

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 12/MP/2019**

**Coram:**

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

**Date of Order: 25<sup>th</sup> November, 2022**

**In the matter of**

Petition under Sections 79(1)(c), 79(1)(f), 79(1)(k) and other applicable provisions of the Electricity Act, 2003 in connection with the disputes and differences arising due to breach of Power Purchase Agreement dated 8.8.2005 entered between MPPMCL and Nuclear Power Corporation of India Limited and allow the claim for damages.

**And**

**In the matter of:**

M.P. Power Management Company Limited,  
Shakti Bhawan, Rampur,  
Jabalpur (M.P) – 482008

**.....Petitioner**

**Vs**

1. Nuclear Power Corporation of India Limited,  
16<sup>th</sup> Floor, Centre-I, World Trade Centre,  
Cuff Parade, Mumbai -400005
2. Power Grid Corporation of India Limited,  
B-9, Qutab Institutional Area, Katwaria Sarai,  
New Delhi-110016
3. Gujarat Urja Vikas Nigam Limited,  
Sardar Patel Vidyut Bhavan, Race Course,  
Vadodara 390007, Gujarat
4. Chhattisgarh State Power Distribution Company Limited,  
CS Power Companies Campus, Daganiya,  
Raipur – 492013
5. Maharashtra State Electricity Distribution Company Limited,  
Prakashgad, Plot No. G-9, Anant Kanekar Marg Bandra (E),  
Mumbai – 400051
6. Electricity Department Govt. of Goa,  
Vidyut Bhavan, 3<sup>rd</sup> Floor,  
Panaji-Goa



7. Electricity Department, Administration of Daman and Diu,  
Vidyut Bhavan, Near 66/11 kV Kachigam Sub-Station,  
Somnath - Kachigam Road, Kachigam,  
Daman-396210.

8. DNH Power Distribution Corporation Limited,  
Vidhyut Bhavan, 66 KV Road, Near Secretariat, Amli,  
Silvassa - 396230, U.T. of Dadra & Nagar Haveli.

9. Western Regional Power Committee,  
& Western Regional Load Despatch Centre  
F-3, MIDC Area, Marol, Andheri East,  
Mumbai-400093

... Respondents

**Parties Present:**

Shri Ravi Sharma, Advocate, MPPMCL  
Shri Anindya Khare, MPPMCL  
Ms. Aishwarya Bhati, ASG, Senior Advocate, NPCIL  
Shri A.P. Singh, Advocate, NPCIL  
Ms. Akanksha Das, Advocate, NPCIL  
Shri Nirnay Gupta, Advocate, CSPDCL  
Ms. S. Usha, WRLDC  
Shri Alok Kumar Mishra, WRLDC  
Shri Aditya Das, WRLDC

**ORDER**

The Petitioner, Madhya Pradesh Power Management Company Limited (in short 'MPPMCL') has filed this petition seeking the following reliefs:

*"a. Declare that events set out from paragraph 3 to 21 above as breach of the PPA on account of the failure of Respondent No. 1 to non-supply of energy from KAPS-1 & 2;*

*b. Restore MPPMCL to same economic position by permitting to Petitioner to recover compensation for the POC transmission Charges i.e. 5532713161- plus interest accrued (as on 30.9.2018) of Rs.8,62,22,479.38 levied by CTU i.e. PGCIL and paid to it due to breach of the PPA due to non-supply of energy and Withdrawal of substantial energy from grid from Petitioner's account for station's use i.e. for auxiliary consumption.*

*c. Direct the Respondent No.1 NPCIL to pay damages of Rs.140.49 crore (Including interest accrued as on 30.09.2018) as indicated in statement of expensive energy purchased by Petitioner from alternative sources from the date of breach of PPA i.e. April, 2016 till September, 2018; and*

*d. Award the interest SBI PLR plus 350 point per annum for the period between payment of POC transmission Charges levied by CTU till the filing of present Petition (including but not limited to pendent lite) and reimbursement thereof by Respondent No.1; and*

*e. Award the interest SBI PLR plus.350 point per annum on the amount paid on account of expensive energy purchased by Petitioner from alternative sources including for the period between payment actually made till the filing of present Petition (including but not limited to pendent lite) and reimbursement thereof by Respondent No.1;*



*f. Award the cost of this petition: and*

*g. Pass such other further orders as this Hon'ble Commission may deem appropriate to meet the ends of justice."*

## **Background**

2. Petitioner, MPPMCL is a 100% owned undertaking of the State of Madhya Pradesh. Prior to this, Madhya Pradesh State Electricity Board (MPSEB) was vested with the functions of bulk purchase of electricity from the generating companies and supply of electricity in bulk to all the three discoms in the State of Madhya Pradesh. Subsequently, the State Government on 3.6.2006 notified the Madhya Pradesh Electricity Reforms Transfer Schemes Rules, 2006 whereby the functions, properties, interest rights and obligations of the residual MPSEB relating to Bulk Purchase and Bulk supply of electricity along with the related agreements and arrangements have been transferred and vested in MPPMCL.

3. The Respondent No.1 Nuclear Power Corporation of India (in short 'NPCIL') is public sector undertaking wholly owned by the Government of India (under the administrative control of the Department of Atomic Energy) and is responsible for the generation of nuclear power for electricity. NPCIL had set-up the nuclear power stations namely Kakrapar Atomic Power Station Units 1 & 2 (in short 'KAPS') and Tarapur Atomic Power Station Unit Nos. 3 & 4 (in short 'TAPS') in the Western Region of India. KAPS with a total installed capacity of 440 MW comprises of Unit-1 which has been declared under commercial operation on 6.5.1993 and Unit-2 was declared under commercial operation on 1.9.1995. TAPS comprise of two units (Units 3 & 4) of 540 MW each.

4. The Respondent No.2 Power Grid Corporation of India Ltd. (PGCIL) is a Company incorporated under the Companies Act, 1956 and is engaged in the inter-State transmission of electricity and other functions provided under the Electricity Act, 2003. PGCIL also discharged the functions of the Central Transmission Utility (CTU) before the



formation of Central Transmission Utility of India Limited (CTUIL) and is under the regulatory control of this Commission. Respondents No 3 to 8 are Bulk Power beneficiaries in terms of PPA and Respondent No. 9 & 10 are responsible for energy accounting and coordinating authority amongst all the generators and beneficiaries.

5. The Petitioner, MPPMCL had entered into a PPA with NPCIL on 8.8.2005, for fixed allocated capacity of 93 MW from KAPS and 180 MW from TAPS, based on the allocation made by MOP, GOI on 4.11.2004 and 12.1.2005. The period of the PPA is 15 years from the date of signing of PPA. The capacity allocated from the units of KAPS & TAPS to the Respondent beneficiaries are as under:

Name of the State/UT	Allocation (in MW)	
	KAPS 1 & 2	TAPS-3 & 4
Gujarat	125	274
Maharashtra	152	393
Madhya Pradesh	93	180
Chhattisgarh	0	48
Daman Diu	2	5
Dadra Nagar Haveli	2	7
Goa	0	11
Unallocated	66	162
<b>Total</b>	<b>440</b>	<b>1080</b>

6. The power supplied to the Petitioner, MPPMCL is through the transmission network owned, maintained and operated by Respondent PGCIL. The Petitioner, along with other Respondent beneficiaries, entered into a Bulk Power Transmission Agreement ('BPTA') with PGCIL on 31.3.1999. Also, in terms of the CERC (Sharing of Inter-state Transmission Charges and Losses) Regulations, 2010 ('the Sharing Regulations 2010') and the Point of Connection (POC) transmission charges under the Sharing Regulations, which came into force from 1.7.2011, the Petitioner and other Respondent beneficiaries, have executed the Transmission Service Agreement ('TSA') with PGCIL on 30.7.2011. Accordingly, in terms of the said BPTA and TSA, the Petitioner has been paying the transmission charges to Respondent PGCIL for the purchase of power from KAPS, without any default or breach till date.



7. In terms of the PPA dated 8.8.2005, MPPMCL and NPCIL agreed on the following commercial terms with regard to payments for the supply of energy and auxiliary power requirements:

***“7.0 RATES OF SUPPLY***

*7.1 It is agreed between NPCIL & MPSEB that the charges for supply of energy shall be as per tariff notification issued by DAE, Government of India from time to time in accordance with section 22(1) (b) of the Atomic Energy Act, 1962 (Central Act 33 of 1962) as amended from time to time. The tariff rate so fixed shall be subject to the fuel and heavy water adjustment charge as advised by DAE from time to time. Variations in effective rates as result of fuel cost adjustment charges and heavy water cost adjustment charge shall not be deemed to be charge or revision of the tariff.*

*7.2 The Bulk Power Beneficiaries including MPSEB shall reimburse to NPCIL, modification in respect of the decommissioning provision component of the tariff rate or any levy in respect of nuclear energy as may be notified by the department of Atomic Energy from time to time or any other such impositions, and these shall not be deemed to be a revision of the tariff.*

*7.3 In the event of any additional investment made with the approval of DAE, towards the modification of the Power Stations facilities, to meet the safety requirements, the tariff will be revised as per notification issued by the Government of India. However, in case of operational efficiency, the MPSEB / Bulk Power Beneficiaries shall be consulted and informed.*

*7.4 as on date the tariff Notification issued by DAE for the power stations are:*

- 1. 1/2(7)/03-Power/675 dtd. September 15,2003 for KAPS unit Nos. 1&2*
- 2. 2/9(1) /2005-Power/288 dated May 10, 2005 for TAPS unit Nos. 3&4”*

8. Petitioner has paid the bills of NPCIL on account of supply of power till March, 2016 and enclosed copy of the receipt of payment of last bill to Respondent NPCIL.

9. In the above background, the Petitioner, MPPMCL has filed this petition for adjudication of disputes on account of breach of PPA dated 8.8.2005, by Respondent NPCIL, for non-supply of power from the Units of KAPS, from April, 2016 to September, 2018 and for payment of damages/compensation by Respondent NPCIL to the Petitioner.

***Submissions of the Petitioner, MPPMCL***

10. The Petitioner MPPMCL, in this petition, has mainly submitted as under:

- (a) In terms of the PPA, BPTA and TSA, it was duly agreed by MPPMCL and NPCIL that the power generated from NPCIL's s generating plants, shall be supplied using the network owned and maintained by PGCIL. An obligation has been imposed on NPCIL,



as per PPA, to deliver power to MPPMCL, at the delivery point of MP Periphery in accordance with the dispatch instructions issued by MPPMCL to Respondent No. 10 WRLDC, in terms of the Indian Electricity Grid Code (IEGC) issued by CERC.

