CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 177/MP/2020

Coram:

Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri Pravas Kumar Singh, Member

Date of Order: 28th January, 2023

In the matter of:

Petition under Section 79(1)(b), 79(1)(f) and other applicable provisions of the Electricity Act, 2003 for applicability of the provisions of PPA dated 26.02.2014 and amendment dated 23.01.2018 for levying penalty for maintaining availability below 80% for a contract year.

And

In the matter of

KSK Mahanadi Power Company Limited.
8-2-293/82/A, Road No. 22, Jubilee Hills,
Hyderabad – 500033 **…. Petitioner**

Vs

1. Uttar Pradesh Power Corporation Limited
   7th Floor, Shakti Bhawan Extension,
   14, Ashok Marg, Lucknow – 226001
2. Madhyanchal Vidyut Vitran Nigam Limited,
   4A, Gokhale Marg, Lucknow – 226001
3. Paschimanchal Vidyut Vitran Nigam Limited,
   Udyog Bhawan, Victoria Park,
   Meerut – 250001
4. Purvanchal Vidyut Vitran Nigam Limited,
   SLW Bhikaripur, Varanasi – 221004
5. Dakshinanchal Vidyut Vitran Nigam Limited,
   UrjaBhawan, NH-2, Sikandra,
   Agra – 282002 **…Respondents**

Parties Present:

Shri Anand K. Ganesan, Advocate, KSKMPL
Ms. Swapna Seshadri, Advocate, KSKMPL

ORDER

The Petitioner, KSK Mahanadi Power Company Limited (in short 'KSKMPL') has filed this petition seeking the following relief(s):

(a) Hold and declare that the computation of penalty applicable for shortfall in availability shall be done on an annual basis, as per clause 4.2.5 of schedule 4 of the Procurer(s) PPA;

(b) Direct the Respondents to comply with the provisions of the Procurer PPA and accordingly refund the penalty amount of Rs. 18,40,87,911/-deducted by considering availability on a monthly basis, along with Late Payment Surcharge in terms of Article 8.3.5;

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

(d) In the interim, direct the Respondents to stop imposing penalties or deductions with respect to availability of the Petitioners' project on standalone basis for each month;

(e) Award costs of the present proceedings;

(f) Pass such further order(s) as this Hon'ble Commission may deem fit and proper in the interest of justice;

2. The Petitioner is a generating company, as defined in Section 2 (28) of the Electricity Act, 2003 (the Act) having established a 3600 MW coal based Thermal Power Project in District Akaltara in the State of Chhattisgarh, which comprises of six units, of 600 MW each. The first three units are under operation and the balance units are at various stages of construction and commissioning. The Petitioner has entered into the Power Purchase Agreements (PPA) for sale of power from its generating station, as under:

(a) PPAs dated 31.7.2012 & 19.12.2014 (as amended on 23.1.2018) between the Petitioner and the distribution licensees of the State of Andhra Pradesh for supply of 400 MW of power;

(b) PPA dated 27.11.2013 (as amended on 11.1.2018 & 28.6.2018) between the Petitioner and Tamil Nadu Generation and Distribution Corporation (TANGEDCO) in the State of Tamil Nadu for supply of 500 MW;

(c) PPA dated 26.2.2014 (as amended on 23.1.2018) between the Petitioner and the distribution licensees in the State of Uttar Pradesh for aggregate supply of 1000 MW of power; and

(d) PPA dated 18.10.2013 (as amended on 15.6.2015) with the Government of Chhattisgarh for supply of 5%/ 7.5% of the net power (gross power generated minus the auxiliary consumption) under the host State obligations

Submissions of the Petitioner

3. The Petitioner, in the petition, has made the following submissions:

(a) The Respondent No.1, UPPCL initiated competitive bidding process by issuing Request for Proposal (RFP) on 27.7.2012 for procurement of power on long-term basis under Case-I bidding, to meet the power requirements of 6000 MW. Accordingly, the Petitioner was selected as a successful bidder to supply 1000 MW power from the Project and PPA was executed with the Respondents 2 to 5 on 26.2.2014.

(b) Pursuant to the above competitive bidding process, apart from the Petitioner, the Respondents had also tied up PPAs with other successful bidders including TRN Energy Pvt. Ltd. and MB Power (Madhya Pradesh) Limited. The terms and conditions of purchase from all the successful bidders was the same, being selected as a part of the same bid documents and bid process.

(c) The PPA dated 26.2.2014 with the Respondent UPPCL was approved and the tariff therein was adopted by the Uttar Pradesh Electricity Regulatory Commission (UPERC) vide its order dated 24.6.2014. Thereafter, the Petitioner commenced power supply to the Respondents from October, 2015.

