PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO.3, BLOCK B, SECTOR18-A MADHYA MARG, CHANDIGARH

Petition No. 33 of 2024
Date of Order: 12.03.2025

Petition under Section 86 (1) (b) and (f) of the Electricity Act 2003 for Adjudication and Recovery of the amount payable by M/s Indian Acrylics on Account of the Generator's event of default in terms of Article13.1.0 (c) & (d) read with Article 13.4.0 of the Power Purchase Agreement dated 04.05.2006.

And

In the matter of: Punjab State Power Corporation Limited, T-8, Thermal Design Complex, Patiala- 147001, Punjab

...Petitioner

Versus

M/s Indian Acrylics Limited, SCO 49-50, Sector 26, Madhya Marg, Chandigarh.

....Respondent

Commission: Sh. Viswajeet Khanna, Chairperson
Sh. Paramjeet Singh, Member

PSPCL: Ms. Poorva Saigal, Advocate (through VC)
Ms. Harmohan Kaur, CE&ARR/TR

M/s Indian Acrylics Limited: Sh. Aditya Grover, Advocate

ORDER

1. Punjab State Power Corporation Ltd. (PSPCL- formerly PSEB) has filed the instant petition seeking adjudication of its claim for compensation payable by M/s Indian Acrylics Limited (IAL) on account of its failure to supply/make available a *"Minimum 30 lac units of energy per annum", as* mandated under Article 2.1.3 of the PPA, for the period of September 2015 to 14.11.2023 (when the PPA was terminated by PSPCL. It has been submitted that:

1.1 The Petitioner, a Distribution Licensee, and the Generating Company IAL has entered into a PPA dated 04.05.2006 for sale of power for a period of 20 years @ Rs. 3.01 per kWh (base year 2001-02) with 3% annual escalation upto 2006-07 and no escalation thereafter.

a) Article 2.1.3 of the PPA, reads as under:

"2.1.3 In order to protect the interest of the Board & Consumers in general, the Generating Company shall continue to supply surplus power of 1.5 MW to the Board at the rate prescribed in Article 2.1.1 above during the Term of the Agreement. ... The generating company will plan its extension/ expansion/ upgradation of Co Gen facility/ load in its Acrylics Fiber Mill in such a way that Minimum 30 lac units of energy per annum will be available for sale to PSEB during the term of this Agreement."

IAL has admittedly augmented its project by commissioning a third power plant of 8.0 MW in September 2006. Accordingly, it was liable to supply a minimum of 30 Lac units per annum to PSPCL during the term of the Agreement/PPA.

b) Accordingly, non-supply and/or discontinuance of services stipulated in the PPA would constitute an event of default under Article 13.1.0 (c) and (d) of the PPA, reproduced below:

*"**13.0.0 EVENTS OF DEFAULT & TERMINATION***

13.1.0 The occurrence of any or combination of the following events at any time during the term of this Agreement shall constitute an Event of Default by the Generating Company:-

……

c) Failure or refusal by the Generating Company to perform its material obligations under this Agreement, or

d) Abandonment of its Co Generation Facility by the Generating

Company or the discontinuance by the Generating Company of services covered under this Agreement unless such discontinuance is caused by Force Majeure or an event of default by the Board."

c) Consequently, PSPCL would be entitled to take remedial action including the issuance of notice to cure the default and termination of Agreement as laid down in Article 13.3.0 and 13.4.0 of the PPA.

d) Accordingly, after issuing the Preliminary Default Notice on 28.08.2023 and IAL's failure to resume power within the stipulated time of 60 days, PSPCL terminated the PPA on 14.11.2023.

e) Thereafter, on 20.02.2024, PSPCL issued a Demand Notice to IAL seeking a recovery of Rs. 9.07 Crore, in terms of Article 2.1.3 as read with Article 13.4.0 of the PPA, as a compensation for the loss suffered for its default of non- supply of the specified 30 Lac Units per annum for the period from September 2015 onwards.

1.2 Factual Background:

a) On 24.07.2001, the Government of Punjab issued the NRSE Policy 2001 offering incentives for setting up of RE power projects including assured purchase of electricity by the PSEB @ Rs. 3.01 per kWh (Base price 2000-01) with an annual escalation of 5% up to 2004-05 and no escalation thereafter.

b) On 18.02.2003, the GoP wrote to the Commission that the Commission may permit PSEB to buy power from the Developers at the rates provided in the NRSE Policy of State Government and PSEB may be allowed to pass

on full cost of the power so purchased in the ARR and load it to the consumers.

c) On 08.04.2003, this Commission vide its Order in Petition Nos. 6-13, 14, 15, 17 and 24 of 2002 adopted the tariff specified in the NRSE Policy 2001, as under:

"6. Many of the Private Developers have taken effective steps including commitment of funds, towards the implementation of these projects. In some cases, even PPAs were signed between these parties and the PSEB. It will thus be not fair or appropriate to change the rate of purchase of power on any ground more so when the rate of sale of electricity was prefixed in the tenders invited by Govt. as per provisions of NRSE policy. ***The Commission has, however, noted that the PPAs are for 20 years extendable for another 10 years through mutual agreement.*** *The rate of purchase of power in respect of old Projects is 3.01 paise/unit with base year 200-01 to be increased by 5% every year up to 2004-05.* ***The rate of purchase of power in respect of new Projects is 3.01 paise/unit with base year 2001-02 to be increased by 3% on yearly basis up to 5 years. Thereafter the rate is to remain fixed for the balance years of the contract. The Commission, therefore, is of the opinion that the rates of purchase of power which may appear to be high in the initial years may prove competitive and highly beneficial in the later years of the duration of the PPAs, keeping in view the incremental cost of power involved in subsequent years of requirement.*** *Thus by allowing these rates, the interests of the consumers will be well served. ...*

7. … ***in order to protect the interests of the PSEB and consumers in general, PEDA and Govt. may take suitable steps to ensure that the developers continue to supply power at prescribed rates during the entire period of contract and NRSE policy is implements.*** *..."*

[Emphasis Supplied]

d) IAL filed a Petition No. 14 of 2004 before the Commission praying *"that the petitioner may be granted permission for wheeling of power to the extent of 1 MW from captive power plant of the petitioner to its sister concern without levying of wheeling charges"*. However, on 18.08.2005, it amended the Petition, *inter-alia,* to pray that the Commission may grant permission for the export of 1.5 MW power to PSEB at the rates as specified in the NRSE Policy 2001.

