

**CENTRAL ELECTRICITY REGULATORY COMMISSION NEW  
DELHI**

**Review Petition No. 7/RP/2020**

**in**

**Petition No. 222/MP/2017**

**Coram:**

**Shri P.K. Pujari, Chairperson  
Shri I.S. Jha, Member**

**Date of Order: 30<sup>th</sup> August, 2021**

**In the matter of**

Petition seeking review of Commission's order dated 23.7.2019 in Petition No.222/MP/2017 pertaining to adjudication of disputes under Section 79(1) (b) read with Section 79 (1) (f) and other provisions of the Electricity Act, 2003, with the Respondent with regard to the tariff payable under the Power Purchase Agreement dated 27.11.2013

**And**

**In the matter of**

KSK Mahanadi Power Company Limited,  
8-2-293/82/A/431/A,  
Road No.22, Jubilee Hills,  
Hyderabad

**..... Review Petitioner**

**Vs**

Tamil Nadu Generation and Distribution Corporation Limited,  
Western Wing, 6<sup>th</sup> Floor, NPKRR Maaligai,  
144, Anna Salai,  
Chennai - 600 002

**.....Respondent**

**Parties present:**

Shri Anand K. Ganesan, Advocate, KSKMPCL  
Ms. Swapna Seshadri, Advocate, KSKMPCL  
Shri Ashwin Ramanathan, Advocate, KSKMPCL  
Shri B.Vinodh Kanna, Advocate, TANGEDCO  
Ms. M. Hemalatha, TANGEDCO  
Ms. Poonkodi, TANGEDCO



## ORDER

The Review Petitioner, KSK Mahanadi Power Company Limited (in short 'KSKMPCL') had filed Petition No.222/MP/2017 for adjudication of disputes with the Respondent, TANGEDCO, with regard to the tariff payable under the Power Purchase Agreement dated 27.11.2013 and the Commission vide order dated 23.7.2019 disposed of the same with the following observations/directions:

*“(a) Non-availability of LTA to the Petitioner is a Force Majeure event in terms of the PPA;*

*(b) On account of Force Majeure, the deemed/extended Scheduled Delivery Date shall be 1.8.2015 i.e. the date from which seller started the supply;*

*(c) On account of Force Majeure, the Expiry Date of the PPA shall be extended up to 31.3.2019 i.e. six months after the Expiry Date as per PPA;*

*(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2015-16, i.e. the first year of power supply; Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable for the 2016-17 i.e. the second year of power supply and so on;*

*(e) The Petitioner is entitled to recover the difference in tariff in terms of the above extended Scheduled Delivery Date and revised tariff for respective contract years;*

*(f) No interest will be payable for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates provided in the PPA.”*

2. Aggrieved by the aforesaid decision, the Review Petitioner has filed this review petition raising the following issues:

*“(a) Admit the review petition, review and set aside the order dated 23/07/2019 of the Hon'ble Commission in Petition No. 222/MP/2017 on the aspects of Delivery Date, Expiry Date and payment of interest/Late Payment Surcharge as raised in the present review petition;*

*(b) Hold and direct that the Delivery Date shall be 05/10/2015 and the corresponding Expiry Date shall be 04/10/2030;*

*(c) Hold and direct that the Respondent shall be liable to pay Late Payment Surcharge at the rate of SBIPLR on the tariff payable to the Petitioner and the tariff paid;*

*(d) Pass any further order or orders as the Hon'ble Commission may deem just and proper.”*



### **Submissions by the Review Petitioner**

3. With regard to extension of SDD (Scheduled Delivery Date) under the PPA, the Review Petitioner has submitted that there are errors apparent on the face of the record in the observations of the Commission in the order dated 23.7.2019 that the parties did not envisage part supply prior to the date of commencement of supply at the time of signing of the PPA and that if the Delivery Date was considered to be 1.10.2015, there would be an issue with regard to the period of supply from 1.8.2015 to 30.9.2015 i.e. period prior to the date of commencement of supply of aggregated contracted capacity. The definition of the 'Delivery Date' expressly provides that it shall be the date when the entire 'Aggregate Contracted Capacity' (500 MW) starts and Clause 4.6.1 of the Schedule 4 of the PPA provides for a situation where there is part supply prior to date of commencement of supply.

