



Petition No. 1355 of 2018

BEFORE

THE UTTAR PRADESH ELECTRICITY REGULATORY COMMISSION

LUCKNOW

Date of Order: 26-10-2020

PRESENT:

Hon'ble Shri Raj Pratap Singh, Chairman

Hon'ble Shri Kaushal Kishore Sharma, Member

Hon'ble Shri Vinod Kumar Srivastava, Member (Law)

IN THE MATTER OF: Petition under Section 86 (1) (f) of the Electricity Act 2003 to direct the Respondent to pay the outstanding amount of Rs 267.77 Crores payable as per the terms of the PPA dated 15.03.2016

R.K.M Powergen Private Limited

2nd& 3rd Floor, 14, Dr. Giriappa Road, T-Nagar,
Chennai- 600 017

...Petitioner

Versus

1. U.P. Power Corporation Limited,

Through its Chairman,
Shakti Bhawan Extension,
14- Ashok Marg, Lucknow- 226 001.

2. Chief Engineer (Planning)

U.P. Power Corporation Limited
3rd Floor, Shakti Bhawan Extension,
14- Ashok Marg, Lucknow- 226 001.

3. Superintending Engineer

U.P. Power Corporation Limited
Electricity Import Export and Payment Circle,
U.P. Power Corporation Ltd., 11th Floor, Shakti Bhawan,
14 Ashok Marg, Lucknow-226 001

4. Paschimanchal Vidyut Vitran Nigam Ltd,

Represented by its Managing Director,
Urja Bhawan, Victoria Park
MD Camp Office, Meerut - 250001, UP



5. Purvanchal Vidyut Vitran Nigam Ltd,
Represented by its Managing Director,
DLW Bhikharipur, Varanasi – 221004, UP

6. Madhyanchal Vidyut Vitran Nigam Ltd,
Represented by its Managing Director,
4A, Gokhaley Marg, Lucknow, UP

7. Dakshinanchal Vidyut Vitran Nigam Ltd,
Represented by its Managing Director,
Urja Bhawan, NH 2, Sikandra, Agra – 282002, UP.

..Respondents

The following were present:

1. Shri Buddy A. Ranganathan, Advocate, RKM
2. Shri Gaurav Ray, Advocate, RKM
3. Shri Sitiesh Mukherjee, Advocate, UPPCL
11. Shri Abhishek Kumar, Advocate, UPPCL

ORDER

(Date of Hearing 17.07.2020)

1. The Petitioner R.K.M Powergen Pvt Ltd (RKMPPL) entered in to PPA with Respondent No. 1, UP Power Corporation Ltd., holding company for the State Distribution Licensees of UP, authorized to enter into PPA's for and on behalf of the State DISCOMs. The present Petition has been filed to enforce the Petitioner's rights under the Power Purchase Agreement (PPA) dated 15.03.2016 with regard to payment of capacity charges, reimbursement of transmission charges, payment towards late payment surcharge, reimbursement of penalty illegally deducted for short supply of power.
2. The details of claim made by the Petitioner are as follows:



S. No	Description of Claims	Amount claimed (Rs /Crs)
1.	Capacity Charges	157.85
2	Transmission Charges	31.89
3	Late payment Surcharges	25.62
4	Penalty for Short Supply (Illegally deducted)	52.41
Total Claim of the Petitioner		267.77

3. The Petitioner has prayed as follows:

- i. Payment of capacity charges for delay in providing consent for start of supply under LTOA and MTOA for a total sum of Rs. 157.85 Crs.
- ii. To make reimbursement of transmission charges for the period from operationalization to the date of supply of power for a total sum of Rs. 31.89 Crs.
- iii. Recovery of late payment surcharge of Rs. 25.62 Crs.
- iv. To make reimbursement of penalty illegally deducted for short supply of power not attributable to Petitioner for a total sum of Rs. 52.41 Cr.

BRIEF FACTS

4. The Petitioner has submitted that
 - a. It had participated in the competitive bidding process for Procurement of 6000 MW base load power on a long-term basis against Request for Proposal document dated 27.07.2012 issued by 2nd Respondent on Case-1 basis. Thereafter, the 2nd Respondent, by way of a communication dated 22.05.2013 issued a Letter of Intent



to the Petitioner, and declared the Petitioner as a Successful Bidder in terms of Clause 3.5 of the Final Request for Proposal. The Letter of Intent was accepted by the Petitioner by way of a letter dated 23.05.2013.

- b. The Petitioner by letter dated 14.12.2015, brought to the 1st Respondent's notice that its first unit of 360 MW, achieved Commercial Operation with effect from 27.11.2015 and therefore requested the Respondent for an early date for signing the PPA in respect of 350 MW supply to the Respondent in terms of the LoI. The Power Purchase Agreement, dated 15.03.2016 was entered into between Four DISCOMs of the Respondent viz. Paschimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited, Madhyanchal Vidyut Vitran Nigam Limited and Dakshinanchal Vidyut Vitran Nigam Limited and the Petitioner for supply of 350MW Power for a period of 25 Years with scheduled delivery date of 30.10.2016.
- c. It issued an alleged advance preliminary written notice dated 15.03.2016 to 1st Respondent confirming its intent and readiness to supply power earlier than the Scheduled Delivery Date which was 30.10.2016 as set out under the clause 4.1.2 of PPA.
- d. The conditions subsequent to be fulfilled by the Seller have been provided for under Article 3.1.1 of the PPA. The relevant extract is set out below:

"3.1.1 (c) The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurers."



Accordingly, the 2nd Respondent, for further examining the Petitioner's request, issued a letter to the Petitioner dated 04.04.2016 requesting for copies of the necessary permission for Long Term Open Access as stipulated under Article 3.1.1 (c).

- e. Petitioner vide letter dated 05.04.2016 informed the Petitioner that it has been granted Long Term Open Access to Northern Region by Powergrid and enclosed a copy of the BPTA dated 24.02.2010 and Transmission Services Agreement dated 06.08.2012. As per the BPTA, Long Term Open Access to Northern Region was for 200 MW only, therefore, the Petitioner was constrained to issue another letter dated 18.04.2016 to the 1st Respondent requesting for issuance of NOC from SLDC for Medium Term Open Access application for the balance supply of 150 MW power.
- f. Subsequently, the Petitioner vide letter dated 26.11.2016 intimated to the 2nd Respondent that LTOA was operationalised on 18.11.2016 permitting supply to DISCOMS of UPPCL from 30.11.2016 and declared its readiness to supply power. However, the Petitioner only received consent from the 2nd Respondent for supply of 200MW power on 31.03.2017 and started to supply power from 02.04.2017 onwards. Thereafter, Petitioner vide letter dated 28.03.2017, indicated to the 2nd Respondent that Power Grid Corporation of India Limited (PGCIL) operationalised the balance 150 MW on 27.03.2017 through MTOA permitting the transfer of power from the Petitioner to the Respondent. The consent for commencement of supply of 150 MW power was granted by the Respondent on 15.05.2017 for scheduling of power with immediate effect. Thus the Petitioner commenced supply of 200 MW power to the Respondent on 02.04.2017 and additional 150 MW power on 17.05.2017.



5. CLAIMS OF THE PETITIONER

I. CAPACITY CHARGES:

- 5.1 There was a delay of 4 months in commencing supply of 200 MW of power, from 30.11.2016 to 31.03.2017. Additionally, for 150 MW, there was a delay of one and a half months, from 27.03.2017 to 15.05.2017. Such delay is solely attributable to the Respondent herein under the terms of the PPA.