(b) NPCIL, has all of a sudden without informing or without any prior notice to MPPMCL stopped the supply of power from KAPS 1 & 2, from April 2016 till September 2018. However, NPCIL has started withdrawing the power for its station's use, i.e. auxiliary consumption since April, 2016 till September 2018;

(c) The issue regarding the non-supply of power from KAPS 1 & 2 from April 2016 onwards by NPCIL, to the beneficiaries, including MPPMCL, was raised by one of the beneficiaries in the 74<sup>th</sup> meeting of Commercial Committee of WRPC on 9.12.2016, wherein, it was agreed to discuss on the methodology to settle the charges for continuous drawl of power by KAPS 1&2, along with the issues related to additional financial burden on MPPMCL, along with other respondents, due to drawing of energy/ power from the interconnection points 5 MUs (approx.) per month by NPCIL, for its station's use of auxiliary consumption;

(d) The PPA has no provision for planned or forced outage and only deals with Force Majeure conditions. Even if it is assumed that forced outage is a force majeure event, then, NPCIL is required to give express written notice to MPPMCL for existence of such an event, within 30 days of occurrence of the event, which are mandatory provisions in the PPA. Without fulfilling the mandatory criteria for giving written notice, no force majeure event shall be considered and no benefits may be granted. In several of its orders, the Appellate Tribunal for Electricity (in short 'APTEL') has observed that forced outage is a temporary situation, not a prolonged situation. NPCIL cannot claim the benefit and it was obliged to supply electricity generated by it to MPPMCL, in terms of the PPA, during the period from April 2016 till September, 2018.

(e) No consensus was reached in the Special Commercial Committee Meeting of WRPC held on 5.1.2017 and it was decided to discuss the issues which occurred due to outage of KAPS 1 & 2 in 33<sup>rd</sup> WRPC meeting. In the said meetings held on 31.1.2017 and 1.2.2017, no consensus was reached.

(f) Aggrieved by the conduct of NPCIL, for non-supply of energy from KAPS 1 & 2, significant withdrawal of power for the use of KAPS 1 & 2 from MPPMCL's account using the transmission network of PGCIL, which has been built for exclusive use of the



Respondent beneficiaries, including MPPMCL, and incurring of losses due to payment of POC charges to PGCIL, due to breach of PPA and purchase of expensive power from alternative sources resulting in huge losses to MPPMCL, a notice of demand for Rs 41.91 crore was sent by MPPMCL on 28.3.2018, to NPCIL, demanding recovery and payment of POC transmission charges (April, 2016 till February, 2018) which was paid by MPPMCL to PGCIL, due to substantial withdrawal of power by NPCIL for its station's use, which resulted in losses to MPPMCL.

(g) NPCIL has not responded to the MPPMCL demand letter dated 28.3.2018 and has therefore impliedly given its consent to all the claims raised by MPPMCL. To resolve all issues mutually between the Respondent beneficiaries and NPCIL, MPPMCL along with other Respondents discussed the matter in the 36<sup>th</sup> meeting of TCC/WPRC and it was informed by NPCIL and PGCIL to Petitioner MPPMCL to approach the Central Electricity Regulatory Commission for recovery of POC Transmission charges and other cost and compensation. Therefore, MPPMCL has approached this Commission for appropriate relief, to safeguard public interest.

(h) The PPA continued to exist till it came to an end by efflux of time and as a result of this, NPCIL was obliged to supply the electricity generated by it to MPPMCL, as per terms of the PPA and the aforesaid act of non-supply of energy and withdrawal of substantial energy from MPPMCL's account is a clear act of breach of the PPA by NPCIL and is therefore liable to pay damages and compensation to the Petitioner. Accordingly, MPPMCL had raised bill for supply of auxiliary consumption from MP periphery to KAPS 1 & 2 and KAPS had already paid all such bills to MPPMCL.

(i) Over and above the provisions of the Electricity Act, 2003 ('the Act') and the regulations of this Commission, the PPA is governed by the provisions of the Indian Contract Act, 1872 (sections 37 & 73) and Electricity, being goods, will also be covered under the provisions of the Sale of Goods Act (sections 57 & 59) for grant of compensation. Breach of contract, in law, is committed when a party refuses to perform his part of contract vis-à-vis the PPA. The measure of damages in contract vis-a-vis the PPA is compensation for the consequences of breach of contract.

(j) NPCIL which had stopped the generation of energy from KAPS 1 & 2 without any valid cause and no fault of MPPMCL, is liable to compensate for the POC transmission charges, paid by MPPMCL to PGCIL along with other associated cost, losses and





damages. Even though PPA is silent on the interest to be paid on compensation, Section 3(2) of the Interest Act, 1978 confers discretionary power on the Commission to allow interest (SECL v State of MP (2003) 8 SCC 648). Also, Regulation 13 of the 2014 Tariff Regulations provides for the payment of interest. Therefore, the interest of SB1 PLR plus 350 points shall be applicable as under:

*(a) On the amount paid for POC transmission charges levied by CTU for the period between April, 2016 till September, 2018*

*(b) For the period between payment of POC transmission charges levied by CTU till filing of present petition (including pendente lite) and reimbursement thereof; and*

*(c) On the amount paid on account of expensive energy purchased by Petitioner from alternative sources including for the period between payment till filing of present petition (including pendente lite) and reimbursement thereof.*

(i) MPPMCL, being the beneficiary of the transmission assets, which was built and developed for the sole purpose of transmitting the energy from KAPS, has been making payments of POC charges from April 2016 till September 2018. Since POC charges were paid to PGCIL, even though there was no use of the transmission asset, the payments of monthly POC charges to PGCIL from April, 2016 till September, 2018 shall be paid as compensation as loss on account of breach of PPA, which works out to Rs 55.32 crore. The interest of Rs 8.62 crore levied by CTU shall also be payable on the said amount.

(j) Due to non-supply of energy from the units of KAPS, MPPMCL was compelled to purchase expensive energy from alternate sources, the difference of cost of energy due to purchase of expensive energy from alternative sources with interest has been tabulated and enclosed as Annexure- P 13 to the petition. This works out to Rs 140.49 crore as on 30.9.2018.

### **Hearing dated 9.5.2019 and 20.7.2020**

11. The Petition was admitted on 9.5.2019 and notices were issued to the Respondents with direction to complete pleadings. However, NPCIL filed Interlocutory Application (IA No.64/2019) challenging the 'maintainability' of the Petition filed by MPPMCL. The Commission, after hearing the said IA on maintainability, on 20.7.2020, disposed of the same vide order dated 26.8.2020, holding that the present petition filed by the Petitioner is maintainable. The relevant portion of the order is extracted below:





*“34. Section 79(1)(f) is pari materia with section 86(1)(f) of 2003 Act. Therefore, the judgement of the Hon’ble Supreme Court in GUVNL case supra is applicable in case of this Commission also. As per the above judgement, where a dispute falls under the adjudicatory jurisdiction of the Commission, the Commission may either adjudicate the dispute or refer it to arbitration. The Commission will take a view whether to adjudicate the dispute or refer the same for adjudication after completion of pleadings by the parties.*

*35. Having held that the Petition is maintainable, we direct that the matter shall be heard on ‘merits. Accordingly, the Respondents are directed to file their replies, on merits, on or before 14.9.2020, with copy to MPPMCL, who shall file its rejoinder, if any, by 28.9.2020. Petition No. 12/MP/2019 shall be listed for hearing in due course for which separate notices shall be issued to the parties.”*

### **Reply of the Respondent NPCIL**

12. The Respondent, NPCIL vide reply affidavit dated 29.10.2020, has mainly submitted the following:

(i) Unit-1 and Unit-2 of KAPS were declared under commercial operation on 6.5.1993 and 1.9.1995 respectively. The relevant provisions of the Act, concerning the present matter are Section 173 (inconsistency in laws), Section 174 (Act to have overriding effect) and Section 175 (Provisions of this Act to be addition to and not in derogation of other laws).

(ii) The relevant clauses of the PPA dated 8.8.2005, entered into between MPPMCL and NPCIL are Clauses (1) Definitions (7: DAE, 14: WRLDC, 16: Power Stations) Clause 2.0: (Allocation of capacity), Clause 3.0 (Power Supply from the Power Station), Clause 6.02 (Auxiliary Power Requirements of the Power Station) and Clause 11.0 (Force Majeure). On 22.9.2005, the beneficiaries of the Western Region signed PPA with NPCIL for supply of power from KAPS.

(iii) On 1.7.2015, Unit-2 of KAPS was under maintenance due to Nuclear Regulatory issues (shut down). On 11.3.2016, KAPS Unit-1 was shut down due to leak in Primary Heat Transport (PHT) and therefore was under outage. The electricity generation in the power station ‘results in the Reactors core generation heat’. The Reactor’s core contains fuel assemblies that are cooled by Heavy Water. The PHT form part of this essential cooling system and is a vital ingredient for the safety and security of the Reactor.

(iv) Safety of Nuclear Reactors: All nuclear facilities are sited, designed, constructed, commissioned and operated in accordance with strict quality and safety standards. The Atomic Energy Regulatory Board (AERB) frames the policies and lays down safety standards and requirements. It also monitors and enforces all the safety provisions. The AERB exercises regulatory control through a stage-wise system of licensing.

(v) Safety is accorded overriding priority in all activity relating to the power station including KAPS. As all the stakeholders are aware the nuclear power plant / power



station in India are not only safe, but are well regulated with the statutory framework for proper protection of the workers, the public, regular surveillance, dosimetry approved standard operating & maintenance procedures, a well-defined management methodology, proper and periodically reverse emergency procedures and disaster management plan. Thus, the various enactments and statutory rules applicable on 11.3.2016, governed the vital issue of PHT leakage in the cooling system of the power station.

(vi) A tabular list of the various statutory enactments and Rules governing the safety including emergency preparedness of the subject nuclear power plant / generating station and a pictorial general depiction of a power plant showing the importance of the cooling system which incidentally includes the PHT, are annexed as Annexure-1 and Annexure-2 respectively.

