

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

**Petition No. 110/MP/2019
along with IAs No. 37/IA/2019, 53/IA/2019 & 29/IA/2020**

Coram:

**Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member**

Date of Order: 22nd November, 2022

In the matter of

Petition under Section 79(1)(f) of the Electricity Act, 2003 for adjudication of disputes arising out of and in relation to the power purchase of 200 MW of power by Haryana Power Purchase Centre from Teesta-III Hydroelectric Project of Teesta Urja Limited through PTC India Limited

And

In the matter of

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

2. M/s Teesta Urja Limited,
2nd Floor, Vijaya Building, 17, Barakhamba Road,
New Delhi – 110001

...Petitioners

Vs

1. Haryana Power Purchase Centre
2nd Floor, Shakti Bhawan,
Sector- 4, Panchkula – 134109

2. Uttar Haryana Bijlee Vitran Nigam Ltd.
Vidyut Sadan, Plot No. C-16, Sector- 6,
Panchkula- 134109, Haryana

3. Dakshin Haryana Bijlee Vitran Nigam Limited
Vidyut Sadan, Vidyut Nagar,
Hisar- 125 005, Haryana

4. Power Grid Corporation of India Ltd.
"Saudamini", Plot No. 2, Sector-29,
Gurgaon -122 001

...Respondents

Parties present:

Shri Tarun Johri, Advocate, TUL
Shri Jaideep Lakhtakia, TUL



Shri Shubham Arya, Advocate, HPPC
Ms. Poorva Saigal, Advocate, HPPC
Shri Ravi Nair, Advocate, HPPC
Shri Nipun Dave, Advocate, HPPC
Ms. Reeha Singh, Advocate, HPPC
Ms. Suparna Srivastava, Advocate, CTUIL
Shri Rajesh Kumar, CTUIL
Shri Manish Ranjan Keshari, CTUIL
Shri Anupam Kumar, CTUIL
Shri Swapnil Verma, CTUIL
Shri Siddharth Sharma, CTUIL
Shri Ranjan Singh Rajput, CTUIL
Shri Akshayvat Kislay, CTUIL

ORDER

The Petitioner No.1, PTC India Limited (in short 'PTC') and Petitioner No.2, Teesta Urja Limited (in short 'TUL') (*hereinafter jointly referred to as 'the Petitioners'*) have filed this petition, seeking the following reliefs:

"(a) Quash the termination Notice dated 27.3.2018 issued by HPPC on Petition No. 1 as being illegal, invalid, non-est and void-ab-initio.

(b) Direct the Respondent Nos 1 to 3 to comply with their contractual obligations by off-taking and scheduling of 200 MW power being generated from 1200 MW Teesta-III Hydro Electric Project located in North District in the State of Sikkim through PTC in terms of the provisions of the Power Sale Agreement dated 21.9.2006 and Power Purchase Agreement dated 28.7.2006 and thereby specifically perform their obligations.

(c) Pass an interim order directing the Respondent Nos 1 to 3 to commence procurement of their Contracted Capacity from Teesta III HEP at the provisional tariff determined by this Hon'ble Commission in Petition No. 249/GT/2016.

(d) Direct the Respondent Nos 1 to 3 to pay the difference between actual revenue recovered by the Petitioners since COD from sale of power under short term/through exchange and revenue based on provisional / final tariff as determined by this Hon'ble Commission in line with the provisions of the PPA/PSA from the COD of the Project or unit thereof, for the corresponding energy share of the Respondents along with interest as per CERC Tariff Regulations.

(v) Direct the Respondent Nos 1 to 3 to open the LC and meet all its liabilities in terms of the BPTA dated 4.6.2010 in favor of Respondent No.4 PGCIL and that PTC doesn't have any liability including relinquishment charges under the BPTA.

(vi) Pass such other order(s) as this Hon'ble Commission may deem fit and proper in the facts and the circumstances of the case."

Background

2. PTC is a company incorporated under the Companies Act, 1956 having an Inter-State trading license under Section 14 of the Electricity Act, 2003 (in short 'the Act').



TUL, a Government of Sikkim enterprise, incorporated under the Companies Act, 1956 is a generating company, within the meaning of Section 2(28) of the Act. TUL has executed and commissioned the 1200 MW Teesta-III Hydroelectric Project (in short 'the generating station'), comprising of six units of 200 MW each in the North District of Sikkim. The commercial operation date (COD) of Units 2, 3 and 4 of the generating station is 23.2.2017 and that of Units 1, 5 and 6 of the generating station is 28.2.2017.

3. The Respondent No. 1, Haryana Power Purchase Centre (in short 'HPPC') is a joint forum of Respondent No. 2, Uttar Haryana Bijlee Vitran Nigam Limited and Respondent no. 3, Dakshin Haryana Bijlee Vitran Nigam Limited (*jointly referred to as the 'Haryana Utilities'*). UHBVN and DHBVN are distribution licensees as per the provisions of the Act and are owned and controlled by Government of Haryana. The Respondent No. 4, Power Grid Corporation of India Ltd. (in short 'PGCIL') is the Central Transmission Utility, which owns and manages the inter-state transmission system across India. PGCIL is vested with the functions of Central Transmission Utility as provided under Section 38 of the Act. PGCIL functions, *inter alia*, include granting connectivity to the generators and also to provide non-discriminatory open access to inter-state transmission system.

Submissions of the Petitioners

4. The Petitioners, in justification of their prayers, have submitted the following:
- (a) The Petitioner's had entered into a Power Purchase Agreement (PPA) on 28.7.2006, for sale of the entire power generated from the Project. Haryana Power Generation Corporation Limited (HPGCL), the predecessor of the Respondent HPPC, who was engaged in procuring power in the State of Haryana (on behalf of Respondents UHBVN and DHBVN) had entered into a back-to-back Power Sale Agreement (PSA) with PTC on 21.9.2006 for procurement of 200 MW of contracted capacity from the generating station of the Petitioner, TUL for a period of 35 years, from its COD.
 - (b) The State Government of Haryana assigned the responsibility for procurement of power and all related matters to the Respondent HPPC.



Also, the State Government, vide its notification dated 11.4.2008, transferred all the agreements for purchase of power signed by HPGCL to Respondent HPPC.

- (c) As per the provisions of the PPA/PSA, the tariff determination has been mandated to this Commission in terms of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2004 (hereinafter referred to as 'the 2004 Tariff Regulations') as amended from time to time.
- (d) The Bulk Power Transmission Agreement (in short 'BPTA') was signed on 24.2.2010 between the Respondent PGCIL, the Petitioner, PTC and six other Long Term Open Access (LTOA) applicants of the project, giving Long Term Access (hereinafter referred to as 'LTA') in accordance with the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-state Transmission and related Matters) Regulations 2009 (hereinafter referred to as '2009 Connectivity Regulations'). Subsequently, a BPTA was signed by the Govt. of Sikkim on 27.4.2010, wherein Sikkim agreed to pay transmission charges directly to PGCIL and also agreed to provide Letter of Credit (in short 'LC') to PGCIL.
- (e) As per PSA, Respondent HPPC was obliged to off take the contracted power and purchase the same at the delivery point. However, the respondent is yet to off take the contracted power. The Petitioners, however, have been sending the day-ahead schedule to the Respondent, on daily basis, since the COD of the project.
- (f) On 4.6.2010, the Respondent HPPC (on behalf of Respondents UHBVNL, DHBVNL), along with other discoms, including PTC entered into a 'BPTA' with PGCIL, whereby they agreed to pay the transmission charges applicable for LTA directly to PGCIL in proportion to their allocation from the project. In the said BPTA, Respondent HPPC also agreed to pay the transmission charges, including charges for inter-regional links (if any) etc., of the system to PGCIL.
- (g) In accordance with Clause 4.2(viii) of the PSA, Respondent HPPC is required to complete all arrangements, as required, 30 days prior to the COD for timely and proper evacuation and transmission of 'purchaser contracted power' and 'purchaser contracted energy'. However, the Respondent in utter disregard of its contractual obligations, has not started to off take the power from the project;
- (h) The 'force majeure' clause provided in Article 10 of the PSA stipulates the extension of time for commissioning of the project, which the affected Party would be entitled for, in the event of any force majeure event.



- (i) Haryana Electricity Regulatory Commission (in short 'HERC') accorded the approval to the PSA for purchase of power vide its order dated 18.6.2007. The order, inter alia, held that this Commission shall determine the provisional tariff. The respondents filed a petition before HERC but the same was held infructuous by HERC substantiating further the fact that Respondent HPPC is legally and contractually bound to comply with its obligations under the PSA and cannot therefore, be allowed to contend that the compliance of its obligations under the PSA is dependent upon the concurrence of HERC, in view of the specific findings of HERC in its order dated 28.8.2017.
- (k) PTC informed the Respondent HPPC about the COD of all units of the project of the Petitioner. On 27.2.2017, PTC requested the Respondent, HPPC to give consent to off-take the share of the contracted power of Haryana, failing which PTC/TUL shall be forced to sell the same under short term, without prejudice to their rights and contentions under PSA/ PPA, as well as under law.
- (l) On 27.3.2017, PTC informed Respondent HPPC that as per provisions of the PSA, the Respondent was required to complete all arrangements including getting approval to the said PSA under Section 86(1)(b) of the Act and operationalizing the same etc., so as to start scheduling power from COD of the project or unit thereof. PTC also enclosed Petitioner, TUL's letter dated 24.3.2017 and stated that due to non-scheduling of the contracted power by Respondent HPPC, TUL/PTC has been forced to sell the same through Power Exchange/ under short term sale, against which it has been able to realize tariff in the range of Rs. 2.14-2.20 / kWh only. Due to non-confirmation by Respondent HPPC for offtake of power, LTA has not been made operational putting constraint on the evacuation of power from the Project. It was also intimated that final/ provisional tariff determined by the Commission shall be payable by Respondent HPPC from COD of the Project, along with applicable surcharge, after adjusting the tariff realized from short term sale and commercial loss due to non-operationalization of LTA for which BPTA has been signed by Respondent HPPC with CTU, shall also have to be borne by the Respondent *pro rata* to its contracted capacity.
- (m) Respondent HPPC was again requested to immediately start scheduling its contracted power and provide confirmation for the same so that CTU could be approached for operationalizing the LTA.
- (n) Petitioner PTC on 25.5.2017, 23.6.2017, 5.9.2017 and on 10.1.2019, wrote to Respondent HPPC requesting for scheduling the power as per PSA, based on the interim tariff determined by this Commission, immediately failing which the said Respondent shall be liable for all consequences including the liabilities under BPTA for non-offtake of the said quantum of power and also that the Respondents, in complete violation of their



contractual obligation have failed to schedule the contracted capacity/ power from the Project due to which PTC / TUL is being forced to sell power under distress, at Power Exchange, since the COD of the Project, which shall be to the cost of HPPC.

- (o) Respondent HPPC vide its letter dated 27.3.2018, conveyed the termination of the PSA executed with PTC, in terms of Article 14.3.2 of the PSA. PTC vide its letter dated 2.5.2018, rejected the termination issued by the HPPC terming the same is illegal and also not based on facts & provisions of the PSA. As per the provisions of the PSA, termination notice can be issued only if Force Majeure events last for a continuous period of 12 months and further such Force Majeure condition has to be operative at the time of issue of notice as also at the time of expiry of 7 days' notice.
- (p) Respondent PGCIL informed PTC on 10.10.2018 that HPPC is required to open a confirmed, irrevocable, unconditional and revolving LC amounting to Rs.1007 Lakhs towards payment security mechanism in respect of 200 MW of LTA granted from Teesta-III for transfer of power to HPPC, as the LTA granted to Sikkim IPPs is to be made effective from 01.12.2018 upon commissioning of Teesta-III-Kishanganj 400 kV D/c (Quad) line.
- (q) In reply to PGCIL's letter above, PTC vide letter dated 25.10.2018 wrote to PGCIL to directly communicate with Respondent HPPC for fulfilling the requirement of LC etc., and also requested to take up the matter appropriately with the Respondent as under the BPTA, the said respondent was liable to open LC and make the payment towards transmission charges etc.
- (r) On 12.12.2018, PGCIL wrote to Respondent HPPC to open a confirmed, irrevocable, unconditional and revolving LC amounting to Rs.1007 lakh towards payment security mechanism in respect of 200 MW of LTA granted from Teesta-III for transfer of power to respondent HPPC and also informed that the LTA is likely to be made effective from 1.1.2019 upon commissioning of Teesta-III- Kishanganj 400 KV D/c (Quad) line.
- (s) As there was no response from Respondent HPCC to PGCIL's letter above, the Petitioner PTC on 10.1.2019 wrote to Respondent inter-alia referring to the BPTA dated 4.6.2010, and pointed out that the Respondent HPPC is under the obligation to pay all charges to Respondent PGCIL for their share of LTA allocation in accordance with the norms /notifications /terms and conditions issued by this Commission from time to time.
- (t) Respondent PGCIL informed PTC on 21.2.2019 that the LTOA in respect of Respondents are being operationalized w.e.f. 23.2.2019. PTC wrote to Respondent PGCIL that all liabilities in respect of the LTOA was of the



Respondents including opening of LC, transmission and other charges and relinquishment charges, if any.

