amount specified in Section 9.5.3, the Purchaser shall restore such shortfall immediately.

XXXX

9.5.11 (i) Pursuant to Section 9.5.1(ii) above, in addition to the Purchaser Letter of Credit provided by the Purchaser in accordance with Sections 9.5.3 through 9.5.10 above, the Purchaser shall also provide PTC with an escrow facility from the bank through which all its receivables, including all its revenue from various collection centres inclusive of capital receipts, proceeds from investments, subsidy and any other source, flow entirely into an account maintained by the Purchaser (such bank being the "Escrow Agent" and such account being the "Escrow Account"). The Parties agree that PTC, Purchaser and the Escrow Agent shall execute (the Purchaser to cause the Escrow Agent to execute) an escrow agreement in accordance with the terms and conditions provided in Annexure B (which provides for a detailed procedure for establishment and operation of the Escrow Account).

(ii) The Parties shall identify the minimum and maximum limit from where the PTC escrow facility shall start in accordance with the parameters detailed in Annexure-B. For this purpose, the Purchaser shall furnish PTC with a certificate from its statutory auditors certifying the quantum of monthly receivables that were received in the Escrow Account during the twelve months prior to the date of signing of this Agreement. The Purchaser shall also make available to PTC all records, as PTC may require, for verifying the same.

(iii) Further the Purchaser also agrees that during the Term of Agreement, the Purchaser shall no later than thirty (30) days after the completion of each annual audit with respect to the Purchaser's accounts furnish PTC with a certificate from its statutory auditors certifying the quantum of monthly receivables that were received in the Escrow Account during the previous financial year (which shall be a period commencing from 1 April of any year and ending on immediately next 31 March).

(iv) If the Purchaser fails to pay a Purchaser Monthly Bill or Purchaser Weekly Bill or a PSA Supplementary Bill on or prior to the relevant PSA Due Date, PTC may request the Escrow Agent for payment from the Escrow Account, of an amount that is equal to such Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary Bill plus Payment Surcharge, in accordance with Section 9.3.8 above, by presenting to the Escrow Bank, the following documents:

- (a) a copy of the Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary Bill which has remained unpaid by the Purchaser.
- (b) a certificate from PTC to the effect that the Purchaser Monthly Bill or Purchaser Weekly Bill or PSA Supplementary



Bill or specified part thereof, has remained unpaid beyond the PSA Due Date; and

(c) calculations of Payment Surcharge mentioned above in Section 9.3.8.

(v) All costs, fees and other payments required in connection with or arising out of any arrangement of escrow agreement or the Escrow Account shall be borne by the Purchaser.

9.5.12 The scheduled Bank, on which the Purchaser Letter of Credit as described in Sections 9.5.3 to 9.5.10 is opened, may use the Escrow Account, as detailed in Section 9.5.11, for recoupment/reinstatement of the Purchaser Letter of Credit.

9.5.13 In the event PTC is unable to fully receive amounts due to it (for reasons not directly attributable to PTC) either by direct payment by the Purchaser or through the Purchaser Letter of Credit or from the Escrow Account, the provisions of Section 14.2 shall apply and such event shall be treated as a Purchaser Event of Default.”

30. Though Article 9.5.1 of the PPA mandates the Respondent PTC to provide to the Petitioner a monthly revolving and irrevocable LC in respect of all payments due under the said agreement, Article 9.5.1 of the PSA provides that the Respondent discoms (Purchasers) shall maintain the PSM, as notified by PTC from time to time, namely through (i) LC and (ii) creation of Escrow facility on the receivables of the Purchaser. While under the PPA, the Respondent PTC is obligated to provide a monthly revolving LC to the Petitioner, under the PSA, the Respondent discoms have the option of providing either a monthly revolving LC or a weekly revolving LC in favour of PTC. Further, under Article 9.5.7 of the PPA, the LC may be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument by mutual agreement between the parties. whereas, under Article 9.5.2 of the PSA, the option for PSM other than the PSM in force or any other superior instrument is to be exercised by PTC from time to time during the terms of the agreement. In terms of Article 9.5.8(b) of the PPA, the Petitioner has a lien on the amounts due and received in the ‘Revenue Collection Account’ maintained by PTC in a scheduled Bank and in terms of Article 9.5.8(c) of the PPA, if the Petitioner is unable to realise the payments due from the PTC under the PPA



by recourse to the Revenue Collection Accounts, PTC shall be obliged to invoke the PSM under the PSA and discharge the payment obligations under the PPA. Unlike the PPA, the LC under the PSA includes trading margin payable to PTC in addition to the energy charges and transmission open access charges.

31. It is, therefore, clear that the provisions of the PPA between the Petitioner and Respondent PTC and the provisions of the PSA between Respondent PTC and Respondent discoms with regard to PSM are entirely different and are independent of the other. In view of the different provisions, it cannot be held that the PSM provisions in PPA and PSAs are back to back arrangements and are inextricably linked to the other. As such, the PSM provisions in the PPA and PSAs are required to be interpreted independently. Article 9.5 of the PPA makes it clear and unambiguous that the Respondent PTC is obligated to establish PSM in favour of the Petitioner in order to secure payments due from the said Respondent. When the language and intent of the parties in the PPA regarding PSM is explicit and clear, there is no reason to make it impliedly contingent upon the Respondent discoms establishing PSM under the PSA. Accordingly, we find no reason to entertain the submissions of the Respondent PTC that the establishment of PSM by it under Article 9.5 of the PPA has nexus with similar action by the Respondent discoms under the PSAs. The submissions of the Respondent PTC stands rejected.