(vii) NPCIL elaborates the technical importance of the PHT system and the same is annexed as Annexure -3. NPCIL points out that, for the sake of safety and security of the concerned atomic power station, the details of the PHT leakage are divulged in a manner so as to acquaint this Commission and all parties of the importance of the same. In this case, transparency about details of a nuclear power station, ought to be tempered with security and safety related issues.

(viii) On 16.3.2016, the Station Director, KAPS Unit 1&2 addressed a letter to Member Secretary, WRPC informing about the outages of KAPS and assuring that all safety measures were working as intended. This letter also stated that the status of revival of both units will be communicated after completion of detailed investigation. The Petitioner is a constituent of WRPC and, was thus, made aware of the unforeseen and uncontrollable fault, which had occurred in relation to the nuclear reactor of the station. This letter was a response to WRPC letter dated 14.3.2016 regarding revival of KAPS, subsequent to leak in PHT system of Unit-1 of KAPS. As inferred, letter from WRPC arose due to the concern of the beneficiaries during onset of summer and reduced generation of nuclear units

(ix) From April, 2016 to September, 2018, NPCIL, due to leakage in PHT system of the nuclear reactor, which was completely beyond the control of NPCIL and also due to the requisite statutory and regulatory framework, under which the fault in PHT had to be addressed, dealt with, repaired and solved, had to undertake the requisite steps which took almost two (2) years and resulted in stoppage of supply of power to all beneficiaries under the PPA, including the Petitioner, MPPMCL.

(x) On 7.4.2016, WRPC issued corrigendum to Regional Energy Account (REA) for the month of March 2016. The REA was forwarded by WRPC inter alia to the Petitioner also. It was specifically pointed out to all the stakeholders addressed in the said communication that within fifteen (15) days from the date of the issue of the said corrigendum to REA, the concerned entity may intimate any discrepancy /error.

(xi) On 8.4.2016, NPCIL issued Bill No. 170095 for the month of March, 2016 seeking



payment of Rs. 2,71,91,943/- from MPPMCL. On 12.4.2016, the 482<sup>nd</sup> Operation and Coordination Committee Meeting (OCCM) was held at Mumbai and an agenda was circulated by Western Regional Power Committee (WRPC) vide letter dated 6.4.2016 covering this item No. at para 8.7. This meeting was attended by various stakeholders including the Petitioner. In this meeting the issue of non-availability of KAPS Unit 1 & 2 (Unit-1 due to leakage in PHT System and Unit-2 due to Reactor Channel Problem) was discussed and recorded.

(xii) Thus, the Petitioner was duly apprised of the unforeseen and uncontrollable problem with the reactor of NPCIL and has duly participated in the said meeting. On 22.4.2016, the period of 15 days as contemplated in the corrigendum to REA (Regional Energy Accounting) dated 7.4.2016 expired. The Petitioner did not dispute the corrigendum. On 22/23.4.2016, the Petitioner processed the bill no. 170095 dated 8.4.2016 for the month of 2016, for payment to NPCIL

(xiii) On 12.8.2016, the Respondent No. 3, GUVNL (one of the beneficiaries) addressed letter to Member Secretary, WRPC in respect of incorporating the agenda in WRPC meeting about methodology of levy of transmission charges by PGCIL on the long-term beneficiaries in Western Region. On 9.12.2016, the 74<sup>th</sup> meeting of Commercial Committee of WRPC was conducted. On 22.12.2016, the Respondent No. 3, GUVNL addressed letter to WRPC requesting it to add an agenda issue relating to NPCIL to make payments to GUVNL since KAPS, was drawing significant power from the grid, during the time of the long outage.

(xiv) On 22.12.2016, WRPC convened a special meeting to discuss various commercial issues including the methodology to settle charges for continuous drawl of power by KAPS on 5.1.2017. On 18.1.2017, WRPC forwarded the agenda for the 31<sup>st</sup> TCC meeting on 31.1.2017 and 33<sup>rd</sup> WRPC meeting on 1.02.2017, to be held at Diu. On 27.1.2017, WRPC circulated the MOM held on 5.1.2017 to all stakeholders.

(xv) On 13.11.2017, NPCIL made payment of the Inter-state transmission charges for the period from April 2017 to June 2018 to PGCIL. On 18.12.2017, PGCIL forwarded its Bill no. 4 for the period April 2014 to March 2017 to NPCIL.

(xvi) On 28.3.2018, MPPMCL addressed letter to NPCIL seeking payment of POC charges for using the transmission network of PGCIL for the Kakrapar sub-station for its auxiliary consumption. On 9.7.2018, MPPMCL raised Debit Note towards energy drawn by KAPS. On 30.7.2018, NPCIL made payment to MPPMCL in respect of auxiliary consumption.

(xvii) On 22.9.2018, Unit-2 of KAPS was pressed into service again, subsequent to the completion of En Mass Coolant Channel Replacement (EMCCR) of the Unit. On 24.5.2019, Unit-1 of KAPS was pressed into service again, subsequent to the completion of En Mass Coolant Channel Replacement (EMCCR) of the Unit. On 14.6.2019, PGCIL forwarded to NPCIL, the POC Bill No. 4 for the period July 2018 to



March 2019. On 27.6.2019, payment was made by NPCIL to PGCIL.

***The Primary Heat Transport System Leakage-as unforeseen and uncontrollable event led to disruption of power***

(xviii) The PHT system is an essential feature of the cooling system of a nuclear reactor. On 1.7.2015, KAPS-2 was under maintenance due to nuclear regulatory issues. KAPS-1 Reactor was shut down on 11.3.2016 due to leakage. In consideration of the safety, safeguard and necessary regulatory and legal framework governing such a technical eventuality, KAPS-1 Reactor was shut down. Upon detailed review by designer, the unforeseen problem had to be ultimately resolved through En Mass Coolant Channel Replacement (EMCCR) of both the units. This event was of public concern and various steps has to be taken in conjunction with other authorities, to ensure safety and security of the public. Copies of the various newspaper reports including translation of vernacular news and press release issued by NPCIL and Atomic Energy Regulatory Board, in respect of the unforeseen grave eventuality which had occurred.

(xix) It was imperative to deal with the situation within the applicable framework of the Atomic Energy Act, 1962. All the requisite steps had to be undertaken and followed. Necessary permission or consent had to be obtained from the competent authority under the Atomic Energy Act, 1962 and the legal framework thereunder. NPCIL was disabled by this unforeseen eventuality, without any of its fault and over which it had own control, to supply electricity to its various beneficiaries including the Petitioner herein.

(xx) The impossibility of supply considering the outage arising from the coolant system has to be seen in light of the fact that the PPA clearly discloses the power station to be nuclear power station and contemplates that MPPMCL should be in a position to receive power, for which, the power station should be in a position to generate. Clause 11 of the PPA contemplates force majeure. NPCIL cannot be held liable for non-supply due to leakage in the PHT System, which was beyond the reasonable control of NPCIL and such an occurrence was also required to be addressed and dealt with in accordance with the applicable regulatory framework under the Atomic Energy Act, 1962.

(xxi) The present petition has to be necessarily construed with due regard to the nature and general terms of the PPA dated 8.8.2005, in its entirety. The force majeure clause should be construed with close attention towards the event which preceded and followed it also. The time taken to undertake EMCCR of both the units has been reasonable. The technology used for the said purpose was advanced technology which involved robotic technology. The safety feature which had to be adhered to by NPCIL is time consuming. The procurement of advance technology and utilization thereof, to deal with the unexpected technical fault was also time consuming.



(xxii) The PHT system leakage of the nuclear reactor was an event beyond the control of NPCIL. Further, NPCIL was bound to follow the stipulations both legal and regulatory, framed by the Central Government, while dealing with the said PHT leakage. Various motor/drives/batteries of the power station (known as station auxiliaries) need continuous power supply to perform the assigned tasks to facilitate safe and stable operation of power station and even during shut down. During unit operation, electric power supply is drawn from the generator as well as the Grid. However, during unit outage (when generator is not available), power is drawn from the grid, also known as "off-site supply".

(xxiii) During unit outage, the responsibility to supply power for these auxiliaries' rests with the bulk power beneficiaries, in whose area, the power station is located. It is stated that unlike a conventional thermal power plant, power evacuation lines from nuclear power plant are utilized not only to evacuate the generated power, but also to draw power from electric grid during unit outage.

(xxiv) Procedure for regional grid operation stipulates that subsequent to nuclear unit outage "off-site power" to Nuclear power plants should be extended on priority basis. This is in accordance with clause 6 of the PPA. The requirement of "Off -Site power" is a must to ensure cooling of the Reactor core and keeping it in safe shut down state, in case of atomic power plant. This is a regulatory and safety requirement. Thus, power drawn by KAPS was purely in line with the PPA and nuclear safety requirement.

(xxv) The Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges & Losses) Regulations, 2010 is the governing framework to regulate payment of transmission charges. As per these Regulations, subsequent to commercial operation of the generator, transmission charges are to be paid by the project beneficiaries, and the Petitioner being one of the beneficiaries, is obligated to pay transmission charges, as KAPS have been in commercial operation for over 20 years. This has been recorded in the MoM of 36<sup>th</sup> WRPC Meeting (para C page 18).

(xxvi) There is no provision in the said regulation or the PPA that when the plant is under shut down after commissioning, the generator has to pay transmission charges (POC) charges. Therefore, NPCIL cannot be made liable to pay transmission charges. Any beneficiary who does not require power, ought to have surrendered the same, so that such surrendered power could be allocated to some other beneficiary. Since the Petitioner did not surrender the allocation, they are obligated to pay the POC transmission charges as per the applicable regulations.

(xxvi) It is denied that the Petitioner is entitled for reimbursement of the cost of alternate power procured by the Petitioner under the PPA, due to the force majeure event affecting KAPS Units. The PPA dated 8.8.2005, does not provide for such a claim. In case of an unforeseen, uncontrollable and unfortunate event like the outages, which occur due to shut down, the essential characteristics of all the requisite protocols to be followed for, in a nuclear power station, cannot be ignored. No beneficiary can claim ignorance of the safety requirements and the specific





stipulations, even relating to repair and other works, to be carried out at in a nuclear power station. The generator cannot therefore be saddled with any cost for obtaining power from alternate source, when a force majeure event occurs.

