

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 331/MP/2018**

**Coram:**

**Shri P. K. Pujari, Chairperson**

**Dr. M. K. Iyer, Member**

**Shri I.S. Jha, Member**

**Date of Order: 8<sup>th</sup> April, 2019**

**In the matter of**

Petition for recovery of unpaid dues and implementation of orders dated 31.8.2017 in Petition No. 28/MP/2016 read with order dated 20.3.2018 in Petition No. 192/MP/2016 and order dated 26.12.2017 in Petition No. 152/GT/2015 for (a) recovery of unpaid bills and imposition of late payment surcharge thereon and (b) recovery of ash disposal expenses.

**And**

**In the matter of**

Maithon Power Ltd.  
Jeevan Bharti, 10th Floor, Tower-I  
124, Connaught Circus,  
New Delhi-110001

.....Petitioner

**Vs**

Damodar Valley Corporation  
DVC Towers, VIP Road  
Kolkata-700 054

.....Respondent

**Parties present:**

Shri Amit Kapur, Advocate, MPL  
Shri Pramod Singh, Advocate, MPL  
Shri Vivek Kumar, Advocate, MPL  
Shri Akshat Jain, Advocate, MPL  
Shri Raghav Malhotra, Advocate, MPL  
Shri Pankaj Prakash, MPL  
Ms. Anushree Bardhan, Advocate, DVC  
Ms. Tania Sareen, Advocate, DVC  
Ms. Poorva Saigal, Advocate, DVC



## ORDER

This Petition has been filed by the Petitioner, Maithon Power Limited (MPL) seeking the following reliefs:

*“(a) Direct that LPSC is payable on all unpaid bills for the period upto December, 2017 as raised by the Petitioner in its supplementary bill dated 1.10.2018 till the date of actual payment;*

*(b) Direct that the recovery mechanism of ash disposal expenses allowed by this Hon’ble Commission in order dated 26.12.2017 passed in Petition No. 152/GT/2015 as the actual approved expenses to be billed in addition to approved AFC in respective months based on generation in that month along with corresponding carrying cost;*

*(c) Direct DVC to pay the arrear amounts as per prayer (a) and (b) above forthwith; and*

*(d) In the interim, direct DVC not to make any unilateral adjustment/ deduction towards part of supplementary bill payable to it from future monthly bills until the present dispute for payment of past period dues and LPSC claimed in the supplementary bill is adjudicated by this Hon’ble Commission.*

*(e) Pass such further /other order(s) /direction(s) /relief(s) as this Hon’ble Commission may deem fit and proper in the interest of justice.”*

### Background

2. The Petitioner is a joint venture between Tata Power Company Limited (TPCL) having 74% shareholding and Damodar Valley Corporation (Respondent no.1) having 26% shareholding. The Petitioner has set up and operates the Maithon Right Bank Thermal Power Project (“the project / generating station”) having an installed capacity of 1050 MW (2 x 525) in the State of Jharkhand. The date of commercial operation (COD) of Unit-I is 1.9.2011 and that of Unit-II is 24.7.2012. PPA was executed between the Petitioner and DVC on 28.9.2006 for sale of 300 MW power from the project for a period of 30 years. Thereafter, an MOU was entered into between the Petitioner and TPCL on 29.9.2006 for sale of 700 MW power, which was further extended to 750 MW vide letter dated 26.9.2007. The Petitioner vide letter dated 30.8.2011 intimated DVC that ERLDC has not allowed scheduling of power under Long Term Access (LTA) pending clearance from PGCIL and stated that (a) in the absence of LTA, the ERLDC had permitted the Petitioner to schedule power through Short Term Open Access (STOA) and (b) DVC had shown



willingness to accept power on STOA basis and requested for written confirmation of the same. In response, DVC by letter dated 12.9.2011 conveyed its confirmation to avail STOA for scheduling of power to DVC for a quantum of 28.57% of its ex-bus capacity of power in the Installed Capacity (IC) of the project in terms of the PPA. Subsequently, as Unit-I of the project was declared under commercial operation, the Commission by order dated 11.11.2011 granted provisional tariff for supply of 150 MW of power from Unit-I to DVC for the period from 1.9.2011 to 31.3.2012 based on the capital cost claimed by the Petitioner. Subsequently on 29.3.2012, PGCIL intimated ERLDC for scheduling of power to Respondent Nos. 1, 2 and 3 therein from Unit-I of the project under LTA as per their respective contracted capacity. Thereafter, Unit-II of the project was commissioned on 24.7.2012.

3. The Petitioner vide letter dated 1.10.2012 informed ERLDC that power is being scheduled on bilateral mode basis with schedule being intimated and agreed to by the beneficiaries and then intimated to ERLDC for consideration. It was also informed that in the months when beneficiaries' requisitions for power is less than the contracted capacity, the Petitioner is facing issues with the certification of availability of its project. The Petitioner had also informed that as the beneficiaries of the project have requested that the availability of the project be certified by ERLDC, the ERLDC may commence scheduling of power and also provide availability certification for the project. In response, ERLDC by letter dated 5.10.2012 informed that the Petitioner had tied up only part of its full capacity under the PPAs and that the same is in megawatt basis and no percentage wise allocation of the said capacity among the beneficiaries exists. It also informed that the long term PPAs entered into by the Petitioner are bilateral in nature and accordingly all accounts have to be maintained by the beneficiaries through their respective load despatch centers and are required to be settled individually between the beneficiaries and that ERLDC has no role to play in the matter.



