

Before

# UTTARAKHAND ELECTRICITY REGULATORY COMMISSION

Petition No. 02 of 2020

**In the matter of:**

Application for adjudication of dispute between Beta Infratech Private Limited and Uttarakhand Power Corporation Limited in respect of termination of Power Purchase Agreement dated 01.03.2017 signed between the parties for Procurement of 107 MW of power on long term basis.

**In the matter of:**

M/s Beta Infratech Private Limited

... Petitioner

AND

**In the matter of:**

Uttarakhand Power Corporation Ltd.

... Respondent

CORAM

**Shri D.P. Gairola      Member (Law)**

**Date of Order: October 07, 2020**

The Order relates to the Petition for adjudication of dispute between Beta Infratech Private Limited (hereinafter referred to as "M/s BIPL" or "the Petitioner") and Uttarakhand Power Corporation Limited (hereinafter referred to as "UPCL" or "the Respondent") in respect of termination of Power Purchase Agreement dated 01.03.2017 signed between parties for procurement of 107 MW of power on long term basis.

## **1. Background and Petitioner's submissions**

- 1.1 A Petition dated 22.05.2019 was filed by M/s BIPL under Section 86(1)(f) of the Electricity Act, 2003, read with Regulation 9, 10 and 20(1) of the Uttarakhand Regulatory Commission (Conduct of Business) Regulation, 2014 for adjudication of dispute between M/s BIPL and Uttarakhand Power Corporation Limited in respect of termination of Power Purchase Agreement dated 01.03.2017 signed between the parties for Procurement of 107 MW of power on long term basis.

- 1.2 The Petitioner later filed an amended Petition dated 30.08.2019, amending its original Petition dated 22.05.2019. The amended Petition was accepted by the Commission and the ongoing discussion in the matter have been made keeping in view the original Petition dated 22.05.2019 filed by M/s BIPL as amended vide its amended Petition dated 30.08.2019.
- 1.3 The Petitioner submitted that it is a Private Limited Company incorporated under the Companies Act, 1956 having its Registered Office at B-4/45, Safdarjung Enclave, New Delhi-110029, and is engaged in the business of generation of power and has set up a 225 MW gas based power plant at Village Mahua Khera Ganj Tehsil Kashipur, District Udham Singh Nagar, Uttarakhand.
- 1.4 The Petitioner further submitted that the present Petition is within the specified period of limitation and Hon'ble National Company Law Tribunal, New Delhi, Principal Bench ("NCLT"), under Section 7 of the Insolvency and Bankruptcy Code, 2016 ("IBC"), in the matter of "Punjab National Bank v. Beta Infratech Private Limited (C.P. No. IB-117(PB)/2019)", vide its judgment dated 14.06.2019 has held that the Financial Creditor therein had succeeded to establish a case of Corporate Insolvency Resolution Process ("CIRP") against the Corporate Debtor i.e., M/s BIPL and appointed Mr. S.V. Satyanarayana, resident of Pearl-201, Sri Sairam Manor, Pragathi Nagar, Yousufguda, Hyderabad-500045 as Insolvency Resolution Professional ("IRP") and they had sought permission from the IRP to proceed with this ongoing Petition.
- 1.5 It has also been submitted that the power generation plant developed by M/s BIPL is an asset for the State of Uttarakhand and is not merely a private property and in corporate insolvency resolution process (CRIP) initiated under the IBC, 2016 regime it is of fundamental importance that the Power Purchase Agreement be not wrongfully terminated particularly since the moratorium under IBC, 2016 has become effective as of 14.06.2019.
- 1.6 It has also been submitted that policy direction was issued by the GoU vide Order No. 456(2)/ 1/2015-14(03)/160/2010 dated 28.04.2015, authorizing UPCL to purchase the power as per terms and conditions of the PSDF Scheme subject to the execution of Power Purchase Agreement ("Policy Direction"). Further, the MoP had issued Office Memorandum No. 4/2 /2015-TH-I to introduce the "Scheme for Utilisation of Gas Based Power Generation Capacity" for the financial years 2015-16 and 2016-17 ("PSDF Scheme"), for stranded gas based plants along with a "List of Stranded Gas Based Capacity", and the Petitioner

company had been given the allocation of e-bid RLNG for generation of power and to sell such power to the discoms, as per terms and conditions specified under the PSDF Scheme, through a Power Purchase Agreement.

- 1.7 It further submitted that on 19.11.2016, i.e. almost after an year of submission of draft PPA by M/s BIPL, UPCL issued LoI to M/s BIPL, confirming its acceptance to purchase 107 MW power (net basis) from the Petitioner's plant at Kashipur and thereafter it submitted that a Petition was filed by UPCL before the Commission seeking approval of the draft PPA to be executed with M/s BIPL, and pursuant to Commission's Order dated 17.02.2017, M/s BIPL and UPCL executed the PPA on 01.03.2017 for procurement of 107 MW of power on long term basis from 225 MW (ISO) Gas Based Combined Cycle Power Project of the Petitioner located in Kashipur, Uttarakhand.
- 1.8 Further, being the Seller it had agreed to sell the contracted capacity of 107 MW of power on round the clock basis upon payment of tariff, and UPCL was mandated to pay the monthly bill on or before the due date, comprising of the tariff for every Contract Year, determined in accordance with Clause 9 and Schedule A of the aforesaid PPA and as per Clause 17.3.1 of the said PPA ruled that any dispute arising from claim for any change in or determination of the tariff or any matter related to tariff or claims which relate to change in tariff or if determination of such claim could result in change in tariff, such dispute would be adjudicated by Appropriate Commission. Further, Clause 17.3.2 states that any other dispute which is not covered by Clause 17.3.1, or where any dispute referred to Appropriate Commission was to be settled through arbitration, as per Arbitration and Conciliation Act, 1996 read with Electricity Act, 2003 and UERC (Conduct of Business) Regulations, 2014.
- 1.9 Petitioner further submitted that initially the Scheduled Delivery Date for supply of power as per the PPA was 16.03.2017, however, UPCL on 21.03.2017 issued a letter requesting M/s BIPL to provide CoD of the Petitioner's gas based power plant, to which the Petitioner confirmed the same to be as September 2017.
- 1.10 It has also been submitted that the funds for their Project was to come from a consortium of 5 banks which was led by Punjab National Bank. On 22.08.2017 and it had issued simultaneous letters to UPCL, and the Hon'ble Chief Minister, GoU requesting to grant extension on commissioning of the power plant from September 2017 to March 2018, as there was delay in receipt of funds from the consortium banks. It further submitted that through

the aforesaid letters, it also informed the Hon'ble Chief Minister and UPCL respectively that the work at project site was continuing by investment of equity funds.

- 1.11 The Petitioner wrote another letter to UPCL on 14.09.2017 on the above matter seeking extension on commissioning of the power plant from September 2017 to March 2018, informing that the delay in receipt of funds from the consortium of 5 banks still persisted, however, no reply was received from UPCL for the same. It submitted that, subsequently, there was shortage of raw material for balance civil works and finishing works of the Project, as mining in Uttarakhand was closed due to heavy rain. Furthermore, on account of delay in receipt of funds for the project, from consortium of the 5 banks, the commissioning work could not be progressed as per the scheduled date. On 28.09.2017, it issued another letter to the Hon'ble Chief Minister, GoU seeking permission to grant extension on commissioning of the power plant from September 2017 to March 2018 on account of delay.
- 1.12 UPCL reverted to M/s BIPL's concern on extension of time for commissioning of the plant on 08.11.2017, stating ostensibly that 'Event of Default' under Clause 16 of the PPA would occur if the supply of power does not commence upto 15th March 2018, i.e. after expiry of 12 months from the Scheduled Delivery Date as mentioned in the PPA, i.e., 16.03.2017, and that UPCL could consider exercising the power for extension/termination of PPA, as per the conditions prescribed in PPA and progress of the plant, only after the Event of Default as per conditions of PPA.
- 1.13 It is also submitted that Petitioner was diligently working towards the completion of the Project, but inspite of all the efforts, the targeted commissioning date of the its plant could not be made feasible due to non-receipt of funds from the consortium banks. It submitted that it had an agreement with the consortium of the banks to fund the completion cost proportionately and all requisite steps were taken to invest the equity needed for completion of the banks. It further submitted that, UPCL vide letter dated 13.03.2018, and the Commission vide letter dated 07.05.2018, were informed that, despite agreeing to fund the project there had been inordinate delay in the sanctions due to the illogical and irrational decision of one member of the consortium banks, i.e. Vijaya Bank, which had wrongfully declared Petitioner company as willful defaulter without any justification and without hearing the Petitioner Company and after regular follow up on this issue and challenging this decision in the Court of law, Vijaya Bank finally cleared M/s BIPL's name from the list

of willful defaulters, however, this action of Vijaya Bank had delayed the sanction of funds from all other banks as well since other banks could not take up the matter to their Board till the time the Petitioner company's name was not cleared from the list of willful defaulters. Hence, an extension till March 2019 was sought from UPCL vide letter dated 13.03.2018, since the inordinate delay in commissioning the plant was beyond its control.

1.14 UPCL issued 'Buyers Preliminary Default Notice' under clause 16.3 (i) of the PPA, for continuation of 'Seller Event of Default' under clause 16.1 of PPA vide its letter dated 14.06.2018. The Petitioner subsequently requested for a meeting with UPCL to give a detailed presentation of the case where no delay in commissioning had been caused due to default by the Petitioner company, and also requested UPCL for extension of CoD upto March 2019, considering the fact that it had made huge investment in the plant through equity infusion worth Rs. 400 Crore and debt from the consortium of the banks. A meeting was held on 07.08.2018 with UPCL for discussion in the matter, and the representative of the Petitioner company elaborated the reasons for delay in commissioning as there being no fault of its own, since, the inordinate delay in achieving the CoD was beyond its control. UPCL was explained the following:

- (i) The position of the power plant was same as was in March 2012 as no work could have been done afterwards;
- (ii) The plant of BETA was ready for testing/trial since March 2012, but, due to GAIL's failure of supply/transportation of gas, the project is suffering, huge money had been invested in the project through equity infusion and loan from the consortium of the banks;
- (iii) The consortium banks did not sanction the balance funds to complete pre-commissioning/commissioning activities due to tightening of provisioning of funding by RBI and consequently by banks for the projects which are Non-performing asset (NPA).

Hence, under the above-mentioned circumstances it requested for extension till 15.03.2019, however, the committee of UPCL observed that, M/s BIPL was wrongfully relying on issue of grants to be received from the banks and that there was no provision in PPA to consider the non-sanctioning of bank loan under the purview of Force Majeure.

