

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

**Petition No. 05 of 2024**  
**Date of Order: 21.10.2024**

Petition under Section 86(1)(b) and 86(1)(f) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPAs) dated 05.01.2001 and as amended on 16.03.2004 executed between Punjab State Power Corporation Limited and M/s Punjab Hydro Power Private Limited seeking appropriate direction for execution of a supplementary PPA; AND/OR issuance of appropriate directions for allowing intra-state and Inter-state open access to M/s Punjab Hydro Power Private Limited for sale and supply of power within or outside the State of Punjab.

In the Matter of: M/s Punjab Hydro Power Private Limited (PHPPL), Regd. Office at B-37 IIIrd Floor, Sector-1, Noida, Gautam Buddh Nagar-201301, Uttar Pradesh.

....Petitioner

Versus

1. Punjab State Power Corporation Limited, through its CE/NRSE & TD, Shakti Vihar, PSPCL, Patiala-147001, Punjab.
2. Punjab Energy Development Agency, through its Director, Plot No. 1-2, Sector 33-D, Chandigarh (U.T.)-160034.
3. Punjab State Load Dispatch Centre, through its SE/Open Access, SLDC Building, 220 kV Sub-Station Ablowal, Patiala-147004, Punjab.

....Respondents

And

**Petition No. 30 of 2024**

Petition under section 86(1)(b), 86(1)(f) and (86)(1)(k) of the Electricity Act, 2003 read with Article 12 of the Power Purchase Agreement (PPAs) dated 12.12.2001 and as amended on 16.03.2004 executed between Punjab State Power Corporation Limited and M/s Kotla Hydro Power

Private Limited seeking appropriate direction for execution of a supplementary PPA; AND/OR issuance of appropriate directions for allowing intra-state and inter-state open access to M/s Kotla Hydro Power Private Limited for sale and supply of power within or outside the State of Punjab.

In the matter of: M/s Kotla Hydro Power Private Limited (KHPPL), Regd. office at B-37, IIIrd Floor, Sector-1, Noida, Gautam Buddh Nagar- 201301 Uttar Pradesh.

...Petitioner

Versus

1. Punjab State Power Corporation Limited (PSPCL), through its CE/ NRSE & TD, Shakti Vihar, PSPCL, Patiala- 147001, Punjab.
2. Punjab Energy Development Agency (PEDA), through its Director Plot No. 1-2, Sector 33D, Chandigarh (U.T.)-160034.
3. Punjab State Load Dispatch Centre (PSLDC), through its SE/ Open Access SLDC Building, 220kV Sub-Station Ablowal, Patiala-147004, Punjab.

...Respondents

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

Petitioners: Sh. Neeraj Kumar, Sr. Advocate  
Sh. Nishant Kumar, Advocate

PSPCL: Ms. Poorva Saigal, Advocate (through VC)  
Ms. Pallavi Saigal, Advocate (through VC)

PEDA: Sh. Aditya Grover, Advocate (through VC)

PSLDC: Sh. Vikrant Sharma, Advocate

## ORDER

1. The Petitioners have filed the present petitions for adjudication of their dispute on the issue of extension in the PPAs for another 10 years through mutual agreement after expiry of the initially agreed term of 20

years and/or grant of open access for sale of power to a third party. In view of the common issues involved, both the Petitions are being disposed through this common order.

1.1 The Petition No. 05 of 2024 is filed by M/s Punjab Hydro Power Private Limited (**PHPPL**), whereon an IA No. 01 of 2024 was also filed requesting for urgent/early listing of the Petition. Considering the Petitioner's request the Petition was fixed for hearing on admission on 06.03.2024 disposing of the IA. During the hearing, the Petitioner submitted that the term of its PPAs expired in Jan/Feb 2023 and based on mutual discussions, as an interim arrangement, it is supplying power to PSPCL at the existing tariff. However, PSPCL has not paid the bills for the power supplied for the months of December 2023 and thereafter with the plea that the interim arrangement is subject to approval by the Commission. After hearing the parties, vide Order dated 07.03.2024, while admitting the petition and directing the Respondents to file their reply to the Petition and the Petitioner to file its rejoinder thereafter, it was also directed that:

*"Keeping in view the facts of the present case, PSPCL shall continue to pay the bills to the petitioner for the electricity supplied from its mini hydel power projects at the existing tariff as per their mutual consent pending the final decision in this petition."*

In compliance thereto, the Respondents PSPCL, PSLDC and PEDDA filed their respective reply on 19.04.2024, 03.05.2024 & 07.05.2024 and the rejoinder thereto was filed by PHPPL on 15.07.2024

1.2 The Petition No. 30 of 2024 is filed by M/s Kotla Hydro Power Private Limited (**KHPPL**) along with IA No. 11 of 2024 for urgent

listing of the petition. The same was taken up for hearing on admission on 19.07.2024 and the IA No. 11 of 2024 got disposed of accordingly. After hearing the parties, the petition was admitted with directions that notice be issued to the respondents. Further, the Petitioner, while submitting that the period of initial 20 years of the PPA expired on 22.06.2024 and MHP of the Petitioner has been disconnected from the Grid by PSPCL, requested for allowing an interim arrangement for supply of power from its MHP as allowed in case of an identical matter pending in Petition No. 05 of 2024. However, PSPCL, objecting to the Petitioner's request for an interim arrangement submitted that the facts and circumstances of the present case are not identical with that of Petition No. 05 of 2024 in view of the fact that the parties therein had mutually agreed for supply of power on the existing rate whereas in the present case the Petitioner has not come forward despite its repeated requests, sought time to file a detailed reply. The Commission directed PSPCL to file its reply within two weeks with a copy to the Petitioner who was to file its rejoinder, thereto, if any within one week thereafter with a copy to PSPCL. PSPCL filed its reply on 05.08.2024 and KHPPL filed its rejoinder on 16.08.2024. The Ld. Counsel for the other Respondents submitted during hearing on 21.08.2024 that their reply filed in Petition No. 05 of 2024 may be read as the reply in Petition No. 30 of 2024 also. As the facts and the issues involved in Petition No. 05 of 2024 and 30 of 2024 were similar, the Petition No. 30 of 2024 was clubbed with Petition No. 05 of 2024.

## 2. Submissions of the Petitioners are summarised as under:

2.1 While, PHPPL was allotted the sites for setting up and operation of Mini Hydrel Power Projects (MHPs) at Dolowal (2x700kW), Salar (2x750kW) and Bhanbhaura (2x650kW), KHPPL was allotted site at Babanpur for setting up and operation of a 1.25 MW MHP. Further, the Petitioners signed separate Tripartite Agreements (**TPAs**) with the PEDA and Punjab Irrigation Department (**PID**) and Implementation Agreements (**IAs**) with the PEDA for the purpose of setting up of the MHPs. Pursuant to the IAs, as mandated therein under Article 4.4.2, the Petitioners entered into PPAs with PSPCL for sale of electricity. Thereafter, the Commission vide its order dated 08.04.2003 approved the said power procurement arrangements.

