

CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

I.A. No. 9/2023

in

Petition No. 85/MP/2022

Coram:

Shri I. S. Jha, Member

Shri Arun Goyal, Member

Shri Pravas Kumar Singh, Member

Date of Order: 17.4.2023

In the matter of

Application for Urgent Listing of the Petition and Interim Relief under Section 79 and Section 94(2) of the Electricity Act, 2003 As Read with Regulation 68 of the Central Electricity Regulatory Commission (Conduct of Business) Regulation, 1999

Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

.... Applicant/Petitioner

Versus

1. Coastal Gujarat Power Limited,
C/o Tata Power Company Limited,
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400021
2. Tata Power Company Limited,
Bombay House,
24, Homi Mody Street,
Mumbai – 400 001
3. Power System Operation Corporation Limited,
Western Regional Load Despatch Centre,
B-9 (1st Floor), Qutab Institutional Area,
Katwaria Sarai, New Delhi -110016
4. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390 007, Gujarat
5. Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9, Bandra (East),
Mumbai-400 051, Maharashtra

6. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

7. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

8. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

9. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.

10. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005

...Respondents

I.A. No. 10/2023
in
Petition No. 123/MP/2022

In the matter of:

1. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana

2. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005

Through Haryana Power Purchase Centre
Shakti Bhawan, Second Floor, Sector-6
Panchkula, Haryana-134109

.....Petitioners

Versus

1. Coastal Gujarat Power Limited,
C/o Tata Power Company Limited,
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400021

2. Tata Power Company Limited,
Bombay House,
24, Homi Mody Street,

Mumbai – 400 001

3. Power System Operation Corporation Limited,
Western Regional Load Despatch Centre,
B-9 (1st Floor), Qutab Institutional Area,
Katwaria Sarai, New Delhi -110016

4. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390 007, Gujarat

5. Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9, Bandra (East),
Mumbai-400 051, Maharashtra

6. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

7. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

8. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

9. Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

....Respondents

I.A. No. 12/2023
in
Petition No. 246/MP/2022

Maharashtra State Electricity Distribution Company Limited,
4th Floor, Prakashgad, Plot No. G-9, Bandra (East),
Mumbai-400 051, Maharashtra

....Petitioner

Versus

1. Coastal Gujarat Power Limited,
C/o Tata Power Company Limited
34, Sant Tuka Ram Road, Carnac Bunder,
Mumbai-400021

2. Tata Power Company Limited,

Bombay House
24, Homi Mody Street
Mumbai – 400 001

3. Power System Operation Corporation Limited,
Western Regional Load Despatch Centre,
B-9 (1st Floor), Qutab Institutional Area,
Katwaria Sarai, New Delhi -110016

4. Gujarat Urja Vikas Nigam Limited,
Sardar Patel Vidyut Bhavan, Race Course,
Vadodara – 390 007, Gujarat

5. Ajmer Vidyut Vitaran Nigam Limited,
Hathi Bhata, Old Power House,
Ajmer, Rajasthan

6. Jaipur Vidyut Vitaran Nigam Limited,
Vidyut Bhawan, Janpath,
Jaipur, Rajasthan

7. Jodhpur Vidyut Vitaran Nigam Limited,
New Power House, Industrial Area,
Jodhpur, Rajasthan

8. Punjab State Power Corporation Limited,
PP&R, Shed T-1, Thermal Design,
Patiala – 147 001

9. Uttar Haryana Bijli Vitran Nigam Limited,
Vidyut Sadan, Plot No. C-16, Sector-6,
Panchkula-134112, Haryana.

10. Dakshin Haryana Bijli Vitran Nigam Limited,
Vidyut Nagar, Vidyut Sadan,
Hissar, Haryana-125005

...Respondents

Parties Present:

Shri M. G. Ramachandran, Sr. Advocate, PSPCL & HPPC
Shri Basava Prabhu Patil, Sr. Advocate, MSEDCL
Shri Chetan Sharma, AAG, MSEDCL
Ms. Poorva Saigal, Advocate, PSPCL & HPPC
Shri Shubham Arya, Advocate, PSPCL & HPPC
Shri Ravi Nair, Advocate, PSPCL & HPPC
Ms. Pallavi Saigal, Advocate, PSPCL & HPPC
Ms. Reeha Singh, Advocate, PSPCL & HPPC
Ms. Shikha Sood, Advocate, PSPCL & HPPC

Ms. Anumeha Smiti, Advocate, PSPCL & HPPC
Shri G. Saikumar, Advocate, MSEDCL
Shri Akash Lamba, Advocate, MSEDCL
Shri Sanjay Sen, Sr. Advocate, CGPL & TPCL
Shri Shreshth Sharma, Advocate, CGPL & TPCL
Ms. Shubhi Sharma, Advocate, CGPL & TPCL
S Ms. Mandakini Ghosh, CGPL & TPCL
Shri Neel Rahate, Advocate, CGPL & TPCL
Ms. Swapna Seshadri, Advocate, GUVNL
Ms. Ashabari Thakur, Advocate, GUVNL
Shri Ashok Rajan, WRLDC
Shri Alok Mishra, WRLDC
Shri Hemant Kumar, WRLDC

ORDER

Punjab State Power Corporation Limited (hereinafter PSPCL/Petitioner) has filed the present interlocutory application (I.A. No.9/2023) in Petition No.85/MP/2022 seeking emergent and urgent relief against Coastal Gujarat Power Limited (CGPL/Respondent No.1), Tata Power Company Limited (TPCL/Respondent No.2) and Western Load Despatch Centre (WRLDC/Respondent No.3) for the alleged breach of the obligations under the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (Grid Code Regulations), the Electricity Act, 2003 (the Act) and the Power Purchase Agreement dated 22.4.2007 (PPA).

2. Uttar Haryana Bijli Vitran Nigam Limited and Dakshin Haryana Bijli Vitran Nigam Limited through Haryana Power Purchase Centre have filed IA No.10/2023 in Petition No. 123/MP/2022 seeking emergent and urgent relief against Coastal Gujarat Power Limited (CGPL/Respondent No.1), Tata Power Company Limited (TPCL/Respondent No.2) and Western Load Despatch Centre (WRLDC/Respondent No.3) for the alleged breach of the obligations under the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (Grid Code

Regulations), the Electricity Act, 2003 (the Act) and the Power Purchase Agreement dated 22.4.2007 (PPA).

3. Maharashtra State Electricity Distribution Company Limited has filed I.A. No.12/2023 in Petition No.246/MP/2022 seeking a direction to Respondent Nos.1 and 2 to schedule full contracted capacity of power i.e.760 MW to the Petitioner in terms of the PPA.

Submissions of PSPCL in IA No.9/IA/2023

4. PSPCL has submitted in the captioned I.A. has submitted as under:

(a) The Ministry of Power, Government of India had issued Directions under Section 11 of the Electricity Act, 2003 for generation and supply of power to the beneficiaries of the generating station from 25.5.2022 to 31.12.2022. During the subsistence of operation of the Section 11 directions, the inter-se rights between the parties were the subject matter of Petition No. 128/MP/2022 filed by TPCL in terms of Section 11(2) of the Act and were admittedly outside the ambit of the PPA. Moreover, TPCL had supplied power to only those Procurers who had availed/consented to offtake such power during the said period.

(b) PSPCL had neither requisitioned nor consented to take any power at the rates determined under Section 11 Directions and was seeking commencement of supply at the PPA terms and conditions. After the expiry of the operation of the Section 11 directions on 31.12.2022, TPCL was obliged to schedule the contracted capacity vis-à-vis PSPCL in terms of the PPA which is binding and enforceable contract between the parties. Contrary to the contractual

provisions, TPCL issued a letter dated 29.12.2022 to PSPCL seeking for payment of power at the Energy Charges, as determined by the Commission in Petition No.128/MP/2022 for the period with effect from 1.1.2023 and if PSPCL was not willing to consent to the said stipulation, it should not attempt to draw power.

(c) PSPCL vide its letter dated 6.1.2023 responded by stating that it was not agreeable to pay for any excess tariff over the PPA tariff since TPCL was bound to schedule and supply power in terms of Article 4.3 and 4.4 of the PPA and the provisions of the Grid Code Regulations. Any power declared available by TPCL shall be deemed to be a declaration under the PPA and would be requisitioned/scheduled accordingly.

(d) As per its knowledge, TPCL has been declaring availability as per the respective entitlement of the Procurers and PSPCL has been requisitioning power in terms of the PPA. However, WRLDC, Respondent No.3, has failed to schedule power to PSPCL. WRLDC wrote a mail dated 13.1.2023 indicating that the LC provided by PSPCL was conditional. PSPCL vide its letter dated 20.1.2023 replied to WRLDC that the LC has been made available as per Article 11.4.1 of the PPA valid up to 30.6.2023 and called upon WRLDC to ensure scheduling of power to PSPCL from TPCL's generating station at Mundra in terms of the PPA, the provisions of the Grid Code and the mandate under Section 28 of the Act.

(e) WRLDC has acted contrary to the statutory mandate of enforcing the declaration of proportionate availability to PSPCL as per the provisions of the PPA, Grid Code and the law laid down by the Hon'ble Supreme Court in the

case of Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited [(2016) 9 SCC 103] and Section 28 of the Act.

- (f) Due to the non-availability of power from TPCL in terms of the PPA, PSPCL has been forced to procure power from alternative sources at much higher tariff than that of TPCL under the PPA.

5. In the above background, the Petitioner has filed the present I.A. seeking the following prayers:

“(a) Direct WRLDC to schedule the quantum of power to the extent of 475 MW being the contracted capacity of PSPCL in terms of the PPA dated 22.04.2007;

(b) Direct Tata Power to forthwith commence supply in so far as PSPCL is concerned to the extent of contracted capacity of 475 MW in terms of the PPA dated 22.04.2007, maintaining the proportionality of the total generation between the Procurers;

(c) Pass ad Interim ex parte orders in terms of prayers (a) and (b) above and confirm the same after notice;

(d) pass such further order or orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”

Submissions of Haryana Power Purchase Centre in I.A. No. 10/IA/2023

6. Haryana Power Purchase Centre in the captioned IA has made the following submissions:

- (a) The Ministry of Power, Government of India had issued Directions under Section 11 of the Electricity Act, 2003 for generation and supply of power to the beneficiaries of the generating station from 25.5.2022 to 31.12.2022. During the subsistence of operation of the Section 11 directions, the inter-se rights between the parties were the subject matter of Petition No.

