

**PUNJAB STATE ELECTRICITY REGULATORY COMMISSION
SCO NO. 220-221, SECTOR 34-A, CHANDIGARH**

**Petition No.15 of 2013
Date of Order: 10.10.2013**

In the matter of : Petition under Section 86 (1) (f) of the Electricity Act, 2003 read with Regulation 9 of the Punjab State Electricity Regulatory Commission (Conduct of Business) Regulations, 2005 seeking a compensation of `124,51,53,525/- alongwith interest @ 15% p.a. from 19.08.2011 till the date of payment, from Punjab State Power Corporation Limited (PSPCL) for the abrupt discontinuance of drawl of power from the Baglihar Hydro Electric Power Project through the petitioner and short payment released by PSPCL amounting to ` 3,88,16,750/- plus late payment surcharge alongwith a payment of `49,45,18,742/- towards water usage charges levied by the State Water Resources Authority under the J&K Water Resources (Regulation & Management) Act, 2010 for the power supplied from Baglihar HEP to PSPCL.

AND

In the matter of: PTC India Limited, 2nd Floor, NBCC Tower, 15, Bhikaji Cama Place, New Delhi-110066

Versus

1. Punjab State Power Corporation Limited, The Mall, Patiala-147001, Punjab.
2. J&K State Power Development Corporation Ltd., Exhibition Ground, Srinagar, Kashmir-190009.

Present: Smt.Romila Dubey, Chairperson
Shri Virinder Singh, Member
Shri Gurinder Jit Singh, Member

ORDER

PTC India Limited (PTC) has filed this petition under Section 86 (1) (f) of the Electricity Act, 2003 read with Regulation 9 of the Punjab State Electricity

Regulatory Commission (Conduct of Business) Regulations, 2005 seeking a compensation of `124,51,53,525/- with interest @ 15% per annum from 19.08.2011 till the date of payment, from Punjab State Power Corporation Limited (PSPCL) for the abrupt discontinuance of drawl of power from the Baglihar Hydro Electric Power Project (Project) and for making payment of `3,88,16,750/- plus late payment surcharge for short payment released by PSPCL to PTC on account of trading margin. The petitioner has also sought payment of `49,45,18,742/- towards water usage charges levied by the State Water Resources Regulatory Authority (SWRRA) under the J&K Water Resources (Regulation & Management) Act, 2010 for the power supplied from the Project to PSPCL.

2. The petitioner has made submissions in the petition as under:-

- (i) The petitioner is engaged, inter-alia, in the trading of the electricity in India and abroad. It had entered into a Power Purchase Agreement (PPA) dated 13.10.2008 with J&K State Power Development Corporation Limited ("JKSPDCL") for purchase of 225 MW of electricity generated by 450 MW Baglihar HEP. Pursuant to the PPA, the petitioner entered into negotiations with erstwhile PSEB for sale of power from the Project and a draft PSA was negotiated and agreed between the petitioner and erstwhile PSEB for sale of 100 MW of power from the Project on long term basis for 12 years from the Commercial Operation Date (COD) of the Project. The petitioner has stated that it has annexed this PSA as Annexure P-3. But Annexure P-3 is PSA between PTC India Limited and Haryana Power Purchase Centre for sale of 50 MW power from the Project.
- (ii) A meeting was held between the petitioner and erstwhile PSEB on 26.03.2009, wherein, it was recorded at Sr.No.6 that draft PSA shall be initialed after approval by State Regulatory Commission. The petitioner has submitted that Minutes of Meeting arrived on 26.03.2009 was a concluded contract which could be seen from the

subsequent conduct of the parties as PSEB/Respondent No.1 commenced availing its share of 100 MW of power from 01.04.2009 in accordance with the draft PSA and Minutes of Meeting dated 26.03.2009.

- (iii) As per the petitioner, clause 2.2 of schedule B of PSA is relevant for the purpose of PTC's trading margin under which sub-clause 2.2.2 states that in case there is no cap on the trading margin for Central Electricity Regulatory Commission, then PTC's trading margin shall be three percent (3%) of tariff rate (Rs.3.65 per kWh). As per CERC (Fixation of Trading Margin) Regulations, 2010, there is no cap in trading margin on long term agreements. So PTC was entitled to a trading margin of 3% of the Tariff Rate (3.65 kWh) under the PSA which works out to be 11 paise/kWh. The petitioner conveyed to PSEB vide letter dated 09.04.2010 that PTC was entitled to trading margin at the rate of 11 paise/kWh, but in view of good relation between PTC and PSEB, PTC would initially charge 9 paise per kWh. An invoice dated 10.04.2010 was raised on PSEB including trading margin at the rate of 9 paise per unit. PSPCL, the successor entity of erstwhile PSEB replied vide letter dated 19.04.2010 stating that long term rates will be applicable after agreement for long term is signed. PTC replied to the letter dated 19.04.2010 vide letter dated 23.04.2010 that power was being supplied on the basis of draft PSA on long term, hence the trading margin has to be as per CERC Regulations for long term contract. The issue was raised by the petitioner again on 29.06.2010 and 20.04.2011 but without any response from the respondent No.1.
- (iv) The petitioner received a communication dated 08.06.2011 from Punjab State Power Corporation Limited, respondent No.1 stating that it had decided to discontinue the 100 MW RTC power from Baglihar Hydro Electric Project with immediate effect. The petitioner vide letter dated 09.06.2011 requested respondent No.1 to indicate the reasons for discontinuance of power of Baglihar long term power. It was further requested that 100 MW power from the Project as short term power

be accepted till the petitioner was able to find a procurer on long term or short term basis and resume scheduling of power.