32. Further, the Respondent PTC has referred to Article 9.5.8(c) of the PPA and has argued that the Petitioner had explicitly recognized the fact that the Respondent discoms will necessarily establish PSM, which the Respondent PTC would be obliged to invoke, in the event of default in payment of dues by Respondent discoms. This Article in the PPA does not in any manner justify the contention of Respondent PTC. Before dealing with this Article, we notice that



Article 9.5.8(a) mandates the Respondent PTC to maintain a Bank Account ('Revenue Collection Account') containing payments received from the Respondent discoms. Article 9.5.8(b) enables the Petitioner, during the term of the PPA, to have a lien on the said Revenue Collection Account maintained by Respondent PTC and only if the Respondent PTC does not replenish the LC or if enforceable LC is not in place, the Bank shall make payments due to the Petitioner. These articles in the PPA, undoubtedly mandate the Respondent PTC to establish and maintain LC and Revenue Collection Account in favour of the Petitioner, without any reference to any article under the PSAs. Only if LC is not made available to the Petitioner, or if the Petitioner is unable to realize its dues from the Revenue Collection Account, Article 9.5.8(c) is required to be invoked. In other words, if Article 9.5.1 and 9.5.8(a) is complied with by the Respondent PTC, the Article 9.5.8(c) would have no operation. The Respondent PTC having not complied with the express provisions of Articles 9.5.1 and 9.5.8 (a) of the PPA cannot rely on Article 9.5.8(c) to say that the establishment of LC as PSM by Respondent PTC in favour of the Petitioner under the PPA is contingent upon similar reciprocal action by the Respondent discoms under their PSAs. The submissions of the Respondent PTC are therefore arbitrary and untenable.

33. The Petitioner has submitted that the Settlement Agreement dated 5.8.2013 read with the PPA also mandate the Respondent PTC to open LC in favour of the Petitioner as security towards payment of bills for supply of power and for payment of LTA charges. It has stated that the PPA and PSAs are bipartite agreements and cannot be considered as tripartite agreement as contended by the Respondent PTC. We notice that the Respondent PTC has executed a Settlement Agreement with the Petitioner on 5.8.2013 wherein the parties had agreed, amongst others, for



withdrawal of pending court cases and for filing of tariff petition before this Commission based on changed parameters. One such mechanism agreed in Clause 6.2 of the said agreement is the obligation of the Respondent PTC to open LC in favour of the Petitioner. The relevant portion of the agreement is extracted hereunder:

6.2(i) The payment of LTA charges to CTU as per the bills raised by CTU on JPVL shall be made by PTC. JPVL shall forward the bills received from CTU to PTC on the same day they are received by JPVL. The PTC shall make the payment within the due date mentioned in the bill for making payment or as prescribed in the relevant regulations. Any loss incurred by JPVL or nay fine /penalty levied on JPVL due to delay in payment of bills by PTC to CTU shall be recoverable by JPVL from PTC.

(ii) Amount of Letter of Credit (hereinafter referred to as 'LC') to be opened by PTC in favour of JPVL under the PPA as payment security for payment of bills for supply of power shall be increased suitably to also secure the payments of the LTA charges.

(iii) xxx."

34. Thus, the above terms of the agreement mandate the Respondent PTC to make payment of LTA charges to CTU in respect of bill raised by CTU on the Petitioner. Clause 6.2(ii) clearly mandates the Respondent PTC to open LC in favour of the Petitioner as security towards payments for supply of power and for LTA charges. The Respondent PTC, having expressly agreed to open LC in favour of the Petitioner under Clause 6.2(ii), cannot now contend that the PSM provisions of PPA and PSAs are interlinked. In our considered view, Article 9.5.1 of PPA read with the Settlement Agreement dated 5.8.2013 explicitly mandate the Respondent PTC to open, establish and maintain a PSM in favour of the Petitioner. The provisions under Article 9.5 are clear and unambiguous and, therefore, making it impliedly contingent upon similar reciprocal action by the Respondent discoms in terms of the PSA would be contrary to the express provisions of the PPA. The submissions of the Respondent PTC are therefore not sustainable and are rejected. Accordingly, the Respondent PTC is obligated to establish and maintain a PSM in favour of the Petitioner in compliance with Article 9.5 of the PPA read with the



Settlement Agreement dated 5.8.2013, independent of the PSM provisions under the PSAs.

35. The Respondent PTC has also relied upon other provisions of PPA and PSAs to justify that the provisions of the PPA and PSAs are inter-connected and inter-dependent. We now examine the same hereunder:

(i) PPA Article 4.2: PTC's obligations

“(iv) Obtain, establish and maintain Payment Security Mechanism in accordance with this Agreement.

36. The Respondent PTC has stated that in terms of the above provision, it was under an obligation to obtain the PSM from the Respondent discoms and provide the same to the Petitioner. This contention of the Respondent is baseless. A plain reading of this provision shows that the Respondent PTC is obligated to open and maintain a PSM in accordance with the PPA. This provision is required to be read with Article 9.5 of the PPA which mandates the Respondent PTC to provide PSM to the Petitioner. By no stretch of imagination can the Respondent PTC be permitted to interpret and link the said clause in the PPA to the PSM provisions in the PSAs. Even otherwise, the Respondent PTC cannot be permitted to make additions to the said clause to give a different meaning. The submissions of Respondent PTC are accordingly rejected.

(ii) PPA dated 21.3.2006

Recitals

(C) PTC and Company have entered into a Memorandum of Understanding on 18th (eighteenth) June two thousand three and Addendum on 15th June, two thousand five and Company Letter dated 12th December, 2005, hereinafter referred as MOU, for PTC to purchase, from the Company, the entire saleable power and energy from the project at the Delivery Point for a period of 35 (thirty five) years from the Commercial Operation Date of the project, for onward sale on a long term basis.