128/MP/2022 filed by TPCL in terms of Section 11(2) of the Act and supply of power under Section 11 Directions were admittedly outside the ambit of the PPA.

- (b) TPCL had supplied power to only those Procurers who had availed/consented to offtake such power during the said period. HPPC had neither requisitioned nor consented to take any power at the rates determined under Section 11 Directions and was seeking commencement of supply at the PPA terms and conditions.
- (c) After the expiry of the operation of the Section 11 directions on 31.12.2022, TPCL was obliged to schedule the contracted capacity vis-à-vis HPPC in terms of the PPA which is binding and enforceable contract between the parties. Contrary to the contractual provisions, TPCL issued a letter dated 29.12.2022 to HPPC seeking for payment of power at the Energy Charges, as determined by the Commission in Petition No.128/MP/2022 for the period with effect from 1.1.2023 and if PSPCL was not willing to consent to the said stipulation, it should not attempt to draw power.
- (d) HPPC vide its letter dated 6.1.2023 responded by stating that it was not agreeable to pay for any excess tariff over the PPA tariff since TPCL was bound to schedule and supply power in terms of Article 4.3 and 4.4 of the PPA and the provisions of the Grid Code Regulations. Any power declared available by TPCL shall be deemed to be a declaration under the PPA and would be requisitioned/scheduled accordingly.

- (e) As per its knowledge, TPCL has been declaring availability as per the respective entitlement of the Procurers. HPPC has been requisitioning power in terms of the PPA. However, WRLDC, Respondent No.3, has failed to schedule power to HPPC except on 4.1.2023 and 5.1.2023. On 10.1.2023, TPCL wrote a letter to HPPC stating that it would be in a position to supply power as per the terms of PPA with present cost of generation. WRLDC wrote a mail dated 13.1.2023 indicating that the LC provided by HPPC was conditional. HPPC vide its letter dated 13.1.2023 replied to WRLDC that the LC has been made available as per Article 11.4.1 of the PPA and called upon WRLDC to ensure scheduling of power to HPPC share of power from TPCL's generating station at Mundra in terms of the PPA.
- (f) HPPC has been unable to procure any power from TPCL in spite of the binding obligations of TPCL to make available the power at the PPA terms and after having made the LC available.
- (g) WRLDC has acted contrary to the statutory mandate of enforcing the declaration of proportionate availability to PSPCL as per the provisions of the PPA, Grid Code and the law laid down by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited [(2016) 9 SCC 103] and Section 28 of the Act.
- (h) Due to the non-availability of power from TPCL in terms of the PPA, HPPC has been forced to procure power from alternative sources at much higher tariff than that of TPCL under the PPA.

7. In the above background, the Petitioner has filed the present I.A. seeking the following prayers:

“(a) Direct WRLDC to schedule the quantum of power to the extent of 380 MW being the contracted capacity of the Haryana Utilities in terms of the PPA dated 22.04.2007;

(b) Direct Tata Power to forthwith commence supply in so far as HPPC is concerned to the extent of contracted capacity of 380 MW in terms of the PPA dated 22.04.2007, maintaining the proportionality of the total generation between the Procurers;

(c) Pass ad Interim ex parte orders in terms of prayers (a) and (b) above and confirm the same after notice;

(d) Pass such further order or orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.”

Submissions of Maharashtra State Electricity Distribution Company Ltd. in I.A. No. 12/IA/2023

8. MSEDCL in the captioned I.A. has submitted as under:

(a) In accordance with Section 11 Directions, Respondent No.1 was declaring power at the rate of 600 to 700 MW capacity during the month of December 2022. However, Respondent No.1 has reduced the declaration drastically to 220 MW which is arbitrary and wrong.

(b) On 29.12.2022, TPCL wrote to MSEDCL stating that it would discontinue the power supply with effect from 1.1.2023. MSEDCL vide its letter dated 30.12.2022 requested TPCL not to take any adverse step and requested for supply of 760 MW power in terms of the PPA.

(c) On 31.12.2022, CGPL demanded payment of outstanding amount of Rs.270.32 crores from MSEDCL failing which CGPL threatened with disconnection of power supply. MSEDCL has paid Rs.96.17 crore to TPCL

against the fixed charges for the period during which MSEDCL did not schedule power which is in compliance with the order of the Hon'ble Supreme Court dated 14.11.2022 in Civil Appeal No.8175 of 2022 filed by PSPCL directing payment of 50% of fixed charges.

(d) After expiry of the Section 11 directions by MoP, TPCL ought to supply full contracted capacity in terms of the PPA and at PPA tariff with effect from 1.1.2023 since TPCL has a legal and binding obligation to maintain supply of electricity and make available the contracted capacity to MSEDCL.

(e) WRLDC has acted contrary to the statutory mandate of enforcing the declaration of proportionate availability to MSEDCL as per the provisions of the PPA, Grid Code and the law laid down by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Limited Vs Essar Power Limited [(2016) 9 SCC 103] and Section 28 of the Act.

9. In the above background, the Petitioner has filed the present I.A. seeking the following prayers:

“a. To direct Respondent No. 1 and 2 to schedule full contracted capacity of power i.e. 760MW to Applicant at a rate in terms of existing PPA,

b. Direct WRLDC to give scheduling in terms of EA, 2003,

c. In alternative, prepone the date fixed in the main petition and hear the petition considering the urgency.

d. Pass any other order as this Hon'ble Commission may deems fit and proper.”

Reply of Tata Power Company Limited (TPCL/Respondent No. 2)

10. TPCL in its reply to the IAs has made the following submissions:

- (a) A relief of specific performance of contract cannot be granted in violation of the provisions of Section 14 of the Specific Relief Act, 1963 (“SRA”). The Petitioners having themselves claimed damages as a part of the main prayer cannot now claim specific performance of the PPA, more so when the bar under Section 14 (b) and (d) of the SRA is applicable in the present factual matrix.
- (b) Under Section 14(b) a contract which involves performance of a continuous duty which the court cannot supervise is also not specifically enforceable. Admittedly, the present performance is of continuous nature and as such the said Section, that is, 14(b) bars grant of relief of specific performance. Additionally, a contract which in its nature is determinable is also not specifically enforceable. Clearly, the present PPA can be determined qua TPCL by substitution for which notice has been issued by PSPCL. Even for default of the Procurer, the right of termination is available in the hands of the Seller. Therefore, the PPA being determinable in nature cannot be specifically performed.
- (c) The contracts which are determinable in nature such as the PPA, though cannot be specifically enforced, the remedy in the form of damages is available subject to any limitations provided in the PPA. The party which alleges to have suffered in the contract which is determinable in nature is not without a remedy. The remedy of specific performance is denied whereas the remedy in the form of compensation in terms of the contract or otherwise may still be available. In the main Petitions, the remedy in the

form of damages has been prayed for. Both the remedies cannot co-exist when the PPA is determinable in nature.

(d) The interim relief sought by way of the IAs and final relief sought by way of the main Petitions is exactly same and as such no case for grant of interim relief which results in grant of final relief has been made out. Further, the relief sought by the Petitioners by way of the captioned IAs is essentially a mandatory injunction against TPCL. It is settled law that mandatory injunction can only be granted in situations where withholding of an interim relief would be tantamount to dismissal of the main petition itself. Since under the present circumstances withholding of interim relief would not vitiate the final relief, such relief at the interim stage cannot be granted.

(e) Since 18.09.2021, except for a few days, power was not supplied to PSPCL, HPPC and MSEDCL under the terms of the PPA. Even during the currency of the directions dated 05.05.2022 issued under Section 11 of the Act read with the clarifications thereto, PSPCL and HPPC chose not to procure power from TPCL. The Petitioners have made submissions in the main Petitions that they have purchased power from elsewhere and have sought damages on account of the difference in the cost of power purchased from elsewhere and the tariff at which TPCL was to supply power under the PPA. All these circumstances confirm that no interim order can be passed at this stage. The circumstances now claimed in the IAs are not new and have persisted since September 2021. Therefore, no case for interim order for specific performance is made out in the present circumstances.

(f) It is an admitted position that notices of default have been issued by the parties against each other. PSPCL and HPPC issued notices of default dated 7.12.2021 and 16.11.2021 respectively. PSPCL also sought substitution of TPCL and issued 'Substitution Notice under Article 14.3.4 read with Schedule 17 of the PPA' to the lenders on 08.03.2022. Clearly, the PPA as admitted by such Petitioners is 'determinable' for TPCL can be replaced/substituted by the lenders and as such, the contractual obligation of TPCL to supply power will cease in the event of substitution. Hence qua TPCL the PPA would stand terminated.

(g) Apart from the fact that damages have been claimed in the main Petitions, the PPA itself provides that should there be any shortfall in supply, the 'Seller' i.e., TPCL shall have to pay penalty at the rate of 20% of simple average capacity charge. This formula is given in Schedule 7 of the PPA at Clause 1.2.5. If such a formula has been accepted by the parties to deal with shortfall in supply, the question of specific performance does not arise. The PPA does not provide for specific performance, on the contrary it provides for compensation in the event of non-supply. This clause cannot now be over-riden by a judicial order at this stage.

(h) While specific performance at the interim stage may be possible in some extreme cases, this is not such a case. Admittedly, a new Section 11 regime has already been notified on 20.02.2023, which comes into effect from 15.03.2023. Since the relief is discretionary in nature, this is not a case wherein discretion can be exercised to grant relief of specific performance

in the interim stage. The demand made by the Petitioners at the interim stage is both unreasonable and unjustified.

Reply of Western Regional Load Despatch Centre (WRLDC/Respondent No.3)

11. WRLDC has filed a common reply to all the three IAs and has mainly submitted as under:

(a) WRLDC has acted in a bona fide manner throughout the entire process, in discharge of the statutory functions and obligations as per the extant regulatory provisions. WRLDC while facilitating scheduling of CGPL power from 1.1.2023 was guided by the provisions of Grid Code and LPS Rules 2022 and the Detailed Procedure issued by National Load Despatch Centre on 3.8.2022 under clause 7(5) of the said Rules.