- (v) The petitioner has submitted that it informed respondent No.1 that the petitioner has located a copy of Order dated 19.01.2011 passed by this Commission in Petition No.15 of 2009 filed by PSEB (respondent No.1) for approval of PSA vide which PSA was returned by the Commission to PSPCL without according approval and for undertaking power procurement through competitive bidding and to determine whether it would be beneficial to go in for PSA and then approach the Commission for approval of this PSA.
- (vi) The petitioner vide letter dated 19.08.2011 reiterated that respondent No.1 had been receiving power from 100 MW Baglihar HE Plant since 01.04.2009 and had been paying long term rates when the short term rates in the market were much higher. Even after Order dated 19.01.2011 of this Commission, respondent No.1 continued to draw power and all of sudden on 08.06.2011 chose to discontinue the supply of power. It was in breach of the Minutes of Meeting dated 26.03.2009 and the draft PSA and accordingly the respondent No.1 was liable to pay an amount of `119,20,43,463/- (subsequently revised to `124,51,53,525/- in this petition as per details) as compensation within 30 days failing which the petitioner would be constrained to initiate appropriate legal proceedings. PSPCL vide letter dated 30.09.2011 stated that the draft PSA could not be signed and as such it had no relevance to the present dispute.
- (vii) The petitioner has further submitted that JKSPDCL (respondent No.2) vide letter dated 03.10.2011 has inter-alia pointed out the malafides on the part of respondent No.1. PSPCL vide its letter dated 15.11.2011 denied any malafide on its part and reiterated the contents of its earlier letter dated 30.09.2011 to the petitioner and stated that there was no reason for the petitioner to raise any claim against it.
- (viii) The petitioner has drawn the attention of the Commission to clause 11.6 of draft PSA on 'Consequence of Termination' and has claimed

damages amounting to `124,51,53,525/- on the basis of Article 11.6.1 and Article 11.6.3 of the said draft PSA.

- (ix) The petitioner has also demanded an amount of `3,88,16,750/- on account of alleged withheld legitimate trading margin and late payment surcharge.
- (x) PTC has further submitted that it received a letter dated 04.01.2012 from JKSPDCL wherein it had been informed that State Water Resources Regulatory Authority, Jammu had imposed water usage charges under the J & K Water Resources (Regulation and Management) Act, 2010. PTC accordingly informed PSPCL and requested for payment of the same for the power consumed by PSPCL. The petitioner has submitted that PSPCL has not paid these charges amounting to `49,45,18,742/- as per invoice dated 27.12.2012 for `11,56,93,995/-, `11,01,37,091/- and `26,86,87,656/- towards water usage charges for power supplied for the period from 10.11.2010 to 31.03.2011 (long term), 01.04.2011 to 30.06.2011 (long term) and 01.04.2011 to 31.10.2011 (short term).
- (xi) The petitioner has also submitted that it moved the Central Electricity Regulatory Commission (CERC) under Section 79 (1) (b) (c) and (f) of the Electricity Act, 2003 for seeking payment of `124,51,53,525/- alongwith interest @ 15% per annum from 19.08.2011 till the date of payment from PSPCL for abrupt discontinuance of drawl of power from Baglihar Hydro Electric Project and short payment released by PSPCL amounting to `3,88,16,750/- plus late payment surcharge. The petition was dismissed by CERC vide Order dated 02.01.2013.
- (xii) The petitioner after submitting that this Commission has jurisdiction under Section 86 (1) (f) of the Electricity Act, 2003 to adjudicate this dispute and that cause of action has arisen in favour of the petitioner to file this petition and that the same is bonafide in the interest of justice, has prayed to :-

- A. Direct respondent No.1 to compensate the petitioner with a payment of `124,51,53,525/-; and/
- B. Direct respondent No.1 to pay `49,45,18,742/- towards water usage charges levied by the State Water Resources Regulatory Authority under the J&K Water Resources (Regulation & Management) Act, 2010; and/or
- C. Direct respondent No.1 to pay interest @ 15% p.a. from 19.08.2011 till the time of receipt of payment.
- D. Direct respondent No.1 to make the outstanding payment amounting to `3,88,16,750/- plus late payment surcharge thereon as per PSA till the time of receipt of payment.
- E. Pass any other order(s) and or direction(s), which the Commission may deem fit and proper in the facts and circumstances of the case.

