

PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SITE NO. 3, BLOCK B, SECTOR 18-A MADHYA MARG, CHANDIGARH

Petition No. 41 of 2018
Date of order: 07.08.2020

Petition under Regulation 86(1) (b) of the Electricity Act, 2003 read with rule 8 of the Electricity Rules, 2005 and applicable provisions of the other Regulations notified by the Commission including the Punjab State Electricity Regulatory Commission (Power Purchase and Procurement Process of Licensee) Regulations, 2012.

AND

In the matter of: Punjab State Power Corporation Ltd., The Mall, Patiala.

...Petitioner

Versus

Udupi Power Corporation Limited. (a subsidiary of Adani Power Limited) 2nd Floor, Le-Parc Richmonde, 51, Richmond Road, Bengaluru- 560025

...Respondent

Present: Ms. Kusumjit Sidhu, Chairperson
Sh. S.S. Sarna, Member
Ms. Anjuli Chandra, Member

Order:

Punjab State Power Corporation Limited (PSPCL) has filed the present petition before the Commission to consider the grant of approval for the Power Purchase Agreement (PPA) dated 29.09.2006 between PSPCL and Udupi Power Corporation Limited (UPCL) earlier known as the Nagarjuna Power Corporation Limited. The petition was admitted vide Order dated 11.01.2019. UPCL filed a reply to the petition vide letter dated 25.01.2019 and PSPCL filed its rejoinder to the reply vide memo no. 5506 dated 01.02.2019. The Commission vide Order dated

07.02.2019 directed PSPCL to submit on affidavit the list of the PPA(s) signed by PSPCL from 29.09.2006,till date indicating PSPCL's share of power (MW), terms of PPA, rate of power and power scheduled/being scheduled and details of the PPAs which remain valid beyond FY 2021-22, Merit Order details according to which the power is being scheduled from the projects for which PPAs have been signed and the list of upcoming PPA(s) entered into/under process by PSPCL for supply of power from FY 2021-22 onwards was also required to be given.

In response to the directions of the Commission, PSPCL submitted an additional affidavit vide memo no. 5606 dated 15.02.2019. The Commission vide Order dated 01.03.2019 observed that PSPCL has executed a number of Power Purchase Agreements and directed PSPCL to file the chronological list of such PPA's alongwith the rate at which these have been executed, the date from which power is being procured and the quantum of power procured each year. UPCL requested to file certain information which was allowed to be filed. UPCL filed affidavit dated 05.03.2019 and PSPCL in compliance of the Order dated 01.03.2019 filed the information vide memo no. 5803 dated 26.03.2019. The Commission vide Order dated 02.12.2019 directed PSPCL to clarify its stand regarding the need to procure Electricity from UPCL and whether it is economical alongwith detailed analysis for the same. PSPCL, in compliance of the order, filed an additional affidavit vide memo no. 6146 dated 24.12.2019 and UPCL filed its reply vide affidavit dated 28.02.2020. PSPCL requested for some more time for filing the comments to the affidavit dated 28.02.2020 filed by UPCL and the Commission vide order dated 06.03.2020 allowed the same to be filed within three weeks. Arguments were heard on 06.02.2019 and 21.02.2019. PSPCL filed its submissions to

the additional affidavit dated 28.02.2020 vide memo no. 5483 dated 15.06.2020. UPCL, vide email dated 15.06.2020, filed a copy of Order dated 27.06.2016 passed by the CERC in petition no. 207/MP/2015 and a copy of affidavit dated 16.03.2016 filed by PSPCL in petition no. 307/MP/2015 before CERC. The petition was taken up for final hearing on 17.06.2020 through video conferencing and after hearing the parties order was reserved, while allowing the parties to file their written arguments. PSPCL submitted consolidated written submissions vide memo No. 5562 dated 02.07.2020.

2. PSPCL's Submissions

2.1 PSPCL submitted that it is the Distribution Licensee in the State of Punjab and amongst other functions it is discharging the function of distribution and retail supply of electricity to the consumers/public at large and procures power from different sources for undertaking the above activity. PSPCL entered into a Power Purchase Agreement dated 29.09.2006 (PPA) with UPCL for purchase of 101.5 MW capacity from the Udupi Thermal Power Project located in Udupi District, Karnataka with a capacity of 1015 MW (2 X 507.5 MW).

2.2 PSPCL submitted that the terms and conditions of tariff on which PSPCL can procure power are to be determined in accordance with the provisions of Section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 which read as under.

“Section 86 (Functions of State Commission): ---

(1) The State Commission shall discharge the following functions, namely: -

(a)

(b) regulate electricity purchase and procurement process

of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;”

Rule 8 of the Electricity Rules, 2005 reads as under:

“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of subsection (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clauses (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”

In terms of the above, the PPA dated 29.09.2006 becomes a concluded contractual agreement only when the PPA alongwith the tariff determined by the Central Commission is submitted before the Commission and the approval of the Commission has been obtained.

2.3 That UPCL filed Petition No. 40 of 2005 before the Central Commission on 11.04.2005 for the approval of tariff for generation and sale of electricity from the Udipi Project to the Distribution Licensees in the State of Karnataka (90%) and to Kerala State Electricity Board (10% of the remaining power). At the time of filing, the Petition, UPCL had no agreement to sell any quantum of power to PSPCL. Subsequently on 29.09.2006, PSPCL agreed to purchase the said quantum of 10% of power, which was agreed to be sold to Kerala State Electricity Board. The

Central Commission vide Order dated 25.10.2005 granted in-principle approval to the capital cost of US \$ 40.0 million + Euro 66.0 million+Rs. 3745.86 Crore, including IDC and financing charges of Rs. 350.14 Crore totaling to Rs. 4299.12 Crore at the exchange rates of Rs. 43.72/US\$ and Rs. 57.33/Euro subject to certain terms and conditions for generation and sale of electricity from the Udupi Project. In terms of the Order dated 25.10.2005, UPCL entered into a power purchase agreement (PPA) with Distribution Licensee of Karnataka State on 26.12.2015 for sale of electricity for 90% of the capacity of the 1015 MW project. In terms of the PPA the first unit of the Udupi Project was to be commissioned by 26.02.2010 and the second unit by 26.06.2010. However, the first unit of the generating station of Udupi Power was commissioned only on 11.11.2010 after a delay of 9 months and the second unit was commissioned only on 19.08.2012 after a delay of 26 months. The said PPA also provided that it would come into force only after the approval of Govt. of Karnataka and the Karnataka Electricity Regulatory Commission. Similarly, on 29.09.2006, UPCL entered into a PPA with PSPCL for the sale and purchase of 10% of the remaining capacity of the Udupi Project (1015 MW). The said PPA was enforceable subject to the approval of the Punjab State Electricity Regulatory Commission. In this regard, the relevant extracts from the PPA dated 29.09.2006 reads as under:

“(v) The Seller has offered to Sell Electricity generated by the Facility corresponding to 10 (ten) percent of the Gross Capacity, to the Buyer and the Buyer has agreed to purchase the same subject to the provision of Electricity Act 2003, and approval of Commission and the terms and conditions, set out herein. The Seller has signed the Power Purchase Agreement

for sale of the balance of the Gross Capacity to the Five Escoms of Karnataka. The Seller Facility has been considered as Mega Power Project as it is to supply power to more than one State and the Buyers and Seller meet the guidelines of Ministry of Power, Government of India for Mega Power Project status.

.....

“Commission” means either the Central Electricity Regulatory Commission or the Punjab State Electricity Regulatory Commission or Karnataka Electricity Regulatory Commission, as the case may be.

.....

Article – 2

2.1....(c) All technical, commercial, legal and other terms and conditions of this Agreement are similar to the Agreement signed between Seller and the Five Escom’s in Karnataka. In future, any changes/modifications made in the Agreement between the Seller and the Five Escoms of Karnataka, similar changes shall be offered to Buyer with option to accept or reject the same. All changes/modifications to be made in this agreement shall be subject to approval of the Commission.”

2.4 That the Government of Karnataka, based on the recommendations of Justice (Retd) Gururajan Committee report dated 23.9.2010 agreed for enhancement of the capacity of the generating station from 1015 MW to 1200 MW and for increase in the capital cost of the project by Rs 583.85 crore, excluding IDC, subject to approval of the Central Commission. Neither Govt. of Punjab nor PSPCL were involved in this agreement and

were therefore not party to either the decision and agreement to enhance the capacity or the increase in cost.

2.5 That UPCL filed tariff petition No 160/GT/2012 before the Central Commission for determination of tariff for supply of electricity to the Karnataka Discoms, PSPCL and Kerala. PSPCL filed its response to the various issues raised in the tariff petition. The Central Commission vide Order dated 24.12.2012 passed in Petition No. 160/GT/2012, while determining the provisional tariff, had specifically noted that the PPA between the petitioner and the respondents will be approved by the respective State Commissions as part of the Power Procurement Process. The Central Commission vide Order dated 20.02.2014 in Petition No. 160/GT/2012, determined the tariff of Udupi Thermal Power Station (2x600 MW) for the period from 11.11.2010 to 31.3.2014 for Unit-I and from 19.8.2012 to 31.3.2014 for Unit-II. The annual fixed charges for the year 2010-11 (11.11.2010 to 31.03.2011), 2011-12 (01.04.2011 to 31.03.2012) 2012-13 (01.04.2012 to 18.08.2012) 2012-13 (19.08.2012 to 31.03.2013) and 2013-14 were allowed as Rs. 62989.00, 62801.04, 62501.76, 142423.36 and 142013.86 lakhs respectively for the Udupi Thermal Power Station:

2.6 That after the commissioning of the two units of the Udupi Project, PSPCL did not schedule any power from the Udupi Project. PSPCL did not enter into any Transmission Service Agreement for the drawal/evacuation of power from Udupi Power either. Accordingly, the entire power of 1200 MW was being sold to the Karnataka Discoms and no part of the power was being sold to or purchased by PSPCL. This has also been noted by the Central Commission in its Order dated 30.06.2016 as follows:

“30...In our view, Karnataka as a long term customer has availed more than 90% power from UPCL. On the other hand, Punjab is not availing power from UPCL. Therefore, Karnataka is liable to pay the transmission charges for long term supply from UPCL's generating station towards LTA of entire 939 MW in terms of Regulation 8 (6) of the Sharing Regulations.”

2.7 That PSPCL, vide letter dated 15.11.2015, informed UPCL that PSPCL be allowed to opt out of the PPA dated 29.09.2006. In response, UPCL proposed to divert the share of PSPCL (101.5 MW) to third parties for a period of three years without any financial implications to PSPCL. PSPCL agreed to the proposal and conveyed its acceptance vide letter dated 21.12.2015 for diverting/selling its share of 101.5 MW to a third party for the period of three years without any liability on either side and the position was to be reviewed suitably thereafter for commencement of supply of power to PSPCL under the PPA. Thus, since no power was being availed by PSPCL and the same had been diverted to the Karnataka Discoms and/or other third parties, there was no need or occasion for PSPCL to approach the Commission and for the Commission to consider on merits the decision for procurement of 101.5 MW from UPCL in terms of the PPA dated 29.09.2006, At that time, considering the power surplus scenario in the state of Punjab, PSPCL did not consider it conducive to the interest of the consumers in the State to proceed with the purchase of any quantum of electricity from UPCL.

2.8 That UPCL on 24.09.2018 informed PSPCL that the period of three years was expiring on 22.12.2018 and requested PSPCL to start scheduling 101.5 MW w.e.f 22.12.2018. After deliberating and examining

the details furnished by UPCL, PSPCL requested UPCL to continue selling the power to third parties as it was not possible for PSPCL to avail power at the cost at which the power was being made available. The said request of PSPCL was denied by UPCL.

2.9 That PSPCL vide letter dated 17.12.2018 informed UPCL that no power could be scheduled under the PPA dated 29.09.2006 till the same is approved by the Commission. The PPA dated 29.09.2006, is required to be considered and approved by the Commission at the tariff terms and conditions determined by the Central Commission. PSPCL had specifically stated that it would not be procuring any electricity pursuant to the PPA or give scheduling for any declaration of availability that may be made by UPCL till such time the PPA has been approved by the Commission in accordance with the provisions of Section 86 (1) (b) of the Act and Rule 8 of the Electricity Rules, 2005 and the Punjab State Electricity Regulatory Commission (Power Purchase and Procurement Process of Licensee) Regulations, 2012. In terms of Regulation 13 of the Power Procurement Regulations notified by the Commission, the approval is to be given by the Commission for the procurement of power as per the following parameters:

- (i) Necessity;*
- (ii) Reasonability of cost;*
- (iii) Promoting efficiency, economy, equitability and competition;*
- (iv) Conformity with regulations for investment approval;*
- (v) Conformity with requirements of quality, continuity and reliability of supply;*
- (vi) Conformity with safety and environmental standards;*

(vii) Conformity with criterion of power purchase as laid down by the Commission;

(viii) Conformity with policy directives of the State Government and policies issued by the Government of India viz. National Electricity Policy, Tariff Policy, long term and short term power procurement guidelines.

2.10 That with regard to the necessity of procurement of 101.5 MW of power from UPCL, PSPCL submitted that as on date, there is surplus in Peak Demand (MW) up to the year 2019-20 and in Energy (MU) up to the year 2020-21 as per PSPCL Demand and Availability report 2017-18 to 2035-36 and reference in this regard was made to the Demand and Availability Forecast Report of the Committee constituted by PSPCL, pursuant to the directions of the Commission in Petition No. 48 of 2014. PSPCL also referred in this regard the Tariff Order dated 19.04.2018 passed by the Commission for the FY 2018-19 wherein it was observed that PSPCL has surplus energy available from various tied up sources including central generating stations and IPPs in the State. PSPCL has to surrender the excess energy, to manage the demand and maintain energy balance. The Commission in its previous Tariff Orders has been consistently directing PSPCL that the surrendering of energy should be as per merit order dispatch from all the thermal generating stations, including PSPCL's own generating stations.

