

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

**Petition No. 55 of 2017
Date of Order: 15.01.2019**

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

In the matter of : Petition under Section 86(1)(f) of the Electricity Act, 2003 seeking setting aside of termination letter dated 09.03.2011 issued by Swasti Power Engineering Limited and specific performance of the PPA dated 24.08.2005.

AND

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

Versus

1. Swasti Power Engineering Ltd., Plot No.111, Road-72, Jubilee Hills, Hyderabad-500033.
2. Punjab State Power Corporation Limited, The Mall, Patiala. Respondents

ORDER:

PTC India Ltd. (PTC) has filed the present petition under Section 86(1)(f) of the Electricity Act, 2003 for setting aside the termination notice dated 09.03.2011 issued by Swasti Power Engineering Limited (Swasti) in relation to PPA dated 24.08.2005 and seeking directions to Swasti to perform its obligations under the PPA and supply power for onward sale to Punjab State Power Corporation Limited (PSPCL).

The petition was admitted vide order dated 31.10.2017. PSPCL submitted its reply to the petition vide memo no. 5872 dated 06.12.2017. Swasti filed its reply to the petition on 07.02.2018. PTC filed rejoinder to the reply filed by Swasti vide letter dated

21.03.2018. The respondents requested to file written submissions and the same were allowed to be filed by the Commission. PTC filed written note for arguments vide email dated 04.05.2018 and vide letter dated 10.07.2018, submitted documents relied upon for arguments during hearing on 03.05.2018. PSPCL, vide memo. No. 5212 dated 06.07.2018, submitted written submissions. Vide order dated 19.07.2018, Swasti was directed to explain the reasons why it did not apply for open access to enable flow of power to PSPCL in accordance with PPA in view of the decision of the APTEL and further PTC and PSPCL were directed to submit their respective replies to the same. Swasti filed IA No. 10 of 2018 seeking condonation of delay in filing written submissions and affidavit which was allowed by the Commission vide Order dated 28.09.2018. Written submissions dated 07.08.2018 and affidavit dated 10.08.2018 filed by Swasti in terms of the Order dated 07.05.2018 and 19.07.2018, were taken on record. After hearing the parties, order was reserved vide order dated 28.09.2018.

2. The facts stated in the petition are summarized as under:
 - i) PTC India Ltd. is a limited company and has been issued a license by the Central Electricity Regulatory Commission to undertake inter-state trading of electricity. Swasti Power Engineering Limited is a generating company with its registered office at 61, New Kondali, MayurVihar Phase-3, New Delhi, and has established the Bhilangana Hydro Power Project, a 3 X 7.5 MW (22.5 MW) generating station in the State of Uttarakhand ("Project"). PSPCL, created to handle generation, trading, distribution of power within the State (since 2010) is a Procurer under the PPA (being the successor of erstwhile Punjab State Electricity Board ("PSEB")).

- ii) The Government of Uttarakhand issued its Policy on Hydro-power Development by the Private Sector in the State of Uttarakhand Para 4.6. of the said Policy is as under:

“4.6 Sale of Power

The IPP can contract to sell power to any consumer/s outside Uttarakhand, to the Uttarakhand Power Corporation Ltd. (UPCL), or for the captive use of new industrial consumers in Uttarakhand. The UPCL will specify the conditions under which any consumer or group of consumers is deemed to be a captive user. Sales to the UPCL will be mutually negotiated and approved by the ERCU.”

- iii) On 16.10.2003, Swasti entered into an Implementation Agreement with the Government of Uttarakhand for setting up the Project. In terms of Article 4.1.1 of the Implementation Agreement, Swasti had the option to, inter alia, sell the power to consumers outside the State of Uttarakhand. The relevant clause of Article 4.1.1 of the Implementation Agreement is as under:

“4.1.1 The Company shall have the option to dispose off Power from the Project, after allowing for Royalty Energy, in any one or more of the following modes

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(v) *Sell Power to any consumer outside the State of Uttranchal”*

- iv) On 23.12.2003, Swasti signed a Memorandum of Understanding with PTC for sale of the entire available capacity of the Project to PTC for onward sale to distribution licensees outside the State of Uttarakhand (“Swasti-PTC MoU”). The following terms of the Swasti-PTC MoU are

relevant:

- “i) That SPEL shall furnish a detailed proposal indicating the provisional tariff alongwith all supporting calculations and other such details of the project as may be required by PTC to arrange for the prospective buyers of power from the Project....*
- ii) That PTC will purchase power generated from the project on the terms and conditions as stipulated in the Power Purchase Agreement to be mutually agreed and signed between PTC and SPEL in consultation with beneficiary States, PTC shall enter into suitable Power Sale Agreement (PSA) with beneficiary states for purchase of power by them.”*
- v) PTC initiated discussions for sale of the power purchased from Swasti to PSEB (predecessor in the interest of PSPCL). In this regard, the chronological sequence of events from April 2004 to Feb,2005 have been given by P.T.C in the petition.
- On 24.08.2005, pursuant to the Swasti-PTC MoU and the PSEB MoU and the correspondence exchanged between Swasti, PTC and PSEB, PTC and Swasti entered into a PPA for purchase of contracted capacity of 22.275 MW (net output less royalty power of 18%) with the Delivery Point being the nearest point of interconnection of the State Grid with the CTU transmission system. On 30.09.2005, Swasti executed the Power Wheeling Agreement with the Power Transmission Corporation of Uttarakhand Limited (“PTCUL”) for wheeling of the power from the Project to the Delivery Point. On 23.03.2006, PTC and PSEB executed the PSA as a back-to-back arrangement to the PPA. The PPA was annexed to the

PSA. On 27.03.2006, PTC informed Swasti that PTC had signed the PSA for onward sale of power in terms of the PPA and that a petition would be filed before the PSERC for approval of the PSA and the tariff.

Since the evacuation facilities relating to the 22kV Ghanshali-Chamba line were not ready for operation, it was proposed that Swasti would use the existing system of Uttarakhand Power Corporation Limited ("UPCL") till the aforesaid line was completed.

- vi) On 03.05.2007, PTC submitted an application to PGCIL for grant of long term open access on CTU system to deliver the contracted capacity to PSEB. On 25.07.2007, Swasti also submitted an application to PTCUL for Long Term Open Access to the intra-state distribution/ transmission system. On 12.06.2007, a Memorandum of Understanding was signed between Swasti and PTCUL with regard to the use of their system for evacuation of power from the Project to the delivery point. On 31.07.2007 the PSERC approved the PSA executed between PTC and PSEB.
- vii) On 03.07.2009, Swasti entered into PPA with UPCL. On 08.07.2009, Swasti wrote to PTC informing PTC of an interim order passed by UERC on 10.06.2009 relating to open access to another generating station - 15MW Vanala Small Hydro Project of Him Urja Pvt. Ltd. wherein the UERC had raised issues relating to the permissibility and validity of sale of power to entities other than consumers/ users outside the State of Uttarakhand. In the said letter, Swasti intimated PTC that on account of the interim order, Swasti is unable to obtain open access. Swasti filed an Application before the Ld. UERC on

10.08.2009 seeking the following relief:

“(A) Permit Swasti to sell electricity to PTC consistent with the PPA dt. 24.08.2005 entered into by Swasti with PTC;

“(B) Direct UPCL and PTCUL to give connectivity and open access on their system for evacuation of power upto CTU grid.....”

viii) On 30.12.2009, UERC dismissed the application filed by Swasti thereby denying open access. The order was based on a clarification provided by the Government of Uttarakhand that there was a severe shortage of electricity in the State and that the hydro generating company proposed to sell power to a Trading Company which did not fall in the category of consumer.

ix) PTC filed Appeal No. 88 of 2010 before Appellate Tribunal of Electricity against the order dated 30.12.2009 passed by UERC. The Tribunal vide its order dated 11.01.2011 allowed the Appeal. The order read as follows:-

“59. In view of the findings, we set aside the order dated 30.12.2009 of the State Commission. The State Commission is directed to grant open access to the generating companies, respondent no. 2 (read Swasti) in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010 after they file application for granting open access on the distribution/transmission system of UPCL/Power Transmission Corporation of Uttarakhand Ltd. before the State Commission.”

x) On 09.03.2011, Swasti issued a notice for termination of PPA to PTC. The operative part of the notice for termination dated 09.03.2011 is reproduced herein below:

"Swasti had informed PTC vide letter dated 08.07.2009 of an event of force majeure on account of which Swasti was unable to gain interconnection and open access from PTCUL, which prevented Swasti, as Affected Party, from supplying power to PTC, and from performing its obligations under the PPA, Swasti was given no choice by UPCL but to enter into a PPA with UPCL so as to be able to sell the generated power. Immediately upon learning of the event of force majeure, Swasti entered into PPA with UPCL on 03.07.2009, and vide notice dated 08.07.2009, Swasti notified you of the event of force majeure, wherein you informed inter alia of the following:

"...UERC interim order dated 10.06.2009 has raised questions on the permissibility and validity of sale of power to persons other than end users/consumers outside the state of Uttarakhand and Swasti had already represented to UERC on the issues raised by the Commission on various grounds including the fact that Swasti has a binding legal agreement with PTC. However, in light of this interim order, UPCL and PTCUL have not been permitting interconnection facility to BHPP to Uttarakhand grid and had indicated that the connectivity will be provided only if a PPA is signed with them..."

"PTC is also aware that the event of force majeure continued for more than 12 months, and, therefore, extended force majeure, as defined in Articles 11.7 and 15.3 had occurred. Swasti is, therefore, sending you a written notice of termination of the PPA, under Article 15.3 of the PPA r/w Article 15.6.3."

- xi) Since Swasti did not rescind the notice of termination and commence supply of power under the PPA, PTC filed Petition

No. 30 of 2013 before PSERC praying for the following relief:

- “(i) The termination letter dated 09.03.2011 issued by Swasti Power Limited be declared as illegal, arbitrary, unsustainable and bad in law;*
- (ii) To direct Swasti to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Swasti and PTC;*
- (iii) To direct Swasti to cancel the PPA dated 03.07.2009 entered into with UPCL and also any other agreement that it may have entered into with any other utilities for supply of power generated from the project in derogation of the terms of the PPA dated 24.08.2005;*
- (iv) In the alternative and if prayer (i) and (ii) as mentioned hereinabove is not granted, then PTC may be awarded damages in accordance with the provisions of the PPA dated 24.08.2005;*
- (v) To direct Swasti to pay/reimburse PTC for any charge/claim which PSEB may claim for PTC;*
- (vi) To direct Swasti to pay/reimburse PTC for any charge/claim that POWERGRID/other transmission utility may claim from PTC alongwith interest thereon;*
- (vii) To direct Swasti to pay to PTC damages for the loss of business due to illegal termination of the PPA by Swasti...”*

PSERC vide its Order dated 02.09.2013 dismissed the petition, holding that the same is not maintainable for want of Jurisdiction.

- xii) PTC then filed a petition before the Ld. UERC seeking the following relief:

- “(i) The termination letter dated 09.03.2011 issued by Swasti Power Limited be declared as illegal, arbitrary, unsustainable and bad in law;*
- (ii) To direct Swasti to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Swasti and PTC;*
- (iii) To direct Swasti to cancel any agreement executed for supply to Respondent No. 2 and also any other agreement that it may have entered into with any other utilities for supply of power generated from the project in derogation of the terms of the PPA dated 24.08.2005;*
- (iv) In the alternative and if prayer (i) and (ii) as mentioned hereinabove is not granted, then PTC may be awarded damages in accordance with the provisions of the PPA dated 24.08.2005;*
- (v) To direct Swasti to pay to PTC damages for the loss of business due to illegal termination of the PPA by Swasti;...”*

The UERC vide its Order dated 26.03.2014 dismissed the petition on the grounds that the PPA and PSA were back-to-back arrangements and that UERC does not have the jurisdiction to decide the present matter.

xiii) PTC therefore filed Appeal Nos. 169 of 2014 and 214 of 2014 before the Appellate Tribunal for Electricity (“Appellate Tribunal”) on the issue of Appropriate Commission to adjudicate upon the disputes between PTC and Swasti. On 31.08.2016, the Appellate Tribunal held that the PPA and PSA are back-to-back arrangements and that the PSERC has jurisdiction to adjudicate upon the disputes between the

parties.

Consequent to the aforesaid judgment, PTC has filed the present petition for adjudication of the dispute between PTC and Swasti.