(xxvii) Due to unforeseen, uncontrollable and unfortunate outage imposed on KAPS Units 1 & 2, the Respondent was not in a position to supply power. The Petitioner by its consent to the PPA has fully recognized the framework of nuclear power station and the limitations inherent, as the provisions of the PPA cannot be read to obligate to supply power during the shutdown. The Respondent cannot be held liable for any breach of the PPA as alleged by the Petitioner.

(xxviii) Clause 6 of the PPA confers the power on the Respondent to draw power for auxiliary consumption.

(xxix) As regards giving notice to the Petitioner, within 30 days, an immediate notice of the event was sent on 16.3.2016 by the Station Director, KAPS Units, 1 & 2 to the Member Secretary, WRPC. This letter is a clear communication of the event as it had transpired and also scope of further investigation being required. The Petitioner is a constituent of WRPC and has attended all meetings. The technicality, the wording or the mode of force majeure notice cannot dictate or obviate an event to be a Force Majeure event or otherwise. The notice given by the technical personnel of NPCIL has to be seen for its objects. In the alternative, it is also stated and submitted that the Petitioner had constructive notice of the Force Majeure event. Clause 11 embodies the principle of transparency and divulging the information. It is submitted that the agenda of 482<sup>nd</sup> meeting was communicated vide letter dated 16.4.2016, which clearly indicated the non-availability of KAPS 1 w.e.f. 11.3.2016.

(xxx) Additionally, the Petitioner's conduct including the participation in the various meetings and not raising any issue on the unforeseen, uncontrollable event for the period of two years, clearly reveals that the Petitioner waived its right if any, for any additional notice under clause 11 of the PPS. Also, clause 11 has to be seen in light of the statutory provisions of the Atomic Energy Act, 1962 and the Rules framed thereunder. The waiver by the Petitioner, who had been immediately made aware of the PHT leakage and other outage, is in consonance with the public policy. The period of two (2) long years when KAPS Units 1 & 2 were under outage, reveals the conduct of the Petitioner, which was that of participating in meetings, discussions and deliberations, relating to the outages and not communicating to the Respondent by raising any issue, disputing any aspects of unforeseen, uncontrollable, accidental event and duration of the said outage.

(xxxi) The contention of the Petitioner relating to Force Majeure event has to be also seen in light of the entire event being in the public domain and appearing in the media. Additionally, the fact that the Petitioner did not communicate the issue relating to the purchase of alternate power or raise any query through any communication to Respondent NPCIL itself, reveals the complete knowledge of outage, by the Petitioner. Further, the Force Majeure event also had a long duration, due to the entire



process of solving the faults, for the outage being contingent on various health and safety statutory provisions. Ignorance thereof, cannot be contended by the Petitioner. The decision of the Petitioner relating to purchase of alternate power would definitely have in its genesis, the knowledge of the unforeseen and uncontrollable outage of KAPS Units 1 & 2.

(xxxii) The petition is bereft of any details relating to the alternate power purchased by the Petitioner and intentionally so. This Respondent also denies the veracity of the quantum and amounts claimed.

(xxxiii) The fault which occurred at KAPS, which were ultimately solved with EMCCR, were beyond the control of the Respondent and attending to the same was regulated by the provisions framed by the Central Government. The moment the outage had been addressed, the supply was restored. The jurisprudence relating to the requirement of notice has evolved over the years. The Petitioner cannot take umbrage of the said aspects to deny the occurrence of the Force Majeure event itself.

(xxxiv) The supply of electricity from 11.3.2016 to September 2018 was adversely impacted by a Force Majeure event as stated hereinbefore. Clause 11 of the PPA absolved the Respondent No. 1 to the extent of the Force Majeure event.

(xxxv) The letter dated 28.3.2018 addressed by the Petitioner only raised the issue of the Petitioner paying POC charges despite not receiving any power from the KAPS Unit 1 & 2, since April 2016. The letter does not allege any breach of PPA nor any issue of purchase of expensive power from alternative sources. The issue of reimbursement of POC transmission charges raised in the letter dated 28.3.2018 was in fact being considered in the meeting of TCC and WRPC. At no point of time did the Petitioner allege breach of PPA by the Respondent NPCIL. In fact, the Petitioner has stated that Clause 6 of the PPA was silent on transmission charges to be borne by the beneficiaries in an event of no supply by the generator. The deliberate and intentional distortion of the contents of the letter dated 28.3.2018 and the MOM of WRPC and the Committees, is an attempt to overcome the conduct of the Petitioner during the period of two (2) years when Unit 1 & 2 of KAPS were under outage.

(xxxvi) The transmission lines from nuclear power stations are intended for not only power evacuation during unit(s) operation, but also to draw grid power supply (also known as offsite power) when units are not operating. This power is required for cooling of Reactor Core and maintaining it in safe shut down state. Also, from Clause 6.2 of PPA, it can be seen that *Utilities/ Bulk Power beneficiaries in whose areas the power stations are located, shall ensure as per the existing agreed practice the reliable start up power to the extent required from two independent sources of the interconnected WR transmission system.* Thus, it is wrong on part of Petitioner to state that the transmission lines are solely meant for transmitting power to the beneficiary.





## ***Rejoinder of the Petitioner***

13. The Petitioner vide its rejoinder affidavit dated 20.11.2020 (filed on 4.12.2020) has submitted the following:

### ***Leakage in the PHT system of the Nuclear Reactor of KAPS-I will not amount to Force Majeure***

(a) The contention of the Respondent that the leakage in PHT system is a force majeure event is baseless, because the event of leakage is not covered under the definition of PPA and that the leakage in PHT system during the operation of the power plant will be covered under O&M and shutting down of plant may be required for temporary outage for repairing purpose only. The doctrine of frustration will apply in a situation where parties to the contract have failed to factor in the risk associated with execution of contract, whereas, the force majeure is genesis of mind of parties to the contract.

(b) The doctrine of frustration is not applicable to the present case as PPA was signed knowing the possible consequences including but not limited to leakages in PGT system. Further, leakage in PHT system was also not factored in as possible force majeure condition.

(c) NPCIL was knowing that leakage in PHT system is such normal operational issues (not covered under force majeure event) similar to reactor coolant channel problem which had occurred in KAPS-2 on 1.7.2015, due which the said was shut down. NPCIL had also not declared the shutdown of KAPS-2 as force majeure event, even though KAPS-2 remained under prolong outage condition, since 1.7.2015, much prior to the outage in KAPS-1, due to PHT system leakage.

### ***Letter dated 16.3.2016 sent to WRPC is not a constructive notice of force majeure***

(d) The letter dated 16.3.2016 sent by NPCIL to WRPC regarding revival of KAPS-1 & 2 subsequent to leak in Primary Heat Transport system of KAPS-1 has nothing to do with notice of Force Majeure event. In paragraph 3.18 of the reply, NPCIL has admitted that said letter dated 16.3.2016 was related to a response to letter dated 14.3.2016 received from WRPC regarding the revival of KAPS-1 & 2 subsequent to leak in PHT system in KAPS-1.

(e) KAPS-2 was under outage (shutdown) condition since 1.7.2015 and prior to enquiry by WRPC vide letter dated 14.3.2016, NPCIL had never intimated to WRPC about the outage conditions in KAPS-2. As the outage condition in KAPS-1 & 2 was related to O&M related routine work and temporary outages in power plants are considered as routine work of maintenance, due to the possible reason that NPCIL had only written to WRPC regarding revival of KAPS 1 & 2 units, that too after 11 months since the outage of KAPS-2. Further, NPCIL has failed to produce the letter dated 14.3.2016 received from WRPC.

(f) Constructive notice is a notice which treats a person who ought to have known a fact, as if he actually does know it. It is the knowledge which the court imputes to a person, upon a legal presumption, so strong, that it cannot be allowed to be rebutted, that knowledge must have been obtained by the person, had he made all the relevant inquiries. Constructive notice is a notice where knowledge of the fact is



presumed from the circumstances of the case (*Re: Hirji Madha vs Nagji Kurji & ors (1964) 5 GLR 289*). The doctrine of constructive notice is not applicable in the present case, as a mere intimation to WRPC, about revival, does not signify that the shutdown of the KAPS-1 & 2, become an indisputable implied fact to the Petitioner, just because the Petitioner is a member of the said committee, especially when the PPA specifies the requirement of an express notice.

(g) NPCIL has claimed force majeure for KAPS-1& 2 collectively. However, NPCIL intimated about outage condition in KAPS-2, after a delay of 11 months since the shutdown of Unit 2 in 1.7.2015. In term of Clause 12 read with Clause 3 of the PPA, it was mandatory on the part of NPCIL to send a written notice with 30 days' time to the other party.

(h) In terms of PPA, NPCIL was required to send a written notice to the Petitioner along with details such as reasons of force majeure, time & date of occurring of force majeure to the satisfaction of Petitioner. If the Petitioner would have received the written notice of force majeure within the mandatory time frame, it would have sent its representatives to check the authenticity of claim of force majeure and would have also checked other details. It is a trite law that no force majeure relief can be granted under the PPA/contract, in the absence of notice within the timelines specified thereunder (judgment dated 30.4.2015 of APTEL in *Himachal Sorang Power Ltd. v. Central Electricity Regulatory Commission & Ors* in Appeal No.54 of 2014). The said finding was further affirmed by this APTEL in Appeal 212/2016, where similar clause 9 of BPTA was involved.

(i) In view of aforesaid, NPCIL has failed to give mandatory written notice of Force Majeure event to the Petitioner within the specified timeline of 30 days. As PPA define the force majeure clause and prescribed the process and time frame for declaration of force majeure event and therefore, doctrine of constructive notice will not apply. Hence, the letter dated 16.3.2016 will not be considered as constructive notice of force Majeure.

***Agenda of the 482<sup>nd</sup> Operation and Coordination Committee (OCCM) meeting dated 12.4.2016 was not sent to Petitioner***

(j) It is submitted that the 482<sup>nd</sup> OCC meeting, is meant for operation purpose and not to decide commercial issues. Neither the Petitioner representative was present in the meeting nor the Petitioner had ever received any intimation regarding the outage condition of KAPS Units-1&2. The Respondent NPCIL instead of giving written notice of force majeure to the Petitioner, informed WRPC. WRPC coordinates the planning of maintenance of generating machines of various generating companies of the region, including those of inter-state generating companies supplying electricity to the region, on annual basis, and also undertake review of maintenance program, on monthly basis. Further, in the said meeting, the representatives of MP SLDC, MP Power Generating and MP Transmission Company were constituents, but MPPMCL was not the constituent, as no intimation or information was made available.

