PUNJAB STATE ELECTRICITY REGULATORY COMMISSION

SITE NO. 3, BLOCK B, SECTOR 18-A, MADHYA MARG, CHANDIGARH

Petition No. 43 of 2021
Alongwith IA No. 16 of 2021
Date of Order: 02.08.2023

Petition for adjudication of disputes arising from illegal recovery made by PSPCL for alleged shortfall in energy generation under Section 86(1) (f) of Electricity Act, 2003.

AND

In the Matter of: M/s Everest Power Private Ltd., Hall A, First Floor, Plot No. 143-144, Udyog Vihar Phase-IV, Gurgaon122015, Haryana.

.....Petitioner

Versus

1. Punjab State Power Corporation Ltd, through its Chief Engineer (PP&R), Inter State Billing (ISB) Thermal Sheds, D-3, Shakti Vihar, Patiala- 147001.
2. M/s PTC India Ltd., 2nd Floor, NBCC Tower, 15, Bhikaji Cama, New Delhi-66.

…..Respondents

Commission: Sh. Viswajeet Khanna, Chairperson

Sh. Paramjeet Singh, Member

EPPL: Sh. Tarun Johri, Advocate

PSPCL: Sh. Anand K Ganesan, Advocate

PTC: Sh. Avdesh Mandoli, Advocate

ORDER

1. M/s Everest Power Private Ltd (EPPL) has filed the present petition under Section 86 (1) (f) of the Electricity Act 2003 for adjudication of disputes arising from the recovery made by PSPCL for alleged

shortfall in energy generation. The petition was admitted vide order dated 09.09.2021 directing PSPCL to file its reply and rejoinder there to by EPPL. The submissions of the petitioner are summarized as under:

1.1 That EPPL has developed a 100 MW Malana II Hydro Electric Project in District Kullu, Himachal Pradesh which was declared under Commercial Operation on 12.07.2012. The entire power generated from the project is being supplied to PSPCL through PTC under a long term PPA/PSA for 40 years. The tariff of the Project is being determined by the Commission (PSERC) and the monthly invoices are raised regularly by EPPL towards energy supplied as per PSERC Orders. However, for the first time on 27.09.2018, PSPCL intimated to EPPL a unilateral deduction/ recovery of Rs. 44,17,14,508/- towards energy shortfall charges paid by PSPCL in previous years from FY 2012-13 to FY 2016-17 alleging non-fulfilment of requirements of Regulation 31 (6) of CERC Notification dated 21.02.2014. EPPL replied to the said letter vide letter dated 25.10.2018 requesting PSPCL to provide the details of alleged non-compliance and energy shortfall and stated that in the absence of such details, the recovery/deduction would be considered unjustified and not admissible. PSPCL vide their letter dated 12.11.2018 provided the details of year wise energy shortfall charges from FY 2012-13 to FY 2016-17 to the tune of Rs. 44,17,14,508/-. Without prejudice to anything contained herein, the action of PSPCL recovering an amount pertaining to the period commencing from FY 2012-13 to FY 2014-15 is untenable in law and inadmissible being barred by the law of

limitation and is untenable and liable to be reversed. Thereafter, PSPCL vide letter dated 07.01.2021 informed about recovery of an interest amount of Rs. 19.64 Crore for shortfall charges for the period FY 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17. The aforesaid deductions of interest charges by PSPCL were made on 23.06.2021 from the monthly energy bills for the month of March 2021, April 2021 and May 2021. It is also barred by law of limitation as the claim of interest payment on the principal amount, if any, relates to FY 2012-13, 2013-14, 2014-15, 2015-16 and 2016-17 and had become time barred much prior to the date of recovery i.e. the year 2021.

1.2 That, being a money claim towards energy shortfall charges, the period of limitation provided under the Limitation Act, 1963, is three years and no recovery of any amount sought to be claimed after the expiry of period of 3 years from the date of accrual of cause of action, if any, could have been carried out by the Respondent. The cause of action, if any, for carrying out the alleged recoveries of the energy shortfall charges arose in favour of the Respondent, in the relevant years when the energy bills were raised by the Petitioner and paid by PSPCL. As no objection, ever, had been taken by PSPCL to the said payments, within a period of 3 years from the date of raising of the said invoices, PSPCL acts and conduct, in the Year, 2018 and now in the Year, 2021 to recover principle and interest in respect of the same are barred by law of limitation being beyond the period of three years from the date of arising of cause of action.

1.3 That the Tariff Order dated 27.11.2013 passed by the Commission states that EPPL shall be entitled for computation and payment of capacity and energy charges in accordance with CERC (Terms and Conditions of Tariff) Regulations 2009 as the same are not specified in the PSERC Tariff Regulations. The same position was reiterated by the Commission in its Order dated 31.08.2015, while truing up Annual Fixed Cost (AFC) for FY 2012-13 & 2013-14. As such, the recovery has been made by PSPCL erroneously for alleged non-compliance of requirement of Regulation 31 (6) of the CERC (Terms and Conditions of Tariff) Regulations, 2014 which is applicable with effect from 1st April, 2014. PSPCL has recovered the amount towards shortfall energy for FY 2012-13 and FY 2013-14 taking into consideration Regulations which was not in existence or enforced during that period. Therefore, the recovery made by PSPCL for FY 2012-13 and FY 2013-14 is against the applicable Regulations during that period, as the applicable CERC Tariff Regulations, 2009 allowed the recovery of energy shortfall on rolling basis. EPPL has applied and followed the applicable Regulations in its true spirit as the main reason of energy shortfall was low water discharge which is beyond EPPLs control. The CERC Tariff Regulations, 2009, applicable during relevant period, nowhere directed for submission of any application for approval of energy shortfall. Therefore, recovery made by PSPCL, on account of energy shortfall for FY 2012-13 and 2013-14 taking into consideration CERC Tariff Regulations, 2014, shows malafide and ulterior intention of PSPCL to only delay or hold the legitimate payment(s).

1.4 That the shortfall in energy has resulted due to low discharge in MalanaKhad which is beyond the control of EPPL. To corroborate the same, EPPL approached WAPCOS, a premier CPSU in the field of water resources and Hydrology studies. The WAPCOS report was submitted to PSPCL vide letter dated 08.12.2020. A perusal of the report establishes that Hydrological data issued by the Board in respect of MalanaK-had River was grossly incorrect and unreliable. As, the DPR of the project had been prepared and finalized by the petitioner based on the hydrological data provided by the Himachal Pradesh State Electricity Board, the petitioner has been unable to generate the designed energy from the project as envisaged in the DPR, which has resulted in huge financial losses to the petitioner due to lower then envisaged generation of units and revenue. The shortfall in achieving the design energy was beyond the control of the petitioner, which falls within the meaning of Force Majeure event as stated under Article 11.1.2 of the PPA. Thus the energy shortfall charges and the interest levied by PSPCL being affected by Force Majeure events are not admissible and recoverable from the petitioner.

1.5 That EPPL and PSPCL filed Cross Appeals at Nos. 30 and 35 of 2014 on some of the issues against the Order dated 27.11.2013 in Petition No. 54 of 2012. On remand by Hon'ble APTEL, the Commission passed a consequential Order 04.12.2014. All the matters with regard to Tariff Order dated 27.11.2013, have already been settled and upheld by the Hon'ble Supreme Court vide Order dated 24.04.2015 in Civil Appeal No 3346-3347 of 2015. That the directions given under

the above referred orders are for computation and payment of Capacity and Energy Charges as per CERC Regulations, 2009; however, no direction was given by the Commission for submission of any application for approval to account for energy shortfall. The monthly energy invoices were raised by EPPL as per provisions of the applicable CERC Regulations which were duly accepted by PSPCL and no objection was raised in the last six years. The actual generation was less than its Design Energy (DE) mainly due to lower discharge which was not attributable to the Developer as the same was beyond its control. In the financial Year 2012-13 design energy at the generating terminal was 251.47 MU and actual generation was 215.22 MU with a total shortfall of 36.25 MU. In financial year 2013-14 the design energy was 403.27 MU and actual generation was 339.88 with a total shortfall of 63.39 MU. EPPL has submitted a letter dated 12.03.2019 to PSPCL raising its objection on unjustified recovery of amounts from running invoices and has submitted the details of actual energy along with reasons of shortfall in the energy generation for FY 2012-13 and 2013-14 to PSPCL which is mainly on account of low discharge.