3. The petition was taken up for admission on 12.03.2013 and after hearing the petitioner, the Commission decided to have preliminary reply of PSPCL vide Order dated 15.03.2013. Notices were issued to PSPCL and JKSPDCL accordingly. Meanwhile, the petitioner filed application for placing draft Power Sale Agreement, which was to be entered into by PTC India Limited and erstwhile Punjab State Electricity Board vide affidavit dated 11.04.2013. PSPCL filed reply vide C.E./ARR & TR letter dated 15.04.2013. PSPCL has submitted in its reply as under:-

- (i) That the petition was not maintainable as there was no vested or legal right for the petitioner to seek direction against the answering respondent to purchase electricity from the petitioner. There is no basis for any compensation as claimed by the petitioner. PSPCL has submitted that there was no Power Sale Agreement (PSA) between the petitioner and PSPCL. PPA between the petitioner and respondent No.2 was on principal to principal basis and there was no involvement or privity of the

PSPCL to the said PPA. There can not be any claim whatsoever against the PSPCL based on the PPA dated 13.10.2008 entered by the petitioner with respondent No.2.

- (ii) PSPCL and the petitioner held negotiations for the execution of Power Sale Agreement (PSA) on principal to principal basis and not a tripartite agreement with JKSPDCL, respondent No.2.
- (iii) By Minutes of Meeting dated 26.03.2009, the petitioner and PSPCL agreed on the procedure to be followed including for the execution of PSA. It was specifically agreed therein that PSA shall be executed only after the approval of the Commission. PSPCL filed petition No.15 of 2009 for the approval of power purchase on long term basis and further approval of draft PSA. The Commission did not accord approval vide Order dated 19.01.2011. As such, PSA never came to be executed and there was no legal or binding obligation on PSPCL to procure electricity from the petitioner. Order dated 19.01.2011 of the Commission has attained finality as the same was not challenged by any person in any forum even after June, 2011 when the petitioner has alleged to have come to know about the said Order. Order was available on the website of the Commission after its issue.
- (iv) The entire electricity that was supplied by the petitioner in the interregnum period was only the short term electricity. It was clearly understood by the parties that the obligation to purchase electricity by PSPCL on long term basis would be applicable only after the execution of the PSA for which approval of the Commission was a pre-condition. The answering respondent would be acting contrary to the provisions of the Electricity Act, 2003 in proceeding to procure the electricity on long term basis from the petitioner after the Order dated 19.01.2011 passed by the Commission. Merely because electricity had been procured from April 2009 to June 2011 on short term basis, does not give any legal or vested right to the petitioner and claim any compensation for not procuring such electricity in future. The

electricity was procured from April 2009 to June 2011 on ad-hoc short term basis without any written and binding agreement. This purchase can not be treated as long term purchase.

- (v) When the supply of electricity by the petitioner to PSPCL during the interregnum period was not on long term basis, the question of the entitlement of the petitioner to the trading margin on long term supply does not arise. The petitioner under the applicable Regulations, was entitled to only the trading margin for short term supply of electricity, which had been fully paid. There was never any dispute on the fact that tariff as agreed, was fully paid by PSPCL for the electricity supplied by the petitioner from April 2009 to June 2011. The trading margin could not have been that for long term supply and had to be only for short term supply and as per applicable Regulations of the Central Commission, the present claim made by the petitioner for payment of full trading margin without the 4 paise per unit cap is contrary to the CERC Regulations and is misconceived.
- (vi) PSPCL has further submitted that claim of the petitioner for water usage charges payable by JKSPDCL is also misconceived because purchase of electricity during the interregnum period by PSPCL from PTC was on principal to principal basis. The tariff was paid to the petitioner on negotiated tariff basis without any tariff determination of each cost element. In the negotiated tariff agreed between parties, there was no scope for subsequent revision unilaterally on account of alleged additional charges payable by the generator, the respondent No.2. The issue lies between the petitioner and respondent No.2 under the PPA, without any role, whatsoever of the PSPCL. PPA is bilateral agreement between petitioner and respondent No.2. The terms and conditions for change in law are in terms of the bilateral agreement between the parties.
- (vii) PSPCL has submitted that in the facts and circumstances mentioned above, the present petition was an abuse of process of the court and was liable to be dismissed in limine with costs.

4. The petition was admitted vide Order dated 17.04.2013 and application dated 12.04.2013 filed by the petitioner for placing draft PSA was taken on record. The petitioner sought time to file rejoinder to the preliminary reply of PSPCL. The rejoinder was filed by the petitioner on 21.05.2013, wherein the filing of preliminary reply was objected to on the basis of the Hon'ble Supreme Court decision in Civil Appeal No.7524 of 2012, PTC India Ltd. V/s GERC & Anr. The petitioner has further submitted as under:-

- (i) The water usage charges have been levied for the period from November 2010 to December 2011. The power was supplied to PSPCL as agreed vide MOM dated 26.03.2009 read with draft PSA and also as per a short term PPA dated 31.03.2011 signed and executed between PTC and PSPCL. There is no denial of the fact that PSPCL has consumed power from the Project of respondent No.2. In terms of PPA dated 31.03.2011 water usage charges are payable in the absence of any contrary provision in the PPA about the payment of taxes. The water usage charges as tax is also payable under Section 64 of the Sale of Goods Act, 1930 and as held by Hon'ble Supreme Court in State of West Bengal v. Kesoram Industries Ltd. (2004) 10 SCC 201 and Namaligarh Refinery Ltd. v. Daelim Industrial Co. Ltd. (2007) 8 SCC 466. Therefore, `49,45,18,742/- towards water usage charges levied by the State Water Resources Regulatory Authority under J&K Water Resources (Regulation and Management) Act, 2010 can not be disputed and are payable by PSPCL.
- (ii) The petitioner has submitted that reply of PSPCL on the issue of trading margin was erroneous. The question of enhanced trading margin arose when Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010 were notified. PTC wrote to PSPCL vide letter dated 09.04.2010 that as per CERC Regulations on Trading Margin effective from 12th February, 2010, there was no cap on trading margin for long