4. During the meeting on 24.6.2014 in the chamber of the Member Secretary, ERPC the Respondent, DVC stated that it would no longer pay the capacity charges of monthly energy bill based on the Plant availability computed on contracted capacity and accordingly sought that the capacity charges payable be calculated on installed capacity of the project. On the submission of the Petitioner that Declared Capacity (DC) of the project is required to be certified by ERPC/ERLDC, it was clarified by ERPC that since tariff is determined by the Central Commission, the computation of fixed charges is to be carried out as is being done for other ISGS. ERPC also emphasized that allocation must be changed from absolute figure in MW to percentage figure to facilitate smooth scheduling as well as recovery of fixed charges to avoid dispute. Accordingly, DVC requested the Petitioner to file petition before the Commission seeking clarification and ERPC requested DVC to continue payment of monthly bills as per existing methodology till such time the Commission clarifies the said issue.

5. Thereafter by order dated 19.11.2014 in Petition No. 274/2010, the Commission determined the tariff of Units I & II of the generating station for the period 2011-14 and also directed the Petitioner to adjust the monthly bills as per proviso to Regulation 5(3) of the 2009 Tariff Regulations. The Petitioner raised supplementary bill for ₹29.35 crore for the period from 1.4.2014 to 31.10.2014 as differential amount recoverable from the beneficiaries based on order dated 19.11.2014. Another supplementary bill was raised by the Petitioner for ₹128.26 crore on the Respondent DVC for the period from 1.9.2011 to 31.3.2014 as differential amount recoverable from the beneficiaries based on the tariff dated 19.11.2014. Both the aforesaid bills amounting to ₹157 crore (29.25 + 128.26) have remained unpaid due to dispute raised by Respondent, DVC.

6. The issue of scheduling of power, declaration of capacity and certification of Plant availability by the Petitioner and payment of arrears by the Respondent, DVC as per



Commission's order dated 19.11.2014 was discussed in the 116<sup>th</sup> OCC meeting on 23.12.2015 and after detailed deliberations, the OCC advised the Petitioner to approach the Central Commission for seeking clarification on the methodology of computation of plant availability and percentage wise allocation of capacity from the project. Hence, the Petitioner filed Petition No. 28/MP/2016 seeking clarification on the methodology of computation of plant availability for ISGS for which capacity has been tied up in megawatt basis. The Commission disposed of the said Petition by order dated 31.8.2017 holding as under:

*“19. It is further observed that the Commission after hearing the parties in Petition No. 192/MP/2016 on 18.5.2017 had directed WRLDC to put in place the methodology proposed by it to facilitate certification of DC of the generating station to RPCs with effect from 1.6.2017. As the prayer of the Petitioner and the issues raised in the instant petition are similar to the case of JPVL in Petition no. 192/MP/2016, we are of the considered view that the interim direction made in the case of JPVL as above shall be made applicable in the instant case.*

*22. Accordingly, as an interim measure, the Petitioner is directed to furnish the data as per format (as specified by WRLDC) enclosed as Annexure-I to this order. ERLDC is directed to schedule power from the generating station and for certification of DC and Plant Availability prospectively from 1.8.2017. Any final decision taken in Petition No. 192/MP/2016 with regard to certification of DC will also be applicable in case of the Petitioner. As regards certification of declaration and Plant Availability of the generating station of the Petitioner for the prior period (2011-14 till 1.8.2017) and for payment of arrear amounts by the respondents to the Petitioner, the matter is under consideration of the Commission in Petition No. 192/MP/2016 and the decision taken in the said petition shall be made applicable in case of the Petitioner.”*

7. Thereafter, the Commission by order dated 26.12.2017 revised the tariff of the generating station of the Petitioner for the period 2011-14 after truing-up exercise and determined the tariff of the generating station for the period 2014-19. The Commission in the said order allowed the actual ash disposal expenses claimed by the Petitioner as additional O&M expenses.

8. Subsequently, the Commission disposed of Petition No. 192/MP/2016 (JPVNL V WRLDC & ors) by order dated 20.3.2018 as under:

*“10. The Commission had observed in order dated 31.8.2017 in Petition No. 28/MP/2016 that certification of declaration and plant availability of the generating station of MPL for the prior period i.e. from 2011-14 to 1.8.2017 would be addressed in the light of the decision in Petition No. 192/MP/2016. Maithon Power Limited (MPL) had filed the Interlocutory*



*Application seeking impleadment as party to the present petition. The Commission while disposing of the IA permitted MPL to make its submissions including data confined to its case in the present petition. MPL vide its affidavit dated 3.11.2017 has submitted the data to the Commission, ERPC and ERLDC. MPL vide its affidavit dated 20.2.2018 has submitted that ERPC/ERLDC may be directed to follow WRLDC's approach and include the details as submitted by MPL on 5.2.2018 in respective REAs.*

*11. We are of the view that ERLDC/ERPC should adopt the similar approach as implemented by WRLDC in respect of JPVL. Accordingly, we direct MPL to furnish the declared capacity and day-to-day schedule of its generating station for the past period. On receipt of the data, ERLDC shall disseminate the said information to ERPC for inclusion in the Regional Energy Accounting by issuing necessary Addendum to the REA of the respective months for the past period”*

9. The Petitioner requested the ERPC on 23.3.2018 to include the data of declared capacity and day to day schedule of the generating station of the Petitioner in the REA by issuing necessary addendum to the REA of the respective months for the past period. On 26.3.2018, the Petitioner raised supplementary invoice on the Respondent, DVC for the period from 1.9.2011 to 31.12.2017 for ₹284.98 crore in terms of Regulation 6(6) of the 2009 Tariff Regulations and Regulation 7(8)(i) of the 2014 Tariff Regulations.