e) On 25.11.2005, the Commission *vide* its Order in Petition No. 14 of 2004, while allowing the same, also stated that, "*in order to protect the interests of PSEB and the consumers in general, the Government and PSEB must adopt suitable safeguards to ensure that the developers continue to supply power at the prescribed rates during the entire period of agreement under NRSE Policy for which suitable provisions shall be incorporated in the PPA".*

f) Accordingly, on 04.05.2006, PSEB (now PSPCL) and IAL entered into a PPA for purchase of 1.5MW of surplus electricity generated from IAL's 7.75 MW (1x6.5 MW + 1x1.25 MW) Co-Generating Facility at Rs.3.01 per kWh (base year 2001-02) with 3% annual escalation upto 2006-07 and no escalation thereafter. It was also agreed that the Generating Company shall make available a minimum of 30 Lac units of energy per annum for sale to PSPCL during the term of the Agreement.

g) On 19.05.2008, IAL filed a Petition No. 04 of 2008 for revision of its tariff to that applicable under the NRSE Policy 2006 and adopted vide the Commission's Order dated 13.12.2007. However, the Commission *vide* its Order dated 05.08.2008, dismissed the said Petition

holding that the project of the petitioner is clearly outside the purview of the new policy. Further, Hon'ble APTEL, *vide* Judgment dated 02.03.2009 disposed of the Appeal No. 184 of 2008 filed by Indian Acrylics, observing that it do not find any ground to hold that the order passed by the Commission would suffer from any infirmity.

h) Thereafter, IAL preferred another Petition No. 05 of 2011 before the Commission for revision of its tariff. However, the said Petition was withdrawn with the liberty to file it again as and when the cause of actions arises as recorded in the Commission's Order dated 20.06.2013.

i) In September 2015, IAL stopped supplying power to PSPCL under the PPA dated 04.05.2006. PSPCL *vide* its letter dated 31.08.2018 sought for reasons for the non-supply of power from their Co-Generation Power Plant and the date for resumption of same. On 27.11.2018, in its reply to PSPCL's aforesaid letter, IAL requested PSPCL to withdraw its letter refusing resumption of supply under the PPA on account of financial unviability.

j) On 14.06.2023, PSPCL again enquired about the non-supply of power against the PPA dated 04.05.2006 since September 2015, categorically stating that as per Article 2.1.3 of PPA, they are bound to supply minimum 30 Lac Units per annum during the term of agreement. Further, on 27.06.2023 and 04.07.2023, PSPCL issued reminders requesting IAL to resume supply of power.

k) On 06.07.2023, IAL refused to resume supply of power under the PPA citing financial distress. In pursuance

thereto, on 28.08.2023, PSPCL issued a Preliminary Default Notice to IAL under Article 13.3.0 of the PPA to resume supply of energy to PSPCL within 60 days of receipt of the notice, failing which, PSPCL shall retain the right to terminate its PPA under Clause 13.3.0 (ii) of the PPA and take such legal recourse as is available under the law.

l) On 27.10.2023, in response to the above, IAL replied as under:

> *"…….. Due to the non-viability, we have stopped supply of the power from September 2015 onwards. Further, it may also be taken into consideration this non-viability of power led to import the Power from PSPCL itself & we are now net consumer of energy from PSPCL with monthly bills ranging up to 4-5 crores.*
>
> *Also, we wish to submit that we are Acrylic Fiber & Yarn manufacturing Public listed industry with the clean past record with good market reputation. However, due to the after effects of Covid-19 on the commercial activities of the industrial activity our firm is currently financially weak & operating under severe cash crunch & debt.*
>
> *Thus keeping in view of the above mentioned position, we hereby accept your proposal and request to terminate the PPA dated 04.05.2006 without prejudice to our rights and without going into any legal penalties."*

m) Thus, after following the due process under Article 13.3.0(ii), namely, issuance of a Preliminary Default Notice dated 28.08.2023 granting 60 days curing period, PSPCL issued a Termination Notice on 14.11.2023 terminating the PPA dated 04.05.2006, reserving its right *"to seek appropriate legal recourse against the*

generating company including but not limited to seeking damages/recompense for the period of non-supply."

1.3 Thereafter, on 20.02.2024, PSPCL issued a Demand Notice under Article 2.1.3 read with Article 13.4.0 of the PPA, seeking compensation of Rs. 9.07 Crores for non-supply of the minimum specified quantum of energy by IAL. On 19.03.2024, IAL vide its letter requested PSPCL to withdraw its Notice dated 20.02.2024 citing financial distress. In response to the aforesaid, PSPCL sent a Letter on 24.04.2024 granting one last opportunity for payment of compensation within 10 days. However, on 15.05.2024, IAL disputed/denied the demand of Rs. 9.07 Crores and sought a 3 week-time to submit its detailed response to the PSPCL's Notice. On 15.06.2024, IAL, while re-iterating the contents of its earlier letters, denied its liability to pay any compensation to PSPCL.

1.4 It is relevant to note that IAL has failed to supply even a single unit of electricity under the PPA since September 2015, thereby, violating the mandatory obligation to make available a minimum 30 Lac units per annum of energy for sale to PSPCL, agreed under Article 2.1.3 of the PPA. The PPA entered into by PSEB/PSPCL was premised on the fundamental basis that the contracted capacity shall be made available to PSPCL to maintain the distribution and retail supply of electricity to the consumers in the State. PSPCL, as a Distribution Licensee has the obligation to arrange the power procurement in a competitive manner so as to ensure that the electricity is made available to the consumers at an economical pricing.

1.5 The non-supply of power has caused severe hardship to PSPCL including in meeting its RPO and penal consequences contrary to the interests of the consumers in the State. Section 73 of the Indian Contract Act 1872 also specify that a compensation is payable to the non-defaulting party, if it is assessed that there have been certain acts/omissions which resulted into non-performance of the contract as agreed to between the parties.

1.6 Computation of Compensation:

a) IAL, having gained the benefits under the NRSE Policy 2001 and enjoyed the higher tariff in the initial years of the PPA but refusing to perform its obligations from September 2015, has put PSPCL and the interest of consumers at a disadvantaged position.

b) As a direct consequence of the refusal/failure on the part of IAL to make available the minimum quantum of contracted capacity, PSPCL has been constrained to arrange the power from alternate sources at a much higher cost besides the loss of RPO suffered by PSPCL.

c) In the facts mentioned above, the claim of PSPCL *qua* IAL in regard to its failure to ensure the due supply of electricity to PSPCL for the period from September 2015 till 14.11.2023 as per the last payable tariff of Rs. 3.489/kWh is as under:

Period	Units (LU)	*Compensation Amount (Rs. Crores)
Sept, 2015 - March, 2016	29,84,520	1,04,12,991
April, 2016 - March, 2017	30,00,000	1,04,67,000
April, 2017 - March, 2018	30,00,000	1,04,67,000
April, 2018 - March, 2019	30,00,000	1,04,67,000
April, 2019 - March, 2020	30,00,000	1,04,67,000
April, 2020 - March, 2021	30,00,000	1,04,67,000
April, 2021 - March, 2022	30,00,000	1,04,67,000