(b) Under the LPS Rules, an ISGS is required to update the PSM default status on day ahead basis in the Payment Security Administration (PSA) portal of NLDC. Subsequently, while scheduling power from that ISGS station, the respective RLDC imposes access restrictions upon the defaulting beneficiaries of the said ISGS as per the quantum (in%) specified by the regulating entity in the PSA portal. During the period under consideration i.e. from 1.1.2023 onwards, TPCL had reported PSM default by some of the beneficiaries such as PSPCL, HPPC and MSEDCL. Keeping in view the PSM default status available in the PSA portal of NLDC and whenever TPCL declared its station availability for any given day, the defaulting beneficiaries were barred from scheduling their entitled power to the extent of access restrictions imposed by TPCL as per the LPS Rules 2022.

(c) After the imposition of LTA access restriction under LPS Rules, the affected beneficiaries of TPCL shared copies of their existing LCs with WRLDC/NLDC. Subsequently, the existence of valid LC was disputed to be inadequate by TPCL. Under the LPS Rules, the onus of validating authenticity and sufficiency of an LC lies with the regulating entity i.e. TPCL in this case. It was beyond the scope of WRLDC/NLDC to adjudicate upon the disputed quantum of LC and therefore, WRLDC/NLDC did not restrict STOA for the defaulting beneficiaries.

(d) WRLDC has denied the allegations of PSPCL, HPPC and MSEDCL that WRLDC had diverted a part of their contracted power to other procurers. Under the provisions of Grid Code, a co-beneficiary of an ISGS is allowed to avail the un-requisitioned surplus (URS) power available with the said ISGS which is considered as a temporary allocation of power to the beneficiary availing the URS power.

Submissions during the hearing

12. Learned Senior Counsel for TPCL made the following points during the course of oral submission:

(a) Section 14 of the SRA sets out the contracts that are not specifically enforceable. Section 14(d) provides that a contract which is in its nature determinable cannot be enforced. Article 14 of the PPA deals with events of defaults and termination. As per Article 14.3.4 of the PPA, in case of Seller's event of default if not remedied within the consultation period, the lenders may exercise or the procurers may require the lenders to exercise their right of substitution under the Financing Agreement. In case of non-exercise of

rights of substitution by the lenders, the capacity charge shall be reduced by 20% for the period of event of default. Further, under Article 14.4.5(i) of the PPA, in case of a Procurer's event of default, the Seller is free to sell the contracted capacity and associated available capacity of the concerned procurer, to any third party of his choice. The Procurer shall have the liability to pay the capacity charges for a period of three years after which the PPA shall automatically terminate. The Seller has the right to terminate the PPA before the expiry of 3 years. The above quoted clauses of the PPA establish that the PPA is terminable and the case is covered under Section 14(d) of the PPA. In this connection, reliance was made on the following judgements:

(i) Indian Oil Corporation Ltd. Vs. Amritsar Gas Service and Others [(1991) 1 SCC 533]

(ii) Rajasthan Breweries Limited V. The Stroh Brewery Company [2000(55) DRJ (DB)]

(iii) ABP Network Private Limited Vs Malika Malhotra [(2021) 283 DLT]

(iv) Spice Digital Ltd. Vs Vistas Digital Media Pvt. Ltd [(2012) 114 (6) Mom LR 3696]

(v) Gujarat Chemical Port Terminal Co. Ltd. Vs Indian Oil Corporation of India [(2016) SCC Online Bom 20605]

(vi) Shri Dinesh Chadha Vs. Hotel Queen Road Pvt. Ltd [ILR (2014) III Delhi 1954]

(b) The interim and final prayer of specific performance is also hit by the bar of Section 14(b) of the SRA as per which the PPA which requires continuous performance and monitoring cannot be specifically enforced. Since in the performance of the PPA, there is a daily requirement of scheduling, procurement of coal, transportation etc. which the court would not be in a

position to supervise, the case will be covered under Section 14(b). Reliance was placed on the following judgements.

(i) MMS Steel & Power Private Limited V. ONGC Limited [(2009) SCC Online Del 4179]

(ii) Urmila and Co. Pvt. Ltd. V. J.M. Baxi and Co. [(1985) SCC Online Del 334]

(c) The relief sought by way of the captioned IAs is exactly the same as the relief sought in the Petitions being Petition No. 85/MP/2022, 123/MP/2022 and 246/MP/2022. As per settled law, no such relief should be granted by virtue of which the final relief, which is asked for and is available at the disposal of the matter is granted. In this connection, reliance was made upon the following judgements of the Hon'ble Supreme Court:

(i) Samir Narain Bhojwani vs. Aurora Properties and Investments and Others [(2018) 17 SCC 203]

(ii) State of Uttar Pradesh and Ors vs. Ram Sukhi Devi [(2005) 9 SCC 733]

(iii) Super Cassettes Industries Ltd. Vs Music Broadcast Pvt. Ltd [(2012) 5 SCC 488]

(d) PPA incorporates provisions such as Article 4.4.1, 14.1 (xiv), 14.3.4 and para 1.2.5 of Schedule 7 of the PPA which make it abundantly clear that should there be any shortfall in supply, the Seller i.e. TPCL shall have to pay penalty at the rate of 20% of simple average capacity charge. The formula given in clause 1.2.5 of Schedule 7 of the PPA was accepted by the parties to deal with the shortfall in supply. Therefore, the PPA does not provide for specific performance; on the contrary it provides for compensation in the event of non-supply.

13. Learned Senior Counsel for HPPC and PSPCL made the following submissions in the matter:

- (a) The contention of TPCL that the PPA dated 22.4.2007 is a determinable contract in terms of SRA is contrary to the provisions of the SRA as amended in 2018 and contrary to a number of decisions passed by Hon'ble Supreme Court, Appellate Tribunal for Electricity, High Courts and this Commission. By the amendment made to the Specific Relief Act, 1963 effective from 1.10.2018, it is no longer a discretionary power of the Court to grant specific performance. Reference has been made to judgement of the Hon'ble Supreme Court in B. Santoshamma and Anr. V. D. Sarala and Anr., [(2020) 19 SCC 80].
- (b) In terms of the various decisions of the Hon'ble Supreme Court, Appellate Tribunal for Electricity and this Commission, the PPA dated 22.4.2007 cannot be considered to be determinable. Reliance was made on the following judgements:
 - (i) M.L. Devender Singh V. Syed Khaja [(1973) 2 SCC 515]
 - (ii) Prakash Chandra V. Angadlal and Ors [(1979) 4 SCC 393]
 - (iii) Judgement dated 6.8.2021 in Appeal No.43 & Batch in Uttar Pradesh Power Corporation Limited and Ors. V. UPERC & Anr
 - (iv) Judgement dated 7.9.2011 in Appeal No.184 of 2010 (M/s Adani Power Limited v. GERC)
 - (v) Judgement dated 7.1.2020 in Appeal No.41 of 2018 (Hinduja National Power Company Limited v. Andhra Pradesh Regulatory Commission and others)
 - (vi) Murugan and Others V. Rainbow Foundation Limited and Others [(2019) SCC online Mad 37961]

(vii) Upma Khanna & Anr. V. Tarun Sawhney & Ors [(2012) SCC Online Del 2716]

(viii) T.O. Abraham v. Jose Thomas and Ors [(2017) SCC Online Ker 18972]

(ix) Order dated 22.11.2022 in Petition No.110/MP/2022 (PTC India Limited and Anr. V. Haryana Power Purchase Centre and Ors]

(x) Order dated 11.4.2022 in Petition No.275/MP/2018 (Tata Power Trading Company Limited V. SKS Power Generation (Chhattisgarh) Limited]

(xi) Order dated 10.1.2020 in Petition No.236/MP/2017 (Damodar valley Corporation v. Madya Pradesh Power Management Company Limited)

- (c) The existence of substitution rights under Article 14.3.4 read with Schedule 17 of the PPA is for the lenders to decide. The PPA continues for the entire term even if there is substitution by the lenders. Therefore, the PPA is not determinable by the existence of such substitution rights. There has in fact been no lender's substitution by lenders pursuant to the notice of default given earlier.
- (d) TPCL's contention that only relief the Procurers are entitled for non-availability/non-supply of power is in terms of Article 14 and/or Clause 1.2.5 to Schedule 7 of the PPA is misconceived as the said provisions do not cover a situation of deliberate and willful breach of not declaring availability in terms of the requirements of the PPA. For the breach, the Procurers are entitled for specific performance and for the period of non-performance the damages in terms of Section 73 of the Indian Contract Act, 1872.

- (e) The LCs submitted by PSPCL and HPPC have been on the same format as the present LC. Further the conditions contained in the LC are in accordance with the provisions of Article 11.4.1. Further, TPCL has wrongly contended that the conditional nature of LC furnished by PSPCL and HPPC and non-payment of Rs.146 crore and Rs.116 crore necessitated issue of Preliminary Default notices dated 12.2.2023 in terms of Article 14.4.2 of the PPA. The common stay order issued by Hon'ble Supreme Court dated 14.11.2022 in Civil Appeal No.8136 of 2022 (in case of Haryana Utilities) and Civil Appeal No.8175 of 2022 (in case of PSPCL) is still operating against the payment of capacity charges to TPCL. The said stay order has also been recorded by the Appellate Tribunal for Electricity in its interim order dated 14.2.2023 in Appeal No. 171/2023 in case of Haryana and interim order dated 9.2.2023 in Appeal No.168 of 2023. In the circumstances, there is no obligation on PSPCL and HPPC to make payments towards the capacity charges for the period pertaining to Section 11 directions.
- (f) In response to TPCL's submission that interim relief cannot be given in respect of matters where the final relief is sought, it has been submitted that the petitions filed by the Procurers are for larger reliefs, namely, both specific performance and exemplary damages for the period of non-performance of obligations and also relief against WRLDC. Further, interim relief of the nature sought for by the Procurers is to be considered if there exist not only prima facie case but also the balance of convenience and factor that irretrievable loss is being caused to the Procurers. The Procurers have a prima facie case in favour of the

Procurers in the light of the authoritative ruling and precedent in Energy Watchdog Case wherein the Hon'ble Supreme Court held that contract becoming onerous, burdensome etc. cannot be a ground for being released of the obligations under the PPA. In an executory contract of 25 years, if the supply of power is stopped unilaterally the balance of convenience and irreparable injury factors are in favour of the Procurers.