10. In terms of the Commission's order dated 20.3.2018 in Petition No. 192/MP/2016 and after verification by ERLDC, the ERPC on 10.5.2018 issued the computation of availability for the capacity tied up by the Petitioner and the day to day scheduled energy of the Petitioner generating station for the period 1.9.2011 to 31.8.2017. On 1.10.2018, the Petitioner issued revised supplementary bills to DVC for ₹123.79 crore for the period from 1.9.2011 to 31.12.2017 based on the figures of availability certified by ERLDC on 10.5.2018 replacing the earlier supplementary bill dated 26.3.2018 for ₹284.98 crore. In response, the Respondent, DVC by letter dated 3.10.2018 informed that in terms of the Commission's order dated 31.7.2017 and 20.3.2018, the availability certificate to be issued by ERPC for the past period in the addendum to REA would be the pre-condition for computation of capacity charge for payment of arrear amounts to the Petitioner for the said period. DVC requested the Petitioner to revise the arrear amount through a supplementary arrear bill, based on the availability certificate issued by ERPC. The



Respondent further stated that the power purchase bills could be considered only when the computation was based on the certification of availability by ERPC. Moreover, in the absence of any specific direction regarding applicability of Late Payment Surcharge (LPSC) on the bills disputed for want of clarification of methodology, either in regulation or in the Commission's orders, the Respondent was not admitting any LPSC imposed by the Petitioner for the past period (2011-14 till 1.8.2017).

In the above background, the Petitioner has filed the present Petition praying for the reliefs as in para 1 above.

### **Submissions of Petitioner**

11. The Petitioner in this Petition has mainly submitted the following:

#### **Imposition of LPSC on arrear payments**

(a) The respondent's share of power from the Petitioner's Project is being supplied from Unit-I from 1.9.2011 and Unit-II from 24.7.2012 onwards. Accordingly, the Petitioner was raising monthly energy bills on DVC for the said supply of power.

(b) The Petitioner was raising bills on the basis of tariff as determined by this Commission from time to time for the generating station. However, certain disputes arose between the Petitioner and the Respondent with regard to the calculation of availability of the Petitioner's generating station for the purpose of raising bills for the supply of power to the Respondent. DVC had contended that the monthly charges have to be paid to the Petitioner on the basis of installed capacity of the project instead of the availability computed based on contracted capacity on MW basis. Accordingly, DVC requested the Petitioner to file petition seeking clarification of the methodology to be followed for computing availability of the Petitioner Project.

(c) The difference with regard to computation of plant availability of the generating station of the Petitioner was only with regard to DVC as other beneficiaries had accepted the Petitioner's methodology of computation of availability and had made payments to the Petitioner, except WBSIEDCL.

(d) The Commission in its order dated 31.8.2017 in Petition No. 28/MP/2016 had recognized the methodology for computation of capacity charges in respect of generating stations similar to that of the Petitioner, whose entire capacity had not been contracted. Accordingly, the Commission directed the Petitioner to furnish data as per formats specified by WRLDC (in Petition No. 192/MP/2016) and ERLDC



was directed to schedule power from the Petitioner project and for certification of DC and plant availability prospectively from 1.8.2017. It was also directed that final decision in Petition No. 192/MP/2016 would also be applicable to the Petitioner.

(e) As regards certification of declaration and plant availability for the period from 2011 to 1.8.2017 and for payment of arrear amounts by DVC, it was directed that the decision taken in Petition No. 192/MP/2016 would also be applicable to the Petitioner.

(f) The Commission on 20.3.2018 while disposing of Petition No. 192/MP/2016, had clarified the position on the dispute between the Petitioner and DVC regarding the declaration of plant availability and upheld the methodology of computation of plant availability as adopted by the Petitioner for billing to DVC. In fact, ERPC was directed to formally certify the plant availability of the Petitioner generating station for the period from September, 2011 based on the past data to be provided by the Petitioner. Since the method of computation of availability by the Petitioner was affirmed by the Commission by order dated 20.3.2018, the Petitioner had raised supplementary bills on DVC for ₹284.98 crore for the period from 1.9.2011 to 31.12.2017, which comprises of (i) ₹77.89 crore towards tariff payable by DVC to MPL for the period 2009-14, (ii) ₹156.43 crore payable by MPL to DVC and (iii) overdue and LPSC payable by DVC to Petitioner amounting to ₹363.52 crore for bills unpaid till 26.3.2018.

(g) ERPC has merely certified the availability already declared by the Petitioner for the past period as directed by this Commission. Further, the availability certified by ERPC demonstrates that the Petitioner's methodology of computing the availability has been correct barring few instances, wherein the Petitioner has considered different availability, considering total DC including excess bilateral capacity declared and scheduled. However, for the purpose of certifying long term availability, ERPC has restricted the daily DC and agreed schedules to 150 MW with the presumption that the balance capacity schedule under bilateral arrangement should be settled by the parties as per their mutual short term agreements.

(h) The bill raised on 26.3.2018 is for the differential amount for the period from September, 2011 till December, 2017 as the Petitioner had started billing DVC from January, 2018, based on the tariff approved by the Commission's order dated 26.2.2017. Even after the differential bill was to be calculated for long term capacity tied up and for bilaterally agreed capacity, there was little difference in the total amount due to availability certified by ERPC for the period 2011-14.

(i) DVC by its letters dated 7.8.2018 and 21.8.2018 stated that the bill raised by the Petitioner on 26.3.2018 was not on the basis on ERPC certified data. The Petitioner has issued supplementary bill on 1.10.2018 to the extent of difference in availability considered by the Petitioner for earlier billing and certified by ERPC including any computation issue and after rectifying certain posting errors. However,



the certified figures for majority period till December, 2017 remains the same and there will be no substantial difference to be made in the supplementary bill dated 26.3.2018 in term of the data published by ERPC on 10.5.2018. The data certified by ERLDC/ERPC is merely declaratory in nature and cannot be treated as fresh determination of availability.

(j) DVC has never disclosed of the disputed amount of the bills raised and has only raised concerns regarding the methodology adopted by the Petitioner for computing availability. The contentions of DVC that no LPSC is leviable on the invoice amount, is an attempt to evade its liability without any basis. It was only on 7.8.2018 that DVC raised concerns over the applicability of LPSC on the outstanding amount raised by the Petitioner on the bill dated 26.3.2018.