2.11 That as regards the cost of procurement, the Central Commission had determined the annual fixed charges of the UPCL Project for the period 2009-14, vide Order dated 24.03.2017 in petition No. 7/GT/2016. The Central Commission determined the annual fixed charges of the UPCL Project for the year 2010-11 Rs.61620.01 Lacs, 2011-12, Rs.62854.47

Lacs, 2012-13 (01.04.2012 to 18.08.2012), Rs.65114.59 Lacs, 2012-13 (19.08.2012 to 31.03.2013) Rs.138953.34 Lacs, and 2013-14, Rs.137029.89 Lacs. The energy charges however vary and would depend on the actual fuel cost. The energy charge billed to Karnataka Discoms by UPCL as per the Tariff Regulations of the Central Commission and the order dated 24.03.2017 passed by the Central Commission, for Sept'18 is Rs. 3.640 per kWh and fixed charges at normative availability is Rs. 1.59 per kWh. Thus, the total tariff comes to be approx. Rs. 5.23 per kWh, as intimated by M/s Adani vide its letter dated 12.11.2018. In addition to the above, the transmission charges for conveyance of the electricity to Punjab periphery needs to be additionally considered (which is approx. 40. Paise/unit.). In the facts and circumstances of the case, PSPCL submitted that there may not be any necessity for PSPCL to procure electricity from Udupi Power at the tariff determined under the order passed by the Central Commission.

2.12 That the Commission has the final and exclusive authority to decide whether in the facts and circumstances of the case and considering the cost of power as per the orders passed by the Central Commission, it would be appropriate for PSPCL to procure such power. There was no occasion prior to 22.12.2018 for PSPCL to procure power from Udupi Power. PSPCL has prayed to:

- (a) Consider the grant of approval of the Power Purchase Agreement (PPA) considering the need for purchase of power by PSPCL in pursuance of the PPA dated 29.9.2006 entered into between PSPCL and UPCL at the tariff determined by the Central Commission; and

- (b) pass such further order or orders as the Commission may deem just and proper in the circumstances of the case.

3. UPCL's Submissions

3.1 UPCL has submitted that the Petition is not maintainable since power procurement under the Power Purchase Agreement dated 29.09.2006 stands approved by the Commission in terms of the tariff Orders dated 16.07.2012, 10.04.2013 and 22.08.2014 for FY 2012-13, FY 2013-14 and FY 2014-15 respectively wherein PSPCL has been including the PPA with UPCL as part of the proposed procurement plan in the ARR's submitted to the Commission. The power purchase approved by the Commission for UPCL's plant is as under:

Financial Year	Source	Purchase (MU)	Rate of VC (Paise/Unit)	VC (Rs Crore)	Total (Rs Crore)
FY 2012-13	Udupi Power	658	324	213.19	213.19
FY 2013-14	Udupi Power	777.89	370	287.82	287.82
FY 2014-15	Udupi Power	66.07	516.21	34.11	34.11

The aforesaid tariff orders have considered and approved transmission charges payable for procurement of power from UPCL as per the Point of Connection (*PoC*) rates applicable under the CERC (Sharing of Inter State Transmission Charges and Losses) Regulations, 2010. PSPCL having included the PPA with UPCL before the Commission during the approval process and having benefited from the same cannot be allowed to reprobate from its stand and the aforesaid procurement process is a constructive approval to the PPA.

3.2 That the Petition filed by PSPCL is an attempt to evade and avoid its

contractual and legal obligations and is an abuse of the process of law. PSPCL has wrongly invoked the PSERC (Power Purchase and Procurement Process of Licensee) Regulations, 2012 for approval of the present PPA. The PPA predates the said Regulations and is not covered by the provisions of these Regulations. Regulation 12 of the Regulations reads as under:

“12. Long-term Power Procurement Procedure

....

(v) Any long-term power purchase arrangements made through MOUs and PPAs with the generating companies by the Distribution Licensee(s) prior to the issue of these Regulations will not come under the purview of these Regulations till their validity;...”

3.3 That the submission of PSPCL that it cannot commence scheduling of power under the PPA till the time the PPA/procurement of power from UPCL is approved by the Commission is incorrect. As per the settled position of law, parties are bound to discharge their respective obligations under the PPA, irrespective of the date of approval of the PPA. The lack of approval of PPA by the Commission does not affect the validity of the agreement. The Karnataka Electricity Regulatory Commission vide Order dated 23.12.2010 in O.P. No. 29/2009 in case of Rithwik Energy Generation Pvt. Ltd. vs. KPTCL & Ors. has held that non approval of the PPA by the Commission will not affect the validity of the agreement entered into by the parties which was upheld by the Hon'ble APTEL vide Order dated 21.10.2011 in Appeal No. 51 of 2011 and by the Hon'ble Supreme Court vide Order dated 06.02.2018 in Civil Appeal No. 5084-85 of 2015. Further, approval of the PPA is the responsibility of the procurer, and

even if the Commission's approval has been delayed, PSPCL cannot be allowed to take advantage of its own wrong. The present PPA is valid and binding, as the power procurement under this PPA was already considered and approved by the Commission in its tariff Orders.

3.4 That the submission of PSPCL denying its liability to pay capacity charges on account of non-approval of PPA, is an afterthought and excuse to escape liability. PSPCL cannot escape its obligation to pay capacity charge in terms of article 3.1 of the PPA read with clause 6.2(1) of the Tariff Policy 2016. The present Petition has been filed in the context of communications exchanged between the parties which demonstrate the mala-fide intent of PSPCL. Communication of 2015 establishes that PSPCL acknowledges its obligations under the PPA. On 07.01.2015, PSPCL requested UPCL for its consent to opt out of the PPA without any financial liability. On 03.11.2015, UPCL informed PSPCL that the transmission agreements are pending at PSPCL's end and requested PSPCL to expedite the same. UPCL proposed an arrangement to sell the power to third parties without any liability on PSPCL for a temporary period of three years and on 21.12.2015 PSPCL conveyed its acceptance to the aforesaid temporary arrangement.

3.5 The following Communications of 2018 mentioned hereunder establish that PSPCL is using the issue of the Commission's approval of the PPA as an excuse to wriggle out of its obligations under the PPA.

- (i) On 24.09.2018, (i.e. when the three-year period was due to expire on 21.12.2018), UPCL approached PSPCL and requested to start scheduling power from UPCL in accordance with the PPA.

- (ii) On 20.11.2018, PSPCL responded to UPCL that it would not be possible for PSPCL to avail the power under the PPA and requested UPCL to continue with the existing arrangement.
- (iii) On 03.12.2018, UPCL informed PSPCL that the arrangement had been made only for a period of three years. UPCL once again requested PSPCL to commence off take power failing which UPCL would be constrained to sell power to third parties in terms of Clause 6.2(1) of the Tariff Policy, 2016.
- (iv) On 17.12.2018, PSPCL communicated to UPCL denying ability to off-take power from December 2018 onwards.
- (v) On 21.12.2018, UPCL communicated to PSPCL that the period has expired, and it shall be selling PSPCL's un-availed share of power to third parties in terms of Clause 6.2(1) of the Tariff Policy, 2016.
- (vi) On 22.12.2018, UPCL communicated to PSPCL that it has started selling power to third parties and PSPCL is liable to pay capacity charges for the power so sold in terms of the extant law.
- (vii) On 24.12.2018, PSPCL communicated to UPCL that it is not liable to make payments for fixed charges under the PPA as the PPA has not been approved. This is the first time that PSPCL came up with the contention regarding approval of the PPA.
- (viii) On 31.12.2018, UPCL responded by stating that PPA approval had been accorded by the Commission through the Tariff Orders for FY 2012-13, FY 2013-14 and FY 2014-15. UPCL

reiterated that the power is being sold to third parties and PSPCL is liable to pay capacity charges in terms of the extant law.

- (ix) On 08.01.2019, PSPCL communicated to UPCL that it shall be approaching the Commission for approval of the PPA.

In view of the aforesaid, it is clear that PSPCL willingly entered into an agreement with UPCL and understands the implications of not fulfilling its obligations. This is evident from the letters to UPCL wherein PSPCL specifically requested UPCL not to impose liability on PSPCL for opting out of the PPA/not availing power. After the lapse of 3 years, PSPCL wanted to continue the same arrangement. However, on account of UPCL enforcing its rights under the PPA, PSPCL has devised a way to avoid power supply and further delay this liability. Therefore, UPCL prayed that PSPCL may be directed to fulfill its obligation in terms of Article 6.2(1) of the Tariff Policy which provides as under:-

“... Notwithstanding any provision contained in the Power Purchase Agreement (PPA), in order to ensure better utilization of un-requisitioned generating capacity of generating stations, based on regulated tariff under Section 62 of the Electricity Act 2003, the procurer shall communicate, at least twenty four hours before 00.00 hours of the day when the power and quantum thereof is not requisitioned by it enabling the generating stations to sell the same in the market in consonance with laid down policy of Central Government in this regard. The developer and the procurers signing the PPA would share the gains realized from sale, if any, of such un-requisitioned power in market in the ratio of 50:50, if not already

provided in the PPA. Such gain will be calculated as the difference between selling price of such power and fuel charge...

3.6 UPCL further stated that PSPCL has submitted that PPA should not be approved considering the high tariff rate approved by the Central Electricity Regulatory Commission. This is incorrect. The PPA stands approved and is valid as on date. Power supply under the PPA is not impacted by the current surplus power situation in the State of Punjab. UPCL had entered into the PPA with PSPCL on 29.09.2006 for a duration of 25 years and post 29.09.2006, PSPCL entered into PPAs with generating stations other than UPCL. The surplus power situation is PSPCL's own design. While PSPCL has the right to do so, it also has an obligation to pay capacity charges towards power not availed. If during the course of tenure of the PPA of 25 years, there is surplus scenario, the obligation of PSPCL to pay capacity charges as per provisions of PPA does not get cancelled. PSPCL has made contradictory submissions in the Petition. On one hand PSPCL is creating the camouflage of getting approval for the PPA and on the other hand PSPCL is making every possible contention so that the PPA is not approved by the Commission. It is a settled legal principle that what cannot be done directly cannot be done indirectly.

3.7 That in accordance with the CERC (Terms and Conditions of Tariff) Regulations, 2009 ("*CERC Tariff Regulations*"), provisional tariff and final tariff of Udipi Thermal Power Station was determined by the Central Commission on 24.12.2012 and 20.02.2014 respectively. UPCL pointed out that before the tariff determination exercise by the Central Commission, the power purchase quantum and cost of power purchase from Udipi Thermal

Power Station was duly approved by the State Commission vide its Tariff Orders dated 16.07.2012, 10.04.2013 and 22.08.2014 for FY 2012-13, FY 2013-14 and FY 2014-15 respectively. It is noteworthy in the said tariff orders that the transmission charges payable for procurement of power from Udupi Power have also been considered at PoC rates and approved by the Commission. Therefore, the PPA has due approval of the Commission and there is no reason for PSPCL to avoid honoring its lawful contractual commitments.

3.8 That as regards the dates of commissioning of the units of Udupi Power Plant, it was submitted that the delay in commissioning was on account of Force Majeure reasons and the same have been duly condoned by the Central Commission. It was also submitted that the PPA of UPCL with the Karnataka ESCOMS are not relevant to the present proceedings and PSPCL has failed to demonstrate why reliance is being placed on the said PPA. UPCL submits that the lack of Article 14.2 in the present PPA supports the case of UPCL and PSPCL is therefore liable to follow its commitments under the PPA. PSPCL cannot therefore make a case to escape liability by citing technicalities of the “*manner*” of approval.

3.9 That with respect to the contention of PSPCL regarding public interest, it was submitted that it is not upto the procurer to decide on the timelines of getting the PPA approved by the Commission. The approval of the PPA is an obligation of the procurer and not a privilege to be enjoyed based on the circumstances. If PSPCL did not consider it right to proceed with procurement from UPCL, it should not have signed the PPA in the first place. However, having made a considered decision and having involved another party by way of an agreement, PSPCL cannot wriggle out of its

obligations with impunity.

4. PSPCL's Rejoinder

4.1 PSPCL reiterating its earlier submissions has submitted that the Commission vide tariff Order dated 16.07.2012, 10.04.2013 and 22.08.2014 approved the projected power purchase only provisionally. These approvals were given on a projected basis and cannot be treated as an approval as per Section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005. Moreover, these projections did not fructify in the financial years of 2012-13 – 2014-15 and no unit of power was actually procured and no deemed fixed charges or any other committed charges as is applicable to long term PPAs was ever called for by UPCL or otherwise paid by PSPCL. This is particularly when the Project was declared under commercial operation w.e.f. 19.08.2012 and the final tariff order has been passed by the Central Commission for the tariff period 2009-14 on 20.02.2014. If the provisional approval in the Tariff Orders of the Commission is to be accepted as a final approval as required under the provisions of the Electricity Act and Rules, the rights and obligations of the respective parties would have become enforceable at that time with PSPCL being required to schedule power and UPCL being required to declare availability and claim tariff for the quantum of power made available to PSPCL. Therefore, there has been no approval by the Commission in terms of Section 86(1)(b) of the Electricity Act, 2003 as read with the rule 8 of the Electricity Rules, 2005. Even assuming that the provisions of the Punjab State Electricity Regulatory Commission (Power Purchase and Procurement Process of Licensee) Regulations, 2012 are not applicable to power purchase agreements entered prior to the notification of the said

Regulations, there are similar provisions under the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005. The criteria/parameters laid down by the Commission in Regulation 13 of the Punjab State Electricity Regulatory Commission (Power Purchase and Procurement Process of Licensee) Regulations, 2012 such as, Necessity, Reasonability of cost, Promoting efficiency, economy, equitability and competition etc, are also contained in Regulation 46 of the Conduct of Business Regulations, 2005. In any event and without prejudice to the applicability of the aforementioned criteria, Regulation 46 mandates that the Commission shall consider the power procurement in terms of the objective of least cost purchase and the need for additional power and further, specifically the requirement of the Commission to consider the merits of power purchase.