As per Clause 4.9.1(a) of the PPA,

"In case of delay to commence supply of Power on account of Procurer event of default the Procurer shall make payment to the Seller of Capacity charges in proportion to their Contracted capacity calculated on Normative availability of Contracted capacity for and during the period of such delay"

- 5.2 The Petitioner raised following bills for capacity charges as given below:

(i) Rs. 125.03 Crs for delay in providing consent for supply of 200 MW of power for the period from 30.11.2016 to 02.04.2017

(ii) Rs. 32.82 Crs for delay in providing consent for supply of balance of 150 MW of power for the period from 28.03.2017 to 15.05.2017

Therefore, the total amount of capacity charges claimed by the Petitioner herein is Rs. 157.85 Crores.

II. TRANSMISSION CHARGES

- 5.3 The Petitioner had paid the demand amounts towards transmission charges to PGCIL from November 2016. However, payments in that regard have not been reimbursed to the Petitioner. The non-payment of transmission charges is clearly contrary to the specific terms of the PPA and the procurement obligations set out in Article 4.3.1 of the PPA. The relevant terms are extracted below:

" 4.3 Procurer's Obligations



4.3.1 Subject to the terms and conditions of this Agreement, the Procurers shall:

...

b) Be responsible for payment of Transmission Charges (from the Injection Point onwards) and the applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurers. The Procurers shall reimburse any of the above charges, if paid by the Seller."

- 5.4 Petitioner has raised bills for reimbursement of transmission charges for an amount of Rs. 31.3 Crs and Rs. 66.3 lakhs for the late payment surcharge on account of transmission charges. Total amount of transmission charges claimed by the Petitioner herein is Rs. 31.90 Crores

III. LATE PAYMENT SURCHARGES-RELEASE OF FULL PAYMENT AGAINST MONTHLY SUPPLY BILLS

- 5.5 The Respondent is stated to have defaulted towards payment against monthly power supply bills as per clause 8.1.1 of PPA, under Article 'Billing and Payment'. The relevant portion of clause 8.1.1 of PPA is stated as follows:

" From the commencement of supply of power, Procurers shall pay the seller the monthly tariff payment on or before the Due Date, comprising of tariff, for every contract year determined in accordance with this Article 8 and Schedule 4.

" Due date shall mean the thirtieth day (30) day after a Monthly Bill or a supplementary bill is received and duly acknowledged by the Procurers."

- 5.6 The payment for supply bills raised for the month of Oct 2017, Nov 2017, Dec 2017 and Jan 2018 amounting to Rs 155.03 Crores was released in instalments that too only from 19.02.2018 to 16.03.2018 only after the issuance of Dispute Notice under clause 14.2.1.1 of PPA by the Petitioner.



5.7 Under this head the Petitioner's claim is as follows:

- (i) Late Payment Surcharge for an amount of Rs.10.11Crores for the period April'17 to Sept'17.
- (ii) Late Payment surcharge of Rs 15.51 Crores payable for delayed release of payment for supply bills raised for the month of Oct 2017, Nov 2017, Dec 2017 ,Jan 2018 and Feb 2018.

The total claim of the Petitioner under this head is Rs 25.62 Crores.

The Relevant clause 8.3.5 of the PPA has been extracted herein:

"In the event of delay in payment of a monthly bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of 2% in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on day to day basis for each day of delay."

5.8 PENALTY FOR SHORT SUPPLY

The Respondent had erroneously deducted penalty on a cumulative basis for the months of May 2017 to November 2017. It was only after repeated correspondences sent by the Petitioner to the Respondent, that the Respondent has reversed the excess penalty deducted. The penalty for below 80% supply as deducted from monthly bills from April 2017 to May 2018 is Rs. 126.65 Crs, out of which 74.24 Crs has been reversed and the balance Penalty of Rs. 52.41 Crs is stated to be payable by the Respondent No.1.

- (i) The Petitioner has submitted that even when the Petitioner declared availability of less than 80%, the Respondent Discoms never drew even the declared availability. Hence, even if the Petitioner had declared full availability, it would not have made any difference at all since the SLDC had always scheduled even less than the capacity declared as per



following table:-

RKMPPL Power supply details to UPPCL with details of Thermal backing by UP SLDC 2017-18

SI No	Month	Contracted capacity kWh	Energy declared by RKM kWh	Energy Concurred By UP kWh	Back down by UP SLDC kWh	% Availability	Cummulative % Availability
1	Apr-17	139200000		124321250	922500	89.97	89.97
2	May-17	202800000		134495000		66.32	78.15
3	Jun-17	252000000	125243750	121446250	405000	48.35	63.25
4	Jul-17	260400000	63553750	61785000	1768750	24.41	43.83
5	Aug-17	260400000	93375000	93375000		35.86	39.84
6	Sep-17	252000000	171527500	167171250	4356250	68.07	53.95
7	Oct-17	260400000	121377500	121302500	75000	46.61	50.28
8	Nov-17	252000000	159780000	158552500	1227500	63.40	56.84
9	Dec-17	260400000	72062500	70673800	1388700	27.67	42.26
10	Jan-18	260400000	70097500	67585000	2512500	26.92	34.59
11	Feb-18	235200000	43723750	42400000	1323750	18.59	26.59
12	Mar-18	260400000	80065000	78778750	1286250	30.75	28.67

- (ii) The penalty under the PPA is nothing but liquidated damages for short supply of power. Hence, liquidated damages or penalty cannot be imposed unless the Respondents prove actual loss.
- (iii) The PPA does not permit the Respondents to suo-moto deduct penalties from the running bills of the Petitioner for penalties under the PPA in terms of Clause 8.3.3 of the PPA contemplating that apart from any deduction mandated by law, a deduction for amounts owing to the Respondents could be deducted from the energy bills of the Petitioner only when the Respondent raises an invoice for such outstanding amount and such invoice is not disputed by the Petitioner.
- (iv) No penalty can be levied against short supply of power when payment obligations are not honored in time. APTEL in **Appeal No.181 of 2013 on 11.7.2014**, has categorically held that where a licensee that is



procuring electricity does not pay the generator on time, it is in breach of a reciprocal promise. Petitioner has placed a Table showing the short payment (after accounting o&m and transmission charges) for every month vis-à-vis the cash shortfall in the following period which prevented the company from purchasing coal has been placed. Therefore, **the deduction of Rs. 52.41 Crores as penalty against short supply of power must be reversed**

6. The Petitioner invoked Article 14 of the Power Purchase Agreement (PPA) as below:

"14.2. Amicable Settlement and Dispute Resolution

14.2.1.1 Either party is entitled to raise any claim, dispute or difference of whatsoever nature arising under, out of or in connection with this Agreement ("Dispute") by giving a written notice (Dispute Notice) to the other party, which shall contain:

- (i) a description of Dispute;*
- (ii) the grounds for such Dispute;*
- (iii) all written material in support of its claim.*

14.2.1.3 Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 14.2.1.1 if the other Party does not furnish any counter claim or defense under Article 14.2.1.2 or 30 days from the date of furnishing counter claims or defense by the other Party, Both the Parties to the Dispute shall meet to settle such Dispute amicably, If the parties fail to resolve the Dispute amicably within thirty days (30) days from latter of the dates mentioned in this Article 14.2.1.3, the Dispute shall be referred for dispute resolution in accordance with Article 14.3."

7. In order and in accordance of Clause 14.2.1.1 of the Power Purchase Agreement (PPA), the petitioner caused Registered notice with acknowledgement due dated 20.02.2018 to the 2nd Respondent detailing the aforesaid claims and sought for Amicable Settlement, the said notice was delivered on 27.02.2018. The petitioner received acknowledgement copy on 3.03.2018. The 2nd Respondent neither disputed nor furnished any defenses whatsoever over the Claims of the



Petitioner even after expiry of 30 days of receipt of Dispute Notice and had not conveyed meeting to settle as per 14.2.1.3. of Power Purchase Agreement (PPA), and as such the petitioner is referring the Claims to be adjudicated by this Commission and has filed the present petition.