- (u) Respondent HPPC, instead of complying with the obligations under the PSA for off taking the 200 MW power from the Petitioners, issued an Expression of Interest (Eoi) towards the purchase of the 500 MW of power from the hydro power developers. This was in complete disregard to the terms and conditions of the PSA and also contrary to the ground mentioned in the termination letters that electricity was not required, whereas, in the Eoi, the urgency towards the power purchase was visible.
- (v) As per BPTA dated 4.6.2010, it was the responsibility and liability of the Respondents 1 to 3 to open LC and pay the transmission charges directly to PGCIL. The action of HPPC in issuance of the termination letter dated 27.3.2018 is illegal and void ab-initio and not based on facts and provisions of the PSA or the approval granted to PSA by HERC vide its order dated 18.6.2007 and again re-emphasized vide its order dated 28.8.2017.
- (w) The issuance of Eoi by the Respondent HPPC for procurement of 500 MW of hydro power, on long-term basis, is completely illegal and an attempt to illegally thwart away its contractual obligations, particularly when, the Respondents are in actual requirement of power from hydro power projects.
- (x) PTC and the Respondents, in terms of the PSA, agreed that the tariff for sale of contracted capacity of energy from the Project would be as be determined by this Commission. The interim tariff for sale of energy generated from the Project as determined by order dated 23.5.2017 in Petition No. 249/GT/2016 is legally binding on the Respondents and thus, they should legally and contractually off-take and schedule the power from the Project.
- (y) There is no legal impediment for the Respondents to off-take the power from the Project, particularly when the approval of the PSA has already been granted by HERC vide orders dated 18.6.2007 and 28.8.2017, at the tariff determined by this Commission in terms of the PSA.
- (z) HERC had already dismissed the petition filed by the Respondent HPPC vide its order dated 28.8.2017, wherein it was specifically observed that the approval to the PSA has already been granted by HERC and further, that the exercise for determination of tariff for sale of energy generated from the Project falls exclusively within the domain of this Commission.
- (aa) The non-scheduling of the contracted capacity of 200 MW from the Project by the Respondents are in complete violation of the terms and conditions of the PSA executed between the parties, as approval to the PSA has already been granted by HERC. Thus, the Respondents are legally and



contractually obligated to schedule the power from the Project as agreed to between the parties under the PSA at the interim tariff determined by this Commission, which would get adjusted retrospectively upon determination of final tariff.

- (ab) The action of the Respondents in not off-taking the contracted capacity generated from the Project led to a situation where the Petitioner's revenue has gone down due to forced sale of their share of contracted capacity under the Power Exchange, which is not sufficient for meeting the debt servicing obligation of TUL in a timely manner. The Punjab National Bank, one of the consortium lenders, had also served a legal demand notice to the Sikkim Power Investment Corporation Limited (SPICL), a majority shareholder of TUL representing the Government of Sikkim, for payment of its outstanding dues (including principal and interest overdue). As per the notice, in the event of non-payment of dues, PNB would be initiating actions as per the provisions of Insolvency and Bankruptcy Code (IBC), 2016. Due to increasing financial stress and consequent non-payment of lenders' dues on time, TUL is being pushed to the brink of slipping into sub-standard category (i.e. NPA) with lenders and towards proceedings under Insolvency and Bankruptcy Code (IBC), 2016 in terms of the RBI Circular dated 12.2.2018.
- (ac) While the Respondent HPPC has declined to off-take its contracted capacity of 200 MW from the Project, simultaneously, in gross violation of its obligations under the PSA entered into more than 10 years ago, they separately approached HERC for procurement of power from three other hydro projects of Sikkim at a levelized tariff for 25 years at Rs. 4.65/kwh for 96 MW Jorethang HEP, Rs. 4.79/kwh for 110 MW Chuzachen HEP and Rs. 4.60/kwh for 97MW Tashiding HEP which the HERC has approved.
- (ad) Further, HERC vide its order dated 10.4.2018 has also granted approval for procurement of hydro power by Haryana Discoms from 36 MW Chanju-I HEP in Himachal Pradesh. Even after securing such approval for procurement of hydro power from aforementioned 4 hydro projects, the EOI dated 03.07.2018 for procurement of 500 MW hydro power from 01.4.2019 has been issued by Respondent HPPC. This establishes that there is requirement of hydro power by the Respondents, but despite this they are not fulfilling their obligation to offtake power from the Project in accordance with the provisions of the PSA executed by it on 21.9.2006, duly approved by HERC, and have chosen instead to purchase hydro power from other generators.
- (ae) The Respondents have been procuring electricity from other generators at a higher tariff, in comparison to the interim tariff determined by this Commission. Haryana utilities have failed to meet their obligation under the BPTA dated 4.6.2010 and open the LC in favour of PGCIL and are liable



for all consequential charges including relinquishment charges for not scheduling power in terms of the PSA.

Interlocutory Application No. 37/IA/2019

5. The Petitioners, during the pendency of this petition, have filed this Interlocutory Application (I.A. No. 37/IA/2019) mainly stating that the non-scheduling of power by the Respondents in terms of the PSA, has resulted in huge financial loss to the Petitioner, who is forced to continue to sell the energy through power exchanges on much lower tariff, than the interim tariff determined by this Commission. The Petitioners have also submitted that it is unable to meet its debt obligations towards its lenders and is on the verge of becoming an NPA on account of non-scheduling of the contracted capacity by the Respondents, in terms of the PSA. Accordingly, the Petitioners have sought the following reliefs:

“(i) Direct the Respondent's to immediately schedule the contracted capacity of 200MW of power generated from Teesta -III Hydroelectric Project and till the final adjudication of the aforesaid Petition;

(ii) Pay to the Petitioners the interim tariff determined by this Hon'ble Commission vide its Order dated 23.5.2019 subject to adjustment upon final tariff being determined and also to pay the trading margin to Petitioner No.1, as per provisions of the PSA;

(iii) Stay the operation of the Letter of Termination dated 27.03.2018 issued by the Respondent, till the final adjudication of the aforesaid Petition.”

Interlocutory Application No. 53/IA/2019

6. Subsequently, the Petitioner No. 1, PTC, filed Interlocutory Application (IA No. 53/ IA/2019) and has pointed out that in terms of the provisions of the BPTA and letters of Respondent PGCIL, the sole contractual liability/responsibility to pay all transmission charges and other charges, including relinquishment charges for the LTA, lie with the Respondents 1 to 3 herein. Referring to the Respondent PGCIL's notification dated 20.5.2019, determining the Stranded capacity and relinquishment charges in terms of Commission's order dated 8.3.2019 in Petition No. 92/MP/2015, wherein the relinquishment charges for the 200 MW LTA of Respondent HPPC as



beneficiary, has been shown in the name of the Petitioner PTC for Rs 45.89 crore, the Petitioner has submitted that the same should be to the account of Respondents 1 to 3, as the Petitioner PTC is not liable for the same. In this background, the Petitioner PTC has, in the IA, sought the following reliefs

“(i) Direct the Respondent No. 4 to amend the said notification to the extent that the relinquishment and consequential charges of 200 MW is not to the account of the Petitioner No.1;

(ii) Declare that the Respondent No.1 to 3 are liable for all the charges including the relinquishment charges in respect of 200 MW LTOA for supply of power from Teesta III project;

(iii) Set-aside the demand of Respondent No.4 as notified in the notification dated 20.5.2019 of the Respondent No.4;

(iv) Pending disposal of the present petition pass an ad-interim order to restraining the Respondent No.4 from taking any coercive action.

Hearing dated 12.6.2019

7. The Petition along with IA No. 37/2019 and IA No. 53/2019 were heard on 12.6.2019 and the Commission, after hearing the learned counsel for the Petitioners' admitted the same, with direction to the parties to complete pleadings in these matters. In response, the Respondent PGCIL and the Respondent HPPC have filed their replies vide affidavits dated 11.7.2019 and 20.8.2019 respectively. The Petitioner, TUL and the Petitioner, PTC have filed their rejoinders (to the reply of PGCIL) vide affidavits dated 31.7.2019 and 29.8.2019 respectively. The Petitioner, TUL has filed its rejoinder (to the reply of HPPC) vide affidavit dated 30.9.2019.

Reply of the Respondent, HPPC

8. The Respondent No.1, HPPC (on behalf of Respondents No. 2 & 3) has mainly submitted the following:

(a) The PSA dated 21.9.2006 between HPPC and PTC for purchase of 200 MW from the project through PTC has been validly terminated by the Respondents vide letter dated 27.3.2018.

(b) The conditions precedent (as per Article 3.1.3 of the PPA) were required to be satisfied within a period of 12 months. Accordingly, the RCOD of the



entire project was stipulated to be 60 months from the expiry of 12 months from the date of PPA (27.7.2012). Petitioner, TUL has stated that the financial closure was achieved on 28.9.2007 and even by this date, the RCOD was 27.9.2012. However, TUL has stated that the SCOD is 31.1.2022 and against the same, the actual COD of all 6 units has been achieved only between 22nd and 24th February, 2017.

- (c) As a result of the delay, there has been a time overrun and a claim for cost overrun. TUL, in its petition before this Commission, has sought a time overrun of nearly 64 months and cost overrun of a substantial amount, namely from the original project cost stipulated as Rs 5700 crore, to the revised cost estimate of Rs.13695 crore i.e 245% increase. TUL has also claimed that the debt exposure has increased from Rs.4650 crore to Rs.7173.71 crore.
- (d) The effective tariff as per interim orders of this Commission, based on the Design Energy and annual fixed charges, as considered in interim order dated 23.5.2017 works out in the range of Rs.4.61 per Kwh to 4.768 per kWh (as per methodology adopted by NHPC) and Rs 4.823 per kWh (as per 85% generation). TUL has been asking for a tariff of Rs 6.073/kWh. The final tariff that may be determined by this Commission is likely to be very high and the merit order of the Haryana discoms will have a lower priority at the tariff mentioned above. In the facts and circumstances mentioned, there has been no necessity for the Haryana Utilities to procure tariff determined by the Commission.
- (e) The completion cost claimed by Petitioner, TUL with the time overrun and cost overrun are substantially higher than the capital cost which was envisaged at the time, when the Haryana Utilities signed the PSA dated 21.9.2006 with PTC and PTC signed the PPA on 28.7.2006 with TUL. TUL has admitted that the project was proceeded in order to salvage the interest of the banks, Financial institutions and the Government of Sikkim. Thus, the project has been completed by TUL contrary to the guidelines provided under Section 61 of the 2003 Act.
- (f) Further, the Government of Sikkim had been claiming free power from the project despite the Government of Sikkim owning 100% of the project. The Government of Sikkim is also considering the project as a commercial venture burdening the procurers with all the cost related to the free power and also the entire cost overrun resulting from the time overrun and also resulting from the change in the shareholding of TUL.
- (g) The intention of Haryana Utilities, PTC India and TUL, at the time when the above agreements were signed was not that the project cost would escalate 2 ½ times than what was envisaged. There has been a fundamental change



in the financials of the project and the substance and spectrum of the agreements entered into between the parties no longer exist.