- (g) As regards the submissions of WRLDC, it has been submitted that MoP "Guidelines for Operationalising optimal utilisation of generating stations as per the requirements in the electricity grid" dated 8.10.2021 only deal with un-requisitioned surplus capacity and the power plants are required to act in accordance with the PPA. WRLDC cannot ignore the terms of the PPA and at the instance of TPCL to consider that the power is requisitioned as the Procurers are not willing to accept the demand of TPCL for higher price. As regards the contention of WRLDC that the onus of authenticating the sufficiency of the LC lies with the generator in terms of the LPSC Procedure issued by the NLDC, it has been submitted that the said procedure requires that the intimation would not be accepted by RLDC unless confirmed by both parties and only in cases where the distribution company does not intimate within 7 days, the intimation given by the generating company would be taken as final. In this case, PSPCL vide its letter dated 20.1.2023 and HPPC vide its letters dated 4.1.2023/6.1.2023 and 13.1.2023/19.1.2023 and 20.1.2023 had intimated to WRLDC that the LCs provided by them are in terms of the PPA.

14. Learned Senior Counsel for MSEDCL made the following submissions during the hearing:

(a) The PPA is not determinable in nature for the simple reason that neither of the parties have the power to terminate the PPA at their will. This principle has been settled by the Commission vide its order in Tata Power Trading Company Ltd. V. SKS Power Generation (Chhattisgarh) Ltd. [2022 SCC Online CERC 289] and judgement of Appellate Tribunal in Uttar Pradesh Power Corporation Ltd. V. U.P. ERC [(2021) SCC Online APTEL 31]. The Courts have time and again held that the only test for ascertaining a determinable contract is whether either of the parties can terminate the contract at their own whims and fancies without providing any reason therefor. In terms of clause 14.3.4 of the PPA, the substitution rights and other rights are not with the Procurers but with the Lenders of the Seller under Seller-Lender agreement. The Lender is not a party to the PPA nor the Procurers are party to the Seller-Lender agreement. Therefore, the Procurers do not even have a contractual right to force the Lender to substitute the Seller. Therefore, the PPA cannot be considered to be determinable in nature.

(b) The performance of the PPA does not require the continuous supervision by the Court for which relief of specific performance can be denied. The generation of electricity is regulated under the provisions of the Act and the Rules and Regulations framed thereunder. In respect of CGPL, WRLDC controls the scheduling of the power on real time basis in accordance with the PPA in terms of Section 28(1)(a) of the Act. Long term PPAs are

entered into by the parties for certainty in supply of power to enable the Procurers to meet their universal supply obligations under Section 43 of the Act and certainly not to seek only damages in case of breach.

- (c) As per Section 20 of the Specific Relief Act, where the party suffering breach of contract has got the contract performed through a third party, he shall not be entitled to claim relief of specific performance against the party in breach. The said section would not bar the Petitioner from seeking specific performance of the PPA for the reason that the Petitioner did not have the option of getting it performed by a third party but was constrained to purchase the said power from the exchange owing to its universal obligations under the Act to supply powers to its consumers.
- (d) Merely because the Petitioner has a remedy available in the form of seeking damages under the PPA, that will not prevent the Petitioner from seeking specific performance of the PPA under the Specific Relief Act. In this connection, reliance has been made on the judgement of the Hon'ble Supreme Court in M.L. Devender Singh V. Syed Khaja [(1973) 2 SCC 515] and Prakash Chandra Vs Angadlal [(1979) 4 SCC 393].
- (e) The Petitioner is not seeking final relief vide the captioned interlocutory application. The Petitioner is only seeking a direction from the Commission to restore the status quo as was prevalent before 18.9.2021. In this connection reliance has been made on the judgement of the Hon'ble Supreme Court in Dorab Cawasji Warden V. Coomi Sorab Warden 7& Others [(1990) 2 SCC 117].

Analysis and Decision

15. We have considered the submissions of the parties and the documents available on record. In the captioned IAs, PSPCL, HPPC and MSEDCL have sought interim relief pending final decision in the respective main petitions. The interim reliefs sought pertain to (a) issue of directions to TPCL/CGPL for commencement of supply of their respective contracted capacity in terms of the PPA dated 22.4.2007 and (b) directions to WRLDC to schedule the power to the extent of their contracted capacity in terms of the PPA, Section 28 of the Act and Grid Code. Relief (a) being the main relief and relief (b) is corollary to relief (a). In other words the petitioner has come before us for a direction that since the PPA is subsisting, the respondent should abide by it. TPCL has contested the reliefs sought through the captioned IAs mainly on the following grounds: (a) The reliefs sought are for specific performance of the contract which cannot be granted as the case is clearly covered under Section 14(b) and (d) of the Specific Relief Act, 1963; (b) The reliefs prayed in the main petitions and the IAs are same and therefore, granting the reliefs in the IA will render the main petition infructuous; (c) There are provisions in the PPA to compensate the Procurers through damages for non-supply of power by TPCL and therefore, directions for specific performance of the PPA is uncalled for. The grounds taken by TPCL have been strongly denied by the Petitioner Procurers.

16. The following issues emerge from the pleadings and oral submission of the parties for our consideration:

(a) Issue No.1: Whether the prayers in the IAs are maintainable since similar prayers have been made in the main petition?

(b) Issue No.2: Whether the prayers in the IAs are barred by Section 14(b) of the Specific Relief Act, 1963?

(c) Issue No.3: Whether the prayers in the IAs are barred by Section 14(d) of the Specific Relief Act, 1963?

(d) Issue No.4: Whether the claims for damages in the main petition debar the Petitioner from claiming the specific performance of the PPA?

(e) Issue No.5: Whether WRLDC has failed to discharge its duties and responsibilities in accordance with Section 28 of the Act and Grid Code?

(f) Issue No.6: In the light of the decisions on the above issues, what reliefs should be granted to the Petitioners?

Issue No.1: Whether the prayers in the IAs are maintainable since similar prayers have been made in the main petition?

17. Section 94(2) of the Act provides that the Appropriate Commission shall have the powers to pass such interim order in any proceeding, hearing or matter before the Appropriate Commission, as that Commission may consider appropriate. Thus, the Commission has the full discretion to pass interim order as it considers appropriate in the facts of the case.

18. TPCL has submitted that the reliefs sought by way of the captioned IAs are exactly same as the reliefs sought in Petition Nos.85/MP/2022, 123/MP/2022 and 246/MP/2022. As per the settled law, no such reliefs should be granted by virtue of which the final relief, which is asked for and is available at the stage of disposal of the matter, is granted. TPCL has further submitted that the reliefs sought by way of captioned IAs are essentially a mandatory injunction sought against it. TPCL has submitted that the Petitioners have made out no case for grant of such mandatory injunctions.

19. PSPCL and HPPC have submitted that the main Petitions filed by them are for specific performance and exemplary damages for the period of non-performance of

the obligations on the part of TPCL and also for relief against WRLDC. These Petitioners have further submitted that all three elements for grant of interim reliefs exist in their case, namely, prima facie case, balance of convenience and irretrievable loss. MSEDCL has submitted that it is not seeking final relief vide the IA, but only a direction from the Commission to merely restore the status quo as was prevalent before 18.9.2021 till the final disposal of the captioned petition.

20. We have examined the prayers made by PSPCL, HPPC and MSEDCL in their respective main petitions and IAs. PSPCL, HPPC and MSEDCL in the Petition No.85/MP/2022, Petition No.123/MP/2022 and Petition No. 246/MP/2022 respectively have sought the following directions:

Prayers in Petition No.85/MP/2022

“(a) Direct the Respondent No 1 and 2 to resume generation and supply in so far as PSPCL is concerned to the extent of contracted capacity of 475 MW in terms of the PPA dated 22.04.2007, maintaining the proportionality of the total generation between the Procurers;

(b) Direct WRLDC to schedule the quantum of power to the extent of 475 MW being the contracted capacity of PSPCL in terms of the PPA dated 22.04.2007;

(c) Pass ad Interim ex parte orders in terms of prayers (a) and (b) above and confirm the same after notice;

(d) Direct the Respondent No. 1 and 2 to re-compensate PSPCL for the amount of Rs 289.0 crores as on 31.12.2021 as well as for the period from 1.01.2022 onwards till resumption of supply, on the same principles together with interest till payment at the rate of 1.25% per month;

(e) Direct that the Respondent No. 3 shall be jointly and severally liable to re-compensate PSPCL for the amount of Rs 289.0 crores, as on 31.12.2021 as well as for the period from 1.01.2022 onwards till resumption of supply, on the same principles together with interest till payment at the rate of 1.25% per month.”

Prayers in Petition No.123/MP/2022

“(a) Direct the Respondent No 1 and 2 to resume generation and supply in so far as HPPC is concerned to the extent of contracted capacity of 380 MW in terms of the PPA dated 22.04.2007, maintaining the proportionality of the total generation between the Procurers;

(b) Direct WRLDC to schedule the quantum of power to the extent of 380 MW being the contracted capacity of HPPC in terms of the PPA dated 22.04.2007;

(c) Pass ad Interim ex parte orders in terms of prayers (a) and (b) above and confirm the same after notice;

(d) Direct the Respondent No. 1 and 2 to re-compensate HPPC for the amount of Rs 316.42 crores as on 28.02.2022 as well as for the period from 01.03.2022 onwards till resumption of supply, on the same principles together with interest till payment at the rate of 1.25% per month;

(e) Direct that the Respondent No. 3 shall be jointly and severally liable to re-compensate HPPC for the amount of Rs 316.42 crores, as on 28.02.2022 as well as for the period from 01.03.2022 onwards till resumption of supply, on the same principles together with interest till payment at the rate of 1.25% per month.”

Prayers in Petition No.246/MP/2022

“(a) Direct Respondent No. 1 and 2 to recall its letter seeking invocation of the Letter of Credit (LC) of the petitioner.

(b) In the interim, grant as stay on invocation of the LC in order to save irreparable damage to the Petitioner herein;

(c) Declare that Respondent No. 1 and 2 were in violation of their obligations due to non-supply of power under MSEDCL PPA, and therefore liable to pay the loss accrued to the Petitioner on said account.

(d) Pass any such further order or orders as this Hon’ble Commission may deem just and proper in the circumstances of the case.