Proceedings in the matter:

8. The hearing in the matter was held on 11.12.2018 and Commission directed UPPCL to file its counter affidavit vide its order dated 13.12.2018. UPPCL filed its reply on 09.01.2019. The next hearing in the matter was held on 11.01.2019, wherein Commission vide its order dated 22.02.2019, upon request of UPPCL, further allowed time to file its counter affidavit and directed Petitioner to file its rejoinder. Next hearing in matter was held on 26.02.2019, which was adjourned on request of Petitioner. Next hearing was held on 26.03.2019, which was again adjourned on request of the Petitioner. Petitioner filed rejoinder dated 25.03.2019. During next hearing on 30.04.2019, Petitioner's Counsel argued and 28.05.2019 was fixed for Respondent's argument. UPPCL filed its reply on 28.05.2019 and requested for another date for arguments. Petitioner submitted its reply dated 08.07.2019 to the counter of UPPCL dated 28.05.2019. The next hearing was held on 11.07.2019, wherein Counsel of both parties pleaded their respective arguments. Commission vide its order dated 18.07.2019 directed Petitioner to file information/documents in the matter. The next hearing was held on 25.02.2020 However, due to change of Respondent's legal Counsel, earlier written submissions could not be served upon the Respondent. Therefore, Commission directed to exchange submissions by the respective parties for response and fixed 25.03.2020 as the next date of hearing. However, due to Covid-19 pandemic next hearing fixed for 12.05.2020 and 03.06.2020, was held on 30.06.2020 and the final hearing in the matter was held on 17.07.2020.

UPPCL reply dated 09012019



9. The Respondent in its reply dated 9th Jan'19 has raised following points:

- (a) The effective date of PPA is 15.03.2016, however, in view of Commission's order dated 01.02.2017 and 06.03.2017, the adopted tariff and the approved PPA came into effect from 6.3.2017. Petitioner did not even for once, raised this issue with UPPCL/UPERC while its tariff adoption was pending approval before the Commission.
- (b) The scheduled delivery date will have to be revised in terms of Article 4.1 of the PPA.
- (c) UPPCL's payments have always been based on the availability of funds and for no deliberate or misconceived reasons, it has ever held back any dues of RKM.

RKM Rejoinder dated 09.01.2019 to UPPCL reply dated 09.01.2019

10. The Petitioner in its Rejoinder dated 25.03.2019 has argued the following:

- (a) There was no stay on the Commission's tariff adoption order dated 1.2.2017 and responsibility of obtaining a tariff adoption order from this Commission squarely rests on the Respondents and it cannot now claim any delay in obtaining such tariff order as an excuse to avoid its contractual obligations to pay capacity charges.
- (b) Respondent had challenged the Commission's order dated 01.02.2017 which was rejected vide order dated 06.03.2017. Respondent's contention that the PPA came into effect only on 6.3.2017 is completely contrary to the express clauses of the PPA. The Respondents' contention therefore that the Scheduled Delivery Date of the PPA holds no sanctity and has been extended till 6.3.2017 is clearly misplaced.



-
- (c) The Petitioner's claim in the present petition for capacity charges for 200 MW is from 30.11.2016 and 150 MW from April 2017 and is based on the actual losses suffered as a result of the Respondent's refusal to draw power from the date of operationalisation of its open access.
- (d) Petitioner has only two obligations in relation to transmission- to obtain open access and to evacuate power from its power station bus bar up to the Injection Point, which it was ready and able to do. Any issues with the transmission of power beyond the Injection Point, however, is entirely at the risk of the Respondent and does not affect the payment of capacity charges.
- (e) The claim for late payment surcharge is a contractual claim on the basis of a commercial contract approved by this Commission.
- (e) The penalties being imposed by the Respondents are clearly not in accordance with the PPA. In fact, the payments released by the Respondent were in instalments which made it difficult for the Petitioner to make timely payments for the supply of coal, transmission charges and its cost of operations.

11. UPPCL additional submission dated 28.05.2019

UPPCL vide its additional submission dated 28.05.2019 has stated the following:

Claim of capacity charges:

Respondent vide its submission dated 28.05.2019 has submitted that

- (a) The premise of its entire claim of capacity charge is in terms of Article 4.9.1 (a) of the PPA which stipulates that in case of delay on account of the procurer event of default, the procurers shall



make payment to the seller of capacity charges in proportion to their contracted capacity for and during the period of such delay.

- (b) The actual reason preventing the petitioner to commence supply of power from the SDD to the respondents was absence of necessary open access permission from PGCIL, the responsibility of which corresponding to the aggregate contracted capacity of 350 MW was that of the petitioner.
- (c) The power purchase contracts are transactions based on reciprocal promises and if a transaction based on reciprocal promises, once the first part of the transaction has not been performed by a party, the question of other party performing any obligation under the contract does not arise.

Claim of transmission charges:

- (d) The petitioner has claimed transmission charges paid by it for the period between November, 2016 to May, 2017. The obligation for payment of transmission charges is dependent on actual supply of power as definition of the transmission charges under the PPA read as follows-

"shall mean the charges to be paid by the seller and reimburse by the procurers as transmission tariff for uses of intervening CTU networks for transmission of power from injection point to the delivery point as approved by the appropriate Commission"

Claim for late payment surcharge

- (e) As the claim towards the capacity and transmission charges is not admitted by the Respondents, accordingly their arises no question for payment of late payment surcharge on the said claims.



Penalty for short supply

- (f) In terms of the clause 4.2.5 of schedule-4 of the PPA, the respondent is entitled to deduct penalty if the petitioner's availability in Contract years falls below 80% and is not dependent upon percentage of power being off taken or scheduled by the respondents.

12.RKM reply dated 08.07.2019

RKM vide its reply dated 8.7.2019 to additional submission of UPPCL dated 28.05.2019 has stated the following:

CLAIM FOR CAPACITY CHARGES

The Petitioner has replied the following vide its reply dated 08.07.2019:

- (a) The Petitioner (Seller) was ready with its Plant and had been granted the Long Term Open Access (LTOA) from PGCIL under the BPTA much prior to the Scheduled Delivery Date. As already mentioned in the Petition, PGCIL operationalised the LTOA for 200 MW with effect from 30.11.2016 and for 150 MW from 27.03.2017. However UPPCL was not ready to receive power by either of those dates. Article 11.2.1(i) and Article 4.3.1 (f) state as under:

"11.2.1 The occurrence and the continuation of any of the following events, unless any such event occurs as a result of Force Majeure Event or a breach by the seller of its obligations under this Agreement or a Seller Event of Default, shall constitute the Event of Default on the part of defaulting Procurer:

- (i) *A defaulting Procurer fails to meet any of its obligations as specified in Article 4.3."*

AND

"4.3 .1 Subject to the terms and conditions of this Agreement, the Procurers Shall:



(a) *Ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be*

.....

(f) *fulfil all obligations undertaken by the Procurers under this Agreement."*

- (b) Under Clause 4.3.1(a), it is the Procurer who was liable to arrange for the Interconnection Facilities on the Procurer's side of the Delivery Point which it had admittedly failed to do. Adherence to the Scheduled Delivery Date being a paramount obligation undertaken by the Respondents (Procurers) while entering in the Power Purchase Agreement, the breach of the same is clearly a Procurers Event of Default, entitling the Petitioner to claim Capacity Charges in terms of Article 11.2.1.
- (c) Reason for delay in commencement in supply of power was not absence of necessary open access permissions from the CTU. The Petitioner had entered into necessary Power Transmission Arrangement with the CTU (PGCIL) well in advance, in fact as far back as in 2012, however it was the Respondents who were not in a position to receive supply of power from the Scheduled Delivery Date or a date prior to that, as requested by Petitioner repeatedly. Despite the ambiguity created by the Respondents, the LTOA got operationalized on 30.11.2016, however, Respondents were ready to offtake the power only on 31.03.2017. Respondent No. 1 can therefore not claim the operationalization of LTOA beyond the Scheduled Delivery Date as a reason for its default. Moreover, the said contention pertaining to the date of operationalization of the LTOA is a mere afterthought, raised for the first time by Respondent No. 1 in its Additional Submissions.





