**CENTRAL ELECTRICITY REGULATORY COMMISSION**
**NEW DELHI**

**Petition No: 186/MP/2018**

**Coram:**
**Shri P.K.Pujari, Chairperson**
**Shri I.S. Jha, Member**
**Shri Arun Goyal, Member**

**Date of Order: 25th January, 2021**

**In the matter of**

Petition seeking directions for refund of amounts wrongfully deducted by the Respondents, TSSPDCL and TSNPDCL towards Capacity Charges, Incentive, Energy Charges, Transmission Charges, Late Payment Surcharge contrary to the terms of the Power Purchase Agreement dated 31.7.2012.

**And**
**In the matter of**

M/s. KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A, Road No.22,
Jubilee Hills, Hyderabad – 500 033,
Andhra Pradesh, India .....**Petitioner**

**Vs**

Southern Power Distribution Company of Telangana Limited ("TSSPDCL")
(formerly known as Central Power Distribution Company of Andhra Pradesh)
6-1-50, Corporate Office, Mint Compound,
Hyderabad – 500063

Northern Power Distribution Company of Telangana Limited ("TSNPDCL")
(formerly known as Northern Power Distribution Company of Andhra Pradesh)
H.No.2-5-31/2, Corporate Office
Nakkalagutta, Hanamkonda,
Warangal (AP) - 506 004 **…… Respondents**

**Parties present**:

Shri Anand Ganesan, Advocate, KSKMPCL
Shri Ashwin Ramanathan, Advocate, KSKMPCL
Shri Sriharsha Peechara, Advocate, Telangana Discoms

## ORDER

The Petitioner, KSK Mahanadi Power Company Limited (KSKMPCL) has filed the present Petition with the following prayers:

> *"(a) Hold and direct that the Respondents are liable and bound to pay to the Petitioner Capacity Charges of Rs.6,47,14,188/-(Rupees six crore forty seven lakh fourteen thousand one hundred and eighty eight only);*
>
> *(b) Hold and direct that the Respondents are liable and bound to pay to the Petitioner the incentive for higher availability of Rs.1,06,37,844/-(Rupees one crore six lakh thirty seven thousand eight hundred and forty four only);*
>
> *(c) Hold and direct that the Respondents are liable and bound to pay to the Petitioner the energy charges towards scheduled energy of Rs.13,76,208/-(Rupees thirteen lakh seventy six thousand two hundred and eight only);*
>
> *(d) Hold and direct that the Respondents are liable and bound to pay to the Petitioner the transmission charges of Rs.1,62,12,219/- (Rupees one crore sixty two lakh twelve thousand two hundred and nineteen only);*
>
> *(e) Direct Respondents are liable for payment of late payment surcharge as per terms of PPA of Rs.4,62,27,362/-Computed till 31/03/2018 and at the same rate in terms of the PPA for the future period till the date of actual payment of the principal by the Respondents to the Petitioner; and*
>
> *(f) Award costs of the present proceedings against the Respondents and in favour of the Petitioner."*

2. The Petitioner is a generating company as defined in Section 2(28) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') and is in the process of establishing a 3600 MW coal-based thermal power project in District Akaltara in the State of Chhattisgarh, comprising of six generating units with an installed capacity of 600 MW each (hereinafter referred to as "the Project"). Three units of the Project are under operation and the balance units are at various stages of the construction and commissioning.

3. The Petitioner had entered into a Power Purchase Agreement (PPA) dated 31.7.2012 under Case-1 medium term bid floated by the distribution licensees (Discoms) of the erstwhile undivided State of Andhra Pradesh for collective procurement of 400 MW. The supply under the said PPA was for a period of three years, i.e. till 15.6.2016.

4. Pursuant to the bifurcation of the erstwhile State of Andhra Pradesh into new State of Telangana and new State of Andhra Pradesh, the PPA got split into two parts, with the two Telangana Discoms having 215.56 MW contracted capacity and the two Discoms of the new State of Andhra Pradesh having remaining 184.44 MW.

5. In the present Petition, the Petitioner is seeking directions for refund of amounts wrongfully deducted by the Respondents (Discoms of the State of Telangana), Southern Power Distribution Company of Telangana Limited ("TSSPDCL") and Northern Power Distribution Company of Telangana Limited ("TSNPDCL") towards capacity charges, incentive, energy charges, transmission charges and late payment surcharge contrary to the terms of the PPA dated 31.7.2012. The Petitioner has submitted the details of amounts deducted under various heads as under:

| S. No. | Particulars | Amount (Rs.) |
|---|---|---|
| 1 | Capacity Charges (fixed charges for availability) | 6,47,14,188 |
| 2 | Energy Charges | 13,76,208 |
| 3 | Incentive payable as per Article 4.2.4 of PPA | 1,06,37,844 |
| 4 | Transmission Charges | 1,62,12,219 |
| | **Total** | **9,29,40,459** |

6. Late payment surcharge computed by the Petitioner till 31.3.2018 on the above amounts worked out to Rs.4,62,27,362.

7. The Respondents, Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited have submitted their combined replies and written submissions vide affidavits dated 12.12.2018, 18.1.2019, 17.6.2019, and 5.5.2020 and additional written submissions in response to the written submission of the Petitioner dated 6.6.2020.

8. The Petitioner has filed its rejoinder/s and written submission vide affidavit/s dated 8.4.2019 and 6.6.2020 respectively. Replies, rejoinders and written submissions filed by the parties have been dealt in the succeeding paragraphs.

**Analysis and Decision**

9. We have considered submissions of the Petitioner, replies of the Respondents, rejoinder of the Petitioner, additional submissions and other documents available on record. The following issues arise for our consideration:

**Issue No.1: Does the Commission have jurisdiction to deal with the dispute?**

**Issue No.2: Is the Petition barred by limitation?**

**Issue No.3: Are the Respondents, in terms of the PPA, liable to pay following withheld Charges as claimed by the Petitioner:**

**i) Capacity charges;**
**ii) Incentive;**
**iii) Energy Charges;**
**iv) Transmission Charges;**
**v) Late Payment Surcharge.**

These issues have been examined and answered in the succeeding paragraphs.

**Issue No. 1: Does the Commission have jurisdiction to deal with the dispute?**

10. The Respondents have submitted that even though the generator is supplying power to more than one State, the dispute raised by the Petitioner belongs to only one State i.e. the State of Telangana and accordingly, the Petitioner is seeking directions for payment of amount exclusively from Telangana Discoms. Therefore, as per the provisions of the PPA, the proper forum for adjudication of dispute is Telangana State Electricity Regulatory Commission.

11. *Per contra*, the Petitioner has submitted that contention of the Respondents that this Commission does not have jurisdiction to deal with the issue involved in misconceived. As per the settled law by the Hon'ble Supreme Court in the judgment dated 11.4.2017 in the case of Energy Watchdog v. CERC and Ors. *[(2017 (4) SCALE 580)]* and subsequent clarification given by the Appellate Tribunal for Electricity vide its judgment dated in Appeal No. 230 of 2017 with regard to the specific case of the Petitioner, any dispute between the Petitioner and Telangana Discoms has to necessarily be adjudicated by this Commission only. Therefore, the Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79(1) (b) of the Act and adjudicate the disputes raised in the present Petition.

12. We have considered the submissions of the Petitioner and the Respondents. The Petitioner has entered into following PPAs for supply of power from the Project:

(a) PPA dated 31.7.2012 between the Petitioner and the Discoms of the State of Andhra Pradesh.

(b) PPA dated 31.7.2012 between the Petitioner and the Discoms of the State of Telangana.

(c) PPA dated 27.11.2013 between the Petitioner and Tamil Nadu Generation and Distribution Corporation (TANGEDCO) for supply of 500 MW. The Petitioner had commenced supply of 281 MW to TANGEDCO with effect from 1.8.2015 and the balance 219 MW with effect from 5.10.2015.

(d) PPA dated 18.10.2013 with the Government of Chhattisgarh for supply of 5%/ 7.5% of net power (gross power generated minus the auxiliary consumption) under the host State obligations.