(k) DVC cannot be allowed to dispute that the bills raised earlier including the supplementary bills dated 26.3.2018 were incorrect. The methodology of computing availability followed in all the bills by the Petitioner has been ratified by this Commission and accordingly the bills raised for the previous period stands legitimized. Therefore, for the purpose of calculation of LPSC, the same would be imposed if the bills remain unpaid beyond 60 days of the date of bills. The Petitioner has claimed LPSC on the outstanding amount as per provisions of the PPA read with the provisions of the 2009 Tariff Regulations and the 2014 Tariff Regulations.

(l) In any event, the Petitioner has already issued a separate bill dated 1.10.2018 for ₹123 crore for both LT capacity and the capacity scheduled in excess of 150 MW and takes into account the figures certified by ERLDC/ERPC in the REA. Further, the Petitioner has carried out certain corrections in posting of payments and double counting of ₹38.55 crore and ₹125.86 crore respectively. Accordingly, the amount receivable as on 26.3.2018 has now been reduced from ₹284.98 crore to ₹123.79 crore.

(m) The methodology of computation had been ratified by the Commission and the figures having certified by ERLDC/ERPC. In view of this, DVC is liable to pay LPSC along with any unpaid bills for the period when the bills were kept pending, as per the PPA executed between the parties and the Tariff Regulations notified by this Commission.

(n) LPSC is the legitimate due claimed by the Petitioner on the bills raised by the Petitioner which were neither disputed on time nor paid by DVC within 60 days of the billing date in terms of the Tariff Regulations. LPSC is a compensation for delayed payment beyond the due date and embodies tariff principles of section 61.

(o) The Petitioner has been raising bills in terms of the orders of this Commission and the provisions of the Tariff Regulations. The mere fact that ERPC has certified the availability declared by the Petitioner does not alter the basis of raising invoices by the Petitioner. In fact, DVC has never taken stand in the past that bills are not payable in the absence of certified availability figures. DVC is estopped from taking



a stand that bills already raised or the supplementary bill dated 26.3.2018 are invalid or needs to be withdrawn. Certification of availability of the Petitioner's generating station by ERPC does not imply that the bills raised by Petitioner prior to such certification by ERPC were invalid.

(p) In view of the above, the Commission may clarify that the bills raised by the Petitioner for the period from 1.9.2011 till 26.3.2018 were correct and had become due for the purpose for imposing LPSC after 60 days of raising the respective bills.

### **Recovery of Ash disposal expenses**

(a) The Commission by order dated 26.12.2017 had allowed additional O&M expenses for ash disposal for the years 2011-12, 2012-13 & 2013-14 on actual basis. However, it has not allowed the same to be considered for the computation of working capital and interest thereon. The expenses though allowed have not been made part of annual fixed charges nor any method of recovery for the same has been specified in the said order. The Petitioner understands that these expenses have to be recovered separately from AFC and in proportion to the actual generation along with and from the date of each monthly bill of the relevant period. Accordingly, it has prayed that the recovery of ash disposal expenses may be allowed on actuals from the date of each monthly bill as the details regarding the same has already been furnished to this Commission.

(b) The LPSC to be recovered from DVC shall be calculated till the time DVC has not made payments of the outstanding amount as per bill dated 1.10.2018.

12. The Petition was admitted on 12.12.2018 and notice was issued to the Respondent with direction to complete pleadings in the matter. In response, the Respondent, DVC has filed its reply and the Petitioner has filed its rejoinder to the said reply.

### **Reply of Respondent, DVC**

13. The Respondent, DVC vide reply affidavit dated 27.12.2018 has submitted the following:

(a) The claim for LPSC alleging the amount outstanding from DVC for the period from September, 2011 till December, 2017 is wrong and is not admissible. The said claim has been made by the Petitioner in regard to the dispute related to the methodology for computing the availability for payment of capacity charges. The Commission had finally decided this aspect relating to the period till August, 2017 in its order dated 20.3.2018 in Petition no. 192/MP/2016. The said order has become applicable in the case of Petitioner and DVC in view of the directions contained on the earlier order dated 31.8.2017 in Petition no. 28/MP/2016 deciding the



methodology for future period and for past period to be decided in Petition No. 192/MP/2016.

(b) The issue as to the applicability of the methodology of the computation of capacity charges of the past period was decided by the Commission only on 20.3.2018 and made applicable to the generation and sale of electricity by the Petitioner to DVC. The liability to pay tariff in terms of the methodology devised in order dated 20.3.2018 crystalized only in March, 2018 and not before in so far as the supply of power to Respondent is concerned.

(c) As the methodology for the past period was pending decision of the Commission and the revision on account of methodology was decided only on 20.3.2018, there cannot be any claim for LPSC for alleged non-payment for the period prior to 20.3.2018.

(d) The claim of the Petitioner was being adjudicated and the amount due to the Petitioner had to be determined/ computed first. Thereafter, once the amount is determined, the Petitioner is required to raise invoice and in case of non-payment by DVC within the due date, the issue of LPSC after the due date would arise in terms of the PPA. There cannot be any claim for LPSC prior to the due date.

(e) The PPA does not have any provision dealing with restitution principles for restoration to the same economic position. Therefore, the Petitioner is not entitled to claim relief which is not provided in the PPA.

(f) The Appellate Tribunal vide its judgment dated 13.4.2018 in Appeal No. 210 of 2017 in Adani Power Limited Vs Central Electricity Regulatory Commission and Ors, has held that since the Gujarat Bid-01 PPA has no provision for restoration to the same economic position, therefore, the carrying cost will not be applicable. Similarly, the Tribunal in judgment dated 14.8.2018 in Appeal No. 111 of 2017 in M/s. GMR Warora Energy Limited Vs. CERC & ors has observed that if there is a provision in the PPA for restoration of the Seller to the same economic position as if no Change in Law event has occurred, the Seller is eligible for carrying cost for such allowed Change in Law event(s) from the effective date of Change in Law event until the same is allowed by the appropriate authority by an order/judgment.