(d) In terms clause 4.2.1 under Schedule 4 of the PPA, monthly bill shall include penalty, determined in accordance with clause 4.2.5 of Schedule 4 and shall be applicable on cumulative basis and included in the monthly bill. Clause 4.2.5.1 of Schedule 4 of the PPA, provides that in case the "*availability for a contract year"* is less than 80%, a penalty of 20% of the simple average capacity charge for all months in the contract year, applied on the energy corresponding to the difference between 80% and actual availability during contract year, will be imposed

(e) Even though, Article 4.2.5 under Schedule 4 of the PPA, provides for the penalty for short-fall in availability to be computed on an yearly basis, the Respondents herein, have however been unilaterally calculating the penalty for each month, keeping in view the contracted capacity for the month, and the actual scheduled availability in the month, on standalone basis. In other words, the Respondents have levied penalties for low availability, on a monthly basis, instead of annual

basis. Accordingly, the Respondents have deducted penalty amounts from the bills raised by the Petitioner, on a monthly basis.

(f) In terms of Schedule 4 under the PPA, the Petitioner is required to supply minimum of 80% during the year, to avoid penalty in terms of the Article 4.2.5 of Schedule 4 of the PPA. It is for the Petitioner to achieve the above target of 80% on an annual basis. Even if there is short-fall of supply for certain months during the year, the Petitioner always has the right to make up the short-fall in the subsequent months to reach the level of 80% on an annual basis. However, the Respondents have not allowed the Petitioner to make-up the short-fall in the availability for certain months in the subsequent months of the contract year, on account of which the Petitioner has been constrained to approach this Commission, to clarify as to the correct methodology for computing the penalty for short-fall in availability, namely, whether it can be done for each month separately, or is to be done on an annual basis.

(g) The expression used in clause 4.2.5.1 of Schedule 4 is "contract year", which is for the full financial year from 1st April to 31st March of the next year as defined under Article 1.1. Further, the penalty under clause 4.2.5.1 of Schedule 4 for short-fall in availability is as against the incentive to the over-achieving the availability in terms of clause 4.2.4.1 of Schedule 4. Both these provisions are mirror provisions, for over-achieving or under-achieving availability during a contract year. Both of these are applicable only for a 'contract year' and not on 'stand alone on a monthly basis'. If for a particular month or few months, the Petitioner achieves availability less than 80%, but is able to make up in the balance months of the Contract Year to achieve 80% for the full contract year, no penalty is payable.

(h) Therefore, the action of the Respondents in deducting penalty amounts on a monthly basis is clearly contrary to the provisions of the PPA, which only provide for penalty in case of shortfall in availability, on an annual basis. In other words, there is no right to the Respondents under the PPA, to compute availability and/or deduct penalty on standalone monthly basis. The terms of the PPA dated 26.2.2014 in this regard are unambiguous and clear, as explained hereinabove.

(i) It is relevant to mention that this specific issue has already been adjudicated by this Commission in the case of two other generators namely, TRN Energy Private Limited and MB Power (Madhya Pradesh) Limited, who had approached the Commission seeking directions to the Respondents, for applicability of the provisions of PPAs for the purpose of calculation of penalties for maintaining Availability below 80% for a contract year.

(j) In view of the above, it is clear that the issues raised in those cases are identical to the issue between Petitioner and the Respondents herein. Further, clause 4.2.5

under Schedule 4 of the PPAs entered into by the Respondents with TRN Energy Pvt. Limited and MB Power (Madhya Pradesh) Limited respectively, are also identical to the provisions under the Petitioners' PPA dated 26.2.2014. The Commission in the above-mentioned orders had clearly held that the deduction of Penalty for shortfall in availability of the contracted capacity on a monthly standalone basis is in violation of the provisions of clause 4.2.5 of Schedule 4 of the PPA and clarified that the penalty for shortfall in availability of the contracted capacity shall be computed on an annual basis (financial year).

(k) The Petitioner has made several representations to the Respondents time and again to follow the correct methodology in computing the penalty for shortfall in availability of contracted capacity, as per terms of the PPA. Despite bringing the above to the notice of Respondents, the Respondents have continued to deduct penalty on standalone monthly basis.

(l) In fact, the Petitioner vide letter dated 10.7.2019 brought to the notice of the Respondents, the above stated orders passed by this Commission, where the specific issue arising in the present case has been dealt with by the Commission. However, the Respondents vide letter dated 20.8.2019 replied stating that the petitions filed by those generators were specific in nature and accordingly the relief had been granted to those generators in their specific petitions. The stand taken by the Respondents in this regard is completely misconceived. As stated hereinabove, both of these above generators, were selected in the same bidding process and under the same bidding documents including the PPA as the Petitioner. Therefore, there cannot be different application of the identical provisions of the PPA.