1.6 Further, the Commission while truing up the AFC for FY 2014-15, FY 2015-16, FY 2016-17 observed that EPPL shall be entitled for computation and payment of capacity charges and energy charges in accordance with Regulation 31 of the CERC (Terms and Conditions of Tariff) Regulations, 2014 as the same is not specified in the PSERC Tariff Regulations. That there was energy shortfall of 155.37 MU, 50.29 and 31.54 MU respectively

in FY 2014-15, 2015-16 and 2016-17. The plant was not operational for a period of around 6 months during FY 2014-15 due to sudden flow of water from Surge Shaft bottom area/gate chamber of the project which was communicated to PSPCL vide letters dated 28.08.2014 and 06.04.2015. The energy shortfalls for the period from FY 2014-15 to FY 2016-17 are mainly caused by low water discharge and happening of certain force majeure events which were beyond the control of the developer. The ECR have been calculated in due compliance with Regulation 31(6)a of the CERC Regulations, 2014. Attention is invited to the fact that the PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 i.e. effective from 1st April, 2014, allows recovery of energy shortfall on rolling basis. However, no provision of any application for energy shortfall was mentioned by PSERC. It is pertinent to mention that the Annual tariff petition filed with the Commission contains the details of energy generation. Furthermore, EPPL is raising its invoices on reduced DE and next year true-up applications are also based on reduced DE. Hence, there was no question of filing separate applications when reduced DE are being provided to and considered by PSPCL while evaluating/releasing of payments against monthly energy invoices.

1.7 That PSPCL has deducted/ recovered an amount of Rs. 44,17,508/- towards recovery of shortfall against the invoices for the month of July 2018 & August 2018 without giving any prior notice. As per clause 10.6.1 of the Power Sale Agreement

dated 23.03.2006, if PSPCL does not dispute a bill raised for power supply within 30 days of its receipt, such bill becomes conclusive. PSPCL does not have any right to claim recovery of any payments which were not disputed earlier. Further, as per clause 10.6.2 and 10.6.3 of the PSA, PSPCL has no right to unilaterally deduct any amount from the power supply bills without first issuing a Bill Dispute Notice. PSPCL has never raised the dispute under the said provisions of the PSA against the monthly energy raised by EPPL including recovery of charges against energy shortfall. Moreover, every year in the tariff petition and true-up petition, the reduced design energy is being reviewed and adjudicated by PSPCL as well as the Commission.

1.8 That PSPCL issued notice to EPPL to realize interest of Rs. 18.81 Crore on the claimed shortfall charges from FY 2012-13 to FY 2016-17 from the monthly energy invoices of EPPL. EPPL vide letter dated 12.01.2021 replied to PSPCL's letter dated 07.01.2021 stating that recovery by PSPCL of Rs. 44.17 Crore from running monthly invoices for shortfall of energy during FY 2012-13 to FY 2018-19 and any interest thereon is not admissible as per law. EPPL also requested PSPCL to appreciate that during lean season (November to March) when discharge in the river remains very low, the monthly invoices are of very nominal amount and therefore any recoveries would adversely affect the operation of Malana-II HEP. PSPCL, vide letter dated 15.02.2021, intimated EPPL that deduction of interest on shortfall charges for the period FY 2012 to FY 2016-17 is deferred till April, 2021 subject to the condition that EPPL

approaches the Commission for the claim of shortfall charges by April 2021. However, EPPL could not file a petition before the Commission before April 2021 due to the COVID pandemic and the lockdown declared by the Govt. PSPCL once again unilaterally deducted shortfall energy charges from the monthly energy bills for the month of April 2021, wherein a deduction of Rs. 93,54,360/- has been carried out by PSPCL without providing any details or basis for such deduction. EPPL has further requested the commission to refer the issue of design energy to the Central Electricity Authority/ authority/ organization/ company or any other competent authority as deemed fit by the Commission and obtain a detailed report on the discharge of MalanaKhad. Accordingly, after giving an opportunity to the petitioner to examine the said report, the Commission may fix the design energy of Malana-II HEP.

1.9 EPPL filed an IA submitting that PSPCL has unreasonably continued to carry out deductions towards monthly energy bills for the month of April 2021 and has been withholding payments towards shortfall energy charges for the subsequent months. The said deductions are unlawful in the light of various documentary evidence including report submitted by M/s WAPCOS which establishes the reason for non-achievement of design energy. EPPL shall suffer an irreparable loss and injury in case PSPCL is not restrained from carrying out the unreasonable deductions from the monthly bills.

1.10 EPPL has prayed to:

a) Allow the instant Petition and thereby, Quash the recoveries made by Respondent/PSPCL vide its letter dated 27.09.2018 and 12.11.2018 from

the monthly energy bills raised by the Petitioner, by declaring that the recoveries made from Petitioner's account, of Principal amount and the interest amount towards shortfall energy charges is illegal, unlawful and void ab-initio;

b) *Direct the Respondent/PSPCL to forthwith refund/pay the recovered amount of Rs. 44,17,14,508/- (Rupees Forty Four Crore Seventeen Lac Fourteen Thousand Five Hundred Eight Only) to EPPL, along with interest @ 18 % p.a. from the date i.e. 27.09.2018 when the aforesaid amount had been deducted by Respondent/PSPCL till the date of actual payment thereof to the Petitioner;*

c) *Direct the Respondent/PSPCL to forthwith return/pay an amount of Rs. 19,64,02,331/- (Rupees Nineteen Crore Sixty Four Lakh Two Thousand Three Hundred and Thirty One Only) being the amount towards interest on shortfall charges unreasonably and illegally deducted by the Respondent/PSPCL from the monthly energy bills of March, 2021, April, 2021 & May, 2021 raised by the Petitioner along with interest @ 18%p.a. from the date when each amount had been deducted by the Respondent from monthly energy bills raised by the Respondent.*

d) *Direct the Respondent/PSPCL not to deduct any further amount towards shortfall charges from Monthly Energy Bills raised by the Petitioner, till the final adjudication of the instant Petition.*

e) *Refer the computation of design energy/design discharge of Malana II HEPO Project to Central Electricity Authority/ Company/ authority/ organisation etc and after giving an opportunity to the Petitioner to examine the said report and provide its comments, the Commission may fix the design energy/Design Discharge of 100MW Malana – II Hydro Electric Project.*

f) *Direct PSPCL to pay the regular monthly energy invoices till the finalization of the matter by PSERC.*

g) *Pass such orders in terms of the submissions made in this petition and other orders as may deem fit in the facts and circumstances of the Petition.*

2. On. 30.09.2021, PSPCL filed their reply to the petition submitting that there is no merit in the petition and the same is liable to be dismissed. PSPCL's submissions are summarized as under:

2.1 The Petitioner had entered into a long-term Power Purchase Agreement (PPA) dated 25.07.2005 with PTC India Limited (PTC) for supply of electricity from the generating station, on the terms and conditions as contained in the said PPA, for a period of 40 years. Based on the said PPA, PSPCL had entered into a Power Sale Agreement dated 23.03.2006 (PSA) with PTC providing for the terms and conditions for supply of electricity by PTC from the generating station of the Petitioner. The PPA and PSA are inter-linked documents, which provided for the terms and conditions on which the supply of electricity would be made by the Petitioner to PSPCL through PTC. On 03.01.2013, the Petitioner, PTC and PSPCL signed a tripartite agreement modifying Article 10.1 of the PSA to incorporate the clause that the tariff would be as determined by the State Commission. It is in this factual background that the entire power generated from the Petitioner's Project since the commercial operation date is being supplied to PSPCL through PTC for a period of 40 years.