- xiv) PTC contended that the alleged event of force majeure came to an end when the Appellate Tribunal vide its Order dated 11.01.2011 set aside the Order dated 30.12.2009 of UERC preventing Swasti from supplying power to PTC. The issuance of the termination notice after the force majeure event had concluded, is untenable and contrary to law. This is evident from the relevant provisions of the PPA which are reproduced below:-

“11.3 Notification of Force Majeure Event

11.3.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such party knew or should have reasonably have known of the commencement of the event of Force Majeure...

11.4 ...If the Company is the Affected Party on account of an Event of Force Majeure, the Company shall issue a prior notice in the manner set out below, confirming the cessation of the event of Force Majeure...

No liability shall accrue on either party in the duration of such notice period. On (or prior to if agreed to by the Parties) the expiry of the above notice period, the Parties shall recommence their obligations pursuant to this Agreement.”

The suspension of obligations is only as long as the force majeure event is in effect. In the present case, the alleged force majeure event ceased once the Appellate Tribunal

allowed the appeal filed by PTC and struck down the decision of UERC prohibiting grant of open access for supply of power from the Project to PTC. In such a scenario, Swasti was contractually obligated to supply power and the purported termination is contrary to the express terms of the PPA.

- xv) The right to terminate the PPA on account of force majeure survives only till such time that the force majeure event is in force. This is evident from the following provisions of the PPA:-

“11.7 Extended Force Majeure

The continuance of an event of Force Majeure for a period of 13 consecutive months shall constitute Extended Force Majeure. In an event of an Extended Force Majeure, either Party may terminate the Agreement pursuant to Article 15.6.3....

15.3 Extended Force Majeure

The occurrence of event of Force Majeure and its continuance for a period of 12 months continuously shall constitute an Extended Force Majeure.

On the occurrence of Extended Force Majeure, either Party shall be entitled to terminate this Agreement by delivering a seven (7) day written notice of termination to the other party; and this Agreement shall stand terminated at the end of such seven (7) day period provided that the Force Majeure condition is still operative at such time. Neither party shall have any liability to the other Party as a result of termination of this Agreement on account of Extended Force Majeure.

In the event that the Company was the Affected Party during such Extended Force Majeure and the Project is subsequently revived by the Company PTC shall have the first right of refusal

for such power that may be produced at terms and conditions to be mutually agreed between the parties.”

- xvi) Swasti has contended in the termination notice that it had informed PTC of an event of force majeure vide letter dated 08.07.2009. The letter dated 08.07.2009 reveals that the said letter is not an intimation of a force majeure event since it does not comply with the mandatory requirements under Article 11.3 of the PPA. Compliance with notice requirements in force majeure clauses is mandatory. The Hon'ble Appellate Tribunal in its judgment dated 30.04.2015 in Appeal No. 54 of 2014 – Himachal Sorang Power Limited Vs. CERC and Others has noted that compliance with notice requirements under force majeure provisions is mandatory. Since the alleged force majeure notice itself does not meet the mandatory requirements under Article 11, the subsequent termination notice which is premised on intimation and continuation of an alleged force majeure event cannot be sustained and ought to be set aside.
- xvii) In terms of Article 11.1.2, the Affected Party can claim force majeure only if it had taken reasonable care or complied with prudent utility practices. In the present case, Swasti has failed to take appropriate steps to ensure that it is able to fulfil its obligations under the PPA. Moreover, even after the Appellate Tribunal directed UERC to grant open access to Swasti upon filing of application by Swasti, it chose to not file the application. In light of the foregoing, the inability to supply power was solely on account of omission on the part of Swasti to take necessary steps pursuant to directions of the Appellate Tribunal. Therefore, Swasti ought not to be permitted to

terminate the PPA under the guise of an alleged force majeure event.

xviii) The law is well settled on the point that where an obligation is cast on a party and it commits a breach of such obligation, such party cannot be permitted to take advantage of such omission. Since termination of the PPA is illegal and ought to be set aside, the Commission ought to grant specific performance of the PPA and direct Swasti to supply power in terms thereof. The Hon'ble Appellate Tribunal has in its judgment dated 07.09.2011 in Appeal No. 184 of 2010 – Adani Power Limited v. GERC and Others has held that specific performance of a PPA can be granted. The present case is analogous inasmuch as:-

- (a) PTC and Swasti have entered into a long term PPA having a term of 35 years.
- (b) Based on the long term PPA, PTC has further entered into a back-to-back arrangement with PSPCL.
- (c) Termination of the PPA has been done by Swasti in complete violation of the terms of the PPA.
- (d) Swasti is seeking to benefit from non-fulfillment of its obligations by depriving PTC and PSPCL of a valuable right to receive power from the Project.

xix) Money is not an adequate relief in the present case and non-performance of the PPA cannot be compensated in monetary terms. Moreover, the subject matter of the PPA is electricity being goods of special value not easily available in the market. Therefore, this is a fit case to direct specific performance of the PPA.

xx) PTC maintained that it has consistently performed the entirety of its obligations under the PPA dated 24.08.2005 and has at all times been ready and willing to perform its obligations under the said PPA and therefore prayed that .

(a) The termination letter dated 09.03.2011 issued by Swasti Power Limited be declared as illegal, arbitrary, unsustainable and bad in law;

(b) Direct Swasti to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Swasti and PTC;

(c) Direct Swasti to cancel the PPA dated 03.07.2009 entered into with UPCL and also any other agreement that it may have entered into with any other utilities for supply of power generated from the project in derogation of the terms of the PPA dated 24.08.2005;

(d) Direct Swasti to pay/reimburse PTC for any charge/ claim which PSEB may claim from PTC;

(e) Direct Swasti to pay to PTC damages for the loss of business due to illegal termination of the PPA by Swasti;

(f) Pass any other order(s) as the Commission may deem fit and proper in the facts and circumstances of the case as well as in the interest of justice.

3. Submissions made by Swasti, Respondent No. 1, in reply to the petition, are summarized as under:

i) The respondent No. 1, contended that the petition is not maintainable in law and in facts, as it suffers from non –joinder of a necessary party i.e. Uttarakhand Power Corporation Ltd. (UPCL). The Petitioner has prayed for directions to the Respondent No.1 to cancel the Power Purchase Agreement

dated 03.07.2009 entered into by the Respondent No.1 with UPCL. The Petitioner has also prayed that any agreement which the Respondent No.1 may have entered into with any other utility for supply of power generated from the Project in derogation of the PPA dated 24.08.2005 may also be cancelled. Respondent No.1 had executed Power Purchase Agreement dated 03.07.2009 with UPCL ("UPCL-PPA"), which created vested rights in favour of UPCL for supply of energy from the Project of Respondent No.1 and has been supplying power from the date of commissioning of the Project on 25.08.2009 till date, at the Regulated tariff as notified by UERC from time to time. Further, a Supplementary long term Power Purchase Agreement dated 10.01.2013 was also executed between the Respondent No.1 and UPCL. The said UPCL PPA has duly been approved by the UERC and the same is reflected in the ARR orders passed by UERC. This has created valuable and vested rights in UPCL towards the supply of energy generated from the Project of the Respondent No.1. The prayers in the Petition, if granted, would adversely affect the contractual and legal rights of UPCL in terms of the loss of right of UPCL to be the beneficiary/consumer of the generated energy from the Project. UPCL therefore, is a necessary and a proper party to the Petition, as its rights are materially affected by the adjudication of the disputes as raised by the Petitioner and in absence of UPCL being arrayed as a party, the Petition would suffer in law. Thus, the Petition is liable to be dismissed for non-joinder of necessary and proper party.

- ii) The respondent also contended that the Petition is not maintainable in law for non-joinder of a necessary party i.e.

Power Transmission Corporation of Uttarakhand Ltd (“PTCUL”), which is responsible for providing open access to the Respondent No.1 through 220kV transmission system as agreed under various agreements entered into with the Respondent No. 1. The Respondent No.1 had entered into a Power Wheeling Agreement dated 30.09.2005 with PTCUL for transmission and evacuation of energy generated from the Project through the 220kV line to be constructed by Respondent No.1 from powerhouse to PTCUL’s 220kV substation at Chamba, from thereon, through the state transmission system to the central transmission system. Necessary Forest clearance for the transmission line corridor was also obtained by the Respondent No.1 after due payment of fees. The evacuation through the 220kV system was the basis on which PPA with Petitioner was executed. However, due to intervention of Government of Uttarakhand (decisions taken at a meeting taken at the meeting convened by Additional Secretary Energy) on 26-12-2006, the 220kV corridor planned by Respondent No. 1 was taken over by PTCUL which was entrusted the responsibility to construct the 220kV line and also a 33/220 kV Substation at Ghansali near the Project location for evacuation of power from the Project. Necessary changes in the sub-station design (33kV in place of 220kV) associated with the generating station of the Project were also done by the Respondent No.1. The Respondent No.1 had also entered into a Memorandum of Understanding dated 12.06.2007 with PTCUL to give formal basis to the decisions at the above referred meeting on 26.12.2006 and detail the evacuation and wheeling of the electricity generated

from the Project. Clause 3 of the MOU stated that the Respondent No.1 would apply through PTCUL/GoU for Long Term Open Access by identifying the origin/termination and routing of transmission system for such wheeling/transmission of its generated power. The said MOU specifically provided that PTCUL would arrange to evacuate power from inter-connection point i.e. Proposed 220/33KV sub-station at Ghansali to the delivery point i.e. within the State of Uttarakhand or at Uttarakhand Periphery/ IS bus/nearest PGCIL substation. The interim arrangements till the completion of the 33/220kV substation were also agreed to. As per this arrangement, till the completion of 33/220kV substation at Ghansali, power from the Project would be evacuated through the 220kV line (to be constructed by PTCUL) charged at 33kV and the existing 33/11kV Ghansali substation. PTCUL disconnected the Project from 220kV line charged at 33kV without completing the 220kV substation to provide grid access to an upstream project. Thus, power from the Project is being evacuated through local 33kV system which has a poor availability record causing huge financial and generation losses to the Respondent No.1. Despite various agreements/MOUs and commitments made to UERC to complete the substation by 2011, till date the sub-station has not been constructed by the State Govt. instrumentalities. The Respondent No.1 has on the basis of the above mentioned agreements, applied for open access as early as 25.07.2007. Neither PTCUL has granted Open Access permission to the Respondent No.1 for evacuation/wheeling of the generated energy from the Project through PTCUL transmission system, nor has the proposed

220/33 kV sub-station at Ghansali been constructed till date by PTCUL. This inaction on the agreed arrangements resulted in occurrence and continuation of Force Majeure and extended Force Majeure conditions leading to termination of the Power Purchase Agreement dated 24.08.2005 (PTC-PPA). This inaction by PTCUL was also criticized by UERC from time to time. Therefore, the Petition in its current form is liable to be dismissed, in law, for non-joinder of PTCUL, which is a necessary and a proper party to the Petition in law and in facts.

iii) Thirdly, it was contended that the present Petition is not maintainable in law, in as much as this Commission has not been conferred with the power/function under the provisions of the Electricity Act, 2003 (Act) to adjudicate upon the validity of the UPCL-PPA dated 03.07.2009 and no power under the Act, has been conferred on the Commission for granting the relief as prayed for by the Petitioner and thereby, directing the Respondent No.1 to cancel the UPCL-PPA dated 03.07.2009. The PPA dated 03.07.2009 is a legally and validly executed contract between the parties and the same is within the regulatory jurisdiction of UERC, only. Thus, the relief as prayed for in the Petition, regarding cancellation of UPCL-PPA dated 03.07.2009 cannot legally be granted by the Commission.

iv) Fourthly, the instant Petition is not maintainable, as the same is barred by limitation. The Petitioner has inter-alia prayed as under:-

“(b) To direct Swasti to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Swasti and PTC.