term agreements. As per clause 2.2.1 of schedule B of draft PSA, PTC was entitled to a trading margin of 3% of tariff rate (Rs.3.65/kWh) which worked out to around 11 paise/kWh but in view of the good relations between the parties PTC would be initially charging a trading margin of 9 paise/kWh only with effect from 1st April, 2010. PTC has further submitted that 100 MW power was supplied for a period of 27 months, therefore transaction between PTC and PSPCL was not a short term transaction. As per MOM dated 26.03.2009, a provision for trading margin at the rate of 3% had been made. PTC reiterated that MOM dated 26.03.2009 and agreed draft PSA was a concluded contract, which could be seen from the subsequent conduct of the parties.

- (iii) PTC has further submitted in its rejoinder that Order dated 19.01.2011 was brought to the notice of the petitioner vide letter dated 08.06.2011, stating therein that PSPCL had decided to discontinue 100 MW power from Baglihar Hydro Electric Project in J&K to Punjab through PTC with immediate effect, without conveying the contents of the Order dated 19.01.2011. PSPCL had acted with malafide intentions in not informing the petitioner about the Order dated 19.01.2011. The knowledge of the same can not be attributed to the petitioner from the fact that Order was uploaded on the website of the Commission. The Order needed to have been communicated to the petitioner to make it bound by that Order. PTC has supported this submission with the decisions of Hon'ble Supreme Court of India. Non-communication of Order dated 19.01.2011 resulted in grave losses for the petitioner and was a clear breach of terms of the MOM dated 26.03.2009 and draft PSA. The petitioner has emphatically submitted that a concluded contract had come into existence which is evident from the conduct of parties. The petitioner has heavily relied on the provisions of the Sale of Goods Act 1930 to prove this point.

- (iv) In its rejoinder to the reply of PSPCL, PTC has further submitted that reply filed by PSPCL was erroneous and misleading. PSPCL was liable to pay enhanced trading margin to PTC and for wrongful termination of the contractual arrangement between the parties as MOM dated 26.03.2009 and draft PSA constituted a complete contractual arrangement. PSPCL is also liable for the payment of the water usage charges as the electricity already stands consumed. The petitioner has prayed for grant of relief as sought in the light of facts and circumstances brought out in the petition and rejoinder.

5. PSPCL sought time to file its response to the rejoinder during hearing on 21.05.2013. PSPCL was directed vide Order dated 22.05.2013 to do so by 02.07.2013 with a copy to the petitioner and respondent No.2. Respondent No.2 (JKSPDCL) was also directed to file reply to the petition by 02.07.2013 with copy to PTC India Ltd. and PSPCL.

Respondent No.2 (JKSPDCL) filed reply/written submissions vide No.JKSPDC/L/2461-63 dated 04.07.2013 and adopted all the averments / contentions of the petitioner and submitted that same may be considered as part of the reply/written submissions of respondent No. 2. It was further submitted that PTC India Ltd. entered into Power Purchase Agreement (PPA) dated 13.10.2008 with respondent No.2 for purchase of 225 MW of power generated from Baglihar HEP for period of 12 years, to sell 150 MW gross capacity power to PTC on long term basis and 75 MW gross capacity on short term basis. JKSPDCL has further submitted that pursuant to the PPA, the petitioner entered into an agreement dated 19.06.2009 with respondent No.1 for onward sale of power for a period of 12 years. PSPCL has continued to enjoy the benefit of 100 MW power on long term rates when bilateral rates in the short term market were much higher. PSPCL voluntarily discontinued drawing power w.e.f. 08.06.2011 without giving time to the petitioner or respondent No.2 for locating any alternate buyer. No reasons for discontinuation were intimated. The decision of the Commission passed in January 2011 (Order dated 19.01.2011) was not conveyed to the petitioner or respondent No.2 for almost 6 months. The petitioner and respondents were kept in dark by PSPCL with the intention of

benefiting itself. The conduct of respondent No.1 amply demonstrates its malafide intention, due to which loss amounting to `358.8 crore has been caused to the respondent No.2 on account of non-scheduling of power and scheduling of power at lower rates. Loss caused to respondent No.2 is payable by respondent No.1.

JKSPDCL has further submitted that water usage charges @ 25 paise per cubic metre of water has been notified by State Water Resources Regulatory Authority for a period of two years w.e.f. 10th of November, 2010. Respondent No.2 has been directed to pay the water usage charges. Since the power has been consumed by PSPCL, the water usage charges indicated in the petition are payable by PSPCL. The averment of PSPCL that in the absence of any Power Sale Agreement, no legal right has been accrued to the petitioner to claim compensation is contrary to the settled legal position that contract may be expressed or implied. Once supply commenced, the concluded contract came into existence. JKSPDCL has submitted that the Commission may be pleased to grant relief as sought by the petitioner in the petition in the interest of justice.