- 1.15 It once again explained its stand to UPCL vide letter dated 13.08.2018, and brought it to the notice of UPCL that:
- (i) M/s BIPL had made full efforts for commencement of supply of energy to UPCL before March 2018, but, could not succeed as banks did not honor their commitment since September 2015 to sanction Rs. 60 Crore to complete pre-commissioning/ commissioning activities;
  - (ii) The reason for delay in commissioning was beyond the control of M/s BIPL, and thus for all practical reasons fall in the definition of Force Majeure as defined in Clause 11 (ii) under the PPA;
  - (iii) PPA extension by UPCL had no downside to UPCL, however, by termination of PPA, UPCL would not gain anything, rather the project after commissioning would help address shortage of supply in the State on long term basis being a project commissioned in the State.
- 1.16 Subsequently UPCL issued the termination notice dated 04.02.2019 to the Petitioner company terminating the PPA signed between M/s BIPL and UPCL. It again tried to seek extension of commissioning of gas till December 2019 vide letter dated 05.03.2019, in view of the NCLT proceedings initiated by banks being the matter of “Punjab National Bank vs. Beta Infratech Pvt. Ltd. ((IB)-117(PB)/2019)”, to find a resolution and finalizing a resolution plan through bidding for this project, and that the case of M/s BIPL falls under Clause 11(ii) of PPA being force majeure as the event was beyond the control of affected party. It further informed UPCL that the PPA was signed with the approval of the Commission, and thus, the Petitioner should have been given a chance to present its case before the Commission, for the wrongful termination of the PPA by UPCL.
- 1.17 Further it has been submitted that, UPCL issued Office Memorandum (Letter No. 859/ UPCL/Com/GG-4/MD) on 19.03.2019 confirming termination of PPA dated 01.03.2017, and also decided to claim inapplicable pre-estimated damages against M/s BIPL under Clause 16.5 of the PPA. In reply to aforesaid Office Memorandum of UPCL, it issued a letter dated 15.04.2019 to UPCL refuting the claims of UPCL, and also informing UPCL that the termination of the PPA vide Office Memorandum dated 19.03.2019 was arbitrary and wrong as the PPA is not merely a private contract entered into between UPCL and M/s BIPL but is a statutory contract that is governed by the provisions of the Electricity Act, 2003, which

could not be terminated unilaterally.

- 1.18 It had submitted to UPCL that the grounds on which the PPA is terminated are invalid and even contractually, UPCL does not have a right to terminate the PPA under the specific terms of the PPA. The said Office Memorandum did not duly consider the relevant and applicable facts, which clarifies that the inordinate delay in commissioning of Petitioner's gas based power plant was beyond its control and thus qualifies for 'Force Majeure' under clause 11.1 (ii) of the PPA and under Article 11.4 of the PPA, and M/s BIPL is not liable for any failure or delay in performance of its obligations that has been caused or contributed to by one of more events of Force Majeure or their effects or by any combination thereof. Therefore, in relation to the obligation to commence supply of power as on the Scheduled Delivery Date, the same has stood automatically extended by the time duration of the delay caused by the Force Majeure events and the terms of Article 16.1(ii) are therefore not applicable, and in this background, UPCL was requested by M/s BIPL to review and withdraw the aforesaid Office Memorandum, otherwise, a dispute under the terms of Clause 17.3.2 of the PPA would arise and the same would be referred to the Commission.
- 1.19 UPCL issued a notice dated 22.04.2019 claiming pre-estimated damages of Rs. 10.70 Crore, ostensibly as per Clause 16.5.3 of PPA dated 01.03.2017 consequent to termination of the said PPA. UPCL also did not give any regard to the letter dated 15.04.2019 issued by its legal counsel and refuted the tenability of the Petitioner's claim, upholding the Buyer's Preliminary Default Notice, Termination Notice and Office Memorandum dated 19.03.2019, vide its letter dated 02.05.2019. In response to the same, counsel for M/s BIPL issued a reply letter dated 13.05.2019 to UPCL's letter dated 22.04.2019 and 02.05.2019, and clarified that there is no Seller's Event of Default and there has been no valid termination of the said PPA, and that Office Memorandum dated 19.03.2019 is ultra vires the PPA and has no legal effect.
- 1.20 It is also submitted that the definition of Force Majeure under clause 11.1 (ii) of the PPA clarifies that any act which is beyond the reasonable control of the affected party directly or indirectly, results in Force Majeure. Clause 11.1 (ii) of the PPA reads as follow: *"Force Majeure means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have*

*been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:..."*

- 1.21 The list of events and circumstances specified under definition of Force Majeure, which leads to the event of Force Majeure is an inclusive list and not exclusive, and thus, it stands clear that the sequence of events which led to non-achievement of Commercial Operation Date was beyond the control of the Petitioner. The 42<sup>nd</sup> Standing Committee Report of the Lok Sabha on Energy ("Report") has also observed at Part-II, Cl. 5 of the Report that present condition of the gas-based power plants is largely due to non-fulfillment of commitment regarding supply of domestic gas by the Government, and thus, it is on the Government only to explore all possibilities to revive these stranded gas based plants. The 42<sup>nd</sup> Standing Committee further noticed at Part-II, Cl. 6 of their Report that the lenders, i.e. the banks just want to shrug off their responsibilities from this national crisis by referring the stressed plants to NCLT for the investments made by them in these gas plants, which is not an acceptable move as the Ministry and the banks/lenders are the people who are responsible for this crisis. It submitted that since the aforesaid Committee is of the view that the non-availability of gas was not under the control of the stranded gas based power plants, which includes M/s BIPL as well, the default being beyond the control of the Petitioner, therefore, results to the event Force Majeure. It further submitted that the 42<sup>nd</sup> Standing Committee Report of Lok Sabha is a privileged document and is binding on the Commission.
- 1.22 The cause of action arose when the Respondent/UPCL arbitrarily and unilaterally terminated the aforesaid PPA even after the Petitioner company's representation to UPCL explaining that the cause of undue delay in commissioning was beyond its control, which was even corroborated by the finding of the Lok Sabha Committee in its Report at Part-II, Cl. 1, and that M/s BIPL had endeavored to make full efforts for commencement of supply of power to UPCL before March 2018.

It further submitted that the cause of action arose when without paying any due regard to M/s BIPL's request, UPCL issued Office Memorandum raising fictitious and illegal allegations of default against the Petitioner company, and confirming termination of PPA dated 01.03.2017, and also decided to claim inapplicable pre-estimated damages, when the said PPA is not merely a private contract but is a statutory contract entered into pursuant to a policy direction of the Government of Uttarakhand and UPCL does not have the

jurisdiction or power or right under law to unilaterally terminate the same and The cause of action further arose when M/s BIPL's counsel's request for withdrawal of the Office Memorandum was not considered by UPCL on the above-discussed grounds, knowing that otherwise, a dispute under the terms of Clause 17.3.2 of the PPA would arise and the same would be referred to the Commission.

1.23 The following grounds of relief in its Petition was submitted by the Petitioner:

- The aforesaid PPA being a statutory contract, which has been entered into pursuant to a specific policy direction issued by the GoU, and the Order of the Commission, therefore, the purported termination of the PPA is invalid and ineffective, as UPCL being a government company is bound by the policy directions issued by the GoU.
- Since the termination notice issued by the UPCL was disputed by the corporate debtor it is not a termination that had come into effect before the CRIP proceedings under IBC, 2016 had been initiated, and the purported wrongful termination of the said PPA stands suspended.
- In light of the findings of the 42<sup>nd</sup> Standing Committee of the Lok Sabha on Energy which provided that the reason of becoming a stranded power plant was outside the control of the Petitioner, there cannot be any reason or ground for termination of PPA by UPCL.
- A dispute has arisen under the terms of Clause 17.3.2 of the PPA, as Clause 17.3.1 of the said PPA rules that any dispute arising from claim for any change in or determination of the tariff or any matter related to tariff or claims which relate to change in tariff or if determination of such claim could result in change in tariff, such dispute would be adjudicated by Appropriate Commission, and Clause 17.3.2 states that any other dispute which is not covered by Clause 17.3.1, or where any dispute referred to Appropriate Commission was to be settled through arbitration, the procedure specified in Arbitration and Conciliation Act, 1996 read with Electricity Act, 2003 and UERC (Conduct of Business) Regulations, 2014 would be followed.

1.24 The Commission held a hearing in the matter on 22.10.2019, wherein M/s BIPL submitted before the Commission that the current Member (Technical) of the Commission was part of the Committee formed by UPCL, while he was serving as Director (Projects) therein, which

approved the termination of PPA between UPCL and M/s BIPL, and, therefore, he should not be a part of the bench hearing the current proceedings in the matter.

1.25 The Commission, in this regard vide its Order dated 15.11.2019 observed as under:

*“In this regard, the Commission is of the view that though Member (Technical) (previously Director (Projects), UPCL) has joined the Commission it would not affect the unbiased working of the Commission which is conducted under the Act and prevalent Regulations, however, since the Petitioner has raised an objection on his hearing the proceedings, hence, in order to give a fair opportunity to both the parties and avoid any conflict of interest that may arise in the matter, the Commission has decided that Member (Technical) may recuse himself from the proceedings related to the present matter. As a result of the same, the future proceedings in this matter shall be heard by a single Member Commission, comprising of Member (Law), UERC.”*

1.26 The Commission further held a hearing in the matter on 28.01.2020, and admitted the aforesaid Petition vide its daily Order dated 04.02.2020. The Commission also directed the Respondent to file a detailed reply on the merits of the Petition with a copy to the Petitioner and directed the Petitioner to file its rejoinder on the same.

1.27 The Respondent's comments, Petitioner's reply, and the Commission's views on the same have been discussed at subsequent paras of this Order.

## **2. Respondent's submission and Petitioner's reply thereon**

2.1 The Respondent, i.e. UPCL vide its reply dated 28.01.2020, 25.02.2020 and 22.06.2020 submitted its comments on the merits of the Petition/amended Petition. Subsequently, UPCL vide its submission dated 15.07.2020 amended its reply dated 25.02.2020 filed on the merits of the Petition, to incorporate/include counter claim to the Petition. UPCL vide its letter dated 16.09.2020 again filed its rejoinder on the reply submitted by the Petitioner. However, in its reply UPCL has reiterated the submissions already made in its previous submissions. Further, this back and forth replies/rejoinders cannot be allowed as in that case it will be an unending exercise.

