

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.114/MP/2019

Coram:

**Shri I.S Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of Order: 04.02. 2022

In the matter of:

Petition under Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003 for adjudication of disputes arising out of Power Purchase Agreement dated 27.11.2013 executed between the Petitioners and the Respondent.

And in the matter of:

**1. GMR Energy Trading Limited,
Building No. 302, New Shakti Bhawan,
New Udaan Bhawan Complex,
Opposite IGI Airport, Terminal – 3,
New Delhi – 110037**

**2. GMR Warora Energy Limited,
Building No. 302, New Shakti Bhawan,
New Udaan Bhawan Complex,
Opp. IGI Airport, Terminal – 3,
New Delhi – 110 037**

.... Petitioners

Versus

**1. Tamil Nadu Generation and Distribution Corporation Limited,
10th Floor, NPKRR Maaligai,
144-Anna Salai,
Chennai- 600002**

....Respondent

Parties Present:

Shri Sanjay Sen, Sr. Advocate for the Petitioners
Shri Hemant Singh, Advocate for the Petitioners
Shri Lakshyajit Singh Bagdwal, Advocate for the Petitioners
Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. Ramisha Jain, Advocate, TANGEDCO

ORDER

The present Petition has been filed against the unilateral reduction of the contracted capacity and consequent non-payment of the capacity charges by the Respondent. The Petitioners have sought payment of capacity charges based on the contracted capacity at the normative/ declared availability, as per Schedule 4 of the Power Purchase Agreement (PPA) dated 27.11.2013. The Petitioners have made the following prayers:

“(a) direct payment of the revised claims of the Petitioner No. 1 for the period from November 2015 to March, 2016, as annexed herewith as ANNEXURE P-10, along with interest calculated in terms of Article 8.3.5 of the PPA;

(b) declare that the Bill Dispute Notices issued by the Respondent, are illegal and not as per the terms of the PPA; and

(c) pass such other and further order or orders as this Hon’ble Court may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”

Submissions of the Petitioners

2. The Petitioners have made the following submissions:

a) The generating station developed by Petitioner No. 2 comprises of two units of 300 MW each. Unit 1 of the generating station was commissioned on 19.03.2013 and Unit 2 was commissioned on 01.09.2013. The Petitioner No. 2, has a composite scheme for the generation and sale of power to more than one State. Thus, in accordance with the provisions of Section 79(1)(b) and Section 79(1)(f) of the Electricity Act, 2003, the appropriate Commission for the adjudication of the dispute raised in the present petition, is this Commission.

b) The power generated from the generating station is being supplied to the States of Maharashtra, Tamil Nadu and the Union Territory of Dadra and

Nagar Haveli pursuant to and in accordance with the following power purchase agreements:

- i. Supply and sale of 200 MW of power on long term basis in terms of the Power Purchase Agreement dated 17.03.2010 executed between the Petitioner and Maharashtra State Electricity Distribution Company Ltd.;
- ii. Supply and sale of 200 MW of power on long term basis in terms of the Power Purchase Agreement dated 21.03.2013 executed with the Electricity Department of the Union Territory of Dadra and Nagar Haveli; and
- iii. Supply and sale of 150 MW of power on long term basis in terms of the Power Purchase Agreement dated 27.11.2013 to the Respondent, through the Petitioner No. 1.

c) The Respondent issued Request for Proposal (RFP) dated 21.12.2012 for long term procurement of power under Case-1 bidding procedure for meeting its base load power requirements. In order to participate in the aforesaid competitive bidding, the Petitioner No. 1 executed an agreement for sale of power with the Petitioner No. 2 on 01.03.2013 to purchase 150 MW from the generating station of the Petitioner No. 2. Further, the Petitioner No. 1 agreed to participate and submit bid in the aforesaid competitive bidding process on behalf of the Petitioner No. 2 for supply of power on a long-term basis to the Respondent.