(e) Direct the Respondent No. 1 to compensate MSEDCL for the amount of Rs 172.38 crores for the period between 01.09.2021 to 15.10.2021 with interest till payment at the rate of 1.25% per month;

(f) Direct the Respondent no. 1 to resume its supply of electricity to MSEDCL in terms of the PPA and contracted capacity mentioned therein.”

In their respective IAs, both PSPCL and HPPC have made similar prayers except the prayers for compensation which are made in the main petition. MSEDCL in its IA has sought directions to TPCL to supply power in terms of the PPA and to WRLDC to schedule contracted quantum in terms of the PPA as made in the main petition. Thus, some of the prayers made in the main petitions have also been made in the IAs.

21. The question that arises is whether the reliefs prayed in the IAs which are same as some of the reliefs prayed in the main petitions can be granted at the interim stage. The following judgements have been relied upon by TPCL against the prayers in the IAs:

(a) State of Uttar Pradesh V. Ram Sukhi Devi [(2005) 9 SCC 733]

“8. ... This Court has on numerous occasions observed that the final relief sought for should not be granted at an interim stage. The position is worsened if the interim direction has been passed with stipulation that the applicable government order has to be ignored. Time and again this Court has deprecated the practice of granting interim orders which practically give the principal relief sought in the petition for no better reason than that of a prima facie case having been made out, without being concerned about the balance of convenience, the public interest and a host of other considerations.”

(b) Samir Narain Bhojwani vs. Aurora Properties and Investments and Ors. [(2018) 17 SCC 203]

“24. That apart, the learned Single Judge as well as the Division Bench have committed fundamental error in applying the principle of moulding of relief which could at best be resorted to at the time of consideration of final relief in the main suit and not at an interlocutory stage. The nature of order passed against the Appellant is undeniably a mandatory order at an interlocutory stage. There is marked distinction between moulding of relief and granting mandatory relief at an interlocutory stage. As regards the latter, that can be granted only to restore the status quo and not to establish a new set of things differing from the state which existed at the date when the suit was instituted.....”

(c) Dorab Cawasji Warden v. Coomi Sorab Warden and Ors. [(1990) 2 SCC 117]

“16. The relief of interlocutory mandatory injunctions are thus granted generally to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted or to compel the undoing of those acts that have been illegally done or the restoration of that which was wrongfully taken from the party complaining. But since the granting of such an injunction to a party who fails or would fail to establish his right at the trial may cause great injustice or irreparable harm to the party against whom it was granted or alternatively not granting of it to a party who succeeds or would succeed may equally cause great injustice or irreparable harm, courts have evolved certain guidelines. Generally stated these guidelines are:

(1) The Plaintiff has a strong case for trial. That is, it shall be of a higher standard than a prima facie case that is normally required for a prohibitory injunction.

(2) It is necessary to prevent irreparable or serious injury which normally cannot be compensated in terms of money.

(3) The balance of convenience is in favour of the one seeking such relief.”

(d) Super Cassettes Industries Ltd. vs. Music Broadcast Pvt. Ltd [(2012) 5 SCC 488]

“76. The often stated principle that Courts would not, normally, grant a relief by way of an interim measure, which is either identical with or substantially the same as the final relief sought in the proceeding, is based on the ground that indiscriminate grant of such interim reliefs are capable of producing public mischief see Assistant Collector of Central Excise, Chandan Nagar, West Bengal v. Dunlop India Limited and Ors. (1985) 1 SCC 260. This Court opined that the injury, if any, to the party approaching the Court is reversible and the public interest in certain instances should outweigh the temporary inconvenience of individuals.”

(e) Deoraj v. State of Maharashtra, [(2004) 4 SCC 697]

“12. Situations emerge where the granting of an interim relief would tantamount to granting the final relief itself. And then there may be converse cases where withholding of an interim relief would tantamount to dismissal of the main petition itself; for, by the time the main matter comes up for hearing there would be nothing left to be allowed as relief to the petitioner though all the findings may be in his favour. In such cases the availability of a very strong prima facie case — of a standard much higher than just prima facie case, the considerations of balance of convenience and irreparable injury forcefully tilting the balance of the case totally in favour of the applicant may

persuade the court to grant an interim relief though it amounts to granting the final relief itself. Of course, such would be rare and exceptional cases. The court would grant such an interim relief only if satisfied that withholding of it would prick the conscience of the court and do violence to the sense of justice, resulting in injustice being perpetuated throughout the hearing, and at the end the court would not be able to vindicate the cause of justice. Obviously, such would be rare cases accompanied by compelling circumstances, where the injury complained of is immediate and pressing and would cause extreme hardship. The conduct of the parties shall also have to be seen and the court may put the parties on such terms as may be prudent....”

22. From the above judgements, the following principles emerge with regard to grant of relief at the interim stage which may amount to final relief:

(a) Final relief sought for should not be granted at the interim stage, primarily on the basis of prima facie case made out, without consideration to balance of convenience, public interest and other considerations.

(b) mandatory relief at interlocutory stage may be granted to preserve or restore the status quo of the last non-contested status which preceded the pending controversy until the final hearing when full relief may be granted.

(c) Strong prima facie case, balance of convenience and irreparable injury may persuade the Court to grant an interim relief though it amounts to granting the final relief itself.

Though final relief should not be granted at the interim stage, the court may grant the same based on considerations of strong prima facie case, balance of convenience and irreparable injury in the facts of a particular case. The Commission is of the view that prayers in the IAs which are same as some of the prayers in the respective main petitions can be considered for grant of relief if the requirements of strong prima facie case, balance of convenience and irreparable injury are established in the light of the judgement in Deoraj v. State of Maharashtra, [(2004) 4

SCC 697]. Further, in the main petition apart from the prayers to supply power in terms of the PPA, the Petitioners have alleged breach of contract on the part of TPCL and have sought damages against the defaulting party which are required to be examined and decided by the Commission at the time of disposal of main petitions. Thus, by considering prayers in the IAs, we are not deciding on all the prayers of the petitioners in the main petitions. Accordingly, we are of the view that the prayers in the IAs can be considered at this stage even though these prayers are made in the main petitions.

Issue No.2: Whether the prayers in the IAs are barred by Section 14(b) of the Specific Relief Act, 1963?

23. Section 14 of the Specific Relief Act, 1963 (SRA) as amended provides that certain contracts are not specifically enforceable. Section 14 is extracted hereunder:

“14. Contracts not specifically enforceable.—The following contracts cannot be specifically enforced, namely:—
(a) where a party to the contract has obtained substituted performance of contract in accordance with the provisions of section 20;
(b) a contract, the performance of which involves the performance of a continuous duty which the court cannot supervise;
(c) a contract which is so dependent on the personal qualifications of the parties that the court cannot enforce specific performance of its material terms; and
(d) a contract which is in its nature determinable.”

24. Under Section 14(b) of the SRA, a contract which involves performance of a continuous duty which the court cannot supervise is not specifically enforceable. In the present case, the Petitioners have sought performance of the PPA by TPCL by supplying power as per the terms of the PPA. TPCL has submitted prayer of the Petitioners for specific performance is barred by Section 14(b) of the SRA, since in the performance of PPA, there is a daily requirement of scheduling, procurement of

coal, transportation etc. which the court would not be in a position to supervise. MSEDCL has submitted that the generation of electricity is regulated under the provisions of the Act, and the rules, regulations and code framed thereunder. In respect of the generating station of TPCL, WRLDC controls the scheduling of the power on real time basis in accordance with the PPA in terms of section 28(3)(a) of the Act. Therefore, performance of the PPA by TPCL does not require continuous supervision by this Commission, and bar under Section 14(b) of the SRA is not attracted.

25. We have considered the submission of parties. Under the provisions of Article 4.1 of the PPA, TPCL carries the obligations to build, own and operate the project. Further, Article 4.1.1 (b) of the PPA vests the responsibility in TPCL to execute the project in timely manner so as to achieve the COD with the Scheduled COD and make available the contracted capacity to meet the Procurers' scheduling and dispatch requirements throughout the term of the agreement. Article 4.3 which deals with "Purchase and Sale of Available Capacity and Scheduled Energy" and Article 4.4 which deal with "Right to Available Capacity and Scheduled Energy" are extracted as under:

"4.3. Purchase and sale of Available Capacity and Schedule Energy

4.3.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurers, and the Procurers undertake to pay the Tariff for all of the Available Capacity up to the Contracted Capacity Scheduled Energy of the Power Station, according to their then existing Allocated Contract Capacity, throughout the term of this Agreement.

4.3.2 Unless otherwise instructed by all the procurers (jointly), the Seller shall sell all the Available Capacity up to the Contracted Capacity of the Power Station to each Procurer in proportion of each Procurer's then existing Allocated Contracted Capacity pursuant to Dispatch Instructions.

4.4. Right to Available Capacity and Scheduled Energy.

4.4.1 Subject to other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurers and the Procurers shall have the exclusive right to purchase the entire Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Available Capacity and/or Scheduled Energy.

4.4.2 Notwithstanding Article 4.4.1, the Seller shall be permitted to sell power, being a part of the Available Capacity of the Power Station to third parties if;

(a) there is a part of Available Capacity which has not been Dispatched by the Procurer, ordinarily entitled to receive such part (Concerned Procurer) and

(b) such part has first been offered, at the same Tariff, to the other Procurers (by the RLDC and/or the Seller) who were not ordinarily entitled to receive such part and they have chosen to waive or not to exercise their first right to receive such part of the Available Capacity within two (2) hours of being so offered the opportunity to receive such part.”

As per the above provision, TPCL has undertaken to sell to the Procurers and the Procurers have undertaken to pay the tariff all of the Available Capacity upto the Contracted Capacity and Scheduled Energy of the power station throughout the term of the PPA. Further, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurers and the Procurers shall have the exclusive right to purchase the entire Contracted Capacity from TPCL.

26. The PPA provides that TPCL shall comply with the provisions of applicable law including the Grid Code and ABT with regard to intimation of availability and dispatch instructions. Article 8.3 and 8.4 are extracted as under:

“8.3 Availability

The Seller shall comply with the provisions of the applicable Law regarding Availability including, in particular, to the provisions of the ABT and Grid Code relating to intimation of Availability and the matters incidental thereto.