(c) *To direct Swasti to cancel the PPA dated 03.07.2009 entered into with UPCL and also any other agreement that it may have entered into with any other utilities for supply of power generated from the Project in derogation of the terms of the PPA dated 24.08.2005.”*

These prayers are barred by Article 54 and 58 of the Schedule of the Limitation Act, 1963, which provide that the limitation period seeking Specific Performance of a Contract or to obtain any declaratory relief has to be filed within a period of 3 years from the date when a party has noticed that performance of obligation has been refused. The PPA had been executed by the Respondent No.1 with UPCL on 03.07.2009 and information with respect to execution of the same had been given to the Petitioner on 08.07.2009. However, the Petition No. 30/2013 titled PTC India Ltd v/s Swasti Power Engineering Ltd. asking for similar relief was instituted before this Commission on 28.05.2013 i.e. after a period of approximately 3 years and 10 months, which is beyond the prescribed period of limitation. The refusal to supply energy from the Project under the PPA dated 24.08.2005 was communicated to the Petitioner on 08.07.2009 and no action challenging the said refusal was taken by the Petitioner till 28.05.2013. Thus, the Petition has been filed by the Petitioner beyond the prescribed period of limitation and therefore, no relief can be granted by this Commission.

v) Fifthly, the Petition filed by the Petitioner is not maintainable as there exists no legal and validly binding Power Sale Agreement between the Petitioner and the Respondent No.2. The PSA dated 23.03.2006 is in fact an unenforceable

document/agreement which is not legally binding upon the parties. This Commission vide its order dated 31.07.2007 passed in Petition No. 9 of 2006, while exercising its jurisdiction under Section 86 (1) (b) for approval of PSA dated 23.03.2006 held as follows

“4.4 Accordingly in exercise of the powers vested in the Commission under the EA 03 and subject to the Petitioner complying with the directions of the Commission given in this order, the Commission hereby grants approval to the electricity purchase and procurement process of PSEB including the capped tariff at which the electricity shall be procured through this PSA between PSEB and PTC for supply of power from the 22.5 MW Bhilangana Hydro Electric Project in District Tehri Garhwal, Uttarakhand. The Commission reiterates that, any changes if required to be made at a later stage in respect of the approvals granted by the Commission in this Order, shall be subject to the prior approval of the Commission.”

Thus, the approval to the PSA was given subject to compliance of directions issued in the said order with respect to the carrying out of certain amendments in the PSA. None of the amendments as suggested by the Commission had been carried out by the Petitioner and the Respondent No.2. Nor was the Respondent No.1 ever informed about carrying out of any such amendments in the PSA. The non-implementation of the Commission's directions by the petitioner and respondent No.2 renders the PSA invalid and not binding upon the parties. Further, none of the parties to the PSA, has approached the other party for carrying out the amendments in the PSA as per the directions issued vide order dated 31.07.2007. Since, the

said amendments as directed to be carried out by the Commission have not been complied with despite a lapse of more than 10 years from the date of the order dated 31.07.2007, the PSA is no longer valid and operative in the eyes of law. As per provisions of Section 86 (1) (b) of the Act, the conditional approval granted to the PSA cannot under the law be considered as an absolute approval by the Commission. The PSA is therefore, not a concluded contract between the parties, as the procurement process of electricity from the Project by the Respondent No.2 has not yet culminated in the eyes of law and has now lapsed on account of delay in carrying the amendments.

- vi) The instant Petition is not maintainable and the same is liable to be dismissed in view of the fact that Respondent No.2 stand before the Commission in Petition No. 54 of 2015 titled Punjab State Power Corporation Ltd. v/s Everest Power Pvt. Ltd & Ors, wherein the Respondent No.2 had made the submission that it has surplus contracted capacity for the State of Punjab:-

35. As evident from the above, the Petitioner has surplus contracted capacity and with additional two units of Talwandi Sabo of 1400 MW and also other generating stations to be commissioned, the surplus would be much higher.”

Thus, the present petition filed by the petitioner is liable to be dismissed, as the Respondent No.2 with whom the Petitioner has entered into the PSA dated 23.03.2006 for sale of contracted capacity generated from the Project, has already submitted before the Commission on affidavit that it already has surplus contracted capacity for the State of Punjab.

vii) Pursuant to the execution of PPA dated 24.08.2005 with the Petitioner, the Respondent No.1 entered into a Power Wheeling Agreement with PTCUL on 30.09.2005, On 20.03.2007, the Respondent No.1 informed PTCUL about the scheduled date of commissioning of the Project and requested for timely construction of 220KV line upto Chamba and commencement of work of 220KV sub-station at Ghansali. It was duly informed that the existing 33KV substation at Ghansali and the existing 33KV lines from Ghansali can handle only about 15MW whereas the Project will generate 22.5MW. On 12.06.2007, Respondent No.1 entered into a Memorandum of Understanding dated 12.06.2007 with PTCUL, further detailing the evacuation and wheeling of the electricity generated from the Project as decided at the meeting taken by Additional Secretary (Energy) on 26.12.2006. The Respondent No. 1 vide its letter dated 09.06.2008 informed PTCUL that the evacuation of total generation of 25MW (including overload capacity) of power from the Project will not be possible over 220KV Ghansali – Chamba line (Charged at 33Kv initially) alone without the interconnection at 33/220KV substation at proposed Ghansali because of the limited load demand at Chamba, which is much less than 25MW and requested for taking necessary action to take into account the system changes required and also indicate the date for signing Transmission Service Agreement. The Respondent No.1, vide its letter dated 16.04.2008 paid open access application fees of Rs.1.0Lakhs and in its letter dated 04.07.2008 submitted the Application again for the grant of Open Access with PTCUL indicating therein that the power from the Project would

ultimately through the 33/220kV Ghansali on its completion and also the interim arrangements till completion of Ghansali sub-station as agreed. On 22.12.2008 PTC requested PTCUL to provide necessary support/assistance for inter-connection of the Project with the State Grid of PTCUL and for conclusion of the Power Wheeling Agreement, at the earliest. PTCUL vide its letter dated 27.01.2009 inter alia informed the Respondent No.1 that in order to achieve Long Term Open Access the following conditions have to be fulfilled:-

- “1. Permission from UPCL to use their network as desired by GoU, MoM dated 26.12.2006.*
- 2. PPA with UPCL.*

viii) On 03.02.2009 the Petitioner requested PTCUL to finalize the necessary agreement with the Respondent No.1 for interconnection of the Project with the State grid for evacuation of power from the Project. The Respondent 1 vide its letter dated 18.02.2009 to UPCL, informed that as per minutes of meeting dated 05.03.2008, the power from the Project is to be evacuated at 33kV through the existing UPCL substation at Ghansali till the commissioning of PTCUL's 220/33KV substation and two 33KV bays at its Ghansali substation to facilitate power evacuation from the Project have also been completed and requested their permission for connection to the 33kV system. The Respondent No.1 once again vide its letters dated 02.04.2009 informed that the Project will be ready for commissioning by 10th April, 2009 and requested for early completion of all the facilities necessary for proper evacuation of power.

- ix) The Respondent No.1 once again vide its letter dated 10.06.2009 informed PTCUL that the 33KV double circuit interconnecting line with ACSR "Panther" conductor from BHPP to UPCL's 33/11KV substation at Ghansali is ready. PTCUL was further requested to initiate necessary action required to facilitate interconnection of BHPP with PTCUL system. Meanwhile UERC vide its order dated 10.06.2009 sought the status of the proposed buyer before grant of permission for Open Access for carrying electricity from the Project outside the State of Uttarakhand. The Order directed the developers to submit the details of the proposed purchaser with whom the PPA has been/or proposed to be signed along with copies of PPA and other relevant documents. UERC sought similar information from the Respondent No.1 The Respondent No.1 vide its letters dated 17.02.2009 and 18.02.2009 informed that BHPP is ready for commissioning in two weeks time and requested the UPCL to provide connectivity to their 33kV system to enable Project commissioning and also permit use of their system for power evacuation.
- x) Although the Project was ready to be commissioned in the month of August, 2009, however, the Respondent No.1 was not granted Open Access by UERC for evacuation of the Power from the Project. Further, the requisite transmission system to the 220 KV sub-station at Chamba for evacuation of the power from the Project to the Central transmission system for onward transmission to Punjab was also not ready (the 33/220kv Ghansali sub-station essential for reliable power evacuation, is yet to come). The Respondent No. 1 being

aggrieved by non availability of the permission granting Open Access by UERC and non availability of the effective transmission network for enabling the evacuation of power from the Project, was therefore constrained/compelled to enter into the UPCL-PPA dated 03.07.2009 for sale of energy generated from the Project to UPCL. The execution of the UPCL-PPA dated 03.07.2009 was only on account of happening of Force Majeure events under the PPA dated 24.08.2005 executed between the Petitioner and the Respondent No.1, which were completely beyond the control of the Respondent No.1.

- xi) In view of the interim order dated 10.06.2009 by UERC and the refusal of UPCL and PTCUL to permit the interconnection facility to the Project to Uttarakhand grid and the indication that connectivity would be provided only in the event of the Respondent No.1 signing the PPA with UPCL for sale of power generated from the Project had no option but to enter into the PPA with UPCL on 03.07.2009 as Swasti was incurring huge financial losses on account of prolonged delay in grant of connectivity to the Project, which would have further resulted in Respondent No.1 defaulting in compliance of its obligations towards the lenders.
- xii) The Respondent No.1 vide its letter dated 08.07.2009, duly informed the Petitioner about the execution of the aforesaid PPA dated 03.07.2009 with UPCL. However, despite being fully aware of the execution of the aforesaid PPA, the Petitioner chose not to raise any dispute or at any time opposed the execution of the PPA dated 03.07.2009, which at that instance, was against the legal rights and interests of the Petitioner

under the PPA dated 24.08.2005. The absence of any objection or dispute on the part of the Petitioner after having received the letter dated 08.07.2009 was itself an admission of the fact that the Petitioner was well aware that on account of existence of the aforesaid issues and facts explained above, the Respondent No.1 cannot legally or factually perform its obligations under the PPA dated 24.08.2005. The conduct of the Petitioner in not raising any dispute against the execution of the PPA dated 03.07.2009 and non exercise of its rights under the PPA dated 24.08.2005 is an implied waiver of the rights of the Petitioner under the PPA, which are sought to be raised or agitated by the Petitioner after a lapse of more than 3 years by filing of the Petition before this Commission on 25.05.2013.

xiii) Had the factors, which resulted in non compliance of the terms and conditions of the PPA dated 24.08.2005 by the Respondent No.1, not been in existence at that time, the Petitioner would have immediately objected to the execution of the PPA dated 03.07.2009 and sought for the Specific Performance of the PPA dated 24.08.2005 executed between the Petitioner and the Respondent No.1. However, the Petitioner chose to remain silent despite having full and complete knowledge of execution of the PPA dated 03.07.2009, which fact is itself an admission of existence of the Force Majeure conditions on part of the Petitioner. The aforesaid facts and the circumstances, clearly evidence that the non performance of the obligations under the PPA on the part of the Respondent No.1 are squarely covered within the meaning of Clause 11.1.2 (ix) and (xi) of the PPA dated

24.08.2005. The Petitioner is aware that the Project is generating power and supplying power to UPCL and could have insisted for supply of power from the Project even on 33kV system. The very fact that they did not ask for it implies that the 220kV system is necessary for power evacuation to central system through 220kV state network.

xiv) Pursuant to the execution of the PPA dated 03.07.2009, Respondent No.1 had been continuously supplying power to UPCL as per the terms and conditions of the PPA, without any objection thereto by the Petitioner. On 10.09.2009, the Respondent No.1 filed a Petition before UERC inter-alia praying for grant of Open Access for supply of power to PTC in terms of the PPA dated 24.08.2005 and for issuance of necessary directions to the UPCL and PTCUL to give connectivity to their system for evacuation of power upto CTU grid. The UERC vide its order dated 30.12.2009, held that as per Clause 4 of the Agreement, the sale of electricity outside the State is not permissible to a licensee. Thus, the Application filed by the Respondent No.1 for grant of Open Access was rejected by UERC.

xv) The Order of UERC dated 30.12.2009 was challenged by the Petitioner before APTEL in Appeal No. 88 of 2010, wherein, APTEL vide its Judgment dated 11.01.2011 was pleased to hold as under:-

“59. In view of the above findings, we set aside the order dated 30.12.2009 of the State Commission. The State Commission is directed to grant open access to the generating companies, Respondent No.2 in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010, after they file application for granting

open access on the distribution/transmission system of UPCL/Power Transmission Corporation of Uttarakhand Ltd. before the State Commission.”

Swasti stated that PTC requested it to file an application for open access before UERC and arrange for sale of power to the Petitioner in terms of the PPA dated 24.08.2005. However, Swasti contended that by the time the Judgment dated 11.01.2011 was pronounced by APTEL, the PPA dated 24.08.2005 was no longer effective and operational on account of extended Force Majeure events under the PPA dated 24.08.2005 and Respondent No.1 was no longer legally or contractually obliged to perform its obligations under the PPA, since the Petitioner had already entered into a PPA on 03.07.2009 on account of prevailing Force Majeure conditions i.e. non grant of permission for Open Access, which continued beyond a period of 12 months after the date of PPA dated 03.07.2009 and Order dated 30.12.2009 passed by UERC. The period of 12 months itself had expired on 02.07.2010. The 33/220 kV Ghansali sub-station was also not ready and with no open access as envisaged in the PPA with the Petitioner it would not be possible to discharge for Respondent No.1 obligations to supply power from the Project on unreliable 33kV system.