- (h) It is in the above circumstances that the Haryana Utilities by letter dated 27.03.2018 proceeded to terminate the PSA dated 21.9.2006 entered into with PTC. In view of the above termination of the PSA, the Haryana Utilities have no longer any legal obligation to implement the PSA for the 200 MW of power agreed to be purchased under the PSA dated 21.9.2006.
- (i) The scheme under the PPA and the PSA is that the Petitioner No. 2 should establish the Power Project at a reasonable cost. It is therefore, not open to the Petitioner to delay the execution of the Project, continue with the implementation of the Project despite substantial time and cost over-run, proceed with the Project despite disputes with the shareholders and above all, for the Govt. of Sikkim to acquire the shareholding of Petitioner No. 2 for a different objective of salvaging the interest of the lenders and financial institutions, instead of considering the execution of the Project with the over-all objective of safeguarding the interest of the consumers who are being serviced by the Procurers such as the Haryana Utilities.
- (j) The PSA dated 21.9.2006 provides for the repudiation of the agreement if PTC is in material breach of the PSA. Similarly, the PPA dated 28.7.2006 also provides for termination of PPA for material breach. The Petitioner No. 1 PTC ought to have therefore, proceeded to terminate the PPA entered into with TUL on account of the breach of TUL, including the act of not acting as a prudent utility and designing, completing the power project in accordance with Prudent Utility practices. The letter dated 27.3.2019 sent by the Haryana Utilities terminating the PSA dated 21.9.2006, is therefore valid, justified and in accordance with law. With the above termination, the Haryana Utilities have no obligation to enforce the PSA and the related PPA.
- (k) PTC has in fact relinquished the long-term access granted to it for evacuation of power from the Power Project in relation to capacity of Haryana Utilities and therefore accepted the termination of the PSA by Haryana Utilities. Having accepted the termination, it is not open to PTC to insist on performance of the PSA, when it had terminated the LTA thereby making it impossible for the Haryana Utilities to take the supply of power from the power project.
- (l) In so far as Haryana Utilities are concerned, the agreement is only with PTC (namely the PSA). If the PSA does not have any valid existence, the Haryana Utilities cannot be proceeded against by TUL, which has a PPA with PTC and Haryana Utilities are not signatories to the PPA.



Reply of the Respondent PGCIL

9. The Respondent PGCIL, in its reply affidavit has mainly submitted the following:

(a) The PPA dated 28.7.2006 between Petitioner No. 1 (as inter-State trading licensee) and Petitioner No. 2 provides for specific rights, obligations and responsibilities for each of the parties.

(b) In accordance with the provisions of the PPA, the Petitioner PTC has entered into PSA dated 21.9.2006 for onward sale of 200 MW power to HPGCL (now Respondent No. 1, HPPC). PTC as a power trader, was to purchase the contracted power at the delivery point and also sell it to identified beneficiaries (including to Respondent No.1) at the delivery point. The PSA provides for specific rights, obligations and responsibilities for each of the parties

(c) In accordance with clause with 4.1 of the PSA, PTC applied to PGCIL for grant of LTA into the ISTS for a period of 35 years under the CERC Connectivity Regulations. After taking up the detailed studies and subsequently identifying the requirement of system strengthening for transfer of power as regards the LTA application of PTC, PGCIL, on 26.5.2009, granted LTA to PTC along with other applicants of Sikkim.

(d) For power evacuation from the generation projects in Sikkim, PGCIL had proposed the implementation of High Capacity Power Transmission Corridor (HCPTC)-III for which regulatory approval was granted by this Commission vide Order dated 31.5.2010 passed in Petition No.233/2009. Thus, with the regulatory approval, PGCIL undertook implementation of HCPTC-III for power evacuation from generating stations in Sikkim including from the Teesta-III project of the Petitioner. As such, LTA grantees on the said corridor including PTC, became liable for paying and sharing the transmission charges, in accordance with the CERC Connectivity Regulations.

(e) PGCIL also entered into a BPTA dated 24.2.2010 with PTC and six other generators in Sikkim whereunder, PGCIL agreed to provide open access for a period of 25 years, on payment of transmission charges from the scheduled date of open access of individual LTA grantees. There was a categorical contractual obligation in the BPTA specifying that PTC was required to pay transmission charges for the LTA quantum of 1200 MW (which included the 200 MW for transfer to HPPC) till the said charges were directly paid by the concerned State utilities to PGCIL.

(f) PGCIL also entered into a BPTA dated 4.6.2010 with HPPC and its beneficiaries for payment of transmission charges under the LTA. Under the BPTA, the beneficiaries agreed to pay transmission charges to PGCIL in proportion to their allocation from the project, from the date of its commercial operation.



(g) PTC vide its letter dated 4.10.2018, informed PGCIL that under the contractual obligations stipulated in BPTA dated 4.6.2010, the absolute liability to open LC, payment of transmission charges rested on Respondent HPPC and that any communication regarding the same was to be issued directly to HPPC, instead of PTC. Accordingly, on 12.12.2018, PGCIL informed HPPC to open a LC corresponding to 200 MW LTA in favour of PGCIL.

(h) Vide letter of 22.2.2019, PTC, sought to *inter alia* relinquish the 200 MW LTA with Respondents HPPC, UHBVN and DHBVN as beneficiary, while disclaiming any extant or future liability towards “*payment of any type of charges including relinquishment charges corresponding to the LTA.*”

(i) The above letter was replied by the PGCIL vide letter dated 6.3.2019, *inter alia* accepting the request for relinquishment, however with accompanied liability towards payment of relinquishment charges, holding PTC liable for payment of the applicable relinquishment charges, as determined by the Commission in order dated 8.3.2019 in Petition No.92/MP/2015 directing the long-term customers to pay the charges.

(j) The prayers of the Petitioners that it not liable for payment of relinquishment charges cannot be allowed in terms of the order dated 8.3.2019 in Petition No. 92/MP/2015 and various other matters pertaining to relinquishment charges, subject to the Respondents Nos. 1 to 3 owing to pay the applicable relinquishment charges in place of the Petitioner.

Accordingly, the Respondent PGCIL has stated that the prayer (e) of the Petitioner may be rejected.

Rejoinder of the Petitioner No. 1, PTC

10. The Petitioner PTC, in response to the reply of the Respondent PGCIL, has filed rejoinder affidavit, mainly submitting the following:

- (a) In terms of the BPTA dated 4.6.2010, any claim in respect of the LTA and all transmission related charges has to be raised by the Respondent PGCIL only on Respondent HPPC, wherein HPPC has undertaken to bear and pay all charges in respect of LTA granted for transmission of power from the project.
- (b) The Petitioner PTC being a trading licensee had applied for LTA at the behest of Respondent HPPC, which is clear from clause 4.1 (iii) & (iv) of the PSA dated 21.9.2006. Also, in terms of clause 1(a) and (b) of the BPTA dated 4.6.2010, the Respondent HPPC (which is one of the beneficiaries)



had undertaken to share and pay the transmission charges etc., The Petitioner PTC had nowhere undertaken to pay for the transmission charges etc., in respect of the power to be supplied to identified beneficiaries.

- (c) Section 9.1.1 of the PSAs with the beneficiaries (discoms of the State of Punjab, Haryana, Uttar Pradesh and Rajasthan) provides that all costs and open access related charges are reimbursable /payable by the Purchasers. It is evident from the PSA and the BPTA dated 24.2.2010, that the sole responsibility for payment in respect of the LTA was that of the beneficiary and PTC had acted only on behalf of the Purchaser(s) as per the terms of the PSAs.
- (d) The LTA for 840 MW only was granted to PTC. Further, clause 2.0 of the BPTA dated 24.2.2010 clearly specifies that PTC's liability to pay the LTA charges is only till the concerned state utility enters into BPTA with PGCIL for payment of their share of LTA charges and provide security that in case the identified beneficiaries do not sign the BPTA with PGCIL only then PTC shall be liable to pay the LTA charges allocated for the beneficiaries.
- (e) The full responsibility in respect of the LTA was on the Respondent HPPC, but as it had illegally terminated the PSA (which is under challenge in the present petition), PTC had requested PGCIL to release the LTA from its side so that the same does not remain unutilized.
- (f) PTC is not liable to pay relinquishment charges and accordingly, the prayer in the petition to the extent that Respondent HPPC is liable for payment of the transmission charges is justified and this Commission may be pleased to pass an appropriate order.

Rejoinder of the Petitioner, TUL to the reply of Respondent PGCIL

11. In response to the above reply of Respondent PGCIL, the Petitioner TUL has in its rejoinder affidavit, mainly submitted that the PPA between TUL and PTC mandates PTC to tie up 70% of the power under the long-term PSA and the balance 30% under long term or short-term PSAs. PTC in turn has signed PSAs with four State Utilities out of which 200 MW PSA was signed by PTC with Haryana Discoms vide PSA dated 21.9.2006. It has also submitted that the Petitioner TUL has not entered into any agreement pertaining to LTA either with PTC or with any of the four identified long-term beneficiaries. The Petitioner TUL has further stated that the transmission line



(Teesta III–Kishanganj 400 KV D/c line with Quad Moose Conductor along with associated line bays) was envisaged to be and has been implemented as an ISTS line by M/s Teesta Valley Power Transmission Line, an inter-state transmission licensee.

Rejoinder of the Petitioner, TUL to the reply of the Respondent HPPC

12. In response to the reply of the Respondent HPPC, the Petitioner TUL, vide its rejoinder affidavit has mainly submitted the following:

- (a) The termination of the PSA dated 21.9.2006 by the Respondent HPPC is arbitrary and illegal and the same is liable to be set aside. Under the PSA and the PPA, the parties have specifically agreed that the tariff of the energy would be such as would be determined by the Appropriate Commission. The price at which the energy would be sold to the Respondent was never agreed to between the parties either in the PPA or under the PSA. The Petitioner, TUL on the basis of the information supplied by PTC had given detailed reasons to the Respondents, at the appropriate time, explaining the reasons for the delay in commissioning of the project, which inter-alia included the force majeure events as envisaged under the PPA and the PSA.
- (b) The SCOD of the project had been envisaged as per the provisions of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014. The time and cost overrun of the project was due to the force majeure conditions as detailed in the Tariff Petition No. 249/GT/2016. The uncontrollable force majeure factors including delays on account of forest clearance, geological surprises, change in design and construction methodology due to poor geology, earthquake of magnitude of 6.8 on Richter scale with epicenter at 60 km from power house location, collapse of Rangchang Khola and Ritchu nala bridges of BRO, flash floods and blockades due to Gorkhaland agitation etc. It may be noted that the Designated Independent Agency (DIA) i.e. M/s A.F Consult India Pvt. Ltd., in its report dated July, 2017, after due examination of all the relevant documentary evidence and facts, have also accepted the occurrence of Force Majeure events and resultant increase in cost overrun of the Project.
- (c) Respondent No.1 to 3 (Haryana Utilities) are parties to the said tariff petition and have submitted their objections to the Commission. Accordingly, under the principle of *estoppel*, the Respondents are prohibited from taking a stand in the present petition, which are either not in conformity with or contradictory to the submissions made in the tariff petition. Further, the tariff petition is purely on the issue of determination of tariff by this Commission and will have no bearing on the contractual and legal obligations of the said



Respondents, under the PSA, which is the subject matter of the present petition.