d) In furtherance to the agreement for sale of power dated 01.03.2013 (between Petitioner No. 1 and Petitioner No. 2), the Petitioner No. 1 submitted its bid and was selected by the Respondent for sale and supply of electricity in bulk. Pursuant to the said bidding process, the Petitioner No. 1 and the Respondent executed a PPA dated 27.11.2013, setting out the terms and conditions for the sale of power, procured from the generating station of the Petitioner No. 2, up to the aggregate contracted capacity of 150 MW at the interconnection point. Accordingly, the Respondent agreed to procure power up to the said aggregate contracted capacity and pay tariff to the Petitioner No.1 as determined in accordance with the terms of the PPA. The said PPA is valid for a term of 15 years from 1.6.2014 to 30.9.2028.

e) Following the execution of PPA dated 27.11.2013 with Respondent, the Petitioner No. 1 and Petitioner No. 2 executed a fresh agreement for sale of power on 03.05.2014.

f) As per the provisions of the PPA, delivery point for supply of the contracted capacity is the STU interface, which is the point at which the CTU network is connected to the intra-State transmission system of Tamil Nadu. The supply of power to the Respondent commenced from 22.10.2015.

g) In accordance with Article 5.1 of the PPA, the Petitioner No. 1, through the Petitioner No.2, was contractually bound to make available entire aggregate contracted capacity of 150 MW to the Respondent. The Petitioners, in compliance of the contractual obligations, declared the normative availability at power plant bus bar as per the PPA. During the period in dispute, the Petitioner No. 1, through the generating station of the Petitioner No.2, was in a position to supply the aggregate contracted capacity as is evident from the capacity declarations. However, the Respondent was never in a position to off take the entire declared capacity.

h) Article 4.4 of PPA makes the Respondent liable to pay tariff as determined in accordance with Schedule 4 of PPA, for all of the available capacity up to the contracted capacity and the scheduled energy.

i) For the period of November 2015 and December 2015, the Petitioner No. 1 raised tariff bills upon the Respondent on 4.12.2015 and 4.1.2016 respectively. The Respondent vide bill dispute notice no.1/2016 dated 29.1.2016 disputed the aforementioned bills of the Petitioner No. 1 and sought revision of the calculation of the incentive amount by taking into consideration the period of grid constraint which occurred in the months of November 2015 and December 2015. The Respondent vide the said notice asked the Petitioner No. 1 to consider the contracted quantum on 01.12.2015 as 121 MW from 00.00 hrs, instead of 121 MW from 07.00 hrs on the said date as taken into account by the Petitioner No. 1 in its bill of December 2015. The Respondent

disputed the difference of Rs.1,27,375.00 and Rs.11,09,469.00 in the calculation of the incentive amount payable under the PPA for the months of November 2015 and December 2015 respectively. In response to the said bill dispute notice no. 1/2016, the Petitioner No. 1 vide its reply dated 10.03.2016 agreed to revise the calculation of the incentive amount for the period of grid constraint as mentioned in the bill dispute notice no. 1/2016.

j) For the supply of power to the Respondent for the months of January 2016, February 2016 and March 2016, the Petitioner No. 1 raised tariff bills on 3.2.2016, 2.3.2016 and 2.4.2016 respectively.

k) Pursuant thereto, the Petitioner No. 1 received another bill dispute notice no.2/2016 dated 31.3.2016 with respect to bills for the months of January 2016 and February 2016, and bill dispute notice no.3/2016 dated 21.4.2016 with respect to bills for the months of March 2016, from the Respondent disputing the aforementioned bills along with earlier bills of November 2015 and December 2015. Vide the said notices, the Respondent, for the first time, relying upon the provisions of Article 9.7.1(c) of the PPA contended that the grid constraint is a 'natural force majeure event' and thereby unilaterally reduced the contracted capacity.

l) In response to the bill dispute notice no.2/2016 dated 31.3.2016, the Petitioner No. 1 vide its reply dated 2.5.2016 objected to the unilateral reduction in the contracted capacity and consequent reduction of the capacity charges. The Petitioner No. 1 also objected to the unilateral decision of the Respondent that grid constraint falls under the event of 'natural force majeure' for entitling the Respondent the relief provided in Clause 9.7.1(c) of the PPA.

m) Further, in response to the bill dispute notice no.3/2016 dated 21.4.2016, the Petitioner No. 1 vide its reply dated 13.05.2016, submitted that the revised bills have been raised by considering the reduction in cumulative availability but not factoring the reduction in contracted capacity. The Petitioner