(g) DVC regularly paid the capacity charges to the Petitioner during the period from September, 2011 to October, 2014, based on the information provided by the Petitioner for entitlement capacity of its LTA customers which was treated akin to installed capacity and for computation of beneficiary availability, which was treated akin to plant availability. The formula applied by the Petitioner for computation of capacity charges for beneficiaries whose capacity is allocated in MW basis and not in percentage of installed capacity was unique and there was no reference either in the 2009 Tariff Regulations or the 2014 Tariff Regulations notified by the Commission or in any subsequent orders of this Commission.



(h) As DVC made all payments to the Petitioner including the capacity charges during the period from September, 2011 to October, 2014 as per computation methodology of the Petitioner, in terms of the agreement arrived at the meeting held on 24.6.2014, there was no scope for raising any LPSC by the Petitioner. The LPSC amount of ₹284.98 crore which the Petitioner has claimed towards unpaid amount of bill from January, 2015 onwards till 26.3.2018 is unjustified. If the same is excluded from the earlier bill, then the total receivable amount of DVC comes to ₹78.54 crore.

(i) DVC vide its letter dated 16.1.2017 categorically informed the Petitioner that in the absence of any reconciliation of the accounts during the past period, it was not in a position to give cognizance of the LPSC amount claimed in its monthly energy bills. In the absence of any specific direction of applicability of LPSC on the bills being disputed for want of clarification of methodology, either in regulation or in any order of this Commission, DVC does not admit any LPSC.

(j) As regards ash disposal expenses, the same has not been included in the AFC allowed to the Petitioner. The Commission in its earlier order dated 8.5.2013 in Petition No. 272/2010 on similar grounds, included ash disposal expenses as additional expenses in the AFC to be recovered. In terms of the above, the Petitioner is required to raise supplementary bills for the additional O&M expenses for ash disposal in proportion to the contracted capacity of DVC to the total installed capacity. DVC agrees to pay the proportionate ash disposal expenses in terms of the said order, once the same is allowed by the Commission to be recovered from beneficiaries when supplementary bills are raised by the Petitioner after necessary addendum to be issued by the Commission.

### **Rejoinder of Petitioner**

14. In response, the Petitioner vide rejoinder affidavit dated 1.2.2019 has submitted that the respondent not only withheld the payment of supplementary bills, but also started deducting payment of capacity charges from bills for the month of January, 2015 onwards on the ground that these bills were incorrect as they were based on incorrect availability figures. The Petitioner along with the monthly bills from June, 2015 started raising LPSC bills for all short payments against bills issued from January, 2015 onwards including supplementary bills. The Petitioner has submitted that the Respondent had withheld payment of arrear amounts on the ground that the computation of availability ought to be done as per formula under Regulation 21(3) of the 2009 Tariff Regulations



considering the installed capacity of the generating station including the untied capacity. Hence, the difference in the annual fixed charges computed by the Petitioner and the Respondent was on account of treatment of the untied capacity in the computation of availability. The Petitioner has stated that there was no fresh determination of the methodology for computing the plant availability by the Commission and the Order dated 20.3.2018 merely interprets the applicable regulations and upholds the correctness of the methodology adopted by the Petitioner. According to the Petitioner, the supplementary bill dated 26.3.2018 raised for the period from 1.9.2011 to 31.12.2017 for ₹284.98 crore, including the LPSC, pursuant to the said order dated 20.3.2018 is as per provisions of the PPA and the tariff regulations. The Petitioner has however clarified that after issuance of certified availability by the ERPC on 10.5.2018, the bill dated 26.3.2018 was revised on 1.10.2018 for ₹123.79 crore, with tariff adjustment of ₹77 crore and outstanding amount along with LPSC of ₹199 crore. The Petitioner has further submitted that it has been fulfilling the obligations under the PPA by supply of uninterrupted power to the Respondent, despite the fact that no payments were being made by the Respondent against the monthly bills raised by the Petitioner. The Petitioner has stated that there is specific provision for levy of LPSC in case of delay in payment beyond thirty days as per provisions of the tariff regulations and the PPA also envisages mandatory payment of bills notwithstanding the fact that in case of dispute either party may seek appropriate remedy. As regards ash disposal expenses, the Petitioner has submitted that the Commission may direct the recovery mechanism of ash disposal expenses allowed in order dated 26.12.2017 as specified in the tariff regulations along with carrying cost. Accordingly, the Petitioner has prayed that the Commission may reject the submissions of the Respondent and grant the relief as prayed for in the Petition.



15. During the hearing of the Petition on 12.3.2019, the learned counsel for the Petitioner submitted that the Petition has been filed for implementation of the order dated 31.8.2017 in Petition No. 28/MP/2016, Order dated 20.3.2018 in Petition No. 192/MP/2016 and Order dated 26.12.2017 in Petition No. 152/GT/2015. The learned counsel further submitted that the issue raised in the Petition pertains to the recovery of unpaid bills for the period from September 2011 to December 2017, imposition of late payment surcharge on the bills raised on Respondent, DVC and recovery of ash disposable expenses. The learned counsel for the Respondent, DVC submitted that all payments have been made as per the decision of the Commission. However, the learned counsel relied on the judgment of the Hon'ble Supreme Court in the case of Nabha Power Limited Vs Punjab State Power Corporation Limited and anr {(2018) 11 SCC} and submitted that LPSC is not payable by the Respondent on the said amounts. The Commission after hearing the parties reserved its order in the Petition.