- (d) It was mandatory for the Respondents to adhere to the Scheduled Delivery Date and allow Petitioner to commence supply from the said date, i.e. 30.10.2016. The Respondents breached this obligation and did not give a mandate to the Petitioner to commence supply despite Notice of Supply being sent by the Petitioner in this regard as early as 15.03.2016. Since the Petitioner had already planned the commencement of its operations in accordance with the date of 30.10.2016, it could not prevent the operationalization of LToA beyond 30.11.2016 as the BPTA in regards the same was signed with PGCIL much earlier.
- (e) The Tariff Adoption Order would not have created a new date of commencement of Contract. Once the Tariff was adopted, there was no change brought about in the Scheduled Date of Commencement rather once the Tariff was adopted under Section 63 of the Electricity Act, 2003, that Order related back to the same Scheduled Delivery Date as provided in the original PPA.

CLAIM FOR TRANSMISSION CHARGES

- (f) Once the CTU has operationalised and the capacity is blocked by the CTU for the use of transmission of power to the Respondents, the CTU network is said to be in use and the Respondents are liable to pay the said Transmission Charges.
- (g) It is denied that the PPA was a contingent Contract, performance of which was contingent on approval of tariff by this Hon'ble Commission. The PPA was a concluded contract with mutual corresponding obligations. The Tariff Adoption by this Commission was required for adopting the tariff only. The same did not create any bar or impediment or in any manner modify



the clauses of the Contract, including the Scheduled Delivery Date. If the Tariff Adoption from this Commission was a sine qua non for performance of the Contract, the date could not have remained the same. The tariff approval order though passed subsequently would therefore relate back to the Scheduled Delivery Date under the PPA. It is therefore incorrect for the Respondent No. 1 to state that the performance under the PPA was suspended until the tariff approval order was passed by this Commission. Moreover, the duty to file the Tariff Adoption Petition was upon the Respondents and Petitioner had no role in the same. Petitioner cannot be forced to bear any loss, that is unjustly caused due to delay in an action which is completely in the hands of the Respondents.

- (h) It is denied that there is any impediment in the regulatory framework in commencement of supply of power prior to tariff adoption, where the date of commencement is specifically mentioned in the Contract and not altered by the Commission. The payment of charges in the interregnum, till the approval of the Tariff may be deferred till the approval of tariff, however, the Supplier cannot be left to bear huge losses on account of its capital cost and transmission cost which the Supplier has aggregated on the basis of contractually agreed date of commencement of supply.

CLAIM FOR LATE PAYMENT SURCHARGE

- (i) The Late Payment Surcharge as claimed is for the interest on delayed disbursement of payments against the monthly supply bills and the supplementary bills raised by the Petitioner. The same are independent of the Capacity Charges and Transmission Charges Claim as raised by the Petitioner under the present Petition.



PENALTY FOR SHORT SUPPLY

- (j) Respondent No. 1 is confounding confusion by making a distinction between penalty and liquidated damages, whereas, in India, under Section 74 of the Indian Contract Act, 1873, there exists no such distinction.

13. The Petitioner has further filed submission / reply dated 29.07.2019, 28.08.2019 and 13.09.2019 and 10.09.2020. UPPCL have made further submission / reply on 21.08.2019, 29.07.2019, 19.03.2020 and 12.10.2020. These submissions/replies reiterate the points made in their respective earlier submissions/replies.

Commission's analysis and decision

14. Commission, before delving into the merit of the claims, wish to highlight that the PPA between the parties casts certain obligations upon both the parties which are to be performed in a given time frame and in a particular manner and therefore any claim/damage sought by either party need to be seen in light of their respective obligations and their fulfilment.

15. The Commission after hearing the arguments of the parties made during hearing and after going through the documents available on record, has framed following issues and has dealt them in following paragraphs:

Claim of Capacity Charges

Issue 1: Whether time taken by Respondent to obtain Commission's approval for adoption of tariff can be a ground for seeking capacity charges by Petitioner



Issue 2: Whether Petitioner fulfilled condition(s) of Notice under Article 4.1.2 of the PPA

Issue 3: Whether the Petitioner was required to take only long-term open access

Issue 4: Whether Petitioner's claim of capacity charge under clause 4.9.1 (a) of the PPA can be allowed

Issue 1: Whether time taken by Respondent to obtain Commission's approval for adoption of tariff can be a ground for seeking capacity charges by Petitioner

16. Article 3 of the PPA deals with Conditions Subsequent to be satisfied within stipulated time-line by Seller i.e. Petitioner and Procurer i.e. Respondent No.1 before commencement of supply of power. As per Clause 3.2.1 of the PPA, the Respondent is to obtain the approval of the Commission for adoption of tariff, prior to the commencement of supply of power under the PPA. Therefore, after the execution of the PPA on 15.03.2016, the Respondent approached this Commission for seeking its approval of the PPA and adoption of tariff.

Procurer is granted a time period of 10 months, from the Effective date of PPA, to satisfy its condition subsequent. As such, there are two conditions stipulated under Clause 3.2.1 (a) and (c) that the Respondent must fulfil at its own cost and risk, prior to the commencement of power supply. The two conditions are reproduced below:

"3.2 Satisfaction of conditions subsequent by the Procurer

3.2.1 The Procurer agree and undertake to duly perform and complete the following activities at the Procurer's own cost and



risk within ten (10) months from the Effective Date, unless such completion is affected by force majeure event or Seller's failure to comply with their obligations under Article 3.1.1 of this agreement or if any of the activities is specifically waived in writing by the Seller:

- a) *The Procurer shall facilitate the representation of the Seller in the relevant RPC forum in coordinating on applicable inter-state/regional transmission linkages required from the injection point to the delivery point.*
- b) *not used*
- c) *The Procurer shall have obtained the order of the Uttar Pradesh Electricity Regulatory Commission for adoption of tariff under Section 63 of the Electricity Act, 2003 and given a copy of the same to the seller."*

17. Effective date of PPA, as defined under Clause 2.1.1, is the date of signing of the PPA between the parties. Therefore, the Effective Date is 15.03.2016. Under the terms of Clause 3.2 of the PPA, the Respondent is required to obtain the tariff adoption order from this Commission within 10 months. The order of the Commission was pronounced on 01.02.2017. Thereafter, the Respondent filed a Review Petition seeking certain clarifications from the Hon'ble Commission. The Review Petition was finally dismissed on 06.03.2017 and subsequently, UPPCL granted its consent on 27.03.2017.

18. Additional time taken by Respondent is covered under the three months extension allowed to the Procurer for fulfilling conditions subsequent in cases of delays, under Clause 3.4.5 of the PPA. It is pertinent to note that such extension under Clause 3.4.5 of the PPA is applicable without requiring any prior consent from the Seller. Moreover no charges for the abovementioned period of three months can be claimed by the parties under Clause 3.4.6 of the PPA. The relevant cause of the PPA is reproduced below:

3.4 Consequence of non-fulfilment of conditions subsequent



3.4.5 In case of inability of the Procurer to perform the activities specified in Article 3.2 within the time period specified therein, otherwise than for the reasons directly attributable to the Seller or Force Majeure event, the time period for the fulfilment of condition subsequent by the Procurers as mentioned in Article 3.2 would be extended for an additional time period which may be required by the Procurers to complete the activities mentioned in Article 3.2, subject to a maximum additional time period of three (3) months. Thereafter, this agreement may be terminated by the Seller at its option, by giving a Termination Notice of at least seven (7) days, in writing to the Procurers. If the Seller elects to terminate this Agreement, the Procurers shall, within a period of Thirty (30) days of termination by Seller, release the Contract Performance Guarantee of the Seller forthwith. In addition, the Procurers shall pay to the Seller a liquidated damages, a sum equivalent to ten percent (10%) of the value of the Contract Performance Guarantee.

