

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 224/MP/2018**

**Coram:**

**Shri P.K. Pujari, Chairperson  
Dr. M.K. Iyer, Member**

**Date of order: 18<sup>th</sup> January, 2019**

**In the matter of**

Petition under sections 79(1)(b) and 79(1)(f) of the Electricity Act, 2003 seeking directions for applicability of the provisions of PPAs dated 18.1.2014 and 20.1.2014 for the purpose of calculation of penalties for maintaining Availability below 80% for a contract year.

**And**

**In the matter of**

MB Power (Madhya Pradesh) Limited  
239, Okhla Industrial Estate, Phase-III  
New Delhi- 110020

**..... Petitioner**

**Vs**

1. Uttar Pradesh Power Corporation Ltd  
7<sup>th</sup> Floor, Shakti Bhawan Extension,  
14, Ashok Marg, Lucknow-226001

2. Paschimanchal Vidyut Vitran Nigam Limited  
Urja Bhawan, Victoria Park,  
Meerut - 250001

3. Purvanchal Vidyut Vitran Nigam Limited  
DLW Bhikaripur,  
Varanasi - 221004

4. Madhyanchal Vidyut Vitran Nigam Limited  
4A, Gokhale Marg,  
Lucknow - 226001

5. Dakshinanchal Vidyut Vitran Nigam Limited  
Urja Bhawan, NH-2  
Sikandra, Agra - 282002

6. PTC India Limited  
2<sup>nd</sup> Floor, NBCC Tower,  
15, Bhikaji Cama Place  
New Delhi - 110006

**..... Respondents**



## Parties Present:

Shri Amit Kapur, Advocate, MBPL  
Shri Ashutosh K. Srivastava, Advocate, MBPL  
Shri Akshat Jain, Advocate, MBPL  
Shri Rahul Sharma, MBPL  
Shri Abhishek Gupta, MBPL  
Shri Rajiv Srivastava, Advocate, UPPCL  
Shri Arpit Shukla, Advocate, UPPCL  
Ms. Harshita Sinha, Advocate, UPPCL  
Ms. Rajshree Chaudhary, Advocate, PTC  
Shri Ravi Kishore, Advocate, PTC

## ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited (MBPL) has filed this Petition seeking the following reliefs:

*“(a) Hold and declare that the computation of penalty applicable for shortfall in availability shall be done on an annual basis as per schedule 4 of the Procurer(s) PPA read with para 4.5 of the competitive bidding guidelines;*

*(b) Direct UPPCL/ PTC to comply with the provisions of the Procurer PPA and PTC-PPA and accordingly refund the penalty amount deducted by considering availability on a monthly basis along with carrying cost;*

*(c) Direct UPPCL / PTC to henceforth compute availability considering the cumulative availability till the last month of the contract year and not on standalone basis for each month, as per the provisions of the Procurer(s) PPA and PTC-PPA; and*

*(d) In the interim, direct UPPCL/ PTC to stop imposing penalties or deductions with respect to availability of the Petitioner’s project on standalone basis for each month;*

*(e) Pass such further orders/directions/reliefs as this Hon’ble Commission may deem fit and proper in the interest of justice.”*

2. The Petitioner is a generating company defined under Section 2(28) of the Electricity Act, 2003 and is operating the 1200 MW ( 2 x 600 MW) domestic coal based thermal power project in District Anuppur, Madhya Pradesh. Both the units have been declared under commercial operation. While Unit-I achieved COD in May, 2015, Unit-II achieved COD in March, 2016. The Petitioner has entered into the following separate PPAs for supply of power from the Project:

(a) PPA dated 5.1.2011 with M.P. Power Management Company Ltd (MPPMCL), the lead procurer for discoms of the State viz., Madhya Pradesh Poorva Kshetra Vidyut Vitran Nigam Limited, Madhya Pradesh Madhya Kshetra Vidyut Vitran Nigam Limited



and Madhya Pradesh Paschim Kshetra Vidyut Vitran Nigam Limited, for supply of an aggregate of 30% of the installed capacity of the Project for a period of 20 years at tariff to be determined by the State Commission;

(b) PPA dated 4.5.2011 with the Govt. of MP (MPPMCL being the nominated agency) for supply of 5% of the net power generated comprising of variable charges to be co-terminus with the life of the Project.

(c) Long-Term PPA dated 18.1.2014 between PTC and the discoms of the State of Uttar Pradesh (Procurer PPA);

(d) Back-to-back PPA dated 20.1.2014 between the Petitioner, MBPL and PTC (PTC-PPA) based on the terms of Procurer PPA.

(e) In addition, the Petitioner has been supplying power to various States/utilities such as Punjab, Gujarat, Telengana, Rajasthan, Tamilnadu, Bihar, Maharashtra, West Bengal, Delhi, Uttar Pradesh, North Eastern States under Short-term PPAs till tie-up for balance capacity is achieved.

3. The Respondent No.1, UPPCL initiated competitive bidding process by issuing Request for Proposal (RFP) on 27.7.2012 for procurement of power on long-term basis under Case-I bidding to meet the power requirements of 6000 MW. Accordingly, the Respondent No.6, PTC was selected as a successful bidder to supply 361 MW (net) power from the Project and PPA was executed with the Respondents 2 to 5 (discoms of the State of UP) on 18.1.2014. As the supply was through PTC (Respondent No.6), back-to back PPA was executed by PTC with the Petitioner on 20.1.2014. Thereafter, supply of 169 MW of power from 22.8.2015 and 192 MW from 26.8.2015 (total 361 MW) to the Procurers commenced in terms of the PPAs dated 18.1.2014 and 20.1.2014.