8.4 Dispatch

The Seller shall comply with the provisions of the applicable Law regarding Dispatch instructions, in particular, to the provisions of the ABT and Grid Code relating to Dispatch and the matters incidental thereto.”

27. From the above provisions, it is apparent that it is the responsibility of TPCL to provide the available capacity up to the contracted capacity to the Procurers and comply with the provisions of Grid Code and ABT with regard to declaration of availability and despatch instructions. It is the responsibility of TPCL to arrange for the coal for generation and supply of electricity in accordance with the PPA. The PPA does not envisage any provisions for mutual consultations between TPCL and Procurers with regard to procurement and transportation of coal. Moreover, the scheduling and despatch of power from the generating station of TPCL is undertaken by WRLDC in accordance with Section 28(1)(a) of the Act read with the provisions of the Grid Code. In fact, TPCL has been generating and supplying the contracted capacity to the Procurers in terms of the provisions of the PPA from the dates of commercial operation of different units of its generating station till 17.9.2021. Only with effect from 18.9.2021, TPCL has not been supplying power to the Petitioners at the PPA tariff on the ground of unprecedented increase in the price of imported coal from Indonesia except for a few days under the draft SPPA at tariff mutually agreed or for short duration in compliance with the Section 11 Directions at the tariff determined by the Commission under Section 11(2) of the PPA. The Petitioners are seeking directions to TPCL for generation and supply of contracted power in accordance with the PPA. Since the scheduling and despatch of electricity are to be carried out by WRLDC in accordance with the provisions of the PPA and Grid Code

and it is the responsibility of TPCL to arrange for procurement and transportation of coal, the Commission is of the view that issue of directions to TPCL for generation and supply of contracted capacity to the Petitioners does not require continuous supervision by this Commission. Accordingly, the bar under Section 14(b) of the SRA is not attracted in this case.

28. TPCL has relied upon the following judgements in support of the contention that issue of specific direction as prayed by the Petitioners for generation and supply of electricity to the Procurers requires continuous supervision by this Commission:

(i) MMS Steel & Power Private Limited V. ONGC Limited [(2009) SCC Online Del 4179]

(ii) Urmila and Co. Pvt. Ltd. V. J.M. Baxi and Co. [(1985) SCC Online Del 334]

We have gone through the above judgements. Both cases are distinguishable from the present case. In MMS Steel case, MMS Steel was seeking extension of its contract with ONGC for supply of sour gas for additional period of 5 years after expiry of the existing contract. By way of relief for injunction, MMS Steel was seeking stay on the stoppage of supply of gas. Hon'ble High Court after going through the contract observed that the contract runs into great and minute details and its nature requires performance of various reciprocal aspects besides the same being continuous in nature. The High Court declined to grant injunction on the ground that the Court cannot supervise the continuous duty with its minute or numerous details and keep on resolving the day to day issues arising from the contract. The facts of the M/s Urmila Case are that M/s Urmila & Co. and M/s. J.M. Baxi & Co. had submitted the bid to the Projects and Development India Ltd. (PDIL) who acting on behalf of NFL invited tenders for transportation of over-dimensional cargo from

Kandla Port to Guna (M.P.) for the installation of the aforesaid project of NFL. However, on a suggestion from NFL, both companies agreed to do the work on consortium basis. Though the terms and conditions between both companies were agreed and were contained in letter dated 28th February 1985 written by M/s Urmila & Co. to M/s. J.M. Baxi & Co, the parties could not enter into a contract. When M/s Urmila & Co came to know that M/s. J.M. Baxi & Co were arranging to undertake the said work through other companies, it filed the petition for specific performance. The Hon'ble High Court observed that there was no concluded contract and there was hardly any justification for issue of any injunction in favour of M/s Urmila & Co. Hon'ble High Court further observed that even it was supposed for the sake of arguments that there did exist a concluded contract between the parties, M/s Urmila & Co was not entitled to any relief as it would involve the performance of a continuous duty which the court cannot supervise. Hon'ble high Court observed that the parties have to take decision daily as to how the work of transportation of a particular machinery would be executed and the entire execution of the work would depend upon the consistent co-operation of the parties. The present case is different from MMS Steel Case and M/s Urmila Case since the Petitioners are seeking performance of the PPA which TPCL was performing till 17.9.2021 without the need for any supervision by this Commission and the PPA still continues to be valid and binding on the parties. The Commission is of the view that granting reliefs prayed in the IAs would not require the Commission to carry out continuous supervision of performance by the parties in terms the directions by the Commission and consequently, the bar under Section 14(b) of the SRA is not attracted in this case.

Issue No.3: Whether the prayers in the IAs are barred by Section 14(d) of the Specific Relief Act, 1963?

29. Section 14(d) of the SRA provides that the contracts which are by nature determinable cannot be specifically enforced. TPCL has submitted that Article 14.3 (Procedure for Seller Event of Default) and Article 14.4 (Termination for Procurer Event of Default) of the PPA clearly establish that the PPA is determinable. TPCL has submitted that PSPCL and HPPC have issued notices of default to TPCL, and even PSPCL has issued a substitution notice to the lenders under Article 14.3.4 read with Schedule 17 of the PPA. According to TPCL, since it can be replaced/substituted by the lenders, the contractual obligations of TPCL to supply power will cease in the event of substitution and therefore, the PPA is clearly determinable. Consequently, directions for specific performance cannot be issued as prayed for by the Petitioners.

30. PSPCL and HPPC have submitted that the PPA is not determinable since there is no option with the Petitioners to terminate the PPA at will as per the provisions of the PPA. Further, the PPA is not determinable by the existence of substitution rights under Article 14.3.4 read with Schedule 17 of the PPA since it is for the lenders to decide and the Procurers do not exercise the right to compel the Lenders to substitute. Moreover, the PPA continues for the entire term even if there is substitution by lenders. PSPCL and HPPC have submitted that there has in fact been no lenders' substitution pursuant to the notice of default earlier given. PSPCL and HPPC have also submitted that the exercise of the right by the Procurers to seek specific performance is an enforcement of their rights under Article 4 read with other provisions of the PPA. MSEDCL has submitted that a contract cannot be

considered as determinable merely because the parties can terminate the same under certain eventualities as stipulated under the contract. Instead, the courts have time and again laid down that the only test for ascertaining a determinable contract is whether either of the parties can terminate the contract at their own whims and fancies without providing any reason whatsoever. In the present PPA, in terms of clause 14.3.4, the substitution rights and other rights are not with the Procurers but with the Lenders of the Seller under Seller-Lender Financing Agreement. The Lender is not a party to the PPA nor the Procurers a party to the Seller- Lender Financing Agreement and therefore, the present PPA cannot be considered to be determinable in nature as neither of the parties can terminate the PPA at will.

31. We have considered the submissions of the parties. The issue in controversy is whether the PPA between TPCL and the Procurers is “by nature determinable” so as to exclude its enforcement through specific performance of the PPA. Pollock and Mulla in their celebrated commentary on “The Indian Contract Act and the Specific Relief Act”, (14 Edn, Volume II, page 1939) expressed their views on ‘determinable contracts’ being not enforceable as per the provisions of Section 14(1) (c) (pre 2018 amendment) of the Specific Relief Act as under:

“A contract, which is in its nature revocable, or determinable as described in Specific Relief Act, is not enforceable by specific performance. Specific performance is not decreed if the defendant would be entitled to revoke or dissolve a contract when executed, as in the case of a contract containing an express power of revocation, since it would be idle to do that which might instantly be undone by one of the parties.”

Where the parties to a contract are vested with express power of revocation enabling either party to revoke or dissolve the contract, such contracts are determinable in nature and cannot be enforced.

32. A Division Bench of the Hon'ble High Court of Kerala in the case of T.O. Abraham v. Jose Thomas, [(2018) 1 KLJ 128] considered the question of determinability "in its nature" of a contract in the following words:

"18.....For a contract to become determinable, it has to be first shown by the defendant that its clauses and terms are such that it would become possible for either of the parties to determine and terminate it without assigning any reason. The words used in section 14(1)(c) is 'inherently determinable'. The effect of the use of the word 'inherently' in the section is to make it unambiguously clear that a contract which can be terminated by either of the parties on their own will without any further reason and without having to show any cause, would ones are inherently determinable. However, if an agreement is shown to be determinable at the happening of an event or on the occurrence of a certain exigency, then it is ineluctable that on such event or exigency happening or occurring alone that the contract would stand determined. In order to see if a particular contract is inherently determinable or otherwise, we have to first see whether the parties to the said contract have the right to determine it or to terminate it on their own without the junction of any other party and without assigning any reason. This is akin to a partnership at will, where one of the partners can notify the others of his intention not to continue in the said firm and the partnership itself then dissolves. The analogy we think is appropriate because a contract, to be inherently determinable, will have to specifically provide competence to the parties to it to terminate it without assigning any reason and merely by indicating that he does not intend to comply with the same."

33. Hon'ble Bombay High Court in Narendra Hirawat and Co. v. Sholay Media Entertainment Pvt. Ltd., [2020 SCC OnLine Bom 391] has dealt with the nature of determinable contract in the following terms:

"8. When the relevant provision [section 14(d) of the Specific Relief Act] uses the words "a contract which is in its nature determinable", what it means is that the contract is determinable at the sweet will of a party to it, that is to say, without reference to the other party or without reference to any breach committed by the other party or without reference to any eventuality or circumstance. In other words, it contemplates a unilateral right in a party to a contract to determine the contract without assigning any reason or, for that matter, without having any reason. The contract in the present case is not so determinable; it is determinable only in the event of the other party to the contract committing a breach of the agreement. In other words, its determination depends on an eventuality, which may or may not occur, and if that is so, the contract clearly is not "in its nature determinable".

34. From the above judgements, it emerges that the contract is in its nature determinable where the contract can be terminated at the will of a party without reference to the other party or without reference to any breach committed by the other party or without reference to any eventuality or circumstance. If the contract is determinable only in the event of the other party to the contract committing a breach of the agreement, it cannot be said as a “contract in its nature determinable” as envisaged under Section 14(d) of SRA.

35. TPCL has submitted that the PPA is determinable which is evident from the following provisions of the PPA:

“ARTICLE 14: EVENTS OF DEFAULT AND TERMINATION

Article 14.3 Procedure for Seller Event of Default

.....