2.2 That it came to the notice of the officials of the PSPCL in the year 2018 that since FY 2012-13 PSPCL had been paying shortfall charges to the Petitioner even though the petitioner had not claimed that reasons for shortfall were beyond its control. In fact, the Regulations require the Petitioner to demonstrate the

same to the satisfaction of PSPCL and/or the Commission and only upon such a declaration the Petitioner was entitled to the shortfall charges. Therefore, on 27.09.2018, PSPCL wrote to the Petitioner that the shortfall charges paid in the past amounting to Rs. 44,17,14,508/- are being recovered. The petitioner disputed the recovery of charges vide letter dated 25.10.2018 and sought details of the shortfall charges so recovered by PSPCL. PSPCL on 12.11.2018 provided the year wise details of the shortfall charges from FY 2012-13 to FY 2016-17.

2.3 That even after providing the clarification and the details of the year wise recovered shortfall charges, the Petitioner vide letters dated 28.11.2018 and 27.12.2018, inter alia, once again disputed the recovery of the shortfall charges by PSPCL and stated that it is in the process of arranging the details for shortfall as sought by PSPCL and would be submitting the same within 1-2 weeks. The Petitioner further mentioned that, under the provisions of the 2009 regulations, it is not supposed to file any application, however the Petitioner maintained silence on the application to be filed for adjudication of disputes for the period commencing from FY 2014-15 period. Thereafter *vide* letter dated 07.01.2019, PSPCL asked the Petitioner once again to provide the requisite documents pertaining to the shortfall in energy generation of FY 2012-13 and 2013-14, for its perusal. Though the above was disputed by the Petitioner, the Petitioner did not initiate any proceedings in relation to the tariff or otherwise for seeking a declaration that the reasons for the shortfall were beyond the control of the Petitioner.

2.4 That on 12.03.2019, the Petitioner for the first time sought to provide the details of the shortfall. But this was limited to the

years 2012-13 and 2013-14 and was replete with discrepancies. However, even this information did not establish that the shortfall was for reasons beyond the control of the Petitioner. The onus is on the Petitioner to establish force majeure events, to claim the benefit of the short-fall energy, which the Petitioner failed to establish. No such attempt to establish was even made for the years from 2014-15 onwards. Thereafter, on 18.12.2020 i.e., after more than two years of the deduction of the amount, The Petitioner provided a report by an agency by the name of WAPCOS. Even this report does little to establish that the reasons for shortfall were beyond the control of the Petitioner.

2.5 That PSPCL acted bonafidely and did not proceed to recover the interest portion immediately. Only when EPPL did not raise any dispute and no tariff proceedings were initiated by the Petitioner in relation to the shortfall charges as per the Regulations, PSPCL *vide* letter dated 07.01.2021 intimated the Petitioner that the outstanding interest portion was being realized by PSPCL. However, based on the request of the Petitioner in its letters dated 12.01.2021 and 19.01.2021, PSPCL agreed to defer the recovery of interest to April, 2021 subject to filing of the petition by the Petitioner before the Commission. However, this was also not adhered to by the Petitioner. In fact, till date the Petitioner has not filed a petition before the Commission seeking tariff on the issue of shortfall energy and a declaration that the shortfall was for reasons beyond the control of the Petitioner. The present Petition is only for adjudication of disputes, without the underlying decision on the shortfall and tariff. The simple interest amounting to Rs. 19,64,02,331/- was then recovered by PSPCL in instalments on 22.06.2021, 09.07.2021 and 11.08.2021. The

Petitioner ought to have filed an application to demonstrate as to how the reasons for shortfall were beyond its control. This has not been done even now and the petition is not maintainable.

2.6 That the recovery of shortfall charges from FY 2012-13 to FY 2014-15 are not barred by the law of limitation. The submissions of the Petitioner are misconceived and there is no bar in the Limitation Act on the recovery of amounts due and payable by the Petitioner. The bar under the Limitation Act is only for seeking a legal recourse in a court of law for recovery of amounts. It is a well settled principle that limitation only bars the remedy and not bar the right itself. The fact that a petition is barred by limitation would only mean that the claim cannot be enforced through judicial proceedings. Limitation does not destroy the rights of parties. The Limitation Act or the principles underlying thereunder would only prevent PSPCL from seeking to initiate recovery proceedings against any person, where the amounts due are more than 3 years old. PSPCL is only the respondent in the present case and the question of Limitation Act applying to a respondent in a proceeding does not arise. PSPCL has relied in this regard on the Hon'ble Supreme Court following judgments; CIT v. Sugauli Sugar Works (P) Ltd., (1999) 2 SCC 355 and Punjab National Bank v Surendra Prasad Sinha (1993) Supp 1 SCC 499.

2.7 **FY 2012-13 and FY 2013-14**

With regard to FY 2012-13 and FY 2013-14, PSPCL has submitted that in petition No. 54 of 2012 filed by EPPL, seeking determination of tariff for its 100 MW plant, the Commission *vide* Order dated 27.11.2013, *inter alia*, held that the Petitioner shall be entitled for computation and payment of capacity charges and

energy charges in accordance with Regulation 22 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2009;

(i) In view thereof, there is no dispute over the fact that it is the CERC Tariff Regulations, 2009 which are to be applied while calculating the energy charge and capacity charge for the Petitioner's Plant. However, the absence of the words 'in an application' would not render in a situation wherein the primary obligation to show that the shortfall was for reasons beyond its control is not required to be established.

(ii) Where the remedy for shortfall charges is only when the shortfall is for reasons beyond the control of the generating company, it is for the generating company to demonstrate and have it decided that it is entitled to shortfall charges due to the shortfall being for reasons beyond its control, i.e., force majeure. And, when the fact is to be established by the generator, the onus of establishing it is on the generator and it has to be done in appropriate proceedings.

(iii) The decision on the shortfall charges is in relation to tariff and has to follow the same procedure and methodology as a tariff proceeding. It cannot be possible done in an adjudicatory petition, nor can the Petitioner assume that it is required to establish only in case of a dispute.

2.8 **FY 2014-15 to FY 2016-17**

In the Tariff Petitions filed by the petitioner for determination of AFC for FY 2014-15, FY 2015-16 and FY 2016-17, the Commission, *inter alia*, has held that the Petitioner shall be entitled for computation and payment of capacity charge and energy charge in accordance with Regulation 31 of the Central

Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014. The CERC Tariff Regulations, 2014 lay down a more linear procedure for computation of shortfall charges which is *'…..on an application filed by the generating company'*. This itself is clarificatory in nature and does not change the procedure to have been followed even earlier. The Petitioner itself is in default of not having approached the Commission by way of a proper application as laid down in Regulation 31 (6) of the CERC Tariff Regulations, 2014 and the Petitioner cannot seek the relief in the present Petition under Section 86 (1) (f) of the Electricity Act, 2003.

2.9 That the Petitioner has provided breakup of shortfall and the reasons thereof for FY 2012-13 and 2013-14. From the table, as provided, it can be seen that Out of the total shortfall of 36.25 MUs, a shortfall of 7.43 MUs have been attributed to the Tripping, a shortfall of 1.09 MUs to Preventive Maintenance and the remaining 27.73 MUs have been claimed to be attributable to shortfall due to Less Inflow. The Petitioner has not provided any details of the reasons of the trippings or of the maintenance work. The Petitioner has not even claimed prudence in the aspect of trippings and maintenance. The tables as provided by the Petitioner show that the claims made are not correct and there is lack of bona fide on the part of the Petitioner. From the table provided;

a) It is evident that even after excess discharge (almost double) on 30.07.2012; there has still been substantial shortfall in generation. It is evident that the shortfall is not due to water discharge being less.

b) On numerous counts in August 2012, even when there has been excess discharge, the Petitioner has claimed shortfall citing trippings and forced outages as the reason. No reason has been provided for the trippings or the outages.

c) In September, 2012, on 17th September, the Petitioner has shown total generation of 1048000 kWh with a water discharge of 14.74 cusecs. However, on 18th September, the Petitioner has shown total generation of 1618000 Kwh with a lower water discharge of 14.16 cumecs. The entire shortfall is claimed due to water discharge. It itself establishes the lack of bona fide on the part of the Petitioner.

d) From the data provided for the month of September it can be observed that on 15.09.2012, 16.09.2012, 17.09.2012, 18.09.2012 and 19.09.2012 when there have been alleged less discharge, the reasons for shortfall have been attributed to trippings and forced outages. The said discrepancy established that the even when there was less discharge the reason for shortfall cannot always be attributable to the same.

e) Out of the total shortfall in generation of 63.39 MUs in 2013-14, the Petitioner has attributed the shortfall corresponding to 25.11 MUs to shortfall due to preventive annual maintenance and 2.26 MUs to trippings. On 17.06.2013 when there was excess discharge, the reason for shortfall corresponding to 4056 kWh has been mechanically attributed to less inflow. The detail as provided by the Petitioner is replete with such discrepancies.

