

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 305/MP/2022**

**Coram:**

**Shri I. S. Jha, Member**

**Shri P.K. Singh, Member**

**Date of Order: 20th January, 2024**

**IN THE MATTER OF**

Petition under Section 79, including Sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 seeking setting aside of the notices dated 4.10.2022 and 19.10.2022 issued by Haryana Power Purchase Centre purportedly to terminate the Power Purchase Agreement (PPA) dated 18.5.2022 executed between the Petitioner and Respondent No. 1, being unlawful and inconsistent with Article 19(2) and Article 19(1) of the PPA.

**AND**

**IN THE MATTER OF**

RKM Powergen Private Limited,  
14, Dr. Giriappa Road,  
T Nagar-600017, Chennai

**...Petitioner**

**Vs.**

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

2. South Eastern Coalfields Limited,  
Seepat Road,  
Bilaspur-495006,  
Chhattisgarh

3. Uttar Pradesh Power Corporation Limited,  
Shakti Bhavan, 14,  
Ashok Marg, Lucknow-226001,  
Uttar Pradesh

4. Chhattisgarh State Power Distribution Limited,  
Vidyut Seva Bhavan,  
Danganiya, Raipur-492013,  
Chhattisgarh

**...Respondents**

**The following were present:**

Shri Sitesh Mukherjee, Advocate, RKMPPL  
Shri Biju Mattem, Advocate, RKMPPL  
Shri Hemant Singh, Advocate, RKMPPL  
Ms. Alchi Thapliyal, Advocate, RKMPPL  
Ms. Supriya Agarwal, Advocate, RKMPPL  
Ms. Poorva Saigal, Advocate, HPPC  
Shri Shubham Arya, Advocate, HPPC  
Ms. Shikha Sood, Advocate, HPPC  
Ms. Anumeha Smiti, Advocate, HPPC

**ORDER**

The Petitioner, RKM Powergen Private Limited (RKM Powergen), has filed the present Petition under Section 79(1)(b), and (1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') for adjudication of dispute arising out of the action of Haryana Power Purchase Centre in relation to the notices issued for termination of the Power Purchase Agreement executed between RKM Powergen and Haryana Power Purchase Centre, in contravention of Articles 19(1) and 19(2) of the said PPA and *inter-alia*, seeking setting aside of the aforesaid notices. The Petitioner has made the following prayers:

*“a. declare that the impugned Notice issued by HPPC dated 19.10.2022 being not in accordance with Clause 19.1.1 of PPA is devoid of any effect of terminating the PPA;*

*b. declare that the impugned Notice issued by HPPC dated 04.10.2022 does not amount to Notice in accordance with Clause 19.2 of PPA dated 18.05.2022, and is devoid of having any purported effect of conveying HPPC's intention to terminate the PPA;*

*c. direct or recommend SECL to carry out the necessary amendments in the FSA dated 03.09.2013 and 23.09.2013 and supply coal in accordance with the terms thereof to the Petitioner so as to enable the Petitioner to supply power to HPPC in terms of PPA; and*

*d. permanently restrain HPPC from taking any coercive actions whatsoever against the Petitioner, including forfeiting, invoking and realising the Performance Bank Guarantee dated 02.06.2022 amounting to Rs.35 Crores or portion thereof in pursuance of the alleged non-supply of power raised in the impugned Notices dated 04.10.2022 and 19.10.2022;”*

## **Background**

2. The Petitioner, R.K.M. Powergen is a generating company having a 4 X360 MW Coal Based Thermal Power Plant at Ucchpinda Village, Janjgir, Champa District, Chhattisgarh. The Respondent No. 1, Haryana Power Purchase Centre acts as a single buyer model for performing the function of arranging Short-Term and Long-Term Power on behalf of the distribution licensees of Haryana, i.e., Dakshin Haryana Bijli Vitran Nigam Limited ('*DHBVNL*') and Uttar Haryana Bijli Vitran Nigam Limited ('*UHBVNL*') (hereinafter referred to as 'the Haryana Discoms').

3. The Respondent Nos. 3 and 4 are the distribution licensees, located in the States of Uttar Pradesh and Chhattisgarh, respectively, wherein the Petitioner has executed Long-Term PPAs with them. The details of the PPAs of the Petitioner with the said distribution licensees is as under:

<b>Date of the PPA</b>	<b>Quantum</b>	<b>Procurer/ Buyer</b>	<b>Tenure</b>	<b>Start Date of PPA</b>
29.9.2006	441 MW	CSEB	20 years	25.6.2011
15.3.2016	350 MW	UPPCL	25 years	30.10.2016

4. On 21.3.2022, Haryana Power Purchase Centre ("HPPC") floated a Medium-term tender/ bid bearing Tender for procurement of 1000 MW power for three years (*i.e., 15.4.2022 to 14.4.2025*) round the year basis (RTC), on DEEP portal through PFC Consulting Limited (*PFCCCL*) & UHBVN website by HPPC, as per the standard bidding documents issued by the Ministry of Power, Government of India on 29.1.2019. The Request for Qualification (RfQ) and Request for Proposal (RfP) was issued on the said date.

5. RKM participated in the said competitive bidding process initiated by HPPC, for procurement of 1000 MW power on medium-term basis against the RfP and RfQ documents dated 21.3.2022. Thereafter, on 5.4.2022, in the above bidding process, RKM was declared as one of the successful bidders qua the quantum of 350 MW of power at a bid quoted tariff of Rs. 5.75/ Kwh.

6. Subsequently, on 7.4.2022, Respondent No. 1 filed a Petition (Petition No. 17 of 2022) under Section 63 of the Act before the Haryana Electricity Regulatory Commission for the adoption of tariff, for purchase of 500 MW power on RTC basis for a period commencing from 15.4.2022 to 14.4.2025, from RKM for a quantum of 350 MW, and another generator, namely, MB Power for a quantum of 150 MW. During the pendency of the said Petition, RKM vide its letter dated 15.4.2022 intimated to HPPC the probable timelines qua the amendment of a Fuel Supply Agreement (FSA) and supply of linkage coal for the purpose of supply of power to the Haryana Discoms. As such, vide the said letter, RKM submitted that as per Clause 1.3 of the Schedule of RfQ, LOA is to be issued after approval from the HERC and as such, the PPA execution would take place after 10 days from the issuance of the Letter of Award (LOA). Further, in particular, RKM had also informed HPPC that as per probable timelines, South Eastern Coalfields Limited (SECL) would require 45 days for amendment of the FSA and supply of linkage coal from the date of submission of the PPA alongwith the approval of HERC.

7. On 21.4.2022, HPPC issued an email to RKM Powergen seeking certain additional information namely, linkage fuel status of the generator, coal stock available as per CEA, availability for availing and status of LTOA. In *response*, the Petitioner vide its e- mail dated 21.4.2022 furnished the information called for.

8. On 27.4.2022, HERC called a public hearing inviting comments/objection from the various stakeholders with respect to the prayers as prayed for by the HPPC. Pursuant to the above public hearing, on 27.4.2022, HERC passed an order, *inter alia*, approving the draft PPA and allowing HPPC to award the LOA to the successful bidders. Further, HERC adopted the tariff quoted by the successful bidders. The said order contained a condition that power shall be supplied for a period of three years from April to October each year.

9. The Petitioner vide its letter dated 29.4.2022, requested the Chief Engineer, Thermal Power Project Planning and Development Division (TPPPDD) for increasing coal quantity for Shakti (B)(VIII)(a) Coal Linkage Auction for the quarter July, 2022 to September, 2022.

10. On 29.4.2022, RKM issued an email to HPPC stating that the company is not in a position to accept HERC order dated 27.4.2022 as terms of supply are not as per supply terms specified in tender document dated 21.3.2022. Thereafter, on the very same day, RKM issued a letter to HPPC withdrawing the earlier communication issued vide e-mail dated 29.4.2022 as the same was inadvertently sent and was not reflecting the correct intent that was to be conveyed to HPPC. Further, vide the said letter, RKM requested HPPC to schedule a meeting to find an effective and mutual resolution on the issues with respect to the timelines as stipulated in the order dated 27.4.2022 passed by HERC in Petition No. 17 of 2022.

11. Further, on 30.4.2022, RKM requested the Ministry of Coal, for participation in the Shakti auction for the procurement of an additional 550 MW until the quantum is tied up in future Long-term/ Medium-term power supply. The Petitioner further informed that if coal is not being allotted for the 550 MW, then two units of 360 MW

each will stop functioning and the same will lead to a crisis. Pursuant thereto, HPPC vide its email dated 29.4.2022, sought further clarifications, which was duly responded by RKM vide its letter dated 2.5.2022. The Petitioner vide its letter dated 3.5.2022 referring to its earlier letter dated 2.5.2022 again submitted that (i) under the RfP/ draft PPA on the basis of which the entire bidding process was conducted, the supply of power is contemplated to be on RTC basis, accordingly, all the tariff calculations for the bid placed by RKM Powergen were done on the basis of RTC supply of power, (ii) The parties are required to procure/ supply power in terms of the tender/ bidding documents issued at the time of bidding. This clearly means that supply of power has to be done on RTC basis. (iii) As such, on the basis of the above, RKM requested HPPC to take-up the aforesaid issue with HERC, in order to get a clarification so that power can be supplied in line with the tender documents. On 4.5.2022, HPPC filed a Review Petition before HERC against the above order dated 27.4.2022 passed in Petition No. 17 of 2022. In the said Petition, HERC approved power procurement from RKM.

12. On 5.5.2022, HPPC issued the LOA to RKM Powergen for supply of 350 MW power at Haryana Periphery from Uchpinda Thermal Power Plant Chhattisgarh in accordance with the terms and conditions of HPPC's bid documents. Further, HPPC requested RKM to start scheduling power at the earliest.

### **Submissions of the Petitioner**

13. The Petitioner has mainly submitted as under:

(a) The Petitioner, vide its letters dated 6.5.2022 and 11.5.2022, requested the Central Electricity Authority for increasing coal quantity for Shakti B(VIII)(a) Coal Linkage Auction for quarter July 2022 to September 2022 and also reiterated its contents in the earlier letter dated 29.4.2022 written to TPPPDD.