April, 2022 - March, 2023	30,00,000	1,04,67,000
April, 2023 - 14th November, 2023 (Date of Termination of PPA)	20,00,000	69,78,000
Total	**2,59,84,520**	**9,06,59,991**

**[Compensation Payable = Shortfall in Units x Rs. 3.489/kWh]*

1.7 In the facts and circumstances mentioned above, the Petitioner pray the Commission to:

a) Direct Indian Acrylics to make payment of Rs. 9.07 Crores (approximately) as damages/compensation under Article 13.4.0 read with Article 13.3.0 (c) and (d) as read with Article 2.1.3 of the PPA for non-supply of minimum 30 Lac Units per year with effect September 2015 to 14.11.2023 alongwith carrying cost/interest;

b) Direct Indian Acrylics to pay the Late Payment Surcharge for the delay in the payment of Rs. 9.07 Crores (approximately), as raised by the Petitioner/PSPCL vide Notice dated 20.02.2024;

c) Award cost of the present proceedings; and

d) Pass any such further order or orders as the Commission may deem just and proper in the circumstances of the case."

2. The respondent filed a short reply on the issue of maintainability of the petition. The petition was taken up for admission on 23.10.2024. While, Ld. Counsel of PSPCL submitted that the Respondent failed to supply power in terms of the PPA dated 04.05.2006 resulting in termination of the PPA and consequential claim of damages/compensation under Article 13.4.0 read with Article 13.3.0 and Article 2.1.3 of the PPA. The Ld. Counsel appearing for the Respondent submitted that PSPCL did not act well within the time stipulated in the PPA and woke up only after a delay of about 8 years. After hearing the parties and observing that the issue herein is a dispute between the licensee and the generating company required to be adjudicated by the Commission under the powers conferred

under Section 86 (1)(f) of the Electricity Act 2003, the petition was admitted with directions that the respondent may file its reply on merits within two weeks with a copy to the petitioner and the petitioner may file rejoinder thereto, if any, within one week thereafter.

3. On 10.12.2021, the Respondent IAL submitted its reply on merits. The same is summarized as under:

3.1 IAL has mentioned the following brief facts:

a) As per the PPA dated 4.5.2006, the rate approved by the Commission and set out in the PPA was Rs.3.01 per KWH (base year 2001- 02) with 3% annual escalation up to 2006-2007. That at the time when the PPA was executed, the rice husk was available at a very low price. As the rate of husk started increasing and on the other hand the rate of the power being supplied to PSPCL was stagnant at Rs.3.49 per kWh, IAL approached PSPCL to revise its tariff in terms of NRSE Policy 2006, so as to avoid forcible closure of its power plants.

b) However, IAL's requests were not considered on the pretext that rates cannot be revised as the power plant of IAL has already achieved COD and the PPA was signed before introduction of NRSE Policy 2006. The approach of PSPCL has been totally ambiguous in this regard as the projects which have signed the PPA under NRSE Policy 2001 and did not achieve COD were given the benefits under NRSE Policy 2006.

c) Eventually, IAL approached the Commission by filing a petition No. 4 of 2008 inter-alia seeking issuance of directions to revise tariff rates as per NRSE Policy

2006. However, the said petition was dismissed by the Commission vide its order dated 05.08.2008. Further, an Appeal No.184 of 2008 challenging the said order was disposed of by Hon'ble APTEL vide order dated 02.03.2009 with the observations as under:

> *"…If the appellant feels that there must be fresh agreement in the light of the escalation of the costs of generation it is for the appellant to approach the PSEB to place all the material about the escalation and then arrive at a common settlement with reference to the rates. Accordingly, the appellant is at liberty to approach the PSEB seeking for a fresh agreement, if so advised. If it is approached, it is for the PSEB to take appropriate decision to arrive at a settlement in accordance with law."*

d) Accordingly, a request was again made by IAL to PSPCL by way of communication dated 04.05.2009 for revision in the rates and to execute a fresh agreement keeping in view the increased power generating cost owing to a steep increase in the fuel cost. Vide the said communication it stood specifically submitted that the export of power to PSEB @ Rs.3.49 per kWh is not feasible and IAL can continue the export of 1.5 MW power only in case it is given the rate of tariff as per NRSE policy 2006. However, the tariff rate was not re-determined by PSPCL inspite of the financial hardship being faced by IAL owing to the steep rise in the husk prices.

e) Thereafter, IAL filed the Petition No. 05 of 2011 before the Commission seeking revision of its tariff rates, whereon vide its order dated 14.09.2011 the Commission observed as under:

"The commission observes that the Government of Punjab, Department of Science, Tech. Env. and Non- Conventional Energy is in the process of formulating a revised NRSE Policy which is likely to be notified shortly. It is expected that this policy would address the issues raised in the instant petition. In view of this, the petition is adjourned sine die. In the meanwhile the petitioner may take up the matter with the department concerned, if so advised."

f) Accordingly, IAL took up the matter with the Secretary Power to Govt. of Punjab. With a hope that the issue to revise the tariff rates would be addressed, an application to withdraw the petition No. 05 of 2011 with the liberty to file it again as and when cause of action arises stood filed by IAL, which was allowed by the Commission vide order dated 20.6.2013.

g) Due to the reasons stated above, which were apparently beyond the control of IAL, the power plants of 6.5 MW and 1.25 MW of IAL were stalled in the year 2010 and 2013 respectively, being not viable. However, somehow or the other IAL kept on supplying the power to PSPCL till September 2015 from its 3rd power plant of 8.0 MW commissioned in September 2006 which was not a part of the PPA.

h) In the year 2014 onwards, IAL expanded its business and manufacturing facilities in its above said manufacturing plant for which more power was required. In the meanwhile, the rates of the Husk increased to more than Rs.5,000/- per MT increasing the power generating cost. IAL started suffering heavy losses with the supply of power to PSPCL due to hike in power cost and increased power consumption. Thus,

the situation totally went out of the control of IAL. Therefore, IAL was forced to stop the supply of power to PSPCL in the year 2015.

3.2 However, IAL came to be in a receipt of PSPCL's communication dated 31.08.2018 regarding resumption of the power supply from its generating facility. IAL, by way of reply dated 29.11.2018, stated categorically that non-supply is due to the reasons beyond its control and requested PSPCL to withdraw the said communication. PSPCL did not respond to the submissions/reply made by IAL and it stood presumed that the issue raised by PSPCL with regard to non supply of power stands withdrawn.

3.3 That, no further action was required to be taken till the representation submitted by IAL was decided and a conscious decision was taken by the PSPCL in terms of the order dated 02.03.2009 passed by the Hon'ble APTEL.