4. With regard to extension of 'Expiry Date' under the PPA, the Review Petitioner has submitted that deciding the question of extension of the Expiry Date separately and limiting the extension for only 6 months is an error apparent on the face of record and the order dated 23.7.2019 is, therefore, contrary to Article 4.7.5 of the PPA and also to the very definition of the Expiry Date under the PPA. Under Article 4.7.5 of the PPA, not only does the Delivery Date get determined after providing for such extension, but also the Expiry Date. There is also an error apparent in as much as not considering that the tariff quoted in PPA is for 15 years, and if the tariff is only applied for 13 years, the entire evaluation and bidding process would be vitiated.

5. With regard to non-grant of interest, the Review Petitioner has submitted that denial of the interest on the basis that the Review Petitioner continued to raise bills



upon the Respondent without a decision on the extension of Schedule Delivery Date is an error apparent on the face of record as the Review Petitioner had raised the bills strictly in terms of the PPA and that the Respondent had denied the payment of full tariff in terms of the PPA despite being put to notice of the provisions of the PPA. According to the Review Petitioner, it is entitled to the interest at the rate of SBIPLR per annum as provided for in Article 8.3.5 read with Article 8.6.8 of the PPA on the principal amount recoverable. The Review Petitioner has stated that once the Commission has adjudicated on the dispute and there is a decision on the extension of Delivery Date, interest/ late payment surcharge is automatically payable. These are the amounts which were payable by the Respondent at the relevant time, which were not paid contrary to the terms of the PPA and on account of which the dispute had to be raised.

#### **Hearing dated 16.7.2020**

6. After hearing the learned counsel for the Review Petitioner on 16.7.2020 through video conferencing, the Commission reserved its order on 'admissibility'. Thereafter, by order dated 28.1.2021, the review petition was admitted after condoning the delay of 4 days in filing the review petition, and notice was served on the Respondent, TANGEDCO.

#### **Hearing dated 18.6.2021**

7. During the virtual hearing of the review petition on 18.6.2021, the learned counsel for the Respondent, TANGEDCO submitted that it has filed Appeal No.145/2021 (*TANGEDCO vs CERC & anr*) before the Appellate Tribunal for Electricity ('APTEL') against the Commission's order dated 23.7.2019 in Petition No.



222/MP/2017 and prayed that the hearing of the review petition may be adjourned till the disposal of the aforesaid appeal. In response, the learned counsel for the Review Petitioner clarified that the issues raised by the Respondent, TANGEDCO in the aforesaid appeal are different from the issues raised by the Review Petitioner in this review petition. The Commission, after hearing the parties, directed the Respondent, TANGEDCO to file its reply and reserved its order in the matter. In compliance to the directions, the Respondent, TANGEDCO on 29.6.2021 has filed its written submissions. No response has been filed by the Review Petitioner.

### **Written Submissions of the Respondent, TANGEDCO**

8. The Respondent TANGEDCO in its written submissions has submitted the following:

(a) Article 3.3.2 read with Article 3.3 states that if the Seller (the Review Petitioner) intends to supply power before the Scheduled Delivery Date, it shall commence such supply on mutual agreement. This date is referred to as the revised Scheduled Delivery Date. The Aggregate Contracted Capacity means the entire quantum of power contracted for which agreement is signed between the parties. The commencement of supply means the start date of any quantum of contracted capacity not necessarily the aggregate contracted capacity;

(b) Schedule 6 of the PPA provides that Scheduled Delivery Date is correlated with capacity charges and bid deadline with energy charges. The Review Petitioner had quoted tariff for both capacity and energy charges from the bid dead line i.e. 6.3.2013;

(c) As per provision of the PPA, capacity charges are to be paid from Scheduled Delivery Date i.e. date of commencement of supply which means the date on which the plant capacity was utilised for scheduling power to the Respondent. When the part supply commenced on 1.8.2015, the quoted capacity charge for the applicable year as noted in the definition of contract year with escalation index notified by the Commission was considered.



(d) Though the supply commenced on 1.8.2015, energy charges were escalated from 6.3.2013 and up to 1.8.2015 and the resultant tariff, on the date of commencement, was considered and paid to all the generators. It is clear that capacity charges are paid from Scheduled Delivery Date and energy charges from the bid deadline. By way of this, there is no loss to the Review Petitioner.