2.10 That as a blanket reason for shortfall in generation, the Petitioner has relied on the WAPCOS report citing that the same substantiates the reason for shortfall in generation. The Report states that no rainfall data was used in deriving the water availability for the Petitioner's Project. Such an observation in the WAPCOS report is shocking since hydro project developers are required to get the DPR approved at the time of establishing the project. The purpose of the report and also its nature is completely different, namely, for revision of design energy. The said report is prepared in March, 2020 and obviously is only based on the documents provided by the Petitioner for the past period. It does not even consider the availability of the plant and the functioning of equipment, the trippings and other reasons that may have resulted in the short-fall. The said report is only a review of the water availability studies.

2.11 It is also the case of the Petitioner that since in the PSPCL letter the CERC Tariff Regulations, 2014 are mentioned therefore the amount recovered prior to 2014 is incorrect. It is submitted that both the CERC Tariff Regulations, 2009 as well as the CERC Tariff Regulations, 2014 lay down that the shortfall charges are payable only if the reasons for such shortfall are beyond the control of the generating company, with the only difference in the two regulations being that the later mentions the requirement of filing of an application for computation and adjudication of shortfall charges. It cannot be the case of the Petitioner that since the CERC Tariff Regulations, 2009 does not envisage about filing of an application hence the recovery made by PSPCL is incorrect. In absence of an application, the obvious corollary to the same is of raising the issue of shortfall in its tariff

petitions. It is denied that no notice was given to the Petitioner before recovering the shortfall charges. Further, whether PSPCL raised a bill dispute in the past is immaterial since it raised the issue in 2018.

2.12 It cannot be the case of the Petitioner that the DPR was prepared on the data as provided by the Himachal Pradesh Electricity Board. As the project proponent, it was the Petitioners' bounden duty to establish the correct technical data at the time of establishing its project. The Petitioner cannot shift its onus on a third party. In any case, the present Petition which has been filed under Section 86 (1)(f) is not the avenue for adjudication of the reasons for shortfall as the same can be raised before the Commission only by way of an application under Regulation 31 (6) of the CERC Tariff Regulations, 2014.

2.13 It is submitted that the shortfall in energy generation was not being considered in the Orders and Judgement being referred to by the Petitioner. Admittedly, the computation and payment of capacity and energy charges have to be in terms of the CERC Tariff Regulations, 2009 which lays down that shortfall charges are to be calculated in accordance with the formula prescribed only in case if the shortfall is for reasons beyond the control of the generating company.

2.14 Further, in reply to the IA filed by EPPL, it was submitted that the same is without any merit and that the shortfall charges are calculated on a yearly basis and not monthly.

3. On 01.11.2021, the Petitioner filed its rejoinder to the reply filed by PSPCL. The submissions are briefed as under:

3.1 The Respondent PSPCL was all along aware of generation details of the Project, as the invoices raised by the Petitioner duly provided for the revised design energy of the Project based on the actual energy achieved of the previous year, as per extant CERC Regulations. However, no objection was raised against the energy shortfall till 27.09.2018, when, PSPCL for the first time intimated the Petitioner of its decision to make recovery towards energy shortfall charges.

3.2 The principles of law of limitation are equally applicable, whether the same is by means of a separate proceedings or adjustments from the amount due and payable to the other party. In the instant case, the amount which was payable by PSPCL, was not given as a security towards satisfaction of any debt borrowed by the Petitioner. Rather, said amount is actually payable by PSPCL towards the sale of energy generated from the Project. Without Prejudice, the judgment nowhere bars an aggrieved party from challenging the illegal recoveries carried out by other party. Thus, the facts of the case judgment cited by PSPCL are in no manner applicable to the facts of the instant case. The Petitioner is relying on the Hon'ble Supreme Court Judgements; Andhra Pradesh Power Coordination Committee & Ors. Vs Lanco Kondapalli Power Ltd. & Ors. (2016) 3 SCC 468 and the State of Kerala &Ors. Vs V.R. Kalliyanikutty & Anr. (1999) 3 SCC 657.

3.3 The Petitioner duly submitted a detailed report prepared by WAPCOS on 08.12.2020, which establishes the river discharge actually observed during the Year, 2012-13 to Year, 2018-19, evidencing that the hydrological data issued by the

HPSEB in respect of Malana Khad River was either grossly incorrect or the project witnessed lower discharge of water after starting construction as well as operation of the project. The Petitioner is also submitting part – II of WAPCOS Report, which conclusively establishes that the Project has actually witnessed lower design discharge, resulting in lower generation of energy from the Project.

3.4 It may be noted that pursuant to enactment of CERC Regulations, 2014, the developers were given liberty to approach CEA in case the actual generation is lesser than the design energy for a continuous period of 4 years on account of hydrology. Admittedly, the period of 4 years expired in the Year, 2018. The Petitioner in the meanwhile initially approached WAPCOS for determination of cause for lower generation than the design energy. Thereafter, the Petitioner was in the process of taking requisite steps for determination of design energy, in the Year, 2020. However, due to COVID-19 pandemic, the Petitioner was not in a position to collate the requisite data and approach CEA. Non-initiation of proceedings by the Petitioner cannot legally entitle PSPCL to recover energy short fall charges which had already become barred by limitation.

3.5 The present Petition has been filed by the Petitioner inter-alia for adjudication of the disputes between the parties arising out of the illegal recoveries made by the Respondent towards energy shortfall charges. There is no requirement for filing of any Tariff Petition, as the Tariff of the Project as determined by the Commission has already been upheld by Hon'ble

APTEL and Hon'ble Supreme Court of India. As per the order of the Commission itself the payment of tariff had to done as per Regulation 22 of CERC Regulations. The whole dispute between the parties is with regard to the implementation of Regulation 22 and recovery of shortfall charges by the PSPCL and the same has nothing to do with the determination of tariff by the Commission, which has already been determined and attained finality, in law.

3.6 The Petitioner has specifically prayed for referring the computation of design energy/design discharge of Malana-II HEP Project to CEA and for fixation of the Design Discharge of the Project. The present Petition is well within the prescribed period of limitation and with specific prayer for determination of design energy of the Project. There is no delay on the part of the Petitioner in approaching the Commission. The Petitioner has also duly explained, in detail, the Report submitted by it, the design discharge witnessed at the Project, since its commissioning, which could not have been envisaged by the Petitioner at the time of preparation of the DPR of the Project.

3.7 Further, the details with regard to Design energy of the Project and trippings and its reasons from the date of commissioning of the Project till date is also known to PSPCL as it is also a member of NRLDC, where all the details of outages and disruptions as also actual generation of the plant are recorded on a daily basis.

3.8 The Petitioner reiterates that in the Commission's Order dated 27.11.2013 in Petition No. 54 of 2012 and subsequent Tariff

Orders, it was inter-alia held that the Petitioner should be entitled for computation and payment of capacity charges and energy charges in accordance with Regulation 22 of the CERC Tariff Regulations, 2009. As per CERC Tariff Regulations, 2009, filing of application was not a pre-requisite for the mechanism related to actual total energy generated by a hydro generating station during a year being less than the design energy for reasons beyond the control of the generating station. Since, the Commission has already provided the mechanism then there is no need to file an application. As per Regulation 22, only in case of a dispute between generator and beneficiary, the generator is required to approach the Commission.

3.9 The issue of filing an application for declaration that the shortfall was beyond the control, was taken up at the time of framing Tariff Regulations for control period 2014-19 by CERC. The Statement of Reasons Order issued by CERC while notifying the CERC Tariff regulation 2014, CERC inter-alia dealt with this issue as under:

"***Stakeholders' Comments/ Suggestions***

35.4…………………

35.5 Some stakeholders submitted that as per Tariff Regulations, 2009, filing of application was not a pre-requisite for the mechanism related to actual total energy generated by a hydro generating station during a year being less than the design energy for reasons beyond the control of the generating station and as such, the provision should be reinstated. NHPC further submitted that reasons beyond the control of generator may be furnished with truing up petition. Jaiprakash Power submitted that when the Commission has already

provided the mechanism then there is no need to file an application. However, in case of a dispute between generator and beneficiary, the generator should approach the Commission.