(e) PPA dated 26.2.2014 between the Petitioner and the Discoms in the State of Uttar Pradesh.

13. The Commission, vide order dated 28.10.2019 in Petition No. 176/MP/2016 involving the Petitioner and Discoms of the State of Andhra Pradesh, has already decided the issue of jurisdiction in case of the Project. The procurement of power by Discoms of the State of Andhra Pradesh and Discoms of the State of Telangana being under the same PPA, the decision as regards jurisdiction in order dated 28.10.2019 in Petition No. 176/MP/2016 would also apply to the Respondents in the instant Petition. The relevant paragraphs of order dated 28.10.2019 are extracted as under:

*"13. We have examined the matter. The Petitioner has entered into separate PPAs with the Discoms of three States, namely, distribution licensees of Tamil Nadu, Uttar Pradesh and erstwhile undivided Andhra Pradesh (which was subsequently bifurcated into Telangana and residuary Andhra Pradesh and the PPA entered into with the Discoms of erstwhile Andhra Pradesh was allocated to Discoms of Telangana and residuary Andhra Pradesh) for supply of power at different points in time and for different quantum. The tariff agreed to under the said PPAs have been adopted by respective State Electricity Regulatory Commissions (SERCs). Sub-section (b) of Section 79(1) of the Act provides that Central Electricity Regulatory Commission shall regulate the tariff of generating company, if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State. The Petitioner has submitted that its generating station located in the State of Chhattisgarh has a "composite scheme" for generation and sale of power to more than one State and hence the Commission has jurisdiction to adjudicate the present matter under Section 79(1)(b) read with Section 79(1)(f) of the Act in terms of the Full Bench judgment dated 7.4.2016 of the Appellate Tribunal for Electricity (APTEL) in Appeal No. 100 of 2013 in the matter of Uttar Haryana Bijli Vitran Nigam Limited v. Central Electricity Regulatory Commission & Ors. In the appeal against the said judgment, Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals*

*titled Energy Watchdog v. CERC & Ors.[(2017 (4) SCALE 580)] has upheld the jurisdiction of this Commission under Section 79 (1) (b) of the Act in respect of the generating companies which have composite scheme for generation and supply of power in more than one State. The relevant paras the order of the Hon`ble Supreme Court is extracted 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 subclause( 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."*

*14. The Hon'ble Supreme Court while interpreting the term "composite scheme" under Section 79(1)(b) of the 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 Act. The Petitioner has submitted that it has a "composite scheme" for generation and sale of power to more than one State. In the light of the decision of the Hon'ble Supreme Court in Energy Watchdog case as regards composite scheme for supply of electricity to more than one State, we are of the view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner under Section 79(1)(b) of the Act and adjudicate the disputes raised in the present Petition.*

*15. It is noted that the Writ Petitions filed before the Hon'ble High Court Judicature at Hyderabad, as referred to by the Respondents, challenging the exercise of jurisdiction by this Commission vide orders dated 27.4.2015 and 15.6.2016 in Petition Nos. 463/MP/2014 and 183/MP/2015 respectively have been disposed of by the Hon'ble High Court vide common order dated 31.12.2018 upholding the exercising of jurisdiction by the Commission under Section 79 of the Act. The relevant extract of the said common order dated 31.12.2018 is as under:*

> *"71. The view taken by the Central Electricity Regulatory Commission on the basis of Section 79(1) (f) alone reflects the correct position in law. Therefore in our considered view, the orders passed by the CERC with regard to jurisdiction are liable to be upheld and the orders passed both by the APERC and by the TSERC are liable to be set aside.*

*…*

*76. Therefore, in fine, the writ petitions are disposed of to the following effect: (i) W.P.Nos.19894 and 15848 of 2015 challenging the orders of CERC, dated 27.04.2015 are dismissed and the CERC is held entitled to decide the disputes covered by the said order, on merits after giving opportunities to all the parties.*

*(ii) W.P.No.22850 of 2016 challenging the order of the Central Electricity Regulatory Commission dated 15.06.2016 is also dismissed and the CERC is allowed to proceed further with the hearing of the case on merits."*

*16. Appeals (SLP (C) Nos. 8016-8018 of 2019) have been filed by AP Discoms before the Hon'ble Supreme Court against the judgment of the Hon'ble High Court of AP and Telangana dated 31.12.2018 upholding this Commission`s jurisdiction. Hon'ble Supreme Court vide its order dated 8.4.2019 had directed the parties to maintain status quo as on 8.4.2019. It is noted that the aforesaid appeal before the Hon`ble Supreme Court challenges the exercise of jurisdiction by the Commission in respect of the generators which were situated in erstwhile State of Andhra Pradesh and after the bifurcation of the erstwhile Andhra Pradesh into the States of Telangana and residuary Andhra Pradesh supplied the power to more than one States i.e. the Discoms of AP and Telangana and not with respect to the Petitioner. Since the project of the Petitioner is not located in the erstwhile undivided Andhra Pradesh, pendency of the appeal filed by AP Discoms before the Hon`ble Supreme Court against the judgment of the Hon'ble High Court of Andhra Pradesh shall not come on the way of exercise of jurisdiction by the Commission in respect of the Petitioner's generating station."*

In line with the above decision, we hold that the Commission has the jurisdiction to adjudicate the dispute raised by the Petitioner which is a generating company supplying power to the Respondents from the Project.

**Issue No. 2: Is the Petition barred by limitation?**

14. The Respondents have contended that the claim made by the Petitioner is barred by limitation. They have submitted that the disputed principal amount of approximately Rs.9.29 crore along with claim of Late Payment Surcharge (LPS) of Rs.4.62 crore are by way of an afterthought, and have been filed after the PPA came to an end by efflux of time on 15.6.2016. The Respondents have submitted that the Petitioner did not initiate any legal proceedings to recover the alleged dues before filing the present Petition on 22.5.2018. Thus, in view of the three-year limitation period as prescribed at Article 55 of the Schedule to the Limitation Act, 1963, the sums claimed under various heads for financial year 2013-14 and financial year

2014-15, are time barred. As per the Respondents, the claim within the limitation period is only Rs.1,85,77,071. The Respondents have furnished a comparison of the Petitioner's claim with claims that fall within the limitation period as under:

| S No | Particulars | Petitioner's claim in the Petition (FY 2013-14 to FY 2016-17) (Rs.) | Claims time-barred till 2014-15 (on account of Petition filing date) (Rs.) | Balance Claim within the limitation Period (Rs.) |
|---|---|---|---|---|
| 1. | Capacity Charges | 6,47,14,188 | 6,09,15,900 | 37,98,288 |
| 2. | Incentive (claimed only for 2015-16) | 1,06,37,844 | 0 | 1,06,37,844 |
| 3. | Energy Charges | 13,76,208 | 9,43,271 | 4,32,937 |
| 4. | Transmission Charges | 1,62,12,219 | 1,25,04,217 | 37,08,002 |
| | **Total** | **9,29,40,459** | **7,43,63,388** | **1,85,77,071** |

15. *Per contra*, the Petitioner has submitted that the supply of power commenced from 14.8.2013 i.e. with a delay of 59 days from the scheduled delivery date. The same led to a series of litigations between the Petitioner and the Respondents. The issue of jurisdiction as regards this Commission vis-à-vis Telangana Electricity Regulatory Commission got settled only pursuant to the full bench decision of the Appellate Tribunal for Electricity (APTEL) in 2016 and thereafter by the judgment in Energy Watchdog case of the Hon'ble Supreme Court in 2017. Since it is only after the decision of the Hon'ble Supreme Court that the issue of jurisdiction got settled, there is no basis for the Respondents to contend that the filing of the present Petition before this Commission is barred by limitation. Further, the PPA between the parties expired on 31.3.2016 and the last payment of monthly bill was made by the Respondents on 7.7.2017. Therefore, the cause of action in the present case arose when the Respondents failed to settle the outstanding dues of the Petitioner upon the termination of the PPA by efflux of time.