3.4.6 No Tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4."

19. Further, the finding of the Hon'ble Supreme Court in **Sikkim Subba Associates v. State of Sikkim** [(2001) 5 SCC 629], wherein, it has been held that if one party who fails to perform its reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming damages for non-performance by the other party. The relevant part of the judgment is reproduced below:

"Waiver involves a conscious, voluntary and intentional relinquishment or abandonment of a known, existing legal right, advantage, benefit, claim or privilege, which except for such a waiver, the party would have enjoyed. The agreement between parties in this case is such that its fulfilment depends upon the mutual performance of reciprocal promises constituting the consideration for one another and the reciprocity envisaged and engrafted is such that one party who fails to perform his own reciprocal promise cannot assert a claim for performance of the other party and go to the extent of claiming even damages for non-performance by the other party. He who seeks equity must do equity and when the condonation or acceptance of belated performance was conditional upon the future good conduct and adherence to the promises of the defaulter, the so-called waiver cannot be considered to be forever and complete in itself so as to deprive the State, in this case, of its power to legitimately repudiate and refuse to perform its part on the admitted fact that the default of



the appellants continued till even the passing of the Award in this case."

20. Further, obtaining the order of this Commission for the adoption of tariff of RKM was an unavoidable pre-condition and commencing supply before the adoption order would be against the scheme of the bidding process and express legislative intent enshrined under Section 63 of the Electricity Act, 2003. In this regard, the findings of the Hon'ble APTEL in **Lanco Infratech Ltd. v. Punjab State Electricity Board** [Appeal No. 109 of 2009], are referred to, wherein the following observations were made: -

"50. In this context, one more decision of the Supreme Court is quite relevant i.e. 1983 (4) SCC 318 – *Excise Commissioner Vs. Manminder Singh*. The relevant observation is as follows:

"Since the provisional acceptance of the highest bid at the auction already held by the Collector was subject to confirmation by the Excise Commissioner; no vested right had accrued to any one and if the Excise Commissioner on the consideration of the circumstances came to the conclusion that it was in the best interest of the revenue to order re-auction, it was not for the High Court to interfere with the discretion of the Excise Commissioner in the proceeding under Article 226 of the Constitution."

This observation would apply in all fours to the present facts of the case. In this case, even assuming that there is some acceptance letter by the procurer, it cannot be construed to be an absolute acceptance and at the most it can be a provisional acceptance by the procurer and as held by the Supreme Court, unless the said acceptance is confirmed by the State Commission, no vested right would accrue to the bidder. Therefore, the contention that they have got a vested right to get the bid accepted has to fail."



21. Therefore, Commission is of the view that there was no anomaly in the procedure adopted by UPPCL in obtaining tariff adoption order from this Commission for fulfilling its conditions required to be fulfilled under the express terms of the PPA, before commencement of power supply under the PPA.

Issue 2: Whether Petitioner fulfilled condition(s) of Notice under Article 4.1.2 of the PPA

22. Article 4 deals with the manner of commencement of supply of power to Procurer(s). As per Clause 4.1.2 of the PPA, the Petitioner is obligated to give UPPCL 60 days advance preliminary written notice and 30 days advance final written notice, of the date on which it intends to commence supply of power. Pertinently, under the provisions of Clause 4.1.1 of the PPA, the Schedule Delivery Date agreed between the parties is October 30, 2016, before which the Petitioner was required to fulfil the conditions stipulated under Article 3.1 and Article 4.2 in the same manner as provided under the PPA. After fulfilling these conditions, the Petitioner was required to give a 60 days and 30 days advance notice in terms of clause 4.1.2. Clause 4.1.2 is excerpted below:

"4.1.2 The Seller shall give the Procured and the concerned RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to commence supply of power"



23. The correspondence made by Petitioner with the Respondent between March 2016 – April 2016 reveal that these letters were written to UPPCL for seeking an early commencement of supply. In one of such letters (letter dated 05.04.2016), RKM had mentioned that post-signing of the PPA, they had informed PGCIL that for 350 MW the firm point of drawl in Northern Region shall be the periphery of State of UP. Whereas in its subsequent letters dated 24.10.2016 and 26.11.2016 (after the expiry of the scheduled date of commencement of supply under Clause 4.1.1 of the PPA) the Petitioner informed the Respondent that PGCIL has operationalized their LTA for 200 MW and MTOA of remaining 150 MW has also been granted (no exact date of operationalization of MTOA was communicated by RKM

24. Under the provisions of Clause 4.1.1 both Seller and Procurer were required to mutually decide a revised delivery date if the conditions cannot be fulfilled by the Schedule delivery date. The Petitioner at first sought an early commencement of supply and thereafter, straightaway sent a notice of operationalization of LTA by CTU (vide letter dated 24.10.2016 & 26.11.2016) requesting to obtain all necessary consent and clearances from SLDC and provide a dispatch schedule for off taking power from 30.11.2016. The findings of the Hon'ble Supreme Court in **Nathulal v. Phoolchand** [1969(3) SCC 120], wherein, it was observed that if under the terms of the contract the obligation of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier. The relevant part is extracted below:

"12. In considering whether a person is willing to perform his part of the contract the sequence in which the obligations



under a contract are to be performed must be taken into account. The argument raised by Mr. Shroff that Nathulal was bound to perform the two conditions only after the amount of Rs. 21,000/was paid is plainly contrary to the terms of the agreement. By virtue of s. 4 of the Transfer of Property Act the chapters and sections of the Transfer of Property Act which relate to contracts are to be taken as part of the Indian Contract Act, 1872. If, therefore under the terms of the contract the obligations of the parties have to be performed in a certain sequence, one of the parties to the contract cannot require compliance with the obligations by the other party without in the first instance performing his own part of the contract which in the sequence of obligations is performable by him earlier."

25. **Therefore, Commission is of the view that the Petitioner is in violation of the express conditions of the PPA by defaulting in giving due notices to the Respondent, in accordance with Clause 4.2.1.**

Issue 3: Whether the Petitioner was obligated to take only long-term open access

26. The responsibility of evacuation of power from Power Plant to the delivery point is of such importance that it finds place in list of Conditions Subsequent to be fulfilled by the Petitioner in a period of 12 months from the effective date which can be extended to a maximum period of 10 months in case of Force Majeure event. The condition subsequent to be satisfied by the seller with regard to evacuation of power from injection point to delivery point are as below:

"3.1 Satisfaction of the Condition subsequent by the Seller

3.2.1 The seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk within twelve (12) months from the Effective Date unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with their obligations under Article 3.2.1 of this



Agreement, or if any of the activities is specifically waived in writing by the "Procurers jointly":

(a) -deleted-

(b)

(c) The seller shall have obtained the necessary permission for long term open access for the transmission system from the injection point up to the delivery point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;

27. Article 3 of the PPA (Conditions subsequent) requires the Petitioner to obtain Long Term Access for Aggregated Contracted Capacity before the commencement of supply under Article 4 of the PPA. The Petitioner had been granted long term open access of 419 MW in WR, 200 MW each in NR and SR as per the BPTA dated 24.02.2010 and TSA dated 06.08.2012. The Petitioner has informed the Respondent regarding LTOA of 200 MW in NR and submitted BPTA dated 24.02.2010 and TSA dated 06.08.2012 to the Respondent in compliance to the Article 3.1.1.(c). The LTOA of NR was operationalised on 30.11.2016 for supply to Respondent under the PPA dated 15.03.2016. The bid evaluation of all bidders was also done keeping in view the long- term transmission charges and not the Medium term / Short term open access transmission charges.