2.2 That as per Article 12 of the PPAs read with the Order dated 08.04.2003 passed by the Commission, the term of the PPAs are valid for 20 years from the date of commissioning of the projects, with the provision that it "would" be extended by another 10 years "through mutual agreement". Accordingly, the date of expiry of the term of 20 years for supply of power from the Petitioners' projects is as under:

Sr. No.		Capacity	Date of expiry of term of 20 Years
1.	<b>PHPPL</b>		
	a) Dolowal	2*700 kW	26.01.2023
	b) Salar	2*750 kW	24.01.2023
	c) Bhanbhaura	2*650 kW	01.02.2023
2.	<b>KHPPL</b> (Babanpur)	1*1.25 MW	22.06.2024

2.3 For the period following expiry of the term of 20 years of the PPAs:

a) In the case of PHHPL's projects:

- (i) PSPCL/PSLDC after consenting/granting open access from 17.03.2023 to 16.04.2023 and then from 17.04.2023 to 16.05.2023 refused to grant extension for the same. However, PSPCL, premised on an email dated 17.04.2023 issued by PEDDA, informed that that sale of power generated from Petitioner's MHPs is governed by IAs signed between PHPPL and PEDDA for 30 years, and therefore it is required to give its consent for extending the term of the PPAs on long term basis for another 10 years at the existing tariff of Rs. 3.658/kWh. Further, while PSLDC stated that, as per the procedure for grant of open access, clearance from PEDDA is a pre-requisite, PEDDA, vide its letter dated 12.05.2023, intimated that, based on the terms and conditions of the IAs and TPAs, PHPPL is under an obligation to sell power to PSPCL only and therefore is required to negotiate with PSPCL for extension of the PPAs upto to the validity of IAs and TPAs i.e. upto 30 years.
- (ii) PHPPL, contested the same relying on various provisions contained under the NRSE Policy-2001, Electricity Act 2003, PSERC (Terms and Conditions for Intra-State Open Access) Regulations 2011 and, replied that since the parties could not mutually agree to a tariff so as to extend the term of the PPAs after completion of 20 years, it is entitled to sell power to third parties through open access. PHPPL also submitted a proposal that it is prepared to sell its electricity to PSPCL @ Rs. 5.50/kWh, failing which it may be allowed open access for supplying power to any third party. However, in the

absence of any mutual agreement on the applicable tariff so as to extend the term of the PPAs, PHPPL requested PSPCL to allow an interim tariff of Rs. 3.658/kWh subject to the final resolution.

(iii) PSPCL agreed for an interim arrangement to take power from PHPPL's MHPs at a tariff of Rs. 3.658 kWh from the date of expiry of open access i.e. 14.05.2023/16.05.2023 until 30.06.2023, which was further extended in instalments upto 31.03.2024, on the request of PHPPL, subject to approval by the Commission.

b) In case of KHPPL, it has been submitted that;

(i) In reply to PSPCL's letter 22.04.2024 directing KHPPL to exhibit its willingness for extension of the PPA by another 10 years, KHPPL vide its letter dated 08.05.2024 requested PSPCL to allow it to continue supplying power after 22.06.2024 on an interim basis at the existing tariff since the identical issues are pending before the Commission in Petition No. 05/2024 filed by PHPPL wherein permission has been granted to continue to pay the bills for the electricity supplied at the existing tariff as per their mutual consent pending the final decision in the petition, as the outcome of that petition shall squarely apply to the present case.

(ii) However, PSPCL vide its letter dated 05.06.2024 stated that, the case (Petition No. 05/2024) pending before the Commission is entirely different and also that since the PPAs are separate, finding of the Commission cannot ipso facto be held applicable to the case of KHPPL. PEDA vide its email

dated 06.06.2024 also forwarded a copy of the letter dated 05.06.2024 issued by PSPCL and directed the Petitioner to coordinate with PSPCL and extend the PPA.

(iii) That PSPCL has grossly failed to appreciate that the contents of the PPA and the issues raised by KHPPL herein and the contents of the PPAs and issues raised by PHPPL in Petition No. 05/2024 are identical and as such, the outcome of the said petition shall squarely apply upon the present case as well.

(iv) The Petitioner requires regular payment for fulfilling its commitments to its employees and to cater to other operational cost and parameters for operating the plant. As such, non-supply of power beyond 22.06.2024 in the absence of any mutual agreement and consequent non-recovery of tariff shall result in causing grave financial hardships, inasmuch as the ability to operate its MHP shall be materially affected apart from loss of generation of renewable energy.

(v) Therefore, KHPPL may also be granted an opportunity to re-negotiate the term and tariff for extension of the PPA and in the meantime until the parties arrive at a conclusion, it may be allowed to continue to supply of power to PSPCL at the existing tariff, subject to adjustment after finalization of tariff.

2.4 The Petitioners, while maintaining that they are not under any obligation to necessarily sell the power from its MHPs to PSPCL after completion of 20 years of power supply from the respective date of commissioning of the MHPs, have submitted the following:



- a) In terms of Article 12.1.0 of the PPAs and the order dated 08.04.2003 passed by the Commission, the term of the PPAs is only for a period of 20 years from the date of commissioning of the projects which may ('would' is the word used in the PPAs) be extended thereafter for another 10 years subject to mutual agreement between the parties.
- b) These projects were set-up, and also PPAs were approved by the Commission vide order dated 08.04.2003, keeping in view the NRSE Policy 2001 which does not mandate the generator to necessarily supply power to PSPCL/PSEB. Rather, it is the duty of PSEB/PSPCL to facilitate evacuation of power even to a third party. Therefore, it is completely misconceived on part of PSPCL and PEDDA to contend that the generators, including the Petitioners are under an obligation to supply power to PSPCL only.
- c) The IAs only provide for construction and validity of the period of the IAs and the manner in which the power projects are to be developed. Although the IAs under Article 4.4 (ii) provide that the Petitioners shall enter into PPAs with PSEB, however, term of such PPAs is not mentioned. Also, though it provides that a valid and enforceable PPA shall at all times during the Agreement Period cover the sale of energy by the Company, but it does not envisage that the valid and enforceable PPA shall be only with PSEB for the entire term of the PPA. Had this been the case, then the term of the PPAs under Article 12 would have been inserted differently and it would not have provided the

option for an extension on mutual agreement after the completion of 10 years.

d) Therefore, PSPCL or PEDDA cannot be allowed to contend that the Petitioners are required to sell power to PSPCL only even though there is no agreement on the applicable tariff so as to extend the term of the PPAs as provided under Article 12.

2.5 The Commission vide its order dated 27.05.2009 in Petition No. 25 of 2008 in the matter of Winsome Yarns Limited (Winsome), has allowed the open access to a similarly placed hydel power project. Further, with the enactment of Electricity Act 2003 (Act), the concept of open access was introduced and also the generation of electricity has been de-licensed. The provisions contained under Section 2 (47) of the Electricity Act, 2003 and the PSERC (Terms and Conditions for Intra-state Open Access) Regulations 2011 provides that any licensee or consumer or a person engaged in generation is entitled to apply and obtain a non-discriminatory right to use the transmission lines or distribution system or associated facilities with such lines or system.