(e) A conjoint reading of the provisions of Article 3 [Article 3.1.1, 3.1.1(b), (c) and (j)] of the PPA specifically provides that the Seller has to satisfy the conditions set out in Article 3.1. The three exceptions which absolve the Seller from the conditions are Force majeure or Procurers failure to comply with their obligation under Article 3.1.1 of the PA or if any activities are specifically waived in writing by the Procurer.

(f) No tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4. Article 4.7.1(c) is applicable only when performance of the Seller is affected by contractor's performance and not due to delay in allocation of LTA. There is no force majeure event which would entitle any relief to the Review Petitioner under the above clauses of the PPA.

(g) As per Article 9.3.1 of the PPA, non-availability of open access is treated as Force Majeure, without any liability on either side and hence the period till the grant of LTA from the Scheduled Delivery Date has been considered as a Force majeure event i.e. up to operationalization of part quantum of 281 MW on 1.8.2015. No communication as mandated under Article 9.5 was made by the Review Petitioner to the Respondent.

(h) Article 2.2.1 of the PPA states that the agreement is valid up to the expiry date of 30.9.2028 and shall automatically terminate, subject to Article 2.4, unless mutually extended by all parties on mutually agreed terms and conditions at least (180 days) prior to the Expiry date, subject to approval of the State Commission (TNERC). If both parties intend to extend the PPA, it could be done with prior approval of TNERC and 180 days prior to expiry date.

(i) Article 3 of PPA stipulates the responsibility of the Seller in getting the long term transmission corridor at its own risk except due to Force Majeure condition. The period for fulfillment can be extended up to the period of such Force Majeure event subject to maximum of 10 months. Thereafter, the agreement can be terminated by both the parties. However, neither the Review Petitioner nor the Respondent chose to terminate the agreement.



(j) By virtue of extension of Scheduled Delivery Date in Article 3 due to Force Majeure event, responsibility lies with the Review Petitioner to commence supply of power on the extended scheduled delivery date of 1.8.2015. Hence, in Article 4.1.1 of the PPA, Scheduled Delivery Date is changed to 1.8.2015 and is no longer 1.6.2014.

(k) Article 4.7.1 clearly states that in the event that the Seller is prevented from performing its obligations under Article 4.1.1 i.e. commencement of supply of power from 1.8.2015 due to the reasons in Article 4.7.1(a), (b) and (c) of the PPA, both the Scheduled Delivery Date and Expiry Date shall be deferred subject to the limit prescribed in Article 4.7.2 of the PPA, where the limit is not more than 6 months. In this case, as the Review Petitioner commenced supply on 1.8.2015 i.e. from the date of allocation of transmission corridor and, therefore, the question of application of Article 4.7.1(a), (b) and (c) of the PPA does not arise.

(l) The PPA clearly states that non-availability of corridor is a 'force majeure' condition and there is no liability on either side. For this reason only, the Respondent had not claimed liquidated damages during the period of non-availability of transmission corridor. Further, as per Article 3.4 of PPA, no tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4. Therefore, the prayer of the Review Petitioner for revision of Scheduled Delivery Date/ Expiry Date is baseless and deserves to be rejected.

(m) While floating tender, the expected date of delivery was mentioned as 1.10.2013 and Expiry Date as 30.9.2028. The Respondent, on request from the bidders, revised the Scheduled Delivery date from 1.10.2013 to 1.6.2014 considering the time limit allowed in Open Access Regulations to make the application for Medium Term access well in advance i.e. five months as per Article 3.1.1(i) of PPA. The Respondent, as per the provision of RFP and using the escalation parameters, evaluated the bid submitted by the bidders quoting the tariff for the period from 1.10.2013 to 30.9.2028 in Schedule 8, calculated the levelized tariff and bidders were ranked. Accordingly, L1 tenderer was called for negotiation and others were requested to match the L1 tariff.

(n) The Review Petitioner neither during signing of PPA nor before the Commission represented for change of Expiry Date. It was only through Petition No. 222/MP/2017 that the Review Petitioner prayed for extension which is an after-thought and cannot be accepted. This period of non-availability of corridor as per Article 9.3.1 of PPA is treated as Force Majeure



without any liability on both sides. By claiming the revision of contract year/ tariff, the Review Petitioner is placing liability on the Respondent, which is against the provisions of PPA;

(o) The Review Petitioner has availed the escalations as provided in Schedule 6 for each of the applicable contract year from 6.3.2013. Having availed the escalation and invoiced as per the terms and conditions of the PPA, the Review Petitioner cannot maintain the plea sought for in the present petition. The plea and prayer of the Review Petitioner in the present petition is against the express terms and conditions of the PPA agreed between the parties.