### **Submissions of Petitioner**

4. In the above background, the Petitioner in this Petition has submitted the following:

(a) The Procurer PPA and the PTC-PPA form part and parcel of the same transaction wherein power is generated by the Petitioner and off taken by the Procurers through PTC, a trading licensee. The role of PTC in the whole process is that of a conduit between the Petitioner and the Procurers i.e the distribution



licensees. The two PPAs are inextricably linked to each other and therefore any rights or obligations arising out of any one of the PPAs would get equally reflected while implementing the other PPA. Accordingly, the rights and obligations under the Procurer-PPA were mirrored in the PTC-PPA.

(b) In December, 2015, the Respondent No.1, UPPCL made unilateral and arbitrary deductions of penalty on account of erroneous computation of Availability of the Petitioners Project. The Petitioner wrote to PTC on 9.12.2015 and 23.12.2015 *inter alia* stating that Schedule 4.2.5 of the Procurer-PPA which provides for levy of Penalty for availability below 80% on Contract Year basis and in terms of Clause 4.2.4 and 4.2.5 of Schedule 4 of the Procurer-PPA, both the incentive payment/ penalty are to be computed on Contract Year basis and the deduction in payment, if any, should have been made in the last monthly bill of the Contract year.

(c) Since the annual availability of 85.92% declared by the Petitioner for 2015-16 was more than 80% no penalty would be applicable for 2015-16 and accordingly requested PTC to release the penalty amount of ₹124158362/- deducted by PTC. Thereafter on 2.9.2017, the Petitioner wrote to PTC regarding release of an amount of ₹156850438/- deducted by PTC towards penalty on account of maintaining availability less than 80% for 2016-17, as the Petitioner had declared availability of 81.82% for 2016-17.

(d) The Petitioner on 16.10.2017 wrote to PTC for release of the total amount of ₹284508233/- (including rebate of ₹3499433/-) on the penalty amount deducted for the years 2015-16 and 2016-17 towards shortfall in supply. In response, PTC wrote to the Petitioner on 24.10.2017 and stated that the penalty deducted for 2015-16 and 2016-17 has been paid back to the Petitioner.

(e) UPPCL on 17.1.2018 issued bill verification memo deducting the penalty amounts for the years 2015-16, 2016-17 & 2017-18 against the bills raised by PTC for the month of December, 2017. PTC on 12.2.2018 wrote to UPPCL that there was no provision in the Procurer-PPA for calculation of the standalone availability and it was always cumulative up to the billed month starting from the contract year. It also informed UPPCL that the cumulative availability for the years 2015-16, 2016-17 & till December, 2017 was 85.92%, 81.82% and 83.62% respectively, which was more than the availability of 80% for applicability of penalty and hence no penalty was leviable against supply of power by the Petitioner. Accordingly, PTC requested UPPCL to refund the amount of ₹172218751/- . However, UPPCL vide its letter dated 21.2.2018 informed PTC that the bills have been verified and penalty has been deducted in compliance with Chief Engineer (Planning) letter dated 11.1.2018 and hence refund of penalty was not admissible.

(f) The Petitioner has a composite scheme in terms of section 79 (1)(b) of the 2003 Act as it generates electricity in the State of MP and is supplying to the State of UP, on long term basis, and various other states outside the host state on short term basis. Hence, this Commission has the jurisdiction to adjudicate the



dispute in terms of Article 14.3.1.1 (a) of Procurer- PPA and the judgment of the Hon'ble Supreme Court in Energy Watchdog case.

(g) If the cumulative availability during a particular financial year is less than 80%, only then a penalty as per clause 4.2.5.1 will be leviable. The Procurer-PPA has incorporated the provision of 4.2.5.1 of schedule 4 as prescribed under the competitive bidding guidelines notified by the Central Government. Therefore, even the standard PPA prescribes that penalty is to be levied in case the availability for a contract year is less than 80%. Thus, the deduction made by UPPCL is contrary to the competitive bidding guidelines.

(h) UPPCL has wrongly computed the availability of the Project on 'standalone monthly basis' instead of considering the same on annual/ contract year basis as prescribed under the Procurer-PPA. Despite the fact that the availability of the Petitioner's Project has been above 80% for every contract year since the commencement of supply by the Petitioner, the deduction of ₹172218751/- by UPPCL is arbitrary and contrary to clause 4.2.5.1 of schedule 4 of the Procurer-PPA.

(i) UPPCL by letter dated 11.1.2018 has unilaterally introduced new methodology for calculating penalty in an event where availability is less than 80%. As per UPPCL, if the cumulative availability declared by the Petitioner for a contract year exceeds 80% being the minimum threshold for applicability of penalty, even then the penalty deducted in any month of the contract year will not be refunded by UPPCL, which is contrary to the Procurer-PPA. Thus, UPPCL has overridden the Procurer-PPA by imposing penalty by considering availability on a monthly basis.

Accordingly, the Petitioner has submitted that the Commission may direct UPPCL to refund the penalty amount of ₹172218751/- deducted along with carrying cost.

5. The Petition was admitted on 6.9.2018 and the Commission issued notice to the Respondents. In response, Respondent No. 1, UPPCL (on behalf of the Respondents 2 to 5) has filed its reply vide affidavit dated 11.10.2018. Rejoinder to the said reply has been filed by the Petitioner vide affidavit dated 18.10.2018.

### Reply of UPPCL

6. The Respondent No.1, UPPCL vide its reply affidavit dated 11.10.2018 has submitted the following:



(a) There is no contractual relationship between the Petitioner and the Respondents 1 to 5 (discoms in State of UP). The PPA dated 18.1.2014 between the discoms of UP and PTC was approved by the UPERC thereby conferring jurisdiction upon UPERC with respect to the disputes.