- xvi) Swasti stated that it was only after the PPA with the UPCL was signed that the project could be commissioned. Thereafter evacuation and sale of power could commence but the transmission issue continued to plague the project causing the heavy losses since the 220/33 KV substation is still not in place.

xvii) Swasti further recounted that UPCL threatened disconnect the evacuation line as also to recover charges for energy already consumed and paid for unless a long term PPA was signed. In fact the line was disconnected. Thus it was apparent that in case the Respondent No.1 had chosen to take the power generated from the Project outside the State of Uttarakhand, then, the existing agreed and in operation evacuation through reliable 220kV line charged at 33kV would be disturbed by UPCL and PTCUL without 33/220kv substation. Further, the Project's power evacuation would be through less than reliable local 33kv system for which strengthening measures were not yet started and further, that the power evacuation from the Project would be fraught with serious problems and it would not be feasible to take power outside the state. Under these extenuating circumstances, the Respondent No.1 in view of the circumstances which were beyond its control and were an act of Govt. instrumentalities again terminated the PPA dated 24.08.2005 vide its letter dated 09.03.2011 and signed another long term PPA with UPCL on 10.01.2013.

4. The reply filed by PSPCL, respondent no. 2, is summarized as under:

- i) PSPCL is a Procurer under the PSA dated 23.03.2006, entered into by the Petitioner as a back-to-back arrangement pursuant to the PPA dated 24.08.2005. PSPCL supports the contentions raised in the present Petition. The letter of termination dated 09.03.2011 is in complete violation of the terms of the PPA, and therefore unsustainable.
- ii) The letter dated 08.07.2009 informing PTC of the UERC Order of 10.06.2009 cannot be considered as an intimation/notice of

force majeure event since it does not comply with the mandatory requirements under Article 11.3 of the PPA. The alleged force majeure event came to an end vide Order of the Appellate Tribunal for Electricity dated 11.01.2011., Thereafter there is no question of terminating the PPA on the basis of a Force Majeure event that is alleged to have occurred in the past and does not subsist anymore. The terms of the PPA do not provide for any such termination.

- iii) Respondent No.1 has sought to terminate the PPA under Article 15.3 citing an extended Force Majeure thereby entitling them to terminate the PPA. The PPA under Article 15.3 clearly provides that the termination on extended Force Majeure is only possible if the Force Majeure condition is still in operation when the notice for the same is given. The termination notice in this case is dated 09.03.2011 i.e. after cessation of the alleged force majeure event. Therefore under the said circumstance, the letter of termination dated 09.03.2011 is clearly arbitrary and liable to be declared as illegal.
- iv) The PPA entered into by Respondent No.1 with UPCL is dated 03.07.2009, i.e. even before the alleged notice of force majeure was given to the Petitioner vide letter dated 08.07.2009. Therefore, Respondent No.1 had itself unilaterally concluded the occurrence of a Force Majeure event, even before the notice of the same was given to the Petitioner. The conduct of Respondent No.1 clearly shows its intent to have never wanted to sell the power to the Petitioner.
- v) An arbitrary termination of such kind does not only affect the parties to the PPA but is also not in the interest of consumers at large. By way of such a letter, Respondent No.1 is indirectly

trying to wriggle out of its obligations to supply power at the decided tariff under the PPA, and sell at a higher price to Uttarakhand Power Corporation Ltd (UPCL), thereby ultimately affecting the end beneficiaries i.e. the consumers. In matters relating to power purchase, the interest of the end beneficiary i.e. consumers, is of utmost importance and ought to be the prime consideration. Termination of the PPA would ultimately affect the consumers by depriving them of electricity at a cheaper rate.

- vi) The project attained financial closure and the Respondent No. 1 could raise funds to proceed to establish and commission the power project only based on the strength of the PPA and PSA. Therefore, it is extremely unfair and unjust on the part of the Respondent No. 1 to now seek to wriggle out of the terms of the PPA.
 - vii) The Power available to the answering Respondent under the PPA would also go to fulfill the Renewable Purchase Obligation and is therefore very vital to the State of Punjab.
5. The rejoinder filed by PTC to the reply filed by Swasti is summarized as under:
- i) PTC denied the contentions of Swasti and explained that the petition is well within the period of limitation. The following dates are relevant in this regard.
 - a) On 03.07.2009, Swasti entered into a power purchase agreement with UPCL.
 - b) On 08.07.2009, Swasti wrote to PTC informing PTC of an interim order passed by the Uttarakhand Electricity Regulatory Commission on 10.06.2009 relating to open access to another generating station - 15MW Vanala Small Hydro Project of Him

Urja Pvt. Ltd. wherein the UERC had raised issues relating to the permissibility and validity of sale of power to entities other than consumers/ users outside the State of Uttarakhand. In the said letter, Swasti intimated PTC that on account of the interim order, Swasti is unable to obtain open access. Swasti further informed that connectivity will be provided only if PPA is signed with UPCL and PTUCL Swasti further stated that it has ensured that suitable protective clauses are incorporated into the standard PPA format with UPCL.

- c) On 10.08.2009, Swasti filed Application before UERC praying for the following relief:-
- “(A) Permit Swasti to sell electricity to PTC consistent with the PPA dt. 24.08.2005 entered into by Swasti with PTC;*
 - (B) Direct UPCL and PTCUL to give connectivity and open access on their system for evacuation of power up to CTU grid.*
 - (C) Pass any further Order(s) as may be deemed appropriate to give complete relief to Swasti.”*
- d) On 30.12.2009, UERC dismissed application filed by Swasti and denied Open Access.
- e) PTC filed Appeal No. 88 of 2010 before the Appellate Tribunal for Electricity against UERC's Order dated 30.12.2009.
- f) On 11.01.2011, the Hon'ble Appellate Tribunal allowed Appeal No. 88 of 2010 filed by PTC and set aside the Order dated 30.12.2009 and directed the state Commission to grant open access to the generating

companies on filing of an application for the same before the state Commission.

Had Swasti been committed to its obligation under the PPA signed with PTC it would have applied for open access to UERC on receipt of the APTEL order. It was further submitted that the cause of action only arose on 09.03.2011 when Swasti sought to terminate the PPA. Therefore the period of limitation has to be reckoned from 09.03.2011 and not 08.07.2009 as claimed by Swasti. PTC initiated the present proceedings for specific performance within the period of limitation. Though the Limitation Act is not applicable, principles analogous thereto have been applied by the Supreme Court in Andhra Pradesh Power Coordination Committee & Ors Vs LancoKondapalli Power Ltd reported as (2016) 3 SCC 468. That these are equitable principles premised on rule of law. These principles ought to be applied in a manner so as to not benefit a defaulting party or prejudice an innocent party. This submission is without prejudice to PTC's contention that its claim is within limitation.

- ii) PTC also contended that UPCL and PTCUL are not necessary and proper parties to the present Petition. The Supreme Court in Kasturi V/s Iyyamperumal and Others, reported as (2005) 6 SCC 733 ("Kasturi Case") laid down tests which ought to be satisfied in order to determine whether a party is a necessary party, as per which a party will be considered a necessary party if:
 - (a) If the Commission will be unable to pass an effective decree in the absence of the said party;

(b) If any relief has been sought against the party in question by way of the Petition.

(c) No relief has been claimed against UPCL/PTCUL. PTC's claim is limited to specific performance of the PPA between PTC and Swasti. PTC is not concerned about the issues which may arise between Swasti and third parties including UPCL/PTCUL. Moreover, the presence of neither UPCL nor PTCUL is required to pass an effective decree in the matter. In light of the foregoing, Swasti's contention that PTC has not impleaded necessary parties is without merit.

iii) In the present Petition, the question before the Commission is whether Swasti has wrongly terminated the PTC PPA. The said question may be adjudicated upon and decided by the Commission without the presence of PTCUL and UPCL. There are no transactions between PTC on one hand and UPCL/PTCUL on the other. PTC is not concerned with issues and legal relationship between Swasti and UPCL. In view thereof, the contention of Swasti is liable to be dismissed. In terms of Supplementary PPA dated 10.01.2013 Swasti has agreed that it is responsible for the legal and financial implications arising out of the PPA, therefore UPCL has no legal interest in the present matter.

iv) The present dispute does not challenge the validity of UPCL PPA dated 03.07.2009. The contention of Swasti that the Commission does not have jurisdiction to adjudicate upon the validity of the PPA dated 03.07.2009 executed between Swasti and UPCL ("UPCL PPA") is misplaced and denied. The dispute in the present Petition relates to the legality of the Termination

Notice dated 09.03.2011 issued by Swasti to PTC and specific performance thereof. The PTC PPA is a valid and binding agreement and Swasti has failed to perform its obligations under the same. Furthermore, during the term of the PTC PPA, Swasti executed the UPCL PPA, inter-alia contracting the entire quantum of power to be supplied under the PTC PPA to UPCL. In the event the Commission holds that the Termination Notice 09.03.2011 is invalid and illegal in terms of the PTC PPA and that the PTC PPA is valid and subsisting agreement, Swasti will be required to supply the entire quantum of power i.e. 22.5 MW from its Project to PTC. In such a scenario, the Commission has the jurisdiction to direct Swasti to comply with its obligations under the PTC PPA.

- v) The Power Sale Agreement between PTC and PSPCL is subsisting and valid. The contention of Swasti that the Power Sale Agreement dated 23.03.2006 ("PTC PSA") between PTC and PSEB is not valid, is incorrect. The Commission by way of its Order dated 31.07.2007 in Petition No. 13 of 2007 granted approval to the PTC PSA. The amendments to the PSA have no bearing on the validity of the PPA. Moreover, both PTC and PSPCL have reiterated that the PSA is valid and binding. Without prejudice to the foregoing, PTC and Swasti obligations under the PPA continue irrespective of the validity of the PPA.
- vi) Petition No. 54 of 2015 filed by PSPCL has no relevance in the present Petition. The contention of Swasti that Punjab State Power Corporation Limited has surplus contracted capacity and is in no need of power from Swasti and therefore, the present Petition is liable to be dismissed is wrong and denied. PSPCL's submissions in Petition 54 of 2015 have no bearing

on the present issue before the Commission on whether the Termination Notice dated 09.03.2011 is valid or not in terms of the PTC PPA. Even otherwise, this Commission had approved the PTC PSA executed with PSPCL which is valid for a period of 35 years. The issue of procurement of power is a matter exclusively between PSPCL and this Commission and the submissions of Swasti in this regard may be ignored.

- vii) Letter dated 08.07.2009 does not qualify as Notice of Force Majeure event under the PPA. The contention of Swasti that since the PTC had failed to object to the execution of the UPCL PPA, amounts to an admission of an existence of a force majeure event under the PTC PPA, was denied. By way of letter dated 08.07.2009, Swasti informed PTC regarding Order dated 10.06.2009 wherein UERC questioned the permissibility and validity of sale of power to persons outside the State of Uttarakhand. Swasti inter-alia informed PTC that it is unable to arrange for connectivity and open access as UPCL and PTCUL are denying the same in view of Order dated 10.06.2009. Further, Swasti stated that it would be executing a PPA with UPCL as it was unable to meet its debt servicing obligations and that it was incorporating suitable clauses in the UPCL PPA safeguarding the interests of PTC.
- viii) The letter dated 08.07.2009 has no mention of force majeure events nor does the said letter comply with the mandatory requirements under Article 11.3 of the PPA. In terms of Article 11.3 of the PPA, a Notice shall include/ full particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed. Article 11.3.1 of the PPA also imposed an obligation of the affected party to provide

regular reports/ notice to the other party, on the progress of those remedial measures. The Hon'ble Appellate Tribunal in its Judgment dated 03.06.2016 in Talwandi Sabo Power Limited vs PSPCL has held that Section 50 of the Indian Contract Act embodies the legal principle that when the contract expressly provides that a particular thing relating to furtherance of contract has to be done in a particular manner, then it has to be done in that manner and in no other manner. It was held that if an Article in the PPA prescribed notices to be given in a particular manner, notices are to be issued in that manner. The Central Electricity Regulatory Commission by way of its Order dated 27.06.2016 in Petition No. 419/MP/2014 titled as Raichur Sholapur Transmission Company Ltd. vs PGCIL & Ors reaffirmed that the requirement of notice for Force Majeure is to be strictly complied with. The CERC while rejecting the contention that other actions (eg. Issuance of letters) qualify as notice, denied relief as no notice in the format mandated by the agreement was provided within the prescribed statutory period. The letter dated 08.07.2009 does not amount to a notice of force majeure nor does it evidence any admission by PTC to the existence of force majeure conditions impacting Swasti.