No. 1 further stated that the monthly bills raised by it, will undergo a revision on account of the following:

- “1. Reduction in the availability due to grid constraint for the month of November’15 and December’15 (509,500 kwh and 4,051,125 kwh respectively),*
- 2. Increase in the contracted capacity (by 455,000 kwh) in the monthly December’15,*
- 3. Revision of availability reduction due to grid constraint in the month of January’16 (changed to 23,188,750 kwh as considered by TANGEDCO from earlier 27,428,750 kwh considered by us in invoice) and*
- 4. Considering the revised tariff (change in the 4 decimal places),”*

n) As per the revised calculation by the Petitioner No. 1, total amount against monthly invoices for the period from November 2015 to March 2016 got increased by Rs.934,504.00. As such, the total amount payable by the Respondent in the present transaction for the alleged disputed period from November 2015 to March 2016 is Rs.5,96,96,917.00 along with interest.

o) As per the obligations enumerated in the PPA, the Petitioners made available the aggregate contracted capacity of 150 MW and declared the normative availability in order to meet the scheduling and dispatch requirements of the Respondent within the terms of the said agreement. Moreover, the capacity charges are computed based on the declared availability, which is in compliance of the aforementioned terms of the PPA and the extant Regulations. Upon declaration of availability on the part of the Petitioner No. 1 (through the Petitioner No. 2) as mandated under PPA, the Respondent cannot seek or unilaterally reduce the contracted capacity and thereby the capacity charges from the bills of November 2015 to March 2016 in contravention of the express provisions of PPA.

p) Based on the requisition made by the Respondent vide bill dispute notices on account of grid constraint, the Petitioner No. 1 revised the cumulative availability without revising its contracted capacity for the period from November 2015 to January 2016. In view of the schedule 4 of the PPA which provides that capacity charges are payable based on the contracted capacity, the Petitioner is entitled to receive the corresponding capacity charges since there can be no reduction of the contracted capacity.

q) Grid constraint is specifically referred under Article 9.2.3 of the PPA. Grid constraint is a general force majeure, and is neither natural nor non-natural force majeure. For grid constraint, which is a general force majeure event, the “obligation” referred under Article 9.7.1(a) only means the obligation of the Petitioner No. 1 to supply power at normative availability. Grid constraint does not have any bearing upon the “ability” of the Respondent to pay tariff.

r) In case of grid constraint situation, the tariff is still required to be paid as per schedule 4 of the PPA. The only benefit the Respondent can claim is provided in the formula in the above schedule itself, which is that as per the said formula the cumulative or declared availability can be reduced, but there is no provision to reduce the contracted capacity i.e. 150 MW.

s) The Respondent is seeking to amend schedule 4 of the PPA by reducing the contracted capacity itself on account of force majeure, which is *de hors* the scheme of the PPA and therefore, cannot at all be done.

t) PPA does not contemplate reduction in the aggregate contracted capacity of 150 MW. On the contrary, as per Article 15.3.1 of the PPA, any amendment to the PPA is to be carried out by written agreement of both the Respondent and the Petitioner No. 1, and that such amendment is to be specifically approved by the appropriate Commission. The unilateral action on the part of the Respondent to reduce the aggregated contracted capacity is therefore, *de hors* the PPA.

u) The Schedule 4 of the PPA deals with the method of tariff payment for supply of power at any given time during the term of the agreement. It provides that the tariff quoted in the bill shall be paid in two parts comprising of (i) capacity charges and (ii) energy charges. It is stated that as per Regulation 13 of the Tariff Regulations, 2009 (specified by the Commission), the capacity charge is leviable for recovery of annual fixed cost consisting of the components as specified under Regulation 14. The capacity charges which are recovered for fixed cost are independent of the varied scheduling of power and

the said charges once incurred towards building the transmission or supply asset, are provisioned to be recovered in a phased manner without subjecting the same to the variable component of the supply system. Hence, the claim of the Respondent to unilaterally reduce the contracted capacity and, therefore, the reduction in capacity charges from the bills of the Petitioner No. 1, owing to grid constraint, is liable to be set aside by this Commission.