(k) NPCIL was bound by the provisions of PPA and duty bound to issue notice/inform Petitioner regarding any outages including but not limited to Force Majeure at the KAPS 1&2. The inaction on part of Respondent No.1 for not supplying power to the Petitioner is clear breach of PPA which has resultantly caused great losses to Petitioner. The communication of agenda dated 6.4.2016 for the 482<sup>nd</sup> OCCM



meeting was related to operational issues, was not sent to Petitioner, which can be ascertained from the list of constituents, which do not mention any details about the Petitioner having knowledge of the agenda or the presence of Petitioner in the meeting.

***Delay of 2 years in filing claims for breach of PPA amount to acknowledgement of constructive notice of force majeure:***

(l) NPCIL contention that MPPMCL was aware about the leakage in the PHT system of KAPS-1 reactor is not true. NPCIL had never intimated in writing or through any means of correspondence to MPPMCL about the leakage in PHT system of KAPS-1 or Reactor Coolant problems in KAPS unit. To escape from its liability for breach of PPA, NPCIL is taking this defence, as an afterthought. In *Ahmedabad Municipal Corporation vs Haji Abdulgafur Haji Hussenbhai ((1971)1 SCC 757)* the Hon'ble Supreme Court has held that "*decision the question of constructive notice is a question of fact, which falls to be determined on the evidence and circumstances of each case.*" It was ruled that the principle of constructive notice cannot be extended to a case wherein express stipulation regarding notice has been provided by the statute. Similarly, express stipulations have been laid down in the PPA with regard to notice of force majeure and therefore the principle of constructive notice cannot be made applicable here.

***There is no provision in regulation or in the PPA that when plant is under shut-down condition after commissioning, generator has to bear POC charges:***

(m) NPCIL is trying to mislead the Commission regarding the 36<sup>th</sup> WRPC meeting. It was the Petitioner who submitted that as NPCIL had paid for Auxiliary Power Consumption, it is further required to pay for POC charges in lieu of losses, including but not limited to the consequential losses suffered by MPPMCL due to breach of PPA. PGCIL informed that for recovery of POC charges, MPPMCL should approach this Commission. Further, it is a settled principle of law on damages that the party should plead and prove the damages and also for steps for mitigation of such damages. In the failure of the same, no damages can be granted. In this regard, the decision of the Hon'ble Supreme Court in the case of *Murlidhar Chiranjilal v. Harishchandra Dwarkadas (AIR 1962 SC 366)*.

(n) In terms of the settled legal principles on law of damages, the Petitioner has purchased alternate power to mitigate its losses and prior to raising its claim before this Commission, tried in every possible manner to settle its disputes with NPCIL in various commercial committee meetings. Further, the Petitioner is well within its rights to file commercial claims within the statutory limitation period of 3 years.

(o) Accordingly, Petitioner has filed the present Petition claiming damages and compensation in lieu of losses suffered by Petitioner due to breach of PPA by NPCIL. It is settled law that when contract is silent on claims, compensation and damages or when there is no ceiling of upper limit for claiming claims, damages or compensation as prescribed in Section 74 of Indian Contract Act, 1872 then, the defaulting party must pay or bear all the losses which are actually suffered by other party and pay the all such claims, damages and compensation to suffering party as actually occurred due to breach of contract or default in performance of contract.



### **Hearing on 22.10.2021**

14. During the hearing through video conferencing on 22.10.2021, the learned Senior counsel for the Petitioner made detailed oral submissions in the matter. However, the Respondent NPCIL was granted time to file its written submission and for completion of pleadings in the matter.

### ***Written Submissions of Respondent NPCIL***

15. The Respondent, NPCIL has filed its written submissions on 16.11.2021 and mainly submitted the following:

- (a) The present petition ought to be dismissed in-limine, on the ground of suppression of facts as the Petitioner has pleaded selective facts and approached this Commission with unclean hands. The Petitioner has placed selective reliance on certain meetings to conjure a factual matrix, which is incorrect to the issue of leakage in Primary Heat Transport (PHT) system due to Reactor Channel problem.
- (b) Considering the nature of nuclear power generation and the risks involved, all nuclear facilities are sited, designed, constructed, commissioned and operated in accordance with strict quality and safety standards. Section 18 of the Atomic Energy Act, 1962 restricts the disclosure of information regarding the plant used for production, development or use of atomic energy. The Atomic Energy Regulatory Board (AERB) frames the polices and lays down safety standard and requirements and exercises monitoring and regulatory control over the nuclear power plants. In terms of the said provisions the PPA dated 8.8.2005, was being implemented between the parties.
- (c) KAPS Unit-2 was under maintenance from 1.7.2015 due to nuclear regulatory issues and KAPS Unit-1 was under outage due to leak in PHT on 11.3.2016. the electricity generation in the power station results in the Reactors core generating heat. The Reactors core contains fuel assemblies that are cooled by heavy water. PHT is part of this essential cooling system and vital ingredient for safety and security of the Reactor.
- (d) NPCIL cannot be held liable for the non-supply due to leakage in the PHT system which was beyond its reasonable control and occurrence was also required to be addressed in accordance with applicable regulatory frame work under the Atomic Energy Act, 1962.
- (e) NPCIL was disabled by this unforeseen eventuality without any of its fault and over which it had no control, to supply electricity to various beneficiaries including the Petitioner. The present petition has to be necessarily construed with regard to the nature and general terms of the PPA, in its entirety. The force majeure clause should be construed with close attention towards the event which preceded and followed it also.



- (f) By letter dated 16.3.2016, the Respondent duly informed the WRPC, of which the Petitioner was part, regarding the unforeseen and uncontrollable fault which have occurred due to which, the outages of KAPS Units-1&2 had occurred and assuring that all safety measures were working as intended. This letter also stated status of revival of those units will be communicated after complete detailed investigation.
- (g) The letter dated 16.3.2016 was in response to WRPC letter dated 14.3.2016 regarding revival of KAPS Units-1&2, subsequent to leak in PHT system of KAPS ward and thus the Petitioner was duly aware of the existence of the PHT issue and subsequent outages. Further, the outage of the said units were discussed in detail during the 31<sup>st</sup> WRPC meeting held on 30.3.2016 and 31.3.2016, which was attended by the Petitioner also. Also, during the 482<sup>nd</sup> OCC meeting held on 12.4.2016, attended by the Petitioner, the issue of non-availability of the said units was discussed has been duly recorded. Thus, the Petitioner was duly appraised of the unforeseen and uncontrollable problem with the Reactor and has duly participated in the said meetings and thus, the Respondent has given sufficient notice to the Petitioner of the force majeure events.
- (h) During the normal plant operation, Nuclear Reactor core cooling is ensured by drawing power supply from the generator as well from grid, to ensure Reactor core cooling and maintaining in safe shut down stage. However, post unit outage when generator is not available, supply is gone from the grid for the said cooling. During unit outage, the responsibility to supply power to these auxiliaries' rests with the bulk power beneficiaries, in whose area the power station is located. Unlike conventional thermal power plant, power evacuation lines from Nuclear Power plants are utilized to evacuate the generator power but also to draw power from grid during unit outage.
- (i) Despite being aware of the aforesaid, the Petitioner on 28.3.2018, addressed letter to the Respondent seeking payment of the POC charges for using the transmission network of the PGCIL, for auxiliary consumption for its substation, from April, 2016 to September, 2018 due to leakage in the PHT system of the Reactor, which was beyond the control of the Respondent, which resulted in stoppage of supply of power to all beneficiaries, including the Petitioner. Nevertheless, on 30.7.2018, the Respondent NPCIL made payment to the Petitioner, in respect to the auxiliary consumption. Also, NPCIL has been making payments of the bills raised by PGCIL.
- (j) Unit-1 and Unit-2 of KAPS, were pressed into service again on 24.5.2019 and 22.9.2018, respectively, subsequent to the completion of EMCCR of the said units. The time taken to undertake the EMCCR of both the units, has been reasonable. The safety feature which had to be adhered to by the Respondent herein, is time consuming. Further, the requirement of 'off-site power' is a must to ensure cooling of the Reactor coal and keeping it in safe in shut down state, in case of atomic power plant, which is regulatory and safety requirement. Thus, the power drawn by KAPS Unit-1&2 was purely in line with the PPA and nuclear safety requirement.
- (k) As per the CERC (Sharing of Inter-State Transmission and Losses) Regulations, 2010, subsequent to the commercial operation of the generator, charges had to





be paid by the project beneficiaries, and the Petitioner being one of the beneficiary's is obligated to pay the transmission charges, since the units have been in commercial operation for more than 20 years. Also, the minutes of the 36<sup>th</sup> WRPC meeting, records that there is no provision in the the PPA that when a plant is under shut down after commissioning, the generator has to pay POC charges. Therefore, the Respondent cannot be made liable to pay transmission charges.

- (l) Any beneficiary, who does not require power ought to have surrendered the same so that, such surrendered power could be allocated to other beneficiary. Since, the Petitioner did not surrender the allocation, they are obligated to pay the POC transmission charges as per the applicable regulations.

### **Written Submissions of the Petitioner**

16. The Petitioner MPPMCL vide affidavit dated 18.11.2021 has submitted the following:

- (a) The incident which led to the outage cannot be termed as force majeure event, as the definition of force majeure in the present case, does not include a reference to breakdown of machinery. In Powergrid (2011 SCC Online APTEL 12), it was held that one cannot read more than what is provided in the definition of shut down. It is well established that force majeure clause is to be applied restrictively, in light of the surrounding words (*judgement in Md. Serajuddin v. State of Orissa MANU/OR/0053/1969, para 31*)
- (b) No details have been given as to the exact reasons for leakage. As per documents furnished, the leakage appears to have been caused on account of corrosion and deposition of salt, which could be presumed, to have caused on account of negligence of the Respondent company (Section 114 of the Evidence Act).
- (c) In the meeting held from time to time, no details were provided as to the reason for breakdown of machinery. It was well within the control of the Respondent to make attempts to get power from the unallocated portion with Central Government and this power could have been supplied to KAPS Unit-3&4. Alternate power could also have been obtained from other plants of the Respondent and no steps were taken in this regard.
- (d) In the present case, the force majeure incident has still not been specified, except that there was a leakage. The exact cost has not been specified. At the highest, it would be the case of breakdown, which do not form part of the definition of force majeure.
- (e) Proper notice as required under the force majeure clause was not given and in that view of the matter, the Respondent is not entitled to take advantage of the force majeure clause. (*judgement of APTEL in Himachal Sorang Power Limited vs CERC [2015] SCC Online APTL 148, para 28*)
- (f) The letter dated 16.3.2016 cannot be said to be a constructive notice, as it was a response to query made by WRPC vide letter dated 14.3.2016, which has not been furnished by the Petitioner. The validity of the letter is disputed on account of its authenticity.