16. The Respondents have further submitted that though they have accepted that there were various litigations regarding the issue of jurisdiction as to whether certain claims should be litigated before the State Commission or this Commission, these can by no means extend the period of limitation. It was incumbent upon the Petitioner to approach a forum, be it this Commission or the State Commission, in order to have its purported claims adjudicated. The Respondents have submitted that the Petitioner did approach this Commission in Petition No. 169/MP/2016 and Petition No. 176/MP/2016 in respect of the same PPA concerning the Discoms of Andhra Pradesh and, therefore, claim of the Petitioner that it did not approach any forum as jurisdiction was not clear, does not hold ground. In support of their contentions, the Respondents have relied upon the judgments of the Hon`ble Supreme Court in the cases of State of Gujarat V. Kothari & Associate [(2016) 14 SCC 761] and M/s Geo Miller & Co. Pvt. Ltd. V Chairman, Rajasthan Vidyut Utpadan Nigam Ltd. [2019 (11) SCALE 764].

17. *Per contra,* the Petitioner has submitted that none of the disputes between the Petitioner and the Respondents were taken up for adjudication on merits either in the State Commission or by this Commission when the issue of jurisdiction was not clear. The reliance on filing of Petition No.169/MP/2016 by the Respondents is misplaced where the matter was taken up for hearing by the Commission only on 16.5.2019, pursuant to the judgment of APTEL and the Hon`ble Supreme Court judgment in Energy Watchdog case. Therefore, there can be no question of the present Petition being barred by limitation, when the forum itself was not clear where the Petitioner could approach. The Petitioner has further submitted that since the issue of the Appropriate Commission for adjudication of this dispute was not settled, it had sent several communications conveying its grievance relating to refund of

amounts wrongfully deducted by the Respondents, towards capacity charges and late payment surcharge contrary to the terms of the Power Purchase Agreement, via several representations dated 6.1.2017, 16.3.2017, 7.7.2017, 19.12.2017, 12.1.2018 and 13.3.2018, but the same were not replied to by the Respondents.

18. We have considered the submissions of the Petitioner and the Respondents. Though no period of limitation has been prescribed in the Act for filing the Petition for adjudication of the disputes, the Hon'ble Supreme Court in the case of Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468] held as under:

> *"30…In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view."*

In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable for adjudication of claims before the Commission.

19. The Respondents have pleaded that the start date for cause of action should be considered as due date of payment of bills and as such, the Petitioner should have either moved State Commission or this Commission after its first bill was allegedly not paid fully by the Respondents. Since the Petitioner did not raise any claim earlier, the Respondents have submitted that all claims starting from the start date of supply to 31.3.2015 are time barred.

20. In this context, we observe that the reason for the deductions in capacity charges and the payable incentive as cited by the Respondents in this petition is that as per clause 9.23 of Article 9 of PPA, revisions in schedule by RLDC/SLDC due to grid constraints is to be treated as a force majeure event and in such cases, the Respondents are liable to pay the capacity charges only for the capacity available after accounting for the backing down instructions by RLDC. Similarly, for non-payment of other claims i.e. energy charges and transmission charges, various reasons have been cited by the Respondents. However, it is not clear from the submissions of the parties whether reasons for deduction of various charges were communicated to the Petitioner when deductions were made. Neither the Respondents have submitted that the Petitioner was informed of the reason for deductions from the bills raised nor the Petitioner has submitted that it had protested the deductions by way of any communication or kept the dispute alive by including the deducted amounts/ LPS in the next bill/ supplementary bills. The Petitioner has referred to its communications addressed to the Respondents dated 6.1.2017, 16.3.2017, 7.7.2017, 19.12.2017, 12.1.2018 and 13.3.2018. However, there are no communications during the period of supply (PPA got terminated on 31.3.2016) from the Petitioner to the Respondents with regard to wrongful deductions made by the Respondents. On the other hand, the Respondents have submitted that the Petitioner did not even carry the deducted amount to next invoices.

21. Not having raised the issue of deductions when bills were raised and sending letters starting from 6.1.2017 conveys that the Petitioner raised the dispute for the first time when it sent letter on 6.1.2017 and that it had accepted the deductions made by the Respondents till then. Therefore, we do not agree with the contention of the Petitioner that cause of action arose on 7.7.2017 i.e. the date on which the last

payment of monthly bill was made by the Respondents after the PPA term was over on 31.3.2016. In our view, cause of action for raising the dispute at first level arose when the Respondents deducted capacity charges from the first bill of August 2013. Had the Petitioner raised the issue with the Respondent or had kept on including the deducted amounts in the next invoices, only then its contention that cause of action for filing the present Petition arose on 7.7.2017 would have been justified.

22. According to the Respondents, the Petitioner`s claim up to 31.3.2015 are barred by limitation. In light of the above discussion, we accept the contentions of the Respondents and hold that the claims of the Petitioner from date of supply i.e. 14.8.2013 to 31.3.2015, are time barred and do not survive the limitation period of three years as the date of filing the Petition is 22.5.2018.

**Issue No. 3: Are the Respondents, in terms of the PPA, liable to pay following withheld charges as claimed by the Petitioner:**

a) **Capacity charges;**
b) **Incentive;**
c) **Energy Charges;**
d) **Transmission Charges;**
e) **Late Payment Surcharge.**

**a) Capacity Charges**

23. The Petitioner has submitted that in terms of the PPA, the capacity charges are payable by the Respondents to the Petitioner for the availability declared by the Petitioner at the Injection Point. The Petitioner has claimed Rs.6,47,14,188 under this head. The Respondents have disputed the quantification of claims and have also submitted that deductions made by them are as per provisions of the PPA.

24. The Respondents in support their contentions have placed reliance upon Article 8 (Billing & Payment) of the PPA, and the requirement to furnish REA (regional energy accounts) along with the bill to contend that capacity charges are to be paid as per the availability in the REA. The relevant clause is reproduced as under:

*"ARTICLE 8: BILLING AND PAYMENT*

*……...*

*8.2.2 Each Monthly Bill and Provisional Bill shall include:*

*(i) Availability and REA for the relevant Month for Monthly Bill and RLDC's daily energy account for Provisional Bill*

*(ii)The Seller's computation of various components of the monthly Tariff Payment in accordance with Schedule 4; and*

*(iii)Supporting data, documents and calculations in accordance with this Agreement……"*

25. The Respondents have also submitted that Schedule 4 of the PPA provides that both the cumulative availability (CAA) and availability (AA) has to be available as per the Regional Energy Account (REA). The capacity charges were to be paid on the basis of the normative availability in accordance with Clause 4.1 of Schedule 4 of the PPA. The relevant extract from Schedule 4 of the PPA is set out below:

*"4. SCHEDULE 4: TARIFF*

*4.1 General*

*…*

*iv) The full Capacity Charges shall be payable based on the Contracted Capacity at the Normative Availability and Incentive shall be provided for Availability beyond Normative Availability as provided in this Schedule. In case of Availability being lower than Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule*

*…*

*4.2 Monthly Tariff Payment*

*…*

*4.2.2 Monthly Capacity Charge Payment (Applicable for all categories of power generation source)*

*4.2.2.1 The Monthly Capacity Charge payment for any Month in a Contract Year n shall be calculated as below:*

*…*

*f) CAA is the Cumulative Availability, as per REA, from the first day of the Contract Year "n" in which month "m" occurs up to and including Month "m" (expressed in percentage);*

*g) AA is the Availability, as per REA, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period), expressed as a percentage; …"*

26. The Respondents have further submitted that the Petitioner raised bills for capacity charges on cumulative availability worked out by the Petitioner itself without taking into account the REA certification on cumulative availability as required under the PPA. Consequently, the Respondents had no option but to verify the availability at the Interconnection Point by themselves. The Respondents relied on the cumulative availability as had been certified by the Telangana State Load Dispatch Centre (SLDC), which is the Control Centre in terms of Article 1.1 of the PPA, through which the Respondents issued dispatch instructions to the Petitioner for supply of power and the payment was made by the Respondents to the Petitioner for capacity charges in light of SLDC certification.