(b) The provisions as contained in Article 14.1.1 and Article 14.3.1.1 (b) of the PPA are completely covered by Section 64(5) of the Electricity Act, 2003 in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case. The parties to the PPA dated 18.1.2014 had subjected themselves to the jurisdiction of UPERC which has approved the said PPA.

(c) In Article 1.1 of the PPA dated 18.1.2014, parties are legally obliged to abide by the terms and conditions of the PPA which includes them jurisdiction of the Courts at Lucknow, in case of disputes between the Procurers and Sellers.

(d) There is nothing in the PPA dated 18.1.2014 which would even suggest that the Procurers owed an obligation towards the Petitioner. It is only through the 'conduit' PTC India Ltd that the Petitioner, in terms of the PPA dated 20.1.2014, could invoke its rights and duties.

(e) PTC is obliged to perform its part as provided in the PPA dated 18.1.2014 and there is no corresponding obligation in terms of the said PPA upon the discoms towards the Petitioner. The Petitioner must restrict itself to the PPA dated 20.1.2014. There is no reciprocal contractual obligation upon the UP discoms to be read ipso facto in the PPA dated 18.1.2014 that is there in PPA dated 20.1.2014.

(f) The Petitioner has got no right to invoke terms and conditions in PPA dated 18.1.2014 and hence the Petition is not maintainable.

### **Rejoinder of Petitioner**

7. The Petitioner vide its rejoinder affidavit dated 17.10.2018 has submitted the following:

(a) The PTC PPA incorporates the terms and conditions of the Procurer-PPA as back to back arrangement for supply of power from the Petitioner's Project to the Respondents. Some of the provisions in the recitals of the PTC-PPA including Article 2, Article 6 and Article 14.11 of the PTC-PPA make it clear that PTC-PPA has been executed in order to enable PTC to fulfill its obligations under the Procurer-PPA and the terms and conditions of the Procurer-PPA are mirrored in the PTC-PPA.

(b) The purpose of executing the PTC-PPA was to enable the supply of power to the Respondents under the Procurer-PPA. The Procurer-PPA and PTC-PPA are co-terminus and one cannot exist without the other. The role of PTC is that of



an intermediary, whereas the actual sale and purchase of electricity takes place between the Petitioner and the Respondents.

(c) When a trading license is not functioning as a merchant trader i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the purchaser under re-sale, then there is a link between the ultimate distribution company and the generator with the trader acting as only intermediary linking company.

(d) The Respondents at the time of bidding was aware that the Petitioner was the developer of the generation source for supplying power to the Respondents and actual sale of power would be done by the Petitioner and that PTC was only acting as a trading licensee for the entire transaction.

Accordingly, the Petitioner has submitted that the contentions of the Respondents deserve no merit for consideration and is therefore liable to be rejected.

8. During the hearing of the Petition on 15.11.2018, the learned counsel for the Petitioner reiterated the submissions made in the Petition and prayed that the reliefs sought for may be allowed. The learned counsel for the Respondent No.1 UPPCL submitted that the PPA dated 18.1.2014 contains provisions which are required to be amended. The learned counsel for the Respondent, PTC however clarified that since it was acting as a 'conduit' between the Petitioner and the Respondents 2 to 5, it had requested UPPCL vide letter dated 12.2.2018 to refund to the Petitioner, the penalty amounts deducted by UPPCL towards the supply of power. Accordingly, the Commission reserved its order in the Petition.

### **Analysis and Decision**

9. After consideration of the submissions of the Petitioners and the Respondent, UPPCL the following issues arise for our consideration:

**Issue No. (A):** Whether the Commission has the jurisdiction to decide the dispute?

**Issue No.(B):** Whether penalty in any contract year is to be calculated on a 'cumulative basis' or on 'standalone' basis in terms of the PPA?



**Issue No A: Whether the Commission has the jurisdiction to decide the dispute?**

10. To determine whether this Commission has the jurisdiction to decide the disputes, it is required to determine (1) whether there exists a composite scheme for generation and supply of power to more than one State (2) whether there is privity of contract between MBPL and the Respondent, discoms of UP, and (3) whether back to back arrangement for supply of power from generating station to the distribution licensee through trader amounts to supply of power by a generating company to a distribution licensee.

**(i) Composite Scheme**

11. The Petitioner has submitted that it has a composite scheme for generation and sale of power in more than one State as contemplated in section 79(1)(b) of the 2003 Act. It has stated that the project located in the State of MP is generating electricity and supplying power to the States of MP and UP, on long term basis and to various other States on short term basis. Accordingly, it has submitted that in terms of the judgment of Hon'ble Supreme Court in Energy Watchdog case [(2017) 14 SCC 80] and Article 14.3.1.1 (a) of the Procurer-PPA dated 18.1.2014, any dispute relating to tariff shall be adjudicated by the Appropriate Commission i.e. the Central Commission. The Respondent, UPPCL has submitted that the PPA dated 18.1.2014 executed between the discoms of UP and PTC was approved by UPERC and hence it has the jurisdiction to decide the dispute. The Respondent has further stated that the provisions of Article 14 of the said PPA is covered by section 64(5) of the 2003 Act and the Hon'ble Supreme Court in the Energy Watchdog case has approved the applicability of section 64(5). The Petitioner in its rejoinder has reiterated that the judgment of the Hon'ble Supreme Court dated 11.4.2017 in Energy Watchdog V CERC & ors is squarely applicable to the present case.