2.6 It is a settled principle of law that contractual terms cannot prevail over the statutory mandate. However, the Procedure framed by PSLDC for grant of Short Term Open Access along with other rudiments also requires the Petitioners to obtain a clearance from PEDDA for applying and availing open access as the Petitioner is using NRSE Fuel. Since the term of the PPAs has already expired, the said requirement ought to have been relaxed inasmuch as, the right to avail open access cannot be curtailed by PEDDA when the Petitioner does not have any commitment to supply power to an

entity within the State of Punjab. Therefore, the act of denying open access to the Petitioners is arbitrary and de hors the provisions of the Electricity Act, 2003 read with the Open Access Regulations framed by the Commission.

2.7 PSPCL vide its various letters directed the Petitioner to sign the PPAs for extension at a tariff of Rs. 3.658/kWh. The said tariff proposed by PSPCL is the same tariff at which Petitioners were supplying power under the expired PPAs. The power projects of the Petitioners have already completed 20 years of its life and for optimum utilisation of the installed capacity, substantial cost towards repair and renovation is required to be incurred by the Petitioners. Therefore, considering the additional capital expenditure, and by taking into account the opportunities available in the open market, the Petitioner has proposed a tariff of Rs. 5.50/kWh for extension of the PPAs.

2.8 The Petitioners, are seeking to:

- a) *Allow the ongoing supply of power to PSPCL at the tariff of Rs. 3.658/kWh, subject to adjustment after finalisation of tariff;*
- b) *Allow the Petitioners and direct PSPCL to continue the supply of power from the Petitioners' MHPs to PSPCL until the Petitioners are able to supply power to any third party And/ Or unless there is a mutual agreement between the Petitioner and PSPCL for extension of the PPAs;*
- c) *In the interim, direct PSPCL to make payments towards the supply of power on regular basis ;*
- d) *Declare and hold that the Petitioners are not under any obligation to supply power to PSPCL after completion of 20 Years of power supply from the date of Commissioning of the power projects;*

- e) *Declare and hold that the Petitioners are entitled for grant of open access for supply of power to any third party(ies) within or outside the State of Punjab;*
- f) *Direct the Respondents to grant consent and approval for open access and enable the Petitioner to supply electricity to any third party;*
- g) *Direct the Respondent No. 3/ PSLDC not to insist for obtaining of clearance from PEDDA for applying and obtaining open access;*
- h) *Grant liberty to the Petitioners to initiate proceedings against PSPCL, at a later stage, pertaining to the generation loss on account of denial and/or non-grant of open access; and*
- i) *Pass such other orders that the Commission deems fit in the facts of this case.”*

### **3. Submissions of PSPCL**

PSPCL, while reiterating the historical facts of the cases submitted by the petitioner, has contended as under:

3.1 The very purpose of the IAs entered into between PEDDA and the Petitioners was the sale of power to PSPCL. In terms of Article 4.4 (ii) of the IAs the PPAs are integral part of the IAs. The Agreement period has also been defined in the IAs under Article 4.3 which specifies that the Agreement shall remain in force up to a period of 30 (thirty) years from Commencement of Commercial Operations of the Project unless terminated earlier in accordance with the provisions of the Agreement. The IAs also specifies that a valid and enforceable PPA must, at all times during the Agreement Period (30 years), cover the sale of power by the Petitioners. The term 'PPA' is also defined in the IAs as the PPA between the Petitioners and PSPCL. Thus the existence of a valid PPA with PSPCL is a sine qua non for the validity of the IA. Therefore, even though the PPAs were signed for an initial period of 20 years, it provides that the

parties are required to extend the same by 10 more years through mutual Agreement.

3.2 Although PSPCL is willing to negotiate and execute the Supplementary PPAs with the Petitioners for the remaining period of 10 years of the IAs, the Petitioners are insisting on a tariff of Rs. 5.50/Unit. The tariff proposed by the Petitioners is exorbitantly high considering that PSPCL has been paying the tariff for 20 years as per the PPA, in terms of which the capital cost of the MHPs stand already recovered by the Petitioners. Further, since the generic tariff determined as per the parameters specified by CERC was not reflective of true market trends, the Commission, after discontinuing the practice of determining generic tariffs vide order dated 19.01.2023 in Petition No. 34 of 2021, has approved the current market aligned tariff of Rs. 3.65-3.75/kWh vide order dated 19.12.2022 in Petition No. 62 of 2022 and the order dated 18.12.2023 in Petition No. 40 of 2023.

3.3 That unlike other non-conventional projects, the Petitioners' MHPs have been established on the canal land in terms of the TPAs entered with the PEDDA and PID (Government of Punjab). The PPAs were premised on the IAs entered into between PEDDA and the Petitioners. Therefore, in the facts and circumstances, where the Petitioners are utilizing state resources for generating and supplying power for a period of 30 years in terms of the IAs, it is clear that a valid and enforceable PPA with PSPCL is also intended at all times to cover the sale of energy by the Petitioners' projects. The rationale being the utilization of the State resources to benefit the consumers in the State.

- 3.4 Keeping in view the above fact the IA cannot exist dehors the PPA. Accordingly, if the Petitioners do not proceed to extend the PPA then the IA shall also stand lapsed (since the PPA is an integral part of the IA). Further, PEDA has already stated in its letter dated 17.04.2023 that the benefits such as the land and water resources of the State of Punjab have been provided to Punjab Hydro for the development of the MHPs in terms of the IA read with Tripartite Agreements for supply of RE power in the State of Punjab only and not for supply of power outside the State.
- 3.5 Therefore, in the event, the Petitioners are not willing to enter into PPAs with PSPCL for 10 more years, then the very basis of the IAs stands eroded and the same would be construed as a fundamental breach. The consequence of the IAs having become unenforceable on account of the fundamental breach is that all the benefits that had accrued upon the Petitioners on account of executing the IAs, namely, land, water resources etc., in terms of the Lease Agreement and Tripartite Agreement, both of which formed as an integral part of the IAs, can also not be claimed/enjoyed by the Petitioners.
- 3.6 In respect of the claim for open access, it is reiterated that the power generated by the Petitioners is to be mandatorily supplied to PSPCL in terms of the IAs signed by the Petitioners with the PEDA. Even in case it is assumed that sale of power to a third party is allowed, the NRSE Policy 2001 cited by the Petitioners, only envisaged its sale to the HT consumers of PSPCL i.e., within the State of Punjab. The rationale being that the present case is not that of a generator seeking open access as a non-discriminatory right,

rather it is an entity that has been specifically granted land, water and other resources of the State with the object that the entire sale of power produced by such an entity would accrue to the benefit of the State Utility/consumers of the State. The reliance placed on the Commission's Order dated 27.05.2009 in Petition No. 25 of 2008 in the matter of Winsome Yarns Limited, which is a captive consumer, is misconceived.