- ix) The contention of Swasti that by the time judgment dated 11.01.2011 was pronounced by Appellate Tribunal for Electricity, the PTC PPA was no longer effective and operational on account of force majeure events is incorrect and denied. The PTC PPA was valid and subsisting at the time of Judgment dated 11.01.2011 was issued by the Appellate Tribunal for Electricity.

- x) The contentions of Swasti that pursuant to the Judgment dated 11.01.2011, UPCL failed to co-operate with Swasti for setting up of a transmission system to evacuate power to PTC, disconnected the Project from 03.11.2011 from the 220V line and coerced Swasti to sign a long term PPA resulting in an event of Extended Force Majeure is incorrect and misplaced. In terms of the definition of "Delivery Point" read with Article 4.1(vi) and (vii) in the PTC PPA, it was Swasti's obligation to coordinate and cooperate with UPCL with regards to acquisition of land for construction and installation of the interconnection facilities and to facilitate delivery of power and energy to PTC at the Delivery Point. Swasti has failed to do so since the transmission system for evacuation of power to PTC from the Project was incomplete and the power was being evacuated through unreliable arrangement at 33 kv level instead of the 220 KV level.
- xi) By way of Order dated 30.12.2009 passed by . UERC, Swasti was denied permission to apply for connectivity for evacuation of power. However, Order dated 30.12.2009 was set aside by Judgment dated 11.01.2011 passed by the Appellate Tribunal in Appeal No. 88 of 2010 in which the Appellate Tribunal directed UERC to inter-alia grant open access to Swasti once Swasti applies for the same. Therefore, it is evident that that the force majeure event had ceased to exist as on 11.01.2011 pursuant to Judgment dated 11.01.2011. Thereafter, it was Swasti's obligation to ensure that the transmission system was set up so as to evacuate power to PTC. Swasti failed to apply to UPCL for grant of open access pursuant to the Judgment dated 11.01.2011. UPCL's letters dated 31.03.2011 and

25.04.2011 make it evident that the temporary arrangement for evacuation of power through 220 KV line Ghansali to Chamba was withdrawn on account of Swasti's failure to comply with instructions of UPCL. In view of the failure of Swasti to apply to UPCL for grant of open access and the disconnection of the 220 KV transmission line due to failure of Swasti, the same would not amount to an event of Force Majeure in terms of the PPA. Swasti has willingly and of its own accord given up the right accrued to it in terms of Judgment dated 11.01.2011. Having done so, Swasti cannot claim it is unable to perform its obligations on account of Force Majeure.

- xii) Earlier By way of letter dated 08.07.2009, Swasti informed PTC regarding Order dated 10.06.2009 passed by UERC as being a Force Majeure event and stated that in the light of its inability to apply for connectivity and open access and adverse financial health, Swasti was constrained to enter into a PPA with UPCL. Mentioning that it had represented before UERC about its binding legal obligation to sell power to PTC, Swasti had ensured that suitable clauses were incorporated in the UPCL PPA. However, in the supplementary PPA executed between Swasti and UPCL dated 10.01.2013, it has been recorded that Swasti would not take claim or any benefit out of Judgment dated 11.01.2011 and has entered into a supplementary PPA with UPCL. Furthermore, in the supplementary PPA, Swasti has deleted all provisions listed in Page 2 of the UPCL PPA which pertain to safe guarding of PTC's rights for supply of power by Swasti in terms of the PTC PPA.

- xiii) As per Article 11.1.2, of the PPA the Affected Party can claim Force Majeure only if the events or circumstances are not within its reasonable control and the Affected Party had taken reasonable care or complied with Prudent Utility Practices.
- xiv) The Hon'ble Supreme Court in the context of Section 56 of the Indian Contract Act has held that a mere obstacle to the execution of a contract does not obviate the obligations of the parties with a turn of events which the parties to the contract did not anticipate in M/s Alopi Pershad & Sons Ltd. Vs Union of India, reported as AIR 1960 SC 588.
- xv) Swasti executed the UPCL PPA even before letter dated 08.07.2009 was sent to PTC informing it about the alleged Force Majeure event. Further, Swasti also failed to file the appropriate applications for grant of connectivity and open access violating the express directions of the Tribunal in Order dated 11.01.2011. Therefore, the steps that Swasti ought to have taken to avoid delay or the non-performance of its obligations under the PPA were not taken. It is evident that Swasti had no intention to perform its obligations under the PPA. Swasti, by way of the Termination Notice dated 09.03.2011, is seeking to take advantage of its own wrong. It is trite law that where an obligation is cast on a party and it commits a breach of such obligation, such party cannot be permitted to take advantage of such omission. In the present case, Swasti is responsible for non-grant of open access and therefore, ought not to be permitted to avoid its obligations under the PPA in the guise of an alleged event of force majeure.

- xvi) The contention of Swasti that PTC is not entitled for specific relief since there is non-availability of safe and reliable transmission network for evacuation of power and supply of power to PTC will only result in additional financial loss to Swasti, is misplaced. In view of the foregoing submissions, the Commission ought to set aside the Termination Notice and direct Swasti to supply power under the PPA. Specific performance of a PPA has been allowed by the Hon'ble Appellate Tribunal in Appeal No. 184 of 2010 titled as Adani Power Limited v GERC wherein, the Tribunal inter-alia stated that merely because contract for sale contains a clause for payment of damages, it cannot be said that the damages alone should be awarded and not specific performance. The Hon'ble Appellate Tribunal also stated that it is a well settled rule that when a property is of a special value or consists of goods which are not easily available in the market, damages would not be an adequate remedy and in such cases, specific performance of the contract should be granted.
- xvii) The contention advanced by Swasti that PTC's silence qua letter dated 08.07.2009 informing PTC regarding the UPCL PPA goes to show that PTC was aware of the Force Majeure event is erroneous. By way of Order dated 10.06.2009, there was uncertainty regarding sale of power from hydro-power projects to consumers outside the state of Uttarakhand. Swasti was requested by PTC on 06.11.2009 to expedite hearing of its application for grant of open access pending before the UERC. During the period post 30.12.2009 till 01.11.2011, the matter regarding supply of power to consumers outside the state of Uttarakhand was sub-judice. PTC itself had filed Appeal No. 88

of 2010 and had prayed to set aside Order dated 30.12.2009 so as to enable Swasti to supply power under the PTC PPA. By way of Order dated 11.01.2011, the Hon'ble Appellate Tribunal set aside the order dated 30.12.2009 and directed UERC to grant open access to Swasti on the systems of UPCL/PTCUL. Only by way of the Termination Notice dated 09.03.2011, did Swasti mention 'Force Majeure'. In all earlier correspondences, Swasti never mentioned that there exists a Force Majeure event under the PTC PPA or that an extended Force Majeure event exists. In light of the above submissions, Swasti cannot be now allowed to contend that PTC was fully aware of the existence of Force Majeure events existing under the PTC PPA.

xviii) The non-existence of an effective, safe and reliable transmission network was never raised by Swasti in letter dated 08.07.2009. Without prejudice to the above, as per the PTC PPA, the obligation to supply power to the delivery point lay on Swasti. Accordingly, the arrangement of wheeling and transmission till the Delivery Point was the responsibility of Swasti. However, Swasti failed to apply for grant of Open Access despite specific directions by the Tribunal in terms of Order dated 01.11.2011. In view of the foregoing, the present Petition ought to be allowed by the Commission.

6. Submissions made by Swasti in compliance of Order of the Commission dated 07.05.2018 are summarized as under:

i) Responding to the Commission's question as to why Swasti did not apply for open access after the Aptel Order of 11.01.2011, Swasti stated that PTC has been informed of the 03.07.2009 PPA with UPCL. The petitioner never raised any objection against

the PPA, thus being well aware of the existence of Force Majeure event, which has prevented compliance with its obligations under the Power Purchase Agreement dated 24.08.2005.

- ii) By the time the Hon'ble Appellate Tribunal passed the Order dated 11.01.2011, the PPA dated 24.08.2005 was no longer effective. The same had become legally unenforceable in the eyes of law, as the Force Majeure event, which was admittedly in existence on 03.07.2009 had extended beyond a period of 12 months i.e. 11.01.2011 and the same continues to persist even today, as no safe and reliable evacuation system is available for transmission of power outside the State of Uttarakhand. Thus, the Respondent No. 1 was not legally and contractually liable to perform its obligations under the PPA dated 24.08.2005 in terms of clause 15.6 of the PPA dated 24.08.2005.
- iii) Non- performance of the obligations by the Respondent No.1 are duly covered within the meaning of Clause 11.1.2 (ix) and (xi) of the PPA dated 24.08.2005. The petitioner was well within its rights to insist for supply of power from the project from the existing 33KV system. The non-grant of Open Access to the Respondent No. 1 was on account of Governmental instrumentality, the same is covered within the definition of Force Majeure event under the PPA dated 24.08.2005.
- iv) Under Article 3.1.3 (v) & (vi) of the PPA dated 24.08.2005, the PPA had to be approved by the Commission. However, the Commission vide its order dated 08.01.2013 had only given a conditional approval to the PSA dated 23.03.2006 and directed the Petitioner and the Respondent No.2 to carry out necessary amendments in the PSA which were never done. The PPA therefore, has not become contractually effective, enforceable and

binding upon the parties. In the light of the above noted factual events i.e. extended force majeure events, which had frustrated the contractual understanding between the parties, the Respondent No.1 therefore, chose not to apply to the concerned authorities for grant of Open Access.

7. The reply of PTC to the submissions of Swasti in pursuance to the order dated 07.05.2018 and 19.05.2018, in brief, is summarized as under:

- i) The alleged event of force majeure, i.e. inability of Swasti to obtain open access from PTCUL on account of Order dated 30.12.2009 passed by UERC, as claimed by Swasti in its termination notice dated 09.03.2011 came to an end when the Hon'ble Appellate Tribunal set aside the same in terms of its Judgment dated 11.01.2011. The Hon'ble Appellate Tribunal had in fact directed UERC to grant Swasti open access pursuant to an application made by Swasti.
- ii) Suspension of obligations is only as long as the Force Majeure event is in effect (Article 11.3 and 11.4 of the PTC PPA); and the issuance of the termination notice after the force majeure event had concluded, is untenable and contrary to the PTC PPA. (Article 15.3 of the PTC PPA).
- iii) In terms of Article 11.5.3 of the PTC PPA, on the occurrence of an extended Force Majeure event, either party is entitled to terminate the PTC PPA. However, such termination can be done after serving a 7 day written notice and provided such Force Majeure event is persisting at the end of the 7 days. However, Swasti issued the Termination Notice only after the Event of Force Majeure as alleged by Swasti had ended pursuant to the Judgment of the Tribunal dated 11.01.2011.

- iv) Swasti's contention that the PTC PPA had been terminated pursuant to an event of extended force majeure is denied. Swasti has claimed that UERC's Order dated 30.12.2009 prevented Swasti from obtaining interconnection and open access which is an event of force majeure. Thereafter, Swasti is seeking to improve upon its earlier stand stating that the event of force majeure continues even today on account of there being no safe and reliable evacuation system for transmission of power outside the State of Uttarakhand. Swasti is trying to improve upon its earlier stand so as to escape its obligations under the PTC PPA.
- v) PTC reiterated it stands that since the letter of 08.07.2009 does not mention force majeure and does not meet the mandatory requirements under Article 11, the subsequent Termination Notice which is premised on intimation and continuation of an alleged force majeure event cannot be sustained.
- vi) In terms of Article 11.1.2 of the PPA, the Affected Party can claim force majeure only if it had taken reasonable care or complied with prudent utility practices. In the present case, Swasti failed to take appropriate steps to ensure that it is able to fulfill its obligations under the PTC PPA including failing to apply for open access even after the Hon'ble Appellate Tribunal directed UERC to grant open access to Swasti upon filing of application.
- vii) In terms of letter dated 08.07.2009, Swasti stated it was unable to apply for connectivity and open access and consequently was unable to supply power in light of Order dated 10.06.2009 passed by the UERC. Swasti had also contended that it was constrained to execute a power purchase agreement dated 03.07.2009 with Uttarakhand Power Corporation. Further, Swasti also stated that it has incorporated relevant clauses in view of its obligations to

supply power to PTC under the PPA whereas, the Generating Company desires to sell entire 22.5 MW (plus 10% overload) power scheduled to be generated in the Generating Company's facility to UPCL pending resolution of legal issues regarding the sale of power other than consumer outside the state of Uttarakhand subject to the following conditions:-

(i) Company's right in regard to sale of power outside the State of Uttarakhand to PTC and others on the final decision of the issue by UERC/Tribunal/Court, if the decision is in the favour of the Company.