- (d) The position of a project in the merit order of the beneficiary has no relation to the performance of its contractual and legal obligations under the PPA/PSA. Otherwise also, the merit order changes on a year on year basis, whereas the PPA/PSA in the present case is for 35 years. The Respondent has entered into the PSA with PTC for a period of 35 years and the same has been approved under section 86(1)(b) of the 2003 Act, by the Haryana Electricity Regulatory Commission (HERC).
- (e) HERC vide its order dated 18.6.2007 has unconditionally approved the PSA between the Respondent HPPC and Petitioner PTC. In the said order, the HERC did not put any restriction on the increase in capital cost, which is to be determined by this Commission. The approval to the PSA was further reiterated by HERC in its order dated 28.8.2017, wherein, on a subsequent petition filed by the Respondents 1 to 3 in an attempt to wriggle out of their contractual obligations under the PSA, the same was dismissed by HERC.
- (f) The Hon'ble Supreme Court in *Alopi Prashad & Sons Ltd v Union of India*, 1960 (2) SCR 793 has held that the performance of a contract cannot be discharged merely because it becomes onerous to either of the parties. Further, the Hon'ble Supreme Court in *Naihati Jute Mills v Hyaliram Jagannath*, 1968 (1) SCR 821 has held that Courts have no general power to absolve the contract merely because its performance has become onerous on account of an unforeseen turn of events.
- (g) As per approved aggregate revenue requirement of Haryana Utilities for 2019-20 by HERC, power is being procured by Haryana Utilities from 17 projects having tariff higher than the present interim tariff of Rs. 4.68/kWh of the project. The PSA provides for procurement of power at the tariff determined by this Hon'ble Commission and the HERC has approved procurement of power from the hydro project of the Petitioner at the tariff to be determined by this Commission.
- (h) Section 61 of the Electricity Act, 2003 does not provide that a generating company should stop the construction of its project which has been techno-economically concurred by the CEA and the power procurement process approved by the State Electricity Regulatory Commission, merely on account of a time and cost overrun which is due to Force Majeure events.
- (i) With the increase in equity stake of the State Government from earlier 26% to more than 60%, the Petitioner No. 2 TUL is now a Government of Sikkim enterprise. It is denied that Government of Sikkim is owning 100% of the project as contended by the Respondent no. 1. The free power is being provided to Government of Sikkim in terms of the Implementation



Agreement signed between Government of Sikkim and TUL on 18.07.2005 for development of the Project. Article 4.22 of the Implementation Agreement provides that any agreement for sale of power by TUL to any third party shall not be detrimental to the rights of Government of Sikkim to receive its free power share as royalty.

- (j) As per the provisions of the PSA, the termination notice could be issued only if Force Majeure events last for a continuous period of 12 months and further such Force Majeure condition had to be operative at the time of issue of notice as also at the time of expiry of 7 days' notice. Admittedly, none of the Force Majeure conditions were prevailing as on the date of issue of termination letter dated 27.03.2018 and the Project had also successfully completed more than two years of its operation. Further, no Force Majeure condition has prevailed for a continuous period of 12 months.
- (k) The delay in commissioning of the project and increase in cost has been due to force majeure and geological surprises. Clause 6.7.1.1 of the PSA provided that in case of any delay falling under force majeure or on account of geological surprise, the IDC or any increase in capital cost shall be allowed to be capitalized. Thus, increase in cost and delay in execution of the project due to force majeure and geological surprises have been envisaged by the parties at the time of execution of the agreement. The tariff petition of the Petitioner is under consideration of the Commission to decide the capital cost and tariff according to the Tariff Regulations. The Respondent is a party to the petition and it is open for the Respondents to raise objections regarding time and cost over-run before the Commission
- (l) The Respondent has not given any instance of the Petitioner not following prudent utility practice. The delay in execution of the project and increase in capital cost has been due to force majeure events and geological surprises, which were beyond the control of the Petitioner. The Respondent (Haryana Utilities), for the first time, conveyed its stand vide letter dated 6.2.2017, i.e. barely three weeks prior to COD of the Project, that it would schedule the power only after concurrence of HERC and after final tariff along with condonation of delay due to force majeure events has been adjudicated by this Commission. Such a stance was not in accordance with the provisions of the PSA which had been unconditionally approved by HERC vide its order dated 18.6.2017 which was again reiterated by its order dated 28.8.2017.
- (m) There is no breach of the provisions of the PPA/PSA which could have entitled the Respondents to terminate the PSA. The submission of the Respondent is only an afterthought, as the said submission never formed part of the letter of termination issued by the Respondents. Petitioner PTC vide letter dated 2.5.2018 has outrightly rejected the purported termination



issued by the Respondents, as the same is not based on facts and provisions of PPA.

- (n) PTC, without prejudice, had relinquished the LTA, even though all the liabilities under the LTA/BPTA were of Haryana Utilities. Accordingly, the Petitioners have made a prayer in the present Petition seeking a direction that Respondent 1 to 3 have all liabilities against the LTA granted for Haryana Discoms including the relinquishment charges. LTA application can be re-applied for the said transmission of power and is likely to be granted soon as North-Eastern grid is not much loaded and foresee any transmission constraint, up to the time processing of LTA permission for interim arrangement of STOA/MTOA for scheduling of the project power to Haryana Discoms.
- (o) PTC has not terminated the PPA and as already stated, the termination notice by the Respondent is illegal. The PPA and PSA are back to back agreements therefore TUL, has the right to proceed jointly with PTC against Haryana utilities to enforce its legal and contractual rights. It is pertinent to mention that the project has been developed on the basis of commitments made by the Discoms under the PSA.

Interlocutory Application No. 29/IA/2020

13. Meanwhile, the Petitioner, TUL, vide its affidavit dated 29.2.2020, has filed Interlocutory Application (IA No.29/2020) seeking to amend/modify the petition by incorporating an additional alternate prayer, thereby, seeking an additional relief/direction from this Commission, in terms of the provisions of Section 21 of the Specific Relief Act, 1963. In addition to the grant of prayers already mentioned in the petition, the Petitioner has prayed to issue a decree against the Respondent Haryana Utilities for payment of damages to the extent of their liability under the PSA for the entire period of 35 years. The Petitioner/Applicant has prayed for grant of leave to allow the amendments to the petition on such terms as may be just, for including an additional alternate claim for damages against breach of the contractual obligations by the Respondent Nos 1 to 3 (Haryana Utilities). The proposed amendments to the petition (a) by raising additional grounds by insertion of *paras 24.18 to 24.23* to the petition; and (b) by insertion of *prayer (dd)* to the petition, is as noted below:



A. AMENDMENT TO THE GROUNDS OF PETITION BY WAY OF INSERTION OF ADDITIONAL PARAS AFTER PARA 24.17, AS BELOW:

"24.18 Because the Petitioners have suffered huge financial losses since the COD of the Project on account of unreasonable and illegal actions of the Respondent No.1 to 3 in as much as the Petitioner/Applicant is being forced to sell the contracted capacity of the Respondent No. 1 to 3 through energy exchange at much lower tariff than what has actually been determined by this Hon'ble Commission. A copy of the Statement evidencing the total loss occasioned to the Petitioner/Applicant are attached hereto and marked as Annexure P-24.

24.19 Because in the light of clear breach of obligations of the Respondent No.1 to 3 under the PSA dated 21.09.2006, the Petitioner/Applicant is entitled to award of damages under the provisions of Section 73 & 74 of the Indian Contract Act, 1872, which legally entitles the Petitioner/Applicant to claim damages from the Respondent No.1 to 3 in the event of breach of contract/agreement executed between the parties by way of non-operationalization of the PSA.

24.20 Because, the provisions of Section 73 of the Indian Contract Act, 1872, are fully applicable to the facts and circumstances of the case and therefore, the Petitioner/Applicant is entitled to the financial losses suffered in the form of damages from the Respondent No.1 to 3 in terms of the law laid down by Hon'ble Apex Court qua application of the provisions of Sections 73 and 74 of the Indian Contract Act, 1872.

24.21 Because, Section 21(4) of the Specific Relief Act, 1963 clearly provides that in determining the amount of any compensation awarded under the Section, the Court shall be guided by the principles specified in Section 73 of the Indian Contract Act, 1872.

24.22. Because the actions of the Respondents No. 1 to 3 have already resulted in financial losses to the tune of Rs 752.89 crores (approx.) to the Petitioner No. 2 and Rs. 12.58 crores (approx) to the Petitioner No. 1 till 31.1.2020, and the same has to be compensated by the Respondents on account breach of terms and conditions of the PSA/PPA."

24.23. Because the Petitioners shall suffer an estimated loss to the tune of Rs 2385 crores (approx.) to Petitioner No. 2 and Rs. 81.08 crores (approx) to Petitioner No. 1 during the entire period of PSA/PPA, in the event of non-grant of any relief of specific performance of the contract by this Commission, which shall be directed to be compensated by the Respondent No. 1 to 3, in the form of damages on account of breach of terms and conditions of the PSA/PPA.

B. PROPOSED AMENDMENT OF THE PRAYER CLAUSE

(dd) "In the alternative and without prejudice, in case Respondent Nos 1 to 3 refuse to offtake the power, then this Commission may be pleased to issue a decree on the said Respondents for payment of damages amounting to Rs 2385 crores (being the difference between the accrued & accruable net revenue from the contracted power sold on the power exchange & under short term bilateral, and the revenue accrued & accruable to Petitioner No.1 from sale of the contracted power to Haryana Discoms at the tariff determined by CERC vide its order dated 09.01.2020 in Petition No. 249/GT/2016, in terms of the PSA for the entire period of the 35 years of the PSA), along with the trading margin thereon of Petitioner No. 1 amounting to Rs. 81.08 crores for the same period. The details of computation of the said damages are enclosed at Annexure P-24.



14. In justification of the above, the Applicant has submitted that it has the legal right to seek specific performance of the PSA, as the Petitioners are entitled to claim damages from Respondent Haryana Utilities for non-compliance of contractual/legal obligations by them, in as much as the said respondents have continuously failed to off-take their contracted capacity from the project which has forced the Petitioners to sell the said capacity in the short-term market under distress at low rates. It has also submitted that under the provisions of the Specific Relief Act 1963, as amended in 2018, it has been emphasized that the agreements/ contracts are to be specifically performed and not to be terminated. The only exceptions to this rule have been enumerated under sections 14 & 16 of the said Act. The Applicant has also submitted that the PSA as also the facts & circumstance enumerated in the present Petition do not fall under any of the exceptions as provided under any of the sections of the Specific Relief Act, 1963. Accordingly, the Applicant has stated that in the light of the aforesaid specific terms and conditions as agreed to between the parties, as also in view of the provisions of Section 21 of the Specific Relief Act, 1963, it has sought the amendment of the aforesaid petition by incorporating the said paragraphs/prayer.

Additional Affidavit of the Petitioner, TUL

15. The Petitioner, TUL vide additional affidavit dated 3.7.2020, has referred to the Commission's order dated 9.1.2020 in Petition No. 249/GT/2016, determining the tariff of the project of the Petitioner for the period from actual COD till 31.3.2019 and has pointed out that the said order has a direct bearing on the outcome of this petition, as the delay in commissioning of the project has duly been condoned and its consequent effect on the completed cost of the project has been approved by the Commission, which is the statutory authority under the Act, and the findings of the Commission is therefore binding upon the Respondents.



Additional Affidavit of the Respondent, HPPC

16. The Respondent, HPPC (on behalf of the Haryana Utilities) vide additional affidavit dated 20.4.2021, has reiterated the submissions made in its reply to the petition. In addition, the Respondent has made the following additional submissions:

(a) The Commission in its order dated 9.1.2020 has approved Rs 13337.33 crore as project completion cost (increase of 234% from the original envisaged cost of Rs 5700 crore) The effective tariff determined by this Commission works out to approximately Rs 6.02/kWh for 2017-18 and Rs 5.76/kWh for 2018-19. Since the Haryana Utilities have already terminated the PSA with PTC, the determination of tariff or consideration of time overrun and cost overrun is not relevant. The right to terminate vested with the Haryana Utilities in terms of the PSA dated 21.9.2006 can, in no manner, be prejudiced due to the said order dated 9.1.2020. Appeal being DFR No. 140 of 2020 has been filed against the said order dated 9.1.2020 without prejudice to the termination of the PSA.

(b) The tariff approved by the Commission works out to Rs. 6.02 /kWh for 2017-18 and Rs. 5.76/kWh for 2018-19 which along with trading margin to PTC results in tariff of Rs. 6.07 and Rs. 5.81 per kWh to Haryana Utilities respectively. Further the transmission charges are applicable to such power. The Petitioners are wrongly referring to the average cost of power sources approved by the HERC without consideration of the actual per unit fixed and variable costs for such project. The average cost is on the higher side due to backing down of plants by the Haryana Utilities, which demonstrates that Haryana Utilities are power surplus for such period. The tariff for TUL cannot be compared to renewable sources such as biomass or solar projects or even the older projects which were commissioned much earlier. There is no PPA/PSA entered into by Haryana Utilities after the commissioning of Teesta project/termination of PSA with PTC, wherein the tariff was higher than the tariff in relation to TUL project (other than for Biogas/Biomass projects which cannot be compared).

(c) The list of projects along with the details of their COD and the signing dates of the respective PPAs and the actual generation tariff is attached hereto and marked as Annexure A. The above projects (except new hydro plants) had already been commissioned prior to the commissioning of Teesta project/termination of PSA with PTC and cannot be relied on to dispute the actions of Haryana Utilities in terminating the PSA with PTC.