(b) RKM vide its letter dated 9.5.2022 conveyed its acceptance of the above LOA and gave its consent with the condition that the supply of power has to be after a period of 90 days from the execution of the PPA, as provided under Article 4.1.3 of the said draft PPA (which was issued with the RfP/ RfQ) read with the above order dated 4.5.2022 passed by HERC.

(c) On 18.5.2022, RKM Powergen and HPPC executed the PPA for supply of 350 MW. The Petitioner vide its letter dated 25.5.2022 requested HPPC for assistance for obtaining the amended Fuel Supply Agreement (FSA) and grant of MTOA. The Petitioner further requested HPPC to send a request letter to SECL, for expediting the FSA amendment and facilitate early supply of linkage coal. RKM also informed that it is in the process of applying the grant of MTOA, in terms of the Connectivity Regulations, 2009.

(d) HPPC vide its letter dated 27.5.2022 requested SECL to amend the FSA and facilitate early supply of linkage coal to RKM so that power to Haryana from Uchhpinda Thermal Power Petition may commence without delay as per the PPA.

(e) On 3.6.2022, the Petitioner furnished Performance Security Bank Guarantee in terms of Clause 9.1.1./4.1.3(a) of the PPA and also furnished a bid security in the form of a BG for an amount Rs. 17.50 crore in terms of Article 9.1.2 of the PPA. Further, in terms of Article 9.1.2, the Bid Security furnished by RKM shall remain enforced till performance Bank Guarantee (BG) is furnished under Article 9.1.1. This means that once performance BG is furnished, the bid security BG is to be returned to RKM.

(f) SECL vide its letter dated 6.7.2022 sought certain clarifications from the Petitioner, including the clarification regarding the period/ month in which power is to be supplied in a year to Haryana Discoms. On 7.7.2022, In response, HPPC vide its letter dated 7.7.2022 clarified the queries raised by SECL.

(g) The Petitioner vide its letter dated 12.8.2022, sought extension of time from HPPC for commencement of power on unavoidable grounds. In

response, HPPC vide its letter dated 23.8.2022 informed the Petitioner that on account of the delay in the commencement of power supply, Performance Security submitted by RKM shall be apportioned at a rate of 0.3% for each day's delay from the date of commencement of power supply i.e., 16.8.2022 as per the PPA.

(h) Further, on 30.8.2022, in response to HPPC's letter dated 23.8.2022, RKM responded by reiterating its submissions that the delay was beyond its control and that RKM had sought for a period of 90 days vide its earlier communications i.e., 9.5.2022, for fulfilment of the various Conditions Precedent and logistics required for the commencement of supply of power, including the requirement of arranging a fuel through executing the amended FSA. However, on 7.9.2022, HPPC requested the Petitioner to commence supply of power with effect from 16.8.2022.

(i) On 14.9.2022, the Petitioner again reiterated its stand as taken in the aforesaid letter dated 30.8.2022 and apprised HPPC that the amendment of FSA is still pending with SECL and requested to extend time period for supply of power after executing the amended FSA. The Petitioner vide its letter dated 17.9.2022 requested CEA to recommend CIL to accord approval to SECL for amendment of the existing FSA for the supply of balance available linkage coal at the earliest for supply of 350 MW net power as per the terms of the PPA signed with HPPC. Further, on 26.9.2022, the Petitioner brought various facts pertaining to Shakti Policy dated 8.3.2019 to the knowledge of CEA and once again requested CIL to accord approval to SECL for amendment of the existing FSA. However, on 4.10.2022, HPPC issued a Notice of Termination purportedly on account of the default committed by the Petitioner for non-supply of power. Further, vide the said letter, the HPPC treated the non-amendment of the FSA too as default of the PPA. HPPC also intimated the Petitioner for forfeiting the Performance Bank Guarantee.

(j) The Petitioner, vide its letter dated 7.10.2022, requested the Ministry of Coal to expedite the amendment of FSA so as to enable the Petitioner to commence supply of power to HPPC without any further delay.



(k) In response to the notice of termination dated 4.10.2022, the Petitioner duly apprised HPPC vide letter dated 12.10.2022 of the fact that the notice dated 4.10.2022 is premature and uncalled for and reiterated its stand that the alleged delay in commencement of power supply was on account of unavoidable reasons which were beyond its control. However, on 19.10.2022, HPPC again issued a Notice for Termination of the PPA, purportedly on account of the same grounds as has been shown in the earlier notice of termination dated 4.10.2022.

(l) CEA vide its letter dated 25.10.2022 requested the SECL to consider the request of the Petitioner for amending the existing FSA for additional coal supply against the above-mentioned medium term PPA of 350 MW (net).

#### **Hearing dated 15.12.2022**

14. The notice was issued to the Respondent to file its reply. The reply to the petition has filed by the Respondents and thereafter, the Petitioner has filed its rejoinder thereof.

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

15. The Respondent, in its reply dated 1.12.2022 has submitted as under:

(a) The jurisdiction to deal with the subject matter of the present Petition lies with the Haryana Electricity Regulatory Commission (hereinafter referred to as 'the State Commission') in terms of Section 64(5) of the Act (hereinafter referred to as 'the Act'). The Petitioner was a party to the tariff adoption proceedings before HERC and was aware of the same. At the relevant time, the Petitioner did not raise any objection as regards the exercise of jurisdiction by the State Commission under Section 63 of the Act. Rather, the Petitioner vide letter dated 3.5.2022, has requested HPPC to seek clarification from the State Commission. Hence, in terms of Section 64 (5) of the Act, RKM Powergen and HPPC have agreed to be subject to the jurisdiction of the State Commission. In support of the above argument, HPPC has relied on the judgement of Hon'ble Supreme Court

in the case of Energy Watchdog v. Central Electricity Regulatory Commission and Ors., [(2017) 14 SCC 80].

(b) The Petitioner has agreed to be governed by the State Commission and the entire transaction, starting from the tariff adoption under Section 63 has been conducted by the State Commission (Ref: Orders dated 27.4.2022 and 4.5.2022) and, therefore, the jurisdiction of this Commission does not arise in the present case. HPPC has further placed reliance upon the certain judgements, namely M.P. Power Management Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission vide Order dated 19.8.2020 in Appeal Nos. 327 & 338 of 2018 and Appeal No. 51 of 2018; and order dated 1.9.2021 passed in Petition No. 48/MP/2021 in the case of ACB (India) Limited v. Gujarat Urja Vikas Nigam Limited.

(c) The primary intent and fundamental aspect of the above tender was the immediate commencement of supply in order to tide over the immediate power requirement in the State of Haryana. On 27.4.2022, the State Commission passed the Order in Petition No. 17 of 2022 allowing HPPC to procure power from MB Power and RKM. After the selection of RKM as the successful bidder, HPPC vide its letter dated 29.4.2022 requested the Petitioner to provide clarification with regard to the commencement of supply of power.

(d) On 9.5.2022, the Petitioner accepted the LoA which provides that supply shall commence within 90 days from the execution of the PPA. On 27.5.2022, as per the request of the Petitioner, requested SECL to amend the FSA. On 13.6.2022, HPPC *inter-alia*, requested the Petitioner to make best efforts to supply power at the earliest to enable the Discoms to cater to the peak demand due to the ensuing paddy season.

(e) The Petitioner vide its e-mail dated 28.6.2022 informed that it is expected to start commencement of supply well before 16.8.2022, i.e., 1.8.2022. From the above email, it is clear that the Petitioner was well aware about the requirement of immediate commencement date of supply which had already been delayed and specifically gave assurance to HPPC with regard to early

commencement of the power supply not later than 16.8.2022. Failure on the part of the Petitioner to commence immediate supply of power within the time stipulated i.e., by the Appointed Date, besides being contrary to the terms of the PPA and the bidding documents (RfQ and RfP), constitutes a fundamental breach of the premise/purpose for which the PPA was entered into; the bidding was conducted by HPPC; and the approval was granted by the State Commission.

(f) A tender was floated by HPPC in order to meet the emergent shortfall in the power supply in the State of Haryana. It was the intent and objective of the bidding that HPPC receives supply of power at the earliest and in no event later than the 'Appointed Date', as defined under the bidding documents (RfQ and RfP), including the draft PPA. Therefore, since inception, it was made clear to all the bidders that the commencement of supply has to occur by the Appointed Date. Failure to commence supply within 120 days of entering into the PPA i.e., by 15.9.2022 would automatically lead to consequences including deemed termination upon delay as provided in Article 4.4 of the Model PPA and the executed PPA.

(g) It was an express understanding between the parties that the Appointed Date i.e., commencement of supply shall begin within 90 days of signing of the PPA, namely by 16.8.2022. Infact, the Petitioner itself had sought to prepone the Appointed Date to 1.8.2022. On 12.8.2022, the Petitioner sought extension of time for commencement of power supply. Further the Petitioner vide its letter dated 23.8.2022 and 30.8.2022 was informed by HPPC that on account of delay in the commencement of power supply, Performance Security submitted by your firm shall be apportioned at a rate of 0.3% (zero point three per cent) for each day's delay from the date of commencement of power supply i.e. 16.8.2022 as per the PPA and reiterated the submissions that the delay in commencement of supply was beyond its control.

(h) Any delay on the part of the Petitioner in arranging and getting the FSA cannot be construed as a Force Majeure event under the PPA. This is particularly, when the terms of the bid itself envisaged an access to assured

supply of fuel as a necessary eligibility criteria. Accordingly, all consequences of non-signing/execution of the FSA would have to be borne by the Petitioner including the termination of the PPA.

(i) The Petitioner, vide its letter dated 14.9.2022, apprised HPPC that the amendment of the FSA is still pending with SECL and requested for an extension of time for executing the amended FSA.

(j) On 4.10.2022, i.e., approximately 140 days from the date of execution of the PPA, HPPC issued a notice of termination to the Petitioner on account of default committed by the RK Powergen for non-supply of power. Thus, HPPC terminated the PPA on account of the failure of the Petitioner to commence power supply within the stipulated time. HPPC also made it clear that the maximum period for achieving the Appointed Date was 120 days from the date of signing of the PPA, failing which the PPA would be deemed to be terminated. HPPC also stressed that it had to face financial losses on account of the default on the part of RKM.