4.2 That in exercise of its powers under Section 86(1)(b) of the Electricity Act, 2003 as read with Rule 8 of the Electricity Rules, 2005, the Commission is required to decide on the aspect as to whether PSPCL should or should not procure the power at the tariff terms and conditions even when such tariff is determined by the Central Commission under Section 79 of the Act. Therefore, the PPA dated 29.09.2006, unless approved or consented to by the State Commission, would not be valid or an enforceable contract by virtue of the statutory mandate as laid down in the Electricity Act, 2003; the Electricity Rules, 2005 and the Conduct of Business Regulations, 2005 notified by the Commission.

4.3 That the PPA entered into between PSPCL and UPCL is in the form of a Contingent Contract as defined under Section 31 of Indian Contract Act, 1872. Further, as per Section 32 of the Contract Act, the same is enforceable only on the happening of event that is contemplated which in

this case is the approval of the Commission. Section 32 of the Indian Contract Act, 1872 reads as under:

“Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible, such contracts become void..”

Since the said condition has not occurred as yet, there are no vested rights accruing to the parties, namely the obligation on the part of the PSPCL to schedule and pay for the contracted capacity to UPCL and the PPA cannot be given effect to. The said view has been reiterated in a judgment of the Hon'ble Tribunal in the case of Rithwik Energy Generation Pvt. Limited v Karnataka Power Transmission Corp. Limited and Ors 2011 ELR (APTEL) 1651 wherein it was held that the PPA becomes enforceable only after the consent is granted by the State Commission:

4.4 That even in terms of the PPA itself, the same cannot be given effect to without obtaining the approval of the Commission and therefore, there cannot be any obligations arising out of the PPA. In addition to the above, since there was no firm concluded agreement, there was no Open Access nor was there any LTA grant for conveyance of power from UPCL in the State of Karnataka to the Punjab periphery. PSPCL did not enter into any Transmission Service Agreement for the drawl/evacuation of power from UPCL. Accordingly, the entire power of 1200 MW was being sold by the Karnataka Discoms and no part of the power was being sold to or purchased by PSPCL. This has also been noted by the Central Commission in its Order dated 30.06.2016 in 10/SM/2014 at Para 30 which inter-alia reads as under:

“30...In our view, Karnataka as a long term customer has availed more than 90% power from UPCL. On the other hand, Punjab is not availing power from UPCL. Therefore, Karnataka is liable to pay the transmission charges for long term supply from UPCL's generating station towards LTA of entire 939 MW in terms of Regulation 8 (6) of the Sharing Regulations.”

In terms of the above aspects, the obligation of PSPCL including to schedule the power and pay the transmission charges as per the provisions of the PPA would arise only when the Commission decides on the sanction to be given for such procurement of power from UPCL as envisaged under Section 86 (1) (b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005. Without prejudice to the above, if UPCL intended to firm up the PPA in compliance with the requirements of Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005 at the time when the Central Commission determined the tariff in the year 2012 or in 2014, UPCL should have either specifically called upon PSPCL to apply for the approval of the PPA or could have filed an application itself for such approval. UPCL did not do so. This is particularly in light of the specific finding in the Order dated 24.12.2012 passed by the Central Commission, namely that the tariff so determined will come into effect only when the PPA is approved by the State Commission. Therefore, the State Commission will decide whether the PPA entered into between the generator and the distribution companies at the tariff determined by this Commission shall be approved or not from the point of view whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State. Article 14.2 of the PPA does not say that the PPA is not valid, but it predicates its enforceability on the approval by

the State Commission. Therefore, the PPA can be considered for the purpose of tariff determination by the Commission to the extent it is permissible under the 2009 Tariff Regulations. However, the tariff so determined will come into effect only when the PPA is approved by the State Commission and the tariff determined is adopted under Rule 8 of the Electricity Rules, 2005.

4.5 That no power has been scheduled by PSPCL and no benefit has accrued to PSPCL. Accordingly, the reliance on the judgments in the case of R. N Gosain v Yashpal Dhir AIR 1993 SC 352 and P.R Deshpande v M.B Haibattoi AIR 1998 SC 2979 on the issue of approbation and re-approbation is misconceived and not applicable to the facts of the present case. There has been no approval by the Commission, constructive or otherwise, in terms of Section 86(1)(b) of the Electricity Act, 2003 and Rule 8 of the Electricity Rules, 2005.

4.6 That the parties to the PPA cannot be held to be bound by the provisions, irrespective of the approval of the Commission. This would defeat the very purpose and object of Section 86(1)(b), of the Electricity Act, 2003 namely to 'regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. The reliance on the decision of the Karnataka Electricity Regulatory Commission in the case of Rithwik Energy Generation Pvt Limited v KPTCL and Ors, besides not being binding upon the Commission, is entirely misplaced. In an appeal against the said order dated 23.12.2010 passed by the Karnataka Commission, the Hon'ble Tribunal was pleased to hold that the distribution licensee has to obtain the

consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission. Further, the judgment in the case of Tata Power Co. Ltd. v. Reliance Energy Ltd., (2009) 16 SCC 659 supports the case of PSPCL . The Hon'ble Supreme Court has specifically recognized the approval by the Appropriate Commission as a necessary requisite for giving effect to an Agreement: A generating company, if the liberalization and privatization policy is to be given effect to, must be held to be free to enter into an agreement and in particular long-term agreement with the distribution agency; terms and conditions of such an agreement, however, are not unregulated. Such an agreement is subject to grant of approval by the Commission. The Commission has a duty to check if the allocation of power is reasonable. If the terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency vis-à-vis the consumer, keeping in view its long-term need are not found to be reasonable, approval may not be granted. There is no delay on the part of PSPCL in obtaining the approval of PPA. There was no occasion prior to 22.12.2018 for PSPCL to procure power from UPCL since UPCL had diverted the power to third parties and hence, there was no requirement for PSPCL to file a Petition for approval before the Commission.

4.7 That it is not open for UPCL to selectively rely on the provisions of the PPA dated 29.09.2006. It cannot seek to claim fixed charges in terms of Article 4 of the PPA without giving effect to the Recitals of the PPA which specifically provide that the off take of power shall be subject to the approval of the Commission. As regards the selling of power to third

parties, PSPCL has no objection to the same provided that no monetary liability can be fastened upon PSPCL to the extent that UPCL is unable to sell the un-requisitioned power. There cannot be however any financial obligations on account of the above at this stage. The power procurement to be made by PSPCL has to be adjudged by the Commission on the twin benchmarks of the 'need for additional power' and whether the 'power purchase is economical in the prevalent circumstances', as provided in the Conduct of Business regulations, 2005. Accordingly, the Commission has to consider whether there is a requirement for procurement of power at the tariff terms and conditions determined by the Central Commission for the UPCL.

4.8 That the delay in the commissioning of the Plant has a direct impact on the tariff, which in turn is one of the factors to be considered by the Commission while ascertaining whether or not PSPCL should procure power from UPCL, as provided in the Conduct of Business Regulations, 2005 and the Power Procurement Regulations, 2012. Further, the PPA dated 29.09.2006 between PSPCL and UPCL has a specific clause to the effect that the legal conditions provided for in the Karnataka PPA are similar to the ones provided for in the present PPA. The Karnataka PPA which specifically provides that the enforceability of the PPA is subject to the approval of the Karnataka Commission shall be applicable to the present PPA as well. In any event, the recitals of the PPA dated 29.09.2006 provide that the Buyer shall be obligated to buy the power only after the approval has been granted by the Commission. It cannot waive (expressly or impliedly) the statutory requirement of obtaining an approval from the Commission. Since the said approval has a direct bearing on the

determination of the Annual Revenue Requirements of PSPCL, the said requirement cannot be waived by the parties.

5. PSPCL's Additional Submissions

5.1 The Commission vide order dated 02.12.2019 directed PSPCL to clarify its stand regarding need to procure electricity from UPCL. PSPCL submitted that there has been no supply of electricity by UPCL to PSPCL against the contracted capacity of 101.5 MW at any time till date. There has also been no demand much less an insistence by UPCL at any time before December, 2018 that PSPCL should file a petition before the Commission for grant of approval for the procurement of electricity from UPCL under the PPA.

5.2 That the power from the two generating units was envisaged to be evacuated through the 400 KV Line of Karnataka Power Transmission Corporation Limited at the Interconnection Point of the CTU (Power grid Corporation of India Limited) till the periphery of Punjab. The 400 KV KPTCL line was not ready until 12th September 2012. At the time when the 400 KV KPTCL Line was available, there was no determination of tariff by the Central Commission, provisional or final. The provisional tariff was decided by the Central Commission in its Order dated 24.12.2012 wherein it had been specifically held that the tariff so determined shall only become applicable/enforceable when the same is approved by the respective State Commissions. The final tariff order was thereafter passed by the Central Commission only on 20.02.2014. In the circumstances PSPCL did not proceed to schedule any power from UPCL and there was therefore, no occasion for PSPCL to file a petition before the Commission to grant approval for procurement of power.

5.3 That vide letter dated 7th January 2015, PSPCL had written to UPCL that scheduling of 10% share of power to Punjab was not possible due to non-execution of tripartite Agreement between KPTCL, UPCL and PSPCL and further, sought confirmation from UPCL that in case PSPCL wants to opt out of the PPA and surrender its share of power from the project, whether UPCL would agree to the same without any legal or financial liability on either party. The case of PSPCL is that the PPA dated 29.09.2006 will be valid and enforceable and can be implemented only upon the grant of the approval by the Commission as envisaged in section 86 (1) (b) of the Act read with Rule 8 of the Electricity Rules, 2005 and Regulation 46 of the Conduct of Business Regulations notified by the Commission. Till the grant of the approval by the Commission, there is no legal right on the part of UPCL to demand that PSPCL should schedule any part of the electricity generated by UPCL or pay any fixed charges or variable charges or any other amount from PSPCL in terms of the PPA.

5.4 That in the facts and circumstances as there were arrangements where under UPCL was utilizing the 101.5MW in respect of which it had entered into a PPA with PSPCL for supply to others and no part of it was being supplied to PSPCL, there was no occasion for PSPCL to approach the Commission prior to December, 2018. PSPCL has filed the petition without any delay i.e. immediately when the circumstances arose where UPCL began to insist on the enforcement of the PPA for supply of electricity to PSPCL and in the alternative, started claiming fixed charges w.e.f December, 2018. Prior to the above, UPCL had been supplying electricity to others and had not called upon PSPCL to pay any fixed charges or any other charges and admittedly, UPCL has not claimed any

such charges from the period from the date of the COD till December, 2018.

5.5 PSPCL filed the list of long term PPAs entered into by PSPCL with the generators in chronological order with the applicable tariff for the FY 2018-19, Merit Order for the period from December, 2018 till October, 2019 indicating the fixed and variable cost of the various generators incorporating the details of UPCL and Statement of per unit cost of the various generators supplying power to PSPCL for the period from December, 2018 till October, 2019 giving the fixed and variable cost details and incorporating the details of UPCL. PSPCL has submitted that in the case of generators situated outside the State of Punjab (such as UPCL) supplying electricity to PSPCL, there shall be an Inter State Transmission Charges ranging from 30 Paise to 40 Paise per unit and in terms of the above statements UPCL is one of the costliest power available with PSPCL, as on date. Further, in addition to the existing fixed costs which works out to Rs. 1.635/kWh as per the tariff order dated 27.06.2019 passed by the Central Commission, there shall be an increase in fixed cost on account of the installation of Flue Gas De-sulphurization Equipment, as approved by the Central Commission in its Order dated 20.11.2019 in Petition No. 346/MP/2018.

5.6 That as per the prevalent situation, there is surplus power available with PSPCL and several generating stations are being backed down and/or the power is being surrendered. The power is being surrendered from Thermal Power Stations on the basis of MOD (merit Order Dispatch). On July, 2019 the Committee appointed by PSPCL had reported on the demand and availability of power in the State of Punjab from the financial

year 2019-20 till 2035-36 and concluded that In view of surplus power available (in terms of Energy MUs) in most of the months of the year up to FY 2024-25, thus it may not be prudent to tie up any more power through long term power purchase except from upcoming plants considered in this scenario.

5.7 That as regards the proposal for setting up of a Supercritical Plant at Ropar, the same has also been dealt with in the Committee Report of July, 2019 and is primarily for the period post 2024-25 when the existing plant at Ropar (4 X 210 MW) is proposed to be de-commissioned. The conclusion reached by the Power Planning Committee in June, 2019 is that Capacity addition, which is required only in 2024-25, should be planned through commissioning of 1st unit & 2nd unit of Super Critical Thermal Plant (5 x 800 MW) at GGSSTP Ropar (after phasing out remaining 4 X 210 MW units at GGSSTP) in 2024-25 & other units in the subsequent years.

5.8 That PSPCL has submitted the Business Plan and Capital Investment Plan for MYT Control Period from FY 2020-21 to FY 2022-23 giving the relevant extract of the report is as under:

“In the upcoming control period, PSPCL is proposing capital investment for Phase-I (3X800 MW) of the project. The estimated Capital cost, Capitalized project cost (including IDC) has been estimated as Rs. 14,372.28 Crore and Cost of generation at 85% Plant Load Factor for the saleable energy with various other considerations and total levelized tariff has been worked out as Rs. 4.68/kWh. The tariff for the first year works out as Rs. 4.81/kWh (fixed cost of Rs. 2.13/kWh and variable cost of Rs. 2.68/kWh). The first unit will be commissioned in 52 months and second unit in 58 months

and third unit in 64 months from the zero date (as per CERC norms).”