2.2 The Petitioner, i.e. M/s BIPL vide its rejoinder dated 12.03.2020 and 17.07.2020 submitted its reply on the comments filed by UPCL on the merits of Petition filed by the Petitioner. Further, the Petitioner vide its submission dated 10.08.2020 submitted its reply on the Respondent's submission dated 15.07.2020, wherein UPCL amended its reply dated 25.02.2020 incorporating/including counter claims to the Petition.

2.3 The Respondent's submission, alongwith the Petitioner's comments on the same is dealt with in the following paras of the Order. The Commission has taken on record the amended reply submitted by the Respondent vide its submission dated 15.07.2020.

2.4 UPCL submitted that it filed the Petition before the Commission seeking approval of the draft PPA to be signed with M/s BIPL (107 MW) for 25 years, and pursuant to the approval accorded by the Commission vide Order dated 17.02.2017 on the draft PPA, UPCL signed the PPA with M/s BIPL on 01.03.2017. UPCL submitted that as per the PPA, Schedule Delivery Date meant as follows:

*"Scheduled Delivery Date" shall mean the scheduled date i.e. 16th March 2017 on which the Seller commences firm supply of 107 MW of power from its gas based plant in accordance with the Agreement;"*

Further, Clause 16 of the PPA reads as under;

*"16:- EVENTS OF DEFAULT AND TERMINATION*

*16.1 Seller Event of Default*

*The occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by Buyer of its obligations under this Agreement, shall constitute a "Seller Event of Default":*

...

*the failure to commence supply of power from the Project to the Buyer up to the Contracted Capacity, even after expiry of twelve(12) months from the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, except where an extension is permitted under this Agreement;"*

UPCL submitted that from perusal of the facts and clauses of the PPA, it is abundantly clear that the event of default occurred on the part of the seller, i.e. M/s BIPL due to non-commencement of supply even after expiry of 12 months from the scheduled delivery date, and, accordingly, UPCL vide letter no. 2395/ UPCL/COM/GG-04/CE dated 14-06-2018 served the "Buyer Preliminary Default Notice" on the Petitioner, i.e. M/s BIPL.

It submitted that in response to the notice, M/s BIPL informed UPCL that the delay in CoD of the plant was for reasons beyond their control and the plant is targeted to be commissioned by December 2018, and huge investment has been made in the plant through

equity infusion and debt from a consortium of five banks led by PNB. It further submitted that M/s BIPL requested for a meeting with UPCL to give a detailed presentation of their case for extension of CoD upto March 2019.

In view of the provisions mentioned in the PPA, and request of M/s BIPL for arranging a meeting, UPCL constituted a committee for bilateral discussions with M/s BIPL regarding non-commissioning of its 107 MW Gas Plant by 16.03.2018, and M/s BIPL informed the Committee in the meeting that its plant could not commence supply of power by 15.03.2018 because of the following reasons:-

- (i) The position of power plant was same as was on March 2012. No work has been done afterwards.
- (ii) The plant was ready for testing/trial since March 2012. Due to GAIL's failure of supply/transportation of gas, the project is suffering till date. Huge money has been invested in the project through equity and loan from consortium of five banks.
- (iii) The banks did not sanction the balance funds to complete pre-commissioning/ commissioning activities due to tightening of provisioning of funding by RBI and consequently by banks for the projects which are NPA.
- (iv) M/s BIPL also requested UPCL to extend the date of commencement of supply by March 2019.

The Committee constituted by UPCL observed the following:

- (i) M/s BIPL instead of giving any bonafide justification for the delay in commissioning of the plant was relying upon the issue of grants to be received from the banks.
- (ii) There was no provision in the PPA to consider non-sanctioning of bank loan under the purview of Force Majeure.
- (iii) M/s BIPL had already sought 2 extension for commencement of supply of power, one from 16th March 2017 to September 2017 and another from September 2017 to March 2018, however both extensions were already permissible as per provisions of PPA dated 01.03.2017.
- (iv) M/s BIPL did not submit any authentic document with regard to its tie up with GAIL for arrangement of gas.

(v) As on date neither domestic gas nor PSDF support was available to the Gas projects.

The above Committee after discussion concluded as below:

- (i) That M/s BIPL had reiterated old requests and nothing has happened on ground level so far.
- (ii) That UPCL was not in a position to consider the statements made by M/s BIPL regarding its efforts of getting loans and arrangement of gas.
- (iii) As per PPA the Scheduled delivery date was 16.03.2017. In case of failure to commence supply by 16.03.2017 the provisions of PPA permitted M/s BIPL to commence supply after one year, i.e. upto 15.03.2018. However, M/s BIPL could not adhere to its earlier commitment/obligation to commence supply from 15.03.2018.
- (iv) That M/s BIPL did not make sincere efforts to commence power from its gas plant.

The Committee in view of facts and circumstances, wherein M/s BIPL could neither commence generation from its Gas Power Plant from 16.03.2017 nor from 15.03.2018 (i.e. even after elapse of one year period permitted under PPA) observed that the extension of the COD to M/s BIPL should not be permitted and PPA dated 01.03.2017 signed between UPCL and M/s BIPL may be terminated keeping in view the interest of UPCL & consumers of the State, and UPCL vide letter dated 04.02.2019 issued "Termination Notice" to M/s BIPL.

M/s BIPL in response to Termination Notice reiterated old facts and further requested for extension of commencement of supply upto Dec 2019. Since the Petitioner could neither commence generation from its Gas Power Plant from 16.03.2017 nor from 15.03.2018 (i.e. even after elapse of one year period provided under the agreement), hence, in view of the default committed by M/s BIPL with regard to non-commencement of supply of power to UPCL as per the provisions of the PPA dated 01.03.2017 and in light of "Buyer Preliminary Default Notice" as per Clause 16.3(i) and "Termination Notice" as per Clause 16.3(iv), the PPA dated 01.03.2017 executed between M/s BIPL and UPCL for procurement of 107 MW power on long term basis from 225 MW (ISO) Gas based Combined Cycle Power Project, was rightly terminated by UPCL in terms of the provisions of clause 16.3 (v).

UPCL also issued a claim notice dated 22.04.2019 upon the Petitioner to pay a sum of Rs. 10.7 Crore (Rs. 10 Lakh per MW) in terms of Clause 16.5.2 of the PPA dated 01.03.2017

as genuine pre-estimated damages within 30 days from the receipt of the notice.

The Petitioner in response to the same submitted that it was to be noted that initially the SDD for supply of power under the said PPA was 16.03.2017, however, UPCL on 21.03.2017 issued a letter requesting M/s BIPL to provide Date of Commercial Operation of the Petitioner's gas based power plant, to which the Petitioner vide letter date 24.03.2017 confirmed the Date of Commercial Operation to be September 2017. It submitted that, thereafter, any inordinate delay in commissioning of its gas based power plant was due to reasons beyond its control and the same qualifies for 'Force Majeure' under clause 11.1(ii) of the PPA and it is not liable for any failure or delay in performance of its obligations that has been caused or contributed to by one or more events of Force Majeure or their effects or by any combination thereof, and therefore, in relation to the obligation to commence supply of power as on the SDD, the same stood automatically extended by the time duration of the delay caused by the Force Majeure events and the terms of Article 16.1(ii) (Seller's Event of Default) are, therefore, not applicable and in any event since Article 16.1(ii) takes into account extension of time permitted under the PPA, the said provision is not applicable to the present fact.

It also submitted that Petitioner never agreed to the observations of the Committee constituted by UPCL for bilateral discussion in the matter, and did not give its consent and thus, the said MoM issued by UPCL was not signed by any party. The Petitioner submitted that as there is no valid termination of the PPA, therefore the provisions of Clause 16.5.3 of the PPA under which pre-estimated damages amounting to Rs. 10.70 Crore has been claimed by UPCL vide its communication dated 22.04.2019 is not applicable to the present matter and any such demand is invalid and without any basis in law or the provisions of the PPA.

- 2.5 UPCL submitted that the Petitioner has wrongly represented that any draft PPA was pending before the Respondent for about one year, and the Petitioner only moved a proposal for entering into PPA, which it is trying to project as a draft PPA.

In response to the same, the Petitioner submitted that its letter dated 08.10.2015 to UPCL clearly records that M/s BIPL had enclosed a draft PPA for procurement of power by UPCL on long term basis. Later, the Petitioner sent another letter on 01.12.2015 to UPCL, reminding UPCL of providing clarifications on the draft PPA, and further, vide its letter dated 24.09.2016 and 29.09.2016, the Petitioner requested UPCL to forward the draft PPA to

the Commission for early signing, therefore, initially the Petitioner had moved a proposal in the form of draft PPA only.

- 2.6 UPCL submitted that the Petitioner knowingly did not make any reference of clause 17.2 of the Power Purchase Agreement, which pertains to amicable settlement. It further submitted that the parties as per clause 17.2.1 of the PPA are required to give a written notice containing a description of dispute, grounds for such dispute and all written material in support of the claim, however, the Petitioner has failed to raise any dispute, and, hence, the provisions of Section 86(1)(f) of Electricity Act, 2003 are not attracted here because there is no dispute which is required to be adjudicated by the Commission. UPCL also submitted that the correspondences made by the Petitioner against the letter of termination dated 04.02.2019 do not fulfill the requirement of the aforesaid clause.

In response to the same, the Petitioner submitted that it was the Respondent who was required to have raised a dispute prior to issuing the arbitrary and invalid Office Memorandum to terminate the PPA, and that the Respondent failed to duly consider the provisions of the PPA as the dispute on whether termination under Clause 16.3(i) could have been taken recourse to had already been raised by the Petitioner. Further, the provisions of Force Majeure under Clause 11.4.1 of the PPA were applicable, and that the Petitioner had followed the prescribed procedure under Clause 17.2 of the PPA whereas the Respondent failed to do so, the Petitioner's counsel had issued a notice/letter dated 15.04.2019 to UPCL in response to UPCL's Office Memorandum dated 19.03.2019 terminating the PPA, giving description, grounds of the dispute, other written submissions and contractual provision for supporting its claim for not terminating the PPA. It further submitted that it requested UPCL to review and withdraw the Office Memorandum, and UPCL responded vide letter dated 02.05.2019 alleging that the submission made by the Petitioner's counsel were against the intent and spirit of the PPA and, hence, not tenable, however, UPCL refused to withdraw the Termination Notice, and the Office Memorandum, and also refused to settle the dispute amicably despite all the efforts made by the Petitioner to reach an amicable settlement. Aggrieved by UPCL's conduct, the Petitioner exercised its right under Clause 17.3.2 of the PPA and the applicable law to refer the dispute between the Parties to the Commission.