35.6 ……………………

“**Commission’s Views**

35.8………………………..

35.9 On the issue of the mechanism related to actual total energy generated by a hydro generating station during a year being less than the design energy for reasons beyond the control of the generating station, the Commission is of the view that under regulated regime, some checks and balances are required and hence, the Commission has included the provision of making an application….

3.10 From the above, it would be clear that it was not an intention of CERC 2009 Regulations and as per Regulation 22, only, in case of a dispute between generator and beneficiary, the generator is required to approach the Commission. PSPCL cannot be allowed to interpret the Regulations and include the words, which are not mentioned in the Regulations. The Regulation has to be given its plain and simple meaning, where it nowhere directs or provides for generating company to approach the commission for determination of the design energy, by filing an application, as has been the case in the Regulations, 2014. Further, Regulations, 2014 cannot be read in clarification to Regulations, 2009, without there being any specific Regulation from CERC. Accordingly, the Petitioner requests the Commission to deal the issue of shortfall in generation 2012-13 and 2013-14.

3.11 As stated above, in the Tariff Regulations for control Period 2014-2019, on the issue of the mechanism related to actual total energy generated by a hydro generating station during a year being less than the design energy for reasons beyond the control of the generating station, the Central Commission has included the provision of making an application.

3.12 The submissions made by the Petitioner are based upon actual data collated by the Petitioner during the operations of the Project. PSPCL have always been informed about the reasons for tripping as well as maintenance works at the appropriate time period. The details of 132 kV transmission line tripping, 220 kV transmission line tripping and Units outages, maintenance work carried out are attached. It is to be noted that:

a) On 30th July 2012, at 2:33 am, there was severe power blackouts affected most of northern and eastern India. The circuit breakers on the 400 kV Bina-Gwalior line tripped. As this line fed into the Agra-Bareilly transmission section, breakers at the station also tripped, and power failures cascaded through the grid. All major power stations were shut down in the affected states including Petitioner's 100 MW Malana-II project in the State of Himachal Pradesh, causing an estimated shortage of 32 GW. Therefore, even after the excess discharge, there was substantial shortfall in generation.

b) The details of the forced outages in the month of August 2012 are attached and marked as Annexure P-7 to the rejoinder. Since all the above forced outages were beyond

the control of the Petitioner that's why shortfall in generation claimed.

c) On 17.09.2012, both 220 kV lines had been tripped at Chhaur substation at 14:01 Hrs. resulted into tripping of both the generation units. Both the lines were taken back into service by 18:57 hrs. Unit-1 by 19:05 Hrs. and Unit 2 restored at 01:36 Hrs. This incidence resulted into total generation of 1048000 kWh and shortfall in generation of 1108697 kWh.

d) Regarding the contention of the Petitioner that on 18.09.2012, though the actual observed discharge after mandatory environmental release of 14.16 Cumecs, which was lower than the water discharge of 14.74 Cumecs on 17.09.2012, total generation was 16118000 kWh, higher than the generation on 17.09.2012 and shortfall in generation 538697 kWh even with higher discharge. It is to be noted that on 18.10.2012, only Unit–2 was tripped due to getting ESD through SCADA malfunctioning, unlike tripping of both the Units for sizable period of time. PSPCL should have checked necessary records which are also available with them, before raising the contention.

e) That during the operation of the plant, there can be some periods where the plant can generate power but, due to temporary transmission unavailability, the power is not evacuated, for the reason which is not attributable to the petitioner. In such cases compensation in shortfall in generation is a standard practice being followed in the Renewable Energy sector. Details of the reason for shortfall

from 16.09.2012 to 19.09.2012 are attached as Annexure P-8 to the Rejoinder.

f) That on 17.06.2013 a forced outage was taken from 09:04:00 to 14:40:00 of generation Unit No.1 for cleaning of Slip Rings and Carbon Brushes of Unit – 1. Due to such forced outage there was a generation shortfall of 361330 kWh.

g) The details of the reason for shortfall in FY 2013-14 due to tripping of transmission lines and forced outages are attached as Annexure P-9 and the details of Shortfall during FY 2014-2015 till 2020-2021 are attached hereto as Annexure P-10 to the rejoinder.

3.13 That the Techno Economic Clearance (TEC) of Malana-II HEP was given by Himachal Pradesh State Electricity Board (HPSEB) in the year 2004. The daily flow series adopted for the project as per approved DPR was of 23 years i.e. from 1970-71 to 1992-1993 and the year 1990-91 was identified as 90% dependable year with the annual flow of 291.56 MCM. That:

a) EPPL has carried out revised water availability study and design energy study for the project taking into consideration of additional hydrological data for the period 2005-06 to 2018-19. The Year 2014-15 works out to be 90% dependable year with the annual flow of 289.58 MCM.

b) The above referred revised waters availability study carried out by EPPL has been reviewed critically by WAPCOS based on the data and computation made available by the EPPL. The revised water availability for the project has

been carried out considering the entire data of 37 years i.e. 1970-71 to 2018-19, which includes 23 years of pre DPR stage and 14 years of post DPR stage. As per the reviewed computation the year 2016-17 works out to be 90% dependable year with annual flow of 285.80 MCM.

3.14 It is reiterated that, there was no requirement for filing of any application before the Commission under CERC Tariff Regulations, 2009. As for the period FY 2014-15 onwards, the present Petition has been filed by the Petitioner for grant of appropriate relief before the Commission. The Petitioner by way of the instant Petition has also approached the Commission for determination of the design energy of the Project based on the data which has been collated by the Petitioner only after commissioning of the Project.

4. During hearing on 03.11.2021, the Ld. Counsel for the petitioner submitted that CERC Tariff Regulations 2014 provide liberty to the developers to approach Central Electricity Authority (CEA) in case actual generation from a Hydro Generating Stations is less than the design energy for a continuous period for 4 years on account of hydrology factor which require revision in design energy and sought permission for approaching CEA to undertake a study and give a report. The Commission allowed the petitioner to approach the CEA for getting the required study done and submit the report within three months with a copy to PSPCL.

5. On 30.01.2023, while enclosing CEA letter dated 03.01.2023 vetting the Design Energy of its project as 326.57 MUs, the Petitioner submitted that:

5.1 Design Energy of the Project as per the approved DPR of the project was specified initially as 427.51 MU. The same was revised to 403.27 MU by the Commission Considering 15% mandatory water release requirement,. However, the Project has been facing energy shortfall since commissioning i.e. from FY 2012-13, due to the low water discharge in Malana Khad. Pursuant to liberty granted, by the Commission vide interim Order dated 15.11.2021, in accordance with the Regulation 31(6) of the CERC (Terms and Conditions of Tariff) Regulations, 2014, the Petitioner requested CEA to review the Design Energy of Malana-II HEP.

5.2 Based on the discharge data of Malana-II HEP for the period 2001-02 to 2019-20, derived using Malana-I HEP discharge data by applying catchment proportion ratio of 0.89 (158.7/178.5), vetted by CWC, the 90% dependable year works out to be 2009-10 with the annual flow of 256.09 MCM. The corresponding Design Energy considering 95% machine availability with 88.99% overall efficiency has been estimated as 326.57 MU for the installed capacity of 100MW. Accordingly, CEA vide its letter dated 03.01.2023 has vetted the Design Energy of the Project to 326.57 MUs.

5.3 It is submitted that, based on said power potential study, the Unrestricted Annual Energy is arrived at 346.74 Mus which matches with the average actual annual generation of 347.52 MUs at generating terminal end for the period FY 2012-13 to FY 2020-21.

5.4 In the light of the aforesaid facts and circumstances, the Petitioner requests the Commission to revise the Design Energy of the Project retrospectively i.e. since commissioning of the

Project as CEA reviewed the Design Energy considering the hydrology data from 2001-02 to 2019-20 (19 years).