(ii) The terms and conditions contained in the PPA and the rights and obligations specified would be subject to the final decision on the legal issues of the sale of power by the company to PTC. However, Generating Company shall give two month notice to UPCL before termination of this agreement.

However, after the Hon'ble Appellate Tribunal passed Judgment dated 11.01.2011 setting aside UERC's Order dated 30.12.2008 directing UERC to grant open access to Swasti, Swasti and UPCL executed a supplementary PPA dated 10.01.2013. In the Supplementary PPA, it has been recorded that Swasti would not claim any benefit out of Judgment dated 11.01.2011 and it would be unconditional without any cost to any party. Furthermore, all provisions safeguarding PTC's interest under the PTC PPA were deleted.

viii) In terms of Article 11.1.2 of the PPA, the affected party can claim Force Majeure only if the events or circumstances are not within its reasonable control and the Affected Party had taken reasonable care or complied with Prudent Utility

Practices. In the present case, Swasti failed to apply for open access pursuant to the judgment dated 11.01.2011 of the Hon'ble Appellate Tribunal directing UERC to grant open access to Swasti. In fact, Swasti had willfully entered into an agreement forgoing its right to open access. In these circumstances, Swasti cannot claim that it was hindered by Force Majeure.

- ix) The contentions of Swasti that PTC failed to fulfil conditions precedent as laid down under Article 3.1.3 (v) and (vi) of the PTC PPA are misplaced. In terms of Article 3.1.3 (v), PTC shall have executed the Power Sale Agreement with the PSPCL. The said Condition Precedent had been fulfilled by PTC in terms of the Power Sale Agreement dated 23.03.2006 which was duly executed between PTC and Punjab State Electricity Board and approved by this Commission vide Order dated 31.07.2007
- x) Since termination of the PTC PPA is illegal, PTC sought the said termination to be set aside, and sought grant of specific performance of the PTC PPA and direct Swasti to supply power in terms of the PPA. The Hon'ble Appellate Tribunal has in its judgment dated 07.09.2011 in Appeal No. 184 of 2010 titled Adani Power Limited v. GERC and Others has held that specific performance of a PPA can be granted.
- xi) In this context, PTC quoted the notification of the Specific Relief (Amendment) Act, 2018 on 01.08.2018, wherein it is mandatory for Courts to direct specific performance of a contract. The amended Section 10 of the Specific Relief Act, 1963 as amended by Specific Relief (Amendment) Act, 2018 provides as under:

“10. The specific performance of a contract shall be enforced by the court subject to the provisions contained in sub-section (2) of section 11, section 14 and section 16.

In terms of Notification bearing F. No. 11(2)/2015-Leg. III dated 19.09.2018 issued by the Ministry of Law and Justice, Govt. of India, the Specific Relief (Amendment) Act, 2018 came into force from 01.10.2018. PTC claimed that Money is not an adequate relief in the present case and non-performance of the PPA cannot be compensated in monetary terms. Moreover, the subject matter of the PPA is electricity being goods of special value not easily available in the market. Therefore, this is a fit case to direct specific performance of the PPA.

8. PTC filed note for arguments and submitted the following Orders:
1. Order dated 30.04.2015 passed by the Hon'ble Appellate Tribunal in Appeal no. 54 of 2014 titled as Himachal Sorang Power Ltd. V/s. CERC and others.
 2. Order dated 03.06.2016 passed by the Hon'ble Appellate Tribunal in appeal no. 97 of 2016 titled as Talwandi Sabo Power Ltd. V/s. PSPCL.
 3. Order dated 27.06.2016 passed by CERC in petition no. 419/MP/2014 titled as Raichur Sholapura Transmission Co. Ltd. V/s. PGCIL & Ors.
 4. Order passed by Hon'ble Supreme Court in M/s. Alopi Parshad & Sons Ltd. V/s. Union of India reported as AIR 1907 SC-58,
 5. Order passed by Supreme Court in Energy Watchdog V/s. CERC & Ors, reported as (2017) 14 SCC80,

6. Order passed by Hon'ble Supreme Court in Nirmala Anand V/s. Advent Corporation (P) Ltd., reported as (2002) 5 SCC-481,
7. Order passed by the Supreme Court in Eureka Forbes V/s. Alahabad Bank, reported as (2010) 6-SCC-193,
8. Order dated 07.09.2011 passed by the APTEL in appeal no. 184 of 2010 titled as Adani Power Ltd. V/s. GERC & Ors.,
9. Order passed by the Supreme Court in Andhra Pradesh Power Coordination Committee & Ors. V/s. Lanko Konda Palli Power Ltd. reported as (2016) 3-SCC-468
10. Order passed by Supreme Court in Kasturi V/s. Iyyamperumal & Ors. Reported as (2005) 6 SCC- 733
11. Order dated 17.12.2012 passed by the UERC in the matter of petition dated 06.12.2012 titled as M/s. Swasti Power Engg. Ltd. V/s. Utrakhand Power Corp. Ltd.

Swasti filed its written submissions and also filed copies of judgments in the case of K. Narendra V/s. Rivera Apartments (P) Ltd.,(1999) 5 SCC-77 and Azhar Sultana V/s. B. Rajamani & Ors.,(2009) 17 SCC 27 respectively.

PSPCL filed written submissions and submitted the copy of Order dated 17.12.2012 passed in petition dated 06.12.2012 by UERC in the matter of M/s. Swasti Power Engg. Ltd. V/s. Utrakhand Power Corp. Ltd.

9. Observations, findings and Decision of the Commission

The Commission has examined the petition, reply submitted by Swasti and PSPCL, rejoinder filed by PTC, written submissions and the other documents filed by the parties. PTC has prayed as

under:

- a) The termination letter dated 09.03.2011 issued by Swasti be declared as illegal, arbitrary, unsustainable and bad in law;
- b) To direct Swasti to specifically perform its obligations under the PPA dated 24.08.2005 as signed by and between Swasti and PTC;
- c) To direct Swasti to cancel the PPA dated 03.07.2009 entered into with UPCL and also any other agreement that it may have entered into with any other utilities for supply of power generated from the project in derogation of the terms of the PPA dated 24.08.2005;
- d) To direct Swasti to pay/reimburse PTC for any charge/ claim which PSEB may claim from PTC;
- e) To direct Swasti to pay to PTC damages for the loss of business due to illegal termination of the PPA by Swasti.

The Commission notes that PTC entered into a PPA dated 24.08.2005 with Swasti for purchase of power from 22.5 (3x7.5) MW Bhilangana Hydro Electric Power Project (BHPP). Swasti executed the Power Wheeling Agreement with PTCUL on 30.09.2005 for wheeling of power from the Project to the Delivery Point at CTU Grid. PTC and PSEB (now PSPCL) executed the PSA on 23.03.2006 as back to back arrangement to the PPA. The PPA is attached as Annexure-C to the PSA.

Swasti signed an MoU with PTCUL on 12.06.2007 for evacuation of power to the Delivery Point. Also, PTCUL, UPCL and Swasti agreed that power from the Project will be evacuated through 33 kV system till the completion of 220 kV Transmission line from Ghansali to Chamba and the sub-station. On 25.07.2007, Swasti applied to PTCUL for Long Term Open Access for the intra-state distribution/transmission system. PSERC approved the PSA dated 23.03.2006 executed between PTC and PSEB (now PSPCL) vide

Order dated 31.07.2007 in petition no. 9 of 2006. In the meanwhile, UERC in its Interim Order dated 10.06.2009 in the application filed by Him Urja Pvt. Ltd. (HUPL) in respect of Vanala Small Hydro Project of 15 MW for grant of permission of Open Access for carrying electricity outside the State of Uttarakhand, held that sale of power from the project is permitted only to a 'Consumer' outside the State in terms of Clause 4.1.1(v) of the supplementary implementation agreement dated 15.04.2006 signed by HUPL with Govt. of Uttarakhand (GoU). UERC directed HUPL to provide information regarding the proposed purchaser of power outside the State of Uttarakhand. Swasti entered into a PPA dated 03.07.2009 with UPCL and intimated PTC vide letter dated 08.07.2009 that it was constrained to execute the PPA dated 03.07.2009 with UPCL as it was unable to apply for connectivity and open access in light of UERC Order dated 10.06.2009. Swasti filed application before UERC on 10.08.2009 praying to direct UPCL and PTCUL to give connectivity and open access on their system for evacuation of power upto the CTU grid and permit Swasti to sell electricity to PTC consistent with the PPA dated 24.08.2005. UERC vide Order dated 30.12.2009 dismissed the aforesaid application of Swasti stating that

“

The clarification from Government has been received and, in its letter dated 10.11.2009 (enclosed as Annexure 2), the Government has informed the Commission that the State is having power shortages and HUPL has proposed to sell the electricity generated to PTC, which is a trading company and does not fall within the category of consumer and, hence, the Government is of the view that it would not be appropriate to consider the open-access proposal of the developer. Accordingly, the Commission has passed a detailed Order dated 30.12.2009 in the matter of M/s HUPL. In this Order,

based on clarification given by the Government, the Commission has concluded that as per Clause 4 of the Agreement the sale of electricity outside the State is not permissible to a licensee. Copy of the said Order may be sent to the Applicant alongwith this Order. The clarification of the Government is applicable to all similarly placed generators including the Applicant.”

PTC filed Appeal No. 88 of 2010 before Hon'ble Appellate Tribunal against the UERC's Order dated 30.12.2009. Hon'ble Appellate Tribunal vide Order dated 11.01.2011 in the said Appeal set aside the UERC Order dated 30.12.2009 and held as under:

“59. In view of the above findings, we set aside the order dated 30.12.2009 of the State Commission. The State Commission is directed to grant open access to the generating companies, Respondent No.2 in Appeal No. 88 of 2010 and Appellant in Appeal No. 93 of 2010, after they file application for granting open access on the distribution/transmission system of UPCL/Power Transmission Corporation of Uttarakhand Ltd. before the State Commission.”

However, Swasti vide letter dated 09.03.2011 issued Notice of Termination of the PPA dated 24.08.2005 to PTC. PTC vide letter dated 15.03.2011 replied that the Termination Notice is illegal and requested Swasti to withdraw the same. As Swasti failed to rescind the Termination Notice, PTC filed petition no.30 of 2013 before PSERC. PSERC vide Order dated 02.09.2013 dismissed the said petition holding that the Commission does not have jurisdiction and that PTC should approach the right forum. Thereafter, PTC filed the petition before UERC which was dismissed by UERC vide Order dated 26.03.2014 stating that the PPA and the PSA were back to back arrangements and that it did not have jurisdiction to adjudicate upon the same. Consequently, PTC filed Appeal No. 168 of 2014

and Appeal No. 214 of 2014 before Hon'ble Appellate Tribunal impugning Order dated 02.09.2013 of PSERC and 26.03.2014 of UERC. Hon'ble Appellate Tribunal vide Order dated 31.08.2016 in the aforesaid appeals held that PSERC has the jurisdiction to decide the dispute. Subsequently, PTC filed this petition.

I. The Commission notes that Swasti in its reply/submissions in the petition filed by PTC raised the following issues. Before giving its findings and decision on the prayers in the petition, the Commission decides these issues as hereunder:

i) Whether UPCL and PTCUL are necessary parties?

With respect to Swasti's claim that UPCL and PTCUL are necessary and proper parties to the petition, PTC has submitted that the Hon'ble Supreme Court of India in Kasturi Vs. Iyyamperumal and Others, reported as (2005) 6 SCC 733 (Kasturi Case) laid down tests which ought to be satisfied in order to determine whether a party is a necessary party. PTC has quoted the relevant findings of Hon'ble Supreme Court of India in the aforesaid case in its submissions. PTC submitted that in view of the same, a party will be considered a necessary party:

- (a) If this Commission will be unable to pass an effective decree in the absence of the said party;
- (b) If any relief has been sought against the party in question by way of the petition.

PTC submitted that its claim is limited to specific performance of the PPA and no relief has been claimed against UPCL/PTCUL. PTC is not concerned about the issues which may arise between Swasti and third parties including UPCL/PTCUL. PTC contended that the presence of neither UPCL nor PTCUL is required to pass an effective decree in the dispute viz whether Swasti has wrongly

terminated the PTC PPA. Furthermore, neither UPCL nor PTCUL is required for effective and adequate adjudication of the said dispute. In term of Supplementary PPA signed on 10.01.2013, Swasti agreed that it would be responsible for the legal and financial implications arising out of the Supplementary PPA. Accordingly, UPCL has no legal interest in the present matter.