- 2.7 UPCL submitted that the Petitioner is intentionally trying to misrepresent by stating that initially the Schedule Delivery Date (SDD) for supply of power under the PPA was

16.03.2017. The PPA had fixed a Schedule Delivery Date (SDD) and no variation was permitted in it. The Petitioner failing to supply power or not supplying power at all in accordance with the estimate made by the Respondent as per Schedule Delivery Date (SDD), the whole planning of UPCL regarding availability of power would have been hampered, and the letter dated 21.03.2017 of UPCL can in no way be interpreted to mean that the Schedule Delivery Date (SDD) had been changed, and the word CoD, i.e. Commercial Date of Operation in the letter in place of SDD was used to imply as to when the Petitioner would commission the power plant.

In response to the same, the Petitioner submitted that its obligation to commence supply of power as on the SDD, stood automatically extended by the time duration of the delay caused by the Force Majeure events, and the terms of Article 16.1(ii) are, therefore, not applicable. Although there was no Seller's Event of Default but even plain readings of the Clause 16(ii) clarifies that the PPA permits variation or extension of the SDD and in the present case the SDD was automatically extended due to Force Majeure events.

The Petitioner submitted that UPCL's averment that, due to non-supply of power in accordance with the SDD, "the whole planning of UPCL regarding availability of power would have been hampered" is baseless, wrong and denied, and UPCL is only making speculative and baseless assertions without substantiating the same with material facts or documents.

2.8 UPCL submitted that vide its letter dated 08.11.2017 it had clarified the purport of clause 16 of the PPA informing the Petitioner that if the supply is not made within 12 months from Schedule Delivery Date (SDD), UPCL may consider exercising the power as per the PPA, and the Petitioner was fully aware that as per the PPA, it only had 12 months and within that time UPCL could not take any decision, therefore any decision regarding PPA could have been taken only after expiry of 12 months, i.e. after 15.03.2018.

It also submitted that the Petitioner did not disclose as to why the funds were not released to the Petitioner company by the consortium of banks, and also the alternative efforts made for arranging the funds and the reasons why the Petitioner could not infuse equity because it appears that the alleged amount of additional funds required was comparatively very small.

UPCL also submitted that the Petitioner has stated to have informed the Hon'ble

Chief Minister, GoU, that the work was still continuing by investment of equity funds, which clearly shows that neither the plant was ready nor the Petitioner was in a position to commission the plant when the PPA with the Respondent was entered into. UPCL further submitted that the Petitioner has wrongly represented that due to reasons beyond its control, it was not being able to commission the plant.

In response to the same, M/s BIPL submitted that UPCL's averment that it could have taken any decision regarding the termination/extension of the PPA only after expiry of 12 months, i.e after 15.03.2018 is false and frivolous and such frivolous statement was issued by UPCL vide its letter dated 08.11.2017 under the influence of the legal opinion of UPCL's counsel. It also submitted that it had provided the reasons for delay in receipt of funds in the amended Petition, and that it had made all the efforts to ensure timely commencement of supply of power and had in fact infused equity of around Rs. 400 crores to continue the work at site, and has always informed UPCL about the progress at the site.

- 2.9 UPCL submitted that there are two other Gas plants namely M/s SEPL and M/s GIPL who had also entered into PPA with UPCL and it is a known fact that both started supplying power to UPCL as per the terms and conditions of their PPAs and are still supplying power to UPCL even after lapse of PSDF scheme. The support through the PSDF scheme was for a very short duration and the existence of any such scheme of the Govt. is totally irrelevant in the present scenario where the PPA with the Petitioner is for a long term and the responsibility to make firm supply lies upon the Petitioner irrespective of the fact that the Govt. gives any support to its plant or it does not.

It further submitted that, the Petitioner is talking about civil works which clearly shows that the plant was never ready and on misrepresentation of the facts and non-disclosure of material information, the Petitioner fraudulently induced the GoU and the Respondent to enter into the PPA.

In response to the same, M/s BIPL submitted that UPCL's averment that two other gas plants namely M/s SEPL and M/s GIPL had entered into PPA with UPCL and are still supplying power to UPCL even after lapse of PSDF Scheme clearly shows the bias and arbitrary action on part of the Respondent. The PPA of the Petitioner is not linked with that of SEPL or GIPL and the fact of signing of PPA with M/s SEPL and M/s GIPL is not known to the Petitioner.

It also submitted that the PSDF Scheme is of utmost relevance to the present fact and circumstances because the Petitioner had been given the allocation of e-bid RLNG for generation of power and to sell such power to the discoms, as per terms and conditions specified under the PSDF Scheme, through a Power Purchase Agreement, and it cannot be alleged by the Respondent that any such scheme of the Govt. is totally irrelevant in the present scenario where the PPA is for long term and responsibility to make firm supply lies on the Petitioner. It further denied that the contention of UPCL that the Petitioner fraudulently induced GoU to enter into the PPA in the light of the fact that the Petitioner always informed UPCL about the progress at the site from time to time and did not conceal any facts while signing the PPA.

- 2.10 UPCL submitted that the Petitioner has submitted that the statement made in UPCL's letter dated 08.11.2017, that event of default under clause 16 of PPA would occur if supply of power is not commenced upto March'18 and UPCL can consider exercising the power for extension/termination of PPA, were issued under the influence of legal opinion, whereas the said letter nowhere mentions about any legal opinion, and even otherwise obtaining legal opinion and ensuring legal compliances and understanding legal complications beforehand only shows the caution exercised and makes the statement even more validated.

In response to the same, M/s BIPL submitted that the fact that the letter dated 08.11.2017 from UPCL to the Petitioner does not anywhere mention about the legal opinion cannot by any means imply that UPCL did not issue the said letter under the influence of the legal opinion provided by UPCL's counsel.

- 2.11 **UPCL submitted that it is only to be seen whether the right of termination has been rightly exercised by the Respondent and whether UPCL is bound to purchase power from the Petitioner even when the Petitioner has failed to comply with the conditions under which the parties entered into an agreement for purchase of power.** It further submitted that the Petitioner has not stated as to under what provisions above extension for the date of Commercial Operation has been sought, as PPA does not provide for any extension of time as claimed by the Petitioner.

In response to the same, M/s BIPL reiterated the submissions already made in the Petition and submitted that the Respondent is not being forced to agree to terms not contemplated or written down at the time of entering of the PPA, and the Petitioner has

clarified in the amended Petition, the circumstances and provision under which extension can be permitted and that the Respondent is merely making baseless assertion and averments that PPA does not provide for any extension of time.

- 2.12 UPCL submitted that it issued 'Buyer's Preliminary Default Notice' due to failure of the Petitioner in fulfilling its contractual obligation to supply the contracted capacity of 107 MW to UPCL before the expiry of the timelines as provided in PPA dated 01.03.2017 and due to occurrence of 'Seller Event of Default' as provided in related provisions of the PPA.

Availability of power and power procurement plan are the essential and important aspects for the Respondent and no generator can continue to delay its commitment and seek extension(s) against the terms and conditions agreed upon between the parties, and it is neither reasonable nor just for the Petitioner to not commence supply of power for such long duration. The Petitioner had almost an year to make available power supply, which is a sufficient time for any plant, and especially for the Petitioner who claimed readiness of its plant for testing and trial way back in March 2012.

The allegation of the Petitioner that it was GAIL's failure of supply/transportation due to which project is suffering is completely wrong as can be seen from the fact that two more gas based power projects with which UPCL signed Power Purchase Agreements at the same time have been continuously supplying power by off-taking gas from GAIL/IOCL, which shows that there were no transportation and gas supply related issues.

In response, the Petitioner again reiterated its submissions made in this regard in its Petition and written submissions and submitted that UPCL issued the Default Notice regardless of its consistent efforts of making UPCL consider the fact that the inordinate delay in achieving the Date of Commercial Operation was beyond its control, and averment of the Respondent that more than sufficient time was there for a plant which was ready for testing way back in March 2012 is baseless and irrelevant and mere misrepresentation of facts.

- 2.13 UPCL submitted that the Petitioner never approached the Commission even when its request for extension was categorically denied which is sufficient to show that the Petitioner was aware and accepted that he could not claim extension as a matter of right. Further, there is no provision in the PPA for considering non-sanctioning of loan from banks under Force Majeure.

In response to the same, the Petitioner submitted that it was making best efforts to reach an amicable settlement with UPCL and when UPCL completely refused to take into consideration the various reasons given by the Petitioner for non-commissioning of the Power Plant on time, the Petitioner exercised its right to refer the matter to the Commission.

2.14 UPCL submitted that for claiming a force majeure event there is a procedure prescribed in the PPA and it is essential to issue a notice informing the force majeure event, which the Petitioner never issued. The Respondent, as per the PPA has the right to terminate the PPA, as the commitment of firm supply is very relevant for the functioning of the Discom and not even Force Majeure condition can keep the supply agreement in suspended animation for indefinite time. The Petitioner was informed in advance that the PPA may be terminated if they fail to fulfill the conditions and supply the power as per PPA.

In response to the same, the Petitioner submitted that the letters dated 13.03.2018 and 07.05.2018 sent to UPCL by the Petitioner were clear and effective notice of Force Majeure. Further, the Petitioner's obligation to commence supply of power as on the SDD, stood automatically extended by the time duration of the delay caused by the Force Majeure events and the terms of Article 16.1(ii) are, therefore, not applicable, also Clause 16.1(ii) clarifies that the PPA permits variation or extension of the SDD, and thus, UPCL cannot allege that SDD cannot be extended beyond 12 months.

It further submitted that in the amended Petition, it had clearly provided the sequence of events which lead to Force Majeure event.

2.15 UPCL submitted that although the PPA was signed pursuant to direction of GoUK, the terms and condition of the PPA should be as per the Regulations and, accordingly, the termination of the PPA carried out is well within the ambit of law and provisions contained in the PPA.

In response to the same, the Petitioner submitted that the specific policy direction issued by the Government of Uttarakhand lay down certain terms and conditions for purchase of power, and the said purchase of power should be as per the terms and conditions of the PSDF Scheme, and the PPA should be in accordance with the Electricity Act, 2003 & Regulations notified by the Commission. The said PPA is a statutory contract, and cannot be unilaterally terminated by the Respondent.

2.16 UPCL submitted that the present Petition filed by M/s BIPL is barred by principle of Estoppel and acquiescence.

In response to the same, the Petitioner submitted that the said principle of Estoppel and acquiescence is not applicable because the Petitioner has been consistent on the enforcement of the provisions of the PPA.