(m)It is submitted that when the issue between the parties is same and that issue has already been decided by the Commission in principle, the Respondents ought to have followed the same principle for the Petitioner as well and should have computed the penalty on an annual basis (financial year) as per the terms of the PPA.

(n) The Respondents have deducted an excessive amount of Rs. 18,40,87,911/- on the penalty for the financial years 2015-16, 2016-17, 2017-18 and 2018-19 towards shortfall in availability. A summary detailing the penalties deducted by the Respondents is attached herewith and marked as **Annexure-I**. While it is clear that the penalty for shortfall in Availability of the Contracted Capacity shall be computed on "annual basis" in terms of clause 4.2.5 of Schedule 4, it is submitted that the Respondents are liable to refund the amounts deducted from the monthly bills of the Petitioner.

(o) The Respondents are also liable to pay Late Payment Surcharge (LPS) on the deducted amount from the date of deduction till the date of payment at the rate envisaged in Articles 8.3.5 and Article 8.8.3 of the PPA. Article 8.3.5 deals with LPS in case of delay in payment of monthly bills by the Procurer beyond the due date. In the present case, the Respondents have unilaterally, deducted penalty of Rs. 18,40,87,911/- considering the 'availability on standalone monthly basis', instead of on 'annual basis', contrary to the provisions of the PPA. The Respondents are liable to pay the LPS on the deducted amount from the date of deduction, till the date of payment at the rate envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

(p) The Commission has the exclusive jurisdiction under Section 79(1) (b) read with Section 79(1)(f) of the Act, in regard to the issues relating to the Petitioner, as the Petitioner has PPAs for supply of electricity to more than one State. The Hon'ble Supreme Court, has, in the case of Energy Watchdog vs. Central Electricity Regulatory Commission & ors., (2017) 14 SCC 80 settled the position of jurisdiction of this Commission, where inter-state supply is concerned and is squarely applicable to the present case.

In this background, the Petitioner has sought the reliefs, as stated in paragraph 1 above.

Hearing dated 14.7.2020

4. The Commission, after hearing the learned counsel for the Petitioner and the Respondent UPPCL on 14.7.2020, 'admitted' the petition and directed the parties to complete their pleadings. In response, the Respondent UPPCL (on behalf of Respondents Nos. 2 to 5 herein) has filed its reply vide affidavit dated 5.8.2020.

Reply of the Respondent UPPCL

5. The Respondent UPPCL vide its reply affidavit has mainly submitted the following:

(a) The present petition filed under section 79(1)(b) and 79(1)(f) of the Act is not maintainable before this Commission, as the PPA dated 26.2.2014 (amended on 23.1.2018) has been approved by the UPERC, while exercising the regulatory power under section 86 of the Act and the parties to the disputes has already submitted to the jurisdiction of the State Commission under section 64(5) of the Act, which is the appropriate Commission for determination of the present dispute between the parties. The above position has already been upheld by the Hon'ble Supreme Court in Energy

Watchdog vs CERC & ors (2017 14 SCC 80). The parties cannot now submit to the jurisdiction of the Central Commission with respect to the disputes arising out of the PPA.

(b) The reliance of the Petitioner on section 79(1)(f) of the Act, in fling the present petition is completely misplaced as the provision expressly says that the provision can be invoked to adjudicate disputes involving the generating companies and transmission licensees and not between the generating companies and discoms. Since in the present case, the dispute is between generating company and the discom and that the PPA is approved by the State Commission, it will be the State Commission alone, who is having the jurisdiction to determine the present petition.

(c) The Petitioner has misconstrued the provision of clause 4.2.5 under Schedule 4 of the PPA by reading it, that the said article provides for penalty for shortfall in availability to be computed on yearly basis. The plain reading of clause 4.2.1 of the PPA would show unequivocally that penalty is to be reflected in each monthly bill of the contract year and it is not explicitly mentioned in the PPA as alleged by the Petitioner that penalty that has been deducted in the monthly basis is to be reconciled for actual availability at the end of the contract year.

(d) If the interpretation sought by the Petitioner is given then seller would not supply adequate power during the peak requirement of the procurers and may supply expensive power upto the contracted capacity during the period of lean requirement of power, thereby causing the procurers to buy expensive power during the peak period. Therefore, to avoid this ambiguity and to protect the interest of both parties, the only interpretation that can be given is that the penalty is enforced for each month, keeping in view the contracted capacity for the month and the actual scheduled availability in the month on standalone basis.

Accordingly, the Respondent has submitted that the reliefs prayed for by the Petitioner are devoid of merits and may therefore be dismissed.