6. PSPCL filed sur-rejoinder dated 18.07.2013 and reiterated that petition was not maintainable and there was no contract between the parties under which, claims as sought by the petitioner could be made. PSPCL further submitted that none of the contentions made by the petitioner in its rejoinder are correct. The principles sought to be invoked by the petitioner have no application to the facts of the present case. The provisions of the relevant statutes and the judgements cited are whimsical, irrelevant and do not apply in the present case at all. Unless there is a prima-facie agreement/contract under which money claim under Section 86 (1) (f) of the Electricity Act, 2003 can be made, the petition can not be maintained before the Commission. The power was procured under an interim arrangement and at no stage, was any other contract/agreement entered into between parties.

PSPCL has further submitted that all power purchases for PSPCL are regulated under Section 86 (1) (b) and approved by the Commission. In case any short term power is purchased to meet exigencies, PSPCL has still to justify its procurement and related costs in appropriate proceedings before this

Commission. There can be no implied binding PSA or other agreement without the approval of this Commission. PPA dated 13.10.2008 entered into by the petitioner with respondent No.2 is on principal to principal basis. No claim can be made based upon the said PPA dated 13.10.2008 against PSPCL. The negotiation for execution of PSA between the petitioner and PSPCL were also on principal to principal basis and not a tripartite agreement with respondent No.2. By MOM dated 26.03.2009, the petitioner and PSPCL had agreed on the procedure to be followed including for execution of PSA. Allegation of not conveying the Order dated 19.01.2011 can not bring into operation the draft PSA as the power was procured on short term basis. There are several differences in the terms of PSA and the terms of Minutes of Meeting dated 26.03.2009, which clearly showed that parties had not agreed to bind themselves by the terms of the PSA till such time the procurement of power was approved by the Commission. PSPCL has submitted that merely because it procured electricity on short term basis from April 2009 to June 2011 does not give any legal or vested right to the petitioner to force PSPCL to procure electricity in future also or otherwise claim any damages or compensation. Letter dated 31.03.2009 clearly states that supply of power was only on day ahead/short term basis. PSPCL has further submitted that the claim of the petitioner for reimbursement by PSPCL of water usage charges payable by respondent No.2 in the State of J&K is also misconceived and baseless. The purchase of electricity during interregnum period was on principal to principal basis between the petitioner and PSPCL and respondent No.2 was not a party to the said transaction. The petition is, therefore, an abuse of process of the court and is liable to be dismissed in limine with costs.

7. The arguments of the petitioner and PSPCL were heard at length on 30.07.2013 and after hearing the arguments, the parties were directed to file written submissions vide Order dated 05.08.2013. PTC has filed the written submissions dated 12.08.2013 and PSPCL filed written submissions vide letter No.6079-81 dated 08.08.2013. Respondent No.2 conveyed that due to imposition of curfew in large parts of J&K, it was unable to attend the hearing on 13.07.2013 and requested for adjournment.

PSPCL was directed vide Order dated 05.09.2013 to give details of other Hydro Electric Projects located in the State of J&K from which PSPCL was procuring power and submit whether any water usage charges were being paid or not in those cases. PSPCL was further directed to give provisions of PPAs/PSAs executed for those projects under which such charges were being paid and to elucidate how the water usage charges are not payable in the case of power procured from Baglihar HEP.

PSPCL has filed the submissions vide memo No.6693 dated 17.09.2013 in compliance with Order dated 05.09.2013 and has submitted that PSPCL has certain allocations of power from the Hydro Electric Projects of National Hydro Power Corporation (NHPC) located in the State of Jammu and Kashmir. These hydro power plants are Salal HEP (690 MW), Uri HEP (480 MW), Dulhasti HEP (390 MW) and Sewa-II HEP (120 MW) from which PSPCL's firm allocation is 184 MW, 66 MW, 32 MW and 10 MW respectively. PSPCL has submitted that the State of J&K passed the Jammu and Kashmir Water Resources (Regulation and Management) Act, 2010 under which water usage charges have been levied on usage of water including generation of electricity and user is required to obtain licence. The State Water Resources Regulatory Authority established under that Act by Government of Jammu & Kashmir, has fixed water usage charges by Order dated 01.02.2011 @ `0.25/cu. mtr. of water with effect from November, 2010, valid for a period of 2 years. NHPC filed a Civil Writ Petition No.604 of 2011 in the Hon'ble High Court of Jammu & Kashmir challenging the Act. The Hon'ble High Court in its interim Order dated 04.05.2011 has directed NHPC to apply for licence and deposit the water usage charges raised by the J&K State Water Regulatory Authority. NHPC filed a petition before the Central Electricity Regulatory Commission bearing No.106 of 2011 for reimbursement of these charges from the beneficiary States. The Central Commission has allowed reimbursement of these charges vide its Order dated 21.10.2011. To provide for reimbursement of these charges, the Central Commission has issued amendments on 31.12.2012 (Third Amendment) in its Tariff Regulations, 2009. This amendment is subject to the decision of Hon'ble High Court of J&K in CWP No.604 of 2011. The reimbursement was billed to PSPCL pursuant to the above mentioned decisions of High Court and CERC.