14.3.4 Within a period of seven (7) days following the expiry of the Consultation Period unless the Parties shall have otherwise agreed to the contrary or the Seller Event of Default giving rise to the Consultation Period shall have been remedied, the Lenders may exercise or the Procurers may require the Lenders to exercise their substitution rights and other rights provided to them, if any, under Financing Agreements and the Procurers would have no objection to the Lenders exercising their rights if it is in consonance with provisions of Schedule 17 . Alternatively, in case the Lenders do not exercise their rights as mentioned herein above, the Capacity Charge of the Seller shall be reduced by 20% for the period of Seller Event of Default

...

Article 14.4 Termination for Procurer Event of Default

...

14.4.5 (i) After a period of seven (7) days following the expiry of the Consultation Period unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the Allocated Contracted Capacity and associated Available Capacity of Procurer/s committing Procurer/s Event of Default to any third party of his choice. Provided such Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that in such three year period, in case the Seller is able to sell electricity to any third party at a price which is in excess of the Energy

Charges, then such excess realization will reduce the Capacity Charge payments due from such Procurer/s. For the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three year period. During such period, the Seller shall use its best effort to sell the Allocated Contracted Capacity and associated Available Capacity of such Procurer generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the Seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller is not at a price less than the Tariff, without obtaining the prior written consent of such Procurer/s. Such request for consent would be responded to within a maximum period of 3 days failing which it would be deemed that the Procurer has been given his consent. Provided further that at the end of the three year period, this Agreement shall automatically terminate but only with respect to such Procurer/s and thereafter, such Procurer/s shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement with respect to such Procurer/s even before the expiry of such three year period provided on such termination, the future Capacity Charge liability of such Procurer/s shall cease immediately.”

36. In case of Seller’s event of default, the Procurers are required to jointly approach the lenders to exercise their right of substitution under Financing Agreements between Seller and lenders. Further, the lenders have full freedom not to exercise their right of substitution despite the requests of the Procurers and in that event, capacity charges would be reduced by 20% during the period of Seller’s Event of Default. In case of Procurer’s event of default, there is a provision for consultation period of 90 days and thereafter, the liability for payment of capacity charges for three years before the PPA qua specific Procurer is terminated. Since termination of the PPA by a party is envisaged only in the event of other party’s default, the PPA cannot be said to be “in its nature determinable” in terms of Section 14(d) of SRA.

37. TPCL has relied upon the judgement of Hon’ble Supreme Court in Indian Oil Corporation Ltd. Vs Amritsar Gas Service and Others [(1991) 1 SCC 533] in support of its contention that the PPA between TPCL and the Petitioners is determinable and

hence, no direction for specific performance can be issued. In ICOL case, the Distributorship Agreement between Indian Oil Corporation Limited (IOCL) and Amritsar Gas Service (AGS) contained two provisions with regard to termination of agreement- Clause 27 which envisaged termination of the agreement on occurrence of any of the specified events and Clause 28 which permitted either party, without prejudice to the foregoing provision or anything to the contrary contained in the agreement to terminate the agreement with 30 days' notice to the other party without assigning any reason. IOCL terminated the distributorship on the basis of certain complaints received against AGS. A dispute had arisen between the parties with regard to the termination of the agreement. The dispute was referred to arbitration at the instance of Hon'ble Supreme Court. The arbitral tribunal in its award granted restoration of the distributorship as one of the reliefs to AGS while at the same time holding that IOCL can at any time terminate the agreement. This relief granted by the arbitral tribunal was challenged by IOCL under Section 34 asserting the applicability of Section 14 (1)(c) of the Specific Relief Act and contending that when the arbitral tribunal having noted that the contract was determinable, it could not have proceeded to grant a relief of specific performance of the contract. In such context, the Hon'ble Supreme Court held that the contract in question by its nature was determinable and hence, granting the relief of restoration of the distributorship was contrary to the mandate of Section 14(1)(c) (Section 14(d) after 2018 amendment) of the Specific Relief Act. It was in the context of Clause 28 of the Distributorship Agreement that the Hon'ble Supreme Court held that the AGS is not entitled to restoration of its distributorship terminated by IOCL but only entitled for loss of compensation for the earning for the notice period of 30 days since the notice was not given to AGS. Thus, the principle that emerges from IOCL case is that if the

agreement contains a provision for “termination at will without assigning any reason” which is analogous to or in the same spirit as clause 28 of the Agreement between IOCL and AGS, then the agreement shall be considered as determinable under the provisions of Section 14(d) of the SRA [Section 14(1)(c) prior to 2018 amendment] and no direction for specific performance can be issued. The rationale for such a provision is that if the directions for specific performance are issued where the contract is in its nature determinable, the effectiveness of such directions could be nullified by subsequent termination. In the present case, there is no provision in the PPA analogous to Clause 28 of the Distributorship Agreement which enables either party to terminate the agreement after notice to the other party without assigning any reason. Therefore, the PPA between TPCL and the Petitioners is not in its nature determinable and that being the case, there is no bar to issue directions for specific performance of the PPA. In our view, the judgement in IOCL case does not support the case of TPCL.

38. TPCL has also relied on the judgements of Hon’ble High Court of Delhi in Rajasthan Breweries Limited V. The Stroh Brewery Company [2000 (55) DRJ (DB)], ABP Network Private Limited V. Malika Malhotra [(2021) 283 DLT 329], Shri Dinesh Chadha v. Hotel Queen Road Pvt. Ltd [ILR (2014) III Delhi 1954] and judgement of the Bombay High Court in Gujarat Chemical Port Terminal Co. Ltd. V. Indian Oil Corporation [(2016) SCC OnLine Bom 2605]. In these cases, Hon’ble High courts have taken the view that the contracts are determinable even when there are provisions for termination on happening of certain events. In our view, these judgements are based on the construction of the relevant contracts of the nature involved in such cases and cannot be relied upon to hold that the PPA between

TPCL and the Petitioners is determinable since the PPA can be terminated by TPCL on the happening of certain events e.g. the Procurers Event of Default which may or may not happen. The PPA does not have any provision for termination by the Procurers who have been vested with the right only to seek exercise of substitution right by lenders in case of TPCL's event of default which again may or may not happen. In the circumstances, holding the PPA as determinable and refusing grant of injunction in favour of Procurers for supply of power will defeat the very purpose of having long term PPA to ensure energy security to the Procurers to meet their universal supply obligations under Section 43 of the Act.

39. The Petitioners have relied upon some of the orders of this Commission in support of their contention that the PPA is not determinable. In Order dated 10.1.2020 in Petition No.236/MP/2017 (Damodar valley Corporation v. Madya Pradesh Power Management Company Limited), the Commission after examining the provisions of the PPA between the parties in the light of the judgement of Hon'ble Supreme Court in IOCL case came to the conclusion that unlike IOCL case, the PPA was for a period of 25 years and there was no provision for revocation or termination of the PPA and accordingly, the Commission came to the conclusion that PPA was not determinable. In Order dated 11.4.2022 in Petition No.275/MP/2018 (Tata Power Trading Company Limited V. SKS Power Generation (Chhattisgarh) Limited], the Commission noted that the PPA between the parties provided for termination only in the event of non-payment of consultant fees or non-fulfilment of conditions subsequent and no right has been given to either party to terminate the PPA at its own volition without assigning any reason. In the light of the decision of Kerala High Court in T.O. Abraham case, the Commission concluded that the PPA only provided

for termination due to default of the parties and no right has been given to either party to terminate the PPA on its own volition without assigning any reason and therefore, the PPA was not determinable. The Commission also distinguished the said case from that of IOCL case since the PPA provided for termination of PPA on the happening of specified events. In Order dated 22.11.2022 in Petition No.110/MP/2022 [PTC India Limited and Anr. V. Haryana Power Purchase Centre and Ors], the Commission after examining provisions of the PSA and in the light of the judgement of Kerala High Court in T.O. Abraham case came to the conclusion that the PSA is not determinable since the PSA signed by the parties only provided for termination due to default of the parties and no right has been given to either party to terminate the PPA on its own volition, without assigning any reason. In the present case also, there is no provision for termination of PPA by either party at will and the termination is contingent upon the happening of certain events which may or may not happen, the PPA cannot be said to be determinable so as to be covered under Section 14(d) of the SRA.

40. In the light of the above discussion, we conclude that the PPA between TPCL and the Procurers cannot be considered as a contract which is “in its nature determinable “ in terms of Section 14(d) of the SRA.

Issue No.4: Whether the claims for damages in the main petition debars the Petitioner from claiming the specific performance of the PPA?

41. TPCL has submitted that as per Article 14(1)(iv) & (xiv), 14.3.4 and Clause 1.2.5 of Schedule 7 of the PPA, should there be any shortfall in supply, TPCL shall have to pay penalty at the rate of 20% of the simple average capacity charge. TPCL has submitted that the PPA does not provide for specific performance and on the

contrary, it provides for compensation in the event of non-supply which cannot be over-ridden by a judicial order at this stage. TPCL has submitted the details of the compensation paid along with the credit notes issued by TPCL in favour of the Procurers as under:

| Procurer | Contracted Capacity | Availability Declared | Shortfall to 75% | Penalty paid@20% of the Average Capacity Charge on Shortfall to 75% |
|----------|---------------------|-----------------------|------------------|---|
| | MW | % | % | Crores |
| GUVNL | 1805 | 46.3% | 28.7% | 77.5 |
| MSEDCL | 760 | 12.1% | 62.9% | 75.5 |
| PSPCL | 475 | 14.2% | 60.8% | 45.7 |
| HPPC | 380 | 12.1% | 62.9% | 37.8 |
| RUVNL | 380 | 15.1% | 59.9% | 36.0 |

42. PSPCL and HPPC have submitted that the provisions quoted by TPCL do not cover a situation of a deliberate and wilful breach of not declaring availability in terms of the requirement of the PPA. Further, for breach by TPCL, the Procurers are entitled to seek specific performance and for the period of non-performance the damages in terms of Section 73 of the Indian Contract Act, 1872. MSEDCL has submitted that merely because the Petitioner has a remedy available in the form of seeking damages as liquidated under the PPA, that will not prevent the Petitioners from seeking specific performance of the PPA under the Specific Relief Act.