Hearing dated 15.12.2022

6. During the hearing on 15.12.2022, the learned counsel for the Petitioner made detailed submissions in the matter. He also submitted that the issue raised in the petition is covered by the orders of this Commission dated 14.5.2019 and 18.1.2019 in Petition No.77/MP/2018 and Petition No. 224/MP/2018 respectively. He, accordingly prayed that the present petition may be disposed of in terms of the aforesaid orders. None appeared

on behalf of the Respondents. Accordingly, the Commission reserved its order in the matter.

Analysis and Decision

7. We have examined the matter. Based on the submissions of the parties, the following issues arise for consideration:

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

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

We now examine the issues as stated below

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

8. The jurisdiction of this Commission to regulate the tariff of the generating companies is derived from Sections 79(1)(a) and 79(1)(b) of the Act and that to adjudicate the dispute under Section 79(1)(f) of the Act. The said provisions are extracted as under:

"Section 79. (Functions of Central Commission): --- (1) The Central Commission shall discharge the following functions, namely:-

(a) to regulate the tariff of generating companies owned or controlled by the Central Government;
(b) to regulate the tariff of generating companies other than those owned or controlled by the Central Government specified in clause (a), if such generating companies enter into or otherwise have a composite scheme for generation and sale of electricity in more than one State;
xxxxxx
(f) to adjudicate upon disputes involving generating companies or transmission licensee in regard to matters connected with clauses (a) to (d) above and to refer any dispute for arbitration;"

9. Under Section 79(1)(b) of the Act, the Central Commission has the jurisdiction to regulate the tariff of generating companies other than those owned or controlled by the Central Government if those generating companies have composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court in

its judgment dated 11.4.2017 in Energy Watchdog case (2017) 14 SCC 80, has dealt with the issue of composite scheme under Section 79(1)(b) of the Act 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 subsections (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."*

10. In terms of the above decision of the Hon'ble Supreme Court, the moment generation and sale of electricity takes place in more than one State, this Commission is the appropriate Commission under the Act. In the present case, the generating station of the Respondent is located in the State of Chhattisgarh and besides the Respondent, it is also supplying the power to the distribution companies of the States of Tamil Nadu and Chhattisgarh. Thus, it has a composite scheme for generation and supply of power to more than one State. In the light of the decision of the Hon'ble Supreme Court in Energy Watchdog case, we are of the view that this Commission has the jurisdiction to regulate the tariff of the generating station of the Petitioner under Section 79(1)(b) of the Act and to adjudicate the disputes raised in respect thereof, under Section 79(1)(f) of the Act.

11. The Respondent UPERC has contended that since UPERC had adopted the tariff and approved the PPA under Section 64(5) of the Act, this Commission does not have

the jurisdiction to adjudicate the present dispute between the parties. It has also stated that in terms of the judgment of the Hon`ble Supreme Court in Energy Watchdog case, the present case is squarely covered under Section 64(5) of the Act. The Respondent have also argued that once the jurisdiction of UPERC has been invoked by the parties in accordance with the provisions of Section 64(5) of the Act, the parties to the PPA cannot now submit to the jurisdiction of the Central Commission.

12. We have considered the submissions of the parties. Section 64(5) of the 2003 Act provides as under:

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

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

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

14. The contention of the Respondent UPPCL that in terms of the findings of the Hon'ble Supreme Court in the Energy Watchdog judgment with regard Section 64(5) of the Act, the State Commission (UPERC) only has jurisdiction in the matter, in respect of the PPA dated 26.2.2014, had already been examined and rejected by this Commission in its order dated 22.6.2018 in Petition No. 171/MP/2016 as under:

"20. In our view, the findings of the Hon"ble Supreme Court on Section 64(5) do not in any manner support the argument of the Respondent that the State Commission (UPERC) will have jurisdiction in matters relating to inter-state supply of power. In the above quoted para, the Hon"ble Supreme Court has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. In the present case, the Petitioner has entered into PPAs for generation and supply of power to three States i.e State of AP, State of UP and State of Tamil Nadu. Accordingly, in respect of the UP discoms PPA dated 26.2.2014, the Respondent, UP discom has invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, Section 64(5) has no application in cases of tariff discovered under competitive bidding process and adopted by the Commission under Section 63 of the 2003 Act. In view of this, we find no merit in the submission of the Respondent, UP discoms and accordingly the same is rejected.