27. In response, the Petitioner has submitted that it had declared the availability at the injection point as per the provisions of clause 4.1 of the PPA and accordingly the capacity charges are payable by the Respondents for capacity made available by the Petitioner. Now the dispute has arisen due to the stand taken by the Respondents that the capacity charges would be paid taking into account the revisions made by the Discoms (the Respondents) or their authorized agencies viz. SLDC and RLDC. According to the Petitioner, the interpretation sought to be made by the Respondents is not only contrary to the terms of the PPA, but also contrary to the settled industry practice. It is unheard of that capacity charges are to be paid based on REA certificates, which only account for actual scheduled energy. The REA certificates are only relevant for payment of energy charges, which certainly is on the basis of actual energy supplied.

28. In response to the reliance placed upon Article 8 by the Respondent, the Petitioner has submitted that Article 8 only deals with the procedure for billing and

payment and in no way determines the substantive right to get the capacity charges to the Petitioner and such an interpretation would be contrary to the express provision under Article 4.4.1 and Clause 4.1 in Schedule 4 of the PPA. Further, on the aspect of reliance placed by the Respondents on SLDC backing down instructions, the Petitioner has submitted that it is in no manner governed by the instructions of SLDC. The scheduling and backing down instructions have no relevance for the purpose of capacity charges, in terms of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (hereinafter referred to as 'the Grid Code'). The Petitioner being an Inter-State Generating Station, RLDC provides the schedules to the Petitioner, and that SLDC has no direct channel of communication with the Petitioner.

29. Apart from the non-submission of REA to substantiate the cumulative availability as indicated in the bills by the Petitioner, the Respondents in their justification for deducting the capacity charges based on the SLDC certification which reduced the availability as declared by the Petitioner to the extent of backing down instructions as issued by the SLDC/RLDC in real time operation, have submitted as under:

i) The Respondents are not obligated to pay capacity charges when RLDC makes revisions in the CTU corridor (due to curtailment/ grid constraint), even if the Petitioner declares its plant available capacity (DC) at the Injection point.

ii) The Respondents have relied upon provisions of Clause 9.2.3 of the PPA at Article 9 (Force Majeure).

iii) In terms of the above provisions of the PPA, revisions by RLDC (CTU transmission corridor curtailment) is to be construed as force majeure event and the Respondents are not obligated to pay any tariff to the Petitioner during

such period, which includes the capacity charges, as the RLDC curtailments (grid constraint) would affect the Petitioner's performance to make the contracted capacity available to the Respondents, for scheduling and despatch, as per ABT for supply of power by the Petitioner to the Respondents.

iv) Mere plant availability declaration by the Petitioner at the Injection point will not fulfil the Petitioner's obligation and it cannot be construed as supply of power to the Respondents if the CTU transmission corridor is not available for scheduling and despatching of power.

v) In this regard, clarification for Force Majeure event given by the Ministry of Power in the guidelines for short term power procurement dated 15th May 2012 (vide Resolution No.23/25/2011-R&R) may be referred that states as below:

> *"b. Force Majeure Events shall mean the occurrence of any of the following events:-*
>
> *"Any restriction imposed by RLDC /SLDC in scheduling of power due to breakdown of Transmission/Grid constraint shall be treated as Force Majeure without any liability on either side…….. "* ***(Annexure 5).***

vi) Thus, restriction imposed by RLDC in scheduling of power due to grid constraint/ breakdown of transmission system is a Force Majeure event.

*vii)* As per the Schedule - 4 (Tariff), clause 4.1 (General) .....(iv) of the PPA, ***"*** *…… full Capacity charges shall be provided based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond Normative Availability of 85% in a month. In case the Availability is lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the Penalty to be paid by the Seller as provided in the Schedule…..****"****.**

viii) As such, monthly bills claimed by the Petitioner towards capacity charges were disallowed partly for not achieving the threshold Availability except for financial year 2015-16, on account of the reasons (RLDC backing down) submitted by the Petitioner itself in the Petition. Hence, the claim

towards capacity charges to the extent survived within limitation period, deserves to be rejected as there is no merit in the claim.

30. *Per contra*, the Petitioner has refuted the reliance placed by the Respondents on Force majeure clause of the PPA in justifying the deductions of capacity charges. In this regard, the Petitioner has submitted as under:

a) A revision or backing down instruction from SLDC/RLDC by no stretch of imagination can be considered as a Force Majeure event. The same is only an afterthought by the Respondents which has never been raised earlier. It is also not being understood as to how this Force Majeure is affecting the Respondents. While the Petitioner had made several communications to the Respondents for refund of deducted amount, the Respondents had never replied to the said communications, let alone raising the issue of Force Majeure by giving an appropriate notice under the PPA.

b) Without prejudice to the above, lack of transmission availability stated to be a Force Majeure in terms of the PPA affecting the Seller, is not necessary to be pleaded by the Petitioner. The Respondents are seeking to plead Force Majeure on behalf of the Petitioner which cannot be allowed.

c) It is not the Petitioner's case that it has been prevented from performing its obligations under the PPA. On the other hand, the Petitioner's claim is strictly in terms of the PPA wherein the Petitioner has duly performed its obligation under Article 5.1.1, and is entitled to payment for the same under Article 4.4.1 read with Clause 4.1 in Schedule 4 of the PPA.

31. We have considered the rival submissions of the parties. The PPA requires that every bill shall be accompanied by the REA indicating cumulative availability and energy scheduled by the beneficiaries. However, REA issued by WRPC for the disputed period did not have such details related to availability and cumulative availability for the generating station of the Petitioner. In fact, during the period from 2013-2017, WRLDC was not sending such data related to the availability and

cumulative availability to WRPC for inclusion in REA for any generating station, including that of the Petitioner, selling power through concurrently running PPAs (short term, medium term and Long term) for part capacities. Therefore, the Petitioner based on the availability declared by it on day ahead basis raised the bills for capacity charges without linking it to REA as REA did not contain such details for the generating station of the Petitioner. There is nothing on record to infer that the Petitioner or the Respondents approached WRLDC/ WRPC to certify the availability and cumulative availability of its generating station. The Petitioner was of the belief that REA only certifies the energy scheduled by various beneficiaries and not the availability. In normal practice, WRPC based on the data as forwarded by WRLDC indicates the availability and cumulative availability of ISGSs in REAs. The data as submitted by WRLDC to WRPC only takes into account the availability declared by the Petitioner on day-ahead basis or any subsequent revision made by it. The availability and cumulative availability data conveyed by WRLDC and adopted by WRPC never accounts for the power scheduled by the beneficiaries on day ahead basis, or any revision made by the beneficiaries during real time, or backing down instructions of RLDC/SLDC for any reason.

32. The Petitioner as well as the Respondents should have approached WRLDC/ WRPC for certifying the availability data which was the requirement of PPA. However, the absence of availability data in REA does not take away the right of the Petitioner for receiving the capacity charges based on the capacity declared by it.

33. We observe that the Respondents while clearing the bills of the Petitioner restricted the payment related to capacity charges based on the SLDC certification of availability which is net off power not received by the Respondents due to backing

down instructions of SLDC/ RLDC. The Respondents have argued that the Petitioner has not produced REA which certifies the availability in terms of PPA and, therefore, has relied upon SLDC data for deduction of the capacity charges. The Respondents have justified its reliance on SLDC data by submitting that SLDC is the control centre as per PPA and the Grid Code, through which it conveys its requirement of power to the Petitioner.