(p) There is no provision under the PPA for applying the rate agreed to under the contract year, for the supply of electricity made in a different contract year. There is no ambiguity in this aspect. The issue of change of first year contract was never in issue when the tender of the Review Petitioner was selected as lowest tender, during execution of agreement or before the Commission for approval of adoption of tariff. The above was not agreed to under the PPA. There is no provision under the PPA for such escalation/ revision of tariff quoted in Schedule 8 of PPA. Further, in the definition for the 'contract year', it is clearly stated that for the purpose of payment, the tariff shall be the quoted tariff, for the applicable contract year, as per Schedule 8 of the PPA.

(q) The PPA executed between the Review Petitioner and the Respondent is valid up to 30.9.2028 and if at all extension is needed, it should be by mutual agreement between both the parties. No party to the agreement can be forced to act against its own volition. Article 4.6.1 in Schedule 4 of the PPA indicates the tariff to be paid to the Seller from the revised scheduled date i.e. if they intend to commence the supply prior to Scheduled Delivery date mentioned in the agreement at the time of signing of PPA i.e. 1.6.2014;

(r) The Review Petitioner, by wrongful interpretation of Article 4.7 of the PPA, states that maximum extension of Expiry Date for 6 months is provided only in Article 4.7.2 which relates to the 'Procurer Event of default' and has no application and, hence, the limitation of 6 months in extension of expiry date is erroneous on the part of the Commission. As the Review Petitioner commenced supply on 1.8.2015 i.e. the date of allocation of transmission corridor by PGCIL, Article 4.7 is not applicable to the Review Petitioner and claiming extension of the expiry date, quoting the above reason is not correct; and



(s) The claim of the Review Petitioner towards Interest/ Late Payment Surcharge for the amount payable is not in line with the PPA provisions. Hence, the same may be rejected. There is no privity of contract between the Respondent TANGEDCO and PGCIL, as the transmission service agreement is exclusively between the Review Petitioner and PGCIL. The PPA entered between the parties does not have any provision for compensation or change in contract year or tariff to be adopted by the Respondent TANGEDCO, in the event of delay in getting LTA by the Review Petitioner from PGCIL.

### **Analysis and Decision**

9. The Review Petitioner is mainly aggrieved by the extension of the Scheduled Delivery Date to 1.8.2015 instead of 1.10.2015; (b) extension of the Expiry Date only by 6 months; and (c) non-grant of interest. Based on the submissions of the parties and the documents available on record, we examine these issues in the subsequent paragraphs.

#### ***(A) Extension of the Scheduled Delivery Date***

10. On the issue of extension of Scheduled Delivery Date, the Commission in the impugned order dated 23.7.2019 had held as under:

*“31. Having decided that non-availability of LTA was an event of force majeure, we now proceed to assess the duration for which the Petitioner was affected by force majeure. The Petitioner was able to supply power to the Respondent only after LTA was operationalized to it by PGCIL from 1.8.2015 for 281 MW and for full quantum of 500 MW from 1.10.2015. Thus, period up to 1.8.2015 for 281 MW and that up to 1.10.2015 for remaining 219 MW is covered under force majeure.*

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*36. We have held earlier that non-availability of LTA is a force majeure event affecting the Petitioner (Seller). As has been held in Para 31 above, the period up to 1.8.2015 for 281 MW and that up to 1.10.2015 for remaining 219 MW is covered under force majeure. Therefore, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1 (operationalization of LTA in the instant petition) shall get extended by the period for which the Seller was affected by force majeure in terms of Article 3.4.3. Even though the period of force majeure extended beyond 6 months, the Respondent or the Petitioner did not exercise its right to terminate the contract in terms of Article 3.4.3 of PPA. Thus, in terms of proviso to Article 3.4.6, Schedule Delivery Date shall get extended for an equal period for which increase in period for fulfilment of conditions subsequent is allowed. As has been held in Para 31 above, the deemed/ extended scheduled delivery date, for the purpose of granting relief to the Petitioner*



*under Force Majeure event, stands extended up to 1.8.2015 for 281 MW and up to 1.10.2015 for 219 MW.*