In the circumstances, the point of time for consideration of the grant of approval to the procurement of power under the PPA by the Commission is December 2018 when PSPCL had filed the Petition immediately upon UPCL insisting on the sale to PSPCL. The need for procurement of power envisaged under Rule 8 of the Electricity Rules, 2005 is to be considered with reference to December 2018 and thereafter and not as on the date of signing of PPA, the COD of the units or any time prior to December 2018. The above factors i.e. the cost of the power procurement from UPCL, as well as the necessity to procure power as on December 2018, may be considered by the Commission while considering the Petition filed by PSPCL.

6. UPCL’s submissions to the Additional Submission filed by PSPCL.

6.1 UPCL, replying to the additional affidavit filed by PSPCL, has submitted that PSPCL vide its Additional Affidavit dated 24.12.2019 has not sought to amend/change prayers made by it in the present Petition. PSPCL has merely reiterated its stand alongside placing on record a few additional documents in support of its contentions.

6.2 That PSPCL’s contentions in its Additional Affidavit dated 24.12.2019 are a blatant abuse of process of the Commission and an erroneous attempt to escape its obligations under the PPA. The tariff orders dated 16.07.2012, 10.04.2013 and 22.08.2014 issued by the Commission testify that PSPCL has been filing petitions which included the present PPA as part of PSPCL’s proposed procurement plan. The aforesaid tariff orders

have considered and approved transmission charges payable for procurement of power from Udupi Power as per the Point of Connection rates applicable under the CERC (Sharing of Inter State Transmission Charges and Losses) Regulation, 2010 and these orders have attained finality.

6.3 That having included the PPA with Udupi Power before the Commission during the Power Procurement Approval proceedings; and having participated before the CERC in tariff determination proceedings for Udupi Power's power plant, PSPCL now cannot be allowed to reprobate from this position as an afterthought. A party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. In this regard, Udupi Power has relied upon the judgments in case of *Suzuki Parasrampuriah Suitings Private Ltd. vs. Official Liquidator of Mahendra Petrochemicals Limited* (2018) 10 SCC 707 and *Joint Action Committee of Airline Pilots' Association of India vs. Director General Association of India* (2011) 5 SCC 435

6.4 That PSPCL's contention that PPA is a contingent contract and is not enforceable unless the Commission approves the same, is untenable, misplaced and erroneous. Once the parties have entered into a PPA, PSPCL cannot now approach the Commission after unjustified and unreasonable delay of 12 years and show its unwillingness to perform its obligations under the same. PPA is a statutory contract and its sanctity ought to be maintained throughout the contracted period. It is a settled position of law that parties are bound to discharge their respective obligations under the PPA, irrespective of the date of approval of the PPA. In this regard, UPCL has relied upon the judgment in case of *M/s. Hinduja*

National Power Corporation Limited vs. APERC & Ors. Appeal No. 41 of 2018, M/s. DB Power Limited vs. RERC in Appeal Nos. 191 and 295 of 2015, Order of Karnataka Electricity Regulatory Commission dated 23.12.2010 in Rithwik Energy Generation Pvt. Ltd. vs. KPTCL & Ors. (O.P. No. 29/2009) which was further upheld by the Hon'ble Tribunal in its judgment dated 21.10.2011 in Appeal No. 51 of 2011 reported as SCC On Line APTEL 163 and the Hon'ble Supreme Court in its judgment dated 06.02.2018 in Civil Appeal No. 5084-85 of 2015 reported as 2018 SCC On Line SC 205.

6.5 That a perusal of the list of PPAs submitted by PSPCL on 15.02.2019, 26.03.2019 and 24.12.2019 before the Commission, makes it evident that PSPCL has been procuring its share of power from different power projects from the respective date of their commercial operation ("CoD") irrespective of whether those PPAs were approved by the Commission. It is relevant in this regard that out of a total of 70 PPAs listed in PSPCL's Affidavit dated 26.03.2019:-

- (i) 65 PPAs have not been approved by the Commission which includes 58 PPAs executed by PSPCL with Central Sector Projects.
- (ii) In 67 PPAs, scheduling of power is stated to have occurred from the COD and in 3 DVC Projects scheduling of power occurred post COD.
- (iii) 45 of the PPAs under which power has been scheduled, the same took place post actual COD of Unit 1 of Udupi Power, i.e., 11.11.2010.

- (iv) Out of a total of 174 NRSE PPAs 81 PPAs have not been approved by the Commission. Yet power of unapproved PPAs is being scheduled by PSPCL.

6.6 That PSPCL has entered into various long-term PPAs for supply of power from different power producers and willfully held out promises and assurances of long-term commitment to off-take power at prudent tariff. Such PPAs under-pin finances of the central sector projects and projects of private generators. PSPCL has been scheduling power from different entities without/prior to the PPA being approved. As such, Udupi Power had a legitimate expectation that PSPCL would duly schedule its 10% share of power under the PPA. PSPCL has singled out Udupi Power to not schedule power and pay for deemed generation. Such conduct on the part of PSPCL is arbitrary, mala fide, unreasonable and unlawful. By acting in complete defiance of the settled position of law, PSPCL now seeks to cover up for its failures by filing the present petition after over 12 years of signing the PPA with Udupi Power, commending for its rejection. This defeats the legitimate expectation of Udupi Power to be protected against violations of regulatory consistency and certainty. In this regard, UPCL has relied upon the judgment of the Hon'ble Tribunal in case of *Gujarat Urja Vikas Nigam Limited vs. Gujarat Electricity Regulatory Commission*, 2014 SCC OnLine APTEL 168 and *M/s. Hinduja National Power Corporation Limited vs. APERC & Ors. Appeal No. 41 of 2018*.

6.7 That it was the sole responsibility of PSPCL to place the PPA for approval before the Commission. Under the scheme of the Act, PSPCL being the Distribution Licensee ("*Discom*") is responsible for placing the PPA for approval before the Appropriate Commission, and the generator

(Udupi Power herein) is obligated to get the tariff approved. The Act confers distinct responsibilities on the contracting parties, and one cannot be made liable for the default of another. In this regard, UPCL has relied upon the recital to the PPA, the judgment of the Hon'ble Supreme Court in case of *B.K. Muniraju vs. State of Karnataka*, (2008) 4 SCC 451 and *Hindustan Shipyard Ltd. vs. State of A.P.*, (2000) 6 SCC 579 alongwith article 2.A.4.1 and article 12.2 of the PPA.

6.8 That Udupi Power has consistently endeavored to give full effect to the terms of the PPA. Repeated attempts and requests since 30.07.2007 were made by Udupi Power (including erstwhile Nagarjuna Power Co. Ltd.) to PSPCL (including erstwhile Punjab State Electricity Board) in order to execute Transmission Service Agreement (“TSA”) and Bulk Power Transmission Agreement (“BPTA”) with Karnataka Power Transmission Co. Ltd. and Power Grid Corporation of India (“PGCIL”) to enable scheduling of power to PSPCL. PSPCL willingly entered into the PPA with Udupi Power and assumed the implications of not fulfilling its obligations thereof. PSPCL’s communications and continuous conduct amounts to acquiescence by conduct recognizing the binding obligations under the PPA and has relied upon the judgment of the Hon'ble Supreme Court in *Kanchan Udyog Limited vs. United Spirits Limited* [(2017) 8 SCC 237].

6.9 That the power surplus situation in the state of Punjab is PSPCL’s making. PSPCL’s claim that the PPA should not be approved considering Udupi Power’s position in the Merit Order stack is an afterthought, misplaced and ought to be rejected. It is relevant in this regard that:-

- (a) Udupi Power entered the PPA with PSPCL on 29.09.2006 for a tenure of 25 years.

- (b) After signing PPA with Udupi Power, PSPCL: -
- (i) Signed 35 PPAs aggregating to a contracted capacity of more than 8311 MW out of 9376.77 MW (89%) [i.e. total contracted capacity of long-term PPAs entered by PSPCL with Central Sector/IPP projects].
 - (ii) Signed 130 PPAs with non-conventional generating stations for procurement of 1191.97 MW of power.
 - (iii) Signed 19 PPAs with non-conventional generating stations [upcoming PPAs under New & Renewable Sources of Energy (“NRSE”) Policy, 2006] for procurement of 360.29 MW of power.
- (c) Power surplus situation is a result of PSPCL’s own lack of due diligence culminating in errors of omission and commission. PSPCL cannot use the power surplus situation or Udupi Power’s current standing in the merit order list, as an excuse to wriggle out of its obligations under the PPA with Udupi Power. Diligent and prudent conduct of procurers is to be considered at the time of signing of the PPA. In this context, the procurer is expected to factor the demand supply projection as on the date of the signing of PPA. In any case, in the present scenario, PSPCL has the obligation to pay capacity charges to Udupi Power towards power not availed under the PPA.
- (d) Further, as per report dated 11.07.2019 published in Times of India article, PSPCL has recently proposed to increase 4100 MW of generation capacity and other PPAs for long term supply for the same. This lays substantive evidence to the fact that PSPCL is

merely making an effort to wriggle out of its obligations under the present PPA in the garb of highlighting public interest.

- (e) That the conduct of PSPCL was bound to lead to grave financial losses to the generator such as Udupi Power that have invested in the project on the basis of the PPA executed with PSPCL. PSPCL must therefore, be estopped from refusing to honor its obligations under the Udupi Power PPA. In this regard, Udupi Power has relied on the judgment of Supreme Court in *Manuelsons Hotels (P) Ltd. vs. State of Kerala*, (2016) 6 SCC 766 and has further referred to the judgments in case of *N Birendra Singh vs. Priyokumar Singh* (2006) 9 SCC 650 and *M.C. Mehta vs. Kamal Nath and others* AIR 2000 SC 1997 and has requested the Commission to reject to contentions of PSPCL in its additional affidavit dated 24.12.2019 and to approve the PPA.

7. Submissions of PSPCL to the affidavit dated 28.02.2020 filed by UPCL

PSPCL replying to the submissions, made by UPCL in its affidavit dated 28.02.2020, regarding the maintainability of the petition, approbation and reprobation by PSPCL, obligation of PSPCL to comply with its obligation under the PPA irrespective of its approval by the Commission, responsibility of PSPCL to get the tariff approved from the Commission, procurement of power by PSPCL from different power projects irrespective of whether the PPA's were approved by the Commission, conduct of PSPCL amounting to waiver and acquiescence and the surplus situation of the power in Punjab is PSPCL's own making, has reiterated its earlier submissions in support of its contentions. PSPCL has further submitted

that:

- i) The Commission has not granted approval for the power procurement from the Udipi Thermal power project as per Section 86 (1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005, by virtue of consideration of the matter in the Tariff Order dated 16.07.2012, 10.04.2013 and 22.08.2014. The above tariff orders have only referred to the provisional approval of the projected purchase by PSPCL from the new power plants. Regulation 46 of the PSERC (Conduct of Business) Regulation, 2005 provides that the Commission shall consider the power procurement in terms of the objective of least cost purchase and need for additional power and further, specifically the requirement of the Commission to consider the merits of the power purchase. Therefore no approval has been granted by the Commission in terms of the Section 86(1)(b) of the Electricity Act, 2003 as read with Electricity Rules, 2005.
- ii) That PSPCL is not attempting to approbate and reprobate. It has always been the case of PSPCL that the PPA shall become effective and enforceable, subject to the approval by the Commission. The Central Commission in its order dated 24.12.2012 and 20.02.2014 itself provide that the tariff is payable only subject to the approval of the State Commission and now it is not open to UPCL to contend otherwise.
- iii) That the approval by the appropriate Commission is a necessary requisite for giving effect to an agreement and PSPCL has relied upon the judgment of the Hon'ble Supreme Court in case of Tata

Power Co. Ltd. Vs. Reliance Energy Ltd. (2009) 16 SCC 659, Rithwik Energy Generation Pvt. Ltd. Vs. Karnataka Power Transmission Corp. Ltd. and Ors 2011 ELR (APTEL) 1651, Hinduja National Power Corporation Limited Vs. Andhra Pradesh Electricity Regulatory Commission and Ors. in Appeal No. 41 of 2018 before the Hon'ble APTEL. The obligation of PSPCL to schedule the power and pay the transmission charges as per the provisions of the PPA would arise only after the Commission decides on the sanction to be given for such procurement from Udupi power as envisaged under section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005.