34. Undeniably, the Petitioner's generating station is an Inter-State Generating Station (ISTS) selling the power to the beneficiaries of more than one State. Also, the said generating station is connected to the ISTS. Therefore, as per the provisions of the Grid Code, the function of scheduling and despatch of the Petitioner's generating station rests with concerned RLDC i.e. WRLDC in this case. The relevant Clause of Grid Code reads as thus:

> *"2. The following generating stations shall come under the respective Regional ISTS control area and hence the respective RLDC shall coordinate the scheduling of the following generating stations:*
>
> *(i) If a generating station is connected only to the ISTS, RLDC shall coordinate the scheduling, except for Central Generating Stations where full Share is allocated to one State…."*
> *…..*

35. Further, as per the Scheduling and Despatch Procedure provided in Grid Code, ISGS are required to declare their ex-power plant capabilities for the next day and the RLDC amongst others, is required to document various information such as station-wise foreseen ex-power plant capabilities advised by the generating stations, the drawal schedules advised by regional entities, all schedules issued by the RLDC including any revisions/ updation thereto. Regulation 6.5 of the Grid Code provides as under:

> *" 6.5 Scheduling and Despatch procedure for long-term access, Medium-term and short-term open access (to be read with provisions of Open Access Regulations 2008 as amended from time to time. The scheduling procedure for medium-term open*

*access transactions shall be similar to the scheduling procedure for long-term access transactions and is as given below, except where it is specifically mentioned for collective transactions.)*

*1. All inter-State generating stations (ISGS) shall be duly listed on the respective RLDC and SLDC web-sites. The station capacities and allocated/contracted Shares of different beneficiaries shall be listed out.*

*…*

*3. By 8 AM every day, the ISGS shall advice the concerned RLDC, the station-wise ex-power plant MW and MWh capabilities foreseen for the next day i.e. from 0000 hrs to 2400 hrs of the following day.*

*….*

*32. RLDC shall properly document all above information i.e. station-wise foreseen ex-power plant capabilities advised by the generating stations, the drawal schedules advised by regional entities, all schedules issued by the RLDC, and all revisions/updating of the above."*

36. As regards Regional Energy Accounts, Grid Code clearly demarcates the responsibility of preparing the REAs on RPC on the basis of inputs received from RLDCs. Regional Energy Account has been defined as under:

*"Regional Energy Account (REA)' means a regional energy account prepared on monthly basis by RPC Secretariat for the billing and settlement of 'Capacity Charge', 'Energy Charge' and transmission charges."*

Further, Regulation 2.4.5 of the Grid Code provides as under:

*"2.4.5 RPC Secretariat or any other person as notified by the Commission from time to time, shall prepare monthly Regional Energy Account (REA), weekly deviation charge account, reactive energy account, and congestion charge account, based on data provided by RLDC, and deviation charge account for wind and solar generators which are regional entities, based on data provided by SLDC/RLDC of the State/Region in which such generators are located and any other charges specified by the Commission for the purpose of billing and payments of various charge."*

37. Clause 4.2.2.1 of Schedule 4 PPA dealing with monthly capacity charges payment provides as under:

*"4.2.2.1 Monthly Capacity Charge Payment*

*…..*

*(f) CAA is the cumulative Availability, as per REA, from the first day of the contract year 'n' in which Month 'm' occurs up to and including Month 'm'*

*(g) …AA is the Availability, as per REA, in the relevant Settlement Period."*

38. We are of the view that as per the Grid Code or provisions of the PPA, SLDC is not the authorized agency for certifying availability data of ISGSs which are declaring their day ahead availability to the RLDC. It is the RLDC who is vested with the task of certifying the availability data which gets reflected in REA issued by RPC.

39. The Respondents have submitted that they are not liable to pay the capacity charges for the power not received due to backing down instructions of the RLDC as the same is covered by the Force majeure clause of the PPA. They have relied upon provisions of Clause 9.2.3 and Clause 9.7 of the PPA that is extracted as under:

> *"9.2.3 An event of Force Majeure affecting the CTU/STU or any other agent of the Seller, which has affected the Transmission facilities from the Power Station to the Delivery Point shall be deemed to be an event of Force Majeure affecting Seller.*
>
> *9.7 Available Relief for a Force Majeure Event:*
>
> *9.7.1…….*
> *(C) ……For the avoidance of doubt, it is clarified that no tariff shall be paid by the Procurer(s) for the part of Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the "Seller", for the duration of such Natural Force Majeure Event affecting the "Seller:*
>
> *For the balance part of the Contracted Capacity, the Procurer(s) shall pay the Tariff to the Seller, provided during such period of Natural Force Majeure Event affecting the "Seller", the balance part of the Power Station is declared to be Available (or scheduling and dispatch as per ABT (or supply of power by the Seller to the Procurer(s)."*

40. Natural Force Majeure Event is defined in Article 9.3.1(i) of PPA which is as under:

> ***"i. Natural Force Majeure Events***
> *act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,"*

It is observed that curtailing of the schedule by RLDC/ SLDC due to grid constraints in real time is not covered under the natural force majeure clause of PPA.

41. In our view, the clauses referred to by the Respondents relate to Force Majeure events are those which can be applied when the Petitioner claims that it is not in a position to supply power. Any application of Force Majeure clause is by the party that is affected by such situation. The Respondents cannot say that the Petitioner was suffering from Force Majeure and that it will not make payment. Even otherwise, we are of the view that real time backing down instructions issued by RLDC due to grid constraints does not fall under force majeure event as referred in clause 9.7.1(C) of PPA and any reliance placed by the Respondents on this clause is misplaced.

42. With respect to the certification of availability (DC) for the disputed period(s) by WRLDC, the Commission vide ROP for the hearing dated 12.5.2020 had directed the Petitioner to approach WRLDC and to submit the same by 6.6.2020. However, Petitioner has craved for further time vide affidavit dated 6.6.2020 to submit the above certifications from WRLDC and REA addendum(s) from WRPC. The Petitioner has also submitted the correspondence exchanged between the Petitioner and WRLDC. Accordingly, subject to certification of availability data by WRLDC and subsequent inclusion in REA by WRPC, the Respondents are liable to make payment. This payment would be for the period from 1.4.2015 onwards only since the period before that is barred by limitation as already decided.

**b) Incentive**

43. The Petitioner has submitted that the PPA provides for an incentive to be paid to the Petitioner for declaring cumulative availability over 85% in a contract year. The Respondents did not accept the Petitioner's declaration of availability on account of RLDC revisions and the cumulative availability admitted by the Respondents was

considered below 85%. Therefore, the Respondents did not pay incentive for the availability in excess of 85% for financial year 2015-16 to the Petitioner.

44. The Respondents have submitted that the Petitioner's claim for payment of incentive is a consequential claim and will be dependent on the Commission's decision on capacity charges. The cumulative plant availability achieved by the Petitioner, except for financial year 2015-16, was less than the normative availability of 85%. As per the Petitioner's own calculation for financial year 2015-16, the cumulative availability is 87.66% and as per the Respondents' calculation for financial year 2015-16, the cumulative availability is 85.41%. For the additional availability of 0.41%, the Respondents have already paid Rs.19,57,617 to the Petitioner. The Respondents have further submitted that the Petitioner is not entitled to its claim of Rs.1,06,37,844 as the Petitioner has wrongly calculated the availability as 87.66%, when the same is 85.41% and that the Respondents have already paid Rs.19,57,617 for the additional availability of 0.41%.