28. Ordinarily, a large gestation period is envisaged between the effective date of PPA and scheduled date of commencement of supply so that all necessary infrastructure for evacuation of power on long term basis can be secured. In this particular case the LOI was issued by the Respondent and accepted by the Petitioner in May'13, the PPA has been signed in Mar'16 i.e. after a period of nearly three years, thus shortening the period between effective date 15.03.2016 and scheduled date of commencement of supply i.e. 30.10.2016.



Therefore, as an additional measure, for the period from 01.10.2016 to 30.09.2019, Petitioner applied for MTOA on 29.06.2016 which was granted on 08.09.2016 and operationalised on 27.03.2017. In fact, balance LTOA of 150 MW has been granted to the Petitioner on 16.07.2018, Petitioner has signed the BPTA for this 150 MW on 15.10.2018 and full 350 MW LTOA has been operationalised on 14.02.2019.

Therefore, Commission is of the view that as part of conditions subsequent, the Seller is to obtain long term open access from injection point to the Delivery point for the entire duration of the PPA.

Issue 4 : Whether Petitioner's claim of capacity charge under clause 4.9.1 (a) of the PPA can be allowed

29. The Petitioner has argued that there is no bar in the PPA for supply of part of the Contracted Capacity and clause 4.8.1 of the PPA contemplates supply of power even from an alternative generation source if Seller is unable to supply from its own generation source. The Petitioner has referred to letter dated (i) 02.06.2016 from UPPCL to UPSLDC and (ii) UPPCL letter dated 31.03.2017 and 15.05.2017 agreeing to commence supply of power.

30. As per Article 1.1 of the PPA, the parties have contracted for an Aggregated Contracted Capacity of 350 MW to be supplied by the Seller at the interconnection point. The Schedule Delivery Date for supplying the Aggregated Contracted Capacity of 350 MW, as defined under Article 1.1, is determined under Article 4.1 of the PPA. The relevant clauses of Article 1.1 are reproduced below:



"Aggregated Contracted Capacity with respect to the Seller, shall mean the aggregate capacity of 350 MW contracted with the Procurers for supply at the Interconnection Point from the Power Station's net Capacity.

Schedule Delivery Date shall have the same meaning ascribed thereto in Article 4.1 of this Agreement."

31. Under the terms of Article 4.1.1 of the PPA, parties have agreed that the Seller shall commence supply of power up to the Aggregated Contracted Capacity of 350 MW from 30.10.2016 or on the revised schedule delivery date. Admittedly, the Petitioner failed to commence supply from the Schedule Delivery Date and neither approached the Respondent for revision of any such date.

The offer made by the Petitioner for supplying part of the Aggregated Contracted Capacity from a date later to 30.10.2016 was neither expressly agreed between the parties nor, was communicated to the Respondent in accordance with the terms of the PPA.

32. As regards to the letter dated 02.06.2016 of UPPCL to UPSLDC, this letter has been addressed to UPSLDC sighting Petitioner's additional measure to seek NOC for applying MTOA for the period 01.10.2016 to 30.09.2019. certainly, the letter can't be interpreted as consent of UPPCL for revising the scheduled delivery date.

The defaults of the Petitioner in terms of Clause 4.1.1 are capitulated hereinbelow:

- a. The Petitioner failed to commence supply on the Schedule Delivery Date as agreed in terms of the Clause 4.1.1, i.e. by 30.10.2016. Admittedly, the Petitioner did not seek any revision in the Schedule Delivery Date either.



- b. On 30.11.2016, Petitioner sought to supply part quantum of the Aggregated Contracted Capacity of 200 MW, without taking any consent or approval from UPPCL for supplying part capacity. **Aggregate Contracted Capacity cannot be split up without the mutual agreement between the parties. If such had been the case, then Clause 4.1.1 would have referred to Part Capacity not Aggregated Contracted Capacity.**

The relevant provision of Article 4.1.1 of the PPA is reproduced below:

"4.1 Commencement of Supply of Power to Procurers

4.1.1 *The Seller shall be responsible to commence supply of power up to the Aggregated Contracted Capacity by the Scheduled Delivery Date on accordance with the provisions of this Agreement, which is October 30, 2016. However, the Seller and the Procurer may mutually agree for commencement of supply of power in a phased manner from the Revised Scheduled Deliver Date(s) as specified in Article 3.3 of this Agreement."*

33. The Petitioner has sought to rely on Clause 4.9.1(a) of the PPA that each of the conditions mentioned in Clause 4.9.1(a) stood fulfilled completely and therefore, the Petitioner is fully entitled to the payment of the Capacity Charges as claimed from the Respondents. Clause 4.9.1 (a) of the PPA is excerpted herein below:

"4.9.1 If the Seller is otherwise ready to commence supply of power and has given due notice, as per provisions of Article 4.1.2, to the Procurers of the date of commencement of power supply, where such date is on or before the Scheduled Delivery Date or Revised Scheduled Delivery Date, as the case may be, but is not able to commence supply of power by the said date specified in the notice, due to a Procurer Event of Default or due to indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the



*Procurer(s)) provided such indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Procurer(s)) has continued for a period of more than three (3) continuous or non-continuous Months, **the Seller shall**, until the effects of the Procurer Event of Default or of Indirect Non Natural Force Majeure Event or (Natural Force Majeure Event affecting the Procurer(s)) no longer prevent the Seller from providing supply of power to the Procurers **be deemed to have an Available Capacity equal to the Aggregated Contracted Capacity relevant to that date and to this extent, be deemed to have been providing supply of power with effect from the date notified, and shall be treated as follows:***

- (a) **In case of delay on account of the Procurer Event of Default, the Procurers shall make payment to the Seller of Capacity Charges in proportion to their Contracted Capacity, calculated on Normative Availability of Contracted Capacity for and during the period of such delay.***

34. Commission has examined the above condition elaborately as below:

(a) Firstly, Seller is to be ready to commence supply of power and has given due notice, as per provisions of Article 4.1.2, to the Procurers of the date of commencement of power supply; and

(b) Secondly, such date of commencement of supply must be such date which is on or before the Scheduled Delivery Date or Revised Scheduled Delivery Date. Further in terms of Clause 3.3.1 of the PPA the Revised Scheduled Delivery Date cannot be a date later than Scheduled Delivery Date i.e. 30.10.2016.

35. It is not disputed that the Petitioner did not have Long Term Open Access as on 30.10.2016 to supply Aggregated Contracted Capacity of 350 MW to Procurers.



The LTA was operationalized on 30.11.2016 only for a part capacity of 200 MW, much after the Scheduled Delivery Date of 30.10.2016. Further, in its letter dated 02.02.2017 it is amply clear that FSA was operationalized on 31.10.2016 i.e. after the Scheduled Delivery Date of 30.10.2016.

36. The notices given by the Petitioner which have been time and again iterated by the Petitioner can't be construed to be due notice under Clause 4.2.1 of the PPA as there was no readiness on its part to supply power. Further, all the correspondences made by RKM before 30.10.2016 just indicate its willingness to supply power from an early date, without providing any firm date regarding supply of power nor indicating that the said notices are in terms of Clause 4.2.1 of the PPA.

37. In fact it was Procurers which were entitled to claim liquidated damages from the Petitioner as it had failed to commence supply power from the Scheduled Delivery Date. The relevant extract of Clause 4.8.1 of the PPA is excerpted herein below:

"4.8.1 If the Seller is unable to commence supply of power to the Procurers by the Scheduled Delivery Date or the Revised Schedule Delivery Date, as the case maybe, other than for reasons specified in Article 4.7.1, the Seller shall pay to each procurer liquidated damages as per this Article 4.8.1 proportionate to then existing Contracted Capacity, for the delay in such commencement of supply of power and making the Contracted Capacity available for dispatch by the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be. ..."

38. Now that the Respondent/Procurer did not impose liquidated damages on the Petitioner for delay in commencing supply of power from the Scheduled Delivery Date i.e. 30.10.2016, accordingly, the time period for achieving the condition subsequent got extended i.e. the time to obtain LTA for the entire Aggregated Contracted Capacity i.e. 350 MW.