3.4 However, PSPCL again issued notices dated 14.06.2023, 27.06.2023 and 04.07.2023 seeking resumption of the power supply under the PPA referred to above. The said notices were also duly responded by IAL vide its communication dated 06.07.2023. Whereby, while narrating the factual matrix of the matter, PSPCL stood inter-alia informed that non-supply of the energy by IAL is due to reasons beyond its control and these are not attributable to any negligent act on part of IAL leading to a force majeure event.

3.5 That, PSPCL issued a default/cure notice dated 28.08.2023 for resumption of power within 60 days and

terminated the PPA vide its communication dated 14.11.2023.

3.6 Thereafter, PSPCL vide its communication dated 20.02.2024 raised a demand for a compensation amount of Rs. 9,06,59,991/- citing non-supply of 30 lakhs unit per annum by IAL from its generating stations from FY 2015-16 onwards. The said communication was duly responded to by IAL by way of reply dated 19.03.2024 requesting PSPCL to withdraw the notice without going into any penalties. PSPCL stood intimated that there was no official notice by PSPCL after stoppage of supply in FY 2015-16, in case it had any issue, the PPA should have been terminated by PSPCL there and then. However, PSPCL by way of communication dated 24.04.2024 reiterated its demand for payment of the said compensation amount. That, on 15.06.2024, IAL submitted its detailed reply narrating the complete factual matrix of the matter, demonstrating that PSPCL's notice dated 24.04.2024 is unwarranted, unjust, illegal, arbitrary and unsustainable in the eyes of law.

3.7 IAL has further submitted that:

a) It is a matter of fact that power supply was made by IAL to PSPCL till Sep 2015 and since then PSPCL has been sitting silent over the issue. Therefore, the claim of PSPCL in the instant matter on account of damages is hopelessly time barred and contrary to the provision of the PPA. PSPCL cannot seek to overshadow the provisions of the Limitation Act 1963, which specifies a period of 3 years for institution of a legal proceeding from the date of arising of the contingency. Also, it is

a latin maxim *"Vigilantibus non dormientibus"* which means that the law helps those who are vigilant, not those who sleep on their rights. It is a principle of equity that equity assists the vigilant, not those who sleep upon their rights. The said principles are squarely applicable in the instant case owing to the belated acts of PSPCL. Even otherwise, as per the clauses of the PPA, as per clause 13.3.0 (ii)(e) states as follows:

> *"If the supply is not resumed at the Co-generating facility by the Generating company or by the third party (who takes over the Co-Generating Facility from the Generating Company) in accordance with Clause 13.3.0 (ii) (b) of this Agreement, the Board shall be well within its rights to approach PSERC for deciding the compensation payable to Board for purchase of costly power from the Co Generating Facility in the initial years of this PPA in line with the PSERC decision dated 25.11.2005."*

Meaning thereby, even in case a compensation is to be paid for non-supply of the power from the Co-generating facility, PSPCL was required to approach PSERC in the initial years of the PPA. PSPCL cannot determine the compensation on its own and that too at the fag end/termination of the PPA.

b) Even if the chronology of events cited by PSPCL itself are believed, it is apparent that as per Clause 13.0.0 of the PPA, where non-supply of the power has been covered as an event of default, in case of the default continuing for a period of 60 days, PSPCL should have issued a cure notice and thereafter could have terminated the PPA. Meaning thereby, once the Generating Company stopped supplying the power in

September 2015, PSPCL should have immediately taken remedial steps leading to termination of the PPA at that early stage itself. That, as per the settled cannons of law, PSPCL cannot be benefited out of its own wrongs by blatantly delaying the process. That the instant case is a fit example of unjust enrichment at the hands of PSPCL. The Petitioner-PSPCL being the State instrumentality is expected to act in fairness and good conscience. However, in the instant case, PSPCL, being the Sole Distribution licensee in the State, is practicing the unwarranted style of might is right.

c) IAL had categorically reported to PSPCL as to the occurrence of a force majeure event as the situation went beyond the control of IAL owing to a steep increase in the prices of the husk leading to the stalling of the operation of the generating stations of IAL. In fact, due to the inaction of PSPCL, IAL had to face financial hardships and losses during the year from 2006-07 to 2015-16, for which PSPCL is liable to compensate IAL.

d) That, without prejudice, as per the settled cannons of law with regard to the claim of damages, it has been held that the damages can only be claimed to the extent of the actual loss suffered. In the instant case, PSPCL has failed to demonstrate as to whether it has faced any losses qua the damages claimed by it. Also, PSPCL has failed to provide any such basis for arriving at any cogent calculation, as to how the petitioner PSPCL has arrived at the purported claim of

Rs. 9.07 Crore owing to damages caused due to non-supply of power by the answering respondent.

4. Rejoinder by PSPCL

PSPCL in its rejoinder to the reply filed by IAL, while reiterating its earlier submissions has replied to the contentions raised by the Respondent as under:

4.1 Issue of the Petition being time-barred:

a) The word 'initial years' in Article 13.3.0(ii)(e) of the PPA only refers to the period of purchase of expensive power from IAL and not the period of approaching the Commission. It provides for compensation to PSPCL for the impugned event of default to offset purchase of costly power of IAL during the initial years of PPA. This provision essentially protects PSPCL by ensuring that if the Generating Company or a successor fails to meet its supply obligations under the PPA, PSPCL is entitled to seek financial compensation for any additional costs incurred to meet the consequent shortfall.

b) Further, IAL's contention that the present Petition is barred by limitation (3 years as per the Limitation Act 1963) is erroneous considering that the breach of contractual obligation to supply a minimum of 30 lac units per annum has continued beginning September 2015 till 14.11.2023 i.e. termination of the PPA by PSPCL. Reference in this regard may be made to Section 22 of the Limitation Act 1963 and the Hon'ble Supreme Court's Judgment in the case of M. Siddiq v. Suresh Das, 8 (2020) 1 SCC 1, reproduced below:

(i) Section 22 of the Limitation Act 1963:

*"**22. Continuing breaches and torts.**—In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."*

(ii) The Hon'ble Supreme Court's Judgment in the case of M. Siddiq v. Suresh Das, 8 (2020) 1 SCC 1:

*"267. The submission of Nirmohi Akhara is based on the principle of continuing wrong as a defence to a plea of limitation. In assessing the submission, a distinction must be made between the source of a legal injury and the effect of the injury. The source of a legal injury is founded in a breach of an obligation. **A continuing wrong arises where there is an obligation imposed by law, agreement or otherwise to continue to act or to desist from acting in a particular manner. The breach of such an obligation extends beyond a single completed act or omission. The breach is of a continuing nature, giving rise to a legal injury which assumes the nature of a continuing wrong.** For a continuing wrong to arise, there must in the first place be a wrong which is actionable because in the absence of a wrong, there can be no continuing wrong. It is when there is a wrong that a further line of enquiry of whether there is a continuing wrong would arise. Without a wrong there cannot be a continuing wrong. A wrong postulates a breach of an obligation imposed on an individual, whether positive or negative, to act or desist from acting in a particular manner. The obligation on one individual finds a corresponding reflection of a right which inheres in another. A continuing wrong postulates a breach of a continuing duty or a breach of an obligation which is of a continuing nature...*