- iv) That it has been settled by the Hon'ble APTEL in various judgments that it is open to either of the parties i.e. the generator and / or the procurers to approach the state Commission to get the requisite approval under Section 86(1)(b) of the Act. and PSPCL has relied upon the judgment dated 26.07.2011 in Appeal 126 of 2010 in the case of Raghu Rama Renewable Energy Limited Vs. Tamil Nadu Electricity Board and ors. and judgment dated 11.10.2018 in Appeal No. 194 of 2016 in the case of PSPCL Vs. EPPL. The inference sought to be drawn by UPCL from Article 2A.4.1 and 12.2 of the PPA that it was the sole responsibility of PSPCL to get the PPA approved is misplaced. The provision 2A and 4A deal with approvals/permits to be procured by the Buyers in respect of the evacuation of Electricity and not otherwise.
- v) That it is incorrect that PSPCL has been scheduling power from others without the approval of the Commission. Prior to the

enactment of the PSERC (Conduct of Business), Regulation, 2005 there was no requirement for PSPCL to get specific approval from the Commission in respect of its power procurement. Therefore, only the PPAs entered into after 7.03.2005 are subject to the approval of the Commission. Insofar as the Central Public Sector undertakings are concerned, the PPAs entered into, are pursuant to the allocation done by the Central Government. PSPCL is a deemed allocatee of the power from the Central Public Sector units and the same do not require a specific approval from the Commission. As regards the Non-conventional/renewable generators, the Commission, has from time to time taking cognizance of the RPO obligations of PSPCL and has been granting approval in respect of the non-conventional / renewable sources of power. PSPCL has filed petition for seeking approval in respect of the various conventional / Non-conventional generators which are pending before the Commission. Udipi power cannot rely on the fact that power from other generators were scheduled and, therefore, they should also get the same benefit without obtaining the requisite approval. There can be no legitimate expectation contrary to the terms of the PPA, the PSERC Regulations, Orders of the Central Commission as well as provisions of the Electricity Act, 2003. In this regard, PSPCL has referred to the judgments in case of *Coromandel Fertilizers V. Union of India and ors.* 1984 (Supp) SCC 457, *Union of India and Others V. M.K. Sarkar* 2010 (2) SCC 59 and *Chandigarh Admn. V. Jagjit Singh* (1995) 1 SCC 745.

vi) PSPCL has neither scheduled nor availed any power from Udupi thermal power station. Therefore, there has not been any waiver by conduct or acquiescence as alleged by Udupi power. Moreover, the said approval has a direct bearing on the determination of the Annual Revenue Requirement of PSPCL and therefore the parties cannot waive the statutory requirement of obtaining approval from the Commission. PSPCL has also referred in this regard the judgment in case of All India Power Engineer Federation V. Sasan Power Ltd. (2017) 1 SCC 487. PSPCL further submitted that there had been no waiver by PSPCL nor the PPA has been amended to waive of the requirement to obtain the approval from the Commission.

vii) That the power purchase and procurement is always planned on the basis of projection of demand by the consumers. The PPAs are entered into from time to time based on such projection and power procurement planning. These include consideration of the growth in the demand expected relevant to various consumer categories particularly the industrial, commercial etc. as there have been instances of re-patriation of the consumers from the Distribution Licensee to open access, captive generation etc. It is therefore baseless on the part of Udupi Power to allege that the surplus situation which had arisen is a deliberated move on the part of PSPCL.

8. Observations and Decision of the Commission.

The Commission has carefully gone through the petition, reply thereto by UPCL, rejoinder by PSPCL, additional affidavits, pleadings/arguments,

judgments and additional documents/submissions adduced by the parties.

The main issues which emerge are as under:

- A. Whether there is delay on the part of PSPCL in obtaining approval of the PPA by the Commission,
 - B. Whether the PPA is enforceable/binding on the parties without the Commission's approval thereof,
 - C. Whether shifting of stand by PSPCL would negate the requirement of approval of PPA by the Commission,
 - D. Whether the approval of the Commission for the purchase of power from UPCL project in the Tariff Orders of PSPCL tantamount to approval of the PPA,
 - E. Whether scheduling of power from other projects for which PPAs have not been formally approved by the PSERC entitles PSPCL to draw power from UPCL project without the approval of the Commission,
 - F. Whether various communications by PSPCL amount to acquiescence by way of conduct of PSPCL,
 - G. Whether there is a requirement of power by PSPCL and the rate of power is economical.
- A. Whether there is delay on the part of PSPCL in obtaining approval of the PPA by the Commission

UPCL has submitted that PSPCL being the Distribution Licensee, is responsible for placing the PPA for approval before the Commission as per the distinct responsibilities conferred upon the contracting parties. PSPCL has defaulted in not applying for the approval of the PPA by this Commission under Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005. UPCL further submitted that the provisions of PPA are to be read along with the recitals. Recital (v) envisages that PPA was made subject to the approval of the Commission. Further Article 2.A.4.1 of

the PPA makes PSPCL liable to obtain and maintain the necessary legal approvals required under the law. Article 2.A.4.1 of the PPA provides as here under:

“2.A.4.1. ...The Buyer shall, at its expense,(III) obtain and maintain in effect, from the appropriate legal authority, all legal approvals required by law to be procured by the Buyer for evacuation of electricity.”

Further, Article 12.2 of the PPA spells out the representations and warranties by the buyer i.e. PSPCL which inter alia include: (i) fulfillment of all legal actions required to authorize execution, delivery and performance by the buyer and, (ii) an assurance that the agreement constitutes a valid, legal and binding obligation of the buyer and is enforceable in accordance with the terms of PPA.

UPCL has submitted that in view of the above provisions in the PPA read along with recital, the obligation to obtain all legal/regulatory approvals including seeking approval of PPA from the Commission are solely cast upon PSPCL. PSPCL cannot frustrate the vested rights of UPCL after a delay of over 12 years of signing the PPA.

UPCL further submitted that it made several attempts to schedule the 10% share of power under the PPA to PSPCL. Repeated attempts since 30.07.2007 were made in order to execute the Transmission Service Agreement (TSA) and the Bulk Power Transmission Agreement (BPTA) with KPTCL and PGCIL to enable scheduling power to PSPCL. In Nov., 2010, PSPCL informed UPCL that it would wait for the completion of 400 kV evacuation system and will not avail power through 220 kV till then, without any financial and other liabilities, the latter being a costlier option.

On 23.08.2012, PSPCL was requested to execute the TSA with KPTCL, BPTA with PGCIL, establish payment security mechanism and to ensure issuance of dispatch instructions. In Nov., 2014, UPCL showed its concern to PSPCL and proposed to start scheduling of power to third parties. In Jan., 2015, PSPCL asked UPCL to waive legal or financial liabilities in case PSPCL opts out of PPA. Thereafter, vide letter dated 21.12.2015 in response to UPCL's letter dated 03.11.2015, wherein UPCL expressed its willingness to explore the possibility of diverting PSPCL's share to a third party for a period of three years with the consent of PSPCL without any liability on either side for sale of power to third party, PSPCL conveyed its acceptance for the same. UPCL clearly specified that its acceptance of PSPCL's proposal to sell power to third parties was an interim arrangement and the position was to be reviewed suitably after three years for commencement of supply to PSPCL in terms of the PPA. PSPCL in its submissions in petition no. 307/MP/2015 recorded in CERC Order dated 27.06.2016 did not give-up its right to 101.5 MW power and had submitted that PSPCL may consider scheduling the same after a period of two to three years. UPCL attributes the same as acquiescence by conduct on the part of PSPCL.

PSPCL has denied any failure on its part in applying for the approval of the Commission under Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005 at any time till Dec., 2018. PSPCL submitted that UPCL is misconstruing the prayer made by PSPCL. The occasion for filing the petition arose only in Dec., 2018 as till then UPCL was selling the 10% share out of the original 1015 MW to others. Such sale to others had occurred after PSPCL had informed UPCL of (a) the issue of Transmission Tripartite Agreement with KPTCL and Powergrid not materializing for the

intended Transmission Line; and (b) the cost of the power for PSPCL was high. PSPCL submitted that it is bound by the terms and conditions of the PPA to procure its share of power from the project, subject to the grant of approval by the Commission and not before that. There is no camouflage by PSPCL. It is the duty of PSPCL to place on record the materials for consideration of the Commission in regard to the competitive pricing of the purchase of power from UPCL. PSPCL submitted that it is for the Commission to consider the approval of the power purchase under the PPA after taking into consideration all the relevant factors. The cost of the power, the Merit Order as well as the per unit Cost (including Transmission Charges) are valid considerations to be adjudged by the Commission to decide the need for additional power and whether the power purchase is economical in the prevalent circumstances in terms of the Electricity Act, 2003 and relevant PSERC Regulations. The Commission has to consider whether there is a requirement for procurement of power at the tariff determined by CERC. In this regard, Hon'ble APTEL's Judgment dated 04.09.2012 in Appeal No. 94 of 2012 in the case of BSES Rajdhani Power Ltd. vs. DERC and Ors. wherein the role of the State Commission was provided as under:

“46. The role of the State Commission is only to decide whether the Power Purchase Agreement to be entered into between the NTPC and the Distribution Company for purchase of Electricity from NTPC Stations at the tariff determined by the Central Commission has to be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State.”

PSPCL has contended that the grant of approval of the power purchase from UPCL has to be considered with reference to the situation

prevalent in Dec., 2018 when the petition was filed on the insistence of UPCL and not as on the date of signing of PPA, the COD of the units or any time prior to Dec., 2018. PSPCL further submitted that sub-clause (6.a) of Regulation 46 of the PSERC Conduct of Business Regulations, 2005 reads as under:

“a. The Distribution Licensee shall satisfy the Commission that the electricity procured under long term power purchase otherwise than through a competitive bidding process or any short term power purchase is economical in the prevalent circumstances and that the Distribution Licensee has made prudent and best efforts to minimise the cost of purchase.”

PSPCL has stated that if UPCL intended to implement the PPA at the time when CERC determined the tariff in the year 2012 or 2014, UPCL should have either specifically called upon PSPCL to apply for the approval of the PPA or itself could have filed an application for such approval. UPCL did not do so. PSPCL referred to various orders of the Hon'ble APTEL where it has been held that it is open to either of the parties i.e. the Generator and/or the Procurer to approach the State Commission to get the requisite approval under Section 86(1)(b) of the Act. In this regard, PSPCL has referred to the following Judgments:

- a) Judgment dated 26.07.2011 in Appeal No. 126 of 2010 in the case of Raghu Rama Renewable Energy Ltd. vs. Tamil Nadu Electricity Board and Ors;
- b) Judgment dated 11.10.2018 in Appeal No. 194 of 2016 in the case of PSPCL vs. Everest Power Pvt. Ltd; and
- c) Judgment dated 07.01.2020 passed by Hon'ble APTEL in Appeal No. 41 of 2018 in the case of Hinduja National Power Corporation Limited vs. Andhra Pradesh Electricity Regulatory Commission and Ors.

According to PSPCL, the inference sought by UPCL from Article '2.A.4.1 – Permits and Approval' and 12.2 of the PPA, namely that it was the sole responsibility of the Buyer/PSPCL to get the PPA approved, is misplaced. The said provision deals with the approvals/permits, to be procured by the buyer, in respect of the evacuation of electricity and not otherwise. There is no stipulation that it is the sole responsibility of buyer/PSPCL to procure the approval from the Commission under Section 86 (1)(b) of the Act. All these permits relate to the pre-operation period, as is evident from the Heading – '2.A.4 – Pre-Operation Period'. At no instance, prior to the commissioning and/or till Dec., 2018 did UPCL call upon PSPCL to obtain the approval from the Commission. Further, Article 12.2 (c) of the PPA dealing with the representation and warranties by the buyer, expressly stipulates that 'This Agreement constitutes a valid, legal and binding obligation of the Buyer, enforceable in accordance with the terms thereof...' which includes within its fold the approval from the Commission.

PSPCL further submitted that the reliance placed by UPCL on the Order dated 27.06.2016 passed by CERC in petition no. 307/MP/2015 relating to Mega Power benefits available to UPCL is misplaced. In para 16 of the said order, CERC had proceeded on the basis that '*At the end of three years, the petitioner shall place on record the status of contractual agreement with PSPCL in order to enable the Commission to take a view in the matter*'. The said statement is consistent with PSPCL's stand that the PPA remains valid but the rights and obligations may become enforceable in the future.

Commission's Analysis

The PPA between PSPCL (erstwhile PSEB) and UPCL (erstwhile Nagarjuna Power Corporation Ltd.) was signed on 29.09.2006. The first Unit was commissioned on 11.11.2010 after a delay of 9 months and the second Unit on 19.08.2012 after a delay of 26 months. UPCL vide affidavit dated 05.03.2019 placed on record inter-se communication between the parties including the letter dated 08.11.2020 from PSPCL to UPCL. Vide letter dated 08.11.2010, PSPCL had informed UPCL that the 400 kV line to be constructed by KPTCL to the nearest PGCIL's substation was not complete and that the transmission charges for the alternative 220 kV route suggested by KPTCL appeared to be high. Further that the transmission losses of 4.3 % on 220 kV route as envisaged in the draft BPTA would be payable over and above what PSPCL will be required to pay if power evacuation is done directly on 400 kV line and this will be a direct loss of 4.3 % of the power allocated to PSPCL. Under the circumstances, PSPCL informed UPCL that it would like to wait for the completion of 400 kV evacuation system for scheduling the power from UPCL plant and further clarified that this would be without any financial and other liability to PSPCL. The 400 kV KPTCL transmission line was commissioned in September, 2012. CERC determined the preliminary tariff vide Order dated 24.12.2012 and the final tariff vide Order dated 20.02.2014. UPCL on 16.05.2014 requested PSPCL to execute Escrow agreement and Deed of Hypothecation and enter into Transmission Service Agreement (TSA) and start scheduling its share of power from the project. Subsequently vide letter dated 20.06.2014, UPCL informing PSPCL that more power is needed in Southern Region due to shortfall in generation and energy procurers are seeking power,

requested PSPCL to confirm whether it is scheduling 101.5 MW power or otherwise. Further, vide letter dated 05.11.2014, UPCL again requested PSPCL to enter into the TSA, operationalize Escrow Accounts and schedule its share of power. PSPCL on 07.01.2015 requested for the consent of UPCL to waive legal or financial liabilities in case PSPCL opts out of PPA and surrenders its share of power from this project. UPCL vide letter dated 03.11.2015 informed PSPCL that while keeping the PPA valid, UPCL is willing to explore the possibility of diverting PSPCL share of 101.5 MW power to a third party for a period of three years with the consent of PSPCL without any liability on either side and that this position could be reviewed thereafter for commencement of supply of power to PSPCL and requested PSPCL to consent to the said proposal at the earliest. PSPCL vide letter dated 21.12.2015 conveyed its acceptance of the same to UPCL. It has been brought out that consequently PSPCL's share of power was sold to third parties till December 2018. It is the case of PSPCL that there was no occasion prior to December, 2018 for it to approach the Commission to seek approval for the PPA under Section 86(1)(b) of the Electricity Act, 2003 when UPCL on 24.09.2018 requested PSPCL to start scheduling 101.5 MW w.e.f. 22.12.2018.