PSPCL has further submitted that there is provision in the relevant PPAs entered into between PSPCL and NHPC. Articles 6.1 and 6.3 of PPAs reads as under:

“6.0 Tariff :

6.1 The tariff to be charged & its associated Terms and Conditions for the energy to be supplied from the NHPC Station shall be as per Tariff Notifications/orders/directions issued/to be issued by CERC from time to time under Electricity Act, 2003 and/or any other Act/Regulations as may be substituted by Government of India in place of these provisions.

6.3. In addition to the energy tariff set out, the Bulk Power Customer shall also be liable to pay to NHPC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess, levy, fees or other imposition etc. levied or to be levied in future as a new tax by the Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per orders of CERC in this regard.”

The water usage charges to NHPC are being released as per Central Commission's Order dated 21.10.2011 read with Third Amendment to its Tariff Regulations, 2009 and the provisions in PPAs entered into with NHPC.

PSPCL has further submitted with regard to the difference in power procurement arrangement from Baglihar HEP and from NHPC Project, stating that in case of power from Baglihar HEP, the same was procured in terms of Minutes of Meeting dated 26.03.2009 and letter dated 31.03.2009 only on day ahead basis. But the PTC is treating supply as if the same is a long term arrangement and making claims on the basis of draft PSA. The contract between the parties was not for purchase of electricity on cost plus basis. PTC is required to establish that tax (water usage charges) was on generation of electricity. Pass through tax is only based on agreements between the parties. PSPCL has further submitted that in case of NHPC, the PPAs provided for a Change of Law clause to allow taxes and duties on generation and supply of

electricity pursuant to change in law to be allowed as a pass through in the tariff. The fact that the water cess on generation of electricity was the reason that Regulations had to be amended to specifically provide for the same rather than claim being allowed in terms of PPA. There can be no question of allowing the water usage charges as pass through in the present matter.

8. After hearing the arguments of PTC India Ltd., PSPCL and J&K State Power Development Corporation Limited on 20.09.2013, hearing of the petition was closed vide Order dated 23.09.2013. The parties submitted during hearing that they intend to file additional / comprehensive written submissions in respect of the new points raised during hearing on 20.09.2013. Accordingly, the parties were directed to file additional / comprehensive written submissions by 30.09.2013 in respect of points raised by parties during arguments of the case.

Order was reserved.

None filed additional comprehensive submissions by 30.09.2013. The petitioner has filed the written submissions on 03.10.2013, wherein all the contentions already made in the petition and rejoinder have been reiterated.

9. Observations & Findings of the Commission

The Commission has gone carefully through the pleadings of the parties.

The Commission notes that PTC has sought compensation/payments from PSPCL as here under:

- a) Compensation of `124,51,53,525/- from PSPCL on account of decision of PSPCL to discontinue drawl of 100 MW power from Baglihar HEP alongwith interest @ 15% per annum from 19.08.2011 till the date of payment by PSPCL.

- b) Payment of `3,88,16,750/- plus late payment surcharge thereon till the time of receipt of payment with regard to short payment of trading margin by PSPCL as per PSA.
- c) Payment of `49,45,18,742/- from PSPCL towards water usage charges levied by State Water Resources Regulatory Authority, Government of Jammu and Kashmir (SWRRA) under the provisions of Jammu and Kashmir Water Resources (Regulations & Management) Act, 2010 for the power supplied from Baglihar HEP.

The observations and findings of the Commission on each of the above are discussed here under:

- i) PTC is seeking a compensation of `124,51,53,525/- with interest at a rate of 15% per annum from 19.08.2011 till the date of payment by PSPCL on account of decision of PSPCL conveyed to PTC vide its letter dated 08.06.2011, to discontinue the supply of 100 MW round the clock power from Baglihar HEP on day-ahead reservation of open access corridor basis, accepted by PSPCL vide letter dated 31.03.2009, with immediate effect. The said charges have been calculated on the basis of Article 11.6.1 'Consequence of Termination for Purchaser Event of Default' and Article 11.6.3 'Calculation of termination payments' under the Article 11.6 'Consequences of Termination' of the PSA which, incidentally, was not signed between PTC and PSPCL. As per the record of discussions of the meeting dated 26.03.2009, the said PSA under negotiation was to be initialed after the approval of the then PSEB and signed after approval of the Commission. The Commission notes that the PSA document filed by the petitioner vide its application dated 12.04.2013 is not initialed by either party. More importantly, the Commission did not approve the said PSA for the long term purchase of power from Baglihar HEP in its Order dated 19.01.2011 in petition no. 15 of 2009 filed by PSPCL. In the absence of a valid PSA, at best, the letter dated 31.03.2009 together with the record of discussions dated 26.03.2009 mentioned therein, only, could be the guiding documents for supply of the

aforementioned 100 MW power from Baglihar HEP. These documents do not have any provision for payment of any charges for discontinuation of the supply of power, by either party. The Commission is of the view that to calculate and demand charges by PTC on the basis of a non-existent document (unsigned PSA) is not justifiable. Further, the contention of PTC that PSPCL did not inform it about the Commission's ibid Order regarding non approval of the PSA until almost six months of the passing of the same, is not tenable as it was in PTC's own interest to keep itself abreast of the up to date developments, especially with regard to the Commission's approval of the PSA, as the very signing of the PSA was incumbent upon it. Perusal of the said Order of the Commission dated 19.01.2011 reveals that PTC was not a party in petition no. 15 of 2009 filed before the Commission by PSPCL. The Commission holds that the claim of PTC for payment of `124,51,53,525/- alongwith interest is based on a non-existent PSA document and there is no such provision in the concerned guiding documents. In view of the above, the Commission decides that the aforementioned amount alongwith interest is not payable by PSPCL to PTC on account of discontinuation of the 100 MW supply of power from Baglihar HEP.