2.17 UPCL submitted that the Petitioner by his act and willful misconduct has caused severe losses to the Respondent including the proportionate cost of the transmission charges borne by the Respondent for the evacuation system booked for the Petitioner and for which charges have been paid by UPCL all this while. UPCL submitted that the transmission licensee may be informed and directed to cancel the connectivity and transmission service agreement or to charge the Petitioner with the transmission charges on the pro rata basis from the date of termination of PPA as presently the proceedings against the Petitioner are pending before the NCLT, and no Petition claiming loss is being filed before the Commission.

In response the Petitioner submitted that the Respondent is merely making baseless assertions regarding severe losses without any basis, and if any material loss was indeed being caused then the Respondent ought to have exercised its rights under Clause 18.16 of the PPA. The Respondent is making baseless and irrelevant requests for directing the transmission licensee to cancel connectivity or transmission service agreement or to charge the transmission charges on pro rata basis from date of termination and such request is without any basis, material evidence, and hence, deserves to be dismissed outrightly.

2.18 UPCL vide its letter dated 15.07.2020 submitted counter claim on the Petition filed by the Petitioner. It submitted that the Petitioner has challenged the termination notice dated 04.02.2019 issued by UPCL terminating the PPA executed between UPCL and M/s BIPL for procurement of power on long term basis from 225 MW (ISO) from the Gas based Power Project. The Petitioner also sought stay on the Respondent from recovering the pre-estimated damages caused to UPCL on account of the default on the part of the Petitioner.

The Petitioner in its letter dated 13.08.2018 had admitted the delay in commissioning of the project, however, stating that the same was beyond its control and that its case does not fall strictly under force majeure as per the definition provided under the PPA dated 01.03.2017. As no valid and cogent explanation was offered by the Petitioner,

UPCL issued the termination notice giving in detail the breaches of the terms and conditions of the PPA committed by M/s BIPL, and reserving right to make a claim as per clause 16.5 of the PPA and for further damages suffered by UPCL on account of the default by M/s BIPL and losses incurred by UPCL on account of making alternative arrangements.

UPCL also submitted that M/s BIPL in reply to the termination notice sent a letter dated 05.03.2019 thereby reiterating its earlier submissions. UPCL submitted that it is further entitled to interest @ 15% per annum on the amount of Rs. 10.7 Crore of pre-estimated damages from the date of the Claim Notice dated 22.04.2019 till realization.

In response to the same, M/s BIPL vide its submission dated 10.08.2020 denied all allegations, assertions, statements and averments made in the Respondent's application. It also submitted that the Respondent's application is liable to be rejected and the counter claims therein are invalid as they have been submitted on 15.07.2020 during the period when the moratorium that came into effect vide the Hon'ble National Company Law Tribunal, ("NCLT") Order dated 14.06.2019 in the matter of "PNB v. Beta Infratech Pvt. Ltd." ("BETA NCLT Proceedings"), and hence, the counter-claim being sought to be raised by the Respondent is barred by law and should have been raised only before the Hon'ble NCLT.

It further submitted that the Respondent's application is only liable to be dismissed summarily as the Respondent failed to disclose before the Commission that it had already approached the Hon'ble NCLT in M/s BIPL NCLT Proceedings, and Hon'ble NCLT vide order dated 15.07.2020 has directed the Resolution Professional to consider the claim of the Respondent on merit. Hence, the very same claim that is being sought to be placed for consideration by the Respondent before the Commission, has already been directed to be considered on merits by Hon'ble NCLT, and is necessarily to be exclusively determined thereunder. The Respondent having itself voluntarily accepted the jurisdiction of Hon'ble NCLT and having placed the same claims before the Hon'ble NCLT, is bound by the directions of the Hon'ble NCLT vide order dated 15.07.2020.

It also submitted that Hon'ble NCLT has vide order dated 24.07.2020, appointed a liquidator in terms of Section 34(1) of the Insolvency and Bankruptcy Code, 2016 ("IBC 2016"), and directed the liquidator to proceed with the liquidation in the manner laid down in Chapter 3 of Part II of IBC 2016. The Respondent having accepted the jurisdiction of the Hon'ble NCLT is therefore bound by its orders, and the Commission does not have any

reason or ground to accept or entertain the Respondent's application.

Since the Hon'ble NCLT New Delhi has the territorial jurisdiction over it and is already seized of the matter in terms of the orders issued during the NCLT Proceedings, and has appointed the liquidator for the Petitioner, and the Commission cannot entertain any alleged counter claims against the Petitioner separately. The Petitioner referred to the judgments/orders of the Hon'ble Supreme Court and Hon'ble NCLT in support of its contention, including order dated 21.08.2019 in the matter of Excel Metal Processors Limited v Benteler Trading International GMBH & Anr., Company Appeal (AT).

Even if the Commission determines the alleged claims raised by the Respondent in these proceedings, then the same are barred and will not be payable by the claimant pursuant to provisions of S. 10A of IBC 2016. Further, even if any of the counter claims being sought to be raised by the Respondent are determined to be payable by the Petitioner, they will be in the nature of debt that become due from the Petitioner upon the Commission's decision, which will be a date after 25th March 2020, and Section 10A of IBC 2016, provides that no application can ever be filed for initiation of corporate insolvency resolution process of a corporate debtor for any default arising after 25th March 2020 for a period of 6 months, or such further period not exceeding one year from such date, as may be notified in this behalf. Therefore, even if the Commission determines that there is any debt due to the Respondent in these proceedings, the same will not be payable in accordance with IBC 2020 Amendment. M/s BIPL submitted that UPCL's counter submission is nothing but clearly a case of forum shopping, and under applicable law, forum shopping is prohibited.

The present dispute before the Commission is to determine the validity and effectiveness of the alleged termination of the PPA by the Respondent, and UPCL's application for submission of counter claims is not capable of being admitted. There was never any concealment of the IBC proceedings by the Petitioner and the Petitioner had informed UPCL of the NCLT Proceedings vide its earlier letter dated 05.03.2019, it is in fact the Respondent who has concealed from the Commission the fact that it has already placed the same claims in the Petitioner's NCLT Proceedings.

UPCL's application is seeking to raise invalid counter claims as the provisions of Clause 16.5.2 are not applicable in the present facts and circumstances, in light of the occurrence of force majeure under Article 11 of the PPA. Furthermore, Clause 16.5.2 of the

PPA is applicable only in the event of termination of the PPA due to Buyer's (i.e. Respondent/UPCL) Event of Default, and deals with the liquidated damages that the Respondent/UPCL is liable to pay the Seller (i.e. Petitioner/BETA). UPCL has therefore admitted to: (i) having terminated the PPA wrongfully, which is amounting to a Buyer's Event of Default, and (ii) being liable under Clause 16.5.2 to pay damages to the Petitioner in respect of the same, at the rate of Rs. 10,00,000/- per MW for the Contracted Capacity, and to this limited extent, the Petitioner has no objection to UPCL's application, and accepts the same, and therefore, the relief sought by UPCL in its application will not be applicable.

2.19 UPCL submitted that the Petitioner had wrongly stated that the present Petition was within limitation and was not barred by limitation and it did not clarify as to how the period of limitation has been computed.

In response, the Petitioner submitted that there is no limitation period applicable for placing additional document on record and amendment of Petition dated 22.05.2019, and, hence, the same is not barred by any limitation. It also submitted that original Petition was filed on 22.05.2019 within a period of three years from the date when the cause of action first arose, and hence, is within the period of limitation under Limitation Act, 1963.

2.20 UPCL submitted that the Petitioner's submission regarding permission sought by it from the appointed IRP to proceed with the ongoing matter and M/s BIPL has been instructed to proceed with the same, are vague and not clear with regard to who is taking permission and who is filing Petition. The PPA was terminated long before the enforcement of Moratorium and appointment of IRP as quoted by the Petitioner, and enforcement of Moratorium has no effect on termination of PPA and it cannot revoke the rightful termination of PPA.

In response to the same, the Petitioner submitted that the additional submissions have been made and it has been signed on behalf of the Petitioner by Mr. S.V. Satyanarayana who has been appointed as the Insolvency Resolution Professional ("IRP") by the Hon'ble NCLT vide its order dated 14.06.2019 and thereafter, confirmed as the Resolution Professional ("RP") by the meeting of committee of creditors ("CoC") with the requisite majority in its first meeting who had subsequently authorized Shri A.K. Jain to execute, sign affidavit and any other document related with the Commission, UPCL, PTCUL that may be required for and on its behalf in relation to any matter in which it is interested or may be concerned in any way.

The PPA was not terminated long before the enforcement of moratorium and appointment of IRP since the termination notice was disputed by the Petitioner, and thus, the termination did not come into effect before the initiation of the CIRP proceedings under the IBC 2016 vide Hon'ble NCLT order dated 14.06.2019 and further extended till 09.03.2020 vide Hon'ble NCLT order dated 05.12.2019. The ongoing proceedings before the Hon'ble NCLT and enforcement of moratorium has a direct bearing on the ongoing dispute relating to the issue of the Termination Notice and Office Memorandum and same stood suspended with the coming into force of moratorium under Section 14 of the IBC 2016. The said PPA is an essential asset of M/s BIPL, and any termination of the PPA jeopardizes the entire CIRP process of BETA under the IBC 2016.

Therefore, the proceedings seeking to terminate PPA as being sought by UPCL vide its notice and Office Memorandum could no longer continue, and, the off-take of power by UPCL from M/s BIPL as provided under PPA, could not be sought to be alienated.

2.21 UPCL submitted that the report of the Lok Sabha Committee referred by the Petitioner is neither relevant nor can be relied upon in the matter, and the Petitioner is trying to generalize the Force Majeure event which is not permissible. Further, the aforesaid report of the Committee is prospective in nature and cannot affect lawful termination of the PPA carried out in the past.

In response to the same, the Petitioner reiterated its submissions made in the Petition and in the written submissions. It further submitted that it is not trying to generalize the Force Majeure event and has given sufficient facts, justifications, and evidences to substantiate the prevailing Force Majeure situation in its pleadings before the Commission.

2.22 The Commission took into account the submissions made by the Petitioner and the Respondent and has made its best efforts to summarize the same in the preceding paras of this order. The Commission has relied upon the various documents and information brought before it during the proceedings by both the Petitioner and the Respondent. The views of the Commission after considering all the material facts into consideration is discussed in the following paras of this order.

### **3. Commission's views and decision**

3.1 A PPA is a legal document incorporating operational, technical & commercial provisions to

be complied in accordance with the relevant rules & regulations.