#### **4. Submission of PEDDA**

The submissions of the State Agency PEDDA are summarised as under:

4.1 The Implementation Agreements (IAs) were signed between the Petitioners and PEDDA describing the terms and conditions of setting up and operating the project etc. Further, in terms of the said IAs, various agreements, including the PPAs incorporating the order dated 08.04.2003 passed by the commission was signed between the Petitioners and PSPCL. The Petitioners have quoted only clause 12.0.0 of the PPAs, however, it has to be read in consonance with clause 4 of the IAs where it is provided that PPA and the other agreements (TPA and lease deed) are an integral part of the IAs. In case one of the agreements comes to an end, the IA would stand to be terminated. Keeping in view the generation & purchase of electricity under the PPA, PEDDA had written a letter to PSPCL on 17.04.2023 stating the following:

*" ....., it is pointed out that M/s. Punjab Hydro Power Private Limited was allocated these MHP projects by PEDDA after due approval from State Government. The company had signed implementation Agreements (IAs) with PEDDA for these projects on 5.12.2001, amended on 16.3.2004 after approval of tariff and other related terms and conditions by PSERC vide order dated 8.4.2003. The validity of*

*IA is 30 years from the respective dates of commissioning which is January 2003 (for MHP Dolowal & Salar) and February 2003 for MHP Bhanbhaura (Total Capacity 4.2 MW). The IAs are therefore valid upto January 2033 and February 2033 respectively.*

*On the basis of these IAs, PSPCL (then PSEB) had signed Power Purchase Agreements (PPA) for these MHP projects. The IAs are still valid and PPAs are integral part of the IAs as per Clause 4.4 (ii) of IAs. Based on IAs Tripartite Agreements (TPAs) were signed amongst PEDDA, Water resource Department, (then Irrigation Department) and Company, allowing use of irrigation canal land and water for these MHP projects. TPAs are valid for 30 years. Therefore, after expiry of PPA validity, PSPCL should not have allowed open access outside the State without consulting PEDDA/State Govt., as the interest of State/PEDA are governed by IAs & TPAs. Water in these Canals/water bodies is a State resource.*

*In view of above you are requested to kindly review the decision of PSPCL of allowing M/s. Punjab Hydro Power Private Limited to sell the RE power outside State/Third Party Sale. As per IAs, PSPCL should have further extended the PPAs after carrying out the negotiations as the IAs are valid for 30 years, so that green power from these MHPs built on irrigation land and utilizing state water resource, is used in the state.*

*It is further requested that if in future also if validity of any PPA is expired, PEDDA/State Govt. must be consulted for any action by PSPCL for sale of power from RE projects."*

- 4.2 That the Department of Irrigation [DIP], Government of Punjab, has not been impleaded as a party, despite the fact that PID is the owner of the land and the TPA/lease deed subsists only till such time as the IAs survives, which is further dependent upon the PPAs. The rights over the land on which the projects exist were conferred to PEDDA under the terms of the lease deed between PEDDA & PID. On the basis of these limited rights, a sub-Lease was entered into between PEDDA and the Petitioners. The lease deed itself provides that it was dependent upon the continuation of



the implementation agreement. In case there no longer exists any IA between the Petitioner and PEDDA, the terms of the land lease under the Lease Deed between PEDDA & PID also does not survive, thereby, there are no rights available with PEDDA over the land under the Sub-lease and the whole land lease is rendered ineffective and the Petitioner would become a trespasser on the government property/land. The trespasser does not hold equity under law. Further, the TPAs contain the term that in case the IA is terminated, the PID reserves the right to resume the land under clause 9 thereof.

- 4.3 That at present, the power is being purchased by PSPCL from NRSE sources in the range of Rs. 3.25 to Rs. 3.75 per unit whereas, the petitioner is insisting for a tariff of Rs. Rs. 5.50/kWH. Further, the combined PLF for the 3 projects of the M/s PHPPL based on units generated as per the data submitted by PSPCL in the ARR is calculated as under:

Year	Installed capacity	Units procured	PLF
2021-22	4.20 MW	17063740	46.38%
2020-21	4.20 MW	19175600	52.12%
2019-20	4.20 MW	18529030	50.36%

- 4.4 The Commission started determining the Generic Levelized Tariff from the year 2010-11 onwards based on the normative parameters fixed by CERC. The Generic Tariff for SHPs, of less than 5 MW commissioned during 2010-11, with the PLF of 30% and useful life of 30 years was determined by the Commission vide its Order dated: 30.09.2010 in Petition No. 32 of 2010 as under:

<b>SMALL HYDRO POWER PROJECTS</b>			
Particulars	Levelised Total Tariff	Benefits of accelerated depreciation (if availed)	Net Levelised Tariff (upon adjustment for accelerated depreciation benefit, if availed)
	(Rs./kWh)	Rs/kWH	(Rs/kWh)
Below 5 MW	4.26	0.57	3.69

Since the actual PLF of power project is ~50%, considering a conservative figure of 40% PLF and other parameters on normative, the Levelized Total Tariff works out as Rs. 3.19/kWh in 2010-11 for the useful life of i.e., 30 years. This further gets reduced for the CoD of FY 2002–03 of the Petitioners' projects. It also needs to be considered that PSPCL has already paid Rs. 3.658/kWh for 20 years from January/February 2003. Also the interest rate which was at its peak in 2010–11 has been reduced substantially in 2022-23. Further, the generic tariff does not provide for additional renovation during the useful life of the project. Still, PSPCL has indicated its willingness to pay the same tariff of Rs. 3.658/ kWh for the next 10 years as well. However, the Petitioners are insisting for a tariff of Rs. 5.50 per unit.

- 4.5 In the case of Winsome Yarns Ltd, both the generating company and the consuming company were the same and the open access was for self-consumption as provided under section 42 of the Electricity Act 2003. Therefore, both the cases are on a different footing as the power generated by the Petitioners herein is not for self-consumption, Thus, the Petitioners cannot draw equity with the case of Winsome Yarns Ltd. as both the cases are markedly different.

4.6 That as regards the NRSE policy 2001, the same was superseded in 2006 and thereafter in 2012 and any such agreement that may have to be entered can only be entered under the prevailing NRSE policy 2012. Under clause 3(ii) of the same facility of open access is available *only* upon the refusal by the state licensee to purchase the power on preferential tariff under the long-term PPA. In the present case, the state licensee, PSPCL has not refused, but as a matter of fact, is purchasing/wants to purchase the electricity being generated by the Petitioners.

## **5. Submissions of PSLDC**

5.1 The Punjab State Load Despatch Centre (PSLDC) has submitted that it is constituted under Section 31 of the Electricity Act 2003 and is performing its functions assigned there under. Further, as per various Regulations issued by the Commission from time to time, Punjab SLDC has been notified as the nodal agency for grant of Short Term Open Access (STOA) and is responsible for ensuring compliance of Regulations, Notifications and Orders of the Commission.

5.2 That, as per Clause 3.2(ii) and 4.1 of the Procedure for Intra-State Short Term Open Access (STOA), specified in terms of the provisions of Punjab State Electricity Regulatory Commission (Terms and Conditions for Intra-state Open Access) Regulations 2011 notified by the Commission, PEDDA's clearance in case of Generators using NRSE fuel(s) and NOC/consent of PSPCL is required to be submitted along with other specified documents for applying for grant of open access.