43. We have considered the submission of parties. The relevant provisions of the PPA relied upon by TPCL are extracted as under:

“4.4 Right to Available Capacity and Scheduled Energy

4.4.1 Subject to other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurers and the Procurers shall have the exclusive right to purchase the entire Contracted Capacity from the

Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Available Capacity and/or Scheduled Energy.

Article 14.1 Seller Event of Default

(iv) after Commercial Operation Date. of all the Units of the Power Station, the Seller fails to achieve Average Availability of sixty five percent (65%), for a period of twelve. (12) consecutive Months or within a non-consecutive period of twelve (12) Months within any continuous aggregate period of thirty six (36) Months, or

(xiv) Occurrence of any other event which is specified in this, Agreement to be a material breach/default of the Seller.”

Article 14.3 Procedure for Seller Event of Default

14.3.4 Within a period of seven (7) days following the expiry of the Consultation Period unless the Parties shall have otherwise agreed to the contrary or the Seller Event of Default giving rise to the Consultation Period shall have been remedied, the Lenders may exercise or the Procurers may require the Lenders to exercise their substitution rights and other rights provided to them, if any, under Financing Agreements and the Procurers would have no objection to the Lenders exercising their rights if it is in consonance with provisions of Schedule 17 . Alternatively, in case the Lenders do not exercise their rights as mentioned herein above, the Capacity Charge of the Seller shall be reduced by 20% for the period of Seller Event of Default”

Schedule 7: Tariff

1.2.5 Contract Year Penalty for Availability below 75% during the Contract Year

In case the Availability for a Contract Year is less than 75%, the Seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs./kWh) for all months in the Contract Year applied on the energy (in kwh) corresponding to the difference between 75% and Availability during such Contract Year.”

44. Perusal of above provisions reveals that Article 14.1 (iv) deals with availability below 65% and consequences for such default have been provided under Article 14.3 i.e. liquidated damages in the form of reduction of capacity charges by 20% for

the period of the Seller's event of default. Clause 1.2.5 of the PPA deals with the penalty for availability below 75% @ 20% of the simple average capacity charge.

45. We have noticed that the Petitioners in the IAs have sought interim directions to TPCL and WRLDC for specific performance of the PPA to schedule the contracted capacities to the Petitioners. We are of the view that the provisions quoted by TPCL are consequences that follow on account of Seller's failure to supply power. The parties to the PPA have never intended that these provisions will override or supplant the provisions of Article 4.3.1 of the PPA under which TPCL has undertaken to sell to the Procurers up to their respective contracted capacity scheduled energy of the power station throughout the terms of the PPA. In other words, the provisions of the PPA relied upon by TPCL do not enure it in case of non-supply of power in breach of the terms of the PPA. Further, the Petitioners have not raised the issue of damages in the IAs. Therefore, while dealing with IAs, the Commission does not consider it necessary to examine the issue of damages which will be dealt with at the stage of final disposal of the petition

Issue No.5: Whether WRLDC has failed to discharge its duties and responsibilities in accordance with Section 28 of the Act and Grid Code?

46. PSPCL and HPPC have submitted that in terms of Clause 2(b) of LPSC Procedure, power is to be scheduled for dispatch after intimation is given that appropriate LC has been opened. Further, the intimation would not be accepted unless confirmed by the parties. In case the distribution company does not intimate within 7 days, the intimation given by the generating company would be taken as final. PSPCL submitted that it had duly intimated WRLDC on 20.1.2023 that LC provided by it was in terms of the PPA. HPPC has submitted that it had intimated

WRLDC on 4.1.2023/6.1.2023 and 13.1.2023/19.1.2023. However, WRLDC did not schedule power to PSPCL and HPPC and has thereby not acted in accordance with the Rules. The issue whether WRLDC has failed to discharge its statutory responsibilities vis-à-vis the Petitioners shall be examined at the stage of final disposal of the case. It is sufficient at this stage to direct WRLDC to carry out scheduling and despatch of power in terms of our directions strictly in accordance with the provisions of the Act, Grid Code, LPS Rules and the provisions of the PPA.

Issue No.6: In the light of the decisions on the above issues, what reliefs should be granted to the Petitioners?

47. In the IAs, the Petitioners have prayed for issue of directions to (i) TPCL to commence supply of power to PSPCL, HPPC and MSEDCL to the extent of their contracted capacity in terms of the PPA by maintaining the proportionality of the total generation between procurers and to (ii) WRLDC to schedule the quantum of power of 475 MW, 380 MW and 760 MW respectively to PSPCL, HPPC and MSEDCL. It is a settled principle of law that grant of interim injunctions should be tested on the touchstone of three principles, namely, existence of a prima facie case for interim relief, balance of convenience in favour of the party seeking interim relief and whether irreparable loss or damage will be caused to the party if interim relief is not granted.

48. We have noted that TPCL was supplying power to the Procurers at PPA tariff till 17.9.2021. TPCL has stopped supplying power to the Procurers at PPA tariff with effect from 18.9.2021 on account of unprecedented increase in cost of imported coal. However, the Petitioners have submitted that since the relief of compensation for

increase in price of Indonesian coal was rejected by the Hon'ble Supreme court in Energy Watchdog Case as the event was held to be neither covered under Change in Law nor under Force Majeure, TPCL is contractually obliged to supply power in terms of the PPA.

49. In order to decide whether there is a prima facie case for interim relief in favour of the Petitioners, we have to consider rights of the Petitioners under the PPA and whether non-grant of interim relief would result in deprivation of such rights. Article 4.3.1 of the PPA provides that subject to the terms and conditions of the PPA, the Seller undertakes to sell to the Procurers, and the Procurers undertake to pay the Tariff for all of the Available Capacity up to the Contracted Capacity Scheduled Energy of the Power Station, according to their then existing Allocated Contract Capacity, throughout the term of this Agreement. Article 4.3.2 of the PPA further provides that unless otherwise instructed by all the procurers (jointly), the Seller shall sell all the Available Capacity up to the Contracted Capacity of the Power Station to each Procurer in proportion of each Procurer's then existing Allocated Contracted Capacity pursuant to Dispatch Instructions. Article 4.4.1 of the PPA provides that subject to other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the Procurers and the Procurers shall have the exclusive right to purchase the entire Contracted Capacity from the Seller. Thus, the Petitioners have right for generation and supply of power to the extent of their respective contracted capacities in the generating station and TPCL carries the reciprocal obligations to supply the contracted capacities to the Procurers including the Petitioners throughout the terms of the PPA. Moreover, arrangement of fuel is the responsibility of TPCL

and compensation for increased cost of imported coal, if any, on account of Indonesian Regulations has been rejected by Hon'ble Supreme Court in Energy Watchdog Case. Therefore, the Petitioners cannot be deprived of their right on the contracted capacity on account of the increased cost of imported coal. The Petitioners have a strong prima facie case in their favour to seek directions to TPCL to comply with the provisions of the PPA by supplying the contracted capacity.

50. The balance of convenience is also in favour of the Petitioners. The Petitioners have entered into PPA for a period of 25 years for ensuring stable supply of power to meet the needs of their consumers and also carry the liability to pay the capacity charges irrespective of whether they schedule the power or not. Since the Petitioners have entered into the PPA for stable and assured supply of power for a period of 25 years at a competitive rate, it will cause them irreparable injury in case of non-supply of power causing inconvenience to the public at large.

51. In the light of the above discussion, the Commission is of the view that the Petitioners have made out a case for grant of interim relief in the form of directions to TPCL to generate and supply the contracted capacity in accordance with the provisions of the PPA till the matter is decided finally. Section 37 of The Indian Contract Act mandates that "the parties to the contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act or of any other law". The respondents have not made out any case for performance under the PPA to be excused or dispensed with. Accordingly, we hereby direct TPCL to discharge its contractual obligations

towards the Petitioners in accordance with the provisions of the PPA, pending final decisions of the Commission on all issues raised in the main petitions.

52. As regards the interim relief sought qua WRLDC, the Commission directs WRLDC to schedule power in accordance with the provisions of the Act, LPS Rules, Grid Code and the provisions of the PPA. Since the directions have been issued to TPCL to discharge its contractual obligations as per the PPA, the Letter of Credit shall be maintained by the Procurers in accordance with the PPA and authenticated by TPCL on the Payment Security Mechanism accordingly.

Other Issues

53. It may be pointed out that as per Section 11(1) of the Act, the Appropriate Government may specify that a generating company shall, in extraordinary circumstances operate and maintain any generating station in accordance with the directions of that Government. Both PSPCL and HPPC have submitted in the pleadings that during the subsistence of operation of the Section 11 directions, the inter-se rights between the parties were the subject matter of Petition No. 128/MP/2022 filed by TPCL in terms of Section 11(2) of the Act and supply of power under Section 11 Directions were admittedly outside the ambit of the PPA.

54. TPCL during arguments pointed out that a new Section 11 regime had already been notified on 20.02.2023, which has come into effect from 16.3.2023. The Commission taking note of new Section 11 regime with effect from 16.03.2023 directs that the interim directions issued through this order shall not be applicable during the subsistence of the Section 11 directions.

55. It is pertinent to mention that based on the High Power Committee Report to offset the impact of increased coal cost in imported coal based power plants located in Gujarat, Government of Gujarat approached the Hon'ble Supreme Court seeking clarification whether any amendments to the PPAs in the light of the recommendations of the HPC would be possible on the face of the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Civil Appeal No. 5399-5400 of 2016 (hereinafter referred to as the Energy Watchdog Case). Hon'ble Supreme Court vide order dated 29.10.2018 in Misc. Application No. 2705-2706 of 2018 in CA No. 5399-5400 of 2016 clarified that its judgement in Energy Watchdog Case would not stand in the way of maintaining applications before the Commission for amendment of the PPA in the light of the HPC Report. Since then, TPCL and the Procurers of Mundra UMPP are engaged in negotiations about the terms and conditions of the Supplementary PPA. In the event of materialisation and implementation of Supplementary PPA, TPCL shall be liable to generate and supply power in terms of the PPA dated 22.4.2007 as may be amended through the Supplementary PPA, and the directions in the present order shall not come in the way of implementation of the Supplementary PPA.

56. The IAs are disposed of in terms of the directions in para 51 and Para 52 above. The main petitions shall be listed for hearing in due course.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member