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*53. We observe that the Scheduled Delivery Date as per the bidding document was 1.10.2013 and the Expiry Date was 15th anniversary of the Delivery Date i.e. 30.9.2028. Article 1.1 of the Article 1 regarding definition and interpretation of the PPA dated 27.11.2013 provides the definition of "Aggregate Contracted Capacity" as under:-*

*"Aggregate Contracted Capacity:- With respect to the Seller shall mean the aggregate capacity in 500 MW contracted with the Procurer for supply at the Interconnection point from the Power Station's Net Capacity."*

*54. In terms of the above definition in the PPA, the Aggregate Contracted Capacity is 500 MW. However, the Petitioner has started supply of 281 MW from 1.8.2015 and 500 MW from 1.10.2015. Thus, it appears that neither the Petitioner and nor the Respondent had envisaged part supply at the time of signing the PPA. If the revised start date is considered to be the start date of supply of Aggregate Contracted Capacity i.e. 1.10.2015, there would be issue regarding tariff for supply from 1.8.2015 to 30.9.2015. Therefore, for the purpose of revision of start date, we consider the date 1.8.2015 to be the Revised Schedule Delivery Date."*

11. The Review Petitioner has submitted that while the Aggregate Contracted Capacity is defined as 500 MW, the Delivery Date i.e. the date of commencement of supply is the date when the supply of entire 500 MW has commenced. The Review Petitioner has pointed out that in the present case, it is not disputed that the commencement of entire 500 MW had only commenced from 1.10.2015. The Review Petitioner has contended that the Commission in paragraph 54 of the impugned order dated 23.7.2019 has made a mistake by observing that none of the parties had envisaged part supply at the time of signing the PPA, which is contrary to the express provision under Article 4.6.1 under Schedule 4 (Tariff) of the PPA. According to the Review Petitioner, the observation of the Commission that if the start date is taken as 1.10.2015, there would be an issue with regard to the period of supply between 1.8.2015 to 30.9.2015, is contrary to the teeth of Article 4.6.1 of the PPA, which specifically provides for this situation of part supply, prior to the date of the



commencement of supply. Accordingly, the Review Petitioner has prayed that the Schedule Delivery Date may be extended from 1.8.2015 to 1.10.2015 and the Commission's order dated 23.7.2019 may be reviewed on this ground.

12. The Respondent TANGEDCO has submitted that reliance to Article 4.6.1 of the PPA by the Review Petitioner, for revision of the Scheduled Delivery Date is incorrect. It has pointed out that Article 4.6.1 under Schedule 4 (Tariff) of the PPA indicates the tariff to be paid to the Seller from the revised scheduled date i.e. if they intend to commence the supply prior to the Scheduled Delivery Date mentioned in the agreement at the time of signing of PPA i.e. 1.6.2014. It has further submitted that there is no provision under the PPA for applying the rate agreed to under the contract year for the supply of electricity made in a different contract year.

13. We have considered the submissions. Article 1.1 of the PPA dated 27.11.2013 provides the definition of "Aggregate Contracted Capacity" and 'Delivery Date' as under:-

*"Aggregate Contracted Capacity: - With respect to the Seller shall mean the aggregate capacity in 500 MW contracted with the Procurer for supply at the Interconnection point from the Power Station's Net Capacity."*

*"Delivery Date: Shall mean the date on which the Seller commences supply of the Aggregated Contracted Capacity to the Procurer"*

14. Also, Article 4.1.1 of the PPA relating to the commencement of supply of power to the Procurer provides as under:

*"4.1 Commencement of Supply of Power to Procurer*

*4.1.1 The Seller shall be responsible to commence supply of power up to the Aggregated Contracted Capacity by the Scheduled Delivery Date in accordance with the provisions of this Agreement, which is 01.06.2014. However, the Seller and Procurer may mutually agree for commencement of supply in a phased manner from the Revised Scheduled Delivery Date as specified in Article 3.3 of this Agreement."*



15. Further, Article 4.6.1 under Schedule 4 (Tariff) of the PPA provides as under:

*“4.6.1: The Tariff for the period prior to date of commencement of supply of power shall be the Quoted Tariff of the first Contract Year with escalation for relevant period only for energy charge.”*

16. The Commission in the impugned order dated 23.7.2019 while deciding that the non-availability of LTA was an event of ‘force majeure’, had observed that the Review Petitioner was able to supply power to the Respondent TANGEDCO only after LTA was operationalized by PGCIL for 281 MW from 1.8.2015 and for the full quantum of 500 MW from 1.10.2015. However, in the said order, the revised Schedule Delivery Date was considered as 1.8.2015 on the grounds that (i) neither parties had envisaged part supply at the time of signing the PPA and (ii) if the revised start date is considered as the start date of supply of Aggregate Contracted Capacity i.e. 1.10.2015, there would be issue regarding tariff for supply from 1.8.2015 to 30.9.2015. The Review Petitioner is mainly aggrieved by these findings stating that the aforesaid observations are contrary to Article 4.6.1 of the PPA.