(E) PTC will enter into suitable arrangements with one or more Purchasers, for sale of Contracted Power from the Project



37. The reliance made by the Respondent PTC on the aforesaid provisions of the PPA does not in any manner lend support to its contention that the PPA and PSAs are interlinked. It is a fact that before signing the PPA on 21.3.2006, the Respondent PTC did not have any MOU with any State Utilities, except the Respondent HPPC for 200 MW. This can be traced to the observations of APTEL in its judgment dated 20.7.2012 in Appeal No. 130/2011. The PPA between the Petitioner and the Respondent PTC was for the contracted capacity of 704 MW and, therefore, the same was not dependent on any MOU for supply of power to PTC for onward sale. Even otherwise, in terms of Article 15.6 of the PPA (Entirety) the MOU stood superseded by the PPA and no reference can be made to it by the parties in the PPA. Similarly, Recital (E) of the PPA does not identify any of the discoms as Purchasers, but only empowers the Respondent PTC to enter into agreements with one or more Purchasers.

(iii) PSA

1.1 Definition

PPA or 'Power Purchase Agreement' means the document including its Schedules containing the terms and conditions for purchase of power by PTC from the Company, as mutually agreed to and entered into, on 21.3.2006. The PPA is attached to this Agreement as Annexure-C and shall be an integral part of this Agreement;

4.1 PTC's Obligations

(i) To require the Company to deliver the Purchaser Contracted Power and Purchaser Contracted Energy, in accordance with the terms of the PPA (a copy of which is attached as Annexure-C to this Agreement)

(ii)..The parties agree that, under this Agreement, PTC is primarily obligated to deliver Purchaser Contracted Power and Purchaser Contracted Energy to the Purchaser that PTC in turn, purchases under the PPA.

13.7 Disputes under the PPA

13.7.1 PTC shall provide the Purchaser with a copy of all notices relating to any disputes raised by the Company or PTC under the PPA.

....

Annexure C

PPA between PTC and Jaypee Karcham Hydro Corporation Limited"



38. Clauses (1.1 and 4.1) of the PSAs clearly evidence the understanding of the parties as to the existence of the PPA dated 21.3.2006 and the obligations of the Respondent PTC to deliver the Contracted power to the Purchasers. It is noticed that the sentence *‘the PPA is attached to this Agreement as Annexure-C and shall be an integral part of this Agreement’* in Article 1.1 above does not find place in any of the PSAs except the Rajasthan discoms PSA dated 27.9.2006. Clause 13.7.1 only show the understanding that since the discoms are not parties to the PPA, it cannot be a party to any of the disputes between them. As regards PPA being attached as Annexure-C to the PSA and forming an integral part of the PSA, it cannot be said that any document annexed to the PSA would get automatically approved by the Commission when the PSA had been approved. This has been interpreted by the APTEL in the said judgment. To specify, the order of the approval of PSPCL PSA by the State Commission (approval of PSERC dated 1.3.2018 in Petition No. 48 of 2014) does not indicate that the PPA had been approved as well. The submissions of Respondent PTC are, therefore, rejected.

39. The Respondent PTC has also pointed out to clauses under Article 3.1.3 of the PPA and PSAs to contend that the PSAs will not be effective until the condition precedent in the PPA is not satisfied. Article 3.1.3(iv) of the PPA provides as under:

“3.1.3 Conditions precedent that may be waived by mutual consent

The following are the conditions precedent, which may be waived by mutual written consent of both the parties:

xxxx

(iv) PTC shall have executed the Power Sale Agreement(s) with the Purchaser approved by the Appropriate Commission for the entire contracted power and made a copy of the same available to the Company.”

40. Similarly, Article 3.1.3 (i) of the PSA provides as under:

“3.1.3 Conditions precedent that may be waived by mutual consent

The following are the conditions precedent, which may be waived by mutual written consent of both the parties:



(i) the Condition Precedent under the PPA shall have been duly satisfied or waived in accordance with the PPA by the Company and PTC, pursuant to which PPA shall become effective.

41. The aforesaid provision [3.1.3(iv)] in the PPA is only a stipulation which has left PTC free to enter into contracts with Purchasers, but to show the Petitioner that the tariff in those PSAs had got the approval of the Appropriate Commissions. In the present case, PPAs were entered by the Respondent PTC long after the execution of the PPA. Moreover, the coming into operation of the PPA as in Article 3.1.3(i) was not dependent on the fulfilment of this condition precedent by the Respondent PTC, since in terms of Article 2.1 of the PPA, the PPA became effective on the date of its execution by the parties.

42. One more contention of the Respondent PTC is that it has been the Petitioner's own understanding that the PPA envisaged the execution of back to back PSAs with the Respondent discoms. It has stated that the PPA should be construed in a manner so as to give effect to this intention and understanding of the parties. According to the Respondent, the arrangement between the parties could be given no other interpretation in view of the fact that the Respondent PTC is playing the role of a trader without assuming any of the risks. It has stated that if the said Respondent is directed to establish a PSM without back to back LC from the Respondent discoms, then the Respondent PTC would be exposed to grave financial risk and the interpretation by the Petitioner would not only be contrary to the language of the agreements and understanding of the parties, but also contrary to business common sense. The Respondent has referred to the judgments of the Hon'ble Supreme Court in Satya Jain Vs Anis Ahmed Rushdie, (2013) 8 SCC 131, the relevant portion of 'The Interpretation of Contracts' by King Lewson and submitted that the Court must also consider the commercial purpose of the instrument and in



considering that purpose must rely upon its own experience of contracts of similar nature.