(k) In the present case, the delay in the occurrence of the Appointed Date, i.e., the commencement of supply is only for reasons attributable to the Petitioner. The correspondences exchanged between the parties, signing/execution of the amendment to the FSA was not only a condition precedent under the PPA but was rather a basic eligibility criterion under the tender documents. Any delay on account of the Petitioner to timely execute the amendment to the FSA does not entitle it to any extension/relief under the Force Majeure clause, i.e., Article 17.4.

(l) A similarly placed generator, namely, MB Power Madhya Pradesh Limited ('MB Power') (150 MW) which was also selected pursuant to the tender issued by HPPC on 21.3.2022, has commenced supply even prior to the period stipulated, i.e., by 19.7.2022 (well before the appointed date i.e., 16.8.2022), considering the emergent circumstances in the State of Haryana.

(m) From the bare perusal of the PPA, it is clear that the PPA provides no embargo as to how the fuel is procured. It was the Petitioner's commercial

decision and discretion to wait for execution of amendment of the FSA by SECL. Being aware of the exigencies of power shortage in the State of Haryana, the Petitioner could have procured fuel from alternate source until the execution of amendment of the FSA by SECL.

(n) Article 4.4 of the PPA provided for termination on delay in commencement of power supply for 120 days under. Despite being cognizant of such terms of the mutually executed PPA, the Petitioner did not endeavour to secure alternate sources of fuel so as to commence supply of power within the stipulated time and avoid termination of the PPA and has to now bear the consequences of the same.

(o) With respect to the prayer of RKM Powergen seeking stay on the encashment of BG, (i) the restricted and extremely limited exceptions recognized for restraining the encashment of BG are fraud of an egregious nature which vitiates the very foundation of the BG (UP State Sugar Corporation –v- Sumac International Limited [(1997) 1 SCC 568 at Para 12]; Himadri Chemicals Industries Ltd. -v- Coal Tar Refining Company [AIR 2007 SC 2798 at Para 11]; Vinitec Electronic Private Limited –v-HCL Infosystem Ltd [(2008) 1 SCC 544 at Para 25-26]; Siti Energy Limited & Anr -vs- PNGRB dated 02/02/2016 in W.P. (C) 125/2016 Delhi at Para 25); (ii) Irretrievable Injustice of exceptional and irretrievable nature as would override the terms of the guarantee and the adverse effect of such an injunction on commercial dealings in the country (UP State Sugar Corporation -v-Sumac International Limited [(1997) 1 SCC 568], Vinitec Electronics Private Ltd. -v- HCL Infosystems Ltd., [(2008) 1 SCC 544 (Para 11 quoting UP Sugar Case)]; Siti Energy Limited & Anr -v- PNGRB dated 02/02/2016 in W.P. (C) 125/2016 at Para 25); and (iii) Encashment is against the terms of the guarantee (Hindustan Construction Company Limited -v- State of Bihar [(1999) 8 SCC 436]).

16. The Petitioner in its rejoinder dated 13.2.2022 has mainly submitted as under:

(a) In regards to necessary jurisdiction, Section 64(5) of the Act does not supersede the jurisdiction of this Commission vested under Part X of the Act

except on the limited aspect of determination of tariff for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States. Further, Section 64(5) of the Act does not divest the jurisdiction of this Commission except on the said limited function of tariff determination. Section 64(5) that falls under Part VII of the Act titled "Tariff" has specifically conferred limited jurisdiction pertaining to tariff determination for any inter-State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States, upon the State Commission. Needless to state that, the tariff determination and dispute settlement are entirely different concepts and as such, the Commission having jurisdiction under Section 64(5) cannot assume the jurisdiction under Section 79(1)(f) as well.

(b) Adjudicatory and dispute settlement jurisdiction with respect to the disputes between the Parties, where the composite scheme is involved, lies exclusively with this Commission by virtue of Section 79. The present issue falls under Clause (f) also besides Clause (b) of Section 79(1), such issue talks outside the limited tariff determination jurisdiction of State Commission vested under Section 64(5). The State Commissions and also this Commission are the creatures of statute deriving their power from the express provisions of the Statute and as such, the respective jurisdictions are circumscribed by the provisions of statute. In this regard, the Petitioner has placed reliance on the law laid down by the Hon'ble Supreme Court in the cases of *Rajeev Hitendra Pathak Vs Achyut Kashinath* [(2011) 9 SCC 541] and *Shrisht Dhawan (Smt) v. Shaw Bros.*, reported in [(1992) 1 SCC 534]. In the context of present matter, no amount of admission, agreement or subjugation by the parties are good enough to confer the State Commission the jurisdiction to deal and adjudicate an issue which otherwise falls within the purview of Section 79(1)(f) of the Act.

(c) With respect to the contention of the Respondent No. 1, that it has validly terminated the PPA in terms of Article 4.4 i.e., on account of the failure of the Petitioner to commence supply power within 120 days of entering into the PPA, the Notices dated 4.10.2022 and 19.10.2022 issued by the Respondent No. 1 are premature, non-compliant with the preconditions as per PPA and unlawful. The Respondent No. 1 issued the Termination Notices in terms of Article

19.1.1(j) of the PPA. However, the said Respondent has failed to take into consideration the Articles 19.1.1 and 19.1.2, which categorically deals with the mandatory pre-conditions for termination of the PPA.

(d) The Respondent No. 1 has premised its notice upon alleged supplier's failure to supply the monthly availability, which is referred to in Clause 19.1.1(j) of the PPA. Respondent No. 1 has placed selective reliance upon the provisions of the PPA and has not even referred to the entire provision of Article 19.1.1 in this regard.

(e) Even assuming that the Petitioner ought to have made available the "Monthly Availability" so as to enable the Respondent No. 1/ HPPC to off-take the same with effect from 16.8.2022, and even if the Petitioner failed in doing so, then, the Termination Notice for the ground provided in Article 19.1.1(j) could not have been issued prior to the expiry of seven months and fifteen days, in terms of the combined reading of the aforesaid provisions of the PPA. However, in the present case, the Respondent No. 1 failed to wait for the occurrence of "Suppliers Default" i.e., a default for a period of four months. Furthermore, the Termination Notice is also not preceded by a communication offering the Cure Period of 3 (three) months and its expiry thereof without curing the alleged default by the Supplier.

(f) The Termination Notice dated 19.10.2022 was issued before the expiry of fifteen days from the first Termination Notice dated 4.10.2022. This clearly shows the arbitrary conduct of Respondent No. 1 with respect to the abiding to the terms and conditions of the PPA.

(f) The entire contention of Respondent No. 1 that it has validly terminated the PPA in terms of Article 4.4 i.e., on account of failure of RKM Powergen to commence supply power within 120 days of entering into the PPA is completely flawed, baseless, devoid of any merits and the same deserves rejection at the threshold. Therefore, in no manner whatsoever, could Respondent No. 1 could have issued the Termination Notice in terms of Article 19.1.1 of the PPA.

(g) The Respondent No. 1 has raised the averment that the Petitioner has failed to ensure access the amended FSA from the Respondent No. 2/ SECL in order to enable commencement of power in the State of Haryana. The Respondent No. 1 vide its letter dated 27.5.2022 requested the SECL, to amend the FSA, and facilitate early supply of linkage coal to RKM Powergen so that power to Haryana from Uchhpinda Thermal Power Petition may commence without delay as per the PPA. Therefore, this clearly goes to show that even Respondent No. 1 was well aware about the difficulties being faced by the Petitioner.

(h)The Petitioner time and again reiterated its stand that the amendment of the FSA is not attributable upon the Petitioner, and was the sole responsibility of Respondent No. 2. In fact, the Petitioner vide its letter dated 17.9.2022 requested the Central Electricity Authority to recommend CIL to accord approval to SECL for amendment of the existing FSA for supply of balance available linkage coal at the earliest for supply of 350 MW net power as per the terms of the PPA signed with the Respondent No. 1/ HPPC.

(i) The Petitioner once again on 26.9.2022 brought to the notice of CEA various facts pertaining to the Shakti Policy 8.3.2019, and once again requested CIL to accord approval to the Respondent No. 2/ SECL for amendment of the existing FSA. Since the Respondent No. 2 failed to amend the FSA, there are no reasons attributable upon the Petitioner that it did not make any efforts qua the amending of the FSA. The Petitioner at all times duly intimated the Respondent No. 1 qua the difficulty being faced by the Petitioner on account of the Respondent No. 2/ SECL for non-amendment of the FSA.

(j) The Respondent No. 1 without any reason whatsoever, proceeded to issue the Termination Notices dated 4.10.2022 and 19.10.2022 to the Petitioner on account of the fact that the FSA could not be amended. In fact, after the issuance of the first Termination Notice dated 4.10.2022, the Petitioner vide its letter dated 7.10.2022 requested the Ministry of Coal to expedite amendment of the FSA so as to enable the Petitioner to commence supply of power to Respondent No. 1 without any further delay.



(k) The Respondent No. 1 while filing its reply has proceeded to rely upon half-baked facts involved in the present Petition. In this regard, CEA on 25.10.2022 requested Respondent No. 2/ SECL, to consider the request of the Petitioner for amending the existing FSA for additional coal supply against the above-mentioned medium term PPA of 350 MW (net). This clearly goes to show that the Petitioner in no manner whatsoever can be held liable for not taking steps qua amending the FSA.

(l) Post the hearing of the present Petition before this Commission, the Petitioner on 1.11.2022 requested the Ministry of Coal, to direct the Respondent No. 2/ SECL to amend the FSA and if there are any further delay in doing so, the Petitioner's financial position would be hampered and would affect the shareholders and the lenders of the Petitioner's Company.