- 3.2 Section 86(1)(b) of the Electricity Act, 2003 stipulates that one of the function of the Commission is to regulate electricity purchase and procurement process of the distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State.
- 3.3 The present dispute between the Petitioner, i.e. M/s Beta Infratech Private Limited and the Respondent, i.e. Uttarakhand Power Corporation Limited relates to termination of PPA dated 01.03.2017 by the Respondent, for procurement of 107 MW of power on long term basis from 225 MW (ISO) gas based CCPP of M/s BIPL located in Kashipur, Uttarakhand.
- 3.4 The Commission analyzed the submission made by both the parties, the relevant clauses of the PPA and applicable Regulations and prima facie it is apparent that the Petitioner was not able to supply power from its gas based power plant to the Respondent as per the schedule, and, accordingly, the Respondent after exercising the powers given under the relevant clauses of the PPA decided to terminate the PPA dated 01.03.2017 by issuing a termination notice to the Petitioner.
- 3.5 **Facts admitted:** Both the parties have not denied the fact that project was still not commissioned till date and the PPA was terminated vide UPCL's Termination Notice dated 04.02.2019 and vide its Office Memorandum dated 19.03.2019. However, the way in which PPA has been terminated has been contested by the Petitioner.
- 3.6 **Point of Dispute:** The Petitioner has claimed that UPCL has wrongfully and illegally terminated the PPA as delay in commissioning the plant was due to Force Majeure events which were beyond its control. Further, the Petitioner has also submitted that since the proceedings had initiated before the NCLT, hence, the termination notice issued by UPCL was void and arbitrary.
- 3.7 Before discussing on the issues in dispute, prima facie it is to be seen whether the Commission has jurisdiction over the present matter or not. In this regard, while analyzing the Petition, two primary issues arises which are as follows:

Clause 17.3.2 of the power purchase agreement dated 01.03.2007 signed between Beta Infratech Private Limited (BIPL) and Uttarakhand Power Corporation Limited (UPCL)

provides that;

*“17.3.2. If the Dispute arises out of or in connection with this Agreement is of the nature not covered in Clause 17.2.1 or where any dispute is referred to the Appropriate Commission to be settled through arbitration, the procedure specified in the Indian Arbitration and Conciliation Act, 1996 read with the Electricity Act, 2003 and UERC (Conduct of Business) Regulations 2014 as amended from time to time shall be followed to the extent applicable.”*

From a literal reading of this Clause 17.3.2, it is understood that it provides for the following two disputes: (a) disputes not covered under Clause 17.3.1; (b) dispute being referred to the Commission to be settled through arbitration. However, both these routes involves complying with the procedures laid down in the Arbitration and Conciliation Act, 1996, the Electricity Act, 2003 and the UERC Regulations. However, Section 86(1)(f) under which the present Petition has been filed provides as under:

*“Section 86. (Functions of State Commission): --- (1) The State Commission shall discharge the following functions, namely: -*

*...*

*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;”*

The above provision of the Act empowers the Commission to either adjudicate the dispute by itself or to refer the matter to arbitration. This power to adjudicate the dispute or to refer the same to arbitration is exclusive to the Commission and cannot be superseded/overridden by the terms of PPA.

Further, regarding operation of moratorium under Insolvency and Bankruptcy Code, 2016, Section 14 of the Insolvency and Bankruptcy Code (IBC) provides for a prohibition on institution of fresh proceedings/continuation of existing proceedings against a corporate entity from the insolvency commencement date. IBC defines the insolvency commencement date to mean the date on which NCLT (National Company Law Tribunal) admits the application for initiating corporate insolvency resolution process (CIRP) in respect of such corporate entity.

From this it is imperative that the moratorium provided for under Section 14 of IBC will be applicable as soon as the NCLT admits the application for initiating CIRP against a corporate entity, however, there is no bar under Section 14 or IBC in general on such

corporate entity undergoing CIRP to initiate proceedings/continue the existing proceedings before relevant forums. In the instant matter before the Commission, since the proceedings are not being initiated against the corporate entity undergoing CIRP (i.e. M/s BIPL) but by such entity, seeking adjudication in the matter of termination of PPA by UPCL, moratorium under Section 14 of IBC will not operate as a bar on the Commission to adjudicate this Petition.

In this regard, it may also be noteworthy that once the application for CIRP is admitted, an interim resolution professional is appointed by NCLT (usually, on the same day of admission of CIRP application) and with its appointment, the board of directors of the said corporate entity stands suspended with all its powers being vested on the interim resolution professional (and thereafter, the resolution professional). Therefore, once the interim resolution professional is appointed by NCLT, it represents the corporate entity undergoing CIRP in all matters which were being initially pursued/proposed to be pursued by the corporate debtor. In this light, the resolution professional of M/s BIPL is well authorised under the provisions of IBC to pursue the instant matter before the Commission, represent it and act on its behalf.

In view of the above discussion, it is evident that the Commission has jurisdiction to entertain the present matter before it, undeterred by the clause of PPA or the operation of moratorium under the IBC.

- 3.8 The basic question that arises out of the submission made by the Petitioner and the Respondent is whether or not there is a sellers event of default, whether any force majeure event has occurred due to non-sanctioning of loan by the banks, and whether the Respondent has rightfully terminated the PPA dated 01.03.2017 under the terms and conditions of the PPA. The Petitioner has outrightly denied the occurrence of seller's event of default, however, it is very clear from the facts and circumstances of the case that the seller, i.e. M/s BIPL has defaulted to supply the power to UPCL within the schedule delivery date, and also even after expiry of one year from the same, which was the period permitted under the terms of PPA. Moreover, the Petitioner has not been able to commence the operation of its plant even before the commencement of NCLT proceedings, which clearly depicts that the Petitioner has failed in terms of commissioning its gas based plant till date and has no valid ground to contest the default so caused.

3.9 The relevant clause of the PPA dated 01.03.2017 are being reproduced hereunder, which are relevant for adjudication of current dispute before the Commission.

*“1.1.72. “Scheduled Delivery Date” shall mean the scheduled date i.e. 16th March 2017 on which the Seller commences firm supply of 107 MW of power from its gas based plant in accordance with the Agreement;”*

Further clause 16.1 of the PPA states as follows:

*“16.1 Seller Event of Default*

*The Occurrence and continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by Buyer of its obligations under this Agreement, shall constitute a “Seller Event of Default”*

- (i) The seller is in breach of any material obligations under this Agreement, which is not rectified within a period of sixty (60) days from the date of notice by the Buyer regarding such breach;*
- (ii) the failure to commence supply of power from the Project to the Buyer up to the Contracted Capacity, even after expiry of twelve(12) months from the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, except where an extension is permitted under this Agreement;*
- (iii) if (a) any winding up or bankruptcy or insolvency order is passed against the Seller or (b) the seller goes into liquidation or dissolution or has a receiver or any similar officer appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to Applicable Law, except consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and retains creditworthiness similar to the Seller and expressly assumes all obligations of the Seller under this Agreement and is in a position to perform them; or*
- (iv) After the Scheduled Delivery Date or Revised Delivery Date, as the case may be, the Seller fails to achieve Target Availability for a period of “twelve (12)” consecutive or non-consecutive months within any continuous period of ‘thirty six (36)’ months in; or*
- (v) The Seller repudiates this Agreement and does not rectify such breach even within a period of sixty (60) days from a notice from the Buyer in this regard.”*

Further, clause 16.3 of the PPA states as follows:

*“16.3 Procedure and Termination for cases of Seller’s Event of Default*

- (i) Upon the occurrence and continuation of any Seller Event of Default under Clause 16.1, the*

*Buyer shall have the right to deliver to the Seller, a Buyer preliminary default notice, ("Buyer Preliminary Default Notice"), which shall specify in reasonable detail, the circumstances giving rise to the issue of such notice.*

*(ii) Following the issue of Buyer Preliminary Default Notice, the Consultation Period of fifteen (15) days or such longer period as the Parties may agree, shall apply.*

*(iii) During the Consultation Period, the Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement.*

*(iv) After the period of seven (7) days following the expiry of the Consultation Period, unless the parties shall have otherwise agreed to the contrary, or the Seller Event of Default giving rise to the said Consultation Period shall have ceased to exist or shall have been remedied, the Buyer shall be simultaneously entitled to issue thirty (30) days notice for termination of this Agreement even before the expiry of the Term of this Agreement with a copy to the Appropriate Commission.*

*(v) If the Seller fails to cure the event of default in the manner provided in this Agreement, the buyer in addition to its right to specifically enforce this Agreement shall also have the right to terminate this Agreement for such event of default even before the expiry of the Term of the Agreement, provided on such termination, the liability of the Seller to supply power shall cease immediately."*

3.10 The contention of the Petitioner that the scheduled delivery date gets automatically extended by the period of delay caused due to force majeure has to be dwelled upon and established in the light of the fact that, whether any force majeure event occurred or not which warrants such an extension to the Petitioner's plant for delay in commissioning/ non-commissioning. The Petitioner, in its submissions, has been continuously mentioning the non-receipt of funds from the banks as the reason for non-achievement of CoD, which has also been cited as force majeure event by the Petitioner.

In this regard, the Commission is of the view that by no stretch of imagination can the non-receipt of funds be termed as a force majeure event, as the question of receiving the funds from the lending institutions basically depends upon the credit worthiness, performance and loan portfolio of the borrower, and such grounds are deemed to be well within the control of the borrower. Had it been the situation that the banks had collapsed, or the lending banks turned out to be defaulter or otherwise, or there was a freeze on the financial institutions for fresh lending, then for once it could have been assumed that non-receipt of funds in such a situation was beyond the control of the borrower, however, in the present case no such event has happened and its only on account of the borrower's, i.e. M/s

BIPL's, default/mismanagement the banks were reluctant to lend the funds for continuance of the project activity. Accordingly, in view of the above discussion, the Commission is unable to accept the contention of the Petitioner that non-lending of funds from the banks is a force majeure event.

- 3.11 The Petitioner has cited that one of the members of the consortium bank, i.e. Vijaya Bank wrongfully declared the Petitioner as willful defaulter and due to the same it could not arrange funds for finishing activities related to its project.