12. The submissions have been considered. As stated, the Petitioner, MBPL is supplying power to the host State of MP and to the discoms of the State of UP from its power project situated in State of MP. It has entered into separate long term PPA dated 5.1.2011 and 4.5.2011 for supplying power from its power plant to the State of MP and PPAs dated 18.1.2014 and 20.1.2014 for supplying power to the discoms in the State of UP through the Respondent No.6 PTC, an electricity trader. In addition to this, the Petitioner has been supplying power to various other States under short term basis. It is therefore evident that the Petitioner, MBPL is supplying electricity to multiple States from the same generating station and such supply is governed by the binding arrangements, namely the PPAs. Sub-section (b) of Section 79(1) of the 2003 Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580) while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term 'composite scheme' as under:

*“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the*



*expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.”*

13. The Hon’ble Supreme Court while interpreting the term ‘composite scheme’ under Section 79(1)(b) of the 2003 Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff has been adopted under Section 63 of the 2003 Act. Since the Petitioner, MBPL is supplying power to multiple States through PPAs, its generating station has a ‘composite scheme’ for generation and sale of power to more than one State. Hence, in the light of the decision of the Hon’ble Supreme Court we are of the considered view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) read with 79(1)(f) of the 2003 Act. Accordingly, the Petition is maintainable.

#### **(B) Privity of Contract**

14. The Petitioner has submitted that the Procurer-PPA and the PTC-PPA form part and parcel of the same transaction wherein power is generated by the Petitioner and off-taken by the Procurers through PTC, a trading licensee. The Petitioner has pointed out that the role of PTC is that of a conduit between the Petitioner and the Respondent discoms of UP and has submitted that the two PPAs are inextricably linked to each other and the rights and obligations under the Procurer-PPA were mirrored in the PTC-PPA. The Respondent, UPPCL has submitted that there is nothing in the PPA dated 18.1.2014 which would suggest that the Procurers owed any obligation towards the Petitioner. It is only through conduit PTC that the Petitioner, in terms of the PPA dated 20.1.2014 could invoke its rights and duties. The Respondent has further submitted that though the PTC-PPA dated 20.1.2014 obligates the Petitioner and PTC to comply with the obligations of PTC in Procure-PPA dated



18.1.2014, there is no corresponding obligation upon the Respondent discoms, in terms of the PPA dated 18.1.2014, towards the Petitioner. The Respondents have stated that there is no provision in the PPA dated 18.1.2014 which would suggest that the Procurer has any obligation towards the Petitioner and it is only through PTC, the Petitioner could invoke its rights and duties. The Petitioner in its rejoinder has contended that the PTC-PPA dated 20.1.2014 incorporates the terms and conditions of the Procurer-PPA dated 18.1.2014 as a back to back arrangement for supply of power from the Petitioner's Project to the Respondent discoms. The Petitioner has further pointed out that some of the provisions including Articles 2, 6 and 14.11 of the PTC-PPA makes it clear that the PTC-PPA has been executed in order to enable PTC to fulfill its obligations under the Procurer-PPA and that the Procurer-PPA and PTC-PPA are co-terminus and one cannot exist without the other. The Petitioners have also submitted that the Respondent at all times was aware of the source of intended supply as is evident from the documents namely the LOT dated 11.12.2013 and the Request for Proposal (RFP) dated 27.7.2012. Referring to the judgments of the Appellate Tribunal in PTC India vs Uttarakhand Electricity Regulatory Commission & ors, Lanco power Ltd v HERC & ors, Lanco Budhil Hydro Power Private Ltd vs HERC & ors and the judgment of the Hon'ble High Court of Delhi in PTC V Jaiprakash Ventures Ltd (2012 (130) DR 351), the Petitioner has contended that when a trading licensee is not functioning as a merchant trader, then there is clearly a link between the ultimate distribution company and the generator with the trader acting as an intermediary linking company.

15. We have considered the submissions of the parties and examined the legal position on the issues raised. As stated earlier, Respondent No.1, UPPCL had initiated competitive bidding process by issuance of RFP dated 27.7.2012 for procurement of 6000 MW base load power on long term basis by UPPCL on Case-I basis. Clause 2.1.2.2



(g) of the said RFP provides that in case the bidder was a trading licensee, it should have executed an exclusive PPA for the quantity of power offered in its bid and copy of the same was to be furnished with the bid. The Petitioner desirous of supplying power to the Respondent discoms, entered into an exclusive PPA with PTC on 21.9.2012 and the said PPA formed part of the bid submitted by PTC before UPPCL. Thereafter, PTC was selected as a successful bidder premised on the PPA dated 21.9.2012. Thus, even at the time of bidding and after PTC was selected as a successful bidder and had signed the Procurer-PPA dated 18.1.2014, the Respondent, discoms were aware that PTC would be supplying power from the Petitioners Project.

16. It is observed that PTC had submitted its offer for 361 MW clearly indicating the source of supply of power from the generating station of MBPL. The offer of PTC was accepted by UPPCL and accordingly, Lol dated 11.12.2013 in favour of PTC was issued for supply of 361 MW of power to UPPCL on a long term basis. The relevant portion of the LOI dated 11.12.2013 is extracted hereunder:

*“This is to inform you that the process of evaluating the bids received pursuant to the final RFP, including the “bid” has been concluded. We are pleased to inform you that your proposal and offer received by way of the bid for the generation source MB power (Madhya Pradesh) Limited for 361 MW has been accepted and M/s PTC India Limited is hereby declared as the successful bidder for the generation source MB Power (Madhya Pradesh) Limited as per clause 3.5 of the Final RFP and consequently, this Letter of Intent (hereinafter referred to as the “LOI”) is being issued.”*

17. PTC after accepting the LOI had acted upon the same by entering into Procurer -PPA dated 18.1.2014 with the Respondent discoms and PTC-PPA dated 20.1.2014 with the Petitioner, MBPL. The Respondent, UPPCL has submitted that there is nothing in the PPA dated 18.1.2014 which would suggest that the Procurers owed any obligation towards the Petitioner and it is only through the ‘conduit’ PTC that the Petitioner, in terms of the PPA dated 20.1.2014 could invoke its rights and duties. In view of the above, we find that this submission of the Respondent discoms is devoid



of merit. Reference can also be made to some of the provisions of the Procurer-PPA and the PTC-PPA, as under:

**Procurer-PPA dated 18.1.2014**

**“1.1 Definitions**

**Declared Capacity:** shall mean the power station’s net capacity at the relevant time at the interconnection point (expressed in MW) as declared by the seller in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff.