45. Article 4.2.4.1 of the PPA dealing with Schedule of Tariff provides for an incentive to the Petitioner for cumulative availability of over 85% in a contract year. Article 4.2.4.1 reads as under:

> ***"4.2.4 Contract year Energy Incentive Payment***
>
> *4.2.4.1 If and to the extent the Availability in a Contract year exceeds normative availability, an incentive at the rate of forty (40%) of the quoted non-escalable capacity charges (in Rs./kWh) for such contract year mentioned in schedule B subject to a maximum of Twenty five 25 paisa/kwh, shall be allowed on the energy (in kwh) corresponding to the availability in excess of Normative Availability"*

46. As per the above Article, the Petitioner would be entitled for an incentive for availability over and above the normative availability. The Petitioner vide affidavit dated 6.6.2020 has submitted the cumulative actual availability for the financial year

2015-16, actual monthly incentive, incentive admitted by the Respondents and balance incentive as follows:

| Month | Cumulative Actual Availability (CAA) in % | Actual Monthly Incentive (Rs.) | Incentive admitted (Rs.) | Balance (Rs.) |
|---|---|---|---|---|
| Apr-15 | 98.26 | 51,43,801 | 5 0,40,051 | 1,03,750 |
| May-15 | 98.53 | 55,29,174 | 5 3,17,662 | 2,11,512 |
| Jun-15 | 99.01 | 58,20,120 | 56,68,245 | 1,51,875 |
| July-15 | 97.90 | 38,56,837 | 37,70,597 | 86,240 |
| Aug-15 | 94.30 | (19,50,657) | (19,82,990) | 32,333 |
| Sep-15 | 91.96 | (19,35,224) | (20,31,861) | 96,637 |
| Oct-15 | 92.18 | 34,20,459 | 31,05,177 | 3,15,282 |
| Nov-15 | 91.10 | (6,32,796) | (10,91,508) | 4,58,712 |
| Dec-15 | 90.79 | 13,24,703 | 1,95,634 | 11,29,069 |
| Jan-16 | 89.91 | (11,40,346) | (88,44,483) | 77,04,137 |
| Feb-16 | 88.23 | (54,20,355) | (57,21,142) | 3,00,787 |
| Mar-16 | 87.66 | (14,20,255) | (14,67,765) | 47,510 |
| **Contract Year** | **87.66%** | **1,25,95,461** | **19,57,617** | **1,06,37,844** |

47. We have already held earlier that the payment of capacity charges is to be done based on availability as indicated in the revised REAs to be issued by the WRPC in due course of time for the disputed period. The Respondents shall pay incentive to the Petitioner if the cumulative availability as indicated in the REAs to be issued crosses the threshold level of 85%. Accordingly, the Respondents are directed to pay the balance incentive to the Petitioner for the year 2015-16, based on revised REAs to be issued by WRPC.

**c) Energy Charges**

48. The Petitioner has submitted that the Respondents have withheld Rs.13,76,208 towards the energy charges from the Monthly Bills during the financial years 2013-14 to 2015-16. The Respondents have contended that claim of only Rs.4,32,937 survives due to limitation.

49. With respect to deductions of energy charges, the Respondents have submitted as follows:

a) Though the Petitioner has claimed energy charges as per REA certification, the scheduled energy includes the excess energy pumped by the Petitioner by not complying with the instructions of Telangana SLDC.

b) As per the Article 5.4 of PPA, the Petitioner was obligated to comply with the provisions of the Grid code relating to scheduling and dispatch and matters incidental thereto. Backing down of generation is a part of scheduling and dispatch for effective grid monitoring to ensure grid security.

c) The reason for deduction from monthly bills is that the Petitioner failed to comply with the backing down instructions issued by the Telangana SLDC in certain time-blocks.

d) In certain instances, the Petitioner (as applicant for MTOA) failed to seek revisions in the drawl schedules at RLDC, despite Telangana SLDC having given backing down instructions. Due to non-compliance with instructions of Telangana SLDC by the Petitioner, part of the energy though included in the REA as Scheduled Energy, the Respondents disallowed the excess energy pumped during the backing down period treating it as un-requisitioned/ inadvertent energy. If the Petitioner had sought for revision of RLDC schedules, then the excess energy injected (1,82,500 kWh) would have been dealt under the deviation settlement mechanism. However, the Petitioner cleverly ensured this excess energy accounted for under Scheduled Energy for claiming the energy charges.

e) Non-compliance with backing down instructions of Telangana SLDC by the Respondents could also have led to endangering the grid and thus the excess scheduled energy need to be disallowed.

50. In response, the Petitioner has submitted that its claims are as per clause 4.2.3.2 under Schedule 4 of the PPA and were made as per REA. The Petitioner is

only bound by the backing down instructions issued by WRLDC and has nothing to do with the backing down instructions issued by the Telangana SLDC and it is not even connected to the State system. For the purpose of energy scheduling for an inter-State generating station, the concerned Load Dispatch Centre in terms of Regulation 6.4 of the Grid Code is the RLDC, and not the SLDC. Therefore, any revision in schedule by the SLDC has to be approved by the RLDC and conveyed to the concerned ISGS to become effective.

51. We have considered the submissions of the Petitioner and the Respondents. The Commission is of the view that any schedule revision/ backing down instruction by Telangana State SLDC at behest of the Respondents is to be conveyed to the generator through WRLDC, as the WRLDC is the agency between the generator and SRLDC/ Telangana SLDC/ the Respondents for the purpose of scheduling. As such, revisions in energy schedule as conveyed to the generator by WRLDC get reflected in the REA issued by the WRPC. In the above paragraphs, we have already noted that the function of scheduling and despatch coordination rests with WRLDC in the Petitioner's case and accordingly, the necessary instruction relating to revision of the schedule/ backing down instruction had to be conveyed through WRLDC. Regulation 6.5.18 of the Grid Code provides for revision of declared capability by ISGS and requisition of power by beneficiaries upon the instructions received from RLDC as under:

> *"6.5.18. Revision of declared capability by ISGS(s) having two part tariff with capacity charges and energy charge and requisition by beneficiary (ies) for the remaining period of the date shall also be permitted with advance notice. Revised schedules/declared capability in such case shall become effective from the 4th time block, counting the time block in which the request for revision has been received in the RLDC to be the first one*."

52. Accordingly, we are of the view that the Respondents were not justified in deducting the energy charges which were claimed by the Petitioner based on the energy scheduled as indicated in the REA.

53. In view of the above, we direct the Respondents to pay withheld energy charges based on the REA for the period from 1.4.2015 onwards.

**d) Transmission Charges**

54. The Petitioner has submitted that in terms of the PPA, the Petitioner had paid the amounts as per bills received from PGCIL. However, the Respondents have short admitted/ not admitted amounts, totalling to Rs.1,62,12,219.

55. The Petitioner has submitted that in terms of the PPA, the Petitioner is required to arrange for open access from injection point to delivery point and the charges paid by the Petitioner on this account are to be reimbursed by the Respondents. Accordingly, the Petitioner had paid the amount as per bills received from PGCIL and submitted proof of payment made against each bill to the Respondents for reimbursement. However, the Respondents while reimbursing the claim, have not admitted an amount of Rs.1,62,12,219. The Respondents have even deducted rebate which was only applicable from PGCIL in event such payment is made to PGCIL as per slabs in terms of BCD (Billing, Collection and Disbursement) Procedures under the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses) Regulations, 2010.

56. The Respondents have contended that the said claims are barred by limitation and the deductions were made as per the provisions of the PPA. Out of Rs.1,62,12,217 claimed by the Petitioner, which includes time barred claims, the

claim for Rs.87,09,427 has been disallowed on account of non-supply of energy for a total of 59 days during the period from 16.6.2013 to 13.8.2013 and submitted that this issue is currently under dispute at the TSERC with O.P.No.60 of 2015 and is thus *sub-judice.*

57. The Petitioner has submitted that the claim of the Respondents that the matter regarding delay of 59 days is sub-judice before TSERC (Telangana State Electricity Regulatory Commission) is factually wrong and misleading. The period of dispute for non-supply of electricity was from 16.6.2013 to 13.8.2013 while the claim for transmission charges in the present Petition are only from September 2013 onwards i.e. for the period when supply had begun. The Petitions being OP Nos. 59/2015 and 60/2015 were initially filed before the Telangana State Electricity Regulatory Commission, which are pending. However, in view of the decision on jurisdiction by the Hon'ble Supreme Court in Energy Watchdog case, these Petitions have to be necessarily transferred to this Commission and no portion of the claim in the present Petition is *sub-judice* before the Telangana State Electricity Regulatory Commission. As per Clause 4.4 under Schedule 4 of the PPA, the Petitioner is to make payments on behalf of the Respondents who are to in turn reimburse the same to the Petitioner. Hence, the Petitioner is only an intermediary in the transaction with respect to transmission charges and can neither profit from the same nor incur any loss. In fact, in many States, including the beneficiaries of the Project in Tamil Nadu, the transmission charges are being paid directly by the beneficiaries to PGCIL.