17. We find force in the submissions of the Review Petitioner. The PPA defines the ‘Delivery date’ as the date on which the Seller commences supply of the ‘Aggregated Contracted Capacity’ to the Procurer. Also, the term ‘Aggregated Contracted Capacity’ has been defined as ‘the aggregate capacity in 500 MW contracted with the Procurer’ for supply at the interconnection point from the Power Stations Net Capacity. In terms of this, the date of supply of the ‘Aggregated Contracted Capacity’ of 500 MW to the Procurer is to be considered as the date of commencement of supply of power. Admittedly, the Review Petitioner had commenced the supply of



'Aggregated Contracted Capacity' of 500 MW power to the Procurer from 1.10.2015, after operationalization of LTA by PGCIL and, hence, the same is to be considered as the revised Scheduled Delivery Date, instead of 1.8.2015. The observations in order dated 23.7.2019 that if the revised start date of supply is considered as 1.10.2015, there would be issue regarding tariff for supply from 1.8.2015 to 1.10.2015 appears to be not in line with Article 4.6.1 under Schedule 4 (Tariff) of the PPA. In terms of this article of the PPA, the tariff for the period prior to the date of commencement of supply of power shall be the quoted tariff of the first contract year with escalation for relevant period only for energy charge. As the supply of power by the Review Petitioner to the Procurer has commenced from 1.10.2015, as stated above, the tariff for the part supply of power to Respondent TANGEDCO during the period from 1.8.2015 till 1.10.2015 will be governed by this provision. These aspects seem to have been overlooked by the Commission while passing the order dated 23.7.2019. This, according to us, is an apparent error on the face of record and, therefore, the prayer of the Review Petitioner for review of order dated 23.7.2019 on this count, is allowed.

18. Accordingly, in modification of our findings in order dated 23.7.2019, we hold that the Scheduled Delivery Date, in Schedule 8 of the PPA (for Schedule Delivery Date), shall be substituted as 1.10.2015, in place of 1.8.2015. In respect of tariff for supply of power to the Respondent TANGEDCO for the period from 1.8.2015 till 1.10.2015, the same shall be governed by Article 4.6.1 under Schedule 4 (Tariff) of the PPA. The issue is decided accordingly.



**(B) Extension of the Expiry Date**

19. As regards extension of 'Expiry Date', the Commission in its order dated 23.7.2019 in Petition No. 222/MP/2017 had decided as under:

*"55. Further, neither of the parties chose to terminate the contract nor agreed to the duration of extension of the expiry date. Upon combined reading of Article 4.7.1 (that prescribes extension to be not less than day to day basis) and Article 4.7.3 (that gives options to the parties to decide on termination of agreement after six months of continuance of force majeure), we are of the view that the Expiry Date of the PPA shall be extended by six months. In terms of provisions of Article 4.7.4 of the PPA, the parties were to agree to extension of Expiry Date which has not happened in the instant case. The Petitioner has raised a dispute vide its letter dated 3.3.2016 and when no response was received from the Respondent, the Petitioner has filed the instant Petition. Therefore, we are not inclined to consider extension of Expiry Date beyond six months. However, it is up to the parties to reach a settlement in this regard, if they so decide. Accordingly, the expiry date is re-fixed as 31.3.2029 i.e. six months from the Expiry Date as mentioned in the PPA (30.9.2028).*

20. In this regard, the Review Petitioner has submitted the following:

(a) The Commission has made an error in so far as separately deciding the question of extension of the 'Expiry Date', as the definition of Expiry Date (which is defined as the 15<sup>th</sup> anniversary of the Delivery Date) itself provides for an automatic extension of the 'Expiry Date' by the same period of time the Scheduled Delivery Date is extended.