- (g) There is no reference to a force majeure event, date, time and cause in the said letter and on the contrary it states that, it will be restored shortly. Clause 11.0 clearly stipulates that the party claiming the benefit of force majeure has to mandatorily give written notice to the beneficiaries. In the absence of the written notice, the claim cannot be sustained.
- (h) The agenda of the 482<sup>nd</sup> OCC meeting dated 12.4.2016 was neither sent to the Petitioner nor the Petitioner was part of the meeting. The Petitioner being a trading licensee was neither invited nor meeting was attended by the Petitioner.
- (i) The transmission asset was built for the purpose of transmitting energy from the Respondent plant, to the beneficiaries of WRs withdrawal point. No energy was supplied and the energy drawn from the grid for auxiliary consumption. The POC charges, are however, being paid by the Petitioner, without receiving any energy.
- (j) The fact that the POC charges would continued to be paid, was a reasonably foreseeable consequence once the supply was stopped, due to forced outage. Since, it is reasonably foreseeable, it would be a recoverable damage under section 73 of the Indian Contract Act [*ONGC vs Saw Pipes Ltd (AIR 2003 SCC 2629)*]
- (k) Assuming without contending that there was no contract between the parties for payment of POC charges, the Respondent would still be covered under section of the Indian Contract Act [*MTNL vs Tata Communication Ltd (2019) 5 SCC 341*]. It was never the intent of the Petitioner, to bear the POC charges gratuitously for the Respondent.
- (l) As held by the Hon'ble Supreme Court in *SECL vs State of MP (2003) 8 SCC 648*, interest is payable in equity in certain circumstances. The Petitioner was left with no other option but to purchase expensive power from alternative sources, as a mitigating measure. It is settled principle of law of contract, that all direct losses shall also be compensated by the party for breach of contract.
- (m) Whenever, atomic power generating stations are connected with the inter-state transmission system, for transmission of electricity to their beneficiaries, these generating station are not only liable to pay transmission charges, but also become subject to regulation of inter-state transmission of electricity.

### **Hearing on 13.1.2022**

17. During the virtual hearing on 13.1.2022, the learned ASG appearing for the Respondent NPCIL made detailed oral submissions in the matter. However, at the request of the Petitioner, the hearing was adjourned.

### **Hearing on 9.2.2022**





18. The Commission, during the virtual hearing on 9.2.2022, after hearing the rejoinder submissions of the learned Senior counsel for the Petitioner, reserved its order in the matter, after granting time to the Petitioner to file short submissions.

### ***Rejoinder Written Submissions of the Petitioner***

19. The Petitioner vide its rejoinder written submissions dated 14.2.2022, has mainly submitted that the Respondent NPCIL had admitted in its reply that it has supplied fixed allocated power to the Petitioner under the PPA dated 8.8.2005 and therefore, the submission of the counsel, that it was supplying non-fixed power, was beyond the scope of pleadings. The Petitioner has also submitted that in specific contracts like PPA or construction, the claims of damages can arise for breach of some element or defective performance or non-performance of any part of contract, which is individual in nature. Based on this legal proposition, the Petitioner has submitted that the prayers in the petition may be allowed.

### **Hearing on 12.7.2022**

20. Since the order in the petition could not be passed prior to the Chairperson Shri P. K. Pujari, demitting office, the matter was re-listed and heard on 12.7.2022, through video conferencing. Based on the submission of the learned counsels for the parties, the Commission reserved its order in the petition.

21. Based on the submissions of the parties, the issues which emerge for consideration in the matter are as follows:

***Issue No. (A): Whether the shutdown of KAPS Units-1& 2 of the Respondent NPCIL can be treated as a force majeure event?***

***Issue No. (B): Whether the Respondent NPCIL has complied with Clause 11.0 of the PPA with regard to issue of force majeure notice?***

***Issue No. (C): Whether the Respondent NPCIL is liable to pay the POC charges for non-supply of power during the shutdown period and for auxiliary consumption?***



**Issue No. (D):** *Whether the Respondent NPCIL is liable to pay damages to the Petitioner for the purchase of expensive power from alternate sources, during the shutdown period?*

*We examine the above issues*

### **Analysis and Decision**

**Issue No. (A): Whether the shutdown of KAPS Units-1& 2 of the Respondent NPCIL is a force majeure event?**

22. The Petitioner MPPMCL has submitted that in terms of the PPA, BPTA and TSA, an obligation has been imposed on Respondent NPCIL, to deliver power to Petitioner MPPMCL, at the delivery point of MP periphery in accordance with the dispatch instructions issued by Petitioner to Respondent WRLDC, in terms of the Indian Electricity Grid Code (IEGC) issued by this Commission. It has submitted that the Respondent NPCIL, all of a sudden and without informing the Petitioner, stopped the supply of power from KAPS 1 & 2, from April 2016 to September 2018, but started drawing power for its station's use, i.e. auxiliary consumption, during the said period. The Petitioner has submitted that the PPA contains no provision for planned or forced outage and only deals with Force Majeure conditions and therefore, the Respondent NPCIL, which stopped the generation of energy from KAPS 1 & 2, without any valid cause, is liable to compensate the Petitioner towards POC transmission charges, paid by it to Respondent PGCIL, along with other associated cost, losses and damages.

23. *Per contra*, the Respondent NPCIL has submitted that from 1.7.2015, KAPS Unit-2 was under maintenance/shut down due to nuclear regulatory issues and from 11.3.2016, KAPS Unit-1 was shut down due to leak in PHT and therefore was under outage. It has stated that the electricity generation in the power station 'results in the Reactors core generation heat' and the Reactor's core contains fuel assemblies that are cooled by Heavy Water. Since PHT, forms part of this essential cooling system, it is a vital ingredient for the safety and security of the Reactor. The Respondent has pointed out that the Atomic



Energy Regulatory Board (AERB) which exercises regulatory control through a stage-wise system of licensing, frames policies and lays down safety standards and requirements and also monitors and enforces all the safety provisions. Thus, the various enactments and statutory rules applicable as on 11.3.2016, governed the vital issue of PHT leakage in the cooling system of the power station. The Respondent has further submitted that in case of an unforeseen, uncontrollable and unfortunate event like the outages, which occur due to shut down, the essential characteristics of all requisite protocols to be followed for, in a nuclear power station, cannot be ignored. It has stated that no beneficiary can claim ignorance of the safety requirements and the specific stipulations, even relating to repair and other works, to be carried out at in a nuclear power station. The Respondent has also stated that the generator cannot therefore be saddled with any cost, when a force majeure event occurs as due to unforeseen, uncontrollable and unfortunate outage imposed on KAPS Units 1 & 2, the Respondent was not in a position to supply power. The Respondent has added that the Petitioner, by its consent to the PPA, has fully recognized the framework of nuclear power station and the limitations inherent, as the provisions of the PPA cannot be read to obligate to supply power during the shutdown. The Respondent has therefore submitted that from April, 2016 to September, 2018, due to leakage in PHT system of the nuclear reactor, which was completely beyond the control of the Respondent and also due to the requisite statutory and regulatory framework, under which the fault in PHT had to be addressed, had resulted in stoppage of supply of power to all beneficiaries under the PPA, including the Petitioner. The Respondent has, therefore, contended that it cannot be held liable for any breach of the PPA, as alleged by the Petitioner.

24. In response to the above, the Petitioner, MPPMCL has argued that the contention of the Respondent that leakage in PHT system is a force majeure event is baseless, as the event of leakage is not covered under the definition of Force Majeure in the PPA and that the leakage in PHT system during the operation of the power plant will be covered



under O&M and shutting down of plant may be required for temporary outage for repairing purpose only. It has also submitted that the doctrine of frustration will apply in a situation where the parties to the contract have failed to factor in the risk associated with execution of contract, whereas, the force majeure is genesis of the mind of parties to the contract. The Petitioner has also stated that the doctrine of frustration is not applicable to the present case, as PPA was signed knowing the possible consequences including but not limited to leakages in PGT system and that the same was also not factored in as a possible force majeure condition. It has further been contended that the Respondent NPCIL was knowing that the leakage in PHT system is such a normal operational issue (*not covered under force majeure event*), similar to the Reactor Coolant Channel problem which had occurred in KAPS-2 on 1.7.2015, due which the said unit was shut down. The Petitioner has added that the Respondent had also not declared the shutdown of KAPS-2 as a force majeure event, even though KAPS-2 remained under prolong outage condition, since 1.7.2015, much prior to the outage in KAPS-1, due to PHT system leakage. Accordingly, the Petitioner has stated that the Respondent is liable to compensate the Petitioner towards POC transmission charges, along with other associated costs, losses and damages.