58. The detailed reasons for deductions made by the Respondents in relation to the said claims for transmission charges that are not barred by limitation are as under:

| Period | Net claim by the Petitioner (Rs.) | Amount paid by Respondents & other DISCOMS (Rs.) | Amount Deducted (Rs.) | Reason for Deduction |
|---|---|---|---|---|
| April-May 2015 (Bill-1) | 8,53,96,101 (After Rebate allowed of Rs.14,06,082) | 8,48,56,302 | 5,39,799 | On account of credit under Bill-4 that was received by the Petitioner from PGCIL, but not passed on |
| June 2015 (Bill-3) | 2,39,82,661 | 2,38,77,756 | 1,04,905 | In lieu of the arrears amount of Bill-3 charges because the Petitioner had not supplied energy between the period of 16.06.2013 to 13.08.2013. The costs on account of non-supply of power were deducted by the Respondents. As already stated before, a dispute in relation to this is currently pending at the TSERC, bearing O.P.No.60 of 2015 |
| August 2015 (Bill -1) | 6,62,31,808 (after Rebate allowed of Rs.1,53,535) | 4,42,64,466 | 2,19,67,342 | Due to change in PoC charges (downward revision) notified by this Commission) |
| August 2015 (Bill-3) | 6,60,54,273 | 6,57,59,256 | 2,95,017 | In lieu of the arrears amount of Bill-3 charges because the Petitioner had not supplied energy between the period of |

| | | | | |
|---|---|---|---|---|
| | | | | 16.6.2013 to 13.8.2013. The costs on account of non-supply of power were deducted by the Respondents. As already stated before, a dispute in relation to this is currently pending at the TSERC, bearing O.P.No. 60 of 2015. |
| September 2015 (Bill-1) | 4,65,75,319 (after availing No Rebate) | 4,55,80,170 | 9,95,149 | Availed credit under Bill-4 that was received by the Petitioners from PGCIL, but not passed on and also availed Rebate as per PGCIL Rebate scheme |
| September 2015 (Bill-4) | 1,74,525 (after availing No Rebate) | Zero | 1,74,525 | On account of deviation charges which were not payable to the Petitioner on account of deviation in the Scheduled Energy |
| November 2015 ( Bill-3) | 1,01,62,304 (after availing No Rebate) | 1,00,29,813 | 1,32,491 | In lieu of the arrears amount of Bill-3 charges because the Petitioner had not supplied energy between the period of 16.6.2013 to 13.8.2013. The costs on account of non-supply of power |

| | | | | |
|---|---|---|---|---|
| | | | | were deducted by the Respondents. As already stated before, a dispute in relation to this is currently pending at the TSERC, bearing O.P.No.60 of 2015 |
| December 2015 (Bill 1) | 2,39,43,869 (after availing the rebate of Rs.2,38,865) | 4,69,64,797 (The extra amount paid was Rs.2,30,20,928 on account of deduction made previously by the respondents in the August 2015 Bill-1 (Rs.2,19,67,342) together with balance amount of Rs.9,88,757 after reconciling the July 2015 Bill-1) | - 2,30,20,928 (Deductions refunded) | Error in billing in July 2015 and revision of POC charges for July 2015 were taken into account by the Respondents and released |
| January 2016 (Bill-1) | 7,07,96,128 (after availing Rebate of Rs.9,17,939) | 7,07,96,128 | 0 | Petitioner is making a claim for Rs.9,88,757. The Petitioner is claiming this amount in relation to the bill of July 2015. However, Respondents have stated that the Amount is already released in December 2015 and not entitled to this claim. |
| January 2016 (Bill-4) | 34,896 ( No Rebate) | 0 | 34,896 | On account of deviation charges which were not payable to the Petitioner on |

| | | | | |
|---|---|---|---|---|
| | | | | account of deviation in the Scheduled Energy |
| February 2016 , September 2016 , December 2016 and February 2017 (Bill-3) | 7,52,53,631 (after availing a rebate of Rs.1,01,455) | 7,47,46,339 | 5,07,292 | In lieu of the arrears amount of Bill-3 charges because the Petitioner had not supplied energy between the period of 16.6.2013 to 13.8.2013. The costs on account of non-supply of power were deducted by the Respondents. As already stated before, a dispute in relation to this is currently pending at the TSERC, bearing O.P.No. 60 of 2015. |

59. We have analysed the deductions and reasons of deductions as cited by the Respondents in their written submissions. As per the PPA, the payment of transmission charges/ wheeling charges to CTU/STU from Injection Point to Delivery Point are to be paid by the Petitioner and thereafter, such charges are to be reimbursed by the Procurers/ Respondents. Clause 4.4 of the Schedule 4 of the PPA reads as thus:

> *"4.4 Transmission/Wheeling Charges and RLDC/SLDC Charges*
>
> *4.4.1 [In case the Seller is responsible for Open Access] The payment of Transmission Charges/Wheeling Charges to the CTU/STU, from the Injection Point to Delivery Point shall be paid by the Seller and would be reimbursed by the Procurer(s).*
>
> *4.4.2 The payment of RLDC/SLDC charge shall be the responsibility of Procurer(s).*

60. The deductions made by the Respondents can be classified under six categories. Each deduction, along with the submissions of the Respondents and the Petitioner, has been examined and our decision on the same, are given in the following paragraphs.

Deduction towards WRLDC Fee and Charges

61. For example, for the month of September 2013, the Respondents have deducted some amount stating that the Petitioner had claimed WRLDC Fees and Charges for 600 MW (unit size), whereas the contracted capacity under the PPA is only 400 MW. Hence, the Respondents limited the claim to 400 MW. The Petitioner has not contested this deduction explicitly.

62. We are of the view that the liability of the Respondents is limited to the contracted capacity of 400 MW as per PPA and balance charges for 200 MW cannot be borne by them. As such, deductions made by the Respondents on this count are in order.

Deductions towards rebate availed by the Petitioner but not passed on to the Respondents

63. For example, for the month of September 2013, the Respondents have deducted some amount stating that the benefit of the rebate availed by the Petitioner from PGCIL under PGCIL Rebate Scheme for the month of August 2013 was not passed on to the Respondents.

64. With regard to these deductions made by the Respondents, the Petitioner has submitted that the Respondents have not only short-admitted the amounts, but have also deducted the rebate which was applicable only in the event such payment was made to PGCIL in terms of the BCD Procedure under the Central Electricity Regulatory Commission (Sharing of Inter-State Transmission Charges and Losses)

Regulations, 2010. The Petitioner has also contended that the Respondents are not entitled to rebate as they are not making timely payment.

65. It is observed that the Petitioner had regularly passed on the rebate received from the CTU to the Respondents. However, wherever the same has not been passed, may be by inadvertent omission, the Respondents have taken corrective action and short-admitted the amount payable. We do not find anything wrong in the action of the Respondents as the late payment, if any, by the Respondents in reimbursing the transmission charges to the Petitioner, is governed by the terms of the PPA and as such the rebate availed by the Petitioner from CTU needs to be passed on to the Respondents as was being done by the Petitioner regularly but for certain inadvertent exclusions.

Deductions towards non-supply of power between the period from 16.6.2013 to 13.8.2013

66. For example, for the months of January, February and May 2014, for Bill-3, the amount in the invoice was Rs.4,91,03,832; the rebate allowed was Rs.5,95,577 and the net claim of the Petitioner was Rs.4,85,08,255. The Respondents (and other Discoms) paid an amount of Rs.4,10,19,255 and deducted an amount of Rs.74,89,000. Consequently, the Petitioner has made a claim for Rs.74,89,000.

67. The Respondents in this regard have submitted that these deductions were made by the Respondents because the Petitioner had not supplied energy between 16.6.2013 and 13.8.2013. The amount towards non-supply of power was deducted by the Respondents and a dispute in relation to this is currently pending at TSERC, bearing O.P.No.60 of 2015. The Petitioner has submitted that the period of dispute for non-supply of power was from 16.6.2013 to 13.8.2013, whereas the claim for

transmission charges in the present Petition is only from September 2013 onwards i.e. for the period when supply had begun. The Petitions being OP Nos. 59/2015 and 60/2015 were initially filed before the Telangana State Electricity Regulatory Commission, which are pending. However, in view of the decision on jurisdiction by the Hon'ble Supreme Court in the case of Energy Watchdog, these Petitions have to be necessarily transferred to this Commission and no portion of the claim in the present Petition is sub-judice before the Telangana State Electricity Regulatory Commission.