- ii) PTC is also claiming an amount of `3,88,16,750/- from PSPCL on account of short payment of trading margin alongwith late payment surcharge. PTC has based its claim and calculations of the same on clause 2.2 of Schedule-B of the said PSA. Perusal of the calculation of the aforementioned amount in Annexure P-15 to the petition reveals that the same is the sum total of the difference in payment of trading margin at which PSPCL has made the actual payment (@ 4 paise per kWh) and the payments calculated at the rate at which it has been claimed by PTC (@ 9 paise per kWh). As brought out in the para above, in the absence of a valid PSA, the letter dated 31.03.2009 together with the record of discussions dated 26.03.2009 mentioned therein, only can be the guiding documents for supply of the said 100

MW power from Baglihar HEP. The letter dated 31.03.2009 vide which acceptance of supply of such power was conveyed clearly indicates that the trading margin was payable @ 4 paise per kWh. PTC has submitted that it took up the matter with PSPCL for payment of trading margin at the enhanced rate of 9 paise per kWh vide its letter dated 09.04.2010 followed by invoice dated 10.04.2010 wherein the trading margin was calculated @ 9 paise per kWh. However, PSPCL vide its letter dated 19.04.2010 informed PTC that long term rates will be applicable after agreement for long term supply of power is signed with PTC. The Commission notes that the calculation of the amount of `3,88,16,750/- on account of alleged short payment of trading margin is based on the non-existent PSA. In view of the above, the Commission holds that the aforementioned amount is not payable by PSPCL to PTC and the payment of trading margin has been rightly made by PSPCL as per the letter dated 31.03.2009 vide which PSPCL conveyed its acceptance to PTC for supply of 100 MW power from Baglihar HEP from 01.04.2009 @ `3.65 per kWh plus trading margin @ 4 paise per kWh on day-ahead reservation of open access corridor basis.

iii) a) PTC is seeking another payment of `49,45,18,742/- from PSPCL on account of water usage charges levied by State Water Resources Regulatory Authority, Government of Jammu and Kashmir (SWRRA) w.e.f. 10.11.2010 as per its Order dated 01.02.2011 under the Jammu and Kashmir Water Resources(Regulation and Management) Act, 2010, conveyed on 04.01.2012 by Jammu and Kashmir State Power Development Corporation Limited (JKSPDCL) @ `0.25 per cubic metre of water valid for two years from the date of Order.

b). As per the petition filed by PTC, out of the total water usage charges amounting to `49,45,18,742/-, `11,56,93,995/- for the period 10.11.2010 to 31.03.2011 and `11,01,37,091/- for the period 01.04.2011 to 30.06.2011 i.e.

`22,58,31,086/- pertain to the supply of 100 MW power from Baglihar HEP as accepted by PSPCL vide letter dated 31.03.2009. The balance amount of `26,86,87,656/- for the period 01.04.2011 to 31.10.2011 pertains to the 75 MW power supplied from Baglihar HEP to PSPCL as per PPA dated 31.03.2011 signed between PTC and PSPCL on the basis of bids invited by PSPCL.

PTC has submitted that the said charges are either payable by the generator (JKSPDCL) or the ultimate purchaser (PSPCL). PTC has also submitted that water usage charges levied by SWRRA on sale of power from NHPC's hydro electric projects located in the State of Jammu and Kashmir have been allowed to be reimbursed by the beneficiaries to NHPC by Central Electricity Regulatory Commission (CERC) vide Order No. 106/2011 dated 21.10.2011.

c). The Commission in its interim Order dated 05.09.2013 asked PSPCL to submit whether any water usage charges are being paid or not in case of other such Hydro Electric Projects and if being paid, then PSPCL shall also give the provisions of PPA/PSA executed for those projects under which such water usage charges are being paid. PSPCL was also asked to elucidate as to how the water usage charges are not payable in case of procurement of power from Baglihar HEP from April, 2009 to June, 2011.