25. We have considered the submissions of the parties. Clause 11.0 of the PPA dated 8.8.2005, which contemplates 'force majeure' provides as under:

**"11.0 FORCE MAJEURE**

*The parties shall ensure compliance of the terms of this Agreement. However, no party shall be liable for any claims for any loss, damage or compensation whatsoever arising out of failure to carry out the terms of this agreement, to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, fire, explosion, tempest, flood, lightning, earthquake or other forces, **accident or any cause beyond the reasonable control of any party, or act of God or due to any restraint or regulation of the State or Central Government.** But any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice within 30 days to the other party to this effect. Generation / drawl of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist. "*



26. In terms of the above, no party shall be liable for any claims for its failure to carry out the terms of the PPA, to the extent that such failure is due to force majeure events such as war, rebellion, mutiny, civil commotion, riot, strike, lockout, fire, explosion, tempest, flood, lightning, earthquake or other forces, accident or any cause beyond the reasonable control of any party, or act of God or due to any restraint or regulation of the State or Central Government. In the present case, Unit-2 of KAPS was under maintenance/shut down due to reactor coolant problem and from 11.3.2016, Unit-1 was shut down due to leakage in the PHT system, thereby resulting in outage. It is noticed from the submissions of the Respondent NPCIL in Annexure-3 of its reply, that PHT is an essential feature of the cooling system of a nuclear reactor and its integrity is of prime importance from the safety and operational point of view. As a result of the said leakage in PHT system, the unit was automatically shut down as per design provisions. The definition of force majeure events, includes therein, events which are beyond the reasonable control of any party. It is evident from the press release dated 11.3.2016 issued by AERB that a plant emergency was declared following the event and the Respondent NPCIL was asked the units under shut down till the incident was fully investigated and corrective actions are taken. Thus, the submission of the Petitioner that leakage in PHT system is not covered under the definition of force majeure and since the exact cause of leakage has not been specified, the same would be a case of breakdown, which does not form part of the definition of Force majeure, are not acceptable, as the occurrence of such technical eventualities, were required to be dealt with and addressed in accordance with the applicable regulatory and legal framework under the Atomic Energy Act, 1962. Thereafter, only on detailed review by the designer, the unforeseen problem could be resolved through En Mass Coolant Replacement System and Units 1 & 2 were put into operation on 24.5.2019 and 22.9.2018 respectively. In our considered view, these incidents, viz, the reactor coolant problem and the leakage in the PHT system, which resulted in outage of the units, could not have been



foreseen and were beyond the control of the Respondent NPCIL. The Petitioner also had knowledge of the inherent limitations of the nuclear generating station, while executing the PPA. In the above background, we, hold that the shutdown of KAPS, Units 1 & 2 from 1.7.2015 till September, 2018 and the non-supply of power to the Petitioner, during the said period, are due to unforeseen and uncontrollable events, covered under Force Majeure in terms of the PPA, and the Petitioner cannot be held liable for breach of the same. *Issue No (A) is decided accordingly.*

**Issue No. (B): Whether the Respondent NPCIL has complied with Clause 11.0 of the PPA with regard to issuance of force majeure notice?**

27. The Petitioner, in the petition, has submitted that even if forced outage is assumed to be force majeure, then Respondent NPCIL is required to give express written notice to the Petitioner for existence of such an event, within 30 days of occurrence of such event, which are mandatory provisions in terms of the PPA. Accordingly, the Petitioner has submitted that without fulfilling the mandatory criteria of written notice, no force majeure event shall be considered and no benefits be granted. *Per contra*, the Respondent has submitted that an immediate notice of the event was sent on 16.3.2016 by the Station Director, KAPS 1 & 2 to the Member Secretary, WRPC regarding the event and the scope of further investigation being required. It has also submitted that the Petitioner is a constituent of WRPC and has attended all the meetings. The Respondent, while pointing out that the technicality, wording or mode of force majeure notice cannot dictate or obviate an event to be a force majeure event or otherwise, has stated that the Petitioner had constructive notice of the force majeure event. It has further stated that the Petitioner having participated in various meetings and become acquainted with the entire aspects of the fault concerning KAPS I & 2, as a participant of these meetings, has waived any requirement of further notice as contemplated under clause 11 of the PPA. The Petitioner has added that the said clause has to be seen in the light of the statutory provisions of the



Atomic Energy Act, 1962 and the rules framed thereunder. In its rejoinder, the Petitioner, has contended that no force majeure relief can be granted under the PPA in the absence of notice within the times lines specified thereunder. Referring to the APTEL judgment dated 30.4.2015 in Appeal No. 54/2014 (*Himachal Sorang Power Ltd v CERC & ors*), the Petitioner has submitted that the doctrine of constructive notice will not apply, in this case, as the PPA is a commercial wisdom of the parties and therefore the letter dated 16.3.2016, cannot be construed as a force majeure notice. The Respondent has, however, referred to 31<sup>st</sup> WRPC/TCC meetings dated 30.3.2016 and 31.3.2016 and the 482<sup>nd</sup> OCC meeting dated 12.4.2016 and submitted that the Petitioner was duly apprised of the unforeseen and uncontrollable problem with the reactor of the Respondent and had duly participated in the said meetings and therefore, the Respondent has given sufficient notice to the Petitioner of the force majeure event.

We have examined the matter. As regards Force majeure, clause 11 of the PPA provides that any party claiming the benefit of this clause shall satisfy the other party of the existence of such an event and give written notice within 30 days, to the other party to this effect. In the present case, KAPS Unit-2 was under shutdown due to reactor coolant problem since 1.7.2015 and Unit-1 was under shutdown due to leakage in primary heat transfer system from 11.3.2016. Even though, the Petitioner has submitted that the Respondent had not declared the shutdown of Unit-2 as a force majeure event, since 1.7.2015, much prior to the outage of Unit-1, we notice from records that the issue of non-supply of power from both the units by the Respondent, have been raised by some of the beneficiaries, including the Petitioner herein, only after the shutdown of Unit-1 by the Petitioner, on 11.3.2016. It, therefore appears that the Petitioner had the knowledge of shutdown of Unit-2 from 1.7.2015 but had not raised any issues thereof. As regards shutdown of Unit-I from 11.3.2016, due to leakage in PHT system, we take note that the Respondent, in terms of the Atomic Energy Act and the legal framework thereunder, is required to obtain necessary permission /consent from the competent authorities. Moreover, as the event was of public concern, various steps were required to be taken in conjunction with the other authorities, to ensure the safety of the public.





Thus, the Respondent is bound by the stipulations, both legal and regulatory, framed by the Central Government, while dealing with PHT leakage. In this context, it is noticed that pursuant to the PHT leakage, the Atomic Energy Regulatory Board, GOI and the Respondent, had issued respective press releases on 11.3.2016, informing the public, about the declaration of plant emergency due to the incident of leakage from coolant system resulting in shutdown of the said unit. The plant was also requested by AERB to be in shut down state till the incident was fully investigated and corrective actions are taken. Thereafter, on 12.3.2016, a press release was issued by the Respondent NPCIL informing the status regarding the shutdown of Unit-1, including the applicable procedures/ guidelines followed by the Respondent. The aforesaid press releases of AERB and NPCIL cannot be side stepped by the Petitioner and contend, that it had no knowledge of the incident regarding KAPS Unit-I. Also, vide letter dated 14.3.2016, a brief note of the incident was placed by the Respondent for consideration of the State Government of Gujarat. Further, in response to the WRPC letter dated 14.3.2016 seeking revival of the units of KAPS, the Respondent, vide its letter dated 16.3.2016 has informed WRPC (*where the Petitioner is also a constituent*) regarding the shutdown of the units and the process undertaken for their revival. Moreover, the issue of non-availability of the units of KAPS was discussed in the 31<sup>st</sup> WRPC meetings dated 30.3.2016/31.3.2016 and the 482<sup>nd</sup> OCC meeting dated 12.4.2016. Though, the Petitioner has disputed the vailidity of the letter dated 16.3.2016, on account authenticity and has also submitted that it was not a party in the aforesaid meetings, these aspects were not raised by the Petitioner, in the WRPC/SCCM meetings, subsequently held on 9.12.2016 and 5.1.2017, which was admittedly attended by the Petitioner. Even in the 36<sup>th</sup> WRPC meeting held on 22/23<sup>rd</sup> June 2018, the Petitioner, while pointing to the non-supply of power for the last two years, had only insisted on the payment of POC charges by the Respondent NPCIL. Thus, the Petitioner had sufficient knowledge of the force majeure event, involving the shutdown of Unit-I from 11.3.2016. The notice is a legal concept



describing a requirement that a party be aware of legal process affecting their rights, obligations or duties. Constructive notice is a notice, where knowledge of the fact is presumed from the circumstances of the case. From the facts narrated above, the Petitioner cannot claim to have no knowledge of the incident, resulting in the shutdown of the units of the Respondents and non-supply of power from 1.7.2015. In the above background and keeping in view the peculiar circumstances of the case, we hold that the Petitioner had constructive notice of the force majeure event, involving the shutdown of the units of KAPS. The judgments of APTEL, referred to by the Petitioner, in support of the contention that force majeure notice has not been issued, cannot be applied to the present case involving a nuclear power project (which is bound by the provisions of the Atomic Energy Act related to safety), unlike the conventional thermal generating stations. The submissions of the Petitioner are therefore misconceived and are not acceptable. Accordingly, we hold that there has been a constructive notice upon the Petitioner, under clause 11 of the PPA. *Issue No. B is disposed of in terms of the above.*

**Issue No. (C): Whether the Respondent NPCIL is liable to pay the POC charges for non-supply of power during the shutdown period and for auxiliary consumption?**

28. The Petitioner, in the petition, has submitted that there has been breach of the PPA for non-supply of power from the units of KAPS, since April, 2016 to September, 2018. It has also stated that in terms of the PPA, the Respondent NPCIL has given the implied warranty for continuous supply of energy for a minimum period of 5 years and despite the non-supply of power to the Petitioner, the said Respondent has been withdrawing power for its stations' own use (i.e. auxiliary consumption) during the said period. It has also submitted that no consensus was reached by the parties in the SCCM held on 5.1.2017 and the 33<sup>rd</sup> WRPC meeting dated 31.1.2018 and 1.2.2018. Aggrieved by the conduct of the Respondent NPCIL for non-supply of energy, significant withdrawal of power for the use of KAPS units from the Petitioner's account, using the transmission network of PGCIL



and incurring losses due to payment of POC charges, to PGCIL, due to breach of PPA and purchase of expensive power from the alternative sources, resulting in huge loss to the Petitioner, a demand notice for Rs.41.91 crore (as on 28.3.2018) was sent to the Respondent NPCIL by the Petitioner, demanding the payment and recovery of POC transmission charges for breach of PPA along with other associated costs. The Petitioner has further stated that pursuant to the decision in the 36<sup>th</sup> WRPC meeting on 22/23<sup>rd</sup> June 2018, it has approached this Commission, for reliefs, to safeguard public interest.