(m) The Petitioner once again on 15.11.2022 requested to the Joint Secretary (Thermal), Ministry of Power to take up the issue of amendment of the FSA with the Ministry of Coal and direct the Respondent No. 2/ SECL to amend the FSA on an urgent basis, in order to commence supply of power to the Respondent No. 1 in terms of the provisions of the PPA. Vide the said letter, the Petitioner also stated that out of the total capacity of 550 MW, the Petitioner has tied up with 350 MW towards supply of power to Respondent No. 1/ HPPC. With respect to the balance 200 MW, the same is to be tied up within a period of two years of stoppage of power to the Telangana Discom on 15.10.2021 on account of default in making payments by the said Discom. Therefore, on account of the delay on the part of Respondent No. 2/ SECL for signing of the amended FSA for the 350 MW tied up with Respondent No. 1/ HPPC, the Petitioner is at the risk of losing EMD if it further participates in long-term/ medium-term tenders.

(n) Subsequently, State of Kerala issued a tender dated 4.11.2022 for supply of 500 MW on medium-term. However, on account of the delay on the part of Respondent No. 2/ SECL, the Petitioner is unable to participate in such bids.

(o) The Petitioner has been making efforts by writing various letters to the Respondent No. 2/ SECL for amending the FSA in order to commence supply of

electricity to the Respondent No. 1/ HPPC in terms of the PPA. The Petitioner executed the FSA with SECL on 3.9.2013 & 23.9.2013 for 900 MW capacity. In the meanwhile, on 22.5.2017, the Ministry of Coal (“MoC”) replaced and substituted the National Coal Distribution Policy (“NCDP”) with SHAKTI Policy, for the purpose of granting coal linkage. Under the said policy, linkage coal was to be granted through auction mode. The SHAKTI Policy categorically stated that the erstwhile NCDP would continue to operate, and also for Medium Term PPAs to be entered into in future.

(p) MOP, Standing Linkage Committee [SLC (LT)] in a meeting held on 29.6.2017 recommended that Clause 2.8.2.3 of the old FSAs pertaining to conditions precedent, whereby the Purchaser was required to furnish the PPA entered directly with the distribution companies or through power trading companies who have back-to-back PPAs with discoms within 24 months, of the FSA may be extended up to 31.3.2020 for all Thermal Power Plants having FSAs. The recommendation of the MOP was on the fact that sufficient PPAs were not available in the Market. In addition to the aforesaid, the Shakti Policy, was further amended on 25.3.2019, wherein certain amendments were carried out to the earlier Shakti Policy of 2017.

(r) Subsequently, the MOP issued a circular dated 30.8.2019 which envisaged a protocol wherein PPAs of the generating companies having FSAs under the old regime, may be cancelled on account of the “default in payment” by Discoms as per the provisions of the respective PPAs. The circular further clarified that the generator which terminates the PPA in case of default in payment by the Discom, shall not be allowed to sell power bilaterally but only through DEEP portal of the MoP or Power Exchange at market determined price for a period of maximum two years. As per the circular, the existing Letter of Assurance (LOA)/ Fuel Supply Agreement (FSA) conditions shall continue for a further period of maximum 2 years. If required, necessary modifications to be made in the existing LOA/ FSA; and linkage after the period of maximum 2 years to be cancelled in case the generator is not able to secure a long/ medium term PPA within the said period.

(s) The Petitioner executed a Medium-Term PPA with PTC dated 26.10.2018 for supply of 550 MW. PTC executed a back-to-back PPA with Telangana Discoms dated 27.10.2021. Due to non-payment of dues by PTC, the Petitioner stopped supply of power on 15.10.2021. Acting on the aforesaid Policies contained in the Notifications issued by the Ministry of Coal and MoP, the Petitioner participated in two bids invited by HPPC for a quantum of 350 MW and 200 MW, respectively, under Section 63 of the Act, for supply of power for a period of three years.

(t) In February, 2022, the Cabinet Committee of Economic Affairs (CCEA) vide its Notification approved offering of coal-by-coal companies through a common e-auction window instead of sector specific auction. Pursuant to the aforesaid Notification, a Special e-forward auction was to be conducted exclusively for the power plants who did not have the PPAs. However, this auction was withdrawn and a Single Window Spot auction was introduced wherein all the industries were allowed to participate. The same completely paralyzed the Power Plants as there was heavy competition and premiums shot sky high.

(u) Vide the aforesaid Notification, CCEA while approving unified auction, i.e., 'Monthly auctions under Shakti B(viii)(a) with progressively increasing quantity', demonstrates that the intent was to ensure adequate quantum of coal for the power sector through monthly auctions so that the coal prices remain reasonable and power costs do not shoot up. However, inadequate quantum of coal was offered in the auctions. Based on plant-wise detailed computation, CEA recommended 11.6 MT as the normative quantity (equivalent to G13 grade). However, CIL offered only 6.4 MT of G13 equivalent coal, which is only around 55% of the CEA recommended quantity. This demonstrates that under the auctions to be conducted after the CCEA notification issued in February, 2022, the coal which was offered was inadequate to meet the requirement of power plants.

(v) CIL has been under non-adherence of the CCEA directions. In this regard, reliance has been made to the amendment dated 25.3.2019 to the SHAKTI

Policy 2017, wherein it was directed that under Clause B(iii) of the SHAKTI Policy, the auctions/ bids shall be held at regular intervals.

(w) The Government of India, Ministry of Coal on 21.3.2022 forwarded a Minutes of Meeting dated 3.2.2022 of the SLC (LT) for power sector to Coal India Limited and Singareni Collieries Company Limited, wherein requests for coal linkages to Central/ State Sector Power Plants was to be considered and also to review the status of existing coal linkages/ LoAs and other related matters. In fact, one of the agendas under the said Minutes was “Agenda Item No. 2 - Extension of timeline for entering into PPA as per Condition Precedent requirement under FSA”. However, despite the above directions, only three rounds of auction have been held under Para B(iii) since the issuance of the aforesaid amendment in 2019. This aspect was highlighted vide an email dated 9.12.2022, issued by the Association of Power Producers to the Secretary, Ministry of Power.

(x) CIL has been in further non-adherence of Ministry of Coal's Notice No. CPD-23011/18/2021-CPD dated 21.3.2022 pertaining to monthly auction. In this regard, pursuant to the Cabinet decision to go in for a unified-auction window for all consumers (regulated and non-regulated), it was decided to discontinue the Special Forward e-auctions (“SFeA”). After the discontinuation of the SFeA, the only viable source of coal remaining for the thermal power plants without PPAs/FSAs (~10 GW) were the auctions held under the provisions of Para B(viii)(a) of SHAKTI Policy [‘SHAKTI B(viii)(a)’], since the power plants (which operate under a regulated tariff environment) cannot compete against non-regulated entities (operating under free market tariffs) participating in the spot market auctions which are open to all consumers.

(y) The Union Cabinet laid down three conditions to be fulfilled by the coal companies, as outlined in aforementioned notice of the MoC. These conditions sought to ensure that the consumers of power did not suffer due to the unification of e-auction windows, and one of the conditions stated that – “... .. the coal companies shall offer coal each month for the SHAKTI B(viii)(a) windows which will be 10% more than the maximum coal booked by the power sector in any of the 3 preceding months [SFEA and SHAKTI B(viii)(a) windows.”

(z) Despite clear cut directions by the Cabinet, the Coal India subsidiaries have been defaulting on both the parameters mandated by the Cabinet, i.e., (i) non-holding of monthly auctions, as instead of the minimum 7 auctions which should have been held till date, only 2 auctions have taken place, with the last one being held in August; and (ii) the quantity of coal offered was only 53% of the CEA approved quantity.

(za) There is no clarity as to whether the FSA of the Petitioner is valid or the same has lost its effectiveness post 31.3.2022. While, the MoP and NITI Aayog were of the view that the issue needs to be resolved and the power plants having FSAs prior to the SHAKTI scheme, ought to be allowed further extension of time for providing copy of medium term PPAs executed with the Discoms for being eligible for linkage coal. However, CIL was of the view that the same is not possible as it cannot plan coal supplies. This is clearly a force majeure event under Article 17 of the PPA.

(zb) Article 17.4 of the PPA, which talks about “force majeure”, categorically states that if any of the Contractors failed to perform their obligations under the said Agreement or “Project Agreement”, provided that such delay is on the part of the Contractor and not the Supplier (RKM), then the said event is deemed to be a force majeure event.

(zc) The present event faced by the Petitioner is nothing but a force majeure event in terms of Article 17.4 of the PPA. The delay in execution of the amended FSA was never on the part of the Petitioner, but it was only on the part of Respondent No. 2/ SECL, and the same was time and again being informed to Respondent No. 1. Therefore, it cannot be said that the Petitioner did not take any steps to ensure that the FSA needs to be amended for commencement of supply of power.

### **Hearing dated 22.2.2023**

17. During the course of the hearing on 22.2.2023, the Petitioner and Respondent No. 1 made detailed submissions in the matter, and re-iterated the submissions

made in the pleadings. After conclusion of the hearing, the Commission directed the parties to file their respective written submissions within a period of two weeks. In terms of the said directions, the Petitioner and HPPC have filed their respective written submissions.

### **Written submissions**

18. The Petitioner, in the written submissions, has reiterated the submissions made in the Petition and rejoinder and has additionally submitted as under:

(a) In the present case, the dispute involves a contractual issue which necessarily falls under the exclusive jurisdiction of Section 79 of the Act. In this regard, reference be made to *Maharashtra Chess Association* judgement, reported in [(2020) 13 SCC 285 (Para 9 & 10)], which holds that the jurisdiction cannot be conferred by mutual agreement and that the same is conferred by statute.

#### *Issue of termination of the PPA:*

(b) The Respondent No. 1 vide its letters dated 4.10.2022 and 19.10.2022 issued notices for the termination of the PPA on account of non-supply of power invoking Article 4.4 which deals with deemed termination of the PPA in the event the supplier cannot achieve appointed date after expiry of 120 days from the date of signing of the PPA. As per Article 26.1, Appointed Date is when all Condition Precedents are achieved or waived.

(c) In the present case, the Condition Precedents as per Article 4.1.3 do not include the execution of FSA. Further, the prescribed condition precedents have been achieved as on 9.7.2022, and that the same was expressly informed to HPPC vide letter dated 9.7.2022. As such, there is no case for deemed termination under Article 4.4 qua non-execution of required FSA.