43. Per contra, the Petitioner has argued that the principles of implying terms to provide business efficacy to the transaction cannot be invoked in the present case as the PSM clause in the PPA is clear and has no ambiguity. It has submitted that the argument of PTC amounts to rewriting the agreement between the parties which as per settled law cannot be done. The Petitioner has added that the Respondent implying such a condition/ contingency would completely destroy the scheme and tenor of Article 9.5, more particularly the provisions of Article 9.5.8(c). In support of this, the Petitioner has referred to the judgment of the Hon'ble Supreme Court dated 2.7.2019 in Adani Power (Mundra) Ltd v GERC & ors.

44. The crux of the submission of the Respondent PTC is that the contract (PPA and PSAs) are commercial documents between the parties and must be interpreted in such a manner so as to lend efficacy to the contract giving effect to the intention and understanding of the parties. This submission of the Respondent PTC though attractive, cannot be sustained. The terms of the contract can be expressed or implied from what has been expressed. We have in this order examined the various Articles/Clauses and arrived at a conclusion that the provisions of the PPA and PSAs, in particular the PSM provisions, are independent and are not interlinked. We have also observed that the provisions under Article 9.5 of the PPA regarding PSM are clear and unambiguous and explicitly mandate the Respondent to establish LC in favour of the Petitioner and, therefore, cannot be made impliedly contingent upon similar reciprocal action by Respondent discoms under the PSAs. In case the provisions of Article 9.5 of the PPA are to be implied by recourse to business efficacy, as suggested by the Respondent PTC, it would



contradict the express provisions therein, which is not permissible. In our view, the terms of contract have to be interpreted in a manner giving a literal meaning, unless some ambiguity exists. This has been laid down by the Hon'ble Supreme Court in its judgment dated 2.7.2019 in Adani Power (Mundra) Ltd case as under:

“16. This Court in the case of Rajasthan State Industrial Development and Investment Corporation and Anr. vs. Diamond & Gem Development Corporation Ltd. & Anr. reported in (2013) 5 SCC 470 observed thus:

*“23. A party cannot claim anything more than what is covered by the terms of contract, for the reason that contract is a transaction between the two parties and has been entered into with open eyes and understanding the nature of contract. Thus, contract being a creature of an agreement between two or more parties, has to be interpreted giving literal meaning unless, there is some ambiguity therein. The contract is to be interpreted giving the actual meaning to the words contained in the contract and it is not permissible for the court to make a new contract, however reasonable, if the parties have not made it themselves. It is to be interpreted in such a way that its terms may not be varied. The contract has to be interpreted without any outside aid. The terms of the contract have to be construed strictly without altering the nature of the contract, as it may affect the interest of either of the parties adversely. [Vide *United India Insurance Co. Ltd. v. Harchand Rai Chandan Lal*, (2004) 8 SCC 644, and *Polymat India (P) Ltd. v. National Insurance Co. Ltd.*, (2005) 9 SCC 174.]*

.....

*20..... An unexpressed term can be implied if and only if the court finds that the parties must have intended that term to form part of their contract. It is not enough for the court to find that such a term would have been adopted by the parties as reasonable men if it had been suggested to them. It must have been a term that went without saying, a term necessary to give business efficacy to the contract, a term which, although tacit, forms part of the contract. As held in the case of *Nabha Power Ltd. (supra)*, for invoking the business efficacy test and carving out an implied condition, not expressly found in the language of the contract, the following five conditions will have to be satisfied:*

- (1) Reasonable and equitable;*
- (2) Necessary to give business efficacy to the contract;*
- (3) It goes without saying i.e. the *Officious Bystander Test*;*
- (4) Capable of clear expression; and*
- (5) Must not contradict any express term of the contract.*

.....

*26. We are of the considered view that the finding of the Appellate Tribunal that the provisions under Article 3.4.2 of the PPA can be invoked only when there is an agreement between the parties that there is violation of any of the conditions specified in Article 3.1.2 of the PPA is totally incorrect. If such an argument is accepted, it will amount to inserting a totally new condition in Article 3.4.2 of the PPA and would amount to re-writing the contract between the parties; it would do total violence to the provisions of Article 3.4.2 of the PPA. It cannot be said to be a condition which is either reasonable or equitable; it also cannot be said to be a condition which is necessary to give business efficacy to the contract; it also cannot be said to be a test which justifies the *Officious Bystander Test*; it also cannot be said to be a condition which is*



capable of the clear expression; it is also not a condition which does not contradict any expressed terms of the contract. On the contrary, is a condition which would totally change the tenor of Article 3.4.2 of the PPA. We are, therefore, of the considered view that the Appellate Tribunal has grossly erred in coming to the conclusion that Article 3.4.2 of the PPA could be invoked only in the event that there is an agreement with regard to violation of any of the conditions in Article 3.1.2.”

Since no ambiguity exists in the PSM provisions in the PPA, the submissions of the Respondent PTC for recourse to business efficiency is therefore rejected.

45. Another submission of the Respondent PTC is that since the trader is only a link in the whole transaction of flow of electricity from the generating company to the ultimate consumer and in any transaction, the risk and liabilities can't stop at the trader's doorstep as not only will such risk and liabilities be disproportionate to the economic interest of the trader, but also such a move will derail the whole scheme of transaction. It has also pointed out that the role of trader is defined and the margin is also regulated and the trader does not have the capacity to take upon itself disproportionate risk, when the transactions are on back to back basis. Referring to the judgments of the Hon'ble High Court of Delhi in PTC v JPVL (2012) 130 DRJ 351, APTEL in PTC v UERC (2011) ELR APTEL 81, Lanco Power Ltd v HERC & ors (2011) ELR APTEL 1714, PTC v UERC & ors (2016) ELR APTEL 1176 and the Orders of this Commission in MB Power (MP Ltd. vs UPPCL) in Petition No. 224/MP/2018, BSPCL v PFC Consulting & ors in Petition No. 88/AT/2019, the Respondent has submitted that the role of Respondent PTC is a conduit in the entire transaction as affirmed in these decisions. The Petitioner has objected to the above submissions and has stated that the obligation of the Respondent PTC to establish PSM in terms of Article 9.5 is independent to the compliance by the Respondent discoms with their PSM obligations under the PSAs.