**Developer:** shall mean the owner of the power station from which the seller shall supply the Aggregate Contracted Capacity to the Procurers.

**Interconnection Point:** shall mean the point where the power from the power station switchyard bus of the seller is injected into the interstate/intrastate transmission system (including the dedicated transmission line connecting the power station with the interstate/ intrastate transmission system).

**Power Station:** shall mean MB Power (Madhya Pradesh) Ltd. power generation facility of installed capacity of 2x600 MW, located at villages Laharpur, Murra, Guwari, Jaithari, Belia in District: Annupur, Madhya Pradesh.

**Trading licensee:** shall mean the seller which is an electricity trader and has submitted an exclusive power purchase agreement executed with developer.

**PTC-PPA dated 20.1.2014**

**Recitals**

**G:** .....It is clearly understood between the parties that the objective of the PTC-PPA is to enable PTC fulfil its duties and obligations under the Procurer-PPA. The procurer-PPA is annexed herewith as Annexure-1 to this PTC-PPA and is the basis for execution of the PTC-PPA

**H:** .....The provision of the Procurer-PPA signed between PTC and the Procurer be applicable mutatis mutandis to this agreement except to the extent anything mentioned otherwise herein under this agreement for the purpose of the Procurer-PPA

**J:** In the above context, the parties agree that they shall perform their respective obligations and functions in strict compliance with the letter and spirit of this agreement and also in strict compliance with the Procurer-PPA.

**Article 2.1.1:** This agreement shall become effective upon the date of execution of this Agreement. The validity shall be same as mentioned in the Procurer-PPA.

**Article 2.1.2:** The term of this agreement shall be co-terminus with the Procurer-PPA when it shall automatically terminate, unless terminated earlier, Pursuant to article 2.2.

**Article 6.1:** The tariff payable by PTC to company under this agreement shall be the amount payable to PTC by procurer as per the provision of schedule 4 of the Procurer-PPA minus PTC trading margin as specified herein below.....

**Article 14.11: Purpose of the Agreement:** The parties herein understand that this PTC-PPA is being entered into to enable PTC fulfil its obligations under the Procurer-PPA for continuous and uninterrupted supply of power to the Procurer under the Procurer-PPA.



18. It is evident from the above that both the PPAs are inextricably linked to each other and the rights and obligations' arising out of any one PPA are also reflected in the other PPA. Further, the LOI issued by UPPCL on 11.12.2013 had recognised the generating station of the Petitioner as the source for supply of power to it through PTC. It is also undisputed that PTC had supplied power to UPPCL from the generating station of the Petitioner since August, 2015 in terms of the said LOI. Thus, the LOI dated 11.12.2013 read with the provisions of the PPAs unambiguously establish the nexus between the generating company MBPL and the Respondent discoms, even though power was supplied through PTC, which is an inter-State trading licensee. Hence, the contention of UPPCL that it has no privity of contract or arrangement with MBPL lacks merit. We, therefore, hold that the present Petition filed by MBPL for adjudication of disputes against Respondent, discoms of UP is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.

**(C) Supply of Power through a Trader**

19. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies through back to back arrangement would be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v HERC & ors) before Appellate Tribunal for Electricity and in OMP 677 of 2011 {PTC India Limited Vs. Jaiprakash Power Ventures Ltd.] before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Tribunal after



considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

*“21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company*

.....

*61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.*

20. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

*“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: “(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be*



*regulated and only transmission and wheeling charges with surcharge would be regulated.”*

*53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.*

*55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.*

*56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework of EA.”*

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*64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco-I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act.”*

21. The above judgement was challenged before the Division Bench of the Hon“ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides that when power is supplied by a generating company to a distribution licensee through the



intervention of a trading licensee for ultimate consumption of consumer, the tariff would be subject to the regulatory jurisdiction of the Regulatory Commission. Since in this case electricity was supplied from the generating station of MBPL to discoms of UP through PTC based on back to back arrangements, such supply of power shall be subject to the regulatory jurisdiction of this Commission including adjudication of any dispute with reference to supply of such power and tariff thereof.

22. The Appellate Tribunal in Lanco Power Ltd v HERC & ors has taken the view that when power is supplied to a trading licensee who has back to back arrangement for supply of the same power to the distribution licensees, the appropriate Commission has the power to determine the tariff. The Hon'ble High Court of Delhi in PTC India Ltd v Jaiprakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of the Commission. In the light of the settled legal position and the factual matrix of the present case, the contentions of UPPCL with regard to absence of jurisdiction of this Commission to adjudicate the dispute between MBPL/PTC and UPPCL are rejected.



We hold that the Petition filed by MBPL to adjudicate the disputes is maintainable under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

**(D) Jurisdiction of the Civil Courts at Lucknow or the State Commission**

23. The Respondent, discoms of UP have further contended that in terms of Article 14.1.1 of the PPA, any legal proceedings in respect of any matters, claims or disputes under the PPA shall be under the jurisdiction of the appropriate Courts in Lucknow. It has also submitted that the provisions of Article 14 of the said PPA is covered by section 64(5) of the 2003 Act and the Hon'ble Supreme Court in the Energy Watchdog case has approved the applicability of section 64(5).