Clause 4.8.1 and 4.9.1 (a) of the PPA are analogous provisions as former deals with default on part of the Procurer to effect supply and later deals with delay on part of Seller to commence Supply of Power. Both these clauses are meant to ensure that if the supply to the effect of Aggregated Contracted Capacity is not met by Scheduled Delivery Date then the consequences will follow as per the PPA. Therefore, Clause 4.9.1(a) of the PPA is inapplicable to present proceedings as none of its ingredients are satisfied in the instant case.

39. Under terms of Clause 4.1.1 of the PPA, RKM was obligated to supply the Aggregated Contracted Capacity from the Scheduled Delivery Date of October 30, 2016 otherwise, the PPA was liable to be terminated on account of event of default under Clause 2.3.1. The relevant provision of Article 2.3 is reproduced below:

"2.3 Early Termination

2.3.1 This agreement shall terminate before the Expiry Date:

i. If either all the Procurers (jointly) or the Seller exercises a right to terminate, pursuant to Articles 3.4.2, 3.4.4, 3.4.5, 4.1.1, 11.3.4, 11.4.5, 11.5.1 or Clause 7.2.3 or Schedule 7 of this Agreement."

40. The condition stipulated under Article 4.1.1 is an absolute condition, which goes to the root of the contract and cannot be amended unilaterally. Therefore, until RKM offers to supply the entire contracted capacity in the manner provided and agreed under the PPA, the said contract cannot be considered to have commenced. In this regard, the finding of the Hon'ble Appellate Tribunal for Electricity in **Jaiprakash Power Ventures Limited v. Madhya Pradesh Electricity Regulatory Commission** [Appeal No. 34 of 2016], wherein the Tribunal has observed that any off take or scheduling below the contracted capacity has to be done strictly in accordance with the terms and conditions of the PPA.



Further, the Hon'ble Tribunal while relying on Section 54 of the Indian Contract Act, 1872 laid down that, if one of the parties fails to follow the procedure prescribed under the PPA, then they cannot claim equity in their favor. The relevant part of the order of APTEL is reproduced below:

"g) Any off take/scheduling below the contracted capacity has to be done strictly in accordance with the Terms and Conditions of the PPA.

i. Any off take/scheduling below the contracted capacity can only be made if two conditions are satisfied i.e.

a) Firstly, a due Notice under Article 4.3.5 is to be issued by the Procurer to the Generator for the lower quantum specifying the period for which such a supply would be taken, and

b)

ii. In the present case, the requirement of Article 4.3.5 of the PPA has admittedly not been fulfilled till date. Therefore, by virtue of Section 54 of the Contract Act 1872, the Respondent No. 3 is in breach of the PPA signed between the Appellant and the Respondent No.3.

Section 54 of the Contract Act is reproduced below: -

"When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promisor of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract."

Therefore, in terms of the above quoted Section 54 of the Contract act, 1872 since the Respondent No.3 has not followed the procedure as prescribed under Clause 4.3.5 the said Respondent cannot claim equity in its favor. Moreover, the financial hardship



caused to the Appellant will have to be appropriately compensated.

- iii. Further, in terms of the PPA the exact period of shortfall in off take of power is to be informed to the Appellant as the words "for a period specified in such notice" mentioned in Article 4.3.5 of the PPA.*
- iv. The Article 4.3.4 of the PPA dated 5th January 2011, provides for sharing of "sales realization in excess of Energy Charges". It is an agreed and accepted position that a share in profit is equally applicable to share in loss. Therefore, the claim of the Appellant must be considered on account of losses incurred in this additional light.*
- v. The performance of the Contract cannot be permitted to be done in an inefficient and uneconomical manner which is contrary to the very preamble of the Electricity Act, 2003 and the various policies framed thereunder and in terms of Regulation 6.3 B of the IEGC any scheduling below the 'Technical Minimum' of the Unit Capacity would result into RSD."*

41. The Petitioner was liable to supply the Aggregated Contracted Capacity from the Schedule Delivery date in terms of Clause 4.1.1 of the PPA. It is submitted that the Petitioner violated both the express conditions stipulating commencement of Supply under the terms of Article 4. Firstly, they did not offer to off take from the Schedule Delivery date of 30.10.2016 nor did they seek an extension / revision of the Schedule Delivery Date in terms of Article 4.1.1 and Secondly, they also failed to supply the Aggregated Contracted Capacity of 350 MW from 30.10.2016 or take a prior consent of the Respondent to supply part capacities from two different dates.

42. Commission is of the view that in terms of clause 4.2, at the time of commencement of power supply, obtaining open access means that aggregated contracted capacity generated by the



Generating unit of the Petitioner could flow over the transmission system between the Generating unit and the delivery point i.e. it must be an operational one with liability of the Petitioner to pay for the cost of such open access. Therefore, the advance preliminary notice dated 15.03.2016 regarding readiness of the Petitioner to commence supply of power ahead of scheduled delivery date / scheduled delivery date has no footing and it is concluded that the Petitioner was not ready to commence supply of power in terms of clause 4.9.1(a) triggering the liability of payment of capacity charges by the Respondent.

43. The Respondent vide letters dated 31.03.2017 and 15.05.2017 have provided consent for commencement of supply in phased manner i.e. 200 MW from 02.04.2017 and 150 MW from 17.05.2017 and therefore, Commission is of the view that the Procurer(s) / Respondent(s) should be liable to pay Capacity charges for 200 MW from 02.04.2017 and 150 MW from 17.05.2017 in terms of the applicable provisions of the PPA dated 15.03.2016.

44. In view of analysis of Issues 1 to 4 ascribed above, Commission decides the claim of capacity charges for an amount of Rs. 125.03 Crs for the period between 30.11.2016 to 02.04.2017 and Rs. 32.82 Crs for the period between 28.03.2017 to 15.05.2017 against the Petitioner. and holds that Procurer(s)/ Respondent(s) should be liable to pay Capacity charges for 200 MW from 02.04.2017 and 150 MW from 17.05.2017.



CLAIM FOR TRANSMISSION CHARGES

45. That the next claim of the Petitioner is with respect to the transmission charges paid by it to PGCIL. The Petitioner has contended that PGCIL operationalized the LTOA with effect from 30.11.2016 and MTOA with effect from 31.03.2017. Accordingly, the Petitioner was required to pay transmission charges to PGCIL from the date of operationalization of LTOA and MTOA.

The Respondent has argued that they are liable only for payment of actual usage of the transmission system

46. Article 4.3.1 of the PPA which provides that the Respondent is liable to refund the transmission charges payable by the Petitioner to PGCIL. Article 4.3.1 of the PPA is excerpted below:

"4.3.1 Subject to the terms and conditions of this Agreement, the Procurers shall:

(b) be responsible for payment of the Transmission Charges (from the Injection Point onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurers. The Procurers shall reimburse any of the above charges, if paid by the Seller;..."

47. The definition of "Wheeling charges" or "Transmission Charges" in the PPA, provides that *"..Shall mean the charges to be paid by the Seller and reimbursed by the Procurers as transmission tariff for usage of intervening CTU networks for the transmission of power from the Injection Point to the Delivery Point, as approved by the Appropriate Commission."* The Transmission Charges for inter state transmission system are approved by the CERC and are based on Capacity Reserved and not on the basis of energy actually flowing.



48. Therefore, Commission, in view of the fact that Transmission Charges in the medium term and long term are on the basis of Transmission Capacity and not on whether there is actual power flow or not, is not inclined to accept the argument of the Respondent. The bills of the transmission charges would therefore be payable by the Respondent(s) as reimbursement against providing bills of transmission charges and proof of payment.