5.3 After submission of NOC/consent by PSPCL, open access for PHPPL's MHPs to Power Exchange was granted by PSLDC for the periods of 17.03.2023 to 16.04.2023 and 17.04.2023 to 16.05.2023. However, on receipt of PSPCL's memo dated 08.05.2023 intimating that PEDDA is objecting to grant of Open Access to the Petitioners without consulting PEDDA/State Govt., as the interest of State/PEDDA are governed by IAs & TPAs, PHPPL was asked to submit the requisite PEDDA clearance. However, PEDDA clearance was not furnished by the petitioner for extension of grant of open access.

## **6. Rejoinder by the Petitioners**

The Petitioners, in the rejoinders to the reply filed by the Respondents, while reiterating the submissions made in the Petitions have further submitted that:

6.1 It is completely misconceived on part of PSPCL and PEDDA to contend that the Petitioners are under an obligation to supply power to PSPCL even after expiry of the mutually agreed term of the PPA. In terms of the NRSE Policy the sale of power to PSPCL is in the form of an incentive only and not a *sine qua non* for setting up and operation of the projects. The developers have the discretion to choose and supply the power to PSPCL or the power may be utilised for captive use or it can be sold to any third party. Further, the reliance placed upon various provisions of the IAs to suggest that the Petitioners are under an obligation to have the PPAs with PSPCL for the entire period of the IAs is also misplaced.

6.2 The submission that there can be no claim for Open Access for inter-state supply of power is also not tenable. The Respondents

has miserably failed to appreciate the various provisions of the Electricity Act 2003 and the scheme and other benefits of the NRSE Policy 2001 extended to the NRSE Projects. The said projects were allocated to the Petitioners prior to enactment of the Electricity Act 2003. After coming into force, one of the core fundamental objectives behind promulgation of the Electricity Act, 2003 is to introduce open access across the territory of India. Although, the NRSE Policy which was issued in 2001 provides for captive use or supply of electricity to any third party, it provides that such third party shall be within the State of Punjab only for the reason that at the time of introduction of NRSE Policy 2001, the concept of inter-state open access was not in vogue. As such, the framers of the Policy could not envisage use beyond the territory of a State or inter-state sale of electricity through open access. However, pursuant to the enactment of Electricity Act 2003, grant of open access is a matter of statutory right and it cannot be denied or curtailed in any manner whatsoever.

6.3 Further, on the one hand it is being contended that sale of power to PSPCL forms the basis of the IAs and on the other hand PSPCL states that even if open access is allowed to the Petitioner it can only be granted for sale to a third party within the State of Punjab. The contradictory stand itself suggests that Petitioners are not under any obligation to supply power to PSPCL beyond the expiry of the mutually agreed PPAs. Moreover, the Policy decisions taken by the State cannot be allowed to survive to the extent such policy decisions run contrary to a legislation. The Electricity Act 2003 is an Act promulgated by the Parliament and has an overriding effect over

any policy decisions taken by any State whether prior or after enactment of the Electricity Act, 2003.

6.4 That Section 2(47) of the Electricity Act 2003 and Regulation 3 (s) of the PSERC (Terms and Conditions for Intra-State Open Access) Regulations 2011 provide that any person engaged in generation is entitled to apply and obtain a non-discriminatory right to use the transmission lines or distribution system or associated facilities with such lines or system. As such, the Petitioners cannot be denied the right of open access, whether intra-state or inter-state, especially when the Petitioners have no contractual obligation to supply power to PSPCL. Also, it has contended that the Petitioners cannot be treated as an independent power producer since it is an entity which has been specifically granted land, water and other resources of the State of Punjab. In this regard, it is submitted that no hydel power project can be established without using the resources of the State and usage of the state resources would not restrict any hydel power project or any other power project from enjoying the status of an independent power producer if such project has been setup at the cost of the project proponent.

6.5 PEDDA in its reply has submitted that the Department of Irrigation (PID) has not been impleaded as a party to the present proceedings. In this regards, it is submitted that the Petitioner has not sought any relief against the PID in the present proceedings. The Petitioners are neither challenging/questioning the validity of the TPAs nor the lease deeds, executed thereunder. The main issue involved in the present proceedings is with respect to survival

or termination of the IAs in the absence of a PPA between the Petitioner and PSPCL.

6.6 That PSLDC in its reply has merely made reference to the Detailed Procedure for grant of open access without appreciating the entire case of the Petitioners. The petitioner has submitted that any licensee or consumer or a person engaged in generation is entitled to apply and obtain a non-discriminatory right to use the transmission lines or distribution system or associated facilities with such lines or system. However, the procedure framed by PSLDC for grant of Short Term Open Access along with other requirements also requires the Petitioners to obtain a clearance from PEDA for applying and availing open access as the Petitioner is using NRSE fuel. In this regard, it has been submitted that since the term of the PPAs have already expired, the said requirement ought to have been relaxed. Since, PSLDC has merely referred and relied upon the procedure approved by the Commission and such procedure not being subject matter of challenge at this stage, the Petitioner reserves its right to challenge the said procedure at a later stage before the appropriate forum, if required.

7. After hearing the parties on 21.08.2024, the Order was reserved allowing the parties to file written submissions within two weeks. The Respondents filed their respective submissions mainly reiterating their earlier submissions. However, the Petitioners in their common Submission filed on 08.09.2024, while reiterating their earlier submissions have highlighted the following issues:

- a) The Petitioners have been allocated various MHPs pursuant to the bidding process conducted under the NRSE Policy 2001. As such,

the provisions contained under such policy will prevail over the express contents mentioned under the IAs. Thereunder, the generators have been given the liberty to choose whether the power generated by them is to be sold to PSPCL or to some other consumer/user.

- b) Moreover, the IAs cannot govern the rights and obligations of the parties to the PPAs which are standalone and separately executed contracts between the Petitioners and PSPCL through mutual agreement. If there is any gap or conflict between the provisions of the IA and PPA, then the terms of the PPA shall prevail over the IA. As per the findings given by Hon'ble APTEL in the matter of RKM Powergen Private Limited Vs. Chhattisgarh Electricity Regulatory Commission & Ors. in Appeal No. 120 of 2022, it is apparent that terms of the PPA cannot be changed or modified unless approved by the Commission. In the present case, while approving the PPA vide order dated 08.04.2003, the Commission has categorically recorded that the term of the PPAs are for 20 years extendable for another 10 years through mutual agreement.
- c) PSPCL during the course of hearing relied upon a decision of Hon'ble High Court of Delhi, i.e. (**2024 SCC Online Delhi 4662**) to contend that the Agreements executed by the Petitioners with PEDDA, PID and PSPCL are inter-linked. In the said case relied upon by PSPCL, the Hon'ble High Court was dealing with a matter where the agreements were co-terminus and the dispute pertained to a completely different subject matter, however, in the present case, clearly the PPA is not co-terminus with the IA inasmuch as



the term of the IA is for 30 years and term of the PPA is for 20 years and also the dispute is distinct.