Considering the above submissions and contentions of the parties, the Commission notes that PTC has not filed any claim against UPCL & PTCUL and Swasti agreed in the supplementary PPA dated 10.01.2013 signed with UPCL that it is responsible for the legal and financial implications arising out of the supplementary PPA. Accordingly, the Commission holds that UPCL and PTCUL are not required to be arrayed as necessary parties for adjudication upon the instant petition.

ii) Whether the Commission has the jurisdiction to decide upon the prayer (b) and (c) of the petition?

Swasti submitted that the petition is not maintainable in law, in as much as this Commission has not been conferred with the power/function under the provisions of the Electricity Act, 2003 to adjudicate upon the validity of the UPCL-PPA dated 03.07.2009 and no power under the Act has been conferred on this Commission for granting the relief as prayed for by PTC and thereby, directing Swasti to cancel the UPCL-PPA dated 03.07.2009. Swasti further submitted that the PPA dated 03.07.2009 is a legally and validly executed contract between the parties and the same is within the regulatory jurisdiction of UERC, only. Thus, the relief as prayed for in the petition, regarding cancellation of UPCL-PPA dated 03.07.2009 cannot legally be granted by this Commission.

PTC submitted that the present dispute does not challenge the validity of UPCL PPA dated 03.07.2009. The dispute in the present petition relates to the legality of the Termination Notice dated 09.03.2011 issued by Swasti to PTC and specific performance thereof. PTC PPA is a valid and binding agreement and Swasti has failed to perform its obligations under the same. Furthermore, during the term of the PTC PPA, Swasti executed the UPCL PPA, inter-alia contracting the entire quantum of power to be supplied under the PTC PPA to UPCL. PTC submitted that in the event that this Commission holds that the Termination Notice 09.03.2011 is invalid and illegal in terms of the PTC PPA and that the PTC PPA is valid and subsisting agreement, Swasti will be required to supply the entire quantum of power from its Project to PTC. PTC submitted that in such a scenario, this Commission has the jurisdiction to direct Swasti to comply with its obligations under the PTC PPA.

The Commission notes that it dismissed the petition no. 30 of 2013 filed by PTC vide Order dated 02.09.2013 holding that this Commission does not have jurisdiction and that PTC should approach the right forum. PTC had sought similar reliefs in petition no. 30 of 2013 as sought now in the instant petition. Thereafter, PTC filed petition before UERC praying for the similar reliefs as sought before this Commission in petition no. 30 of 2013. UERC issued Order dated 26.03.2014 in the petition filed by PTC and dismissed the same stating that the PPA and the PSA were back-to-back arrangements and that it did not have jurisdiction to adjudicate upon the same. PTC filed Appeal No. 168 of 2014 and Appeal No. 214 of 2014 impugning Order dated 02.09.2013 of this Commission and 26.03.2014 of the UERC before Hon'ble Appellate Tribunal. In the said appeals,

PTC sought directions from Hon'ble Appellate Tribunal as to whether this Commission or UERC will have jurisdiction to adjudicate upon the present dispute. Hon'ble Appellate Tribunal in the Judgment dated 31.08.2016 in Appeal No. 168 of 2014 and Appeal No. 214 of 2014 held that Punjab State Electricity Regulatory Commission has the jurisdiction to decide the present dispute. Accordingly, the Commission holds that the plea of Swasti is not tenable and the Commission has the jurisdiction to decide the present dispute including the relief sought regarding cancellation of UPCL-PPA dated 03.07.2009 as prayed for in the petition.

iii) Whether the petition is barred by Limitation?

Swasti submitted that the petition is not maintainable and the same is liable to be dismissed, as the same is barred by Limitation. Swasti further submitted that prayers (b) & (c) as sought for by PTC in the petition, cannot be legally granted by the Commission, as the said prayers are barred by Article 54 and 58 of the Schedule of the Limitation Act, 1963, which clearly provides that the Limitation period seeking Specific Performance of a Contract or to obtain any declaratory relief has to be filed within a period of 3 years from the date when a party has noticed that performance of obligation has been refused. Swasti submitted that PPA had been executed by it with UPCL on 03.07.2009 and information with respect to execution of the same had been given to the petitioner on 08.07.2009. However, the petition no. 30/2013 titled PTC India Ltd. Vs. Swasti Power Engineering Ltd. asking for similar reliefs had been instituted before this Commission only on 28.05.2013 i.e. after a period of approximately 3 years and 10 months, which is beyond the

prescribed period of limitation. Swasti submitted that the refusal to supply energy from the Project under the PPA dated 24.08.2005 was communicated to PTC on 08.07.2009 and no action challenging the said refusal was taken by PTC till 28.05.2013. Swasti submitted that the instant petition has been filed by PTC beyond the prescribed period of Limitation and therefore, no relief can be granted by the Commission, as prayed for by PTC and the petition is liable to be dismissed as not maintainable in law.

PTC submitted that the present petition is within the period of Limitation. With regard to Swasti's contention that the present petition is barred by Limitation in terms of Article 54 and 58 of the Schedule to the Limitation Act, 1963 (Limitation Act), PTC submitted as under:

- a) On 03.07.2009, Swasti entered into the UPCL PPA.
- b) On 08.07.2009, Swasti issued a letter to PTC inter-alia informing of its inability in obtaining open access and that it had executed the UPCL PPA.
- c) On 10.08.2009, Swasti filed an Application before UERC seeking permission to sell power under the PPA executed with PTC and directions to UPCL and PTCUL for grant of connectivity.
- d) On 30.12.2009, UERC dismissed application filed by Swasti and denied Open Access.
- e) PTC filed Appeal No. 88 of 2010 before Hon'ble Appellate Tribunal against UERC's Order dated 30.12.2009.
- f) On 11.01.2011, Hon'ble Appellate Tribunal allowed Appeal No. 88 of 2010 filed by PTC and set aside UERC's Order dated 30.12.2009.

PTC further submitted that counsel for Swasti in the aforesaid Appeal submitted that Swasti stands committed to the agreement signed with PTC but is not in a position to supply power to PTC in

view of the order of the State Commission. The cause of action arose only on 09.03.2011 when Swasti sought to terminate the PPA and refused performance. Therefore, the period of Limitation has to be reckoned from 09.03.2011 and not 08.07.2009 as claimed by Swasti. Consequently, the present petition is not barred by limitation. PTC further submitted that though the Limitation Act is not applicable, principles analogous thereto have been applied by the Hon'ble Supreme Court of India in Andhra Pradesh Power Coordination Committee & Ors. Vs Lanco Kondapalli Power Ltd. reported (2016) 3 SCC 468. These are equitable principles premised on rule of law. These principles ought to be applied in a manner so as to not benefit a defaulting party or prejudice an innocent party.

In view of the above submissions and contentions of the parties, the Commission notes that Swasti in the Appeal No. 88 of 2010 submitted before Hon'ble Appellate Tribunal that Swasti stands committed to the agreement signed with PTC but it is not in a position to supply power to PTC in view of the Order of the UERC. The said Appeal was disposed of by Hon'ble Appellate Tribunal vide Judgment dated 11.01.2011. Therefore, no cause of action arose for PTC till 11.01.2011 as Swasti had expressed its commitment to the PPA dated 24.08.2005 signed with PTC. The cause of action for PTC arose only on 09.03.2011 when Swasti issued Termination Notice to PTC terminating the PTC PPA. Thereafter, PTC filed petition no. 30 of 2013 in this Commission which was dismissed vide Order dated 02.09.2013 holding that this Commission does not have jurisdiction and that PTC should approach the right forum. Subsequently, PTC filed another petition before UERC praying for similar reliefs as sought before this Commission in petition no. 30 of 2013. UERC

issued Order dated 26.03.2014 in the petition filed by PTC and dismissed the same stating that the PPA and the PSA were back-to-back arrangements and that it did not have jurisdiction to adjudicate upon the same. Consequently, PTC filed Appeal No. 168 of 2014 and Appeal No. 214 of 2014 impugning Order dated 02.09.2013 of this Commission and 26.03.2014 of the UERC before Hon'ble Appellate Tribunal which were decided by Hon'ble Appellate Tribunal vide Judgment dated 31.08.2016 wherein it has been held that Punjab State Electricity Regulatory Commission has the jurisdiction to decide the present dispute. Thereafter, PTC filed the present petition in the year 2017. In view of the above, the Commission holds that the question raised by Swasti that the petition is barred by limitation is without merit.

iv) Whether the petition is maintainable as per the contention of Swasti that there exists no legal and validly binding Power Sale Agreement between PTC and the Swasti?

Swasti has submitted that the petition is not maintainable and the same is liable to be dismissed, as there exists no legal and validly binding Power Sale Agreement between PTC and the Swasti. The PSA dated 23.03.2006 between PTC and PSEB (now PSPCL) is an unenforceable document/agreement which has no legal binding upon the parties. The approval to the PSA was given by the Commission vide Order dated 31.07.2007 subject to compliance of directions issued in the said Order with respect to the carrying out of certain amendments in the PSA. Swasti submitted that none of the amendments as suggested by the Commission have been carried out by PTC and PSPCL. Swasti was never informed about carrying out of any such amendments in the PSA. Swasti further submitted

that the non implementation of the Commission's directions by PTC & PSPCL renders the PSA invalid and not binding upon the parties. Since, the said amendments as directed to be carried out by the Commission have not been complied with despite lapse of more than 10 years from the date of the Order dated 31.07.2007, the PSA is no longer valid and operative in the eyes of law. Swasti submitted that as per provisions of Section 86 (1) (b) of the Act, the conditional approval granted to the PSA cannot under the law be considered as an absolute approval by the Commission. The PSA is therefore, not a concluded contract between the parties, as the procurement process of electricity from the Project by PSPCL has not yet culminated in the eyes of law and has now lapsed on account of delay in carrying the amendments.

PTC submitted that the Power Sale Agreement between PTC and PSPCL is subsisting and valid. The Commission vide Order dated 31.07.2007 in petition no. 9 of 2006 granted approval to the PSA. The amendments to the PSA have no bearing on the validity of the PSA. PTC contended that obligations of the parties under the PPA continue irrespective of the validity of the PSA which is evident from Article 4.3.2 of the PPA which states that Swasti has undertaken to sell the Contracted Maximum Capacity to PTC at the Delivery Point and PTC has undertaken to purchase the said power at the delivery point and pay tariff in accordance with the PTC PPA.

Considering the above submissions and contentions of the parties, the Commission is of the view that non carrying out of the amendments directed by it in Order dated 31.07.2007 in petition no. 9 of 2006 while granting approval to the PSA do not render the PSA unenforceable/invalid as this is between PTC and PSEB (now PSPCL) and do not prevent Swasti from

honouring the PPA. The Commission holds that the PSA dated 23.03.2006 signed between PTC and PSEB (now PSPCL) is still a legally valid and subsisting document.

v) Whether the petition is maintainable as per Swasti's contention that PSPCL has no requirement of energy generated from the Project?

Swasti submitted that the petition is not maintainable and the same is liable to be dismissed in view of PSPCL's stand before the Commission in petition no. 54 of 2015 titled Punjab State Power Corporation Ltd. Vs. Everest Power Pvt. Ltd. & Ors, wherein PSPCL submitted on affidavit that it already has surplus contracted capacity for the State of Punjab. Swasti further submitted that the petition is liable to be dismissed as PSPCL has no requirement of energy generated from the Project.

PSPCL submitted that the Power available to it under the PPA would contribute to fulfil the Renewable Purchase Obligation (RPO) and is therefore very vital to the State of Punjab.

PTC submitted that petition no. 54 of 2015 filed by PSPCL has no relevance in the present petition. The availability of surplus contracted capacity available with PSPCL as stated in petition no. 54 of 2015 has no bearing on the present issue before the Commission on whether the Termination Notice dated 09.03.2011 is valid or not in terms of the PTC PPA. PTC submitted that the Commission had approved the PSA executed with PSPCL which is valid for a period of 35 years and the issue of procurement of power is a matter exclusively between PSPCL & PTC.