15. Also, similar contention raised by the AP discoms in respect of the PPA dated 31.7.2012 executed by the Petitioner, had been examined by this Commission in Petition No.61/MP/2021 (KSKMPCL v AP discoms) and the same was rejected by the Commission vide its order dated 1.5.2021. The relevant portion of the said order is extracted hereunder:

"16. With regard to Section 64(5) of the Act, the Hon'ble Supreme Court in its judgment dated 11.4.2017 in Energy Watchdog Case had observed the following:

Xxxx

In our view, the findings of the Hon'ble Supreme Court on Section 64(5) of the Act do not in any manner support the argument of the Respondents that the State Commission/APERC will have jurisdiction in matters relating to inter-State supply of power. Hon'ble Supreme Court in above paragraph has observed that the non-obstante clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) of the Act to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of two States. In respect of PPA dated 31.7.2012 and its subsequent amendment dated 19.12.2014, the Respondents, AP Discoms have invoked the jurisdiction of the State Commission/APERC for adoption of tariff under Section 63 of the Act and approval of the PPA under Section 86(1)(b) of the Act. The said Petitions can be construed as a joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Further, there is nothing on record to show that both the Petitioner and AP Discoms had approached the State Commission for

determination of tariff under Section 64(5) of the Act. In our view, the case of the Petitioner is not covered under Section 64(5) of the Act, since the generating station of the Petitioner is supplying power to more than one State and therefore, has a composite scheme for generation and supply of power under Section 79(1) (b) of the Act. Consequently, any dispute involving Section 79(1)(b) of the Act can only be adjudicated by the Central Commission under Section 79(1)(f) of the Act. In the light of the above discussion, we are of the view that even though the tariff discovered under the competitive bid process was adopted by the State Commission under Section 63 of the Act, Section 64(5) has no application in the present case since the generating station is having composite scheme of generation and supply of electricity in more than one State and in terms of judgment of the Hon'ble Supreme Court in Energy Watchdog Case, the jurisdiction for regulating the tariff of the generating station of the Petitioner and adjudication of disputes vest in the Central Commission. Accordingly, the submission of the Respondents, AP Discoms on this count is not sustainable."

16. Further, in Appeal No.230/2017 filed by the Petitioner, before APTEL, against the order of APERC dated 28.9.2016 (in OP No.46/2014) holding that it has the jurisdiction to adjudicate the disputes, notwithstanding the supply of power by the Petitioner to two or more States, the APTEL by its judgment dated 31.10.2018, upheld the jurisdiction of this Commission, as under:

"5.5……While analyzing Sections 79, 86 and 65, Their Lordship, while interpreting composite scheme opined that the State Commission has jurisdiction only where generation and supply takes place within the State (intra-State). But in a case where the generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. In the present case, the generation of electricity is in the State of Chhattisgarh and sale of electricity is not restricted to either State of Chattisgarh or State of Andhra Pradesh. The Appellant generating company supplies electricity to other States as well, i.e. Tamil Nadu, Uttar Pradesh and Telengana apart from Andhra Pradesh and Chhattisgarh."

17. The aforesaid decision of APTEL was challenged by the Respondents AP discoms, before the Hon'ble Supreme Court in Civil Appeal No. 11142 of 2018 and the Hon'ble Court on 3.12.2018, upheld the aforesaid judgment of APTEL dated 31.10.2018, as extracted hereunder:

"2) We are not inclined to interfere with the order passed by the Appellate Tribunal for Electricity, New Delhi.

3) Accordingly, the Civil appeal is dismissed.
4) However, we make it clear that we have considered only the case of K.S.K Mahanadi Power Company Ltd."

18. Thus, the jurisdiction of this Commission to adjudicate the disputes between the parties in respect of the generating station of the Petitioner, having been settled by the aforesaid decisions and having attained finality, the submissions of the Respondent UPPCL in the present case, that UPERC only has the jurisdiction to entertain the disputes relating to the generating station of the Petitioner, cannot be entertained and is accordingly rejected. Accordingly, the Petition is maintainable.

19. One more submission of the Respondent UPPCL is that Section 79(1)(f) of the Act can be invoked to adjudicate disputes involving generating companies and transmission licensees and not between generating companies and discoms. It has argued that in the present case, since the PPA has been approved by the State Commission and as the dispute is between the generating company and the discom, the State Commission alone has the jurisdiction to adjudicate the dispute.

20. The matter has been examined. Under Section 79 (1)(f) of the Act, this Commission has been conferred the power of adjudication of disputes, if such disputes;

(i) are 'involving' generating companies or the transmission licensees, and

(ii) are connected with clauses (a) to (d) of sub-section (1), that is, regulation of tariff of the generating companies of the kind mentioned in clauses (a) and (b) or regulation of inter-State transmission of electricity under clause (c) or determination of tariff for inter-State transmission of electricity under clause (d).