29. *Per contra*, the Respondent NPCIL has submitted that during unit outage, the responsibility to supply power for these auxiliaries' rests with the Bulk Power beneficiaries, in whose area, the power station is located. It has also stated that unlike conventional thermal generating stations, power evacuation lines from Nuclear Power Plant are utilized not only to evacuate the generated power, but also to draw power from electric grid during unit outage. Referring to clause 6 of the PPA, the Respondent has submitted that the requirement of 'off-site' power is a must, to ensure cooling of the reactor core and keeping it in safe shut down in case of an atomic power plant, which is a regulatory and safety requirement. The Respondent has also pointed out to the 2010 Sharing Regulations notified by this Commission and submitted that subsequent to the commercial operation of the units of KAPS, the transmission charges are to be paid by the project beneficiaries and the Petitioner, being one of the beneficiaries, is obligated to pay the transmission charges, as recorded in the 36<sup>th</sup> WRPC meeting. Accordingly, the Respondent has submitted that the power drawn by KAPS Units 1 & 2 was purely in line with the provisions of the PPA and the nuclear safety requirements. The Respondent has however submitted that on 30.7.2018, it had made payments to the Petitioner in respect of the auxiliary consumption (Anneure-15 of reply) and has also been making payments of the bills raised by the Respondent PGCIL, during the period.



## **Auxiliary consumption charges**

30. The matter has been examined. Clause 6 of the PPA provides for the following:

### **6.0 AUXILIARY POWER REQUIREMENTS OF THE POWER STATION**

*6.1 If, at any time, the Power Station is unable to meet its own auxiliary power requirements and / or requirements of other facilities belonging to the Department of Atomic Energy, Government of India in the Western Region, full requirement of power as and when required by the power Stations and other facilities of the Department of Atomic Energy, Government of India shall be made available by the Bulk Power Beneficiaries at 220 KV (KAPS 1&2) / 220 KV or 400 KV (TAPS-3&4) as required by the Power Station. The power (energy) so supplied will be adjusted against the energy supplied by the Power Stations to the MPSEB / Bulk Power Beneficiaries in subsequent months as per the existing practice agreed upon.*

31. Also, as per Annexure-A (Memorandum of instructions for the assessment of energy sold to the Bulk Power Beneficiaries) to the PPA, the following has been provided:

*“A.4. As the 220 kV /400 kV lines from the power stations are connected to WR transmission system, apart from evacuating the power from the Power Stations, there will also be power flow from and to the WR grid through these lines. When Power Stations are totally shut down, the power requirement of the Power Stations and their facilities belonging to the department will be obtained from WR Grid through these lines.”*

32. Thus, in terms of clause 6.1 above, the Respondent NPCIL has been conferred the power, to draw power for auxiliary consumption and the same is required to be adjusted against the energy supplied by the power stations to the Respondent beneficiaries, during the subsequent months as agreed upon. It is noticed, that the Respondent has been drawing power (5 MUs per month) for meeting its auxiliary consumption using the transmission network of PGCIL at 220 kV level. Though, the power drawn by the generating station of the Respondent NPCIL is to be adjusted against the power supplied to the beneficiaries, as above, there was no specific methodology to settle the continuous draw, in view of shutdown of both units. However, as recorded in the MOM of the 33<sup>rd</sup> WRPC meeting, the Respondent, in response to the discussions in TCC, had agreed to the settlement of auxiliary consumption, during the period of shutdown of the units, at the same rates at which KAPS supplies energy on monthly basis. Accordingly, the Respondent NPCIL, had on 30.7.2018, paid all the beneficiaries, the auxiliary consumption energy charges at the same rate at which KAPS supplies energy every month, during the outage period. In terms of this, the Respondent has already paid to the



Petitioner, an amount of Rs.9,52,89,774/- (as per Annexure-15 of the petition) for the period from April, 2016 to August 2018, towards energy charges, and the same has not been denied by the Petitioner. In this background, the claim of the Petitioner for recovery of charges/compensation towards auxiliary energy consumption by the Respondent, does not survive for consideration.

### **Transmission charges**

33. The Petitioner has also submitted that as the Respondent NPCIL has paid the auxiliary energy consumption charges, it is further required to pay for the transmission charges (POC) in lieu of losses including but not limited to consequential loss suffered by Petitioner due to breach of PPA. Per contra, the Respondent has referred to the MOM of the 36<sup>th</sup> WRPC meeting and submitted that there is no provision in the 2010 Sharing Regulations, notified by the Commission or the PPA that when the plant is under shutdown after commissioning, generator has to pay POC charges and therefore, the Respondent cannot be made liable to pay the transmission charges. It has added that, since the Petitioner had not surrendered the allocation, they are obligated to pay the POC transmission charges as per applicable regulations.

34. As regards the payment of POC charges to Respondent PGCIL, the provisions of the PPA provides as under:

*'3.1. The power to MPSEB shall be supplied using the transmission network owned, maintained and operated by the PGCIL and the Bulk Power Beneficiaries subject to demonstrable system constraints and payment of transmission / wheeling charges as per the established guidelines of the competent authority under the Act as amended from time to time, followed in the Western Region.'*

35. Some of the provisions under the BPTA dated 31.3.1999 are extracted below:

*"3.0 POWERGRID shall operate and maintain the transmission system belonging to it in the Western Region as per agreed guidelines and directives of the Western Regional Electricity Board and Regional Load Despatch Centre and cooperate with Bulk Power Beneficiaries of the Region, so as to maintain the system parameters within acceptable /reasonable limits except where it is necessary to take measures to prevent imminent damage to any equipment."*

.xxxx



*“5.0 For the above services, Bulk power Beneficiaries shall regularly pay to POWERGRID the monthly transmission charges as per clause 9.0 of this agreement in respect of the POWERGRID owned transmission assets in the region.”*

XXXXX

#### 8.0 TARIFF

*The transmission Tariff and terms and conditions for the power to be transmitted by POWERGRID from Central Sector Station(s) shall be as per Notification issued by MoP/CERC from time enclosed at Annexure-C or as may be agreed with the Bulk Power Beneficiaries and POWERGRID which shall also form integral part of this Agreement which would be subject to determination /revision by Govt of India/CERC from Time to Time.”*

#### **“9.0 BILLING AND PAYMENTS**

*All charges under this Agreement shall be billed by POWERGRID and shall be paid by Bulk Power Beneficiaries in accordance with the provisions of clause A4 of Annexure-A.”*

36. Thus, in terms of the BPTA and the PPA, the Petitioner is obliged to pay the transmission charges to Respondent PGCIL for the purchase of power from KAPS Unit 1 & 2. Also, in terms of the 20210 Sharing Regulations notified by this Commission, subsequent to the COD of the generator, the transmission charges are to be paid by the beneficiaries. Accordingly, the Petitioner is under an obligation to pay transmission charges, since KAPS Unit 1 & 2 have been in commercial operation for more than 20 years. There is no provision under the said Regulations, BPTA or the PPA, which mandate the payment of POC charges by the generator, when the plant is under shut down. Seen in this context, the prayer of the Petitioner to direct the Respondent NPCIL to pay POC charges would amount to re-writing of the contract, which is not permissible. Even otherwise, we have, in this order, held that the non-supply of power by the Respondent to the Petitioner for the period from 1.7.2015 till September, 2018 is covered by ‘force majeure’ under the PPA and the Respondent cannot be held liable for breach of the same. In the light of the above discussions, the contention of the Petitioner that, in the absence of any provision in the contract, it is liable to claim damages/compensation for Rs 55.32 crore from the Respondent under Sections 70 and 73 of the Indian Contract Act, 1872, along with interest, is not acceptable. We, however, notice that the Respondent NPCIL has made payment on 13.11.2017 for the bills raised by PGCIL for (KAPS 1& 2) for the



period April, 2017 to June, 2018 (Annexure -12) and on 27.6.2019 for (KAPS 1 & 2 & KAPS 3 & 4) for the period from July, 2018 to March, 2019 (Annexure-16) to the Respondent PGCIL. Nevertheless, in view of the decision above, we find no reason to issue any direction to the Respondent NPCIL to make further payments, if any. *Issue No. (C) is disposed of in terms of the above.*

**Issue No. (D): Whether the Respondent NPCIL is liable to pay damages to the Petitioner for the purchase of expensive power from alternate sources, during the shutdown period?**

37. The Petitioner has submitted that there has been loss of public money due to purchase of expensive alternate power from other sources, due to non-supply of power equivalent to the contract demand from KAPS Units 1 & 2 for the period from April 2016 to September, 2018. It has also referred to the judgment of the Hon'ble Supreme Court on M. Chiranjilal v H. Dwarakadas (1962) 1 SCR 653, and submitted that it is settled principle of law on damages that the party should plead and prove the damages and also to take action for mitigation of such damages. The Petitioner has further submitted that it has purchased the alternative power to mitigate its losses and before raising its claim, tried every possible manner to settle the dispute with Respondent in various Commercial Committee meetings. The Petitioner has submitted that all direct losses shall be compensated by the party for breach of contract and has accordingly claimed damages for Rs 140.49 crore (*including interest accrued as on 30.9.2018*) for the said period. This has been objected to by the Respondent stating that the generator cannot be saddled with any cost for obtaining power from alternate source, when a force majeure event occurs.

38. We have examined the matter. Clause 3.3 of the PPA provides as under:

*“3.3 The MPSEB shall at all times endeavour to take all the power, which the Power Stations are in a position to send out.....”*

39. It is therefore evident that the Petitioner was aware of the peculiar and distinct nature of the generation activity undertaken by the Respondent NPCIL and the inherent limitations





on the supply of power from nuclear power stations. The Petitioner, having agreed to take the power, which the power station is in a position to send out, cannot now say that it has incurred huge losses, due to purchase of expensive power. Moreover, the Petitioner in its demand notice dated 28.3.2018 had not raised any issue regarding the purchase of expensive power and that it has been incurring huge losses since 1.7.2015, nor the same was informed to the Respondent. In view of this, the submissions of the Petitioner are not tenable. We have, in this order, held that the non-supply of power by the Respondent NPCIL to the Petitioner, is on account of unforeseen and uncontrollable events which are covered under force majeure, under the PPA and the Petitioner cannot be made liable for the same. Further, as the supply from the power stations of the Respondent NPCIL are governed by the provisions of the PPA, which contain a force majeure clause, the prayers of the Petitioner for payment of damages/ compensation, along with interest, in terms of provisions of the Indian Contract Act, 1872 is misconceived and is not acceptable. In view of this, the claim of the Petitioner on this count is rejected. *Issue No. (D) is disposed of as above.*

40. Petition No.12/MP/2019 is disposed of in terms of the above.

**Sd/-**  
**(Pravas Kumar Singh)**  
**Member**

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I.S. Jha)**  
**Member**