### **Analysis and Decision**

16. Based on the above submissions, the following issues emerge for consideration:

**Issue (a):** Imposition of Late Payment Surcharge (LPSC) on outstanding amounts for September, 2011 to December, 2017; and

**Issue (b):** Clarification on Ash Disposal expenses allowed in Commission's order dated 26.12.2017

**Issue (a): Imposition of Late Payment Surcharge (LPSC) on outstanding amounts for September, 2011 to December, 2017**

17. As stated, the Petitioner had raised bills on the Respondent, DVC for payment of capacity charges towards supply of power from its generating station based on availability computed on 'contracted capacity' instead of the 'installed capacity' in the denominator in the formula specified for availability under Regulation 21(3) of the 2009 Tariff Regulations. It is observed that the Respondent unilaterally started deducting payments from the capacity charges billed by the Petitioner from August, 2012 onwards after the



COD of Unit-II on 24.7.2012. Thereafter, based on the proposal of the Respondent DVC vide its letters dated 3.7.2013 and 11.7.2013 for payment of capacity charges on the basis of entitlement certified by the Central Load Dispatch (CLD), DVC and acceptance of the same by the Petitioner vide its letter dated 12.7.2013, the Respondent DVC has been paying the capacity charges to the Petitioner as per certification of the CLD, DVC till October, 2014. Accordingly, no payments including LPSC for the period till October, 2014 were outstanding from the Respondent DVC. However, the Respondent DVC had objected to the payment of monthly bills based on plant availability computed on contracted capacity (on MW basis) and accordingly sought the payment of capacity charges to be calculated on the installed capacity of the project. Accordingly, DVC had requested the petitioner to file petition before this Commission seeking appropriate clarification. Meanwhile, pursuant to the determination of tariff by the Commission vide order dated 19.11.2014 in Petition No. 274/2010 for Units I & II for the period 2011-14 and based on the directions in the said order to adjust the monthly bills as per proviso to Regulation 5(3) of the 2009 Tariff Regulations, supplementary Invoices raised by the Petitioner in January, 2015 for ₹157 crore (₹128.26 crore for the period 1.9.2011 to 31.3.2014 and ₹29 crore for 1.4.2014 to 31.10.2014) were not paid by the Respondent DVC, as it had disputed the computation of availability with contracted capacity in the absence of any certification by ERLDC/ERPC of the same. Also, subsequent to the order dated 26.12.2017 in Petition No. 152/GT/2015, the Petitioner on 26.3.2018 raised supplementary bill for ₹284.98 crores on DVC which included the arrears amounts and LPSC thereon till 26.3.2018. Thereafter, the bill dated 26.3.2018 was revised to ₹123.79 crore on 1.10.2018 after considering the availability figures certified by ERPC on 10.5.2018 which included the revised amount of arrears and LPSC thereon.



18. The Petitioner has contended that since the methodology for computation of availability by the Petitioner was affirmed by the Commission in its order dated 20.3.2018 in Petition No. 192/MP/2016, the supplementary invoice dated 26.3.2018 for ₹284.98 crore (later revised to ₹123.79 crore on 1.10.2018) was payable along with LPSC. Per contra, the Respondent DVC has contended that the claim for LPSC on the outstanding amounts for the period from September, 2011 till December, 2017 is not admissible, since the methodology for computing the plant availability factor for payment of capacity charges till August, 2017 was finally decided by the Commission's order dated 20.3.2018 in Petition No. 192/MP/2016 wherein ERLDC/ERPC was directed to adopt the same approach as followed by the Western Region. It has argued that the claim of the Petitioner was being adjudicated and the amount due to the Petitioner had to be determined/ computed first and only after the amount is determined, the Petitioner was required to raise invoice for the amount so computed. The Petitioner has contended that the revision on account of the methodology for computation of plant availability was decided in order dated 20.3.2018 and crystallized when REA was prepared in terms of the said order during May, 2018. Accordingly, it has submitted that there cannot be any claim by the Petitioner for LPSC for the period prior to April/May, 2018.

19. The submissions have been considered. Some of the provisions in the PPA dated 28.9.2006 are extracted hereunder.

*"4. Tariff at delivery point*

*4.1 Subject to the provisions of this agreement, SELLER shall supply the energy at the delivery point on scheduled basis and BUYER shall pay to SELLER for the scheduled energy as per REA prepared by ERPC. Tariff for such sale of power by SELLER to BUYER at SELLER periphery will be determined by CERC/appropriate Commission from time to time in accordance with CERC/Appropriate Commission regulation on terms and conditions of tariff including capital cost.*

*xxx*

*BUYER shall be liable to pay capacity (fixed) charges proportion to their contracted power i.e. 300 MW from SELLER in terms of target availability as per CERC norms."*

**5. BILLING, PAYMENT AND LC**



## 5.1 Billing

5.1.1 *The quantum of energy sold to the Buyer out of the energy available for sale shall be the energy as indicated in the REA issued by ERPC.*

5.1.2 *The billing cycle will be monthly based on REA issued by ERPC.*

5.1.3 *In the event of acceptance or deemed acceptance of the Invoice the Buyer shall make payment of the same to the Seller within the thirty (30) days of receipt of the Invoice. Buyer is entitled to get rebate at the rate of 2% of the billed amount if the same is paid within seven days of receipt of the bill. In case the payment is made beyond seven days but within 30 days of receipt of the bill, rebate will be 1 (one) percent.*

5.1.4 *In the event the Buyer fails to make payment within the periods set out in Clause 5.1.3 above the Seller shall be entitled to recover the same by encashing the irrevocable Letter of Credit issued in favour of the Seller, which the Buyer hereby irrevocably authorizes the Seller.*

5.1.5 *In event of delay in payment of monthly bill by Buyer beyond its due date, a late payment surcharge shall be payable by Buyer to the Seller. Such late payment surcharge shall be guided by the CERC Regulations on terms and conditions of tariff and its amendment from time to time.*