(d) The Petitioner had already complied with the Condition Precedents specified under clause 4.1 of the PPA. This fact was duly intimated to the Respondent No. 1/ HPPC by the Petitioner vide letter dated 9.7.2022. The same was also accepted and acknowledged by the HPPC. Since the CPs

stood fulfilled, thereafter the PPA could only be terminated in accordance with the provisions of Article 19 and none other.

(e) A conjoint reading of the contents of the notices alongwith Article 19 are suggestive of the fact that HPPC has premised its notice upon alleged supplier's failure to supply the monthly availability, which is referred to in Clause 19.1.1(j) of PPA. It needs to be noted that Article 19.1.1(j) refers to the event where failure to supply power for (i) 4 consecutive months, or (ii) cumulative 4 months within any continuous 12 months by the supplier, becomes event of default of supplier. However, as per Article 19.1.1(j) (iii), if such failure is, *inter alia*, on account of shortage of coal for reasons beyond RKM, then the same is not supplier's event of default. In view of the aforesaid provisions of the PPA, it can be ascertained that no "Supplier Default" as provided in Article 19.1.1(j) could have been triggered with respect to the termination of the PPA under Article 19.1.1.

(f) A lapse of four months of alleged "Supplier Default" in achieving monthly availability. Thereafter, subject to the expiry of cure period, if no period is specified then the cure period shall be construed as three months Cure Period as per Article 19.1.1 (which ought to have commenced from service of a Notice in this regard to cure the alleged default). Further, if default by supplier is not cured within the specified cure period, subject to Force Majeure, then only it becomes default of the supplier. Thereafter, in terms of Article 19.1.2, subject to a further notice of 15 days conveying the intention to terminate the PPA, in terms of Article 19. Therefore, the Termination Notice for the ground provided in Article 19.1.1(j) could not have been issued prior to the expiry of 7 months and 15 days, in terms of the combined reading of the aforesaid provisions of the PPA. In support, the Petitioner has relied upon *Captain Sube Singh v. Lt. Governor of Delhi*, [reported in (2004) 6 SCC 440 [Para 29].

(g) As demonstrated, the fuel shortage/non-availability is clearly not attributable to the Petitioner, based on change in policy related to coal distribution qua power plants having FSAs before the advent of the Shakti

Policy. Further, the same has been repeatedly notified to Respondent No. 1 vide letters dated 12.10.2022, 14.9.2022 and 30.8.2022. In any event, even a 'Change in Law' event which cannot be compensated in monetary terms under the aforesaid PPA is a force majeure event in terms of Clause 17.4(a). As such, in the present case, since the coal as per the Fuel Supply Agreement is unavailable on account of the midstream changes in the SHAKTI policy, the Petitioner is ready and willing to find and use alternate source of coal to supply power. However, Respondent No. 1 is not inclined to offtake the said power using alternative coal source and pay for the same. Hence, the same results in a "Change in Law" Event, i.e., mid-stream change in the SHAKTI policy cannot be compensated to RKM Powergen due to the stand taken by Respondent No. 1. Accordingly, without prejudice, such Change in Law is to be treated as a force majeure event and that the Petitioner cannot be fastened with any liability due to the fact the said force majeure events prevented the commencement of supply of power under the PPA.

19. The Respondent, HPPC in its written submissions dated 23.3.2023 has reiterated the submissions made in the reply and has mainly submitted as under:

(a) In the present case, the delay in the occurrence of the Appointed Date, i.e., the commencement of supply is only for the reasons attributable to the Petitioner. Any delay on account of the Petitioner to timely execute the amendment to the FSA does not entitle it to any extension/relief under the Force Majeure clause, i.e., Article 17.4. Therefore, owing to the consistent failure on the part of the Petitioner to commence supply, the Respondent No. 1 proceeded to issue the termination notice in accordance with Article 4.4 of the PPA and the PPA stands terminated validly.

(b) After the signing of the PPA, the Petitioner kept extending the timelines for executing/amending the FSA with SECL. Since the pre-qualifying condition stipulated in Clause 2.2.1 (d) has not been met by the Petitioner even after the signing of the PPA, the Respondent No. 1 proceeded to terminate the PPA. Such termination is also in consonance with Clause 2.6.3 of the RfQ.



Therefore, in any event, it was open for Respondent No. 1 to terminate the PPA in terms of Clause 2.6.3 of the RfQ.

(c) The failure on the part of the Petitioner to commence immediate supply of power within the time stipulated i.e., by the Appointed Date, besides being contrary to the terms of the PPA and the Bidding Documents (RfQ and RfP), constitutes a fundamental breach of the premise/purpose for which the PPA was entered into; the bidding was conducted by the Respondent No. 1; and the approval was granted by the State Commission.

(d) In so far as the Petitioner has challenged the termination of the PPA stating that the PPA could have been terminated only after the expiry of a total period of 7.5 months, the same goes against the object of immediate commencement of supply which Respondent No. 1 sought to achieve through the PPA. When 3 years medium term PPA can only be terminated after approximately 10.5 months from its execution [i.e., 90 days from execution of the PPA (Appointed Date) + 7.5 months as put forth by the Petitioner], on failure to commence supply of power, the purpose of procurement of power through execution of a PPA is rendered meaningless.

(e) At no instance, the Petitioner issued any force majeure notice to Respondent No. 1. Article 17.5.1 read with Article 17.5.2 of the PPA specifically required a force majeure notice to be issued to claim any relief in respect of the purported force majeure event. Accordingly, the Petitioner is not entitled to any relief under Article 17 of the PPA.

(f) The implications of the SLC Meeting dated 28.10.2022 have no bearing on the present case. Respondent No.1 had validly terminated the PPA on 4.10.2022 as read with 19.10.2022. Any event occurring post the termination cannot affect the termination done by Respondent No. 1.

(g) The Petition was filed by the Petitioner on 26.10.2022. The rights of the parties stand crystallized on the date of the institution of the suit. The Hon'ble Supreme Court has upheld the same in its judgments in the cases of

Rajender Bansal and others v. Bhuru and others, [(2017) 4 SCC 202]; and Atma Ram Mittal v. Ishwar Singh Punia, [(1984) 4 SCC 284].

(h) Thus, as per Clause 2.8.2.3 (Condition Precedent) of the FSA, the generator is required to furnish the PPA, entered into directly with the Distribution Companies (DISCOMs) or through power trading companies who have back to back PPAs with the distribution companies within 24 months from the date of signing of the FSA. Since the Petitioner had executed its PPA with HPPC only after 31.3.2022, it was not eligible for coal supply under the LoA-FSA regime even as on the cut-off date.

(i) In any event, the extension in timelines for fulfilling the Condition Precedents under the FSAs was at the discretion of the Ministry of Coal, and the same could not have been claimed as a matter of right by the Petitioner. Further, even the SLC meetings prior to termination of the PPA had not allowed extensions to the timelines for fulfilling the Condition Precedents under the FSAs beyond the outer limit of 31.3.2022 (as specified in the Shakti Policy 2017) [Ref. Minutes of the SLC Meeting dated 03.02.2022 at Pages 853 to 862]. Therefore, the Petitioner had misrepresented to have access to an assured fuel supply as without executing a PPA until 31.3.2022, The Petitioner was not eligible for drawing coal under the SHAKTI Policy, 2017 for the supply of power to HPPC under the existing FSAs

(j) On the issue of stay on encashment of performance guarantee, the principles governing the invocation and the payment under the Bank Guarantee are well-settled by number of decisions of the Hon'ble Supreme Court and APTEL.

### **Analysis and Decision:**

20. We have considered the submissions of the Petitioner and the Respondents and perused the documents available on record. The following issues arise for our consideration:

**Issue No.1: Whether this Commission has the jurisdiction to adjudicate upon the present petition?**

**Issue No. 2: Whether the termination notice dated 4.10.2022 and 19.10.2022 issued by the Respondent No. 1 are valid and sustainable?**

The above issues have been dealt with in the subsequent paragraphs.

**Issue No.1: Whether this Commission has the jurisdiction to adjudicate upon the present petition?**

21. The Petitioner has submitted that the Commission has the necessary jurisdiction to entertain the present Petition and to provide the reliefs as sought for hereunder. The Petitioner submitted that it has a composite scheme in terms of Section 79(1)(b) of the Act, as it supplies electricity to the distribution licensees in more than one State. The details of some of the Power Sale Agreements executed by the Petitioner, other than the agreements/ arrangements which are subject matter of the present Petition, are as under:

<b>Date of the PPA</b>	<b>Quantum</b>	<b>Procurer/ Buyer</b>	<b>Tenure</b>	<b>Start Date of PPA</b>
29.09.2006	441 MW	CSEB	20 years	25.6.2011
15.03.2016	350 MW	UPPCL	25 years	30.10.2016

22. On the other hand, Respondent No. 1 has argued that the adoption of tariff as well as the procurement of power on the terms and conditions contained in the draft PPA and bidding documents were approved by the State Commission. It is clear from the same that the Petitioner was a party to the above tariff adoption proceedings. At the relevant time, the Petitioner did not raise any objection as regards the exercise of jurisdiction by the State Commission under Section 64(5) of the Act. The above position has been clarified by the Hon'ble Supreme Court in the case of Energy Watchdog v. Central Electricity Regulatory Commission and

Ors.,[(2017) 14 SCC 80]. Respondent No.1 has further argued that Section 64 (5) of the Act is a special provision in the nature of an exception and reserves the jurisdiction of the State Commission for the distribution licensee of the State which is purchasing power from the generators who otherwise have a composite scheme of generation and supply, for which the jurisdiction shall otherwise be vested with this Commission under Section 79(1)(b) of the Act. The Respondent in support of its contention has relied on the judgement of APTEL and order of the Commission in the cases M.P. Power Management Company Ltd. v. Madhya Pradesh Electricity Regulatory Commission in Appeal Nos. 327 & 338 of 2018 and Appeal No. 51 of 2018; and order dated 1.9.2021 in Petition No. 48/MP/2021 in the case of ACB (India) Limited v. Gujarat Urja Vikas Nigam Limited.