Hearing dated 23.11.2021

17. During the hearing of the Petition along with IAs, through virtual hearing, on 23.11.2021, the learned counsel appearing for the Petitioner PTC made detailed oral submissions seeking reliefs against the illegal termination of the PSA dated 21.9.2006 by the Respondents (Haryana Utilities) and for payment of the relinquishment charges



to the Respondent, PGCIL. The learned counsel for the Petitioner TUL also made detailed oral submissions in support of the reliefs prayed in the petition. He also referred to the Commission's order dated 13.1.2020 in Petition No. 78/MP/2018 (DVC v MPPMCL) and the judgment dated 6.8.2021 of APTEL in Appeal Nos. 43/2020 to 47/2020 (UPPCL & ors v UERC & anr) and submitted that there is no ground for frustration of the contract and therefore direct the specific performance of the contract by the Respondents. However, due to paucity of time, the matter was adjourned.

Hearing dated 2.12.2021

18. During the hearing of the Petition along with IAs, through virtual hearing, on 2.12.2021, the learned counsel for the Petitioner, PTC made detailed oral submissions with regard to payment of transmission charges and relinquishment charges by the Respondent beneficiaries in the context of PSA dated 21.9.2006. He further submitted that in terms of the Commission's findings in the order dated 8.3.2019 in Petition No. 92/MP/2019, the relinquishment charges form part of the transmission charges and are therefore payable by the Respondents to PGCIL/CTU. Matter was part-heard.

Hearing dated 13.1.2022

19. During the hearing of the Petition along with IAs, through virtual hearing, on 13.1.2022, the learned Senior counsel for the Respondent HPPC, referred to the reply and made detailed oral submissions. He mainly submitted that the Respondent has terminated the PPA on account of time overrun and cost overrun, whereby the estimated project cost increased from Rs. 5700 crore to Rs.13965 crore. He added that the Petitioner has continued with the project only for the purpose of salvaging the financial institution or protecting the interest of the Government of Sikkim, but not to safeguard the interests of consumers. In response, the learned counsel for the Petitioner No. 2, TUL objected to the submissions of the Respondent HPPC and



submitted that the initial commercial bargain was not on a particular cost, as it was based on the normative tariff determined by this Commission. He also submitted that the Commission, while determining the tariff of the generating station, had considered the issue of time and cost overrun and allowed the same on prudence check. The learned counsel for the Respondent, CTUIL made oral submissions in the matter. She also referred to letter dated 6.3.2019 addressed by CTUIL to the Petitioner PTC and submitted that since the Petitioner PTC is the LTA grantee and a signatory to the BPTA executed with the beneficiaries, the relinquishment charges are payable by the Petitioner PTC. In response, the learned counsel for the Petitioner PTC, referred to CTUIL letter dated 10.10.2018, confirming that the Haryana Utilities are liable to open Letter of Credit (LC) on termination of agreement on account of time and cost overrun. In response, the learned counsel for the Petitioner, TUL submitted that the initial commercial bargain was not on a particular cost, as it was based on normative tariff to be determined by the Commission and further submitted that while determining the tariff of the generating station, the Commission had considered the issue of time and cost overrun and allowed the same on prudence check. The learned counsel for the Respondent, CTUIL submitted that since the Petitioner PTC is the LTA grantee and a signatory to the BPTA executed with the beneficiaries, the relinquishment charges are payable by the Petitioner PTC. In response, the learned counsel for the Petitioner PTC referred to the CTUIL letter 10.10.2018, confirming that the Haryana Utilities are liable to open LC. Accordingly, the Commission, after hearing the parties, reserved its order in the matter.

Hearing dated 12.7.2022

20. As the order in the Petition/IA could not be passed prior to the Chairperson Shri P. K. Pujari demitting office, these matters, were re-listed for virtual hearing on 12.7.2022. During the hearing, the learned counsels appearing for the Petitioners and



the Respondents submitted that since pleadings have been completed in the matter, the Commission may reserve its orders. Accordingly, order in the Petition/IAs were reserved.

Interlocutory Applications

21. Before, dealing with the issues raised in the petition, we proceed to examine the prayers of the Petitioners in the aforesaid IAs (i.e IA Nos. 37/2019, 53/2019 and 29/2020), and dispose of the same, as stated in the subsequent paragraphs.

22. The prayers of the Petitioners/Applicants in IA No.37/2019 are extracted in paragraph 5 above. Admittedly, the interim prayers (i) to (ii) made in the said IA, were subject to final adjudication of the disputes raised in this petition. Since these interim prayers, which were not granted and, are similar to prayers (a) and (b) of the Petitioners in the original petition (as in para 1 above) and are being finally disposed of by this order, these prayers in the IA are rendered infructuous. Similarly, prayer (ii) of the Petitioner, in the IA, is also rendered infructuous, as the tariff of the generating station of the Petitioner, had been determined by Commission's order dated 9.1.2020 in Petition No. 249/GT/ 2016. Accordingly, IA No. 37/2019 stands disposed of in terms of the above.

23. The prayers of the Petitioner/Applicant, PTC in IA No.53/2019 are extracted in paragraph 6 above. As the prayers (i) to (iii) in the IA are consequential reliefs, based on our findings with regard to prayer (e) in the original petition (as in para 1 above), these prayers have become infructuous. Similarly, the prayer (iv) of the Petitioner in the said IA, to pass ad-interim order restraining the Respondent PGCIL from taking coercive action, is also rendered infructuous, as the present petition is being finally disposed of by this order. Accordingly, IA No. 53/2019 stands disposed of in terms of the above



24. Further, the prayer of the Petitioners/Applicants in IA No. 29/2020 to permit the amendments (A) and (B) to the original petition (as stated in para 13 above), are allowed, and the same will be considered while adjudicating the issues raised in the original petition. The IA stands disposed of in terms of the above.

25. Accordingly, we proceed to examine the issues raised in the present petition. Based on the submissions of the parties, the issues which emerge for consideration, are as under:

Issue No.(A): Whether the termination of the PSA dated 21.9.2006 vide Respondent HPPC letter dated 27.3.2018 is valid?

Issue No.(B): Whether the Petitioners are entitled to Specific Performance of the PSA/PPA?

Issue No.(C): Whether the Petitioner PTC is liable for payment of all charges including relinquishment charges to Respondent PGCIL?

Issue No.(D): In the alternate, whether the Petitioners are entitled to damages for Rs. 2385 crore for refusal of Respondent Nos. 1 to 3 to off-take power at the tariff determined by Commission's order dated 9.1.2020 in Petition No.249/GT/2016?

26. The Government of Sikkim, as a part of national drive for 50000 MW Hydro Initiative of the country, awarded several hydro-electric projects to various Independent Power Producers (IPPs). The project was a part of overall development of the Teesta basin undertaken by the Govt. of Sikkim, through six hydro projects, having cumulative capacity of about 3000 MW. In February 2005, the Govt. of Sikkim issued Letter of Intent (LOI) to the Consortium led by M/s Athena Projects Pvt. Ltd. for implementation of the Project on a Build, Own, Operate and Transfer ('BOOT') basis, in joint venture with the Govt. of Sikkim. Accordingly, on 18.7.2005, the Petitioner and the Govt. of Sikkim entered into an Implementation Agreement for implementation of the Project. Based on the provisions of the said agreement, the Govt. of Sikkim is entitled to free power at the rate of 12% for initial period of 15 years commencing from



the date of commercial operation of the project and at the rate of 15% for the balance period of 20 years. On 12.5.2006, the Central Electricity Authority (CEA) accorded concurrence to the project at an estimated completion cost of Rs. 5705.55 crore. CEA vide its letter dated 14.6.2010 amended this concurrence to make changes in the project features due to difficulties encountered by the Petitioner in construction of the Spillway Arrangement as approved earlier. CEA in the original concurrence dated 12.5.2006 had approved Design Energy (DE) of 5183 MU. However, the DE was revised by CEA to 5213.82 MU in the addendum to the concurrence dated 14.6.2010 due to changes in the project features. Thereafter, the Petitioner No.2 TUL, entered into PPA with the Petitioner No.1 PTC on 28.7.2006, for a period of 35 years from the COD of the generating station for sale of entire power from the project, excluding auxiliary consumption, free power and transformation losses incurred upto the delivery point. Consequently, PTC entered into PSAs with certain beneficiaries (including Respondents Nos 1 to 3 herein), for sale of power on long term basis for 35 years. In compliance with the conditions envisaged under the PPA, PTC vide its letter dated 9.11.2016 also submitted application to the Respondent No.4 PGCIL, for grant of LTOA to the project and the said Respondent vide its letter dated 26.5.2009, had granted LTOA to the Petitioner, PTC. The details of the PSAs entered into between the Petitioner No.1 PTC and some beneficiaries of the States, for sale of power from the project are as under:

Name of beneficiaries	Date of PSA	Contracted capacity
PSPCL	15.9.2006	340 MW
HPPC	21.9.2006	200 MW
UPPCL	27.9.2006	200 MW
Rajasthan discoms	27.9.2006	100 MW

27. The Commission vide its order dated 23.5.2017 in Petition No.249/GT/2016 had allowed interim tariff for the period from 23.2.2017 to 31.3.2019, based on 85% of the capital cost as on COD of the units and the same was permitted to be continued



beyond 31.3.2019, by order dated 25.3.2019, subject to adjustment after determination of final tariff of the generating station. Thereafter, the Commission, after considering the submissions of the parties, determined the tariff of the generating station of the Petitioner TUL, vide order dated 9.1.2020 in Petition No.249/GT/2016.

28. With the above background, the issues under paragraph 25 are dealt with in the succeeding paragraphs:

Issue No.(A): Whether the termination of the PSA dated 21.9.2006 vide notice dated 27.3.2018 of the Respondent HPPC is valid?

And

Issue No.(B): Whether the Petitioners are entitled to Specific Performance of the PSA/PPA?

29. Since the issue of termination of the PSA and the grant of specific performance are inter-related, we examine these issues together.

30. The Petitioners have submitted that the termination notice dated 27.3.2018 issued by the Respondent HPPC is non-est, illegal and ought to be set aside. They have submitted that the said notice was never accepted, as the same is without any merit and is in complete violation of the terms and conditions of the PSA, as no event of default had occurred under the PSA. The Petitioners have also pointed out that as per clause 14.3 of the PSA, termination notice can be issued only if force majeure events last for a continuous period of 12 months, and further, such force majeure conditions has to be operative at the time of expiry of 7 days' notice. They have also stated that the contention of the Respondent HPPC that the very purpose of the PSA was for electricity required at the time of need, which basis had changed with the extraordinary delay in the project, is not tenable, under the provisions of the PSA, as approved by HERC, as the same is belied by the fact that the Respondents have issued 'Expression of Interest' on 3.7.2018, for procurement of 500 MW of hydropower, on long-term basis.



31. *Per contra*, the Respondent HPPC has submitted that there has been substantial time overrun (*64 months*) and cost overrun (*from Rs.5700 crore to Rs.13965 crore*) of the project. It has also stated that the completion cost claimed by the Petitioner, TUL based on the time overrun and cost overrun, are substantially higher than the capital cost envisaged at the time when the Haryana Utilities signed the PSA dated 21.9.2006, with Petitioner PTC, who had signed the PPA dated 28.7.2006, with the Petitioner, TUL. It has also submitted that though the effective tariff as per interim order dated 23.5.2017 works out to Rs 4.61/kWh (approx.), the Petitioner TUL has been seeking the tariff of Rs 6.073/kWh, which will have a lower priority under the merit order of the Haryana Utilities. The Respondent has further submitted that the PSA and the PPA executed by the parties, cannot be implemented, as the intention of the parties at the time when the said agreements were signed, was not that the project cost would escalate 2½ times than what was envisaged. The Respondent has submitted that there has been fundamental change in the financials of the project and the substance and spectrum of the agreements entered into between the parties no longer exist. In the above circumstances, the Respondent has submitted that there is fundamental breach of the PSA dated 21.9.2006 and related PPA dated 28.7.2006, which led to the Haryana Utilities terminating the agreement, as per notice dated 27.3.2018. Accordingly, the Respondent has contended that the notice terminating the PSA is therefore valid, justified and in accordance with law.