- d) Further, the Commission cannot test the veracity of the IA signed between the Petitioners and PEDDA. The Commission is vested with adjudicatory powers for adjudication of disputes only when such disputes are between the licensees and generating companies. In this regard, reliance is placed on judgment dated 31.08.2023 in the matter of *Mr. Gagan Narang Vs. Delhi Electricity Regulatory Commission & Ors in Appeal DFR No. 245 and 247 of 2023* passed by Hon'ble APTEL wherein it has been held that under Section 86(1)(f) of the Electricity Act 2003, the Commission can exercise its adjudicatory powers only when a dispute is between the two licensees or between a generating company and a licensee. Assuming without admitting that there is any event of default on part of the Petitioners under the IAs, then PEDDA is free and empowered to pursue its grievances in terms of IAs and in accordance with law.
- e) The issues raised in the present proceedings are limited to the declaration of rights and obligations of parties to the PPA more particularly as mentioned under Article 12. During the course of the hearing before the Commission on 21.08.2024, PSPCL has unequivocally admitted before the Commission that the Petitioners cannot be compelled to sign the supplementary PPAs in the absence of any mutual agreement after the expiry of 20 years. Once, it has been admitted by PSPCL that it cannot compel the generator to sign the supplementary PPA for extension; the contention with respect to supply of power after expiry of 20 years

does not arise. Also, it is a well settled principle of law that a contract can only be extended by mutual agreement by the parties to a contract. The Hon'ble Supreme Court and the Hon'ble High Courts in various cases held that both the buyer and the seller must agree to extend time for the delivery of goods and it cannot be done unilaterally. Thus, PSPCL cannot unilaterally seek to extend the PPA by compelling the Petitioners and by abusing its dominant position.

- f) Further, the introduction of open access is stated to be one of the fundamental objectives in promulgation of the Electricity Act 2003. As such, when a statute provides a right to the Petitioners to avail open access then it cannot be curtailed in the garb of a Policy decision by the State. Also, the contractual arrangement cannot override the statutory right as held in the judgment passed by Hon'ble Supreme Court in the matter of *Nutan Kumar v. Ind ADJ*, (2002) 8 SCC 31. Therefore, denial of open access in the absence of any contractual obligation towards PSPCL beyond the expiry of the PPA is certainly resulting in restricting the rights of the Petitioner in as much as the Procedure framed by PSLDC for grant of Short Term Open Access along with other requirements also requires the Petitioner to obtain a clearance from PEDA for applying and availing open access as the Petitioner is using NRSE fuel.
- g) It is also submitted that PSPCL has abused its Dominant Position by denying KHPPL's request to supply power to it on an interim basis. The issues raised by KHPPL and PHPPL are completely identical and as such, the KHPPL ought not to have been treated

differently. Even the contents/express provisions of the PPA/IA/TPA are identical. KHPPL has been made to suffer loss of generation of RE Power on day to day basis even when it was offering power at a competitive interim tariff of Rs. 3.658/unit till the finalisation of the issue.

## **8. Analysis and Decision of the Commission**

The Commission has examined the submissions and arguments thereon by the parties. The prayers of the Petitioners, in addition to seeking to allow them to continue supply of power from its MHPs to PSPCL as an interim arrangement, are consolidated as under:

- i) Declare and hold that the Petitioners are, not under any obligation to supply power to PSPCL after completion of 20 Years of power supply from the date of Commissioning of the power projects and are, entitled for supply of power to any third party within or outside the State of Punjab;*
- ii) Direct, the Respondents to grant consent and approval for open access to enable the Petitioners to supply electricity to any third party and, PSLDC not to insist for obtaining of clearance from PEDDA for applying and obtaining open access;*
- iii) Grant liberty to the Petitioners to initiate proceedings against PSPCL, at a later stage, pertaining to the generation loss on account of denial and/or non-grant of open access; and pass such other orders that the Commission deems fit in the facts of this case.”*

However, as the prayers are interlinked with each other, the Commission decides to deal with them jointly.

Herein, the Petitioners' case is that, after the expiry of the agreed term of twenty years of the PPAs, the Petitioners are not obliged to sell power to PSPCL in the absence of any mutual agreement on the applicable

tariff so as to extend the term of the PPAs. Thus, they are therefore entitled to sell the power generated from their Projects to any third party (within or outside the State) as envisaged in the NRSE Policy 2001 read with the mandate for open access under the Electricity Act 2003. On the other hand, the contention of the Respondents (PSPCL & PEDDA) is that the existence of a valid and enforceable PPA with PSPCL is a *sina qua non* for the validity of the Implementation Agreement signed under the same NRSE Policy 2001. The Commission examines the same as under:

8.1 The Commission analyses the provisions of the NRSE Policy 2001 under which the projects were set-up, the Implementation Agreements (IAs) signed by the Petitioners with the State Agency PEDDA for the purpose of setting-up of the projects, the PPAs signed by the Petitioners with the State Utility PSEB (now PSPCL) for sale of power and the Commission's Order in the Petition filed for allowing the said power procurement arrangements as hereunder:

**a) The NRSE Policy 2001, states as under:**

***"1. Objectives of the Policy:***

***.....The Policy is formulated to achieve the following objectives:***

.....

- *To meet and supplement minimum rural energy needs through sustainable NRSE programmes.*
- *To provide decentralised energy supply for agriculture, industry, commercial and household sector.*

.....

**V INCENTIVES:**

.....

6. Punjab State Electricity Board will purchase electricity in whole or part offered by the power producer without any restriction of time or quantum to ensure full utilisation of NRSE.

.....

**FISCAL AND FINANCIAL INCENTIVES CODE UNDER NRSE POLICY 2001**

.....

**4. Facilities by Punjab State Electricity Board:**

(i) **Wheeling:** The PSEB will undertake to transmit through its grid the power generated and make it available to the producer for captive use or third party sale within the State at a uniform wheeling charge of 2% of the energy fed to the grid, irrespective of the distance from the generating station. The third party must be HT consumer of the PSEB, unless this stipulation is relaxed specifically by the PSEB.....

(ii) **Sale of Power:** The rate of sale of power to the PSEB from NRSE projects shall be as under:

**1. OLD PROJECTS**

PSEB shall continue to purchase electricity at a price of Rs. 3.01 per unit (base year 2000-01) with 5% annual escalation up to 2004-05 in line with previous policy guidelines issued by Punjab Govt. vide Notification no. 4/23/93-3ST/142 dated 21<sup>st</sup> Jan, 1994, for NRSE power projects including Mini/ Micro Hydel Projects for which the Memorandum of Understanding/ Agreements have already been signed by PEDDA with the private developers. These projects will not be allowed escalation beyond 2004-05.”.

**2. NEW PROJECTS**

For the NRSE-Projects including Mini/ Micro Hydel Projects and Co-generation Projects, the Purchase price of Electricity by the PSEB shall be Rs. 3.01 per unit (base year 2001-2002). The annual escalation shall be payable at the rate of 3% on yearly basis upto

five years. Thereafter, no escalation will be allowed for these projects.