46. The submissions have been considered. The contention of the Respondent PTC that as a trader it was not taking upon itself any financial and commercial risk cannot be accepted. In this connection, we extract some of the provisions of the PPA and PSAs as under:

PPA dated 21.3.2006

4.3.1 The Company undertakes to sell to PTC and PTC undertakes to purchase and pay the Tariff in accordance with this Agreement for the Contracted Power and Contracted Energy from the Project. The risk and title to power and energy shall be transferred from the Company to PTC at the Delivery Point. PTC's share of the Declared Capacity shall be in the proportion of 704 MW to gross Rated Capacity of the Project in each Settlement Period from COD of the first Unit for Term of the Agreement. PTC shall receive Secondary Energy in the same proportion as that of its share in the Design Energy.

4.3.2 PTC shall have the right to sell the Contracted Power and Contracted Energy to any Purchaser and shall inform the Company of such Purchaser. This shall not relieve PTC of its obligation to off tae Contracted power and Contracted Energy from the Project and to make Tariff Payments to the Company.

9.1.1 From the Commercial Operation Date (COD) of the first unit of the Project, PTC shall pay to the company, tariff payment calculated in accordance with this Article 9 and Schedule E. The payment shall be made against the Monthly Bills raised by the Company for each month. All Tariff Payments by PTC shall be in Indian Rupees.

9.3.1 Both Parties expressly agree that the essence of Articles 9.3 and 9.4 is timely payment by PTC for the Monthly Bills issued by the Company to PTC in accordance with this Agreement.

9.3.5 If PTC pays amounts against a Monthly Bill or Supplementary Bill (either directly or through drawdown of Letter of Credit on request from PTC) within ten (10) days of receiving such bill, PTC shall be entitled to a Payment Rebate of 2%, and if PTC pays amounts against a Monthly Bill or Supplementary Bill after 10 days of its receipt but not later than the Due Date, PTC shall be entitled to a Payment Rebate of 1%. Such rebate shall be deducted from the amount of the Monthly Bill or Supplementary Bill, as applicable, by PTC, at the time of payment, and the payment shall be made to the Company accordingly.

9.3.6 In the event of delay in payment of a Monthly Bill by PTC or Supplementary Bill by either Party, beyond a period of thirty (30) days from the Due Date, a Payment Surcharge shall be payable at the rate of simple interest of 1.25% per month or the outstanding amount of payment, calculated for each day of delay, and such Surcharge shall be added to the amount of the Monthly Bill, or Supplementary Bill as the case may be, and the payment made to the Company accordingly.

12.1.2 PTC shall indemnify, defend and hold the Company harmless against:

(a) any and all third party claims, actions, suits or proceedings for any loss of or damage to property of such third party, or death or injury to such third party, arising out of a breach by PTC of its obligations under this Agreement except to the extent that any such claim, action, suit or proceeding has arisen due to a negligent act or omission, breach of this Agreement or breach of statutory duty on the part of the Company, its contractors, servants or agents.



14.2 PTC Event of Default

The occurrence and continuation of any of the following events, unless nay such event occurs as a result of a Force Majeure or a breach by the Company of its obligations under this Agreement, shall constitute a PTC Event of Default:

- (i) PTC fails to pay any undisputed portion of a Monthly Bill or Supplementary Bill for a period of 30 days after the Due Date (either directly or through a drawdown of the Letter of Credit) or fails to ensure the issue, maintenance, replenishment, renewal or restoration the Letter of Credit, to the required amount pursuant to Article 10 resulting in the Company not being able to draw upon such Letter of Credit, as per terms of this Agreement, for a period of 30 days.

xxx

14.6.2 Consequence of Termination for PTC Event of Default

Where this Agreement is terminated by the Company pursuant to Article 14.5 for a PTC Event of Default, PTC shall pay compensation to the Company, an amount equal to Rupees two hundred thirty seven point five crore only (Rs. 237.5 crore only). However, in case any compensation pursuant to CERC Inter-State Transmission Regulations for relinquishment of transmission access is payable by the Company, then such compensation amount and above amount of Rupees two hundred thirty seven point five crore only (Rs. 237.5 crore only) shall be payable by PTC. Such amount shall be paid within thirty (30) days of the day of termination of this Agreement.

14.6.4 The Party liable to make payment of the termination amount shall not be discharged of its obligations under this Agreement until the termination amount has been paid to the other Party.

xxx

15.11 None of the provisions of this Agreement shall constitute a partnership or agency or such similar relationship between the Company and PTC.”

PSA

4.3.2 Notwithstanding anything to the contrary in this Agreement, PTC shall not be in breach of this Agreement, if, due to termination of the PPA or otherwise, PTC supplies power at mutually agreed rates to the Purchaser from one or more alternative sources

4.3.3 If the Purchaser fails to pay the amounts due under the terms of this Agreement within the applicable PSA Due Date, then PTC shall have the right to divert and sell the Purchaser Contracted Power and Purchaser Contracted Energy to a third party at the risk and cost of the Purchaser. PTC shall be obligated to restart supply of the power only seven days after all payments due are received along with applicable surcharge. In the event that PTC requires to use the Purchaser's transmission system for supply of Purchaser Contracted Power to any third party during the period of such default, Purchaser shall provide open access to its transmission/ distribution system free of cost to PTC or such third party.