Hence, in evaluating whether there is a continuing wrong within the meaning of Section 23, the mere fact that the effect of the injury caused has continued, is not sufficient to constitute it as a

continuing wrong. For instance, when the wrong is complete as a result of the act or omission which is complained of, no continuing wrong arises even though the effect or damage that is sustained may enure in the future. ***What makes a wrong, a wrong of a continuing nature is the breach of a duty which has not ceased but which continues to subsist. The breach of such a duty creates a continuing wrong and hence a defence to a plea of limitation****."*

[Emphasis supplied]

4.2 Issue of PSPCL's delay in terminating the PPA and taking advantage of its own wrongs/ unjust enrichment:

The PPA does not impose any specific timeline on PSPCL to act/terminate the PPA for the Generator's default. In absence of any termination, for all intents and purposes the PPA was valid and existing. The rights and obligations within a contract remain enforceable until the contract is lawfully terminated or expires by its own terms. As long as the contract was in force, PSPCL's right to seek remedies for any breach or non-performance remained intact. Even otherwise, Article 13.5 of the PPA reads as under:

"13.5.0 Failure by either by Board or the Generating Company to exercise any of its rights under this Agreement shall not constitute a waiver of such rights. Neither Party shall be deemed to have waived any failure to perform by the other unless it has made such waiver specifically in writing."

Further, Article 27.0.0 of the PPA expressly provides that, *"No delay or forbearance of either party in the exercise of any remedy or right would constitute a waiver thereof*".

Further, an exercise of rights in pursuance of the provisions of the PPA/contract entered into between parties cannot

mean taking advantage of its own wrongs and/or exercise of a dominant position. Also, IAL has failed to establish the three tests necessary for proving unjust enrichment, as laid down by Hon'ble APTEL's Order dated 26.02.2024 in Appeal No. 213 of 2023 (in the matter of M/s TGV SRAAC Limited v. APERC& Ors) reproduced below:

> *"17. The concept of Quasi Contract is basically founded on the doctrine of "unjust enrichment". This doctrine itself is based upon the maxim "Nul ne doit s' enricher aux depens des autres" (No one ought to enrich himself at the expense of others.) The rationale behind the doctrine of unjust enrichment is that in certain situations, it would be unjust to allow the defendant to retain a benefit at the plaintiff's expenses. To apply this doctrine, it must be established that :*
>
> *(i) the Defendants/Respondents have been enriched by the receipt of a "benefit";*
>
> *(ii) this enrichment is "at the expenses of the plaintiff";*
>
> *(iii) the retention of the enrichment is unjust."*

In fact, PSPCL has incurred losses due to the cessation of power supply by IAL and it is IAL that has enjoyed higher tariff during the initial years of the PPA, and subsequently refused to perform its obligations since September 2015, thereby placing PSPCL and the interest of consumers at a disadvantageous position.

4.3 Issue of PSPCL's exercise of dominant position:

a) As regards IAL's allegation that PSPCL has acted in a dominant manner, it is submitted that IAL has freely entered into a contract with PSPCL. Wherein, IAL had a legal and binding obligation to supply electricity from its Power Plant for a period of 20 years of Agreement/PPA at the stipulated tariff. Having benefitted from the higher

tariff in the initial years of the PPA, IAL cannot now seek to contend that it would supply power only if the tariff is enhanced. Contractually and legally, no additional tariff could be claimed by Indian Acrylics from PSPCL. The matter already stands decided by this Commission in Order dated 05.08.2008 passed in Petition No. 04 of 2008 and Hon'ble APTEL Order dated 02.03.2009 in Appeal No. 184 of 2008, whereby the pleas of IAL were not accepted. Hence, the issues which have already been decided and attained finality cannot be re-agitated by IAL. In so far as the Order dated 02.03.2009 passed by Hon'ble APTEL in Appeal 184 of 2008 is concerned, the Petition No. 05 of 2011 filed thereafter was withdrawn by IAL with liberty to file fresh petition as and when the cause of action arises to the petitioner. Thus, IAL's reliance on its letters seeking revision of the rates/tariff is not relevant to the subject matter in hand. Without prejudice to above, reference may be made to the decision of the Hon'ble Supreme Court in the matter of Excise Commissioner v. Isaac Peter, (1994) 4 SCC 104:

> *"26.....We are, therefore, of the opinion that in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State. In such cases, the mutual rights and liabilities of the parties are governed by the terms of the contracts (which may be statutory in some cases) and the laws relating to contracts. It must be remembered that these contracts are entered into pursuant to public auction, floating of tenders or by*

negotiation. There is no compulsion on anyone to enter into these contracts. It is voluntary on both sides. There can be no question of the State power being involved in such contracts."

4.4 Issue of occurrence of Force Majeure Event (Financial Onerousness/ Unviability):

a) IAL by way of its Reply has sought to allege that non-supply of power was on account of force majeure event of financial onerousness/distress caused due to an uncontrollable increase in the cost of rice husk. In this regard it is submitted that it is a settled principle of law that onerousness in performing the terms of a contract does not lead to frustration of the Contract. Reference in this regard may be made to the decision of the Hon'ble Supreme Court in the matter of M/s Alopi Parshad & Sons v. The Union of India, (AIR 1960 SC 588).

b) Without prejudice to the above, it is submitted that to avail the benefit of Force Majeure under the PPA, it is incumbent upon the Party seeking any relief, to issue a Force Majeure Notice under 19.2.0 of the PPA within 7 days. However, at the relevant time, Indian Acrylics did not issue any Force Majeure notice as is necessarily required under the PPA. It was only *vide* letters dated 27.11.2018, 06.07.2023 27.10.2023 that Indian Acrylics refused to supply power to PSPCL citing financial distress/unviability. Further, these letters were written in response to PSPCL seeking an explanation for the non-compliance on the part of Indian Acrylics.