32. In response to the above, the Petitioners have submitted that the delay in execution of the project and increase in capital cost has been due to force majeure events and geological surprises, which were beyond the control of the Petitioner. The Petitioners have submitted that clause 6.7.11 of the PSA provides that in case of delay falling under force majeure or on account of geological surprises, the IDC or any



increase in capital cost shall be allowed to be capitalized. Thus, the increase in cost and delay in execution of the project due to force majeure and geological surprises have been envisaged by the parties at the time of execution of the agreement. The Petitioners have also stated that the tariff petition (249/GT/2016) is under consideration of the Commission and the Respondent is a party to the petition and therefore, it is not open for the Respondent to raise its objections regarding time and cost overrun before the Commission. They have further submitted that the PSA provides for procurement of power from the project of the Petitioner TUL, through PTC, at the tariff to be determined by this Commission. Referring to the Commission's order dated 9.1.2020 in Petition No.249/GT/2016, determining the tariff of the project, the Petitioners have submitted that since the Commission had condoned the delay of 64 months in the completion of the project, on the ground that the same were in the nature of force majeure events and its consequential effect on the completion cost of the project having been approved by the Commission, the findings are therefore binding on the Respondents. The Petitioners have added that no force majeure condition prevailed as on the date of issue of termination letter dated 27.3.2018 and also for a continuous period of 12 months. The Petitioners have also stated that the stand of the Respondent HPPC is not in accordance with the provisions of the PSA, which was approved by HERC vide its order dated 18.6.2007 and reiterated again by HERC vide its order dated 28.8.2017, in the petitions filed by the Respondents.

Analysis and Decision

33. We have examined the submissions of the parties. It is pertinent to mention that the Petitioner TUL has entered into contractual obligations for supplying power to multiple States (*see table under para 26 above*) through PPA dated 28.7.2006 with the Petitioner PTC and with back-to-back binding arrangements with the distribution entities of the States, through various PSAs, including the PSA dated 21.9.2006 with



the Respondent Nos. 1 to 3 herein. Thus, the project of the Petitioner TUL has a 'composite scheme' for generation and sale of power to more than one State. The actual COD of the generating stations is 28.2.2017.

34. Recitals (E) & (F) of the PPA dated 28.7.2006 is as under:

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

- (i) PTC would enter into PSAs on long term basis for atleast 70% of the contracted capacity;*
- (ii) xxx*

(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, subject to other terms and conditions of this Agreement.

35. Sections 4.1(i) & (ii) and Clause 4.2 (ii) & (iii) of the PSA provides for the obligations of PTC and Purchaser (*Haryana Utilities*) respectively, as under:

4.1 PTC obligations

PTC agrees and undertakes

(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) To sell purchaser Contracted Power and Purchase Contracted Energy to the Purchaser in accordance with this agreement at the Delivery Point after adjusting for losses, if any, between the Project generator terminal and the Delivery Point;

xxxx

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.

4.2 Purchaser's Obligation

The Purchaser agrees and undertakes:

(i) xxxx;

(ii) To offtake Purchaser Contracted Power and Purchaser Contracted Energy at the Delivery Point;

(iii) To pay the amounts due against Purchaser Monthly Bills or Purchaser Weekly Bills and PSA Supplementary Bills to PTC by the respective PSA Due Dates, including the amounts in connection with obtaining and maintaining long-term open access for the transmission of power from the Delivery Point to the CTU drawal point in the Purchaser's state:

(iv) xxxx.



Section 6.7: Delayed Commissioning /early Commissioning

6.7.1: Commissioning delay/early Commissioning by the Company

6.7.1.1 In case of delay in Commissioning, beyond the RCOD, the Interest during construction for the period of delay or any increase in Capital Cost of the Project that would not have occurred but for such delay shall not be allowed to be capitalized for determination of tariff, except in case delay is due to any Force Majeure arising out of 'act of God' as set out in Article 10.1.2(i) of the PPA or geological surprises, In case of delay due to any 'act of God' as set out in Article 10.1.2(i) or geological surprises, increase in interest during construction or any increase in capital cost of the Project that would not have occurred, but for such delay shall be allowed to be capitalized after setting off amount received from insurance coverage.

xxxxxx

9.1.2 *The Purchaser shall pay Tariff to PTC based on the Capital Cost and means of financing thereof, as approved by CEA/CERC on completion of the Project, in proportion to the ratio of Purchaser Contracted Power to the Rated Capacity, such Rated Capacity being adjusted for Free Power. The Tariff payable by the Purchaser will be determined in accordance with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2004 and as may be modified or amended up to the date of execution of the PPA. Determination of Tariff would be subject to approval by CERC. Subject to Section 9.1.1, the Tariff as approved by CERC will be applicable for purchase and sale of the Purchaser Contracted Power and Purchaser Contracted Energy.*

9.1.3 *In addition to the generation tariff as above, the Purchaser shall pay to PTC, the applicable charges for transmission of power from the Project bus-bar up to the Delivery Point, in case the Delivery Point is not the Project bus-bar.*

36. It is evident from Clause 4.1(i) and (ii) above, that the Petitioner PTC is primarily obligated to deliver the contracted power and contracted energy to the Purchasers and that PTC in turn purchases from the Petitioner TUL, in terms of the PPA. Also, in terms of Clauses 4.2(ii) and (iii) above, the Purchasers are obligated to off-take the said power, at the delivery point, and pay the amounts against monthly bills/ supplementary bills, in terms of the PSA. The PSA defines the term 'Tariff' to mean the tariff payable in accordance with the PPA, and in terms of 'Recital F' of the PPA, the tariff as approved by this Commission, is to be made applicable for the purchase and sale of the contracted power. In other words, the price at which the power would be sold was never agreed to between the parties in the PPA or the PSA, as the same was subject to determination by this Commission.



37. Further, the PPA/PSA provides for details of the force majeure events and the extension of time for commissioning of the project, which the parties would be entitled for relief, in the event of force majeure. While Clause 9.1.2 of the PSA (supra) provides that the Purchaser shall pay tariff based on the capital cost and means of financing thereof, as approved by the Commission, Clause 6.7.11.1 of the PSA (supra) provides that in case of delay falling under force majeure or on account of geological surprises, the IDC or any increase in capital cost shall be allowed to be capitalized. It is therefore clear, that the delay in execution of the project due to force majeure events and geological surprises, and the consequential increase in capital cost of the project on this count, were all envisaged by the parties, at the time of execution of the PPA/PSA. Hence, the Respondent HPPC cannot say that the escalation of the project cost was not envisaged by the parties, at the time of signing the agreements. Be that as it may, in Petition No.249/GT/2016 filed by the Petitioner TUL for approval of tariff of the generating station for the period from COD till 31.3.2019, the Respondent Haryana Utilities, had filed its objections on the issue of time overrun and cost overrun claimed by the Petitioner, as under:

“24..... The Respondents have also submitted that the project was to be completed within 60 months from the financial closure, which was to be completed in the year 2012. While pointing out that the actual COD is in the year 2017, these Respondents have stated that the time overrun is nearly 64 months and the cost overrun claimed is more than double the original project cost. Hence, all these need to be as considered afresh for the purpose of deciding on the purchase of electricity. In these circumstances, the Respondents have stated that there cannot be any direction or mandate to Haryana discoms to necessarily purchase electricity. The Respondents have reiterated that they would schedule and purchase electricity from the project if and only when the HERC grants concurrence, based on the final tariff to be determined by this Commission”

38. Thus, the Respondents, having undertaken to schedule and purchase electricity from the project, based on final tariff to be approved by this Commission, should not have, during the pendency of the tariff petition, and prior to the decision of this Commission on the issue of time and cost overrun, terminated the said PSA.



Nevertheless, the Commission, after considering the submissions of the Respondents and after prudence check of the reasons/justification for time and cost overrun on account of force majeure events and geological surprises, rejected the contention of the Respondent Haryana Utilities, and approved the capital cost and the annual fixed charges for the generating station vide its order dated 9.1.2020. As the extension of time for commissioning of the project due to Force Majeure events (*as agreed by the parties in the PPA/PSA*) having been affirmed in favour of the Petitioner, TUL, by order dated 9.1.2020, the Respondents cannot contend that there has been material breach of the PSA by PTC and that there were no prudent utility practices. As the Respondent HPPC had agreed to purchase power from the project and pay the Petitioner PTC the tariff (based on the capital cost and financing thereof) as approved by the Commission, in terms of the provisions of the 2014 Tariff Regulations, it is not open for the Respondents, to justify the termination of the PSA, on the ground that the escalation in the capital cost of the project was not envisaged by the parties, at the time of execution of these agreements.

39. The Respondents HPPC has, in the termination letter dated 27.3.2018, stated that the PSA is terminable on account of 'Extended Force Majeure' in terms of Clause 14.3 and that the PSA may be treated as terminated in exercise of the rights of the Respondent under Clause 14.3.2 with a notice of 7 days. In this regard, the provisions in the PSA are extracted below:

“10.7 Extended Force Majeure

The continuance of an event of Force Majeure for a period of 12 consecutive months shall constitute Extended Force Majeure. In the event of Extended Force majeure, either Party may terminate the Agreement pursuant to Section 14.3.

14.3 Extended Force Majeure

14.3.1 The occurrence of an event of Force Majeure and its continuance for a period of 12 months shall constitute “Extended Force Majeure” and either Party shall have the right to terminate this Agreement in such instances.

14.3.2 In the event that any event of Force Majeure specified in Section 10.2, singularly or in any combination thereof, lasts for a continuous period of twelve (12) Months,



either Party shall be entitled to terminate this Agreement by delivering a seven (7) day written notice of termination to the other Party; and this Agreement shall stand terminated at the end of such seven (7) day period provided that the Force Majeure condition is till operative at such time. Neither Party shall have any liability to the other Party as a result of termination of this Agreement pursuant to this Section.

40. It is noticed that the Petitioners had rejected the termination letter dated 27.3.2018 terming the same as illegal and not based on the provisions of the PSA, considering that none of the force majeure conditions were prevailing as on the date of issue of the said termination letter and that the project had completed more than a year of operation as on 28.2.2018. As per the aforesaid provisions, either party may terminate the PSA, in case the force majeure events specified, lasts for a continuous period of 12 months, provided such force majeure condition is operative at the time of issuance of such notice. It is noticed that the Petitioner PTC, based on information from Petitioner TUL, had been informing the Respondent Haryana Utilities, since 2011, on the time and cost overrun faced due to force majeure events, including the estimated revision in the capital cost of the project in the completion cost. Despite this, the Respondent Haryana Utilities did not invoke this clause, for termination of the PSA. As rightly contended by the Petitioners, none of the force majeure conditions were prevailing, as on the date of issue of the termination letter dated 27.3.2018, as the project had successfully commenced operation since 28.2.2017. Therefore, the reliance placed to Clause 14.3 of the PSA, by the Respondent Haryana Utilities, to justify the termination of the PSA dated 21.9.2006, is in our view, an afterthought and is not sustainable.

41. The Respondent Haryana Utilities have submitted that since there is no regulatory approval of the PSA for procurement of power at the revised cost, the PSA dated 21.9.2006 is terminable. Clause 3.1.1 (iii) of the PSA (*conditions precedent to be satisfied by the Purchaser*) provides that the Purchaser shall have obtained the approval as may be necessary, from the HERC with regard to this agreement. It is



noticed that HERC vide its order dated 18.6.2007, had approved the procurement of power from the project of the Petitioner, TUL, in exercise of its power under Section 86(1)(b) of the Act. The said approval, was subject to, amongst others, that the provisional tariff to be determined, shall be subject to retrospective adjustment and that the Haryana Utilities shall make necessary arrangements for off-take of contracted power. Neither the provisions of the Act or the provisions of the PPA/PSA, provide for a requirement to seek fresh approval of the PSA, based on the revised cost /tariff approved by this Commission. This submission of the Respondents, is also not acceptable and the termination of the PSA on this ground is not tenable.

42. To conclude, the Respondent Haryana Utilities have, in our view, acted in contravention of the provisions of the PSA, and therefore the termination of the PSA dated 21.9.2006 is not sustainable in law. In view of the discussions and findings above, we set aside the termination of PSA dated 21.9.2006 vide Respondents notice dated 27.3.2018.