9.1.1 The Purchaser shall pay to PTC, the payments comprising;

- (i) Tariff Payment (subject to Section 6.7 of this Agreement) and
- (ii) All other costs incurred by PTC in accordance with the PPA and reimbursable by the Purchaser, including
- (iii) PTC's Trading Margin and
- (iv) Any transmission open access charges



9.1.5.2 PTC's Trading Margin shall be Rs. 0.05/kWh for the Tariff Years 1 to 12 and Rs. 0.10/kWh for the Tariff Years 13 to 35 and shall be payable by the Purchaser to PTC for the entire Purchaser Billable Energy provided that the Trading Margin shall be as decided pursuant to the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2005 issued on 23rd January, 2006 if the same is applicable to transactions of the nature and duration as captured in this Agreement subject further to the condition that if CERC increases such Trading Margin or clarifies either that the applicable Trading Margin is not decided pursuant to the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2005 issued on 23rd January, 2006 or that there shall be no specified limits on Trading Margin, then the Trading Margin shall be 5 paisa for the first 12 years and 10 paisa for the subsequent period (until Tariff Year 35) of this Agreement or the CERC notified Trading Margin as applicable to transactions of the nature and duration as captured in this Agreement, whichever is lower. Such margins shall be in compliance with any norms applicable to transactions of the nature and duration as captured in this PSA, as may be laid down by CERC from time to time.

14.4 Termination Procedure for PTC Event of Default

14.4.1 Upon the occurrence and continuation of a PTC Event of Default, the Purchaser has the right to deliver to PTC a Purchaser Preliminary Termination Notice, which notice shall specify in reasonable detail the circumstances giving rise to the issue of such Purchaser Preliminary Termination Notice.

14.6 Consequence of Termination

14.6.1 Consequence of Termination for PTC Event of Default

14.6.1.1 Wherein this Agreement is terminated by the Purchaser pursuant to Section 14.4 for a PTC Event of Default, PTC shall be liable to pay to the Purchaser as termination compensation, an amount in the same proportion to Rs. 237.5 crores, as the ratio of Purchaser Contracted Power to PTC's Contracted Power in the PPA. However, in case any compensation pursuant to CERC inter-State Transmission Regulations for relinquishment of transmission access from the Delivery Point is payable by the Purchaser, then such compensation amount and the aforementioned amount equal to the proportion of Rs. 237.5 crore, as the ratio of Purchaser Contracted Power to PTC's Contracted Power in the PPA, shall be payable by PTC."

47. The primary obligation of the Respondent PTC as per Article 4.1 of the PSA is to deliver Contracted Power and Contracted Energy to the Purchaser that the Respondent PTC purchases under the PPA. However, a closer look on the aforesaid Articles in the PPA and PSA would reveal that the Respondent PTC has taken upon itself the financial and commercial risk and was not just acting as a conduit between the generating company and the Respondent discoms. It is further noticed that the Respondent PTC had filed petition before the PSERC (Petition No. 71/2015) for fixing its Trading margin for the period 1.4.2014 to 31.3.2015 with



respect to sale of 100 MW power from Malana II Hydro Electric Project to Respondent PSPCL through PTC and submitted that it undertakes various costs and risks as extracted under:

“11. Petitioner further submitted various obligations, costs and risks being undertaken by PTC which are as under:

- (a) Open and maintain a letter of Credit as required in terms of the PPA;*
- (b) Scheduling of power and real time revisions in schedule for which PTC operates and maintains a 24x7 Control Room;*
- (c) Payment of monthly bills and supplementary bills to the Generator as well as raising corresponding bills to the purchasers;*
- (d) Obtaining long term open access from the Central Transmission Utility on behalf of the Purchaser for adequate transmission capacity and provision of payment security mechanism to the CTU;*
- (e) Obtaining and maintaining the Trading License;*
- (f) Operational/ Control Room Expenses;*
- (g) Risks pertaining to late payment by Purchasers;*
- (h) Risks pertaining to non-payment by Purchasers;*
- (i) Risks pertaining to contract dishonor by Purchasers/Generators;*
- (j) Increased net-worth requirements by Ld. CERC and return on net worth;*
- (k) Administrative and Legal Expenses.*

12. In view of these risks PTC prayed for to fix a Trading Margin at Rs. 0.05/kWh for the current period in terms of the PSA read with the Tripartite Agreement and Order dated 27.11.2013 passed by the Commission.”

48. In the said Petition, the Respondent PTC had also submitted the following:

“PTC further submitted that it released advance payments to EPPL for meeting the statutory obligations and did not charge interest on the same. The major risks undertaken by PTC pertain to contract dishonour, late payment and non-payment by the purchaser. Though PSPCL is making payments for long-term open access charges, all the obligations and risks under the Bulk Power Transmission Agreement signed with PGCIL lie with PTC”

49. It is therefore evident that the Respondent PTC in the said case while narrating the risks undertaken by it had acknowledged that it has the obligation to open and maintain LC as required in terms of the PPA. That being the case, it cannot be prudent on the part of the Respondent PTC to now take a different stand and argue that it was merely acting as a conduit between the Petitioner and the Respondent discoms and that it does not have the capacity to take upon itself disproportionate risk when the transactions are on back to back basis. The



Respondent PTC, in our view, was taking upon itself the financial and commercial risk and was dealing on its own behalf independently in the PPA as well as in the PSA. In view of this, it can be concluded that the Respondent PTC is obligated in terms of the PPA to establish a PSM in favour of the Petitioner independently, without any reciprocal LC from the Respondent discoms under the PSA.