In this regard, the Commission is of the view that the Petitioner company being a commercial organization, ought to anticipate such exigencies and it is their duty to manage the availability of funds from the lenders or other sources for successful commissioning of its project. The alleged wrongful act of one of the members of the consortium bank, cannot be formed a basis for usurping the power of other party to the contract, i.e. UPCL of its right under the contract. It was the Petitioner who was required to manage the availability of the funds, and as a prudent business practice, the same is expected to be well within the control of the borrower, in the present case M/s BIPL. Thus, the Commission is of the view that non-receipt of funds from the consortium banks could not be termed as a force majeure event, that warrants the extension of time period for commencement of plant by the Petitioner beyond the time frame prescribed in the PPA, as the same was the duty of the Petitioner which was well within its control. Accordingly, in view of the above discussion, the contention of the Petitioner that the situation wherein one of the consortium member of lender declaring M/s BIPL as willful defaulter be considered as a force majeure event under the terms of the PPA, cannot be accepted.

- 3.12 The Petitioner and the Respondent both are commercial organization and management of resources is their individual area of concern, and one cannot be made to suffer endlessly for the default of the other. The fact that the Petitioner was unable to receive the funds from the bank, can in no way be used to impose the burden on the Respondent, as it was the Petitioner who was required to manage the availability of funds for timely commissioning of the plant and not the Respondent. The Respondent could not be made to wait till infinity for the Petitioner to fulfill its obligation under the PPA. From the facts and information brought before the Commission, it is apparently clear that the Petitioner was allowed sufficient time

under the terms and conditions of the PPA to start the commercial operation of its plant, however, it failed to do so.

- 3.13 There is no denial to the fact that the Petitioner's gas based plant was declared as a stranded plant, but that does not mean that it did not have the opportunity to revive and achieve its commercial operation. Here it is pertinent to note that two other gas based plant located in the State of Uttarakhand, namely M/s Sravanthi Energy Pvt. Ltd. (M/s SEPL) and M/s Gama Infraprop Pvt. Limited (M/s GIPL), which were also stranded gas based projects, and their loan accounts were also classified as NPA by the Banks successfully commenced their operation during the same period at the time when the Petitioner was expected to start the commercial operation of its plant, and are continuously supplying power from their plant to UPCL in line with the PPA executed between the parties respectively.
- 3.14 Further, the submission of the Petitioner that it never agreed to the observations of the committee constituted by UPCL for bilateral discussion and did not give its consent there to has no relevance in the current matter, as it can be seen from the Petitioner's letter dated 21.06.2018 that the said meeting was requested by the Petitioner for giving a presentation of their case for consideration by UPCL for extension of CoD upto March, 2019. Accordingly, the Commission rejects the contention of the Petitioner in this regard.
- 3.15 Further, UPCL has submitted that the Petitioner did not resort to clause 17.2 of the PPA which speaks about amicable settlement, and as per clause 17.2.1 of the PPA, parties are required to give a written notice containing a description of dispute, grounds for such dispute and all written material in support of the claim, however, the Petitioner has failed to raise any dispute, and hence, the provisions of Section 86(1)(f) of Electricity Act, 2003 are not erected here because there is no dispute which is required to be adjudicated by the Commission. In response to the same, the Petitioner submitted that it was for the Respondent to raise a dispute prior to issuance of office memorandum to terminate the PPA, and that the Petitioner has followed prescribed procedure under clause 17.2 of the PPA by responding to UPCL's office memorandum, duly giving description, grounds of the dispute, other written submissions and contractual provision for supporting its claim for not terminating the PPA.

In this regard, the Commission is of the view that it is irrelevant in the current stage of the proceedings whether or not the procedure under clause 17.2 of the PPA has been

followed as the matter has reached such an advance level where a PPA has already been terminated, and its termination has already been contested by the affected party. The Commission as discussed before, has already decided to admit the current matter, and has full authority to adjudicate the current issue brought before it. Accordingly, in view of the above discussion, the Commission denies the contention of the Respondent that Petitioner has failed to raise any dispute which is required to be adjudicated by the Commission.

3.16 Further, UPCL submitted that due to the failure of the Petitioner to supply power or not supply power at all in accordance with the estimate made by the Respondent as per Schedule Delivery Date (SDD), the whole planning of UPCL regarding availability of power gets hampered, and UPCL's letter dated 21.03.2017 wherein it asked the Petitioner to provide the CoD can in no way be interpreted to mean that the Schedule Delivery Date (SDD) had been changed, and the word CoD, i.e. Commercial Date of Operation in the letter in place of SDD was used to imply as to when the Petitioner would commission the power plant and supply power to UPCL. In this regard, the Petitioner re-iterated that the delay in commissioning was beyond its control and sought additional time upto September 2017 for commencing the supply. The Petitioner also denied that planning of UPCL regarding availability of power would be hampered due to non-supply of power by M/s BIPL from its gas based power plant.

In this regard, the Commission would like to state here that the Commission has been allowing the power purchase cost to UPCL in the Tariff Orders after taking into account the availability of power from the various sources including the gas based plant of M/s BIPL. Accordingly, the Respondent has to plan way ahead for arranging the availability of power, and sudden non-availability of 107 MW of power ought to have a great impact on the power procurement planning, and also on the planning related to banking of power. The Petitioner here should understand that its gas based plant for supplying 107 MW of power to UPCL is a source for fulfilling the power requirement of the discom and any variation with regard to availability from a such a source would definitely lead UPCL to seek other sources to compensate the same, and as such requires a huge amount of time to streamline. Thus, the fact that the non-availability of expected power from the Petitioner's plant may have hampered the power procurement and planning of the discom, cannot be denied. The Respondent, being a commercial organization is required to do certain planning to optimize its operations, and power procurement being the main input for the discom, needs to be

planned well in advance to mitigate the exigencies in future, and thus it cannot be denied that the non-supply of power from the Petitioner's plant ought to have impact on the power procurement planning of the discom. Accordingly, in view of the above discussion, the Commission accepts the contention of the Respondent that non-availability of power from a firm source hampers the power procurement and planning process and therefore, the Petitioner's submission in this regard are not acceptable.

3.17 Further, UPCL submitted that the Petitioner should have made alternative arrangement for funds if the lenders for the project were not releasing the funds for the completion of the project, or through infusion of equity as from the submission of the Petitioner it appears that the alleged amount of required funds was very small. In this regard, the Petitioner submitted that the Respondent has wrongly terminated the PPA, where the Respondent could extend the time for commencement of the Petitioner's plant considering the fact that the delay in achieving the CoD was beyond the control of the Petitioner and also it made all the efforts for timely commencement of plant and had infused equity of around Rs. 400 Crore for works at site.

In this regard, the Commission is of the view that, the Petitioner cannot force the Respondent to not exercise its rights under the PPA, where a continuous default was being committed by the Petitioner in terms of the commencement of its gas based plant as per the schedule. The Commission further observed that the Petitioner has submitted that it has been duly informing the concerned authorities regarding delay in commissioning of its plant, in this regard the Commission is of the view that mere informing the respective authorities would not serve any purpose until and unless there are concrete grounds for substantiating the claims. Moreover, it cannot be the basis for preventing one of the parties to the contract to exercise its rightful right under the terms of the agreement. The Commission, as discussed before, has made it clear that non-availability of funds cannot be construed to be a force majeure event as management of funds is the responsibility of the borrower, and the fault on account of the same cannot be a basis to pass on the burden on the other party.

The Petitioner has been continuously submitting that it had infused about Rs. 400 Crore in the project, which was the position as on November, 2016, thereafter there is no record or information available which substantiates that the Petitioner infused additional

equity post signing of the PPA. This reflects towards the non-seriousness of the Petitioner in getting the project commissioned on time.

Accordingly, in view of the above discussion, the Commission agrees with the contention of the Respondent that the Petitioner should have resorted to alternative sources to fund completion of its project, and therefore the Contention of the Petitioner that it made full efforts, without substantiating the same through any documentary evidence, is not acceptable.

3.18 Further, UPCL referred to the two other gas based plants of M/s SEPL and M/s GIPL respectively in the State, which were stranded and commenced operation under the support of PSDF scheme of GoI, and are supplying power under the terms of PPA. UPCL also stated that the Petitioner in its Petition has stated that balance civil works and finishing works of the project were affected due to shortage of raw material, which clearly shows that the plant was never ready and Petitioner misrepresented the facts to induce UPCL to enter into PPA. The Petitioner, in response to the same submitted that its PPA is not linked to two other gas based plants operating in the State as referred by UPCL. Further, the Petitioner has been continuously informing UPCL about progress of its plant and there has been no misrepresentation of facts to induce UPCL to enter into PPA.

In this regard, the Commission is of the view that, although it is true that the PPA of the Petitioner's plant is not linked to other two gas based plants, of M/s SEPL & M/s GIPL respectively which are operating in the State, but still it cannot be denied that both of these plants were also stranded gas based plants and were in a similar position to the Petitioner's plant and still managed to commence operation and are continuing the same till date when there is no PSDF support from the Govt. The Commission is of the view that there is no harm in benchmarking the performance of the Petitioner's plant against the already running plants in the State of Uttarakhand, as this would help in analyzing the efficacy of the efforts put in by the Petitioner. The comparison of this nature would help in giving better picture of the state of situation instead when the performance of the Petitioner's plant is analyzed in isolation. Moreover, as discussed before, mere informing the progress of the project will not serve any purpose until and unless there are concrete grounds for substantiating the claims. Accordingly, in view of the above discussion, the Commission accepts the point of comparison, with other gas based plants in the State, as raised by the

Respondent.

- 3.19 Further, the Petitioner submitted that based on the legal opinion, UPCL issued the letter dated 08.11.2017 stating that event of default under clause 16 of PPA would occur if supply of power is not commenced upto March'18 and UPCL can consider exercising the power for extension/termination of PPA.

In this regard, the Commission is of the view that by no stretch of imagination, the Respondent, i.e. UPCL can be barred from seeking opinion from its legal counsel, rather it is a rightful act to seek advice of legal counsel before proceeding with a matter which is of grave consequences to the parties and also to the concerned stakeholders. Further, from perusal of the Respondent's letter dated 08.11.2017, nowhere a reference of legal opinion can be found, then it could not be understood as to why the Petitioner is trying to bring on record the matter which is part and parcel of the Respondent's internal working. The Commission in this regard is of the view that this contention is irrelevant to the present discussion in light of the fact that both the parties have equal right to seek legal advice/remedy for the matters pertaining to their businesses. Accordingly, the Commission is unable to accept the contention of the Petitioner in this regard.