5.1.6 *All payments made by the buyer shall be appropriated by the Seller in the following order of priority:*

- i. Towards late payment surcharge, payable by the Buyer, if any;*
- ii. Towards earlier unpaid monthly Invoice, if any; and*
- iii. Towards the then current Invoice.”*

20. The relevant provisions of the 2009 Tariff Regulations and the 2014 Tariff Regulations with regard to LPSC are as under:

Regulation 35 of the 2009 Tariff Regulations provides as under:

*“35. Late payment surcharge. In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary beyond a period of 60 days from the date of billing a late payment surcharge at the rate of 1.25% per month shall be levied by the generating company or the transmission licensee, as the case may be.”*

Regulation 45 of the 2014 Tariff Regulations provides as under:

*“45. Late payment surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary of long term transmission customer/DICs as the case may be, beyond a period of 60 days from the date of billing, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be.”*

21. It is evident from the above that the provisions of the PPA dated 28.9.2006 and the provisions of the Tariff Regulations notified by the Commission provides for LPSC in case the bill payment is delayed beyond a period of 30/60 days. The Petitioner has computed the outstanding amount including LPSC in Annexure 4 of the Bill dated 1.10.2018 by



revising the previous bills with ERPC certified availability figures and including the payments actually received for bills raised from COD of Unit 1 till 31.12.2017, including LPSC thereon. The details with regard to the components considered in the bills dated 26.3.2018 and 1.10.2018 as submitted by the Petitioner is as under:

*(figures in crore)*

Sl. No.	Component of bill	Bill dated 26.3.2018	Bill dated 1.10.2018
A.	True-up for 2011-14		
	a. True up difference as per availability figures on bill date	77.89	54.20
	b. Billed amount for excess capacity during 2011-12	-	23.04
	c. Total for 2011-14	77.89	77.24
B.	Final tariff for 2014-17 as per availability on the date of bill	(-)156.43	(-)152.57
C.	Arrears outstanding including LPSC		
	a. Total outstanding	363.52	363.52
	b. Less: impact of posting errors	-	(-)38.55
	c. Less: amount of arrears already adjusted in A above.	-	(-)125.86
	d. Net arrears outstanding	363.52	199.11
D.	<b>Total A(c)+B+C(d)</b>	<b>284.98</b>	<b>123.79</b>

22. In terms of the provisions of the PPA quoted above, the basis of monthly billing was to be the REA issued by ERPC. While there was scheduled energy available in monthly bilateral REAs issued by ERPC, there was no certification of DC and availability in these REAs till August, 2017. DVC had requested the Petitioner to file Petition before the Commission seeking clarification on the computation of availability for calculation of capacity charges and ERPC had requested DVC to continue payment of monthly bills as per existing methodology till such time the Commission clarified the said issue. Despite this, pending resolution of availability dispute, DVC was making payment of the capacity charges to the Petitioner as per its own computation of availability based on installed capacity without any certified availability from ERPC. The Respondent has submitted that the computational methodology for determination of capacity charges was not getting any support from any Regulation and since there was lack of transparency in the arrear bills raised by the Petitioner in January 2015, DVC was constrained to hold up the bills for



payment, subject to instructions from regulatory bodies. This submission of the respondent cannot be accepted. In our view, the provisions of the PPA do not provide for unilateral deduction of payments by DVC from the monthly bills raised by the Petitioner. Also, the submission of the Respondent, DVC that the liability to pay tariff in terms of the methodology devised in Commission's order dated 20.3.2018 crystallised only in May, 2018 after certification of availability figures in the REA by ERLDC/ERPC and not prior to it is not correct and arbitrary. As stated, Petition No. 28/MP/2016 filed by the Petitioner was at the instance of the Respondent DVC and hence the Respondent was aware that the payment of the arrear amounts for the past period was subject to the clarification by the Commission in this petition. After passing of Order dated 31.8.2017 (in Petition No. 28/MP/2016) (as quoted in para 6 above) and Order dated 20.3.2018 (in Petition No. 192/MP/2016) (as quoted in para 8 above) and the certification of availability figures in the REA by ERLDC/ERPC (addendum to REAs), the Respondent became liable to pay the arrear amounts for the past period (from 1.9.2011 to 31.8.2017), along with LPSC, since unilateral deductions had been made by the Respondent DVC from the Petitioner's original bills, during the pendency of the dispute. Further, Regulation 21 of the 2009 Tariff Regulations, which specifies the formula for Availability as PAFM or PAFY, has neither been modified nor changed by the Commission in order dated 20.3.2018. The interpretation of Regulation 21 of the 2009 Tariff Regulations and the revision of REAs in terms of the Commission's order dated 20.3.2018, would in our view, be applicable from the date from which such regulations came into force and not from the date of the order. The question of crystallization of liability from 20.3.2018 as contended by the Respondent is not acceptable since the payment of original bills, unilaterally deducted by the Respondent, became due, after the issuance of REAs. As the methodology adopted by the Petitioner for billing the Respondent DVC, has been upheld by the Commission and the REAs issued accordingly, the imposition of LPSC thereon by the Petitioner, on the



outstanding amounts for the past period is in order and the Respondent is liable to pay the same.