The final tariff was determined by CERC in February 2014. Any attempt by PSPCL to seek approval of the PPA under the Section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 would not have fructified as no firm tariff was available till the same was finally determined by CERC in February 2014. Technically PSPCL could not have filed the petition for approval of the PPA under the Section 86(1)(b) of the Electricity Act, 2003 read

with Rule 8 of the Electricity Rules, 2005 till the firm tariff was available since the statutory approval under Section 86(1)(b) of the Act could not have been granted by the Commission without looking at the rate at which power was to be procured. Thereafter, PSPCL informed UPCL of its desire to opt out of the PPA and from December, 2015 to December, 2018 the parties mutually agreed to a proposal to sell PSPCL's share of power to third parties. The proposal was apparently mutually beneficial to both the parties therefore both agreed to that course of action. On the refusal of UPCL to continue with the same arrangement from December 2018, PSPCL filed the petition for approval under Section 86(1)(b). Had UPCL wanted to supply power to PSPCL prior to that, on refusal by PSPCL, it could have sought legal remedy under the law of the land as various options were available to it. When PSPCL did not seek approval of this Commission after the tariff was decided by CERC in February 2014, if aggrieved by the same, UPCL could/should have filed an application in 2014 itself for redressal of its grievance, if any. UPCL was in constant touch with PSPCL at all times. After responding to PSPCL's request for opting out of the PPA, by offering and seeking approval of PSPCL to sell its share of power to a third party and to review the PPA after 3 years and then implementing the same, UPCL has acquiesced to PSPCL's proposal. Under the circumstances, in the opinion of the Commission, UPCL having acquiesced to PSPCL's proposals from time to time, it cannot now allege default on the part of PSPCL in this matter. UPCL could have approached the Commission at any time if it was not in agreement with PSPCL.

B. Whether the PPA is enforceable/binding on the parties without the Commission's approval thereof

As per submissions of PSPCL, the PPA dated 29.09.2006 is required to be approved by the Commission as per Section 86(1)(b) of the Electricity

Act, 2003 read with Rule 8 of the Electricity Rules, 2005 and Regulation 46 of the PSERC (Conduct of Business) Regulations, 2005. Rule 8 of the Electricity Rules, 2005 provides that though the Tariff is determined by CERC, however, the State Commission may determine whether a distribution licensee in the State should enter into a PPA. The parties have specifically agreed on the enforceability and effectiveness of the PPA only upon the approval granted by the Commission. In this regard, Recital (v) of the PPA provides as under:

“(v) The Seller has offered to sell Electricity generated by the facility, corresponding to 10 (ten) percent of the Gross Capacity, to the Buyer and the Buyer has agreed to purchase the same subject to the provisions of Electricity Act 2003, and approval of Commission and the terms and condition, set out herein. The Seller has signed the Power Purchase Agreement for sale of the balance of the Gross capacity to the Five Escoms of Karnataka.”

As such, the PPA being a contingent contract is not enforceable by either party prior to approval of the Commission.

UPCL has contended that the PPA is a statutory contract and its sanctity ought to be maintained throughout the contracted period. The parties are bound to discharge their respective obligations under the PPA, irrespective of the date of approval by the Commission of the PPA. UPCL counsel stated that the contentions of PSPCL that the PPA is a contingent contract and is not enforceable unless this Commission approves it, is untenable. Once, PSPCL entered into the PPA in the year 2006 and it cannot now approach the Commission after a delay of 12 years and express its unwillingness to perform its obligations under the PPA. UPCL has placed reliance on Hon'ble APTEL's Judgment dated 07.01.2020 in M/s Hinduja National Power Corporation Ltd. vs. APERC and Ors., wherein

it was held that the PPAs prior to the approval of the State Commissions are not inchoate or incomplete Agreements. Further, UPCL has placed reliance on the Hon'ble APTEL's Judgment dated 02.02.2018 in M/s DB Power Ltd. vs. RERC, wherein it was held that once the preliminary approvals are granted and the PPAs are produced for final approval for the appropriate Commission, then the parties must honour the PPAs. UPCL has further submitted that in the KERC Order dated 23.12.2010 in Rithwik Energy Generation Pvt. Ltd. vs KPTCL and Ors., it was held that non approval of PPA will not affect validity of the agreement since the same binds the parties till the Commission specifically refuses to approve it. UPCL has stated that this Order was upheld by Hon'ble APTEL in its Judgment dated 21.10.2011 in Appeal No. 51 of 2011 and the Hon'ble Supreme Court of India in its Judgment dated 06.02.2018 in Civil Appeal No. 5084-85 of 2015.

In reply, PSPCL has submitted that in exercise of its powers under the Electricity Act and the Conduct of Business Regulations, 2005, the Commission is required to decide whether PSPCL should or should not procure the power at the tariff even when such tariff is determined by CERC under Section 79 of the Act. The PPA, unless approved by the Commission, would not be a valid or an enforceable contract without the approval of the Commission. In the Hinduja case, which refers to an inchoate or incomplete Agreement, the finding of Hon'ble APTEL was in the context of the contention raised by the AP Discoms, that power procurement was only in the nature of an offer/proposal and not a complete Agreement. The above contention of the AP Discoms was negated by Hon'ble APTEL. The said findings are not applicable to the PPA dated

29.09.2006 which specifically provides that it would become an effective concluded contractual agreement only when it is approved by the Commission. PSPCL has further submitted that UPCL's reliance on the judgment dated 02.02.2018 passed by Hon'ble APTEL in the case of DB Power Limited v RERC and Ors, is misplaced. In the said case, the Draft PPA had been duly approved by the State Commission in exercise of its powers under Section 63 of the Electricity Act, 2003. In the present case, the tariff determination is under Section 62 of the Act and after the tariff determination by CERC, the PPA is required to be approved by the Commission. PSPCL has also placed reliance on the Hon'ble APTEL's Judgment in the Rithwik case highlighting para 10.5, which is brought out here under:

“10.5. In view of above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Reform Act and Section 86(b) of the 2003 Act.....”

PSPCL has submitted that Hon'ble APTEL set aside the decision of KERC in Rithwik case on the specific aspect that non approval by the State Commission does not affect the validity of the PPA. PSPCL has contended that apart from the Orders of CERC dated 24.12.2012 and 20.02.2014 in Petition No. 160/GT/ 2012 specific to UPCL, the contention that the approval of the appropriate Commission is a necessary requisite for giving effect to the agreement has been reiterated in the Judgment of Hon'ble Supreme Court of India in the case of Tata Power Co. Ltd. vs. Reliance

Energy Ltd. (2009) 16 SCC 659, Judgment passed by Hon'ble APTEL in the Rithwik case 2011 ELR (APTEL) 1651 and Judgment dated 07.01.2020 passed by Hon'ble APTEL in the Hinduja case (Appeal No. 41 of 2018).

PSPCL has further submitted that the PPA has a specific clause that the legal conditions provided for in the Karnataka PPA are similar to the one provided in the PPA. Article 2.1 (c) of the PPA with PSPCL provides as here under:

“2.1(c). All technical, commercial, legal and other terms and conditions of this agreement are similar to the agreement signed between the seller and the five Escoms in Karnataka.....”

Further, Clause 14.2 of the PPA with Karnataka Escoms provides as under:

“14.2 This Agreement shall come into force only after approval of the GoK and the Commission and till then this Agreement is not legally enforceable against either by the Parties.”

As such, the clause in the Karnataka PPA which specifically provides that the enforceability of the PPA is subject to approval of Karnataka Commission, shall be applicable mutatis mutandis to the present PPA. The recital to the PPA with PSPCL provide that buyer shall be obligated to buy the power only after the approval has been granted by the Commission.

Commission's Analysis

Considering the submissions of both the parties including the case laws relied upon, the Commission is of the view that the PPA will come into effect only after obtaining the approval of the Commission under Section 86(1)(b) of the Act, wherein the Commission is mandated to approve electricity purchase and procurement process

of distribution licensee including the price at which electricity shall be procured from the UPCL project. PSPCL could not have scheduled power under the PPA without obtaining the prior specific approval of the Commission. The facts in the Hinduja case as well as DB Power Ltd. are different.

In the Hinduja case, the parties agreed to continue the amended and restated PPA with modifications and had a consensus that tariff will be as determined by the State Commission. The continuation agreement was considered concluded subject to the approval of the State Commission. It is not the case of PSPCL that the PPA is incomplete or inchoate. PSPCL's case is that the PPA is enforceable after the approval of the Commission.

The DB power case is a competitive bidding case where tariff determination was under Section 63 of the Act and tariff adopted was to be inserted in the draft PPA already approved, whereas in the present case the tariff determination has been under Section 62 of the Act and the PPA is required to be approved by the Commission in terms of Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005. In the said case, it was held that statutory power exercised by the Commission under the Act cannot be scrapped or revisited resulting into sole disadvantage to generators/suppliers. In the instant case the Commission is yet to exercise its statutory power under Section 86(1)(b) of the Act.

The decision of KERC in Rithwik case was set aside by Hon'ble APTEL on the specific aspect that non approval by the State

Commission does not affect the validity of the PPA. Hon'ble APTEL in its Judgment dated 21.10.2011 had held as under:

“.....

10.5. In view of above, the distribution licensee has to obtain the consent of the State Commission for procurement of power against the PPA. Unless the State Commission gives its consent to the PPA, the distribution licensee cannot procure power under the PPA. Thus, the PPA will come into effect only after obtaining the consent of the State Commission. If the consent is denied by the State Commission, the PPA shall become void as per Section 25(3) of the Karnataka Reform Act and Section 86(b) of the 2003 Act.....”

PSPCL has relied upon the Judgment of Hon'ble Supreme Court of India in the case of Tata Power Co. Ltd. vs. Reliance Energy Ltd., which specially recognizes the approval by the Commission as a necessary requisite for giving effect to an agreement.

As provided in the Recital (v) of the PPA, specific approval of the PSERC to the PPA is required in the instant matter. To that extent it is a contingent contract. Therefore, PSPCL could not have scheduled any power from the project till it had the specific approval of the Commission under section 86 of the Act. Various Authorities have repeatedly held that it is the duty of the Commission to check if the allocation of power, terms and conditions relating to quantity, price, mode of supply, the need of the distributing agency viz-a-viz the consumer are reasonable, keeping in view long term requirement. Otherwise approval may not be granted. Also it has been held that the State Commission will decide whether the PPA entered into between the generator and the distribution companies at the tariff determined

by CERC shall be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper rate or in a more economical manner.

Hence, the Commission holds that in the instant case, the PPA would come into effect only after approval in terms of Section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 is granted by the Commission.

C. Whether shifting of stand by PSPCL would negate the requirement of approval of PPA by the Commission

UPCL has contended that PSPCL participated in the tariff determination proceedings held by CERC and now cannot reprobate from this position as an afterthought. The Hon'ble Supreme Court of India in the case of Suzuki Parasrampuriah Suitings Pvt. Ltd. vs. Official Liquidator of Mahendra Petrochemicals Ltd. (2018) 10 SCC 707, held that a party cannot be permitted to approbate and reprobate on the same facts and take inconsistent shifting stands. The Hon'ble Supreme Court of India in the case of Joint Action Committee of Airline Pilots Association of India vs. Director General Association of India (2011) 5 SCC 435, held that taking inconsistent pleas by a party makes its conduct far from satisfactory.

PSPCL has replied that its participation in the tariff determination/ approval process of UPCL before CERC would not constitute a binding obligation on the part of PSPCL to schedule power from UPCL. The Orders of CERC provide that the tariff is payable only subject to the approval of the State Commission and have attained finality insofar as these aspects are concerned, it is now not open to UPCL to contend otherwise. PSPCL has submitted that it is not attempting to approbate and re-appropriate as the

PPA shall become effective and enforceable after the approval by the Commission. The reliance on the decisions in the case of Suzuki Parasrampuriah Suitings Pvt. Ltd. and Joint Action Committee of Airline Pilots Association of India dealing with approbation/re-approbation, is therefore not relevant to the present proceedings.

Commission's Analysis

After signing the PPA with UPCL, PSPCL was required to seek approval for procurement of power at the approved tariff from this Commission. The tariff for the project was to be determined by CERC in the petition filed by UPCL, PSPCL being an interested party was obliged to attend the hearings held by CERC for determination of tariff of the project. CERC while determining the preliminary tariff in its Order dated 24.12.2012 held that the tariff of the generating station of the petitioner (UPCL) shall be determined by CERC in accordance with the 2009 Tariff Regulations and the State Commission will decide whether the PPA entered into between the generator and the distribution companies at the tariff determined by CERC shall be approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State. The relevant portion is extracted as here under:

“22. Therefore, it emerges from the above judgment that the tariff of the generating station of the petitioner shall be determined by this Commission in accordance with the 2009 Tariff Regulations. The State Commission will decide whether the PPA entered into between the generator and the distribution companies at the tariff determined by this Commission shall be

approved or not from the point of view of deciding whether the power can be procured from other sources at a cheaper or in a more economical manner to supply the same to the concerned State. It is to be noted that Article 14.2 of the PPA does not say that the PPA is not valid, but it predicates its enforceability on the approval by the State Commission. Therefore, the PPA can be considered for the purpose of tariff determination by this Commission to the extent it is permissible under the 2009 Tariff Regulations. However, the tariff so determined will come into effect only when the PPA is approved by the State Commission and the tariff determined by this Commission is adopted under Rule 8 of the Electricity Rules, 2005.”

The above was reiterated by CERC in its Order dated 20.02.2014 while determining the final tariff.

Now in this petition, PSPCL has come to the Commission under section 86(1)(b) of the Act read with Rule 8 of Electricity Rules and as required under the PPA, for consideration of grant of approval of the PPA wherein all the relevant data and facts have been placed before the Commission to help the Commission in taking an informed decision. In view of the above, there is no merit in the contention of UPCL that PSPCL has been shifting its stand.