24. The matter has been considered. It is noticed that Article 14.3.1 provides for Dispute Resolution by the "Appropriate Commission". Article 14.3.1.1(a) provides for the following:

*"Where CERC is the Appropriate Commission, any dispute arising from a claim made by any party for any change in or determination of tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the tariff or determination of any such claims could result in change in tariff, shall be subjected to adjudication by the Appropriate Commission."*

25. As stated earlier, the generating station of the Petitioner has a composite scheme for supply of power in more than one State. Hence, the 'Appropriate Commission' in terms of Article 14.3.1.1(a) will be the Central Commission to deal with any of the claims/disputes raised by the Petitioner under the PPA dated 18.1.2014 / 20.1.2014. The submissions of the Respondents, UP discoms are, therefore, rejected.

26. The Respondents, UP discoms have referred to the findings of the Hon'ble Supreme Court in the Energy Watchdog judgment as regards Section 64(5) of the 2003 Act and has contended that the State Commission (UPERC) only has jurisdiction in the matter. Section 64(5) of the 2003 Act provides as under:



*“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.*

27. With regard to Section 64(5), the Hon’ble Supreme Court in its judgment dated 11.4.2017 had observed the following:

*“Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”*

28. In our view, the findings of the Hon’ble Supreme Court on Section 64(5) do not in any manner support the argument of the Respondent that the State Commission (UPERC) will have jurisdiction in matters relating to inter-state supply of power. In the above quoted para, the Hon’ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. “By application of the parties concerned” would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of the two States. In the present case, the Petitioner has entered into PPAs for generation and supply of power to two States i.e. State of MP and the State of UP on long term basis. In respect of the UP discoms PPA dated 18.1.2014, the Respondent, UP discoms have invoked the



jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, even though the tariff discovered under competitive bidding process was adopted by a State Commission under Section 63 of the 2003 Act, Section 64(5) has no application in the present case since the generating station is supplying power to more than one State and in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the generating station of the Petitioner vests with this Commission. In view of this, we find no merit in the submission of the Respondent, UP discoms and accordingly the same is rejected.

Having dealt with the objections of the Respondents UP discoms as above and held that the Petition is maintainable, we proceed to examine the issues raised by the Petitioner, on merits.

**Issue No. (B): Whether penalty in any contract year is to be calculated on a 'cumulative basis' or on 'standalone' basis in terms of the PPA?**

29. The Petitioner has submitted that it had supplied 169 MW of power to the Procurers with effect from 22.8.2015 and 192 MW with effect from 26.8.2015 in terms of the Procurer-PPA and PTC-PPA and payments for the preceding three months up to November, 2015 were made to the Petitioner in accordance with the Procurer-PPA. It has also submitted that penalty was imposed on the Petitioner by UPPCL amounting to ₹124158362/- and ₹156850438/- for the years 2015-16 and 2016-17 respectively on the ground of maintaining availability below normative level and consequently, PTC deducted the said amounts from the energy bill of the Petitioner. According to the Petitioner, PTC had claimed rebate of ₹2663254/- and ₹836179/- on the penalty amount deducted for the years 2015-16 and 2016-17 respectively. Since the annual



availability for the year 2015-16 (from 22.8.2015 till 31.3.2016) was 85.92%, and 81.82% for the year 2016-17, the Petitioner vide letter dated 16.10.2017 requested PTC to release the total amount of ₹284508233/- (including rebate of ₹3499433/-) deducted by PTC towards shortfall in supply. In response to the said letter dated 16.10.2017, PTC, on 24.10.2017, informed the Petitioner that the said penalty amounts deducted for the years 2015-16 & 2016-17 had been paid back to the Petitioner. Subsequently, the Respondent, UPPCL has unilaterally introduced a new methodology for “deduction of penalty under Case-I PPA” through its letter dated 11.1.2018 of the Chief Engineer (Planning), UPPCL addressed to the Superintending Engineer (Import/Export Unit) of UPPCL. Accordingly, SE (Import/Export Unit), UPPCL has computed the availability of the Petitioner’s Project on a ‘stand-alone monthly basis’, instead of considering the same on annual/ Contract Year basis as prescribed under the Procurer-PPA and has arbitrarily imposed penalty on erroneous computation of availability. The Petitioner has contended that the decision of UPPCL in imposing penalty of ₹172218751/- in terms of the letter dated 11.1.2018, for maintaining availability less than 80% on a ‘monthly basis’ instead of ‘Contract Year basis’ for the said years is contrary to the provisions of the Procurer-PPA & PTC-PPA including para 4.5 of the competitive bidding guidelines specified by the Central Government.

30. The matter has been examined. Clause 4.2 of Schedule 4 of the Procurer-PPA dated 18.1.2014 provides as under:

**“4.2 Monthly Tariff Payment**

**4.2.1 Components or monthly tariff payment**

*The monthly bill for any month in a contract year shall consist of the following:*

- (i) Monthly capacity charge payment in accordance with clause 4.2.2 of schedule 4;*
- (ii) Monthly energy charge for scheduled energy in accordance with clause 4.2.3 of schedule 4;*
- (iii) Incentive determined in accordance with clause 4.2.4 of schedule 4 (applicable on a cumulative basis and included in each monthly bill);*



(iv) Penalty determined in accordance with clause 4.2.5 of schedule 4 (applicable on a cumulative basis and included in each monthly bill)

xxxx

**4.2.5 Contract year penalty for Availability below Eighty percent (80%) during the contract year**

4.2.5.1 In case the availability for a Contract Year is less than eighty percent (80%), the seller shall pay a penalty at the rate of twenty percent (20%) of the simple average Capacity Charge (in Rs/Kwh) for all months in the Contract Year applied on the energy (in kWh) corresponding to the difference between eighty percent (80%) and Availability during such Contract Year”