23. We have considered the submissions of the Petitioner and Respondent. The Petitioner has entered into separate PPAs with the SCEB and UPPCL on 29.9.2006 and 13.3.2016 for supply of 441 MW and 350 MW for 25 years and 25 years respectively. On 27.4.2022, HERC approved the draft PPA pursuant to competitive bidding process and adopted the tariff discovered through the competitive bidding process in terms of Section 63 of the Act. The jurisdiction of this Commission to regulate the tariff of the generating companies is derived from Section 79(1)(a) and (b) of the Act and it derives its power to adjudicate the dispute from Section 79(1)(f) of the Act. The said provisions are extracted as under:

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

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

\* \* \* \* \*

*(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;”*

24. Under Section 79(1)(b) of the Act, this Commission has the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those generating companies have composite scheme for generation and sale of electricity in more than one State. The Hon`ble Supreme Court in the case of Energy Watchdog v. CERC & Ors [2017 (4) SCALE 580] has dealt with the issue of composite scheme as under:

*“22. The scheme that emerges from these Sections is that whenever there is inter- State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub- sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission`s jurisdiction is only where generation and supply take place within the State. On the other hand, the moment generation and sale take place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”*

25. As per the above findings of the Hon`ble Supreme Court, the moment generation and sale of electricity take place in more than one State, this Commission is the appropriate Commission under the Act. In the present case, as stated above Petitioner is supplying power to CSEB in the State of Chhattisgarh and to UPPCL in

the State of Uttar Pradesh from its power project situated in the State of Chhattisgarh. It has entered into long term PPA dated 29.9.2006 (Start date of the PPA is 25.6.2011) for supplying power from its power plant to the distribution company in the State of Chhattisgarh i.e. SCEB and PPA dated 15.3.2016 (start date of the PPA is 30.10.2016) for supplying power to the distribution company in the State of UP i.e. UPPCL. It is, therefore, evident that the Petitioner is supplying power to more than one State from the same generating station and such supply is governed by separate binding arrangements, namely the PPAs. The entire scheme of generation and supply of power, therefore, unmistakably indicates that the Petitioner has a composite scheme for generation and supply of power in more than one State.

26. With regard to Section 64(5) of the Act, the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case had observed the following:

*“Section 64. (Procedure for tariff order): --- (1) An application for determination of tariff under section 62 shall be made by a generating company or licensee in such manner and accompanied by such fee, as may be determined by regulations.*

.....

*(5) Notwithstanding anything contained in Part X, the tariff for any inter- State supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefore.”*

In our view, the findings of the Hon'ble Supreme Court on Section 64(5) of the Act do not in any manner support the argument of the Respondent that the State Commission/HERC will have jurisdiction in matters relating to inter-State supply of power. Hon'ble Supreme Court in the above paragraph has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply,

transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) of the Act to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter- State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. In respect of the adoption of tariff as well as procurement of power on the terms and conditions contained in the draft PPA and bidding documents, the Petitioner has invoked the jurisdiction of the State Commission/HERC for the adoption of tariff under Section 63 of the Act and approval of the PPA under Section 86(1)(b) of the Act. The said Petitions may be construed as a joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Further, there is nothing on record to show that both the Petitioner and HPPC had approached the State Commission for determination of tariff under Section 64(5) of the Act. In our view, the case of the Petitioner is not covered under Section 64(5) of the Act, since the generating station of the Petitioner is supplying power to more than one State and therefore, has a composite scheme for generation and supply of power under Section 79(1) (b) of the Act. Consequently, any dispute involving Section 79(1)(b) of the Act can only be adjudicated by the Central Commission under Section 79(1)(f) of the Act. In the light of the above discussion, we are of the view that even though the tariff discovered under the competitive bid process was adopted by the State Commission under Section 63 of the Act, Section 64(5) has no application in the present case since the generating station is having composite scheme of generation and supply of electricity in more than one State and in terms of judgment of the Hon'ble Supreme Court in

Energy Watchdog Case, the jurisdiction for regulating the tariff of the generating station of the Petitioner and adjudication of disputes vest in the Central Commission. Accordingly, the submission of the Respondent, HPPC on this count is not sustainable.

27. The issue is accordingly answered.

**Issue No. 2: Whether the termination notice dated 4.10.2022 and 19.10.2022 issued by the Respondent No. 1 are valid and sustainable?**

28. The Petitioner has argued that the letters dated 4.10.2022 and 19.10.2022 allegedly terminating the PPA on account of non-supply of power were premature and non-compliant with the preconditions as per the PPA. It has been submitted that the said Termination Notices have been issued by the Respondent, HPPC on account of the supplier's alleged default in terms of Article 19 of the PPA, in particular, the supplier's failure to supply the monthly availability as provided in Article 19.1.1(j). However, perusal of the said Article reveals that the termination notices on the grounds provided therein could not have been issued prior to expiry of 7 months and 15 days and as such the Respondent, HPPC has failed to wait for occurrence of the supplier's default i.e. a default for a period of 4 months. The Petitioner has further submitted that the Respondent, HPPC is wrongfully invoking the Article 4.4 of the PPA which deals with deemed termination of the PPA in the event the supplier cannot achieve Appointed Date after expiry of 120 days from the date of signing of the PPA as the Appointed Date was when all the Conditions Precedents are achieved or waived, which in the present case, were achieved on 9.7.2022 and as they do not include the execution of the FSA. Alternatively, the Petitioner has also stated that even assuming that amendment to the FSA to cater to the Petitioner's PPA with HPPC is to be viewed as Condition Precedent under the



PPA, the Force Majeure issues encountered by the Petitioner would exonerate the Petitioner from any liability for failure to commence supply under the PPA.

29. *Per contra*, HPPC has submitted that there was an express understanding between the parties that Appointed Date i.e. 90 days from the execution of the PPA (16.8.2022) and the Appointed Date has been defined to mean the date on which the Conditions Precedents are achieved or satisfied or waived as the case may be and shall be the date of commencement of the Contract Period. It has been further submitted that combined reading of Article 2.1(b) and Article 3.1.1 makes it clear that the supply had to commence from the Appointed Date and Article 4.4 further stipulated that in the event the Appointed Date does not occur for any reason whatsoever within a period of 120 days from the date of execution of the PPA, the PPA shall be deemed to have been terminated by mutual agreement. It has been further stated that as per the proviso to the said Article, in the event the Appointed Date is delayed for reasons attributable to the Supplier, the Performance Security of the Supplier shall be encashed and appropriated by HPPC as damages. HPPC has submitted that in the present case, the delay in occurrence of Appointed Date i.e. commencement of supply is only for reasons attributable to the Petitioner. The signing/execution of the amendment to the FSA was not only a condition precedent under the PPA but was rather a basic eligibility criteria under the tender documents and any delay on account of the Petitioner to timely execute the amendment to the FSA does not entitle it to any extension/relief under the force majeure clause. The Respondent, HPPC has accordingly stated that owing to the consistent failure on the part of the Petitioner to commence supply, HPPC proceeded to issue the termination notice in accordance with Article 4.4 of the PPA and the PPA stands validly terminated.

30. We have considered the submissions made by the parties. Although, the Petitioner has contested the notices dated 4.10.2022 and 19.10.2022 as issued by the Respondent No.1, HPPC towards termination of the PPA dated 18.5.2022 being premature and non-compliance with Article 19.1.1(i) of the PPA, we notice that neither the said notices refer and invoke the said Article nor the Respondent No.1, HPPC has made any such submission that said notices have been issued owing to the suppliers' default as covered under the said clause. Article 19.1.1(i), which stipulates one of the supplier's events of default, is to be triggered when the supplier fails to achieve a monthly availability of 70% for a period of 4 consecutive months or for a cumulative period of 4 months within any continuous period of 12 months, save and except to the extent of non-availability caused by (i) a force majeure event, (ii) an act or omission of Utility, no occurring due to any default of the supplier, or (iii) shortage of fuel occurring for any reasons not attributable to the supplier. Clearly, the minimum threshold for application of said clause is failure on the part of the supplier to achieve a monthly availability of 70% for a period of 4 consecutive months and in the present case, even as per the submissions of HPPC, the Petitioner was required to commence the supply 16.8.2022 and the period of 4 consecutive months would expire only on 16.12.2022. Therefore, even assuming that the exclusion provided in the said clause do not apply, the said clause could not have been triggered prior to such date and no termination notice could have been issued relying on the said clause in the month of October, 2022 itself. In any case, as we have already noted above, the Respondent No.1, HPPC has not relied upon the said clause in justifying the issuance of notices dated 4.10.2022 and 19.10.2022 and has submitted that the said notices have been issued in accordance with Article 4.4 of the PPA. It is, however, observed that neither of the notice specifically refers to nor mentions the

Article 4.4 of the PPA therein. But both the notices are essentially on the premise that as per the PPA, it was sole responsibility and obligation of the Petitioner to ensure that power supply commences within 90 days i.e. latest by 16.8.2022 and failure on part of the Petitioner thereof entitles HPPC to forfeit the Performance Security along with termination of the PPA. Although the Notice dated 19.10.2022 refers to Article 4 to indicate that, execution of amendment of the FSA was not stipulated as condition precedent, but it was the prior obligation of the supplier, the fulfilment of which was assured by the Petitioner in such a manner that the commencement of power supply occurs within the time stipulated under the PPA i.e. 91<sup>st</sup> day from the Appointed Date. The relevant extract of the notice dated 19.10.2022 is reproduced hereunder for sake of reference:

*“.....It was the categorical stand of the RKM Powergen before HERC that power will commence under the PPA as per the terms of the reference the bid supply of power within a period of 90 days. It was on this basis that the final approval was accorded by the HERC for addressing the immediate power shortage.*

*As per Article 4 of the PPA, the execution of an amendment of FSA was not stipulated as 'condition precedent'. The execution of amendment of FSA was the prior obligation of the Supplier, the fulfillment of which was assured by RKM Powergen in such a manner that the commencement of power supply occurs within the time stipulated under PPA. i.e. 91st day from the Appointed Date.*