21. We have in paragraph 10 above held that the Commission has the jurisdiction to regulate the tariff of the generating station of the Petitioner under Section 79(1)(b) of the Act and to adjudicate the disputes raised in respect thereof, under Section 79(1)(f) of the Act. The contention of the Respondent that Section 79(1)(f) of the Act, applies only to the disputes involving generating company and transmission licensee and not between generating company and Discoms, and therefore, the petition is not maintainable, is not

acceptable. We notice that similar contentions raised by GRIDCO were examined by the Commission in Petition No. 163/MP/2012 (BPSL v GRIDCO & ors) and the Commission by order dated 9.5.2013 rejected the same as under:

> *'17. GRIDCO has argued to read the word 'involving' as 'between' and disjunctive word 'or' as conjunctive word 'and'. The question is whether it is permissible to substitute words in the process of construction. One of the fundamental principles of statutory interpretation is that a construction which requires addition or substitution of words or which results in rejection of words as meaningless has to be avoided. In Commissioner of Income Tax Vs Tata Agencies [(2007) 6 SCC 429] the Hon'ble Supreme Court held that;*
>
> > *"62. The intention of the legislature has to be gathered from the language used in the statute which means that* ***attention should be paid to what has been said as also to what has not been said****." (Emphasis supplied)*
>
> *18. xxxx*
>
> *19. In the case of Ramesh Mehta Vs Sanwal Chand [(2004) 5 SCC 409] it was held by the Hon'ble Supreme Court that in 'suitable' cases the court may add or omit or substitute words to make a statute workable. In the present case, we see no reason to hold that without substituting the word 'involving' with the word 'between' and word 'or' with word 'and', clause (f) of sub-section (1) of Section 79 becomes unworkable or leads to any uncertainty or absurdity. The plain dictionary meaning of word 'involve' is 'to envelop, to entangle, to include, to contain, imply' (Shorter Oxford Dictionary). Therefore, the expression 'disputes involving generating companies or transmission licensees' in clause (f) means the disputes which entangle or include the generating companies or transmission licensees. This interpretation is logical and stands to reason when seen in the light of the fact that the entities associated with clauses (a) to (d) of sub-section (1) of Section 79 are either the generating companies or the transmission licensees. Further, as per P Ramanatha Aiyar's Advanced Law Lexicon (Third Edition), the word 'involve' is also used, according to the context, as synonymous with word 'affected'. In the context of clauses (a) to (d) of sub-section (1) of Section 79, the word 'involving' can be said to have been used synonymously with the word 'affecting' because the regulatory functions discharged under these clauses directly relate to the generating companies and the transmission licensees. For this reason, the expression 'disputes involving generating companies and transmission licensees' may be read as 'disputes affecting generating companies or transmission licensees. There is absolutely no warrant to substitute the word 'involving' with the word 'between'. Such an interpretation shall be totally out of place and defeat the purpose and object of the power or function of adjudication conferred on this Commission. Therefore, the argument advanced on behalf of GRIDCO to substitute the word 'between' for the word 'involving' is rejected.*

22. Further, APTEL vide its judgment dated 4.9.2012 in Appeal No. 94 & 95/2012 held as under:

> *"32. Section 61 and 79 not only deal with the tariff but also deal with the terms and conditions of tariff. The terms and conditions necessarily include all terms related to tariff. Determination of tariff and its method of recovery will also depend on the terms and conditions of tariff. For example, interest on working capital which is a component of tariff will depend on the time allowed for billing and payment of bills. This will also have an impact*

on terms and conditions for rebate and late payment surcharge. Similarly, billing and payment of capacity charge will depend on the availability of the power station. Therefore, the scheduling has to be specified in the terms and conditions of tariff.

33. Accordingly, the billing, payment, consequences of early payment by way of grant of rebate, consequences of delay in payment by way of surcharge, termination or suspension of the supply, payment security mechanism such as opening of the Letter of Credit, escrow arrangement, etc., are nothing but terms and conditions of supply.

34. Section 79(1)(f) of the Electricity Act, 2003 provides for the adjudication of disputes involving a generating company or a transmission licensee in matters connected with clauses (a) to (d) of Section 79. Thus, anything involving a generating station covered under clauses (a) and (b) as to the generation and supply of electricity will be a matter governed by Section 79 (1) (f) of the Act."

23. In line with the above decisions, we hold that the Petition is 'maintainable' and the Commission has the jurisdiction to adjudicate the dispute in terms of Section 79(1)(f) read with Section 79(1)(b) of the 2003 Act.

Issue No. (A) is disposed of accordingly.