CLAIM FOR LATE PAYMENT SURCHARGE

49. It is submitted that the Petitioner has made certain claim towards the Late Payment Surcharge by way of supplementary bill for INR 10.11 Crores and INR 15.51 Crores payable for delayed payment of bills for the supply bills of October 2017, November 2017, December 2017, January 2018 and February 2018. Respondent has argued that the Petitioner has to prove actual loss in order to claim late payment surcharge.

50. The late payment Surcharge is clearly covered in Clause 8.1.11 read with Clause 8.3.5 which reads as under:-

"8.3.5 In the event of delay in payment of a Monthly Bill by the Procurers beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurers to the Seller at the rate of two percent (2%) in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill..."



51. The Levy of late payment surcharge is in nature of interest on the payments delayed and a compensation for the deprivation of the monetary sum for a certain duration by the Respondents. Hon'ble APTEL in the matter of Tamil Nadu Electricity Board Vs. GMR Power Corporation Pvt. Ltd. [Appeal No. 177 of 2010], has held that:

"13.7 We do not agree with the contention of the appellant that the respondent no. 1 has to establish incurring of any loss before claiming the interest on late payment. The Respondent No. 1 is entitled for interest for the money due to it on a particular date but illegally held back by the appellant. Further the PPA also stipulated payment of interest on late payments from the date they become due"

52. Therefore, Commission is not inclined to accept the contention of the Respondent to prove actual loss before claiming late payment surcharge as Petitioner is liable to claim late payment surcharge in terms of the PPA. Accordingly, the claim towards LPS is justified and needs to be claimed from the Respondent. Commission directs the Petitioner to provide detailed computation of the LPS amount so that the same can be verified for payment as per the terms of the PPA.

PENALTY FOR SHORT SUPPLY

53. The PPA provides for a normative availability. If the declarations of availability by the Petitioner were less than 80% availability for a contract year, the PPA provides for the payment of a penalty. The penalty is provided for in Clause 4.2.1 (a) read with Clause 4.2.5.1 of the Schedule 4 of the PPA. The same are thus reproduced as under:

"4.2 Monthly Tariff Payment.

4.2.1 Components of Monthly Tariff Payment

The Monthly Bill for any Month in a Contract Year shall consist of the following:



Monthly Capacity Charge payment in accordance with Clause 4.2.2 of Schedule 4.

Monthly Energy Charge for Scheduled Energy in accordance with Clause 4.2.3 of Schedule 4.

*Incentive determined in accordance with Clause 4.2.4 of Schedule 4 (applicable on a cumulative basis and included in each Monthly Bill).
Penalty determined in accordance with Clause 4.2.5 of Schedule 4 (applicable on a cumulative basis and included in each Monthly Bill).*

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 ¢/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..."

54. Petitioner has argued that it was unable to declare the minimum availability since it was the Respondent who was itself defaulting in payment of the Energy Bills. The Respondent could not insist on the maintenance of the normative availability if they did not comply their primarily obligation of making timely payments to the petitioner. The Petitioner specifically pleaded in the Petition that even when the Petitioner was declaring the availability less than 80%, the Respondents were, in fact, scheduling power less than the declared availability. Petitioner has also argued that there is nothing on record to show that the Respondent either fell short of power or had purchased the shortfall of power from any other source. In the absence of any pleading or proof in that regard, the Respondent cannot contend that they suffered any loss at all for which Petitioner would be able to pay any penalty under PPA.



Further, Petitioner has held that it is settled law that where any contract provides for payment of any sum of monies by way of "penalty" or by way of "liquidated damages", the person claiming such "penalty" or "liquidated damages" must firstly prove that he suffered some loss and then must prove the quantum of such losses.

55. Petitioner has placed conclusion in the Kailash Nath case as extracted hereunder:-

" 43. *On a conspectus of the above authorities, the law on compensation for breach of contract under Section 74 can be stated to be as follows.*

43.1 Where a sum is named in a contract as a liquidated amount payable by way of damages, the party complaining of a breach can receive as reasonable compensation such liquidated amount only if it is a genuine pre-estimate of damages fixed by both parties and found to be such by the court. In other cases, where a sum is named in a contract as a liquidated amount payable by way of damages, only reasonable compensation can be awarded not exceeding the amount so stated. Similarly, in cases where the amount fixed is in the nature of penalty, only reasonable compensation can be awarded not exceeding the penalty so stated. In both cases, the liquidated amount or penalty is the upper limit beyond which the court cannot grant reasonable compensation.

43.2 Reasonable compensation will be fixed on well known principles that are applicable to the law of contract, which are to be found inter alia in Section 73 of the Contract Act.

43.3 Since Section 74 awards reasonable compensation for damage or loss caused by a breach of contract, damage or loss caused is a sine qua non for the applicability of the section.

43.4 The section applies whether a person is a plaintiff or a defendant in a suit.

43.5 The sum spoken of may already be paid or be payable in future.

43.6 The expression "whether or not actual damage or loss is proved to have been caused thereby" means that where



it is possible to prove actual damage or loss, such proof is not dispensed with. It is only in cases where damage or loss is difficult or impossible to prove that the liquidated amount named in the contract, if a genuine pre-estimate of damage or loss, can be awarded.

43.7. *Section 74 will apply to cases of forfeiture of earnest money under a contract. Where, however, forfeiture takes place under the terms and conditions of a public auction before agreement is reached, Section 74 would have no application..."*

Commission is of the view that Petitioner has failed to understand that the said penalty is not contingent to percentage of power being off taken or scheduled by the Respondents. The Petitioner must declare a cumulative Availability of 80% in a Contract Year, in the event it fails to comply with the said provision, the Respondents are empowered to deduct penalty towards short supply of power.

56. The Petitioner has further submitted that short supply has been on account of delay in releasing the payments towards the supply bills by the Respondent. In this regard it is submitted that the declared capacity as provided in para 31 of the Petitioner has always been constantly low despite the fact that for FY 2017-18, basis the reconciliation statement the gross amount payable to RKM i.e. INR 511,15,46,011/- and the Procurers have already paid INR 478,00,00,000/-. The deficit was only INR 33,15,46,011. It is submitted that when more than majority payments were made by the Procurer for FY 2017-18 at regular intervals as per the PPA, can the Petitioner claim that just because there was delay in payment of invoices it could not declare the availability. The reconciliation statement clearly shows that payments were made by the Respondents at regular intervals and as such that can't be the sole cause which led to declaration of low availability by the Petitioner.



In any event, Schedule 4.2.5.1 of the PPA, mandates procurer to deduct penalty for short supply and there is ample evidence of record to show that payments towards invoices were being made by the Respondent at regular intervals. If any deficit was there that also was compensated by making payments over and above the invoice amount for certain months.

57. Commission is of the view that the terms i.e. penalty and liquidated damages are to be read in the context of the PPA. The penalty deducted by the Respondents is towards short supply of power as provided under Schedule 4.2.5 of the PPA. In terms of the afore-said provision of the PPA, if the Availability for a Contract Year is less than 80%, the Respondent is entitled to deduct penalty.

58. Commission, therefore, directs the Respondent to adhere to Schedule 4.2.5.1 of the PPA for the purpose of levy of Penalty and refund any penalty deducted which is not in accordance with schedule 4.2.5.1 of the PPA.

59. The findings of the Commission with respect to the claims of the Petitioner are summarized as below:

S. No	Description of Claims	Amount claimed (Rs /Crs)	Commission's decision
1.	Capacity Charges (for the period between 30.11.2016 to 02.04.2017 and for the period between 28.03.2017 to 15.05.2017)	157.85	Rejected



2	Transmission Charges	31.89	Reimbursement of transmission charges allowed
3	Late payment Surcharges	25.62	Allowed
4	Penalty for Short Supply	52.41	Allowed

60. Petition is disposed of in terms of above.

(Vinod Kumar Srivastava)
Member

(Kaushal Kishore Sharma)
Member

(Raj Pratap Singh)
Chairman

Place: Lucknow

Dated: 26.10.2020