4.5 Issue of computation of Compensation:

a) The contention raised by Indian Acrylics namely, that

PSPCL has not suffered any damage/loss to claim compensation is erroneous. In fact, Indian Acrylics by breach of its minimum supply and material obligations under the PPA, has made it liable for damages proportionate to the expenses incurred by PSPCL in purchasing alternate power and payment of RPO penalties during the default period from September, 2015 until the termination of the PPA.

b) That Section 73 of the Indian Contract Act 1872 also stipulates that the non-defaulting party is entitled to damages for non-performance of the contract if the loss or damage was foreseeable at the time of contract formation. Further, Article 2.1.3 of the PPA is akin to a genuine pre-estimate of damages as it stipulates the minimum supply under the PPA, namely, 30 Lac Units thus, the same may also be treated as liquidated damages under Section 74 of the Indian Contract Act 1872.

c) Also, it is well settled position that *"Section 74 is to be read along with Section 73 and, therefore, in every case of breach of contract, the person aggrieved by the breach is not required to prove actual loss or damage suffered by him before he can claim a decree."* Reference in this regard may be made to ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705.

d) Even otherwise, it is a settled position that in a regulatory set up *"It is very difficult to compute the actual loss due to breach of contract by a generating company to the Distribution licensee."* Reference in this regard may be made to the following decisions passed by the Hon'ble

Appellate Tribunal in the matter of M/s Lanco Kondapalli Power Limited v. Andhra Pradesh Electricity Regulatory Commission in Appeal No. 154 of 2013 and PTC India Limited v. GERC in Appeal No. 47 and 62 of 2013. In addition to the aforesaid, it has been held by the Hon'ble Courts that it is the defaulting party who has to prove that no loss has been suffered by the non-defaulting party.

e) Further, in reference to Indian Acrylics' claim that PSPCL has not provided a cogent calculation, it is submitted that in the interest of fairness, PSPCL has computed and provided the details of the amount to be compensated by PSPCL at the last payable tariff under the PPA, which was Rs. 3.489/kWh.

5. On 22.01.2025, the Petition was taken up for final hearing. While the Respondent reiterated its contention of PSPCL's actions being much delayed and time barred, PSPCL referred to the non-waiver clauses of the PPA. Further, while contending that a contract is subject to law, the Respondent submitted that compensation, if any, is to be assessed on the differential rate of actual power purchase. After hearing the Ld. Counsel for the parties, the Order was reserved with direction that the parties may file written submissions, if any, within two weeks. Both, PSPCL and SAEL submitted their respective written submissions on 10.02.2025 reiterating their submissions made during the proceedings of the case.

6. Analysis and Decision of the Commission:

The Commission has examined the submissions and arguments thereon by the parties. The issue brought up for adjudication is

PSPCL's claim for compensation on account of the Respondent IAL's failure to supply/make available a *"Minimum 30 lac units of energy per annum",* mandated under Article 2.1.3 of the PPA, for the period of September 2015 to 14.11.2023 (when the PPA was terminated by PSPCL. There is no dispute *per-se* of IAL's contractual obligation to make available a Minimum of 30 lac units of energy per annum for sale to PSEB (now PSPCL) during the term of the Agreement. However, IAL is opposing the petition citing 'occurrence of force majeure event', 'exercise of dominant position', the Petition being delayed/time-barred, 'PSPCL's delay to seek benefit out of its own wrong/unjust-enrichment' etc. The Commission examines the same as under:

6.1 Issue of occurrence of the Force Majeure Event (Financial Onerousness/ Unviability):

The Respondent's contention is that PSPCL stood informed that non-supply of power was due to reasons beyond its control, namely financial unviability/onerousness owing to steep increase in the prices of the rice husk used as fuel in its plant, constituting a force majeure event.

Whereas PSPCL's plea is that, in terms of the PPA, IAL had a legal and binding obligation to supply electricity at the stipulated tariff. PSPCL's case is that it is a settled law that onerousness in performing the terms of a contract does not lead to frustration of the Contract. PSPCL has further submitted that, without prejudice to the above, at the relevant time, IAL did not issue any Force Majeure notice as required necessarily under the PPA. The letters cited by IAL are in fact its requests seeking enhancement in tariff and/or replies submitted in response to the letters/notices issued by PSPCL, and not the Force Majeure notice(s) in term of the PPA.

The Commission refers to Article 19 of the PPA which reads as under:

19.0.0 FORCE MAJEURE

19.1.0 *If any party hereto shall be wholly or partially prevented from performing any of its obligation under this Agreement by reason of or on account of lighting, earthquake, fire, floods, invasion, insurrection, rebellion, mutiny, civil unrest , riot, epidemic, explosion, the order of any court, judge or civil authority, change in applicable law, war, any act of God or public enemy or any other similar cause or reason, reasonably beyond its control and not attributable to any negligent or intentional act, error or omission, then such party shall be excused of its obligations/liabilities under this Agreement and shall not be liable for any damage, sanction or loss resulting there from to the other party.*

19.2.0 *The party invoking this clause shall satisfy the other party of the existence of any Force Majeure event and give written notice within seven (7) days of the occurrence of such Force majeure event to the other party and also take any reasonable and possible steps to eliminate, mitigate or overcome the effect and consequence of any such Force Majeure event."*

As is evident, the 'increase in cost of generation' as cited by IAL is not included in the reasons specified in the PPA so as to get excused of the obligations under the PPA. Further, it cannot be disputed that it is a settled principle of law that onerousness in performing the terms of a contract does not lead to the frustration of the Contract.

Also, the PPA specifies that the party invoking 'Force Majeure' is to satisfy the other party of the existence of such Force Majeure event and give written notice within seven (7) days of the occurrence of same to the other party. However, the Respondent IAL did not produce an evidence of issuing such a notice within 7 days of cessation of supply to PSPCL. Further, in view of the settled law that when a contract/PPA requires

something to be done in a particular manner, it has to be done in the same manner, the Respondent's letters seeking revision of its tariff and/or replies submitted to the PSPCL's letters/notices cannot be considered to fulfill the mandatory requirement of issuance of FM Notice under the PPA.

Thus, the Respondent's contention of a 'Force Majeure Event' is not maintainable in the instant case.

6.2 Issue of exercise of dominant position by PSPCL:

IAL has submitted that PSPCL has not considered its requests for revision of tariff (from the rate allowed under NRSE Policy 2001) to the rate specified in NRSE Policy 2006 despite an abnormal increase in the husk price used as the fuel in its plant. IAL's contention is that till its representation dated 04.05.2009 submitted to PSPCL in terms of Hon'ble APTEL's order dated 02.03.2009 was decided by PSPCL, no further action was required to be taken by the PSPCL.

On the contrary, it's PSPCL's case that IAL had entered into the PPA dated 04.05.2006 with PSPCL, in terms of the tariff approved vide the Commission's Order dated 25.11.2005 in Petition No. 14 of 2004, on its own accord and free will. In terms of the same, it had a binding obligation to supply electricity to PSPCL at the stipulated tariff for a period of 20 years of Agreement/PPA. IAL's prayer for revision of its tariff from the rate as specified in NRSE policy 2001 to that applicable to the projects covered under NRSE Policy 2006 stand already dismissed by the Commission vide its Order dated 05.08.2008 in Petition No. 04 of 2008. Further, the Commission's said decision has also been upheld by Hon'ble APTEL vide its Order dated 02.03.2009 in Appeal No. 184 of

2008 filed by IAL.