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

24. The Petitioner has submitted that in terms Clause 4.2.1 under Schedule 4 of the PPA, monthly bill shall include penalty determined in accordance with clause 4.2.5 of Schedule 4 and shall be applicable on cumulative basis and included in the monthly bill. Clause 4.2.5.1 of Schedule 4 of the PPA provides that in case the "*availability for a contract year*" is less than 80%, a penalty of 20% of the simple average Capacity Charge for all months in the Contract year applied on the energy corresponding to the difference between 80% and actual availability during contract year will be imposed. It has also submitted that though, Article 4.2.5 under Schedule 4 of the PPA provides for the penalty for short-fall in availability to be computed on a yearly basis, the Respondents have been unilaterally calculating the penalty for each month, keeping in view the contracted capacity for the month and the actual scheduled availability in the month on standalone basis. In other words, the Respondents have levied penalties for low availability on a monthly basis

instead of annual basis. Accordingly, the Respondents have deducted penalty amounts from the bills raised by the Petitioner on a monthly basis. The Petitioner has pointed out that in terms of Schedule 4 under the PPA, it is required to supply minimum of 80% during the year, to avoid the penalty, in terms of the Article 4.2.5 of Schedule 4 of the PPA. Even if there is short-fall of supply for certain months during the year, the Petitioner always has the right to make up the short-fall in the subsequent months to reach the level of 80% on an annual basis. While stating that the expression used in Clause 4.2.5.1 of Schedule 4 is "*Contract Year"*, which is for the full financial year from 1st April to 31st March of the next year as defined under Article 1.1., the Petitioner has submitted that the penalty under Clause 4.2.5.1 of Schedule 4 for short-fall in availability is as against the incentive to over-achieving the availability in terms of Clause 4.2.4.1 of Schedule 4. Both these provisions are mirror provisions, for over-achieving or under-achieving availability during a Contract Year. The Petitioner has further stated that if for a particular month or few months, the Petitioner achieves availability less than 80%, but is able to make up in the balance months of the Contract Year to achieve 80% for the full Contract Year, no penalty is payable. Accordingly, the Petitioner has submitted that the action of the Respondents in deducting penalty amounts on a monthly basis, is clearly contrary to the provisions of the PPA, which only provide for penalty in case of shortfall in availability on an 'annual basis'. In other words, there is no right to the Respondents under the PPA to compute availability and/or deduct penalty on standalone monthly basis. The Petitioner has contended that the terms of the PPA dated 26.2.2014 are unambiguous and clear and therefore, the deduction of the amount of Rs. 18,40,87,911/- on the penalty for the financial years 2015-16, 2016-17, 2017-18 and 2018-2019 towards shortfall in availability, is misconceived and contrary to the provisions of the PPA. The Petitioner has also stated that the issue has already been adjudicated by the Commission in the case of two other generators namely,

TRN Energy Private Limited and MB Power (Madhya Pradesh) Limited, who had approached the Commission seeking directions to the Respondents, for applicability of the provisions of PPAs for the purpose of calculation of penalties for maintaining Availability below 80% for a contract year. The Petitioner has also stated that the Respondents are liable to pay the late payment surcharge on the deducted amount, from the date of deduction till the date of payment, at the rate envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

25. *Per contra*, the Respondent UPPCL has contended that the Petitioner has misconstrued the provision of clause 4.2.5 under Schedule 4 of the PPA by reading it, that the said article provides for penalty for shortfall in availability to be computed on yearly basis. It has also submitted that the plain reading of clause 4.2.1 of the PPA would show unequivocally that penalty is to be reflected in each monthly bill of the contract year and it is not explicitly mentioned in the PPA as alleged by the Petitioner that penalty that has been deducted in the monthly basis is to be reconciled for actual availability at the end of the contract year.

26. The matter has been examined. Clause 4.2 of Schedule 4 of the PPA dated 26.2.2014 provides as under:

"***4.2 Monthly Tariff Payment***

4.2.1 Components or monthly tariff payment
The monthly bill for any month in a contract year shall consist of the following:
(i) Monthly capacity charge payment in accordance with clause 4.2.2 of schedule 4;
(ii)(Monthly energy charge for scheduled energy in accordance with clause 4.2.3 of schedule 4;
(iii) Incentive determined in accordance with clause 4.2.4 of schedule 4 (applicable on a cumulative basis and included in each monthly bill);
(iv) Penalty determined in accordance with clause 4.2.5 of schedule 4 (applicable on a cumulative basis and included in each monthly bill)
xxxx

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

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

27. The term 'Contract Year' has been defined in the PPA dated 26.2.2014 as under:

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

Provided that:

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

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

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

28. As per clause 4.2.1 (iv) of Schedule 4 of the PPA, monthly bill shall include penalty determined in accordance with clause 4.2.5 of Schedule 4 and shall be applicable on cumulative basis and included in the monthly bill. Clause 4.2.5.1 of Schedule 4 of the PPA dated 26.2.2014 provides that in case the availability for a contract year is less than 80%, a penalty of 20% of the simple average Capacity Charge for all months in the Contract year applied on the energy corresponding to the difference between 80% and actual availability during contract year will be imposed. In terms of the definition of the 'Contract Year', the first contract year is from October, 2015 to 31.3.2016 and the subsequent contract year commences from 1st April and ends on 31st March, of the subsequent year. It is clear from the provision of clause 4.2.5.1 of Schedule 4 that the penalty shall be calculated on the basis of the availability for the entire contract year and not on the basis of availability during any particular month or 'standalone basis'.