31. The term ‘Contract Year’ has been defined in the Procurer-PPA as under:

*“Contract Year shall mean the period commencing on the effective date and ending on the immediately succeeding March 31 and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31;*

*Provided that:*

*(i) In the financial year in which the scheduled delivery date would occur, the contract year shall end on the date immediately before the scheduled delivery date and a new contract year shall commence once again from the scheduled delivery date and end on the immediately succeeding March 31, and thereafter each period of twelve (12) months commencing on April 1 and ending on March 31, and*

*(ii) Provided further that the last contract year of this agreement shall end on the last day of the term of this agreement;*

*And further provided that for the purpose of payment, the tariff shall be the quoted tariff for the applicable contract year as per schedule 8 of this agreement.”*

32. As per clause 4.2.1 (iv) of Schedule 4 of the Procurer-PPA, monthly bill shall include penalty determined in accordance with clause 4.2.5 of Schedule 4 and shall be applicable on cumulative basis and included in the monthly bill. Clause 4.2.5.1 of Schedule 4 of the Procurer-PPA dated 18.1.2014 provides that in case the availability for a contract year is less than 80%, a penalty of 20% of the simple average Capacity Charge for all months in the Contract year applied on the energy corresponding to the difference between 80% and actual availability during contract year will be imposed. In terms of the definition of the ‘Contract Year’, the first contract year is from 26.8.2015 to 31.6.2016 and the subsequent contract year commences from 1<sup>st</sup> April and ending on 31<sup>st</sup> March, of the subsequent year. It is clear from the provision of



clause 4.2.5.1 of Schedule 4 that the penalty shall be calculated on the basis of the availability for the entire contract year and not on the basis of availability during any particular month or 'standalone basis'.

33. However, the Chief Engineer (Planning) has issued certain guidelines for computation of penalty under Case-1 PPA. The letter dated 11.1.2018 issued by the Chief Engineer (Planning) UPPCL, addressed to the Superintending Engineer (Import/Export Unit) contains the following guidelines for calculation of penalty:

*“(a) Penalty be enforced for each month keeping in view the Contracted Capacity for the month and the actual scheduled availability in the month on standalone basis i.e non-cumulative yearly treatment to availability.*

*(b) As a corollary of the above, there shall be no reconciliation of the monthly penalty deducted at the end of the Contract Year.*

*(c) For the previous contract year(s) same principle be applied and in case any penalty is deemed payable for the contract year(s) against the Seller the same be adjusted from the monthly bills of the Seller.”*

34. It is evident from the above that UPPCL has decided to calculate penalty for each month, keeping in view the contracted capacity for the month and the actual scheduled availability in the month on standalone basis. In other words, UPPCL has decided to adopt non- cumulative yearly treatment of availability. As a corollary to the above decision, UPPCL has dispensed with the reconciliation of the monthly penalty deducted at the end of the contract year. Further, UPPCL has also sought to give retrospective effect to the decision of computation of the penalty to previous years. The above decision is contrary to the existing provisions of the PPA. Clause 4.2.5.1 of Schedule 4 of the Procurer-PPA dated 18.1.2014 provides for computation of Availability of the Contracted Capacity on an 'annual basis' and penalty, if any, was required to be imposed only if the annual availability falls below 80%. In other words, the Procurer-PPA dated 18.1.2014 does not provide for the computation of Availability and/or deduction of penalty on standalone monthly basis. The terms of



the Procurer-PPA dated 18.1.2014 are unambiguous and clear and the Respondent, UPPCL is bound by the express provisions of the said PPA. Therefore, the letter of UPPCL for computation of the penalty is clearly in violation of the provisions of the PPA. UPPCL cannot introduce changes in the PPA unilaterally or issue guidelines which have the impact of altering the clauses of the PPA.

35. During the hearing on 15.11.2018, the learned counsel for the Respondent, UPPCL submitted that the PPA dated 18.1.2014 contains provisions which are required to be amended. Any change in the PPA requires amendment of the PPA, in terms of Article 15.3 of the PPA. Article 15.3 provides as under:

**“15.3 Amendment**

*15.3.1 This agreement may only be amended or supplemented by a written agreement between the parties and after obtaining the approval of the Appropriate Commission, where necessary.”*

36. Though the Respondent UPPCL has stated that the PPA dated 18.1.2014 contains clauses which require amendment, no such action has been taken by the parties to seek formal amendment of the PPA. In the absence of any formal amendment of the PPA, the provisions of the PPA are sacrosanct in so far as the contractual relationship between the parties is concerned.

37. The Petitioner has submitted that it had declared availability of more than 80% for the years 2015-16, 2016-17 and 2017-18. The monthly break-up of Availability declared by the Petitioner for the years 2015-16, 2016-17 and 2017-18 are detailed hereunder:

**2015-16**

Aug,2015 & Sep, 2015	Oct, 2015	Nov, 2015	Dec, 2015	Jan, 2016	Feb, 2016	Mar, 2016	2015-16
56.54%	74.74%	93.95%	98.18%	97.28%	100%	88.44%	85.92%

**2016-17**

April, 2016	May, 2016	June, 2016	July, 2016	Aug, 2016	Sep, 2016	Oct, 2016	Nov, 2016	Dec, 2016	Jan, 2017	Feb, 2017	Mar, 2017
53%	91%	73%	97%	93%	66%	69%	100%	74%	99%	93%	85%