6. PSPCL filed reply to the affidavit dated 30.01.2023 filed by EPPL. PSPCL, reiterating its earlier submissions, has further submitted that:

6.1 It was the claim of the Petitioner that its Project has been continuously facing energy shortfall since FY 2012-13. Regulation 31 of the CERC Tariff Regulations, 2014 which holds the field lays down that in case the actual generation from a hydro project is less than the design energy for a continuous period of 4 years on account of hydrology factor, the generating station shall approach the CEA with relevant hydrological data for revision of design energy of the station. Thus, counting from FY 2012-2013 and assuming that the shortfall in energy generation was indeed for reasons beyond the control of the Petitioner, the Petitioner ought to have approached the CEA for revision of design energy after FY 2015-16 but the Petitioner made a request to the Commission to refer the design energy to CEA for revision only in FY 2021.

6.2 The revised design energy cannot be implemented or otherwise impact the tariff or any terms and conditions in a retrospective manner and cannot be used to direct PSPCL to refund the amounts, as claimed by the Petitioner. In terms of Regulation 31 of the CERC Tariff Regulation, 2014, the Petitioner had to file an application establishing that the reasons for shortfall in energy generation were indeed beyond its control. The Petitioner has failed to approach the Commission at the relevant point of time and the benefit of revision of design energy, if any, cannot be sought from the date of commissioning. Moreover, had the Petitioner approached the CEA for revision of design energy

immediately after FY 2015-16, the only relief which the Petitioner would have been entitled to was revision of design energy for the future period.

6.3 The Design Energy being an Annual Design Energy as revised by CEA to be 326.57 MUs shall be made applicable, if at all, prospectively from the next financial year i.e., FY 2023-24 subject to prudence check by the Commission while determining tariff. Moreover, there is no revision in the design energy for the past period in the communication of the CEA. The CEA has considered the past data and other factors. These would not however in any manner affect the tariff determined by the Commission in terms of the Regulations and the failure of the Petitioner to file an appropriate application seeking the shortfall charges after establishing that the same were beyond the control of the Petitioner.

6.4 Therefore, the revision in design energy being an Annual Design Energy, if at all, can only be prospectively from FY 2023-24 subject to prudence check by the commission while determining the tariff.

7. The Petitioner filed its rejoinder on 01.04.2023 to the PSPCL's above reply. While reiterating its earlier submissions, it was submitted that:

7.1 The present Petition has been filed *inter-alia* for adjudication of the disputes between the parties arising out of the illegal recoveries made by the Respondent towards energy shortfall charges. There is no requirement for filing of any Tariff Petition. As per the Tariff Orders of the Commission, which has already attained finality, the payment of tariff (Energy Charges) had to done as per Regulation 22 of CERC Regulations. The whole dispute between the parties is with regard to the implementation

of Regulation 22 and the same has nothing to do with the determination of tariff, which has already been determined and attained finality, in law.

7.2 Pursuant to enactment of CERC Regulations, 2014, the developers were given liberty to approach CEA in case the actual generation is lesser than the design energy for a continuous period of 4 years on account of hydrology. Admittedly, the period of 4 years expired in the Year, 2018. Admittedly, the period of 4 years expired in the Year, 2018. The Petitioner in the meanwhile initially approached WAPCOS for determination of cause for lower generation than the design energy, outcome of which took a considerable time. The Petitioner’s approach to WAPCOS for submission of report on Design energy of the Project was again a bonafide attempt to ensure that its understanding qua lower design discharge in MalanaKhad was correct or not and once, the said report confirmed the aforesaid understanding, the Petitioner was in the process of taking requisite steps for determination of design energy, in the Year, 2020. However, due to COVID-19 pandemic, the Petitioner was not in a position to collate the requisite data and approach CEA and filed the present Petition on 22.07.2021. The CERC Tariff Regulations, 2014 nowhere debar or restrict the rights of a developer to approach the Commission even after expiry of the said period of four (4) years and therefore, delay if any, on the part of the Petitioner cannot legally disentitle a renewable power generator from approaching the Commission seeking reliefs, which are *prima facie* covered under the Regulations.

7.3 That since commissioning of the Project, the Petitioner was claiming 50% of AFC determined by the Commission in energy invoices raised to PSPCL as per CERC Regulations and the same was accepted and paid by PSPCL to EPPL till 2017. However, suddenly, on 27.09.2018, PSPCL deducted arbitrarily the said amount from energy bills allegedly towards recovery of shortfall charges. Since, it was not disputed by PSPCL and continued to pay the same, Petitioner had not filed separate petition claiming shortfall energy charges. Having come to know of such illegal deduction, the Petitioner immediately approached the WAPCOS for detailed hydrology study on MalanaKhad. WAPCOS took considerable time in overtaking study and submitted its report on 08.12.2020.

7.4 In the meanwhile, Petitioner filed a Petition 02 of 2020 in Jan., 2020 in the matter of Business Plan including Capital investment plan for the Control Period from FY 2020-21 to FY 2022-23, wherein the Petitioner revised its annual gross generation from 403.27 MU (Design Energy) to 360.74 MU, claiming low discharge. Thereafter, during the pendency of this Petition, the Petitioner filed Petition No. 01 of 2022 for approval of APRs of FY 2020-21 & 2021-22 and Revised Estimates for FY 2022-23, wherein Petitioner submitted that it had requested CEA for a revised study on the hydrology factor of the project as actual generation from the project is less than the design energy. Subsequently, the Petitioner in Petition No. 75 of 2022, filed for approval of APR of FY 2022-23 and projections for next Control Periods for FY 2023-24 to FY 2025-26, while submitting that the CEA is about to complete the study has requested to allow recovery of energy charge for FY 2022-23 and previous years

based on CEA's revised Design Energy. The Petitioner having established the reasons for shortfall in energy beyond its reasonable control, is therefore, entitled to the relief as prayed for in the present Petition including refund of the amount deducted by the PSPCL towards energy shortfall charges.

7.5 The Petitioner's whole case is that, since inception, shortfall in generation is because of lower design discharge in MalanaKhad, which fact is clearly established through the report submitted by CEA. Therefore, the design energy of the Project has to be revised, retrospectively, as there is no contrary evidence on record which suggests that the Project has ever achieved the design energy as estimated in the DPR.

8. The petition was taken up for hearing on 10.05.2023. The Ld. Counsel appearing for M/s PTC India Ltd. submitted that PTC is not contesting the petition. After hearing the parties, Order was reserved and the parties were allowed to file their respective written submissions. PSPCL and the Petitioner submitted their written submissions on 22.05.2023 and 31.05.2023 respectively, reiterating their earlier submissions

9. Observations and Decision of the Commission

The Commission has examined the submissions and counter submissions made by the parties. The Petition is for adjudication of disputes arising from the deductions made by PSPCL to recover the payments made to the Petitioner in FY 2012-13 to FY 2016-17 on account of shortfall in generation. The Commission examines the same as under:

9.1 Prayer to quash the recoveries made by PSPCL on account of energy shortfall for the period FY 2012-13 to FY 2016-17

and consequent directions to PSPCL for refund/payment of same along with the interest:

9.1.1 Issue of Limitation:

It has been pleaded that PSPCL's action of recovering shortfall charges paid for FY 2012-13 to FY 2014-15 in 2018 and interest on the shortfall charges of FY 2012-13 to 2016-17 in 2021, is barred by Law of Limitation. Whereas, PSPCL's contention is that the bar under the Limitation is only for seeking legal recourse in a court of law. The Commission refers to the case laws cited by the parties as under:

a) The Hon'ble Supreme Court Judgements cited by the Petitioner:

(i) In the matter of Andhra Pradesh Power Coordination Committee & Ors. Vs Lanco Kondapalli Power Ltd. & Ors.; (2016) 3 SCC 468:-

"30………..*In the absence of any provision in the Electricity act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. …."*

As is evident, the issue dealt herein is of the claims coming for adjudication before the courts which are legally not recoverable in a regular suit on account of law of

limitation and hence distinguishable from the matter under consideration.