It is evident from the above that the Respondent UPPCL has decided to calculate penalty for each month, keeping in view the contracted capacity for the month and the actual scheduled availability in the month on standalone basis. In other words, UPPCL has decided to adopt non-cumulative yearly treatment of availability. As a corollary to the above decision, UPPCL has dispensed with the reconciliation of the monthly penalty deducted at the end of the contract year. The above decision is contrary to the existing provisions of the PPA dated 26.2.2014. Clause 4.2.5.1 of Schedule 4 of the PPA dated 26.2.2014 provides for computation of Availability of the Contracted Capacity on an 'annual basis' and penalty, if any, was required to be imposed, only if the annual availability falls below 80%. In other words, the PPA dated 26.2.2014 does not provide for the computation of Availability and/or deduction of penalty on standalone monthly basis. The terms of the PPA dated 26.2.2014 are unambiguous and clear and the Respondent, UPPCL is bound by the express provisions of the said PPA. The Respondent cannot introduce changes in the PPA unilaterally which have the impact of altering the clauses of the PPA. Hence, in terms of the provisions of the PPA penalty cannot be imposed by Respondent, UPPCL by calculation of availability on 'standalone monthly basis'. In our considered view, the methodology adopted by the Respondent, UPPCL for deduction of penalty for the financial years 2015-16, 2016-17, 2017-18 and 2018-19 by computation of availability of Contracted Capacity on 'standalone monthly basis', amounts to unilateral amendment of the provisions of the PPA and is contrary to Clause 4.2.5 of Schedule 4 of the said PPA. We, therefore, hold that the Petitioner is entitled to refund of the excess penalty amount deducted by the Respondent, UPPCL by considering the Availability on monthly basis. We also hold that the penalty applicable for shortfall in Availability of Contracted Capacity shall be computed by Respondent UPPCL, on 'annual basis' in terms of Clause 4.2.5 of Schedule 4 of the PPA dated 26.2.2014. We,

also direct that the refund of the excess penalty amount by the Respondent UPPCL to the Petitioner, in terms of our decision above, shall be based on documentary proof that the Petitioner's generating station has maintained availability of more than 80% (calculated on a cumulative basis) for the contract year ending 31st March 2019.

29. In terms of Clause 8.7.1 of the PPA dated 26.2.2014, all reconciliations including computation of availability /deduction of penalty, if any, shall be done on quarterly basis at the beginning of the following quarter of each contract year and annual reconciliation at the end of each contract year. We have, in this order, held that the penalty applicable for shortfall in availability of the contracted capacity shall be computed by the Respondent UPPCL on 'annual basis' in terms of the PPA dated 26.2.2014. Accordingly, the annual reconciliation shall be undertaken by the Respondent, UPPCL taking into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. in terms of the provisions of the said PPA dated 26.2.2014.

Issue No. (B) is disposed of as above

Late Payment Surcharge

30. The Petitioner, in the Petition, has prayed that the penalty amounts deducted by Respondent, UPPCL ought to be refunded to the Petitioner along with late payment surcharge.

31. The matter has been considered. As held above, the amounts deducted by Respondent, UPPCL is contrary to the provisions of the PPA dated 26.2.2014 which was otherwise payable on the due date, at the end of the relevant month. Article 8.3.5 of the PPA provides as under:

> *"8.3.5 In the event of delay in payment of monthly bills by any procures beyond its due date, a late payment surcharge shall be payable by such procures to the seller at the rate*

of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill."

xxxxx

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

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

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

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

Summary

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

(a) The penalty for shortfall in Availability of the Contracted Capacity shall be computed by Respondent, UPPCL on "annual basis" in terms of clause 4.2.5 of Schedule 4 of the PPA dated 26.2.2014.

(b) Annual reconciliation to take into account REA, tariff adjustment payments, tariff rebate, late payment surcharge etc. shall be undertaken by the Respondent in terms of the provisions of the said PPA dated 26.2.2014.

(c) Any penalty amount deducted by the Respondent, UPPCL in violation of clause 4.2.5 of Schedule 4 of the PPA shall be refunded to Petitioner, along with late payment surcharge from the date of deduction till the date of payment at the rate as envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

35. Petition No. 177/MP/2020 is disposed of in terms of the above.

Sd/-	***Sd/-***	***Sd/-***
(Pravas Kumar Singh)	**(Arun Goyal)**	**(I. S. Jha)**
Member	**Member**	**Member**