23. The Respondent DVC has contended that the PPA does not have a provision dealing with restitution principles of restoration to the same economic position and therefore, the Petitioner is not entitled to claim relief which is not provided for in the PPA. This submission of the Petitioner is also not acceptable. The Commission by its orders dated 19.11.2014 in Petition No. 274/GT/2010 had revised the tariff of the generating station for 2011-14 based on truing-up exercise and had determined tariff of the generating station for the period 2014-19 by Order dated 26.12.2017 in Petition No. 152/GT/2015. It is noticed that Article 5.1.5 of the PPA provides for payment of late payment surcharge by the buyer to the Seller in the event of delay in the payment of monthly bill by Buyer beyond its due date. It also provides that such late payment surcharge shall be guided by the Regulations of this Commission on terms and conditions of tariff and its amendment from time to time. Regulation 35 of the 2009 Tariff Regulations and Regulation 45 of the 2014 Tariff Regulations notified by the Commission provide for LPSC in case payment of charges is delayed by a beneficiary beyond the period of 60 days from the date of billing. In other words, any payment made beyond the period of 60 days from the date of billing attracts LPSC on the outstanding amount of the invoices. Since the Petitioner has raised the invoices, including LPSC on unpaid amounts since September, 2011 in terms of the provisions of the PPA and the Tariff Regulations notified by the Commission, the Respondent DVC is liable to pay the same.

24. The Petitioner has submitted that the net amount payable by the Respondent as per bill dated 1.10.2018 is ₹123.79 crore. However, the Respondent, DVC during the hearing on 12.3.2019 has submitted that all payments have been made by the Respondent as per decision of the Commission except for the LPSC which is not payable in terms of the



judgment of the Hon'ble Supreme Court in Nabha Power Limited Vs. Punjab State Power Corporation Limited and another {(2018) 11 SCC}. In our view, the judgment in Nabha Power case is distinguishable from the present case. In the said case, the claim for interest was rejected as it was never made at any stage, despite there being a provision for LPSC in the event of delay in payment of monthly bills. The relevant portion of the judgment is extracted hereunder:

*“71. .... We do not think that the present one is a fit case where the principle of compensation for deprivation should enure for the benefit of the appellant as a measure of restitution. More so as it has not been claimed by them at any stage. It does appear that this inclusion in the written synopsis does seem to arise as canvassed by the learned Senior Advocate for the first respondent on account of the Tribunal not finding favour with such claim in the remand proceedings by reason of no claim being laid towards the same. We are, thus, not inclined to grant this claim.”*

25. In the present case, the Petitioner has been claiming LPSC from the Respondent DVC in the monthly bills raised since June, 2015 in terms of Article 5.1.5 of the PPA read with the provisions of the Tariff Regulations. Therefore, the judgment of the Hon'ble Supreme Court is not applicable in the present case. The Respondent DVC is liable to pay the arrear amounts billed by the Petitioner along with LPSC. Accordingly, payment of arrear, if any, of all unpaid bills claimed by the Petitioner is required to be made by the Respondent DVC, to the Petitioner, after reconciliation and LPSC on arrear unpaid bills shall be leviable from the date of original monthly bills issued after reconciliation.

#### **Issue (b): Recovery of Ash Disposal expenses**

26. The Commission in its order dated 26.12.2017 in Petition No. 152/GT/2015 had allowed additional O&M expenses for ash disposal with the following observations:

*“52. We have examined the submissions. The petitioner has incurred actual ash disposal expenses of Rs.10.00 crore in 2012-13 and Rs.43.26 crore in 2013-14 as total expenditure due to gross generation in the units pertaining to both Long-term (“LT”) and Short-term (“ST”) sales. Since, the entire installed capacity of the generating station was not tied-up with Long term beneficiaries for the period 2011-14, the Petitioner has taken initiative during the said period to sell the portion of the unallocated capacity under Short-Term to various customers. Hence, the Petitioner has apportioned the ash disposal expenses based on the actual LT-ST sales ratio during each year of the period from 2011-14.*



53. .... Also, in terms of the direction of the Commission in order dated 19.11.2014, the revenue earned from the sale of Ash during the period has been reduced from the total Ash disposal expenses for the relevant period. Accordingly, the actual Ash disposal expenses of (-) Rs. 11.00 lakh in 2011-12, Rs 861.00 lakh in 2012-13 and Rs. 3376.00 lakh in 2013-14 as claimed by the petitioner is allowed as additional O&M expenses. However, the same has not been considered for the computation of Maintenance Spares, O & M Expenses and Receivables in the calculation of Interest on Working Capital.”

27. The Petitioner has submitted that though the expenses has been allowed, they have not been made part of the annual fixed charges allowed to the Petitioner from the period 1.9.2011 to 2013-14. The Petitioner has submitted that despite the Commission allowing the ash disposal expenses, the Respondent, DVC has refused to pay the same on the ground that they have not been made part of annual fixed charges nor any method for recovery of the same has been specified in the order dated 26.12.2017. The Petitioner has also submitted that these expenses have to be recovered separately in proportion to the actual generation along with and from the date each monthly bill of the relevant period.

28. In response, the Respondent, DVC has submitted that it would pay the proportionate ash disposal expenses once the same is allowed by the Commission in the operating part of the annual fixed charges to be recovered from the beneficiaries as and when the supplementary bill is raised by the Petitioner after necessary addendum to be issued by the Commission. However, the Petitioner in its rejoinder has stated that the ash disposal expenses allowed to the Petitioner is on the basis of actual ash generation and it has claimed only proportionate expenses from the Respondent. Accordingly, the Petitioner has sought directions from the Commission with regard to the mechanism for recovery of ash disposal expenses allowed in order dated 26.12.2017 with costs.

29. The matter has been considered. It is evident from the submissions of the Respondent that it is willing to pay the ash disposal expenses after clarification by the Commission as to whether they form part of the annual fixed charges. The Commission in the said order



dated 26.12.2017 quoted at paragraph 26 above had allowed the ash disposal expenses separately as additional O&M expenses over and above the annual fixed charges, as the same was not considered for computation of Interest on working capital. In view of the submissions of the parties, it is clarified that the actual ash disposal expenses allowed as additional O&M expenses in order dated 26.12.2017 shall be recovered separately from the beneficiaries.

30. This disposes of Petition No. 331/MP/2018.

*Sd/-*  
(I. S. Jha)  
Member

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

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