The rate shall be uniform throughout the day of the entire years. The PSEB will not liable to pay any additional amount on any account. The producer will have an option to sell the electricity generated by him to any third party (a consumer) within the State of Punjab (as defined under Clause 4(i) above) at a rate not lower than the tariff of PSEB applicable to such category/ categories of consumers.

.....

**5. Other incentives:**

- (i) Government land if available will be leased out to the developer initially for 33 (three years shall be considered as construction period), on a notional lease rental of Rs. 1.00 per Sq. Mt. per annum subject to further renewal on mutually agreed terms and conditions among the parties.
- (ii) Wherever Irrigation land on canal banks is available beyond their requirement, Punjab Irrigation Department (PID) will transfer canal land to PEDDA on notional lease amount of Rs.4500/- per annum per site. The leased canal land will be subsequently transferred to the power producers for development of Small Hydro Projects on Build, Operate and Own basis for 33 (three years shall be considered as construction period) years on the same terms and conditions set forth by PID. Ownership of such land will remain with PID.

.....

- (iv) The power producers setting up hydel projects will pay cess @ one paisa per unit of electricity generated for use of river/canal water.

.....

**8. Clearance of Project proposal:**

(i) *The parties desirous of setting up NRSE projects will sign an MoU with PEDDA for development of the NRSE project.*

.....

(iii) *After approval of the project, the Producer shall enter into an Implementation agreement with PEDDA .....*”

As is evident, the NRSE Policy 2001 specifies its objectives ‘to meet and supplement minimum rural energy needs through sustainable NRSE programmes’ and ‘to provide decentralised energy supply for agriculture, industry, commercial and household sector’. Further, while specifying the applicable incentives of availability of land, water etc. at nominal rates by the State government and preferential tariff for supply of power by PSEB (now PSPCL), it also provided an option to the producers to utilise the generated power for captive use or third party sale within the State to any HT consumer at a rate not lower than the tariff of PSEB applicable to such category of consumers. Thus, clearly the objective of the NRSE Policy 2001 was to utilize the State resources to encourage investment into creating renewable energy capacity for the benefit of the consumers of the State. The Petitioners’ plea that the framers of the Policy could not envisage the use of electricity beyond the territory of a State as the concept of open access was not in vogue, cannot change the express provisions stated in the policy.

b) In furtherance to the above NRSE Policy, the Petitioners, in their commercial wisdom for the purpose of setting-up the projects,

signed the Implementation Agreements (IAs) with the State Nodal Agency, which specifies as under:

**“1.2 Definitions**

.....

**GOP** Means the Government of Punjab, and includes all its agencies, authorities under its control/regulation including but not limited to PEDA,PSEB,PID;

**PPA** Means the Power Purchase Agreement to be entered between the PSEB and the Company for sale of power from the project.

.....

**4.3 Agreement Period**

(i) This Agreement shall remain in force upto a period of 30 (thirty) years from Commencement of Commercial Operations of the Project (Agreement Period) unless terminated earlier in accordance with the provisions of the Agreement

.....

**4.4 Supplementary of Agreements**

**(i) Agreement with Punjab Irrigation Department (PID)**

The Company shall enter into a separate agreement with the Punjab Irrigation Department (PID)/PEDA within ninety (90) days from the effective date. Issues relating to land availability for construction of projects ... shall be detailed in this agreement. The Agreement with PID shall be an integral part of the Implementation Agreement and the parties shall abide by the same.

**(ii) Agreement with Punjab State Electricity Board (PSEB)**

The Company shall enter into a separate Power Purchase Agreement (PPA) with PSEB, within ninety days from the Effective Date, for the sale of energy. The PSEB shall purchase the whole of the power offered from the Project at terms and conditions agreed, in PPA to be signed by the



*Company with PSEB. A valid and enforceable PPA shall at all times during the Agreement Period, cover the sale of energy by the Company. ... The PPA shall be an integral part of the Implementation Agreement and the parties shall abide by the same.”*

As is evident, in their commercial wisdom for the purpose of setting-up the projects, the Petitioners, consciously opted for the option of preferential tariff for supply of power to PSEB (now PSPCL) provided in the NRSE Policy 2001 and, proceeded to execute/sign the IAs for a period of 30 years by agreeing to the stipulation provided therein that a valid and enforceable PPA with PSPCL shall cover the sale of energy by the Company at all times of the IA period. Thus, the Petitioners, through their own decision had imposed a waiver on themselves and have consciously foregone the option of third party sale for the validity/term of the IAs signed with the PEDDA. In this regard:

- (i) The Petitioners’ plea that IAs nowhere prescribe nor envisage that the valid and enforceable PPA shall be only with PSPCL for the entire term of the PPA, is not factually correct. The term ‘PPA’ stands clearly defined in the IAs to ‘means the Power Purchase Agreement to be entered between the PSEB (now PSPCL) and the Company for sale of power from the project’. Also, the Petitioners’ plea that, as the projects were allocated to it under the NRSE Policy 2001, the provisions of policy shall prevail over the express contents mentioned under the IAs is misconceived. In fact, the Policies are guiding instruments and do not have a force of

law to override the obligations agreed to specifically in a contract entered-into by the parties with mutual consent.

- (ii) The Petitioners, after submitting in their rejoinder to the Respondents reply that the main issue involved in the present proceedings is with respect to survival or termination of the IAs in the absence of the PPAs with PSPCL, changed their stance in their written submissions dated 08.09.2024 by submitting that 'the Commission cannot test the veracity of the IAs signed between the Petitioners and PEDDA by citing Hon'ble APTEL's observation (in judgment dated 31.08.2023 *in the matter of Mr. Gagan Narang Vs. Delhi Electricity Regulatory Commission & Ors in Appeal DFR No. 245 and 247 of 2023*) that under Section 86(1)(f) of Electricity Act 2003, the Commission can exercise its adjudicatory powers only when a dispute is between the two licensees or between a generating company and a licensee. Accordingly, the Commission feels that the Petitioner ought to have approached the Commission only after settling its dispute with PEDDA. However, herein, the intention of the Commission to refer to the provisions of the IAs is only to ascertain the scheme of things leading to the set-up of the impugned NRSE Projects and the impact and relevance of the IAs to the PPAs signed.

- c) Further, in terms of the above IAs and in confirmation of its agreement to have a valid and enforceable Power Purchase Agreement (PPA) with PSPCL to cover the sale of its energy at all times of the IA

period, the Petitioners entered into PPAs with PSPCL, which reads as under:

*“Whereas, the Generating Company has been selected by Punjab Energy Development Agency (PEDA)/Government of Punjab (GOP) to design, construct, own, operate & maintain a ... Mini Hydro based power plant (hereinafter referred to as “Project”) ... and has executed and signed an Implementation Agreement with Punjab Energy Development Authority (PEDA) to this effect.*

*Whereas, the Generating Company had executed and signed a Power Purchase Agreement dated 12.12.2001 with the Board for designing, constructing, owing, operating and maintaining a 1.25 MW plant and sale/purchase of power generation therein.*

*Whereas, the Generating Company had filed a petition before the Punjab State Electricity Regulatory Commission (PSERC) for approval of tariff and other related terms and consitions for sale of power to the Board from the Project and the Commission has granted an approval to the general terms of this Agreement, in line with its Order dated 8<sup>th</sup> April, 2003.*

*Whereas, the Parties, have in compliance of order dated 8<sup>th</sup> April, 2003 passed by the Commission and in line with the provision of the Electricity Act, 2003 agreed to mutually amend, restate and substitute the signed Power Purchase Agreement dated 12.12.2001 with this Agreement.*

.....