50. In addition, the Petitioner has submitted that Regulation 7(h) of the CERC (Procedure, Terms and Conditions for grant of trading license and other related matters) Regulations, 2009 (hereinafter called the 'Trading license Regulations') recognises safeguards against payments receivable by PTC from buyers and the safeguards to be created by PTC for securing payments due from it to the sellers are two distinct and separate dealings. According to the Petitioner, as per Regulation 7(h), the regulation provides the latter dealing will not be contingent on the fructification of the former dealing, unless of course the trader and the seller expressly agree so. It has, therefore, stated that in the absence of a mutual agreement between PTC and the Petitioner, expressly making the obligation of establishing PSM upon PTC first receiving security from the Respondent discoms, PTC cannot be heard to say that by very nature of its business of being a trader, the creation of PSM in favour of the seller, in all cases would be impliedly contingent on PTC first receiving security from the Respondent discoms. This, according to the Petitioner would be contrary to Regulation 7(h) of the Trading Licensee Regulations.

51. Per contra, the Respondent PTC has submitted that Regulation 7(h) of the Trading Licensee Regulations has three parts, namely

- (a) The obligation on the licensee to carry out trading in accordance with the agreed terms and conditions;
- (b) The right of the licensee to take such safeguards as may be considered



necessary with regard to Payment security Mechanism from the buyers/ discoms.

(c) Obligation to ensure timely payment of dues through a Letter of Credit or any other appropriate instrument or as may be mutually agreed between the seller and the licensee.

52. Accordingly, the Respondent has submitted that being a trading licensee, it has a statutory right to be safeguarded by way of PSM from the buyers/ discoms. The Respondent has further submitted that it has the right to insist on a back to back PSM in line with the provisions of the PPA and the PSAs and in the light of the right given to it under Regulation 7(h) to take such safeguards as it may deem necessary. Accordingly, the Respondent has submitted that its obligation to establish PSM under the PPA is contingent upon receipt of the same from the Respondent discoms. The Respondent PTC has also pointed out that back to back LC arrangement was mutually agreed between the Petitioner and the Respondent and the same is evident from the fact that from November 2017 onwards, the Rajasthan discoms had opened weekly LCs for the years 2017-18, 2018-19 & 2019-20 and in turn the Respondent PTC had opened similar weekly LC in favour of the Petitioner which had been accepted till the interim order dated 6.6.2019 of this Commission.

53. The matter has been examined. Section 2(71), 52(2) and Regulation 7(h) of the Trading License Regulations is extracted below:

“Section 2(71) “trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly;

Section 52 (Provisions with respect to electricity traders):

.....

(2) Every electricity trader shall discharge such duties, in relation to supply and trading in electricity, as may be specified by the Appropriate Commission.

7. Obligations of the Licensee: The licensee shall be subject to the following obligations; namely:-

.....

(h) The licensee shall carry out trading in accordance with the agreed terms and conditions, and may take such safeguards as he may consider necessary with regard to payment security mechanism from the buyers, but shall always ensure timely



payment of dues to the seller for purchase of the agreed quantum of electricity either through a letter of credit or any other appropriate instrument or as may be mutually agreed between the seller and the licensee.”

54. Thus, Section 52(2) read with Regulation 7(h) of the Trading License Regulations casts a statutory obligation on the person issued with a trading license by this Commission to carry out trading in accordance with the agreed terms and conditions, and take such safeguards as considered necessary with regard to payment security mechanism from the buyers. It provides that the trading licensee shall always ensure timely payment of dues to the seller for purchase of the agreed quantum of electricity either through a letter of credit or any other appropriate instrument or as may be mutually agreed between the seller and the licensee. It clearly emerges from the above that while a trader may take necessary safeguards with regard to PSM from buyers (Respondent discoms), it shall always ensure timely payment of dues of the Seller (Generating Company) either through LC or any appropriate instrument as mutually agreed by the parties. These regulations statutorily mandates the Respondent PTC to open and provide LC as PSM to the Petitioner independent of any safeguard which the Respondent PTC may consider necessary as PSM from the buyers (Respondent discoms). Regulation 7(h) does not, in any manner, support the contention of the Respondent PTC that its obligations regarding PSM are contingent upon receipt of the same from the discoms.

55. Admittedly, in the present case, there has been no mutual agreement between the parties with regard to any other appropriate instrument as PSM in place of LC. Accordingly, the Respondent discoms (Purchasers) are obligated to provide LC and Escrow facility to the Respondent PTC in terms of Article 9.5.1 of the PSA and the Respondent PTC is obliged to open and maintain LC and Revenue Collection Account in favour of the Petitioner in terms of Article 9.5 of the PPA. These are



clear and specific terms in the contract and the same is required to be mandatorily complied with by the Respondent PTC and the discoms independently. The Respondent PTC's insistence on a back to back PSM thereby making it impliedly contingent upon receipt of PSM from the Respondent discoms would, therefore, be contrary to the provisions of the aforesaid regulations and the provisions of the PPA and PSA.

56. Further, the Respondent PTC has referred to the MOP, GOI Order No. 23/ 22/ 2019 dated 28.6.2019 and has submitted that the distribution licensees/ procurer of power are obligated to open LC. The Respondent has stated that since it is not the Procurer of power but only the Respondent discoms (Respondents 2 to 7 herein) are procurers of power, they are under an obligation to open LC.

57. The relevant portion of the MOP, GOI order dated 28.6.2019 is extracted hereunder:

"4.0 The Power Purchase Agreements have the provision regarding maintenance of adequate Payment Security Mechanism mainly in the form of Letters of Credit by the Distribution Licensees/ Procurer of Power. A robust Payment Security Mechanism requires adequacy and validity of Letter of Credit to cover the payments due on account of drawal of power.