(b) While the Commission had already decided on the revision of Scheduled Delivery Date, the extension of 'Expiry Date' was merely a consequence of the same. The date of 30.9.2028 has only been mentioned being the 15<sup>th</sup> anniversary of 1.10.2013, the original date of scheduled delivery as envisaged in the PPA. The definition could not be read to mean otherwise and the purpose of this is to ensure that the Seller actually supplies electricity for a period of 15 years, and not for a shorter period of time.

(c) In clauses (2) to (4) of Article 4.7 of the PPA, the period of 6 months has no relevance with regard to extension of the Delivery Date and the Expiry Date. It has further submitted that in terms of Article 4.7.5 of the PPA, as a result of the extension of time, the Scheduled Delivery Date "and the Expiry Date" under Article 4.7.1, shall be the newly determined date "after providing for such extension'.

(d) Having already decided on providing such extension, there cannot then be any restriction on the extension to the Expiry Date. When the Delivery Date has



already been decided to be revised, the expiry date automatically extends to the 15<sup>th</sup> anniversary of the Delivery Date. While the Delivery Date has been revised to 1.8.2015, without prejudice to the fact that the same also ought to be revised to 1.10.2015, the Expiry Date would have to be the 15<sup>th</sup> anniversary calculated from 1.10.2015.

(e) There is an error apparent in as much as not considering that the PPA quotes tariff for 15 years, and if the tariff is only applied for 13 years, the entire evaluation and bidding process would be vitiated. The observation that it is up to the parties to reach a settlement with regard to the extension of Expiry Date is erroneous as the contesting parties rarely agree on aspects. It is for this purpose that the clause itself provides that failing any such agreement, the dispute shall be adjudicated by the Commission

(f) The order of the Commission in this regard is contrary to Article 4.7.5 and also the very definition of 'Expiry Date' under the PPA. Under Article 4.7.5 of the PPA, not only does the Delivery Date get determined after providing for such extension, but also the Expiry Date. Not extending the Expiry Date by the same period is an error apparent on the face of the record.

21. The Respondent TANGEDCO has objected to the above submissions of the Review Petitioner that Article 4.7.1 is applicable only when the Seller is not able to commence the supply even after allocation of transmission corridor due to Force Majeure events affecting on account of list of machinery, contractors' obligations etc., as mentioned in Article 9.2.4 of the PPA. It has stated that as the Review Petitioner had commenced the supply on 1.8.2015 i.e. date of allocation of transmission corridor by PGCIL, Article 4.7 is not applicable to the Review Petitioner and claiming extension of expiry date quoting the above reason is not correct.

22. The submissions have been considered. The provisions of Article 4.7 of the PPA are extracted hereunder:

*"4.7 Extensions of Time*



*4.7.1 In the event that the Seller is prevented from performing its obligations under Article 4.1.1 by the Revised Scheduled Delivery Date(s) or the Scheduled Delivery Date, as the case may be, due to:*

- a) any Procurer Event of Default; or*
- b) Force Majeure Events affecting the Procurer, or*
- c) Force Majeure Events affecting the Seller,*

*the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date shall be deferred, subject to the limited prescribed in Article 4.7.2, for a reasonable period but not less than 'day for day' basis, to permit the Seller or the Procurer through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or the procurer, or till such time such Event of Default is rectified by the Procurer.*

*4.7.2 In case of extension occurring due to reasons specified in Article 4.7.1(a), any of the dates specified therein can be extended, subject to the condition that the Scheduled Delivery Date would not be extended by more than six (6), months or the date on which the Seller elects to terminate this Agreement, whichever is later.*

*4.7.3 In Case of extension due to reasons specified in Article 4.7.1(b) and (c), and if such Force Majeure Event continues even after the maximum period of six (6) months any of the Parties may choose to terminate the Agreement as per the provisions of Article 11.5.*

*4.7.4 It the Parties have not agreed, within thirty (30) days after the affected Party's performance has ceased to be affected by the relevant circumstance, on the time period by which the Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 14.*

*4.7.5 As a result of such extension, the Scheduled Delivery Date and the Expiry Date newly determined shall be deemed to be the Scheduled Delivery Date and the Expiry Date for the purposes of this Agreement.*