68. The Commission observes that Bill-3 as raised by the CTU is for adjusting the over-recovered or under-recovered transmission charges as collected through the Bill-1. The BCD Procedure framed under Central Electricity Regulatory Commission (Sharing of inter-State Transmission Charges and Losses) Regulations, 2010, on the Bill-3 for generators, provides as under:

> *"2.1.3 Third Invoice*
>
> *The Third Invoice shall be raised for adjustment in Yearly Transmission Charges. It shall be the Total amount to be recovered from the DICs on account of adjustments in interest rates, FERV, rescheduling of commissioning of transmission assets, etc, as allowed by CERC, for any ISTS Licensee. It shall be computed for the respective DICs in line with the Regulations as below:*
> *……..*
>
> *2.1.3.1 For Generators: For the Generators, it shall be in proportion of its average Approved Injection over the previous six months."*

69. As such, any credit or liability as indicated by the CTU in Bill-3 is passed on to the Respondents in proportion of their contracted capacity and is payable by the Respondents. We note that the claims of the Petitioner for reimbursement of transmission charges are for the period after supply of power had commenced under the PPA while the matter before TSERC is for the period when there was no power supply. There being no power supply, any claim of transmission charge cannot be

there and there can be no claim for any adjustment in subsequent period. In our view, the period of claims is different and also the cause of action is different. Therefore, the Respondents cannot deny claim of reimbursement of transmission charges payable to the Petitioner taking plea of pending Petition before TSERC. However, any such claim towards reimbursement of transmission charges would be admissible for the period from 1.4.2015 onwards.

Deductions towards credits received by the Petitioner in Bill-4 from CTU but not passed on to the Respondents

70. For example, for the month of September 2015, for Bill-1, the amount in the invoice was Rs.4,65,75,319; the rebate allowed was Rs.0, and the net claim of the Petitioner was Rs.4,65,75,319. The Respondents paid Rs.4,55,80,170 and deducted Rs.9,95,149. Consequently, the Petitioner has made a claim for Rs.9,95,148.

71. The Respondents have submitted that these deductions were made because the Petitioner had not passed credit received from CTU under Bill-4 to the Respondents.

72. The Petitioner has contested these deductions corresponding to credits received from the CTU under Bill-4, alleging that the same amounts to double deduction as the Petitioner is regularly passing on the credits received under Bill-4 by reducing the same from Bill-1. The Petitioner, with respect to contention of the Respondents that the Petitioner had only submitted Bill-1 which is the regular POC bill, but had not shared the Bill-4 and passed on the credit received from PGCIL, has submitted that the same is factually incorrect as the credits availed from PGCIL have been passed on to the Respondents under Bill-1 itself and any further deduction of credits amounts to double accounting which ought not to be permitted. The final

amount under Bill-1 (after adjusting the credit) is apportioned between the beneficiaries of the Petitioner in terms of the PPAs. Therefore, the credit received under Bill-4, is in fact being passed on to the Respondents as well.

73. Bill-4 pertains to the penal charges to be paid by the Petitioner (or any other DIC) for deviating from the granted quantum of approved access to ISTS. For the generator, the purpose of Bill-4 as provided in BCD Procedure reads as thus:

> *"2.1.4 Fourth Invoice*
>
> *The Fourth Invoice shall be raised for deviations from the approved levels of injection and withdrawal. It shall be computed in line with the Regulations as below:*
>
> *2.1.4.1 For the Generators*
>
> *a) In case Average MW injected by the Generator during time block of positive deviation is greater than the sum of Approved Injection, Approved Additional Medium Term Injection and Approved Short Term Injection, then for the first 20% deviation, transmission charges shall be at the zonal Point of Connection charges for the generation zone. For deviation beyond 20%, the additional transmission charges shall be 1.25 times the zonal PoC charges for the generation zone.*
>
> *b) In case a Generator instead of injecting, withdraws from the grid, the additional transmission charges shall be computed as: [1.25× PoC Transmission Charge for the demand zone in Rs./MW / time block] x [Average MW Withdrawal during time blocks of such negative deviation] "*

74. Such charges are pooled and credited back to all DICs in Bill-1. It is observed from the invoices submitted by the Petitioner that credits for Bill-4 were being passed on to the Respondents in Bill-1 on regular basis. As such, the Respondents' action of deducting transmission charges on this count is wrong unless there is some inadvertent omission on part of CTU or the Petitioner in passing of credit received.

75. As such, the Petitioner is directed to produce evidence to the Respondents in this regard. The Respondent shall reconcile the records based on evidence given by the Petitioner within 30 days of receiving the documents and pay to the Petitioner any amount that is due within 60 days.

Deduction of deviation charges paid by the Petitioner to CTU against Bill-4 for injecting more power than allowed under MTOA

76. For example, for the month of January 2016, for Bill-4, the amount in the invoice was Rs.34,896, no rebate was allowed and the Respondents disallowed the amount on account of deviation charges which were not payable to the Petitioner on account of deviation in the Scheduled Energy. The Respondents have submitted that on overall basis, a sum of Rs.2,09,421 was raised on the Petitioner through Bill-4 for deviating from the Schedules, under deviation settlement mechanism (DSM). The Petitioner has failed to prove that the deviations occurred as a result of instructions of Telangana SLDC and hence, the Petitioner was responsible for such deviation and the Respondents are not liable to pay the same.

77. In this regard, the Petitioner has submitted that Bill-4 pertains to the DSM charges to be paid by the Petitioner and has to be reimbursed by the Respondents. Whether the charges were a result of revisions issued by Telangana SLDC or not, is not at all a relevant consideration. The entitlement of the Petitioner to get reimbursement of transmission charges/ scheduling charges under the PPA from the Respondents is not subject to whether such charges arose out of the revisions of Telangana SLDC.

78. We have considered the rival submissions. The Petitioner has been granted open access to ISTS by CTU for injection of contracted energy and delivering it to the Respondents. It is the responsibility of the Petitioner to pay charges for transmission of power from its generating station to the Respondents within such granted quantum of access. Any deviation in injection from granted quantum of access has to be on account of the Petitioner only. Consequently, any amount levied

in Bill-4 on account of DSM, arising out of penalty due to any over injection is a matter solely between the Petitioner and the CTU. Accordingly, the Petitioner is liable for such payments to CTU as per Bill-4 and the Respondents are not liable to reimburse such amount to the Petitioner. Hence, disallowing of such Bill-4 invoices by the Respondents is justified and reasonable.

Deductions due to reduction in POC charges by the Respondent and wrong Billing by the Petitioner for the month of July 2015

79. It is observed from the submissions of the Petitioner and the Respondents that the deduction by the Respondents of Rs.2,19,67,342 in August 2015 due to downward revision of POC charges and short billing of Rs.9,88,757 by the Petitioner, were rectified by the Respondents in December 2015 by making additional payment of Rs.2,30,20,928. As such, disputed amount does not exist on this account.

80. We also direct WRLDC and WRPC to make available the REA as required under PPA between the parties as soon as possible and in no case later than 90 days from date of this order. The Petitioner shall serve a copy of the order upon WRLDC and WRPC for necessary action.

81. The Respondents are liable to pay late payment surcharge (as per rates prescribed in the PPA) on the amount that remains unpaid and bills have been raised by the Petitioner earlier for the amount that has been allowed vide this order.

82. This order disposes of Petition No. 186/MP/2018.

| | | |
|---|---|---|
| **Sd/-** | **sd/-** | **sd/-** |
| **(Arun Goyal)** | **(I. S. Jha)** | **(P. K. Pujari)** |
| **Member** | **Member** | **Chairperson** |