D. Whether the approval of the Commission for the purchase of power from UPCL project in the Tariff Orders of PSPCL tantamount to approval of the PPA

UPCL contended that the petition is not maintainable since the PSERC has already approved the power purchase including 101.5 MW of power from UPCL and also approved transmission charges payable for procurement of power as per the point of connection rates applicable under relevant CERC Regulations vide Tariff Orders dated 16.07.2012,

10.04.2013 and 22.08.2014 for FY 2012-13, FY 2013-14 and FY 2014-15 respectively in the petitions filed by PSPCL as part of PSPCL's proposed procurement plan. PSPCL submitted that the Commission has not granted the approval for the power procurement from the Udupi Thermal Power Project under Section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005, in the Tariff Orders dated 16.07.2012 (FY 2012-13), 10.04.2013 (FY 2013-14) and 22.08.2014 (FY 2014-15). The reference in the tariff orders to the purchases were on a projected basis and cannot be treated as an approval that is required to be taken as per Section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005. The projections made in the tariff orders did not fructify in the financial years of FY 2012-13, FY 2013-14 & FY 2014-15 and no unit of power was actually procured, no deemed fixed charges or any other committed charges including transmission/PoC charges as applicable to long term PPAs was ever billed for by UPCL or otherwise paid by PSPCL. The obligation of PSPCL including to schedule the power and to pay the transmission charges as per the provisions of the PPA would arise only after the specific approval of the Commission. If the provisional approval in the Tariff Orders of the Commission is to be accepted as a final approval as required under the provisions of the Electricity Act and Rules, the rights and obligations of the respective parties would have become enforceable at that time, with UPCL being required to declare availability, PSPCL being required to schedule power and UPCL to claim tariff for the quantum of power made available to PSPCL. PSPCL has further submitted that Regulation 46 of the PSERC (Conduct of Business) Regulations, 2005 provides that the Commission shall consider the power procurement in terms of the objective of least cost purchase and the need for additional

power and further, the specific requirement that the Commission consider the merits of the power purchase envisaged.

PSPCL further submitted that there has been no supply of power by UPCL to PSPCL during FY 2012-13, FY 2013-14 and FY 2014-15. UPCL did not at that time proceed against PSPCL for enforcing the commencement of declaration and scheduling of power. UPCL utilized the 101.5 MW power to supply to other parties.

Commission's Analysis

Under Section 86(1)(b) of the Electricity Act, 2003, the Commission has been assigned the statutory function to regulate electricity purchase and procurement process of the distribution licensee including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State. The long term agreements for purchase of power (PPAs) like UPCL project are normally of 20/25 years tenure. The provisional approval of projections for procurement of power in the annual Tariff Orders for the distribution utility cannot be construed as approval of the PPA, as intended in Section 86(1)(b) of the Act. At the most it can be attributed as approval of projections of sources and quantity of purchase of power for one year. As regards the approval of variable charges and transmission/PoC charges for the UPCL project in the said Tariff Orders, the provisional approval was for the projected power procurement as a whole for PSPCL for that particular year. However, UPCL never declared availability nor did PSPCL schedule power from UPCL during FY 2012-13, FY 2013-14 and FY

2014-15. As such, no payment for the purchase of power was made by PSPCL to UPCL and no transmission/PoC charges were paid to PGCIL for transmission of UPCL power. Considering the above, the contentions of UPCL in this regard do not have any merit. The Commission holds that the specific approval of the Commission of the PPA under Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rule, 2005 was neither applied for nor granted in the instant matter.

E. Whether scheduling of power from other projects for which PPAs have not been formally approved by the PSERC entitles PSPCL to draw power from UPCL project without the approval of the Commission

UPCL has alleged that PSPCL has been procuring power from different power projects from the respective date of their commercial operation irrespective of whether those PPAs were approved by the Commission. UPCL submitted that as per the list submitted by PSPCL, 65 PPAs (including 58 PPAs with Central Sector Projects) out of 70 PPAs listed out by PSPCL are without the approval of the Commission and in 45 PPAs power has been scheduled post CoD of Unit-1 of UPCL project i.e. 11.11.2010. Similarly out of 174 Renewable Energy PPAs listed by PSPCL, 81 PPAs have not been approved by the Commission though power is being scheduled by PSPCL from such projects. UPCL submitted that therefore it had a legitimate expectation that PSPCL would duly schedule its 10% share of power under the PPA. PSPCL has singled out UPCL to not schedule power and pay for deemed generation. PSPCL has now unjustifiably after a period of over 12 years of signing the PPA with UPCL, sought approval of the PPA in this petition.

PSPCL has denied that it is scheduling power from other projects without the approval of the Commission and denied differential treatment to UPCL project. PSPCL has submitted that only the PPAs entered into after 07.03.2005 i.e. the enactment of PSERC (Conduct of Business) Regulations, 2005 are subject to the approval of the Commission. Insofar as the Central Public Sector Undertakings are concerned, the PPAs entered into are pursuant to the allocation done by the Central Government. The nature and status of the Central Government allocation has been recognized by CERC in its Order dated 09.03.2017 in the case of Kanti Bijlee Utpadan Nigam Ltd. vs. CTU and Ors. (Petition No. 20/MP/2017) as under:

“27..... Unless and until the allocation of power in favour of particular beneficiaries is rescinded by Ministry of Power, the PPAs shall subsist and the concerned beneficiaries shall be liable to comply with the provisions of the PPAs including their obligations to sign the LTA Agreement and liability to pay the transmission charges. The beneficiaries do not have any option to unilaterally abandon the PPAs and their obligations thereunder.”

Therefore, PSPCL is a deemed allocatee of the power from the Central Public Sector projects and the same do not require a specific approval from the Commission.

As far as the non-conventional/ renewable generators are concerned, the provisions of Section 86(1)(e) of the Electricity Act dealing with the Renewable Purchase Obligation provide for a minimum percentage of power to be procured from renewable sources of energy. The Commission has been taking cognizance of the RPO compliance of PSPCL from time to time. Therefore, the Commission has been granting approval in respect of the non-conventional/renewable sources of power.

PSPCL submitted that it has distinguished the UPCL case on the following grounds:

- a) It is specifically provided in the PPA with UPCL that the enforcement of the PPA is contingent upon the approval of the Commission under Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005 which was duly recognized by CERC in its tariff orders for UPCL.
- b) Till date power has not been scheduled by PSPCL from UPCL project and no benefit has accrued to PSPCL.

PSPCL submitted that the allegations made by UPCL are sweeping in nature and without considering the context and salient aspects. In the case of NPL, TSPL and GVK, specific approval of the Commission was taken. The cases of Sasan Power and Mundra (CGPL) are different and are pursuant to an international competitive bid for Ultra Mega Power projects and there has been continuous supply/scheduling of electricity from the said projects at economical prices.

PSPCL has filed petitions before the Commission seeking approval in respect of the various conventional/non-conventional generators and the same are pending before the Commission. UPCL cannot rely on the fact that power from other generators was scheduled and, therefore, it should also get the same benefit, without obtaining the requisite approval. The plea raised by UPCL is described as plea of negative equality, which has been consistently rejected by Hon'ble Supreme Court. It has been held that merely because others have got the benefits in a manner not in accordance with law, does not give a right to a person to demand the same. PSPCL has referred to the following cases in this regard:

- i) Coromandel Fertilizers vs. Union of India and Ors 1984 (Supp) SCC 457
- ii) Union of India and Ors. vs. M.K Sarkar 2010 (2) SCC 59
- iii) Chandigarh Admn. vs. Jagjit Singh, (1995) 1 SCC 745

The above principle was re-iterated by Hon'ble APTEL in its Judgment dated 04.07.2017 in Appeal No. 32 of 2015 and Batch in the case of TSPL vs. PSERC and Ors. and Batch.

Commission's Analysis

PSPCL has filed three separate petitions, two for PPAs signed with generating companies for supply of power from conventional sources and one for PPAs signed for supply of non-conventional power. The Commission is examining the issue of power procurement by PSPCL under the various PPAs without Regulatory approval. The matter will be decided on merit. In the opinion of the Commission, UPCL cannot plead to its own advantage any aberration by PSPCL, on this account.

F. Whether various communications by PSPCL amount to acquiescence by way of conduct of PSPCL

UPCL has alleged that various communications of PSPCL and its continuous conduct amounts to acquiescence by conduct. In Nov., 2010, PSPCL informed UPCL that it would wait until the completion of 400 kV evacuation system and till such time it shall not avail power from UPCL instead of utilizing the 220 kV network, being a costlier option as compared to ISTS evacuation. UPCL submitted that with this letter, PSPCL gave implicit consent to UPCL to sell the un-requisitioned power to third party in

the interim period. UPCL has submitted that it had no option but to sell the un-requisitioned power to Karnataka Escoms who were willing to off-take power with prior consent of PSPCL. Thereafter, UPCL informed PSPCL about the commissioning of 400 kV transmission facility in September, 2012 and requested PSPCL to execute TSA, BPTA. However, no reply was received from PSPCL. UPCL vide its letter dated 05.11.2014 express serious concern and informed PSPCL that it would start scheduling power to third parties. PSPCL requested UPCL to waive legal or financial liabilities in case PSPCL opts out of the PPA. Also it is recorded in CERC's Order dated 27.06.2016 in Petition No. 307/MP/2015 as part of PSPCL's submissions that "*PSPCL has not given up or surrendered its right of 101.5 MW of power...PSPCL may consider for scheduling power from the petitioner's project after a period of two to three years...*". PSPCL accepted in its letter dated 07.01.2015 that its 10% share of power could not be scheduled owing to non-execution of the Tripartite TSA between KPTCL, UPCL and PSPCL. UPCL had accepted PSPCL's proposal to sell power to third parties as an interim arrangement and the position was to be reviewed suitably after the completion of three years for commencement of supply of power to PSPCL in terms of the PPA. UPCL cited the Judgment of Hon'ble Supreme Court in *Kanchan Udyog Ltd. vs. United Spirits Ltd.* [(2017) 8 SCC 237].

In reply, PSPCL has submitted that it never scheduled nor availed any power from UPCL project. There has therefore, not been any waiver by conduct or acquiescence, as sought to be alleged by UPCL. Even, if PSPCL so desired, it cannot waive the statutory requirement of obtaining an approval from the Commission. Since the said approval has a direct bearing on the determination of the Annual Revenue Requirements of

PSPCL where public interest is involved, there cannot be any waiver by the parties. PSPCL has cited the following cases:

- i) All India Power Engineer Federation vs. Sasan Power Ltd. (2017) 1 SCC 487.
- ii) Lachoo Mal vs. Radhey Shyam (1971) 1 SCC 619
- iii) Indira Bai vs. Nand Kishore (1990) 4 SCC 668)
- iv) Krishna Bahadur vs. Purna Theatre (2004) 8 SCC 229 : 2004 SCC (L&S) 1086

PSPCL did not agree to purchase the proportionate quantum on account of the increase in the capacity of the generating units from 507.50 MW each to 600 MW each. The power from the two generating units were envisaged to be evacuated through the 400 kV line of KPTCL at the interconnection point of the CTU till the periphery of Punjab. The 400 kV KPTCL line was not ready until 12.09.2012. When the 400 kV KPTCL line was available, there was no determination of tariff by the CERC, provisional or final. The provisional tariff was decided by the CERC in its Order dated 24.12.2012, wherein it had been specifically held that the tariff so determined shall only become applicable/ enforceable when the same is approved by the respective State Commission. The final tariff order was thereafter passed by CERC on 20.02.2014 re-iterating the same. At no instance after Feb., 2014 till Dec., 2018 did UPCL declare any availability for PSPCL to schedule.

Vide letter dated 07.01.2015, PSPCL had written to UPCL that scheduling of 10% share of power to Punjab was not possible due to non-execution of the tripartite agreement between KPTCL, UPCL and PSPCL

and further, sought confirmation from UPCL that in case PSPCL wants to opt out of the PPA and surrender its share of power from the project, whether UPCL would agree to the same without any legal or financial liability on either party. UPCL vide letter dated 03.11.2015, stated that it is willing to divert PSPCL share to 3rd party for a period of three years with the consent of PSPCL without any liability on either side. PSPCL vide letter dated 21.12.2015 accepted the same.

PSPCL submitted that there had been no waiver by PSPCL nor had the PPA been novated or amended to waive off the requirement to obtain the approval from the Commission. The stand of PSPCL has been consistent in as much as it has been repeatedly stated that there was a valid PPA dated 29.09.2006 entered into between the parties but the enforceability of the PPA was subject to the statutory approval by the Commission.

PSPCL further submitted that the reliance placed by UPCL upon the Order dated 27.06.2016 passed by CERC in Petition No. 307/MP/2015 relating to Mega Power benefits available to UPCL is misplaced. The submissions made before CERC is consistent with its earlier stand that the PPA remains valid but the rights and obligations may become enforceable in the future.

Commission's Analysis

Considering the submissions above, the Commission opines that there could not have been any waiver by conduct or acquiescence on the part of PSPCL since the case law quoted by PSPCL clearly bring out that no waiver is possible where public interest is involved. The essence of approval by the Commission

under Section 86(1)(b) of the Act for looking into the need of power and its price lies in watching the public interest. As already brought out herein before, there could not have been any approval of the PPA by the Commission till February, 2014 when CERC determined the final tariff for the project. UPCL never declared any availability of power for PSPCL. The agreement between UPCL and PSPCL to sell PSPCL's share to a third party from December 2015 to December 2018 was a mutually beneficial arrangement. The same was never brought to the notice of the Commission nor was the Commission's approval sought by either of the parties. The Commission is of the firm view that in the instant case PSPCL could not have scheduled any power from UPCL project without the specific approval of the Commission under Section 86(1)(b) of the Act read with Rule 8 of the Electricity Rules, 2005. There was never any bar on UPCL to enforce its rights under the PPA through various legal remedies available under the law of the land. Acquiescence by conduct by PSPCL does not hold any water as it cannot waive the legal requirement of the specific approval of the PPA by the Commission as required on two grounds (i) provision of section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 (ii) specific provision in the PPA that PSPCL has agreed to purchase the power from the UPCL project subject to the approval of the Commission, which has also to take into account, inter alia, public interest.