5.0 It has been seen that despite above provisions, Letters of Credits are not being given and there is huge outstanding on account of unpaid power bills. This makes it difficult for the Generators to pay for the fuel, which has to be prepaid, to continue the generation. The Generators are also required to pay to the Railways in advance for the fuel/transportation leading to shortfall in generation capacity. There will thus be wide spread load shedding on account of lack of generation. It is essential therefore that all the provisions mentioned above are implemented strictly. NLDC & RLDC are therefore directed as follows:

- i. In accordance with Section 28 (3) (a), NLDC & RLDC shall dispatch Power only after it is intimated by the Generating Company and/ Distribution Companies that a letter of Credit for the desired quantum of power has been opened and copies made available to the concerned Generating Company.*
- ii. The intimation to NLDC and RLDC shall specify the period of supply.*
- iii. RLDC shall dispatch electricity only up to the quantity equivalent of value of Letter of Credit.*
- iv. The dispatch shall stop once the quantum of electricity under LC is supplied.*
- v. The concerned generating company shall be entitled to encash the LC after*



expiry of grace period, i.e. 45 to 60 days as provided in the PPA.

- vi. *In the event power is not dispatched for any reason given above, the Distribution licensee shall continue to pay the Fixed Charge to the Generating Company.”*

58. The order of MOP, GOI pertains to the opening and maintaining LC as PSM under PPAs signed by the distribution licensees. Thus, in our view, the said order would be applicable only in cases where a generating company supplies electricity to a distribution licensee directly, in terms of the PPA executed by the parties. This order does not cover situations wherein, a supply is made by a generating company to a trader in terms of the PPA for onward supply to the distribution licensee in terms of the PSA. Even otherwise, this order of MOP does not override the independent provisions of the PPA and PSAs entered into by the trader for such transactions. Hence, the said order is not applicable to the present case. The reliance placed by the Respondent PTC on the MOP, GOI order dated 28.6.2019 is devoid of merits and is therefore rejected.

59. One other issue raised by the Respondent PTC is that the back to back LC arrangement was mutually agreed between the Petitioner and the Respondent PTC from November 2017 onwards wherein, the Rajasthan discoms had opened weekly LCs for the years 2017-18, 2018-19 & 2019-20 and in turn the Respondent PTC had opened similar weekly LC in favour of the Petitioner which had been accepted till the interim order dated 6.6.2019 of this Commission. This submission of the Respondent, PTC does not justify its contention that opening of LC in favour of Petitioner under the PPA is contingent upon receipt of the same from discoms. In this connection, Article 15.3 of the PPA provides as under:

“15.3 No waiver

A waiver by a Party shall be in writing and executed by an authorized representative of that Party. Neither the failure by one Party to insist on any occasion upon the performance of the terms, conditions, and provisions of this Agreement nor time or other indulgence granted by one Party to the other shall act



as a waiver of such breach or acceptance of any variation or the relinquishment of any such right or any other right under this Agreement, which shall remain in full force and effect.”

60. The Respondent PTC has not furnished any document in writing to show that there has been mutual agreement between the parties with regard to PSM or that the Petitioner, in writing, had waived the obligation of Respondent PTC under Article 9.5.1 to provide LC to the Petitioner, independent of its receipt from the Respondent discoms. Accordingly, we find no merit in the submission of the Respondent PTC and the same is therefore rejected. In our considered view, the Respondent PTC is obligated to open and maintain LC as PSM in favour of the Petitioner in terms of Article 9.5 of the PPA without reciprocal action on part of the Respondent discoms to establish PSM.

61. Also, the Respondent PTC has placed reliance on the decision of the Hon'ble Delhi High Court in O.M.P. 677/2011 to contend that the Hon'ble Court had returned a finding that the PPA and PSAs are on back to back agreements and interlinked. In our view, no such finding has been returned by the Hon'ble Court in its judgment. In the said case, the Hon'ble Court vide its judgment dated 15.5.2012 set aside the Arbitral Award and gave a finding on the PPA dated 21.3.2006 that in case of intra-State supply of electricity, the State Commission will have jurisdiction and in case of inter-State supply, only the Central Commission will have jurisdiction. The submission is, therefore, rejected.

62. Based on the above discussions, the prayer of the Petitioner is allowed and the Respondent PTC is directed to establish and maintain the Payment Security Mechanism in the form of LC in favour of the Petitioner in terms of Article 9.5 of the PPA, independent of receipt of the same from the Respondent discoms under the PSAs.



63. It is observed that the Rajasthan discoms have opened weekly LCs for the years 2018-19 & 2019-20 and in turn, the Respondent PTC had opened weekly LCs in favour of the Petitioner. The Respondent PSPCL vide affidavit dated 9.7.2019 has submitted that it has issued LC for an amount of ₹12.66 crore in favour of the Respondent PTC for the period from 7.3.2019 to 6.3.2020. Since the prayer of the Petitioner for a direction on Respondent PTC to establish PSM in favour of the Petitioner has been allowed in this order, we find no reason to give any direction to the Respondent discoms, against whom no relief has been claimed by the Petitioner.

64. Accordingly, the decisions are summarised as under:

- (a) The Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner in terms of Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act and the Petition is therefore maintainable;
- (b) The provisions of the PPA dated 21.3.2006 between the Petitioner and the Respondent PTC with regard to PSM are clear and unambiguous and is independent of the provisions of PSM in PSAs between the Respondent PTC and the Respondent discoms.
- (c) The Respondent PTC is mandated to establish and maintain PSM in favour of the Petitioner in terms of Article 9.5 of the PPA and Regulation 7(h) of the Trading License Regulations and the same is not contingent upon the receipt of PSM from the Respondent discoms in terms of their PSAs.
- (d) In terms of the above, the Respondent PTC shall open, establish and maintain LC as PSM in favour of the Petitioner, within 10 days from the date of receipt of this order.

65. Petition No. 393/MP/2018 is disposed of in terms of the above.

Sd/-
(I.S.Jha)
Member

Sd/-
(Dr. M.K. Iyer)
Member

Sd/-
(P.K.Pujari)
Chairperson