(ii) In the State of Kerala & Ors. Vs V.R. Kalliyanikutty & Anr.; (1999) 3 SCC 657:-

"1. All these appeals raise a common question of law whether a debt which is barred by the law of limitation can be recovered by resorting to recovery proceedings under the Kerala Revenue Recovery Act of 1968………

16….. The provisions in the present case are statutory provisions for coercive recovery of "amounts due"*………….An Act must expressly provide for such enlargement of claims which are legally recoverable, before it can be interpreted as extending to the recovery of those amounts which have ceased to be legally recoverable on the date when recovery proceedings are undertaken. Under the Kerala Revenue Recovery Act such process of recovery would start with a written requisition issued in the prescribed form by the creditor to the collector of the District as prescribed under Section 69(2) of the said Act. Therefore, all claims which are legally recoverable and are not time-barred on that date can be recovered under the Kerala Revenue Recovery Act.*

***17**……….Looking to the scheme of recovery and refund under Sections 70 and 71, "amounts due" under Section 71 are those amounts which the creditor could have recovered had he filed a suit.*

***18.** In the premises under Section 71 of the Kerala Revenue Recovery Act claims which are time-barred on the date when a requisition is issued under Section 69(2) of the said Act are not "amounts due" under Section 71 and cannot be recovered under the said Act. Our conclusion is based on the interpretation of Section 71 in the light of the provisions of the Kerala Revenue Recovery Act."*

As is evident, the issue dealt herein is the provisions of recovery proceedings under the Kerala Revenue Recovery Act of 1968 and hence distinguishable from the matter under consideration.

b) The Hon'ble Supreme Court Judgements cited by PSPCL:

(i) In the case of CIT v. Sugauli Sugar Works (P) Ltd., (1999) 2 SCC 355:

"10.The principle that expiry of period of limitation prescribed under the Limitation Act could not extinguish the debt but it would only prevent the creditor from enforcing the debt has been well settled…."

(ii) In the case of Punjab National Bank v Surendra Prasad Sinha (1993) Supp 1 SCC 499, the Hon'ble Supreme Court has held as under-

"5. Admittedly, as the principal debtor did not repay the debt, the bank as creditor adjusted at maturity of the F.D.R., the outstanding debt due to the bank in terms of the contract and the balance sum was credited to the Saving Banks account of the respondent. The rules of limitation are not meant to destroy the rights of the parties. Section 3 of the Limitation Act 36 of 1963, for short "the Act" only bars the remedy, but does not destroy the right which the remedy relates to. The right to the debt continues to exist notwithstanding the remedy is barred by the limitation. Only exception in which the remedy also becomes barred by limitation is that right itself is destroyed. …….. The time barred debt does not cease to exist by reasons of S.3. That right can be exercised in any other manner than by means of a suit. The debt is not extinguished, but the remedy to enforce the liability is destroyed. What S.3 refers is only to the remedy but not to the right of the creditors. Such debt

continues to subsist so long as it is not paid. It is not obligatory to file a suit to recover the debt. It is settled law that the creditor would be entitled to adjust, from the payment of a sum by a debtor, towards the time barred debt….."

As is evident it has been held by the Hon'ble Supreme Court that the Section 3 of the Limitation Act 36 of 1963, for short "the Act" only bars the remedy, but does not destroy the right. The debt is not extinguished, only the remedy to enforce the liability in a court of law lapses. That right can be exercised in any other manner than by means of a suit. As already observed by the Commission in Petition No. 02 of 2022, the Hon'ble Supreme Court has reiterated the above observations in its judgment dated 05.10.2021 (Civil Appeal No. 7235 of 2009) as under:

"Under the law of limitation, what is extinguished is the remedy and not the right. To be precise, what is extinguished by the law of limitation, is the remedy through a court of law and not a remedy available, if any, de hors through a court of law."

Thus, the Commission is of view that the Petitioners' plea that the amount is being rendered irrecoverable due to 'Limitation' is not sustained in the impugned matter.

9.1.2 Shortfall Charges for FY 2012-13 and FY 2013-14

The Petitioners' plea is that the recovery has been made erroneously by citing alleged non-compliance of the CERC Regulations' 2014, which are applicable only with effect from 1st April, 2014. It was submitted by the Petitioner that the applicable CERC Tariff Regulations' 2009 allowed the recovery of energy shortfall on a rolling basis and submission of an application was not a pre-requisite for implementation of the mechanism provided

there under Regulation 22(6) for treatment of shortfall in energy. Accordingly, as the shortfall was mainly due to low water discharge which is beyond its control; the monthly energy invoices were raised on rolling bases which were accepted by PSPCL without raising any objection. The Petitioner also submitted that there was no requirement for filing of any Tariff Petition, since the Tariff Orders of the Commission has already specified that the calculation and payment of tariff (Energy Charges) had to done as per Regulation 22 of CERC Regulations. As such, the whole dispute is with regard to the implementation of Regulation 22 (6) and has nothing to do with the determination of tariff, which already stands determined and has attained finality.

On the other hand, PSPCL submitted that the CERC Tariff Regulations 2009 as well as the CERC Tariff Regulations 2014 lay down that the shortfall charges are payable only if the reasons for such shortfall are beyond the control of the generating company with the only difference being that the Regulations’ 2014 mentions the requirement of filing of an application for consideration of shortfall charges. PSPCL submitted that there is no dispute over the fact that it is the CERC Tariff Regulations 2009 which is to be applied for calculating the energy charge for the Petitioner’s Plant for FY 2012-13 and FY 2013-14. PSPCL contended that the absence of the words ‘in an application’ in the CERC Tariff Regulations 2009 would not absolve the Petitioner of the primary obligation to show that the shortfall was for reasons beyond its control. The onus to establish force majeure events, to claim the benefit of the short-fall energy, is on the Petitioner which it has failed to establish. In fact, the present Petition is only for adjudication of disputes, without seeking any decision on the

shortfall and tariff. It was also submitted that even the subsequent information submitted by the petitioner on 12.03.2019, was replete with discrepancies and did not establish that the shortfall was for reasons beyond the control of the Petitioner.

The Commission refers to the Commission's Order dated 27.11.2013 in Petition No. 54 of 2012, wherein, while determining the Annual Fixed Costs for the Petitioner's project for FY 2012-13 and FY 2013-14, it was specified that:

> *"EPPL shall be entitled for computation and payment of capacity charge and energy charge in accordance with Regulation 22 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations 2009 as the same is not specified in the PSERC Tariff Regulations"*.

Thus, the Commission agrees with the Petitioner that the applicable Regulations for FY 2012-13 and FY 2013-14 are the CERC Regulations' 2009 and also that the dispute involved herein is with regard to the implementation of the mechanism specified in the Tariff Order for computation and payment of Energy Charges in the event of shortfall in generation and not of tariff determination. Accordingly, the Commission further refers to the relevant extract of the Regulation 22 of CERC Tariff Regulations 2009 which reads as under:

> *"22(6) In case actual total energy generated by a hydro generating station during a year is less than the design energy for reasons beyond the control of the generating company, the following treatment shall be applied on a rolling basis:*

(i) in case the energy shortfall occurs within ten years from the date of commercial operation of a generating station, the ECR for the year following the year of energy shortfall shall be computed based on the formula specified in clause (5) with the modification that the DE for the year shall be considered as equal to the actual energy generated during the year of the shortfall, till the energy charge shortfall of the previous year has been made up, after which normal ECR shall be applicable;"

As is evident, Regulation 22(6) of CERC Tariff Regulations 2009 does not explicitly mandate filing of an application for implementation of the mechanism provided therein for treatment of shortfall in energy.

However, PSPCL has professed a pertinent point that the remedy available for payment of shortfall charges is only for reasons being beyond the control of the generating company. It is thus obvious that it is obligatory for the generating company to establish the same. Regarding this issue the Petitioners has made out a case that the shortfall was mainly due to low water discharge which is beyond its control. It consequently raised the monthly energy invoices on a rolling basis as per the provisions of the Regulations which were accepted by PSPCL without any objection at that time and now PSPCL cannot raise a dispute in hindsight and with retrospective effect.