d). PSPCL in its submissions has brought out that the 100 MW power purchased from Baglihar HEP was not based on cost plus tariff and it was not a case where individual cost and expenditure are identified and that only a reasonable regulated tariff was being paid and additional cost and expenditure could be claimed as a pass through. PSPCL has submitted that the record of discussions dated 26.03.2009 provide only for payment of Cess/Tax/Duty imposed on generation, sale and trading of electricity and not other aspects such as water usage etc. PSPCL has submitted that before claiming any amount under the said clause, PTC has to first establish that the tax is on generation of electricity. PSPCL has further submitted that even in case of NHPC projects, the water usage charges became payable to the generator only pursuant to the Order passed by CERC on 21.10.2011 and amendment of the Tariff Regulations by CERC as these charges were not allowable as pass through automatically. PSPCL has submitted that since the water usage

charges were not on generation of electricity, CERC issued amendment to its Tariff Regulations 2009 on 31.12.2012, subsequent to its Order dated 21.10.2011. PSPCL has also argued that tariff for NHPC projects is being determined on cost plus basis by CERC under sections 61, 64 and 79 of the Electricity Act, 2003 read with its Tariff Regulations 2009. The allocation of power from NHPC projects by Government of India is on long term basis to all the utilities including PSPCL. As per PSPCL's submissions, although the following provision existed in the PPA with NHPC, an amendment to Tariff Regulations 2009 was carried out by CERC to allow reimbursement of water usage charges to NHPC by the beneficiaries as the same were not allowable under the existing provisions.

'6.3. In addition to the energy tariff set out, the Bulk Power Customer shall also be liable to pay to NHPC in accordance with any law in force, all payments made or payable by it on account of taxes, duties, cess, levy, fees or other imposition etc. levied or to be levied in future as a new tax by the Government or other authority in respect of generation, transmission and supply of energy including activities incidental and ancillary thereto as per orders of CERC in this regard.'

PSPCL has further submitted that none of the above conditions exist in the present case and the acceptance for supply of 100 MW power from Baglihar HEP was on day-ahead basis on a negotiated tariff without any tariff determination on each cost element for the electricity supplied by PTC.

The Commission notes that a workable arrangement in respect of supply of 100 MW power from Baglihar HEP was made vide letter dated 31.03.2009 till the approval of the said PSA by the Commission. In the record of discussions dated 26.03.2009 referred to in the said letter, it was provided that the PSA shall be signed after approval by the Commission. However, the said PSA was not approved by the Commission in its Order dated 19.01.2011 in petition no. 15 of 2009. Therefore, as brought out above, the letter dated 31.03.2009 together with the record of discussions dated 26.03.2009 only can be the guiding documents for supply of the said power. The PSA having not been approved by the Commission, only the provision in the said letter and record of discussions can be referred to. Para 3 of the record of discussions dated 26.03.2009 reads as under:

'It was explained by PTC that the tariff rate is net of the all taxes & duties i.e. after the date of execution of agreement, if any Cess/Tax/Duty is imposed on Generation, Sale and Trading of Electricity by the State Govt./Central Government, the same will be payable by PSEB. However, at present no such Cess/Tax/Duty etc., is applicable.'

Considering the detailed submissions made by the parties, the Commission is convinced of the submissions and arguments put forth by PSPCL that the water usage charges amounting to `22,58,31,086/-, in respect of the supply of 100 MW power from Baglihar HEP, are not payable by PSPCL.

(e) With regard to the water usage charges of `26,86,87,656/- for the period 01.04.2011 to 31.10.2011 pertaining to the supply of 75 MW power from Baglihar HEP to PSPCL as per PPA dated 31.03.2011, the Commission notes that as brought out in the said PPA, PSPCL invited bids for purchase of said power vide Specification No. 1/2011 and the PPA was signed on the basis of acceptance of offer of PTC by PSPCL. Clause 3.7 'Taxes and Duties' of the PPA reads as under:

'At present no taxes or duties are applicable on power sale and purchase transactions. However, in future during the validity of contract, if any taxes or duties are levied by Central or State Government, the same shall be borne by PSPCL beyond delivery point.'

As per this clause, no taxes and duties were applicable on power sale and purchase transactions as on 31.03.2011. However, as per PTC's submissions, JKSPDCL vide letter dated 04.01.2012, informed PTC regarding levy of water usage charges by SWRRA vide order dated 01.02.2011 w.e.f. 10.11.2010, the date of commencement of Jammu and Kashmir Water Resources(Regulation and Management) Act, 2010. Perusal of the copy of the said order dated 01.02.2011 of SWRRA, filed by PTC in the petition, reveals that the said order was received in the office of JKSPDCL on 03.02.2011 vide receipt no. 1963. However, for reasons best known to JKSPDCL, the same is stated to have been communicated to PTC on 04.01.2012. This being a case of sale of power through competitive bidding, the inclusion of these charges by

PTC would have altered the merit order and PTC's offer may have been rejected. Therefore, in view of the above and the submissions and arguments put forth by PSPCL, the Commission is convinced that the water usage charges amounting to `26,86,87,656/-, in respect of supply of 75 MW power from Baglihar HEP by PTC as per PPA dated 31.03.2011 based on competitive bidding process, are also not payable by PSPCL. Accordingly, the Commission holds that PSPCL is not liable to pay the amount of `49,45,18,742/- (`22,58,31,086/- plus `26,86,87,656/-) to PTC on account of water usage charges for the period from 10.11.2010 to 31.10.2011.

Summarizing, all the claims as per prayer made by PTC, do not stand valid in the eyes of law and are, therefore, rejected.

The petition is disposed of accordingly.

Sd/-
(Gurinder Jit Singh)
Member

Sd/-
(Virinder Singh)
Member

Sd/-
(Romila Dubey)
Chairperson

Chandigarh
Dated: 10.10.2013