The Commission notes that IAL's prayer for revision of its tariff, from the rate as specified in NRSE policy 2001, to that made applicable to the projects covered under NRSE Policy 2006 was dismissed vide the Commission's Order dated 05.08.2008 in Petition No. 04 of 2008, holding that the project of the Petitioner is clearly outside the purview of the new policy. The said order of the Commission was also upheld by Hon'ble APTEL vide its Order dated 02.03.2009 in Appeal No. 184 of 2008 filed by IAL, observing that it does not find any ground to hold that the order passed by the Commission suffers from any infirmity.

Further, as regard the liberty granted to IAL by Hon'ble APTEL, while upholding the Commission's Order, to approach PSPCL to seek a common settlement and IAL's consequent communication dated 04.05.2009 to PSPCL, the Commission observes that the subsequent Petition No. 05 of 2011 filed by IAL was withdrawn by it with the liberty granted to it to file a fresh petition as and when the cause of action arises for the Petitioner. However, the Commission notes that no petition has been filed thereafter by IAL.

The commission also refers to the Hon'ble Supreme Court Judgment in the matter of Excise Commissioner v. Isaac Peter, (1994) 4 SCC 104, cited by PSPCL, wherein it has been held that:

> "..*in case of contracts freely entered into with the State, like the present ones, there is no room for invoking the doctrine of fairness and reasonableness against one party to the contract (State), for the purpose of altering or adding to the terms and conditions of the contract, merely because it happens to be the State..."*

Thus, IAL's contention of non-acceptance/pendency of its

representation to PSPCL seeking unilateral enhancement in tariff to allege exercise of dominant position by PSPCL is not sustained.

6.3 Issue of the Petition being delayed/time-barred:

The Respondent IAL's contention is that the Petition, relating to the cause of action beginning September 2015 when the Generating Company stopped supplying power to PSPCL, is hopelessly delayed/ time-barred. Further, IAL's argument is that PSPCL cannot seek to overshadow the provisions of the Limitation Act 1961, which specifies a period of 3 years from the time the contingency happens for filing of suits for compensation for breach of contracts.

Whereas, PSPCL's plea is that the impugned breach (i.e. non-supply of a minimum of 30 lac units per annum which continued since September 2015 till the termination of the PPA on 14.11.2023), is of a continuing nature, which is covered under Section 22 of the Limitation Act.

The Commission refers to Section 22 of the Limitation Act 1963 which specifies that, *"In the case of a continuing breach of contract.., a fresh period of limitation begins to run at every moment of the time during which the breach continues".*

The Commission notes that it is not under dispute that the impugned breaches of non-supply of a minimum of 30 lac units per annum persisted/continued from September 2015 till the termination of the PPA on 14.11.2023. However, the Commission also refers to the observations made in the Hon'ble Supreme Court's Judgment (in the case of M. Siddiq v. Suresh Das, 8 (2020) 1 SCC 1), cited by PSPCL, as under:

"263. The application of the principle of continuing wrong in the context of

service jurisprudence came up before a two judge Bench of this Court in Union of India v Tarsem Singh 168. …..

The High Court in appeal was held not to be justified in directing the payment of arrears for the payment beyond three years before the institution of the writ petition."

In view of Section 22 of the Limitation Act and the relevant portion of the Hon'ble Supreme Court's judgment, IAL's contention of delay/bar of limitation in filing of the instant petition is sustainable only for the period beyond three years of the date of filing of this petition. However, due to the continuing nature of the impugned breach (i.e non-supply of the mandated power) PSPCL's claim for compensation, if any, upto to the period of three year immediately prior to the date of filing of this petition is within the limitation period.

6.4 Issue of PSPCL's delay to seek benefit out of its own wrongs/unjust-enrichment:

The Respondent IAL's contention is that, once the Generating Company stopped supply of power in September 2015, PSPCL should have immediately taken remedial steps to issue a cure notice and subsequently termination of the PPA as per Clause 13.3.0. However, PSPCL delayed the process and issued the default notice only on 28.08.2023 and proceeded to terminate the PPA on 14.11.2023 after a period of 8 years of the event of default in 2015. Therefore, it is a case of PSPCL seeking to benefit out of its own wrongs and seeking unjust-enrichment. IAL further submitted that, in terms of Article 13.3.0 (ii)(e) of the PPA, PSPCL was to approach this Commission in the initial years and not after a delay of eight years or after the termination of the PPA. It is also the Respondent's case that a

contract is subject to law and PSPCL cannot seek to over shadow the 'Law of Limitation'.

On the contrary, PSPCL's plea is that, in terms of the PPA, IAL had a legal and binding obligation to supply electricity from its Power Plant for a period of 20 years of Agreement/PPA at the stipulated tariff. Having benefitted from the higher tariff in the initial years of the PPA, IAL cannot now seek to contend that it would supply power only if the tariff is enhanced. It was submitted by PSPCL that the PPA (Article 13 or otherwise) does not impose any specific timelines on PSPCL in case of the Respondent's default. Even the word 'initial years' contained in Article 13.3.0(ii)(e) of the PPA refers to the period of purchase of expensive power from IAL and not the period for approaching the Commission. Otherwise also , Article 27.0.0 of the PPA expressly provides that *"No delay or forbearance of either party in the exercise of any remedy or right would constitute a waiver thereof".* It is PSPCL's case that an act/exercise of right in pursuance of the provisions of the PPA/contract entered into between the parties cannot be construed as taking advantage of its own wrongs/unjust-enrichment.

The Commission refers to relevant extracts of the PPA, reproduced below:

> ***13.3.0*** *…, if an Event of Default by either party extends for a period of sixty (60) calendar days after receipt of any written notice of such Event of Default from the Non-defaulting party then:-*
>
> *(i) If the default pertains to the Board, ...*
>
> *(ii) If the default pertains to the Generating Company the Board may at its option.*
>
> *(a) Require the Generating Company to cure the default and*

resume supply to the Board within sixty (60) days of receipt of notice from the Board.

(b) ……..

(c) Terminate the Agreement.

(d) …….

(e) If the supply is not resumed at the Co-Generating Facility by the Generating Company .., the Board shall be well within its rights to approach PSERC for deciding the compensation payable to Board for purchase of costly power from the Co Generating Facility in the initial years of this PPA in line with the PSERC decision dtd. 25.11.05.

13.4.0 The non-defaulting party may also institute such legal action or proceedings or resort to such other remedies as it deems necessary.

13.5.0 Failure by either Board or the Generating Company to exercise any of its rights under this Agreement shall not constitute a waiver of such rights. Neither Party shall be deemed to have waived any failure to perform by the other unless it has made such waiver specifically in writing.

…..

27.0.0 NON-WAIVER

27.1.0 No delay or forbearance of either party in the exercise of any remedy or right will constitute a waiver thereof and the exercise or partial exercise of remedy or right shall not preclude further exercise of the same or any other remedy or rights.".