Specific Performance of the PSA/PPA

43. Having held that the termination of the PSA dated 21.9.2006 is not valid, as above, the issue for consideration is whether the Petitioners are entitled for specific performance of the PSA. The Petitioners, vide IA No. 29/2020 has submitted that the action of the Respondents in not off-taking the contracted capacity generated from the project has severally affected the revenue stream of the project, arising due to forced sale of Respondent's 1 to 3 share of the contracted capacity under the PSA/PPA through the power exchange by the Petitioners, which has not even been sufficient for meeting the debt servicing obligation of Petitioner, TUL in a timely manner. They have also submitted that under the provisions of the Specific Relief Act 1963 as amended in 2018, it has been emphasized that the agreements/ contracts are to be specifically



performed and not to be terminated and the only exception to this rule have been enumerated under Sections 14 and 16 of the said Act. The Petitioners have further stated that it is apparent that the PSA as also the facts and circumstance enumerated, do not fall under any of the exceptions as provided under any of the sections of the Specific Relief Act, 1963. Therefore, the PPA/PSA are compulsorily enforceable against the Respondent Haryana Utilities and they cannot be allowed to wriggle out from their obligation to offtake power/ energy from their contracted share of 200 MW being generated by the project. Accordingly, the Petitioners have submitted that they have a legal right to seek specific performance of the PSA. Per contra, the Respondent Haryana Utilities' have contended that they have no obligation to enforce the PSA pursuant to its termination dated 27.3.2018 and the Commission's order dated 9.1.2020 in Petition No.249/ GT/ 2016.

44. We have examined the matter. Section 14 (d) of the Specific Relief Act [Section 14(c) prior to the Amendment Act of 2018] is extracted as under:

"14. Contracts not specifically enforceable: - The following contracts cannot be specifically enforced, namely: -

(a) to (c) xxxxxxxxxxxx

(d) a contract which is in its nature determinable.

45. As per the above provisions, the contracts which are determinable or revocable in terms of specific provision for termination or revocation in the said contracts cannot be specifically enforced under Specific Relief Act. In other words, the contract, which can be terminated by either of the parties at their own will, without assigning any further reason and without having to show cause, is 'inherently determinable'. In the present case, the right to terminate is provided under Clause 2.2 and Clause 3.3 of the PSA, which are extracted as under:

"2.2 Early Termination

This Agreement shall terminate before the Expiry Date:



- (a) if either the Purchaser or PTC exercises a right to terminate, pursuant to Section 14 or Section 3.3; or
- (b) if the Project is abandoned by the Company due to unforeseen circumstances, as provided in the PPA in accordance with Articles 5.10 of the PPA: or
- (c) such other circumstances as the Purchaser and PTC may mutually agree in writing.

Section 3 Condition Precedent

3.1 General

The Conditions precedent and obligations of the parties with regard thereto, are as specified below and the Parties shall use reasonable endeavours to provide the required documents and take all actions to satisfy the Conditions Precedent within 12 months from the date of execution of this Agreement, or such extended period as may be mutually agreed by the Parties.

3.1.1 Conditions Precedent that may be waived by the purchaser

Xxx

3.1.2 Conditions Precedent that may be waived by the PTC

Xxx

3.1.3 Conditions Precedent that may be waived by mutual consent

xxxx

3.3. Right to terminate

3.3.1 If the Conditions Precedent listed in Article 3.1 are not duly satisfied or waived by PTC or Purchaser, as the case may be, within twelve (12) months of the date of execution of this Agreement, or such extended time as may be mutually agreed between the Parties in writing, either Party may terminate this Agreement By giving a written notice of termination to the other Party not earlier that twelve (12) months from the date of execution of this Agreement; and this Agreement shall stand terminated twelve (12) months from the date of such notice unless the Conditions Precedent have been satisfied by such date.

46. Thus, Clause 2.2 provides for early termination of the PSA by the parties, pursuant to Clause 14 or Clause 3.3. of the PSA. Clause 3.3 provides for termination of the PPA by the parties, in case the conditions precedent (as per Clause 3.1) are not satisfied or waived by the parties within 12 months from date of execution of the agreement (PSA) or any extended time as may be mutually agreed by the parties. Though the Respondent Haryana Utilities have claimed that the Petitioners have not satisfied the conditions precedent within the said period, it had, admittedly, not exercised the right of termination. Similarly, Article 14.1 and Article 14.2 of the PSA provide for termination, in case of 'PTC Event of Default' and termination for 'Purchaser Events of Default' respectively. The Hon'ble High Court of Kerala in its judgment in T.O. Abraham v Jose Thomas (2018) 1 KLJ 128 has held that if an



agreement is shown to be determinable at the happening of an event or on the occurrence of a certain exigency, then the contract would stand. Thus, for a contract to become determinable, the same should contain provisions for 'termination at will'. However, in the present case, the PSA signed by the parties only provide for termination due to default of the parties and no right has been given to either party to terminate the PPA on its own volition, without assigning any reason. In our considered view, the PPA/PSA is not a determinable contract and can be enforced. We have, in this order, rejected the Respondent Haryana Utilities' contention that there has been material breach of the agreement by the Petitioner PTC and held that the termination of the PSA by the Respondent Haryana Utilities, is not valid. Therefore, the Respondents are bound to perform its obligations under the PSA, by off-taking and scheduling the contracted power from the project of the Petitioner, TUL.

47. As rightly pointed out by the Petitioners, the Hon'ble Supreme Court, in the judgments extracted below, has held that the performance of a contract cannot be discharged merely because it has become onerous on account of unanticipated turn of events.

In Alopi Prashad & Sons Ltd v UOI (1960 (2) SCR 793

There is no general liberty reserved to the courts to absolve a party from liability to perform his part of the contract, merely because on account of an unanticipated turn of events, the performance of the contract may become onerous. That is the law both in India and in England, and there is, in our opinion, no general rule to which recourse may be had as contended by Mr. Chatterjee, relying upon which a party may ignore the express covenants on account of an unanticipated turn of events since the date of the contract."

In Naihati Jute Mills v Hyaliram Jagannath 1968 (1) SCR 821

"A contract is not frustrated merely because the circumstances in which it was made are altered. The Courts have no general power to absolve a party from the performance of his part of the contract merely because its performance has become onerous on account of an unforeseen turn of events."

48. Accordingly, we, allow the prayer of the Petitioners on this ground and direct the Respondent Haryana Utilities to perform their contractual obligations, under the PSA,



by off-taking and scheduling the 200 MW of the contacted power from the project of the Petitioner TUL. We direct accordingly.

49. The Petitioners have also prayed for payment of the difference between the actual revenue recovered by the Petitioners since COD from sale of power and then revenue based on provisional /final tariff as determined by this Commission from COD of the project, for the corresponding energy share of the Respondent Haryana Utilities, along with interest in terms of the Tariff Regulations. As stated, the Commission vide order dated 23.5.2017 had granted interim tariff from the COD of the units of the generating station till 31.3.2019. The tariff of the generating station from COD of the units till 31.3.2019, has been finally determined vide order dated 9.1.2020 in Petition No.249/GT/2016, which is subject to adjustment of the interim tariff granted. We have in this order, set aside the termination notice dated 27.3.2018 issued by Respondent Haryana Utilities on the ground that the same is unsustainable in law and had accordingly decided that the Petitioners are entitled to specific performance of the PSA dated 21.9.2006, by off-take of the contracted power by the Respondents. As the Respondent Haryana Utilities had admittedly not scheduled the power from the project since COD, we direct that the Petitioners are entitled for the payment of the tariff determined by this Commission, corresponding to the declaration made by the Petitioner TUL for Respondent Haryana Utilities, as verified by the concerned RLDC, from the COD of the units, subject to adjustment of the revenue earned by the Petitioners, from sale of power under short term/through exchange. Needless to say, the arrear amounts payable by the Respondents, as above, shall be with interest, in terms of Regulation 8(13) of the 2014 Tariff Regulations and Regulation 10(7) of the 2019 Tariff Regulations. The aforesaid payments shall be made by the Respondent Haryana Utilities to the Petitioner PTC, within two months from the date of this order.

Issues A and B are disposed of accordingly.



Issue No.(C): Whether the Petitioner PTC is liable for payment of all charges including relinquishment charges to Respondent PGCIL?

50. The Petitioners have submitted that as per Clause 1.1 of the PSA, the Delivery Point is defined to mean the “Delivery Point means the point of interconnection with the CTU or a Transmission Licensee, from where open access in accordance with the CERC Interstate Transmission Regulations is available and at which the risk and title of the Purchaser Billable Power and Purchaser Billable Energy shall pass from the Company to PTC and shall further pass from PTC to the Purchaser. Therefore, the risk and title of the purchaser billable power and purchaser billable energy is transferred to Respondent HPPC at the Project’s bus-bar, from where, power is evacuated through the ISTS. It has also stated that Clause 4.2(vii) of the PSA, the Respondent HPPC is required to make available to PTC all information and co-operation as may be necessary to obtain and maintain LTA for adequate transmission capacity from CTU for transmission of Purchaser Contracted Power and Purchaser Contracted Energy and accordingly, the Petitioner PTC was granted LTA from Respondent PGCIL on 26.5.2009. Subsequently, amendments to LTA have been issued by PGCIL vide its letters dated 7.10.2015 and 5.4.2018. The Petitioners have further submitted that after grant of LTA to Petitioner PTC, the Respondent HPPC entered into BPTA with PGCIL on 4.6.2020, whereunder, the Respondent agreed to pay the applicable transmission charges of PGCIL, including FERV, incentive taxes, ULDC/NLDC charges including charges for inter-regional links (if any) of the system strengthening scheme, for the said LTA, as well as applicable regional transmission charges, in proportion to their allocation from the Project, directly to PGCIL. The Petitioner PTC, in response to the letter dated 10.10.2018 of PGCIL informing that the Respondent HPPC is required to open LC towards payment security mechanism for transfer of power to Respondent HPPC, requested PGCIL vide letter dated



25.10.2018, to directly communicate with Respondent HPPC, as under BPTA, the said respondent was liable to make the payments towards transmission charges. The Petitioners have submitted that since the Respondent Haryana Utilities have failed to meet their obligation under the BPTA dated 4.6.2020 and open LC in favour of Respondent PGCIL, they are liable for all consequences including relinquishment charges for not scheduling the power as per terms of the PSA.

51. *Per contra*, the Respondent PGCIL has submitted that the contractual arrangement under the PPA was that Petitioner PTC, as a power trader, was to purchase the entire billable power generated from the project of the Petitioner for onward sale to other entity(s) out of which at least 70% was to be on long-term basis. The power generated was to be delivered at the inter-connection point of the Respondent PGCIL and from there, it was to be carried through the use of ISTS. It has also submitted that pursuant to the grant of LTA, the Respondent entered into BPTA dated 24.2.2010 with the Petitioner PTC and six other generators in Sikkim whereunder, Respondent No.4 agreed to provide open access for a period of 25 years on payment of transmission charges from the scheduled date of open access of individual LTA grantees. The Respondent has pointed out that the obligation for payment of transmission charges as per clause 2 of the BPTA for the LTA quantum of 1200 MW (which included the 200 MW for transfer to Respondent HPPC) is of the Petitioner PTC, till the said charges were directly paid by the concerned State utilities to Respondent PGCIL. The Respondent PGCIL also entered into a BPTA dated 4.6.2010 with the Petitioner PTC and its beneficiaries for payment of transmission charges under the LTA, wherein, the beneficiaries had agreed to pay the transmission charges to Respondent PGCIL in proportion to their allocation from the project from its date of commercial operation. The Respondent PGCIL informed the Petitioner PTC vide its letter dated 21.2.2019 about the operationalization of LTA and in response,



the Petitioner PTC, vide its letter dated 22.2.2019 has stated that the obligations pertaining to opening of LC, payment of charges etc., were those of the respective beneficiaries in terms of the BPTA signed with Respondent PGCIL. Pursuant to Petitioner PTC's letter dated 22.2.2019 seeking relinquishment of 200 MW LTA with the Respondent Haryana Utilities, while disclaiming any extant or future liability towards payment of any type of charges, including relinquishment charges, the Respondent PGCIL vide its letter dated 6.3.2019, accepted the request for relinquishment, however, with accompanied liability towards payment of relinquishment and notice period charges. The Respondent PGCIL has submitted that the Petitioners request for relinquishment was processed in terms of the applicable regulations/procedures and the various orders of this Commission. Referring to the Commission's order dated 8.3.2019 in Petition No. 92/MP/2015, the Respondent PGCIL has added that the relinquishment charges liability for Petitioner PTC for relinquishment of 200 MW vide letter dated 22.2.2019 was Rs.45.89 crore. Accordingly, the Respondent PGCIL has submitted that the prayer of the Petitioner PTC, stating that it has no liability to make payment of relinquishment charges, cannot be allowed, subject only to the Respondent Haryana Utilities owing to pay the applicable relinquishment charges in place of the Petitioner.