*.....  
The contentions made by you in your letter dated 12.10.2022 are factually incorrect. HPPC had not granted any extension of time to commence supply of power under PPA. RKM Powergen vide letter dated 12.08.2022 expressed its inability to commence power from 16.08.2022 and requested for a period of 1 month for execution of FSA with SECL. In response to this HPPC vide letter dated 23.08.2022 denied extension of time. Further, HPPC vide letter date 07.09.2022 denied that the delay in supplying the contracted power to Haryana Utilities is on account of unavoidable reasons. In that view, it was reiterated that no extension of time is being granted to RKM Powergen.*

*Furthermore, your reliance on Article 17 while contending that the delay in the commencement of power supply was owing to 'Force Majeure Political Event' is misplaced and untenable. You have selectively reproduced Clause 17.4 in your letter to wrongly allege entitlement for extension of period for commencement of power supply. As stated above, the execution of an amendment of FSA is not a stipulated 'condition precedent' set forth in Article 4 of PPA. Therefore, there is*

*no question of any extension of period for the fulfillment of the same. The non-execution of PSA was a condition mandated in terms of the approval of HERC. On failure of RKM Powergen to fulfill that condition, the said approval has been lapsed thereby constituting a material default of Supplier under PPA.*

*Furthermore, Clause 17.4 is not applicable to the present case as the non-execution of amended FSA is a failure of Supplier to effectively liason with the SECL and obtain the requisite amendment within the committed time as expressly mentioned while seeking approval of the power source. The non-execution of amended FSA cannot otherwise be termed as an 'unlawful refusal' in terms of Clause 17.4 of PPA. It is therefore, incorrect to contend that the non-execution of amended FSA is a result of Force Majeure Political Event'.*

*Since the execution of the PPA, while HPPC followed up numerous times for commencement of power supply and extended cooperation in the interest of receiving required power. However, RKM Powergen continued to make false assurances/representations regarding commencement of power supply. It was the sole responsibility and obligation of RKM Powergen to ensure that power supply commences within 90 days after signing of the PPA failing which HPPC is entitled to forfeit the Performance Security along with the termination of PPA.*

*Needless to say, the non-supply of power by you within the stipulated time period, has caused financial losses to the HPPC/Haryana Utilities as adequate resources were deployed for execution of PPA with RKM Powergen. Further, the non-supply of power under PPA has disrupted the power planning and has led to purchase of costly power from the Power Exchanges to meet the power requirements for the State of Haryana.*

*In view of the foregoing, it is expressly stated that Power purchase agreement dated 18.05.2022 executed between HPPC and M/s RKM Powergen Pvt. Ltd. stands terminated on account of default of the Supplier, i.e. M/s RKM Powergen Pvt. Ltd. and consequently, the Performance Bank Guarantee shall be forfeited in terms of PPA.”*

31. Keeping in view that the Respondent No.1, HPPC in its submissions have specifically pleaded that above notices are in accordance with Article 4.4 of the PPA, we may proceed to examine the said Article, which is reproduced hereunder:

*“Article 4.4 Deemed Termination upon delay*

*Without prejudice to the provisions of Clauses 4.2 and 4.3, and subject to the provisions of Clause 9.2. the Parties expressly agree that in the event the Appointed Date does not occur. For any reason whatsoever, 120 (one hundred twenty) days from the date of this Agreement or the extended period provided in accordance with this Agreement, all rights, privileges, claims and entitlements of the Supplier under or arising out of this Agreement shall be deemed to have been waived by, and to have ceased with the concurrence of the Supplier, and the Agreement for Procurement of Power shall be deemed to have been terminated by mutual agreement of the Parties. Provided, however, that in the event the delay in occurrence of the Appointed Date is*

*for reasons attributable to the Supplier, the Performance Security of the Supplier shall be encashed and appropriated by the Utility as Damages thereof. ...”*

The above Article provides that in the event Appointed Date does not occur, for any reason whatsoever, 120 days from the date of the Agreement or the extended period provided in accordance with the Agreement, all rights, privileges, claims and entitlements of the Supplier under or arising out of this Agreement shall be deemed to have been waived by and to have ceased with the concurrence of the supplier and the Agreement shall be deemed to have been terminated by mutual agreement of the parties. It is also provided that in the event, the delay in occurrence of the Appointed Date is for reasons attributable to the supplier, the Performance Security of the Supplier shall be encashed and appropriated by the Utility as damages thereof. As per the plain and clear language of this Article, it gets triggered only in the event the Appointed Date does not occur within 120 days from the date of the Agreement or for such extended period as agreed upon by the Parties. The agreement defines the Appointed Date as under:

*“Appointed Date” means the date on which all the Conditions Precedent are achieved and every Condition Precedent is either satisfied or waived, as the case may be, in accordance with the provisions of this Agreement, and such date shall be the date of commencement of the Contract Period.”*

As per the above definition, the Appointed Date is the date on which all the Conditions Precedent are achieved, either upon being satisfied or waived, as the case may be, as per the provisions of the Agreement and it further states that the Appointed Date/such date shall be the date of commencement of the Contract Period. For sake of completeness, we may also refer the definition of the Contract Period, which reads as under:

*“Contract Period” means the period starting on and from the Appointed Date and ending on the earlier of 3<sup>rd</sup> (third) anniversary of the Appointed Date and the date of termination of the Agreement”.*

Thus, clearly the Appointed Date is the starting date of the Contract Period and this correspondingly, entails the obligation on the Petitioner to commence the supply under the PPA from such date. However, the crucial question, which is also the focal point of controversy, is whether the Appointed Date is linked to the commencement of Supply? As already noted above, Appointed Date is the date on which all the Condition Precedents are achieved and shall be the date of commencement of Contract Period. Undoubtedly, the Petitioner was under an obligation to commence the supply from the commencement of the Contract Period. However, the commencement of actual supply was not a pre-condition for commencement of the Contract Year. In other words, in the event of failure to achieve the actual commencement of supply on the commencement of the Contract Period, it cannot be construed as failure on its part to achieve the Appointed Date or correspondingly extend the Appointed Date. The occurrence of the Appointment Date correlates to the fulfilment of the Conditions Precedents, either by way of satisfaction or by way of waiver and the commencement of the Contract Period and not with the commencement of supply under the Agreement. Thus, the Appointed Date gets fixed upon fulfilment of the conditions precedent by both the side and consequently, the Contract Year commences. However, failure on part of the Petitioner to commence the supply beginning from such date/commencement of the Contract Year does not extend the Appointed Date so determined upon the fulfilment of the conditions precedents by the parties. Although the failure on part of the Petitioner to commence the supply from the Appointed Date or commencement of the Contract Year may be subject to the other liabilities arising in terms of the agreement, it cannot be considered as failure to achieve the Appointed Date, as envisaged in the Article 4.4 of the PPA. So long as the Petitioner has fulfilled its

conditions precedent, as prescribed in Article 4.1.3 of the PPA, no fault can be attributable to the Petitioner towards delay/default on its part to achieve the Appointed Date. The conditions precedent required to be satisfied by the supplier are as under:

*“Article 4.1.3 The Conditions Precedent required to be satisfied by the Supplier within a period of 90 (ninety) days from the date of this Agreement shall be deemed to have been fulfilled when the Supplier shall have:*

- (a) provided Performance Security to the Utility;*
- (b) delivered to the Utility a legal opinion from the legal counsel of the Supplier with respect to the authority of the Supplier to enter into this Agreement and the enforceability of the provisions thereof;*
- (c) deposited a certified true copy of this Agreement with the RLDC and SLDC having jurisdiction and obtained a receipt thereof, in accordance with the provisions of Clauses 14.3.3 and 19.4.1;*
- (d) submitted the Capacity Certificate and evidence of the capacity of the Power Station;*
- (e) procured access to the transmission system required for carrying electricity from the Power Station to the Delivery Point.*

*Provided that upon request in writing by the Supplier, the Utility may, in its discretion, waive any of the Conditions Precedent set forth in this Clause 4.1.3 or grant extension of time, not exceeding 90 (ninety) days, for fulfilment thereof, as the case may be. For the avoidance of doubt, the Utility may, in its sole discretion, grant any waiver hereunder, with such conditions as it may deem fit.”*

32. Evidently, the execution of the FSA is not part of the Conditions Precedent required to be fulfilled by the Supplier under the above Article. Even the Respondent, HPPC in its notice dated 19.10.2022 has indicated so. Moreover, the Petitioner in its submissions has indicated that all the aforesaid Conditions Precedent had been fulfilled on 9.7.2022, which was duly informed to HPPC by the letter of even date. As such, we do not find any submission on behalf of the Respondent, HPPC, that there had been default on the part of the Petitioner in fulfilling the Conditions Precedent as indicated in the aforesaid Article. In view of the above, we are not in agreement with

the submissions of the Respondent No.1, HPPC that failure on part of HPPC to commence the supply w.e.f 16.8.2022 amounts to failure to achieve the Appointed Date as envisaged in the Article 4.4 of the PPA and consequently, the Agreement is deemed to have been terminated in terms thereof. As we have noted that occurrence of the Appointed Date does have any correlation with the commencement of the supply and it may so be possible that date of commencement of the supply be different or later than the Appointed Date, albeit of course the Petitioner being liable to the any consequences arising for the such delays in commencement of supply under the Agreement.