- 3.20 Further, UPCL submitted that Petitioner had sufficient time of around one year beyond the SDD as per PPA, that too in the wake of fact that the Petitioner was claiming readiness of its plant for testing and trial way back in March, 2012. UPCL also submitted that non sanctioning of funds by banks due to tightening of the norms by RBI or whatsoever reasons is not a concern for the Respondent, and shows that the Petitioner has failed to fulfill the prescribed norms of getting the loan from the banks. In response to the same, the Petitioner submitted that there were change in norms governing Non-performing assets (NPA), which made it difficult for the Petitioner to get the funds from the bank, and it does not in any way imply that the Petitioner failed to fulfill prescribed norms of getting loan from the bank.

In this regard, as discussed before, the Commission is of the view that the responsibility of arranging the funds and commencing the supply of power from its plant was of the Petitioner, and it cannot be allowed to shrug off its responsibility by taking clue of the change in banking norms or other grounds. Accordingly, the Commission agrees with the Respondent's submission in this regard that the Petitioner had sufficient time to

commence its plant in view of the fact that the Petitioner claimed its readiness way back in March, 2012 itself.

- 3.21 Further, UPCL also claimed pre-estimated damages computed in terms of Clause 16.5.2 of the PPA dated 01.03.2017. UPCL also claimed interest @ 15 % per annum on the amount of Rs. 10.7 crores of pre-estimated damages from the date of the Claim Notice dated 22.04.2019 till realization. In response to the same, the Petitioner submitted that the Respondent in this regard has already approached the Hon'ble NCLT in M/s BIPL NCLT Proceedings, and Hon'ble NCLT vide order dated 15.07.2020 has directed the Resolution Professional to consider the claim of the Respondent on merit. The Petitioner also submitted that the counter claims submitted by the Respondent vide its submission dated 15.07.2020 are liable to be rejected as they have been submitted during the period when the moratorium came into effect vide the Hon'ble NCLT order dated 14.06.2019 in the matter of "Punjab National Bank v. Beta Infratech Pvt. Ltd. (CP. No.(IB)-117(PB).2019)", and hence, the counter-claim being sought to be raised by the Respondent is barred by law and could have been raised only before the Hon'ble NCLT in M/s BIPL NCLT Proceedings.

In this regard, the Commission analyzed the submission of both the parties and is of the view that, the current issue before the Commission is regarding adjudication of dispute against termination of PPA, and inclusion of fresh claim of pre-estimated damages by the Respondent through a counter claim cannot be warranted in the current proceedings. The Respondent itself in its submissions has submitted that it is in the process of calculating the amount of claim and seeks liberty of the Commission to file a separate Petition for claiming the same, therefore, if the Respondent wishes to claim the amount of pre-estimated damages by way of pleading before the Commission, then UPCL may file a separate Petition in this regard. Moreover, as brought to the Commission's notice by the Petitioner, UPCL has already approached Hon'ble NCL in this regard, and Hon'ble NCLT vide its Order dated 15.07.2020 has directed the Resolution Professional to consider the claim of the Respondent on merit, hence, considering UPCL's claim of pre-estimated damages at this stage of the current proceedings will lead to multiplicity of proceedings on a single issue, and accordingly, the Commission is not taking any view in this regard in this current Order and the Respondent is advised to seek proper recourse in accordance with the prevailing laws.

3.22 Further, the Respondent submitted that the Petitioner has suppressed the proceedings going on in the Hon'ble NCLT and the same has come to the knowledge of UPCL, UERC and GoU for the first time in these proceedings. In response to the same, the Petitioner submitted that the ongoing of proceedings in NCLT was duly informed to UPCL vide Petitioner's letter dated 05.03.2019, and it also filed additional submission dated 30.08.2019 to apprise the Commission and UPCL of the Hon'ble NCLT's order dated 14.06.2019 in the matter of "Punjab National Bank vs. Beta Infratech Pvt. Ltd. ((IB)-117(PB)/2019)", wherein it initiated corporate insolvency resolution process ("CIRP") against the Petitioner under Insolvency and Bankruptcy Code, 2016 ("IBC 2016").

In this regard, the Commission was apprised by the Petitioner vide its letter dated 05.07.2019, wherein it requested to amend its Petition in view of the Hon'ble NCLT order 14.06.2019. Accordingly, the Commission is of the view that there is no active and intentional concealment of this fact by the Petitioner, and the same does not holds much relevance as far as the current proceedings are concerned. Accordingly, in view of the above discussion, the Commission does not accept the contention of the Respondent that there was any concealment of proceeding related to NCLT by the Petitioner.

3.23 Further, UPCL submitted that the PPA was terminated long before the enforcement of the Moratorium and appointment of Interim Resolution professional (IRP), and therefore enforcement of Moratorium has no effect on termination of PPA and also it cannot revoke the rightful termination of PPA. In response to the same, the Petitioner submitted that since the termination notice was disputed by the Petitioner, therefore, the termination did not come into effect before the initiation of the CIRP proceedings under the IBC 2016 vide Hon'ble NCLT order dated 14.06.2019 and further extended till 09.03.2020 vide Hon'ble NCLT order dated 05.12.2019. The Petitioner submitted that the ongoing proceedings before the Hon'ble NCLT and enforcement of moratorium has a direct bearing on the ongoing dispute relating to the issue of the Termination Notice dated 04.02.2019 and Office Memorandum dated 19.03.2019, and the same stood suspended with the coming into force of moratorium under S.14 of the IBC 2016.

In this regard, as discussed earlier, the Commission is of the view that, it is imperative that the moratorium provided for under Section 14 of IBC will be applicable as soon as the NCLT admits the application for initiating CIRP against a corporate entity,

however, there is no bar under Section 14 or IBC in general on such corporate entity undergoing CIRP to initiate proceedings/continue the existing proceedings before relevant forums. In the instant matter before the Commission, since the proceedings are not being initiated against the corporate entity undergoing CIRP (i.e. M/s BIPL) but has been initiated by such entity itself, moratorium under Section 14 of IBC will not operate as a bar on the Commission to adjudicate this Petition. Accordingly, the Termination Notice dated 04.02.2019 and Office Memorandum dated 19.03.2019 issued by UPCL shall not stand suspended as they were issued long before the enforcement of the Moratorium and appointment of Interim Resolution professional (IRP). Further, with regard to the contention of the Petitioner that after coming into effect of moratorium, there is a prohibition on the continuation of pending proceedings against the corporate debtor, and also prohibition on transferring, encumbering and alienating of any legal right or asset of corporate debtor, the Commission would like to state that the termination of the PPA by UPCL was already concluded prior to enforcement of moratorium, and as such no proceedings for termination of PPA were pending from the end of the Respondent that were being continued at the time when the moratorium got effected. Further, since the PPA was terminated by UPCL way before the date of enforcement of moratorium, therefore it also does not hold good that there is any alienation of legal right of the Petitioner during the moratorium period.

The Petitioner's current Petition challenging the termination of PPA is a separate issue and it cannot be relied upon continuance of pending proceedings/CIRP for claiming benefit in the name of enforcement of moratorium by the Petitioner, by stating that the termination notice has been challenged and therefore the same has not attained finality and the proceeding are still continuing. Further, it is not denied that the power generation plant developed by the Petitioner is an asset for the State of Uttarakhand, however, this fact cannot be constructed to unduly hit the State discom who have rightfully terminated the PPA on account of non-performance by the Petitioner under the terms of PPA. Accordingly, in view of the above discussion, the Commission rejects the contention of the Petitioner that the termination of PPA did not come into effect before the initiation of the CIRP proceedings under the IBC 2016.

3.24 Further, as discussed in the preceding paras, the Petitioner has referred to 42<sup>nd</sup> Standing Committee Report of the Lok Sabha wherein a new scheme for funding of the stranded gas based projects by the Govt. has been stipulated and the same has also included the

Petitioner's gas based plant as stranded. The report also mentions that the present stranded condition of the gas-based power plants is largely due to non-fulfillment of commitment regarding supply of domestic gas by the Government, and it further provides that lenders, i.e. banks just want to shrug off their responsibilities from national crisis by referring the stressed plants to NCLT for investments made by them in these plants. Taking clue from the same, the Petitioner submitted that the aforesaid report of the standing committee clarifies that the reason for the Petitioner's power plant being stranded was beyond its control and falls within the definition of Force Majeure under the provisions of Clause 11.1 (ii) of the PPA.

In this regard, the Commission is of the view that, although the aforesaid report of Lok Sabha standing committee acknowledges that the Petitioner's gas based plant is a stranded asset, and present condition of the gas-based power plants is largely due to non-fulfillment of commitment regarding supply of domestic gas by the Government, and also that banks just want to shrug off their responsibilities from national crisis by referring the stressed plants to NCLT for investments made by them in these plants, still it cannot form a basis for granting any relief to the Petitioner by declaring the issue of non-funding by its lenders as a force majeure. The Commission is of the view that the report is progressive in nature, and had no relevance to the fact or circumstances of the case when the Petitioner, under the terms of the PPA was required to fulfill its obligation of commencing the supply of power to UPCL within the time frame given in the PPA. This also becomes imperative from the fact that two other gas based projects in the State, of M/s SEPL an M/s GIPL respectively, whose name have also found mention in the report of the Standing Committee as stranded projects, have commenced their operation and are still continuing to supply the power from their plants by tying up gas from agencies like GAIL/IOCL. The Commission agrees that the list of events and circumstances specified in definition of force majeure under clause 11.1 of the PPA is an inclusive list, but that does not mean that any event/inefficiency could be considered as a force majeure for the said purposes to claim benefit under the clause, thus, the Commission is of the view that there was no force majeure event that took place which delayed the commissioning of the Petitioner's plant beyond the schedule as per the PPA.

3.25 The Commission analyzed at length the submission of both the parties and after taking into account all the relevant facts and information brought before it, and also in light of the

discussion held in preceding paras of this Order, is of the view that the termination of PPA by UPCL by exercising its right given under the agreement is valid and is upheld by the Commission. There does not exist any case of force majeure event due to non-availability of funds to the Petitioner from its lenders, as it was the duty of the Petitioner to fulfill its obligation under the terms of PPA by whatever means and sources.

The fact that both the parties are commercial entities have equal right to protect their interest, and any business arrangement, whether regulated or otherwise entered through an executed contract, shall be governed by the terms and conditions agreed therein unless otherwise unlawful. There is no merit in denying the Respondent from enjoying its right of termination of PPA in line with the terms agreed upon, as ultimately being a business entity it has all the rights vested under the contract that can rightfully be exercised.

3.26 Accordingly, in light of the above discussion, the Commission is of the view that the PPA has been rightfully terminated by the Respondent after following due process under the terms of PPA, and as such the moratorium period in view of the NCLT Order is not applicable upon such termination by the Respondent.

4. Ordered accordingly.

**(D.P. Gairola)**  
**Member (Law)**