The Commission, while noting PSPCL's submission that the PPA does not specify any time line for issuing *'written notice of such Event of Default',* is however of the view that it cannot be construed to mean that PSPCL can sleep over the matter for a period of 8 years. Further, on the issue of PSPCL's reference to non-waiver clauses of the PPA, the Commission agrees with

the Respondent's contention that a contract is subject to law and PSPCL cannot seek to over shadow the 'Law of Limitation'.

Also, perusal of Article 13.3.0(ii)(e) of the PPA, beginning with the words "*If the supply is not resumed at the Co-Generating Facility by the Generating Company ..",* indicates that it comes into force in case supply is not resumed by the Generating Company. It clearly indicates that it was required that PSPCL should issue a cure notice and seek resumption of supply. The Compensatory sub-Clause (e) would only then come into play for PSPCL to seek the benfit of compensation and that too only *'for purchase of costly power from the Co Generating Facility in the initial years of the PPA'*. PSPCL has obviously failed to adhere to the relevant clause of the PPA and has not correctly utilised its import.

If PSPCL finds it pertinent to seek relief from the time the Event of Default occurred, it was also required to take note of it then and seek appropriate remedies as per the clauses of the PPA relating to such Event of Default and its cure. PSPCL ought to have issued a cure notice and sought resumption of supply immediately on noticing the breach by the the Generating Company. However, it didn't take the remedial measures in terms of the PPA and is therefore estopped from claiming the impugned compensation at this belated stage.

Thus, it is evidently clear that PSPCL's impugned delay, in issuing of the default notice and consequent termination of the PPA, tantamount to seek benefit out of its own wrong/unjust-enrichment by trying to remedy its own delay/error to the detriment of the Respondent IAL.

6.5 Issue of computation of compensation:

IAL's contention is that PSPCL has failed to demonstrate as to whether it has faced any losses qua the damages/ compensation claimed by it. IAL further submitted that PSPCL has not provided any cogent calculation for arriving at the purported claim of Rs. 9.07 Crore due to non-supply of power by the respondent. It was also contended by IAL that even if the compensation is to be paid for non-supply of the power from its Co-generating facility, the same is to be assessed on the differential rate of actual power purchase in reference to the rate payable to IAL for supply of power contracted and that PSPCL was required to approach PSERC and cannot proceed to determine the same on its own.

Whereas, PSPCL's plea is that, by breaching its minimum supply obligations specified under the PPA, IAL has made itself liable for the compensation proportionate to the expenses incurred by PSPCL in purchasing alternate power and the penalties paid for non-compliance of RPO requirements. PSPCL, while relying on Section 73 of the Indian Contract Act 1872 stipulating that the non-defaulting party is entitled to damages for non-performance of the contract, has further submitted that the Article 2.1.3 of the PPA stipulating the minimum supply of 30 lac units per annum is akin to a genuine pre-estimate of damages. The same can be treated as liquidated damages under Section 74 of the Indian Contract Act 1872. Accordingly, it has computed the amount of compensation by considering the last payable tariff under the PPA, which was Rs. 3.489/kWh. Furthermore, PSPCL has also sought reliance on the Hon'ble Supreme Court Judgment in case of ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705.

The Commission refers to Section 73 and 74 of the Indian Contract Act, as under:

"73. Compensation for loss or damage caused by breach of contract.— When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

….

74. Compensation for breach of contract where penalty stipulated for.— When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for."

Further, the Hon'ble Supreme Court Judgment in case of ONGC Ltd. v. Saw Pipes Ltd., (2003) 5 SCC 705, as cited by PSPCL, also states that:

"(1) Terms of the contract are required to be taken into consideration before arriving at the conclusion whether the party claiming damages is entitled to the same.

(2) If the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract unless it is held that such estimate of damages/compensation is unreasonable or is by way of penalty, party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act."

As is evident, Section 74 of the contract Act specifies that, '*if a sum is named in the contract as the amount to be paid in case of such breach, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named'.* The Hon'ble Supreme Court also states that if the terms are clear and unambiguous stipulating the liquidated damages in case of the breach of the contract the party who has committed the breach is required to pay such compensation and that is what is provided in Section 73 of the Contract Act.

However, the Commission is not convinced that, Article 2.1.3 of the PPA can be considered as the '*sum named in the contract as the amount to be paid' or* 'liquidated damages to be paid' *in case of such breach* under Section 74 of the Contract Act. The Commission observes that it only specifies the quantum namely the minimum supply of 30 lac units per annum and not the rate(s) so as to determine the sum payable in case of the generator's default. If that was to be the case there was no need for the PPA to specify under Article 13.3.0(ii)(e) of the PPA that:

> *"(e) If the supply is not resumed at the Co-Generating Facility by the Generating Company .., the Board shall be well within its rights to approach PSERC for deciding the compensation payable to Board ..."*

Further, the Commission notes that, while IAL's contention is that the compensation (if any) is to be assessed on the differential rate of power purchase by PSPCL, PSPCL's submission is also that it is liable for the compensation proportionate to the expenses incurred by PSPCL in

purchasing alternate power and the penalties paid for non-compliance of RPO requirements.

On balance, the Commission is clear that for determining the compensation payable by IAL, for breach of its impugned obligation to supply/make available a *"Minimum 30 lac units of energy per annum" as* mandated under Article 2.1.3 of the PPA, the differential rate of power procured by PSPCL from alternate sources, if higher than that contracted in the PPA, and the RPO penalty paid by PSPCL (if any) on account of the shortfall caused due to the Respondent's impugned breach is required to be ascertained. However, PSPCL, neither in its petition nor in the subsequent proceedings of same, has submitted any such data to enable the Commission to determine such quantum of the compensation, if any, payable in terms of the PPA.

The submission of PSPCL that it has computed the compensation amount, on its own, considering IAL's obligation at the last payable tariff applicable under the PPA, i.e., Rs. 3.489/kWh is an overreach and not in order. In fact, the amount of Rs. 9.07 Crore raised by PSPCL is the cost of power procurement from the IAL's deemed supply obligation and not the additional costs incurred by PSPCL. The same cannot be accepted as a fair assessment of the compensation payable by IAL for the impugned breach of its supply obligation in terms of the PPA.

Thus, the Commission has no hesitation in holding that PSPCL's impugned claim of Rs. 9.07 Crore raised on IAL is not in terms of the PPA and hence not maintainable. Accordingly, PSPCL's prayer to direct IAL to pay the Late Payment Surcharge (LPS) for the delay in payment of the

impugned amount raised vide PSPCL's Notice dated 20.02.2024 and to award cost of the present proceedings is also not maintainable.

The petition is dismissed in light of the above analysis/observations of the Commission.

Sd/-
(Paramjeet Singh)
Member

Sd/-
(Viswajeet Khanna)
Chairperson

Chandigarh
Dated: 12.03.2025