The Commission observes that, though PSPCL has erred in accepting the invoices without proper verification, the Petitioner is also at fault in claiming the payment for generation loss which cannot be attributed entirely to the reasons being beyond its control. The Petitioner ought to have got verified the relevant

hydrology data before depicting the design energy (DE) output based on the same in the PPA/PSA. That onus was entirely on the petitioner and that data on which the DE was based was not supplied or vetted by PSPCL but was sourced, verified and adopted by the petitioner itself. Further, as is evident from rejoinder dated 01.11.2021 submitted by the Petitioner, incidences of routine O&M activities and faults such as Annual Maintenance, cleaning of Slip-Rings & Carbon Brushes, Rotor Earth Fault, SCADA Malfunctioning, Machine Processor Problem, Dam Silt Flushing etc. have been also cited as the reasons for the impugned shortfall in generation. Such events cannot be termed as ‘Force Majeure and are actually maintenance lapses which are entirely attributable to the Petitioner who is provided complete normative O&M expenses to undertake regular maintenance and ensure the efficacy and efficiency of the generating plants operations. Proper maintenance is within the reasonable control of the generator and these faults/lapses could have been avoided if it had taken timely reasonable care or complied with prudent utility practices.

In light of the above observations, the Commission is of the view that the Petitioner’s plea to quash PSPCL’s action of recovering the shortfall charges paid to the Petitioner is not sustainable. Hence the recovery for the period of FY 2012-13 and FY 2013-14 affected by PSPCL is held to be appropriate and valid.

9.1.3 Shortfall Charges for FY 2014-15 to FY 2016-17

The Petitioners' plea is that the energy shortfall for the period from FY 2014-15 to FY 2016-17 was also caused by low water discharge and force majeure events which were beyond the control of the developer. Since, energy shortfalls have occurred within ten years from the date of the commercial operation of the generating station, the ECR was calculated on reduced DE as per provisions of Regulation 31 (6) of the CERC Regulations, 2014. It was submitted that there was no question of filing a separate application as the invoices based on reduced DE provided by the Petitioner were considered by PSPCL while evaluating/releasing payments against monthly energy invoices. The Petitioner also made a reference to the PSERC (Terms and Conditions for Determination of Generation, Transmission, Wheeling and Retail Supply Tariff) Regulations, 2014 with the submission that it allows recovery of energy shortfall on rolling basis; however, no requirement of any application for claiming energy shortfall was mentioned therein. It was also mentioned that the Annual tariff petition filed with the Commission contains the details of energy generation.

The Commission refers to the Tariff Orders dated 31.08.2015 in Petition Nos. 37 of 2014, Order dated 20.12.2016 in Petition No. 55 of 2015 and Order dated 08.08.2017 in Petition 74 of 2015 filed for approval of the Annual Fixed Cost (AFC) of the Petitioners' Project for the FY 2014-15, FY 2015-16 and FY 2016-17 respectively, specifying as under:

"EPPL shall be entitled for computation and payment of capacity charge and energy charge in accordance with Regulation 31 of the Central Electricity

Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 as amended from time to time as the same are not specified in the PSERC Tariff Regulations."

And, the CERC Tariff Regulations 2014 specifies as under:

"31. Computation and Payment of Capacity charge and Energy Charge for Hydro Generating Stations:

....

(6) In case the actual total energy generated by a hydro generating station during a year is less than the design energy for reasons beyond the control of the generating station, the following treatment shall be applied on a rolling basis <u>on an application filed by the generating company</u>:

(a) In case the energy shortfall occurs within ten years from the date of commercial operation of a generating station, the ECR for the year following the year of energy shortfall shall be computed based on the formula specified in clause (5) with the modification that the DE for the year shall be considered as equal to the actual energy generated during the year of the shortfall, till the energy charge shortfall of the previous year has been made up, after which normal ECR shall be applicable:

Provided that in case actual generation form a hydro generating station is less than the design energy for a continuous period of 4 years on account of hydrology factor, the generating station shall approach CEA with relevant hydrology data for revision of design energy of the station."

It is apparent from the above that the computation and payment of energy charges for the petitioners' project for FY 2014-15, FY 2015-16 and FY 2016-17 was to be regulated in accordance with the CERC Tariff Regulations 2014, which explicitly provides for consideration of the treatment for the shortfall in energy on a rolling basis 'on an application filed by the generating station'. It also has a Proviso "that in case actual generation form a hydro generating

station is less than the design energy for a continuous period of 4 years on account of hydrology factor, the generating station shall approach CEA with relevant hydrology data for revision of design energy of the station".

The Commission is of the view that where a procedure has been specified it has to be mandatorily followed. The Petitioners' plea that since invoices raised by it were not disputed it didn't file any application/petition is not acceptable. The Petitioners' reference to the PSERC Tariff Regulations 2014 is also misplaced, as the said PSERC Regulations were made effective only from 01.04.2017 i.e., for the 1st MYT Control Period of FY 2017-20. Further, the Petitioners' plea that the Annual tariff petition filed with the Commission contains the details of energy generation is also not maintainable as the same is not considered while determining the AFC of the project. Moreover, it does not satisfy the criteria of making an application under the Regulations to demonstrate/ establish that the energy shortfall is for the reasons beyond its control.

Thus, the Petitioner, without following due process of filing an application as laid down in the Commission's Orders read with the stated CERC Regulations, cannot claim the relief provided thereunder by citing it as a dispute under Section 86 (1) (f) of the Electricity Act, 2003.

9.2 Prayer to fix the design energy/Design Discharge of 100 MW Malana–II Hydro Electric Project.

The Petitioner is pleading for revision of the Design energy, as vetted by the CEA vide letter dated 03.01.2023, with retrospective effect since the commissioning of the Project in FY 2012-13, with

the plea that the CEA report has considered 2009-10 as the 90% Dependable year based on the hydrology data for the period of 2001-02 to 2019-20, evidencing that the project witnessed lower discharge since its commissioning. In fact, DPR of the project was prepared on the data provided by the HPEB, which has proved to be unreliable and incorrect. It has also been pleaded that, although, the period of 4 years expired in the Year 2018, the CERC Tariff Regulations 2014 do not restrict the rights of a developer to approach the Commission even after expiry of the said period for seeking relief *prima facie* covered under the Regulations.

Whereas, PSPCL's contention is that it cannot be the case of the Petitioner that the DPR was prepared on the data as provided by the HPEB, since it was the Petitioners' bounden duty to establish the correct technical data at the time of establishing its project being its proponent and developer. As such, the Petitioner cannot shift the onus on to a third party. The delay in approaching CEA to reassess the design energy is on the part of the Petitioner who thus cannot claim relief for previous periods due to its own laxity. Thus any revision as indicated by the CEA report can only apply prospectively from FY 2023-24.

The Commission observes that the CERC Tariff Regulations, 2014 specify that in case the actual generation is less than the design energy for a continuous period of four (4) years on account of hydrology, the generating station shall approach the CEA with relevant data for revision of design energy of the station. As the Petitioner is claiming shortfall in generation since the commissioning of the project i.e. 12.07.2012, it was required to approach the CEA with the relevant hydrology data for revision of design energy of its station immediately after FY 2015-16. Since

the Commission agrees with the Petitioner that the said Regulations do not restrict its right to approach even after the expiry of the stated period of 4 years, the Petitioner was allowed to approach the CEA for review of its design energy during the proceedings of this petition. However, the Commission notes that the same Regulations also do not specify that benefit of such revision can be claimed for the period lapsed due to its own volition. Moreover, since the 'Design Energy' is a performance norm in terms of generation and is required to be achieved by a hydel generating station, the Commission is of the view that the norms/principles cannot be made applicable retrospectively. In this regard, the Commission also refers to Hon'ble APTEL's judgment dated 29.04.2022 in Appeal No. 264 of 2014 and Appeal Nos. 173 & 277 of 2015, wherein, it has been observed that, the adoption of norms at the stage of truing up, if different from the norms taken during the tariff order, are in violation of principles laid down by the Tribunal. The delay in approaching CEA for reasessing the DE is entirely due to the fault of the Petitioner.

In view of above, the Commission decides to consider the revised Design Energy for the Petitioner's project as vetted by CEA only from FY 2023-24 onwards.

The Petition is disposed of in light of the above analysis, observations and directions of the Commission.

Sd/-	Sd/-
(Paramjeet Singh)	(Viswajeet Khanna)
Member	Chairperson

Chandigarh

Dated: 02.08.2023