23. The Review Petitioner has submitted that the Commission having decided to provide such extension of the Scheduled Delivery Date in terms of Article 4.7.5 of the PPA, there cannot be any restriction on the extension of the Expiry Date. It has stated that when the Delivery Date has been decided to be revised to 1.10.2015, the Expiry Date would also have to be the 15<sup>th</sup> anniversary calculated from 1.10.2015. The Review Petitioner has argued that if the tariff is only applied for 13 years, the entire evaluation and bidding process would be vitiated. The submissions of the



Review Petitioner are not acceptable. Admittedly, Article 4.7.4 and Article 4.7.5 read with Article 4.7.1(c) of the PPA provide for extension of the Scheduled Delivery Date and Expiry Date on account of Force Majeure Events affecting the Seller. The Commission, in the impugned order dated 23.7.2019, after considering the fact that Article 4.7.1 of the PPA prescribes for extension to be not less than day to day basis and keeping in view that neither of the parties chose to terminate the PPA nor agreed to extension of the expiry date, had extended the Expiry Date by six months (i.e. till 31.3.2029). Such newly determined Expiry Date shall be deemed to be the Expiry Date in terms of Article 4.7.5 of the PPA. We find no error apparent on the face of the order, as the Commission by a conscious decision, based on the submissions of the parties and after interpretation of the provisions of the PPA had granted such extension of Expiry Date by 6 (six) months. The Review Petitioner cannot, therefore, be permitted to reopen the case on merits and seek review of the order on this count. The review cannot be treated as an appeal in disguise. Accordingly, the prayer of the Review Petitioner for review of the order dated 23.7.2019 on this count is rejected.

***(C) Non-grant of Interest***

24. The Review Petitioner has submitted that there is error apparent on the face of record since the Review Petitioner had raised bills strictly in terms of the PPA and that the Respondent TANGEDCO had denied payment of full tariff in terms of the PPA, despite being put to notice of the provisions in the PPA. The Review Petitioner has contended that it is entitled to interest at the rate of SBIPLR per annum, as provided in Article 8.3.5 of the PPA on the principle amount recoverable. It has also stated that the interest is payable for the delay in payment of the full tariff from the



dates when the amounts became due, till the date of actual payments being made by the said Respondent. The Review Petitioner has argued that amounts recoverable relate back from the date of supply and, therefore, the said amounts necessarily have to be paid along with applicable interest for the reason that the Review Petitioner has been deprived of amounts it was entitled to, at a particular time, on account of the wrongful action on the part of the Respondent. It has stated that the said amounts are now to be paid along with the applicable Late Payment Surcharge/ interest as provided for in the PPA.

25. The Respondent TANGEDCO has submitted that the claim of the Review Petitioner for interest/ late payment surcharge for the amount payable is not acceptable as the claim is not in line with the provisions in the PPA.

26. The matter has been considered. Relevant portion of the impugned order is as follows:

*“58. The Petitioner has further prayed for grant of interest at the rate of SBIPLR for the amounts payable by the Respondent to the Petitioner, calculated from the date when the amounts became due and till the date of actual payment. We are not inclined to accept this request since it was the Petitioner who continued to raise bills upon the Respondent without a decision on the extension of Schedule Delivery Date.*

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*62. In view of the above, summary of our decisions with respect to the prayers of the Petitioner is as under:*

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*(f) No interest will be payable for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates provided in the PPA.”*

27. The Commission in its order dated 23.7.2019 directed the Respondent TANGEDCO to make payments within 60 days of raising of bills by the Review Petitioner, failing which TANGEDCO would be required to pay late payment surcharge in terms of the relevant provisions of the PPA. However, in the said order,



the prayer of the Review Petitioner for grant of interest at SBIPLR rate for the amounts that became due and till the date of actual payment was declined. Thus, the Commission has already considered the contention of the Review Petitioner in the impugned order and had rejected it. The Review Petitioner is trying to re-agitate the matter that has already been decided and the same is not allowed in a Review Petition. In this background, we find no reason to review the order on this count. Accordingly, the prayer of the Review Petitioner to review the order dated 23.7.2019 on this count is rejected.

### **Summary**

28. In view of the decision in (A) Extension of the Scheduled Delivery Date and (B) Extension of the Expiry Date as above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 1.10.2015. However, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2016-17 i.e. the second year of actual power supply and so on. In view of the decision in (C) Non-grant of Interest as above, the late payment surcharge shall be applicable as per the provisions of the PPA.

29. Review Petition No.7/RP/2020 in Petition No. 222/MP/2017 is disposed of in terms of the above.

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

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