Swasti has no *locus standi* in the matter of whether PSPCL is surplus in power or otherwise. That is a matter for the Commission to decide. The Commission observes that PSPCL

has been unable to fully comply with its Non-Solar Renewable Purchase Obligation in the past years. The Commission is of the firm view that the power from Swasti's hydro Project which is less than 25 MW would have contributed towards PSPCL's Non-Solar RPO compliance. Accordingly, the Commission does not agree with the plea of Swasti that PSPCL has no requirement of renewable energy generated from the Project.

vi) Force Majeure claimed by Swasti

Swasti vide letter dated 08.07.2009 informed PTC about the Order passed by UERC on 10.06.2009 relating to open access to another generating station - 15MW Vanala Small Hydro Project of Him Urja Pvt. Ltd. wherein UERC had raised issues relating to the permissibility and validity of sale of power to entities other than consumers/users outside the State of Uttarakhand. Swasti stated that on account of the said Order, it was unable to obtain Open Access. Swasti further stated in the aforesaid letter that UPCL and PTCUL have not been permitting inter-connection facilities of the Project to Uttarakhand grid and had indicated that the connectivity will be provided only if a PPA is signed with them. Swasti stated that keeping in view the overall situation and its obligation to sell power to PTC as per the existing PPA, it had ensured that suitable clauses to safeguard the interest of PTC are incorporated in the PPA which it had signed with UPCL on 03.07.2009. Thereafter, Swasti vide letter dated 09.03.2011 issued notice of termination of the PPA dated 24.08.2005 signed with PTC. In the notice to PTC, Swasti stated that it had informed PTC vide letter dated 08.07.2009 of an event of force majeure on account of which Swasti was unable to get inter-connection and open access from PTCUL, which prevented it from

supplying power to PTC and performing its obligations under the PPA. Swasti further stated that the event of force majeure continued for more than 12 months and therefore extended force majeure, as defined in Article 11.7 and 15.3 of the PPA had taken place and termination notice was issued in terms of Article 15.3 read with Article 15.6.3 of the PPA.

PTC vide letter dated 15.03.2011 replied to the termination notice dated 09.03.2011 and denied the averments therein. PTC stated that during the course of hearing of Appeal No. 88 of 2010 filed by PTC impugning UERC Order dated 30.12.2009, Counsel for Swasti submitted before the Hon'ble Appellate Tribunal that Swasti stands committed to the PPA with PTC but is unable to supply power in the light of the UERC Order dated 30.12.2009. Hon'ble Appellate Tribunal vide Order dated 11.01.2011 set aside the UERC Order dated 30.12.2009 and specifically directed UERC to grant open access to Swasti after Swasti files an application for the same. PTC stated that in view of the above facts and correspondence, Swasti cannot claim to be affected by a force majeure or extended force majeure event under the PPA.

The Commission notes that Articles 11 and 15 of the PPA provide as under:

"11. Force Majeure

.....

11.3 Notification of Force Majeure Event

11.3.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. Such notice shall include full

particulars of the event of Force Majeure, its effects on the Party claiming relief and the remedial measures proposed, and the Affected Party shall give the other Party regular reports on the progress of those remedial measures as such other information as the other Party may reasonably request about the situation.

11.3.2 The Affected Party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations.

.....

11.7 Extended Force Majeure

The continuance of an event of Force Majeure for a period of 12 consecutive months shall constitute Extended Force Majeure. In the event of an Extended Force Majeure, either party may terminate the Agreement pursuant to Article 15.6.3.

Article 15 Events of Default and Termination

.....

15.3 Extended Force Majeure

The occurrence of event of Force Majeure and its continuance for a period of 12 months continuously shall constitute an Extended Force Majeure.

On the occurrence of Extended Force Majeure, either Party shall be entitled to terminate this Agreement by delivering a seven (7) day written notice of termination to the other Party; and this Agreement shall stand terminated at the end of such seven (7) day period provided that the Force Majeure condition is still operative at such time. Neither Party shall have any liability to the other Party as a result of termination of this Agreement on account of Extended Force Majeure.

In the event that the Company was the Affected Party

during such Extended Force Majeure and the Project is subsequently revived by the Company, PTC shall have the first right of refusal for such power that may be produced, at terms and conditions to be mutually agreed between the Parties.

.....
15.6.3. Consequence of Termination for Extended Force Majeure

Where this Agreement is terminated by either Party pursuant an Extended Force Majeure in accordance with Article 15.3, then in such event this Agreement shall stand terminated without any further liability to either party, from the date of such termination.”

Swasti signed a PPA with UPCL on 03.07.2009 renegeing on its earlier PPA with PTC without informing PTC. It was only vide letter dated 08.07.2009 that Swasti informed PTC regarding the same. The said letter dated 08.07.2009 neither mentioned force majeure nor complied with the other requirements essential for a force majeure notice in terms of the above provisions in the PPA. Thereafter, in defiance of Hon’ble Appellate Tribunal’s directions in its Order dated 11.01.2011 in Appeal No. 88 of 2010, Swasti did not file application before UERC for grant of open access on the distribution/transmission system of UPCL/PTCUL. Instead, Swasti vide letter dated 09.03.2011 issued Notice of Termination to PTC stating as under:

“.....
PTC is also aware that the event of force majeure continued for more than 12 months, and, therefore, extended force majeure, as defined in Article 11.7 and 15.3 had occurred. Swasti is, therefore, sending you this written notice of termination of the PPA, under Article 15.3 of the PPA, read with Article 15.6.3.

.....”

The Commission notes that Swasti entered into a PPA with UPCL on 03.07.2009 without informing PTC of the facts. As such, the communication dated 08.07.2009 of Swasti, which was sent after the signing of the PPA with UPCL due to force majeure conditions as claimed by Swasti, cannot be said to be a notice in compliance of the provisions of Article 11 of the PPA. In this regard, the Commission is relying upon Hon'ble Appellate Tribunal's judgment dated 30.04.2015 in Appeal No. 54 of 2014 - Himachal Sorang Power Limited Vs. CERC and Ors. wherein it has been held that compliance with notice requirements under force majeure provisions is mandatory.

In view of the above, the Commission holds that as the requirement of issue of notice under Article 11 has not been complied with by Swasti for claiming relief under the Force Majeure clause. Further, the Commission notes that at the time of giving termination notice on 09.03.2011 by Swasti to PTC, the alleged extended force majeure did not exist as Hon'ble APTEL in its Order dated 11.01.2011 had already directed UERC to grant open access on the distribution/transmission system of UPCL/PTCUL on filing of an application by Swasti. As such, the plea of Force Majeure/Extended Force Majeure raised by Swasti is devoid of merit.

II. The prayers of the petitioner are dealt as under:

The Commission notes that Swasti filed an application on 10.08.2009 before the Uttarakhand Electricity Regulatory Commission seeking permission to sell electricity to PTC as per the PPA dated 24.08.2005 and directions to UPCL and PTCUL to give connectivity and open access on their system for

evacuation of power upto CTU grid. The said application was dismissed by UERC vide its Order dated 30.12.2009 on the clarification provided by the Government of Uttarakhand that denying the open access to Swasti was in view of the fact that there was severe shortage of electricity in the State and that PTC is a trading company / licensee and does not fall under the category of consumer. It was further held that as per clause 4 of implementation agreement, the sale of electricity outside state is not permissible to a licensee. Swasti failed to Appeal against the said Order dated 30.12.2009 passed by UERC. However, PTC filed an Appeal (Appeal no. 88 of 2010) challenging this Order of UERC. Hon'ble Appellate Tribunal set aside the impugned Order dated 30.12.2009 of the UERC vide its judgment dated 11.01.2011 and directed UERC to grant open access on the distribution/transmission system of UPCL/PTCUL on filing of an application by Swasti.

In contravention to the above judgment of Hon'ble Appellate Tribunal, Swasti issued a Termination Notice dated 09.03.2011 to PTC for termination of the PPA dated 24.08.2005. Further, Swasti signed a Supplementary Agreement dated 10.01.2013 to PPA dated 03.07.2009 with UPCL wherein it has been recorded that Swasti wants to enter into this Supplementary Agreement to Power Purchase Agreement dated 03.07.2009 with UPCL without claiming any benefit out of the Order dated 11.01.2011 of Hon'ble Appellate Tribunal unconditionally and without any cost to any party. Further, the following clause was inserted in the PPA dated 03.07.2009:

“

(ii). *The Generating Company agrees that it shall be*

responsible and shall inter alia bear all financial & legal implication if the execution of any other agreement signed earlier between Generating Company and other party is affected because of signing of this Power Purchase Agreement.

.....”

In view of the above, the Commission finds that Swasti has contravened and violated the directions given by Hon'ble Appellate Tribunal in the judgment dated 11.01.201 in Appeal no. 88 of 2010 by not filing an application for connectivity and open access before UERC. The Commission is of the view that where an obligation is cast on a party and it commits a breach of such obligation, such party cannot be permitted to take advantage of such omission as held by Hon'ble Supreme Court of India in the cases of Nirmala Anand Vs. Advent Corporation (P) Ltd, (2002) 5 SCC 481 and Eureka Forbes Vs. Allahabad Bank, (2010) 6 SCC 193 as under:

Nirmala Anand Vs. Advent Corporation (P) Ltd, (2002) 5 SCC 481:

“The Appellant has always been ready and willing to perform her part of contract at all stages. She has not taken any advantage of her own wrong. The Appellant is in no way responsible for the delay at any stage of the proceeding. It is the respondents who have always been and are trying to wriggle out of the contract. The Respondents cannot take advantage of their own wrong and then plead that the grant of decree of specific performance would amount to an unfair advantage to the Appellant”.

Eureka Forbes Vs. Allahabad Bank, (2010) 6 SCC 193:

“Maximum Nullus commodum capere potest de injuria sua propria has a clear mandate of law that, a person who by

manipulation of a process frustrates the legal rights of others, should not be permitted to take advantage of his wrong or manipulations. In the present case, Respondent Nos. 2 & 3 and the Appellant have acted together while disposing off the hypothecated goods, and now, they cannot be permitted to turn back to argue, that since the goods have been sold, liability cannot be fastened upon Respondent Nos. 2 & 3 and in any case on the Appellant."

Further, the Hon'ble Supreme Court has held that a mere obstacle to the execution of a contract does not obviate the obligations of the parties. In the context of Section 56 of the Indian Contract Act, 1956, Hon'ble Supreme Court in M/s Alopi Pershad & Sons Ltd. Vs Union of India, reported as AIR 1960 SC 588 has observed as under:

"21. [...]The Indian Contract Act does not enable a party to a contract to ignore the express covenants thereof, and to claim payment of consideration for performance of the contract at rates different from the stipulated rates, on some vague plea of equity. The parties to an executory contract are often faced, in the course of carrying it out, with a turn of events which they did not at all anticipate - a wholly abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution, or the like. Yet, this does not in itself affect the bargain they have made. If, on the other hand, a consideration of the terms of the contract in the light of the circumstances existing when it was made, shows that they never agreed to be bound in a fundamentally different situation which has now unexpectedly emerged, the contract ceases to bind at that point - not because the court in its discretion thinks it just and reasonable to qualify the terms of the contract, but because of its true construction it does not apply in that situation."

The observations in the aforesaid case were relied upon by the Hon'ble Supreme Court in judgment dated 11.04.2017 titled Energy Watchdog Vs CERC and Ors, reported as (2017) 14 SCC 80.

Keeping the above in view and considering the submissions and contentions of the parties, the Commission holds that the Termination Notice dated 09.03.2011 issued by Swasti to PTC is not valid and is unsustainable in the eyes of Law and sets aside the same.

As regards the prayer of PTC to direct Swasti to cancel the PPA dated 03.07.2009 entered into with UPCL, the Commission observes that Swasti signed the PPA with UPCL on 03.07.2009 without informing and/or seeking approval of PTC when a valid and subsisting PPA dated 24.08.2005 existed between them. Considering the same, so far as this Commission is concerned, the PPA dated 03.07.2009 entered into by Swasti with UPCL is void *ab initio*. Swasti is directed to specifically perform its obligations under the PPA dated 24.08.2005 signed with PTC. Swasti is further directed to apply for open access for transmitting the power on UPCL/PTCUL distribution/transmission system to CTU grid for onward transmission to the State of Punjab and report to this Commission within 7 days.

The prayers (a), (b) and (c) made in the petition by PTC are disposed of in terms of above. As regards prayers (d) and (e) regarding directions to Swasti to pay/reimburse PTC for any charge/claim which PSPCL may claim from PTC and to pay to PTC damages for the loss of business due to illegal termination

of the PPA, the Commission holds that the same are premature as no cause of action has arisen.

The petition is disposed of in terms of the above.

**Sd/-
(Anjuli Chandra)
Member**

**Sd/-
(S.S. Sarna)
Member**

**Sd/-
(Kusumjit Sidhu)
Chairperson**

Chandigarh
Dated: 15.01.2019