**2017-18**

Apr, 2017	May, 2017	June, 2017	July, 2017	Aug, 2017	Sep, 2017	Oct, 2017	Nov, 2017	Dec, 2017	Jan, 2018	Feb, 2018	Mar, 2018
70.21%	77.76%	86.47%	94.19%	88.18%	71.06%	74.71%	91.66%	97.83%	90.64%	99.18%	80.40%

38. The penalty amount deducted by UPPCL from the Petitioner's bill for the years 2015-16, 2016-17 and 2017-18 based on the Availability achieved by the Petitioner for the said years are as under:

Contract year/ financial year	Cumulative Availability achieved by Petitioner (%)	Amount deducted / penalty imposed by UPPCL / PTC (in ₹)
2015-16	85.92	49401469
2016-17	81.82	93886799
2017-18 (upto December, 2017)	85.13	28930483
<b>Total</b>		<b>172218751</b>

39. It is evident from the above that the Petitioner has maintained availability of more than 80% calculated on a cumulative basis for the contract years 2015-16, 2016-17 & 2017-18 (December, 2017). Hence, in terms of the provisions of the PPA no penalty can be imposed by UPPCL by calculation of availability on standalone monthly basis in terms of its letter dated 11.1.2018. In our considered view, the methodology adopted by the Respondent, UPPCL for deduction of penalty of ₹172218751/- for the years 2015-16, 2016-17 and 2017-18 (upto December, 2017) by computation of availability of Contracted Capacity on standalone monthly basis, in terms of the said letter, amounts to unilateral amendment of the provisions of the PPA and is therefore contrary to Clause 4.2.5 of Schedule 4 of the Procurer-PPA. We, therefore, hold that the Petitioner is entitled to refund of the said amount deducted by UPPCL by considering Availability on monthly basis. We also hold that the penalty applicable for shortfall in Availability of Contracted Capacity shall be computed by UPPCL, on 'annual basis' in terms of Clause 4.2.5 of Schedule 4 of the Procurer-PPA dated 18.1.2014.



40. The Petitioner has also submitted that the decision of UPPCL not to reconcile the monthly penalty at the end of the Contract Year is contrary to Article 8.7 of the Procurer-PPA dated 18.1.2014. In terms of Clause 8.7.1, all reconciliations including computation of Availability /deduction of penalty, if any, shall be done on quarterly basis at the beginning of the following quarter of each contract year and on annual basis at the end of each contract year. We have in this order held that the penalty applicable for shortfall in availability of the contracted capacity shall be computed by the Respondent on annual basis in terms of the PPA dated 18.1.2014. Accordingly, annual reconciliation to take into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. shall be undertaken by the Respondent in terms of the provisions of the said PPA dated 18.1.2014.

41. The Petitioner has prayed for refund of penalty amount of Rs 172218751/- deducted by UPPCL considering availability on monthly basis along with carrying cost. In support of its contention, the Petitioner has relied upon the judgment dated 20.12.2012 of the Appellate Tribunal for Electricity in Appeal No. 150/2011 (SLS Power Ltd V Andhra Pradesh Electricity Regulatory Commission and judgment dated 13.4.2018 in Appeal No. 210/2017 (APL V CERC & ors) and has submitted that principle of recovery of carrying cost/time value of money is an established principle of regulatory jurisprudence. Accordingly, the Petitioner has submitted that the penalty amounts deducted by UPPCL ought to be refunded to the Petitioner along with carrying cost.

42. The matter has been considered. The amount of Rs 172218751/- has been deducted by UPPCL/PTC contrary to the provisions of the PPA which was otherwise payable on the due date at the end of the relevant month. Article 8.3.5 of the Procurer-PPA provides as under:



*“8.3.5 In the event of delay in payment of monthly bills by any procures beyond its due date, a late payment surcharge shall be payable by such procures to the seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill.”*

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*8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable in the same terms applicable to the Monthly Bill in Article 8.3.5.”*

43. Due date has been defined in the PPA as under:

*“Due Date” means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such monthly bill or supplementary bill is payable by such Procurer.”*

44. Due date has been defined as the thirtieth day after a monthly bill or supplementary bill is received and duly acknowledged by the Procurers. Article 8.3.5 deals with late payment surcharge in case of delay in payment of monthly bills by the Procurer beyond the due date. In terms of Article 8.8, tariff payments for change in parameters, pursuant to provisions in Schedule 4 shall be raised as supplementary bills. Article 8.8.3 deals with late payment surcharge in case of delay in payment of supplementary bills. In the present case, the Respondent, UPPCL has unilaterally, based on letter dated 11.1.2018, deducted penalty of ₹172218751/- against bills raised by PTC for the month of December, 2017 considering the Availability on standalone monthly basis, instead of on annual basis, contrary to the provisions of the PPA. In our view, UPPCL/PTC are liable to pay the late payment surcharge on the deducted amount from the date of deduction till the date of payment at the rate envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

45. Based on the above, the decision of the Commission is summarized as under:

(a) The penalty for shortfall in Availability of the Contracted Capacity shall be computed by Respondent, UPPCL on “annual basis” in terms of clause 4.2.5 of Schedule 4 of the Procurer- PPA dated 18.1.2014.



- (b) Annual reconciliation, to take into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. shall be undertaken by the Respondent in terms of the provisions of the said PPA dated 18.1.2014.
- (c) Any penalty amount deducted by the Respondent, UPPCL in violation of clause 4.2.5 of Schedule 4 of the Procurer- PPA shall be refunded to Petitioner, along with late payment surcharge from the date of deduction till the date of payment at the rate as envisaged in Articles 8.3.5 and 8.8.3 of the Procurer- PPA.

46. Petition No. 224/MP/2018 is disposed of in terms of the above.

**Sd/-**  
**(Dr. M.K. Iyer)**  
**Member**

**Sd/-**  
**(P.K. Pujari)**  
**Chairperson**