33. The Respondent No.1, HPPC, however, also argued that although the execution of the FSA was not stipulated as condition precedent, the execution of the amendment of the FSA was the prior obligation of /pre-qualifying criteria for the supplier, not only in terms of the PPA and the stipulations of RfQ and the failure on part of the Petitioner to execute the amended FSA/secure the fuel supply also enabled HPPC to terminate the PPA in terms of Clause 2.6.3 of the RfQ. We have considered the submissions of the Respondent, HPPC on the above part. We notice that the provisions of the PPA indeed required the supplier to have a Fuel Supply Agreement for assured supply of fuel for meeting the obligations under the PPA. For instance, as per Article 5.1.5 (k) of the PPA, the supplier was, at its own costs and expenses, required to perform and fulfil its obligations under the Fuel Supply Agreement. Moreover, under Article 7.1 (n), the supplier represents and warrants to the Utility that it has entered into a FSA for assured supply of fuel required for meeting its obligations under this Agreement. We also find that the requirement of



assured supply of fuel was also a requisite for eligible bidders under the RfQ documents. Clause 2.2 of the RfQ document provided as under:

*“2.2 Eligibility of Bidders*

*2.2.1 For determining the eligibility of Bidders for their pre-qualification hereunder, the following shall apply:*

*(d) the Power Station has access to an assured supply of fuel;”*

34. Moreover, as pointed out by the Respondent, HPPC, the Clause 2.6 of the RfQ also permitted it to terminate the PPA even after its execution in the event one or more of the pre-qualification conditions have not been met by the Bidder or the Bidder has made material misrepresentation or the Bidder has given any materially incorrect or false information. The relevant provisions of Clause 2.6 of the RfQ read as under:

*“2.6. Right to accept or reject any or all Applications/Bids*

.....

*2.6.3 In case it is found during the evaluation or at any time before signing of the APP or after its execution and during the period of subsistence thereof, including the contract thereby granted by the Utility, that one or more of the pre-qualification conditions have not been met by the Bidder, or the Bidder has made material misrepresentation or has given any materially incorrect or false information, the Bidder shall be disqualified forthwith if not yet appointed as the Supplier either by issue of the LOA or entering into of the APP, and if the Bidder/SPV has already been issued the LOA or has entered into APP, as the case may be, the same shall, notwithstanding anything contrary contained therein or in this Section A, be liable to be terminated, by a communication in writing by the Utility to the Bidder, without the Utility being liable in any manner whatsoever to the Bidder and without prejudice to any other right or remedy which the Utility may have under his Section A, the Bidding Documents, the APP or under applicable law.”*

35. In the present case, no misrepresentation or furnishing of wrong information can be attributed to the Petitioner in respect of securing the Fuel Supply Agreement.

It is noted that the Petitioner vide its letter dated 15.4.2022 had specifically informed HPPC about the probable timeline of 45 days for amendment to the FSA and supply of linkage coal. The Petitioner has executed the Fuel Supply Agreements with SECL on 3.9.2013 and 23.9.2013 for a quantum of 16,90,000 MT and 23,83,857 MT respectively, which according to the Petitioner corresponds to 900 MW capacity. However, admittedly, the commencement of coal supplies under the FSA was subject to the submission of the Power Purchase Agreement with the distribution licensees. HPPC vide its letter dated 21.4.2022 had also requested the Petitioner to furnish, *inter alia*, details relating to linkage fuel status. In response, the Petitioner by its letter dated 25.4.2022 had intimated HPPC that for entering into the amendment to the FSA (required for operationalization of the original FSAs for different agreements), the Petitioner would require a copy of the executed PPA and approval of tariff granted by the Appropriate Commission. Thus, the aspect of the Petitioner intending to secure the fuel under the original FSAs on the basis of the execution of the PPA with HPPC was duly within the notice of the Respondent, HPPC and on this very basis, HPPC appears to have proceed with issuance of the LOA to the Petitioner and consequently, execution of the PPA. Be that as it may, it is an undisputed position that as on date of issuance of the notices dated 4.10.2022 and 19.10.2022, the Petitioner was not able to secure the assured fuel supply for discharging its obligation for supply of power under the PPA, a pre-qualification to be an eligible bidder, and Clause 2.6 of the RfQ specifically permitted that even after the execution of the PPA, if it is found that the Bidder/ Petitioner has not been able to meet one or more of the pre-qualification conditions, HPPC will be entitled to terminate the PPA by way of a written communication. In this regard, we do find some merit in the submission of HPPC. Keeping in view that the PPA already

proceeds on a premise that the generator has entered into a fuel supply agreement for assured supply of fuel for meeting its obligation under the Agreement, the failure on the part of the Petitioner to have such Fuel Supply Agreement, within the extended timeline as allowed by HPPC, might be made subject to the consequences indicated in the RfQ as noted above. However, what brings to our notice is that even for exercising its rights under Clause 2.6.3 of the RfQ, HPPC had to issue written notice to the Petitioner on the above aspect. Although in the present case, HPPC has issued two separate notices dated 4.10.2022 and 19.10.2022, none of them have been issued by invoking the aforesaid provision of RfQ. Although, the notice refers to the failure on the part of the Petitioner to have an amendment to the FSA for securing the assured coal for discharging its obligation of supply under the PPA, this simply does not render the issuance of said notice under the provisions of the RfQ. The said notices having not been issued under the provisions of the RfQ, the Respondent, HPPC cannot be permitted to supplement the reasons for termination of the PPA by way of additional assertions as made in the present case. As already noted above, the said notices were, essentially, premised upon the Petitioner's failure to supply the power within 90 days from the Appointed Date i.e. by 16.8.2022, which in turn entitled HPPC to terminate the PPA and invoke the Performance Bank Guarantee as furnished by the Petitioner thereunder. However, in the foregoing paragraphs, we have already noted that failure on part of the Petitioner to commence supply within 90<sup>th</sup> days of execution of the PPA did not give any right to HPPC to terminate the PPA under Article 4.4 of the PPA. Hence, both the notices, being premised on the basis of aforesaid reasons, have to be held neither in accordance with the provisions of the PPA nor under the provisions of the RfQ as sought to be contented by HPPC in the present proceedings. Having held that the Respondent

No.1, HPPC cannot proceed to terminate the PPA by invoking the Article 4.4 of the PPA in the present case, the issue of its entitlement to invoke the Performance Bank Guarantee as furnished by the Petitioner as per the proviso to the said Article does not survive. The Respondent, HPPC has also vehemently relied upon the various provisions of the RfQ, RfP and the observations of the HERC to establish that the purpose of the said tender was for the immediate commencement of supply. We are in complete agreement with aforesaid plea of the Respondent, HPPC. The perusal of the relevant provisions of the RfQ, LOA and the observations of HERC in its order 27.4.2022 clearly reflects that procurement of power from the Petitioner was for ameliorating current shortage prevailing in the State and we also observe that the Petitioner had itself in its various communications had assured the Respondent, HPPC about the early commencement of supply and not later than 16.8.2022. Clearly, the Petitioner had failed to abide by its representations to the above effect. However, the consequences of such failure have to be as per the provisions of the PPA and/or RfQ as pointed out by the Petitioner. But none of the provisions of the PPA and/or RfQ as relied upon by the Respondent, HPPC permitted it to consider the delay in commencement of supply as the delay in achievement of the Appointed Date and consequently, terminate the PPA on the basis of such delay.

36. We also notice that the Petitioner has also narrated its coal related issues in detail including the deliberations that took place in the Meetings of the Standing Linkage Committee. The Petitioner has also pleaded that the non-availability of the fuel in its case was an event beyond its control and in the nature of force majeure event in terms of Article 17 of the PPA. However, we are not inclined to go into these aspects in the present case for the reasons that many of the events as relied upon or indicated by the Petitioner were subsequent to the filing of the present Petition and in

particularly, after the issuance of the termination notice dated 4.10.2022 and 19.10.2022 as issued by the Respondent, HPPC. Moreover, we also do not find any reason to go into the aspects of examining the delay in execution of the amendment to the FSA amounts to a force majeure event or not under the PPA as no prayer has been made by the Petitioner in this regard in the present proceedings. Moreover, invocation of a force majeure plea by the Petitioner is in context of the exclusions to Article 19.1.1(j) of the PPA and in the foregoing paragraphs, we have already held that the said notices could not have been considered to be issued under Article 19 of the PPA nor Respondent, HPPC has made any assertion that the said notices were issued under the said Article.

37. The Petitioner in its prayer (c) has prayed to direct SECL to carry out the necessary amendments in the FSA dated 3.9.2013 and 23.9.2013. It is noticed that neither SECL nor the subject of allocation of coal under the FSAs falls within the purview of this Commission. Therefore, no relief can be granted by the Commission in this regard. However, the parties are at liberty to peruse this relief at the appropriate forum in accordance with the law. The prayer (c) is answered accordingly.

38. The Petitioner in its prayer (d) has requested to permanently restrain HPPC from taking any coercive actions whatsoever against the Petitioner, including forfeiting, invoking and realising the Performance Bank Guarantee dated 2.6.2022 of Rs.35 crore or portion thereof in pursuance of the alleged non-supply of power raised in the impugned Notices dated 4.10.2022 and 19.10.2022. In the foregoing paragraphs, we have already held that the Termination Notices dated 4.10.2022 and 19.10.2022 cannot sustain as the provisions of the PPA does not permit the

Respondent, HPPC to treat the date of commencement of supply as Appointed Date and to terminate the PPA in the event, the Petitioner fails to commence supply within 90 days from the date of its execution i.e. by 16.8.2022. Consequently, we have also held that the Respondent No.1, HPPC cannot proceed to invoke the Performance Bank Guarantee as furnished by the Petitioner under the PPA by relying upon the proviso to Article 4.4 of the PPA. The Prayer (d) is answered accordingly.

39. In view of the forgoing observations, we hold that the Termination Notices dated 4.10.2022 and 19.10.2022 cannot be sustained with as the provisions of the PPA does not permit the Respondent to treat the date of commencement of supply as Appointed Date and to terminate the PPA in the event, the Petitioner fails to commence supply within 90 days from the date of its execution i.e. by 16.8.2022. Consequently, the Respondent No.1, HPPC cannot proceed to invoke the Performance Bank Guarantee as furnished by the Petitioner under the PPA by relying upon the proviso to Article 4.4 of the PPA. We would like to, however, clarify that in this order we have held the Termination Notices dated 4.10.2022 and 19.10.2022 unsustainable on the grounds on which they were issued and as such have not render any findings on the others aspects such as the rights and liabilities of each side under the provisions of the PPA and/or RfQ.

40. In view of the foregoing observations, the present Petition No. 305/MP/2022 stands disposed of.

Sd/-  
**(P. K. Singh)**  
Member

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