G. Whether there is a requirement of power by PSPCL and the rate of power is economical

PSPCL has submitted that there is surplus in peak demand (MW) upto the year 2019-20 and in energy (MU) upto the year 2020-21 as per

PSPCL's Demand and Availability Report 2017-18 to 2035-36. PSPCL further submitted that several generating stations are being backed down and/or the power is being surrendered. The power is being surrendered from Thermal Power Stations on the basis of Merit Order Despatch (MOD). The committee formed earlier by PSPCL was recalled on 03.07.2019 to study the demand and availability of power in the State of Punjab for the next 16 years from FY 2019-20 to FY 2035-36. The committee in its report in July, 2019 concluded that in view of surplus available (in terms of Energy MUs) in maximum months of the year up to 2024-25, it may not be prudent to tie up any more power through long term power purchase except from upcoming plants considered in this scenario.

PSPCL further submitted that the power purchase and procurement is always planned on the basis of projection of demand by the consumers. The PPAs are entered into from time to time, based on such projection and power procurement planning. These include consideration of the growth in the demand expected of various consumer categories particularly the industrial, commercial etc. There have been instances of re-patriation of consumers from the distribution licensee to open access, captive generation etc. It was therefore denied that the surplus situation which had arisen is a deliberate move on the part of PSPCL. PSPCL has placed on record the circumstances under which the petition was not filed prior to December 2018 and that the same is not for any default on the part of PSPCL particularly as the quantum of power covered under the PPA was being supplied to others. UPCL did not require PSPCL to specifically seek approval of the Commission. When UPCL insisted that on scheduling of its power by PSPCL the latter has approached the Commission. PSPCL further submitted that the need of procurement of power and its rate, as

envisaged under the Electricity Act & Rules, is to be considered from December 2018 & thereafter and not as on the date of signing of the PPA, CoD of the project or any time prior to December 2018.

UPCL power is one of the costliest power available with PSPCL as on date. In addition to the existing fixed cost which works out to Rs. 1.635 per kWh as per the Tariff Order dated 27.06.2019 passed by CERC, there shall be an increase in fixed cost on account of installation of Flue Gas De-sulphurization equipment, as approved by CERC in its Order dated 20.11.2019 in petition no. 346/MP/2018. In the case of generators situated outside the State of Punjab such as UPCL supplying electricity to PSPCL, there shall be an inter-state transmission charges ranging from 30 paise to 40 paise per kWh.

UPCL has alleged that the power surplus situation in the State of Punjab is PSPCL's making. PSPCL's claim that the PPA should not be approved considering UPCL's position in the Merit Order stack is misplaced. PSPCL has signed 35 PPAs aggregating to a contracted capacity of more than 8311 MW with Central Sector/IPP projects, 130 PPAs with non-conventional generating stations for procurement of 1191.97 MW of power and 19 PPAs with non-conventional generating stations for procurement of 360.29 MW of power after signing the PPA with UPCL. PSPCL cannot use the power surplus situation or UPCL's current standing in the merit order list, as an excuse to wriggle out of its obligations under the PPA with UPCL. The procurer is expected to factor the demand supply projection as on the date of signing of PPA. PSPCL should pay capacity charges to UPCL towards power not availed under the PPA.

UPCL submitted that PSPCL proposes to increase its generation

capacity by 4160 MW. PSPCL is making an effort to wriggle out of its obligations of the PPA in the garb of highlighting public interest. The conduct of PSPCL is bound to lead to financial losses to the generator that invested in the project on the basis of the PPA executed with PSPCL. PSPCL should be stopped from refusing to honour its obligations under the PPA. UPCL further submitted that if during the course of the PPA tenure of 25 years, there is a surplus scenario, the obligations of PSPCL, to pay capacity charges to UPCL as per provisions of PPA does not get cancelled.

Commission's Analysis

The Commission is of the considered opinion that it would be appropriate for the Commission to consider the approval under Section 86(1)(b) of the Electricity Act, 2003 read with Rule 8 of the Electricity Rules, 2005 and PSERC (Conduct of Business) Regulations, 2005 from December 2018 onwards when the petition was filed by PSPCL for the purpose. The said Section, Rules and Regulations are reproduced as here under:

Section 86(1)(b) of the Electricity Act, 2003

“86. Functions of State Commission.- (1) The State Commission shall discharge the following functions, namely:-

(a)

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

***(c)*”**

Rule 8 of the Electricity Rules, 2005

“8. Tariffs of generating companies under section 79.- The tariff determined by the Central Commission for generating companies under clause (a) or (b) of sub-section (1) of section 79 of the Act shall not be subject to re-determination by the State Commission in exercise of functions under clause (a) or (b) of sub-section (1) of section 86 of the Act and subject to the above the State Commission may determine whether a Distribution Licensee in the State should enter into Power Purchase Agreement or procurement process with such generating companies based on the tariff determined by the Central Commission.”

Regulation 46 of PSERC (Conduct of Business) Regulations, 2005

“46. Power Procurement and Purchase

(1) In accordance with the provisions of the Act and the licence conditions, every Distribution Licensee shall purchase and procure electricity required for the Licensed Business of the Distribution Licensee in an economical and efficient manner and under a transparent power purchase and procurement process and generally based on the principles of purchase of electricity at the least cost.

(2)

(3)

(4) (a) The Distribution Licensee shall satisfy the Commission as to the need for additional power procurement on a long term basis.

(b) The Distribution Licensee shall not enter into a binding or enforceable contractual commitment of such long term power purchase till the Commission by a general or special order approves the procurement of electricity by the Distribution Licensee.

(5) Unless otherwise approved by the Commission by a general or special order, a long term power purchase or procurement by the Distribution Licensee shall be done through a competitive procurement process approved by the Commission.

(6) (a) The Distribution Licensee shall satisfy the Commission that the electricity procured under long term power purchase otherwise than through a competitive bidding process or any short term power purchase is economical in the prevalent circumstances and that the Distribution Licensee has made prudent and best efforts to minimise the cost of purchase.

(b) The Commission may not permit any such long term purchase if the manner or method proposed for such procurement of electricity is not conducive to the objective of least cost purchase or for any other reason the purchase is not economical or efficient.

(7) The short term power purchase

Accordingly, the Commission has to consider approval of power procurement mainly on two grounds i.e. the need for additional power procurement on a long term basis and whether it is economical in the prevalent circumstances.

Power Purchase is always planned on the basis of projections of the consumer demand and net availability of power. As per the prevalent situation, there is a surplus power available with PSPCL and several generating stations are being backed down and power is being surrendered.

Taking the issue of requirement of power first, the Commission has recently carried out the True-up of FY 2018-19 along with APR of FY 2019-20 and ARR for 2nd MYT Control Period of FY 2020-21 to 2022-23. Data

submitted by PSPCL for the true-up of FY 2018-19, indicated surrender of 8570.94 MUs of power worth Rs. 976.87 Crore of capacity charges from sources other than PSPCL's generating plants. Also PSPCL's own thermal plants i.e GGSSTP and GHTP were operated on partial capacity and were able to achieve PLF of only 23.50% and 30.84% respectively. PSPCL's projections for FY 2019-20 to FY 2022-23 also indicate surplus power from sources other than PSPCL's generating plants as 11616 MU, 14175MU, 13783MU and 11952MU respectively in the four year period.

The Report submitted by PSPCL on Demand and Availability of power in Punjab for the period 2019-20 to 2035-36 **which has been prepared considering that the entire demand is to be met through long term PPAs**, indicates that PSPCL would be deficit in meeting the peak demand from the year 2020-21 and in terms of energy from the year 2028-29 onwards.

The report also indicates that generation capacity during the FY 2018-19 was 13431.31 MW with break up as under:

Sr. No.	Power Sources	Capacity available in FY 2018-19 (MW)
1	Own Thermal & Hydro Power	2776.05
2	BBMB (share of Punjab)	1133.20
3.	IPPs (TSPL, NPL & GVK)	3920
4.	PEDA & NRSE Projects	1240.87
5.	EPPL & Karcham Wangtoo HEPs	300

6.	Central and other Generation Stations through long term PPAs	4061.19
Total installed Capacity		13431.31

The Commission notes that Punjab is an agrarian State and the power demand is at the maximum during the 4 months (June to September) of the paddy season (12638 MW in 2018-19). During the remaining eight months of the year, average peak demand hovers at about 55 % of peak demand of the paddy season (i.e. about 6900 MW in 2018-19). In fact, the maximum peak demand of 12638 MW has been incident only for about one hour, remained between 12000 to 12499 MW for 9.75 hours and between 11000 MW and 11999 MW for 175.75 hours in the whole year. It is evident from the annual load pattern that PSPCL does not need to tie-up power for the full 12 months of the year on long-term basis for meeting the maximum peak demand. It would be desirable to meet the demand through a judicious mix of long term, medium term and short term contracts and purchases on the power exchange. Obtaining power through long-term contracts for the full 12 months of the year would result in surrender of energy during 8 months of the year.

It would be pertinent to mention here that the installed capacity on all India basis as on 31st March 2020 was about 370 GW against the peak demand of 183 GW during the year 2019-20. Further as per the 19th EPS report of Central Electricity Authority, peak demand shall be about 340 GW against installed capacity of 831 GW by FY 2029-30. **(Report of CEA on optimal generation mix)**. Thus power is now freely available on the exchange at competitive rates.

The Electricity Act, 2003 (Act), under Section 86(1)(e) mandates the Commission to promote cogeneration and generation of electricity from renewable sources of energy by providing suitable measures for connectivity with the grid and sale of electricity to any person, and also specify, for purchase of electricity from such sources, a percentage of the total consumption of electricity in the area of a distribution licensee. PSERC vide its RPO Regulations 2011 mandated the RPO for PSPCL for the period 2011-12 to 2014-15 with target of 4% by 2014-15. The RPO targets for the period 2014-15 to 2019-20 were set under Punjab State Electricity Regulatory Commission (Renewable Purchase Obligation and its compliance) (Amendment1) Regulations, 2015 at 9.5% by 2019-20. The GoI in February 2015 decided to target 175 GW of Renewable energy by 2022. In order to achieve the target of 175 GW of renewable capacity by March, 2022, Ministry of Power, Government of India, in consultation with Ministry of New and Renewable Energy, vide its Order dated 22.07.2016 notified the long term growth trajectory of RPOs for Non-solar as well as Solar uniformly for all States / Union Territories. Ministry of Power requested that SERCs may consider notifying RPO for their respective States initially for three years from FY 2016-17 to FY 2018-19 to reach 17.00% by 2018-19. Thereafter, Government of India, vide Order dated 14.06.2018, notified the long term growth trajectory of RPOs for further three years from FY 2019-20 to FY 2021-22 and requested that SERCs may consider notifying the RPO for the Years 2019-20, 2020-21, 2021-22 to reach 21.00% by 2021-22. PSERC considering all factors prevailing in the State of Punjab increased the RPO from 6.5% in FY 2018-19 to 17.5% in FY 2022-23. This addition in the RPO will require corresponding additions to the Renewable Energy in Punjab State. This shall lead to

increased surrender of energy from the contracted thermal/gas Plants. PSPCL will need to swap about 5230 MU of thermal power with NRSE power in 2022-23. Govt is further targeting about 440 GW of renewable Capacity in the country by 2030 to meet its Intended Nationally Determined Contribution (INDC) which shall further bring down the PLF of thermal plants in the country including Punjab. In addition Government of India through Bureau of Energy Efficiency (B.E.E.) is promoting the use of energy efficient equipment through various schemes viz. LEDs, CFLs, star rated ACs, fans etc. which shall further reduce the growth in demand in future. Further, in view of the reduced cost of solar power, all consumers are motivated to install their own solar rooftop plants, thus affecting the demand adversely.

Thus, it can be seen that it may not be prudent to procure round the year power from UPCL on a long term basis. As such, the Commission is convinced that the need to procure power from UPCL on long term basis is not established.

Secondly, regarding the price, it has been submitted by PSPCL that in September 2018, the price of power being billed to Karnataka by UPCL project is Rs. 3.64/kWh variable charges and Rs. 1.59/kWh fixed charges. Considering the interstate transmission charges of Rs. 0.40 /kWh, the variable charges work out to Rs. 4.04 per kWh and thus it is not likely to be scheduled in the merit order dispatch. Even projects having a generation cost lower than UPCL are not being scheduled for most of the time. PSPCL is already paying heavy amounts as fixed charges for surrendered power. UPCL shall further add to the quantum of surrender of power and hence fixed costs payable by the utility/ consumers. The Commission notes that in

view of untied generation capacity available in the country, power is available on Power exchange at prices below Rs. 3.00 per unit even during peak time.

Thus at the given price, the power from UPCL project would not be an economically viable proposition particularly so when much cheaper power is available in the market. If this PPA is approved, capacity charges would have to be paid without scheduling any power, which would not be in the interest of consumers of Punjab. Therefore, the Commission in exercise of its power under section 86(1)(b) of the Electricity Act, 2003 does not approve PSPCL's proposal regarding the procurement of power (101.5 MW) from the UPCL project.

The petition is disposed of accordingly.

Sd/-
(Anjuli Chandra)
Member
Chandigarh
Dated: 07.08.2020

Sd/-
(S.S. Sarna)
Member

Sd/-
(Kusumjit Sidhu)
Chairperson