**12.0.0 Term of the Agreement**

*12.1.0 Except where terminated by default, this Agreement shall remain in force for a period of 20 (twenty) years from the date of commissioning of the Project, which would be extended by another 10 (ten) years through mutual agreement.”*

As is evident from the extracts of IAs and the PPAs reproduced above, the said PPAs are born out of the express provisions agreed to in the IAs signed by the Petitioners with PEDDA. The reference to the IA is a part of the PPAs signed between the parties. Therefore, the Petitioners' plea that the IAs cannot govern the rights and obligations of the parties to the PPAs is misconceived. Accordingly, the 'Term of the Agreement' is also specified as 'a period of 20 (twenty) years from the date of commissioning of the Project, which would be extended by another 10 (ten) years through mutual agreement'. Herein, the use of words 'would be extended' signifies clearly that the said PPAs are envisaged to be extended up to the full term of 30 years of the IAs, through mutual agreement.

- d) Accordingly, the Commission, in its Order dated 08.04.2003 (reproduced below) in Petition No. 17 of 2002 seeking approval of the said arrangements for sale of power from the Petitioners projects to PSPCL, after noting that the PPAs are for 20 years extendable for another 10 years through mutual agreement, had directed that 'in order to protect the interests of the PSEB and consumers in general, PEDDA and Govt. may take suitable steps to ensure that the developers continue to supply power at prescribed rates during the entire period of contract and NRSE policy is implemented':

*"6. Many of the Private Developers have taken effective steps including commitment of funds, towards the implementation of these projects. In some cases, even PPAs were signed between these parties and the PSEB. It will*

*thus be not fair or appropriate to change the rate of purchase of power on any ground more so when the rate of sale of electricity was prefixed in the tenders invited by Govt. as per provisions of NRSE policy. The Commission has, however, noted that the PPAs are for 20 years extendable for another 10 years through mutual agreement. The rate of purchase of power in respect of old Projects is 301 paise/unit with base year 200-01 to be increased by 5% every year up to 2004-05. The rate of purchase of power in respect of new Projects is 301 paise/unit with base year 2001-02 to be increased by 3% on yearly basis up to 5 years. Thereafter the rate is to remain fixed for the balance years of the contract. The Commission, therefore, is of the opinion that the rates of purchase of power which may appear to be high in the initial years may prove competitive and highly beneficial in the later years of the duration of the PPAs, keeping in view the incremental cost of power involved in subsequent years of requirement.....*

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

Thus, it becomes abundantly clear that one of the main objectives of the NRSE Policy 2001, under which the Petitioners' projects are set-up, was to utilize the resources of the State for the benefit of its consumers. These resources were made available to the developers under the policy at nominal rates. The Petitioners agreed to the use of these resources at nominal rates and signed the Implementation Agreements (IAs) with the State Nodal Agency for setting-up of its projects by consciously undertaking to have valid and enforceable PPAs with PSPCL to cover the sale of energy generated, at all times of the IA period, in a well considered waiver

of the rights available to them to opt for a third party sale under the then prevalent NRSE Policy 2001.

8.2 Further, while observing that the issue of open access, if any, is required to be filed separately under the PSERC Open Access Regulations, the Commission notes the Petitioners' submission that the Procedure specified under the Regulations is not a subject matter of challenge in this petition and that the Petitioners reserve their right to challenge the said procedure at a later stage before the appropriate forum, if required. Accordingly, the Commission examines the matter to the extent of the limited issue i.e. whether the Respondent PSLDC ought to have relaxed the condition of obtaining a clearance from PEDDA for applying and obtaining open access in the Petitioners' case.

The Commission notes the Petitioners' plea that contractual terms cannot prevail over the statutory mandate under Section 2(47) of the Electricity Act 2003. The Commission, however, also notes that a contract signed too has a statutory base under the Indian Contract Act. The Commission refers to the same, which reads as under:

*"2(47) "open access" means the non-discriminatory provision for the use of transmission lines or distribution system or associated facilities with such lines or system by any licensee or consumer or a person engaged in generation in accordance with the regulations specified by the Appropriate Commission."*

As is evident, the statutory mandate herein provides for non-discriminatory provision for the use the distribution/transmission network and associated facilities in accordance with the regulations

specified by the Appropriate Commission. The Commission notes that the PSERC (Terms and Conditions for Intra-state Open Access) Regulations 2011 read with the Procedure for Intra State Short Term Open Access specified there under mandates the requirement of the State Agency PEDAs clearance in case of the Generators using NRSE fuels for availing of the open access. It is also a settled law that, the Regulations framed if any are to be necessarily followed. Accordingly, the Petitioners' prayer to direct the Respondent PSLDC to not to insist for obtaining of clearance from PEDA, in terms of the specified procedure for applying and obtaining open access, for its NRSE Projects cannot be accepted.

The Commission's Order dated 27.05.2009 in Petition No. 25 of 2008 cited by the Petitioners is clearly differentiated from the present issue as therein the petitioner M/s Winsome Yarns Limited was a Captive power Generator which is not the case of the Petitioners. Also, there under, neither did M/s Winsome avail of the applicable preferential tariff during the initial period of the project nor did PSPCL/PEDA raise any issue of the IA's stipulation of having a valid and enforceable PPA with PSPCL to cover the sale of energy during the agreement period.

**In light of the above detailed analysis/observations regarding the scheme of things leading to the set-up of impugned NRSE Projects, particularly the conscious relinquishment of the option under NRSE Policy 2001 for supply to a third party by the Petitioners in the Implementation Agreements signed with the State Nodal Agency, the Commission is of view that the impugned prayers of the Petitioners are not maintainable.**

However, while agreeing with the parties submissions that a party cannot be compelled to enter-into/extension of the PPAs, the Commission is of view that it would be to the benefit of all if the parties could endeavour to arrive at a consensus for extension of the PPAs by another 10 (ten) years i.e., up to full period of the IAs, through mutual agreement. Therefore, the Commission deems it proper to direct the parties to re-negotiate and explore the possibility to come up with a mutually acceptable tariff, subject to the ceiling of applicable tariff in terms of the Commission's Order dated 08.04.2003 read with the NRSE Policy 2001, within 30 days of this Order. In case a mutually acceptable agreement is not arrived at, the parties shall be free to invoke the jurisdiction of the Commission to determine the tariff for the balance period of 10 years.

The Petitions are disposed of in terms of above analysis and decision/directions by the Commission

Sd/-  
(Paramjeet Singh)  
Member

Sd/-  
(Viswajeet Khanna)  
Chairperson

Chandigarh

Dated: **21.10.2024**