52. In response, the Petitioner has submitted that from a reading of the PSA and BPTA dated 4.6.2010, it is evident that the sole responsibility for payment in respect of LTA was that of the beneficiary, and the Petitioner PTC had acted only on behalf of the Purchaser(s), as per terms of the PSA. The Petitioner has stated that though the full responsibility in respect of their LTA was on the Respondent HPPC, but as the said Respondent had illegally terminated the PSA, the Petitioner PTC had requested to release the relevant LTA from its side, so that the same does not remain unutilized. The Petitioner PTC has contended that having signed the BPTA dated 4.6.2010 and



having taken the full responsibility and onus for all the charges, including but not limited to the relinquishment charges, the onus should be on the Respondent HPPC and not on the Petitioner PTC.

53. We have examined the matter. While the Petitioner PTC has argued that the sole responsibility for payment in respect of the LTA was that of the Purchasers (Haryana Utilities) and that the Petitioner PTC had acted only on behalf of the Purchasers, the Respondents PGCIL has contended that the Petitioner PTC, being a LTA grantee is liable for payment of relinquishment charges in terms of the directions/orders of this Commission in Petition No.92/MP/2015, subject to Respondent Haryana Utilities making payment of the applicable relinquishment charges in place of the Petitioner. Some of the Clauses in the PPA and PSA with regard to payment of transmission charges etc., to CTU are as under:

Clause 4.2 of PPA: PTC Obligations

PTC agrees and undertakes to:

'(1) xxxx

xxx

(vii) sell Contracted Capacity and Contracted Energy in accordance with this Agreement;

Xxx

(ix) PTC shall enter into LTPSAs on long term basis at least for 70% of the Contracted Capacity; and

(x) PTC may enter into LTPSAs or STPSAs for the balance of the Contracted Capacity..."

Clause 8.1 of the PPA: Interconnection facilities and Transmission facilities

8.1.1: Responsibilities

.....PTC shall enter in to or require the Purchaser to enter into a bulk power transmission agreement with the CTU, in accordance with the CERC Interstate Transmission Regulations, for transmission of Contracted Capacity from the Delivery Point to the drawal points of the Purchasers."

54. In terms of the above provisions in the PPA, the Petitioner PTC, as a power trader was to purchase the power generated from the project of the Petitioner, TUL to be delivered at the interconnection point of Respondent PGCIL, to be carried to Purchasers, through the use of ISTS. The Petitioner PTC's obligations under the PSA, for transfer of power to the beneficiaries, are as under:



4.1 of the PSA: PTC obligations

PTC agrees and undertakes

xxxxx

(iii) To obtain on behalf of the purchaser the long-term open access for adequate transmission capacity from the Central Transmission Utility pursuant to the CERC interstate Transmission Regulations to enable wheeling of Purchaser Contracted Power and Purchaser Contracted Energy from the Delivery Point through CTU's system up to the CTU drawl point in the Purchaser's state;

(i) To pay on behalf of the Purchaser the wheeling and any other charges to the CTU and any other entities that may be involved, including all charges applicable pursuant to the CERC Interstate Transmission Regulations for the long-term open access obtained by PTC pursuant to Section 4.1(iii) above;

55. Thus, the Petitioner PTC, has not only agreed to avail open access on behalf of the said beneficiaries (including Respondent Haryana Utilities), but also agreed to pay to the Respondent PGCIL all charges, which are payable for availing open access. It is noticed that the Respondent PGCIL had granted LTA to the Petitioner, PTC on 26.5.2009, with request to undertake the signing of the BPTA for sharing of transmission charges. It is also noticed from Clause 2.0 of the BPTA dated 24.2.2020, executed by the Petitioner PTC with Respondent PGCIL and six other generators for LTA that, in case of the project of the Petitioner TUL, the liability to pay transmission charges to PGCIL, was upon the Petitioner PTC, till the same were directly paid by the concerned State Utilities.

56. Further, Clause 1 of the BPTA dated 4.6.2010, executed by the Respondent PGCIL with the Petitioner PTC and beneficiaries, provides as under:

1. (a) Beneficiaries shall share and pay the transmission charges including FERV, incentive, taxes ULDC/NLDC charges including charges for inter-regional links (if any) etc. of the system strengthening scheme (indicated at Encl.2) for above Open Access in proportion to their allocation from Teesta-III Project from its date of commercial operation in accordance with the norms/ notifications/terms and conditions issued by CERC from time to time.

(b) Beneficiaries shall also share and pay the applicable regional transmission charges of concerned region(s) including inter-regional links if any, for above Open Access in portion to their allocation from Teesta-III Project.

xxxxx



57. The Petitioner, PTC has relied upon the above clauses to contend that the beneficiaries are liable to pay the transmission charges etc., directly to PGCIL in proportion to their allocation. This has been objected to by the Respondent PGCIL stating that the Petitioner PTC, as LTA grantee, on behalf of the Respondent Haryana Utilities, is primarily responsible for the payment of transmission/ relinquishment charges. It is noticed that in the present case, the Respondent PGCIL, based on the application of the Petitioner PTC, had granted LTA on 26.5.2009, with a request to sign the BPTA for sharing of transmission charges corresponding to their share of power. Though, in terms of the BPTA dated 4.6.2010, the beneficiaries had undertaken to open LC and also pay the transmission charges etc., is noticed that the Petitioner PTC, vide its letter dated 22.2.2019 sought to relinquish the subject LTA and the same was accepted by the Respondent PGCIL vide its letter dated 6.3.2019, with accompanied liability towards the payment of relinquishment charges. In this background and keeping in view that the Petitioner PTC, as an LTA grantee has relinquished the subject LTA, we hold that the Petitioner, PTC is liable to pay the relinquishment charges to the Respondent PGCIL for the subject LTA for 200 MW.

58. Further, it is noted that the Petitioner PTC vide its letters dated 4.10.2018 and 22.2.2019 had opposed the opening of LC and the payment of transmission charges, stating that the same are payable by the Respondent HPPC and had also sought relinquishment of the subject LTOA (200 MW), without any future liability for such charges including relinquishment charges for the same. This has been opposed by the Respondent PGCIL, stating that the Connectivity Regulations, 2009 do not envisage any exemption from payment of compensation, in case of relinquishment of LTOA and the liability for relinquishment by the LTOA grantee shall be subject to the decision of this Commission in Petition No. 92/MP/2015. It is pertinent to mention that the Commission vide its order dated 8.3.2019 in Petition No. 92/MP/2015 had held



that the relinquishing long-term customers are liable to pay compensation (relinquishment charges) as per methodology specified in the said order. The relevant portion of the said order is extracted below:

“160. The relinquishing LTA customers are directed to deposit the relinquishment charges calculated and billed by CTU, within a period of three months of raising the bill by CTU. CTU is directed to calculate the stranded capacity and the compensation (relinquishment charges) payable by each relinquishing long-term customer as per methodology specified in this Order respectively within one month of date of issue of this Order and publish the same on its website.”

59. The Commission in the said order had clarified that the relinquishment charges are in the nature of transmission charges. Therefore, the Petitioner cannot absolve itself of its liability to pay the relinquishment charges. Having said so, we notice that Clause 9.1.1 (iv) of the PSA, as quoted below, provides that the Purchasers shall pay to Petitioner PTC, amounts, amongst others, transmission charges, RLDC/SLDC charges or other applicable charges that may be payable by PTC for use of the transmission system from the Delivery Point to the Purchasers point of drawl for selling purchaser Contracted Power to the Purchaser.

9.1 GENERAL

9.1.1 The Purchasers shall pay to PTC, the payments comprising:

xxxxx

(ii) Xxxxx; and

(iii) Any transmission open access charges pursuant to CERC inter-state transmission Regulations viz., transmission charges, RLDC/SLDC charges or other applicable charges that may be payable by PTC for use of the transmission system from the Delivery Point to the Purchasers point of drawl for selling purchaser Contracted Power to the Purchaser.

Xxxxx

60. Similarly, Clause 4.2 (iii) of the PSA (as stated in para 35 above) obligates the Purchasers to pay the amounts for obtaining and maintaining long term open access for the transmission of power. On a harmonious reading of the provisions of the PPA /PSA and the orders of this Commission, it is evident that the responsibility of making payment of the transmission charges, including relinquishment charges to the Respondent PGCIL, in respect of the subject LTA, is with the Petitioner PTC. Needless



to say, the charges paid by the Petitioner PTC, shall however be reimbursable by the Respondent Haryana Utilities, as the subject LTA obtained by the Petitioner PTC, is on behalf of the Purchaser(s). We direct accordingly. *Issue (C) is disposed of accordingly.*

Issue No.(D): In the alternate, whether the Petitioners are entitled to damages for Rs. 2385 crore for refusal of Respondent Nos. 1 to 3 to off-take power at the tariff determined by Commission's order dated 9.1.2020 in Petition No.249/GT/2016.?

61. As stated, the Petitioner PTC vide Interlocutory Application No. 29/2020 has, in the alternative, prayed for issue of a decree on the Respondent Haryana Utilities, for payment of damages amounting to Rs.2385 crore (being the difference between the accrued & accruable net revenue from the contracted power sold on the power exchange & under short term bilateral, and the revenue accrued & accruable to Petitioner No.1 from sale of the contracted power to Haryana Utilities at the tariff determined by order dated 9.1.2020 in Petition No. 249/GT/2016, in terms of the PSA for the entire period of the 35 years of the PSA), along with the trading margin thereon of Petitioner PTC amounting to Rs. 81.08 crores for the same period. The Petitioner PTC has stated that due to clear breach of their obligations by the Respondent No.1 to 3 under the PSA dated 21.9.2006, the Petitioner is entitled to award of damages under the provisions of Section 73 & 74 of the Indian Contract Act, 1872, which legally entitles the Petitioner/Applicant to claim damages from the Respondent No.1 to 3 in the event of breach of contract/agreement executed between the parties by way of non-operationalization of the PSA. Since, we have, in paragraph 48 of this order, directed the Respondents to perform the obligations under the PPA, the prayer of the Petitioner under this head has not been considered.

Summary:

62. The summary of our decision, is as under:



- (a) The termination of PSA dated 21.9.2016 vide letter dated 27.3.2018 is in contravention of the provisions of the PSA and is therefore illegal and set aside;
- (b) The Petitioners are entitled to the grant of specific performance of the PPA/PSA. The Respondent Haryana Utilities are therefore directed to perform its contractual obligations under the PSA by off-taking and scheduling of 200 MW of the contacted power from the project of the Petitioner TUL;
- (c) Consequently, the Petitioners are entitled for payment of the tariff determined by this Commission, corresponding to the declaration made by the Petitioners for Respondent Haryana Utilities, as verified by the concerned RLDC, from COD of the units, subject to adjustment of any revenue earned by the Petitioners, from sale of power under short term/ through exchange. The arrear amounts payable by the Respondents, as above, shall be with interest, in terms of Regulation 8(13) of the 2014 Tariff Regulations and Regulation 10(7) of the 2019 Tariff Regulations. The aforesaid payments shall be made by the Respondent Haryana Utilities to the Petitioner PTC, within two months from the date of this order.
- (d) The Petitioner PTC, an LTA grantee, having relinquished the subject LTA, is responsible for the payment of the transmission charges / relinquishment charges in respect of the subject LTA, in terms of the provisions of the PPA/PSA and the orders of this Commission. This, however, is reimbursable by the Respondent Haryana Utilities;
- (e) The alternate prayer of the Petitioners, for a decree for payment of damages, along with trading margin, by the Respondent Haryana Utilities has not been considered.

63. Petition No. 110/MP/2019 along with the Interlocutory Applications, is disposed of in terms of our discussions and findings, as above.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I.S. Jha)
Member