v) As provided under schedule 4 of the PPA, the capacity charges shall be payable to the seller merely upon manifesting the contracted capacity at normative availability (i.e. 85%) and not on the basis of actual energy scheduled from the grid by the procurer. In the present case, the Petitioner No. 1, being the seller, has declared the contracted capacity at full normative availability as mandated under PPA, for the period from October 2015 to March 2016. Thus, the Petitioner No. 1 is entitled to recover the capacity charge without any reduction in the contracted capacity in the tariff formula provided in schedule 4 of the PPA. The lower scheduling of energy from the grid by the Respondent on account of grid constraint can never lead to the amendment of the above formula provided under the PPA.

w) Article 8.6.2 of the PPA mandates a party who is disputing the bill raised under PPA, to issue a notice within 30 days of receiving the said monthly bill. However, the Respondent issued bill dispute notice against the monthly bill dated 4.12.2015 and 3.2.2016 for November 2015 and March 2016 respectively, beyond the limitation of 30 days i.e. on 29.1.2016 and 31.3.2016 which is in contravention of Article 8.6.2 of PPA. On this sole ground, the Respondent is barred to raise any dispute, whatsoever qua the supply month of November 2015 and March 2016.

3. The Petition was listed for hearing on admission on 30.5.2019. The Commission admitted the Petition and directed the parties to complete the pleadings. The Respondent has filed its reply vide affidavit dated 29.11.2019. The Petitioner has filed its rejoinder vide affidavit dated 22.1.2020. Further, during the hearing dated

12.10.2021, the Commission reserved the order in the Petition. The parties have also filed their respective written submissions.

Submissions of the Respondent

4. The Respondent has mainly submitted as under:

a) PGCIL (Power Grid Corporation of India Ltd.) allotted corridor under MTOA (medium-term open access) since the Petitioner No. 1 initially applied for MTOA for part quantum of 56 MW on 22.10.2015 and full quantum of 150 MW from 16.12.2015. Long term access was allotted by PGCIL from 16.1.2016 onwards.

b) During the months of November 2015, December 2015 and January 2016, there were transmission constraints in scheduling of power to TANGEDCO, which is a Force Majeure event affecting the seller and the details of quantum constrained is given below:

i.	November 2015	-	5,09,500	kWh
ii.	December 2015	-	40,51,125	kWh
iii.	January 2016	-	2,31,88,750	kWh

c) The curtailment of power from November 2015 to January 2016 occurred due to natural force majeure event. The provision in the PPA at Clause 9.7.1 states that no tariff shall be paid for part of the contracted capacity affected by a natural force majeure event affecting the developer, for the duration of such natural force majeure event.

d) As per the terms of PPA entered into between the Respondent and the Petitioner No. 1, system constraint due to natural force majeure event does not entitle the Petitioner No. 1/ Petitioner No. 2 to claim tariff for part of the contracted capacity affected by natural force majeure event. As per Article 4.4.1, Article 9.3.1 & Article 9.7.1(c) of the PPA, no tariff shall be paid by the procurer for the duration of such natural force majeure event affected the procurer.

e) As per Article 4.4.1 of the PPA, the procurer undertook to pay tariff for all of the available capacity up to the contracted capacity and corresponding scheduled energy. The available capacity for November 2015 to January 2016 was as per the schedule allowed by RLDC, since the procurer received only that capacity at its delivery point and therefore, paid for the available capacity.

f) From November 2015 to January 2016, the seller gave declaration of a specified capacity to the procurer and the procurer accepted the declaration of the seller's prescribed capacity. However, the seller could not punch in its declared capacity for getting scheduling because RLDC reduced the schedule of the seller and the seller could deliver only the available capacity out of the declared capacity at the delivery point of the procurer.

g) As per Article 9.3.1 of PPA, any restriction imposed by PGCIL/ RLDC/ SLDC in scheduling of power due to breakdown of transmission/ grid constraint shall be treated as Force Majeure without any liability on either side (non-availability of open access is treated as force majeure). It is an admitted fact that restriction was imposed by RLDC on the declared availability of seller, due to grid constraint.

h) As per Article 9.7.1(c) of PPA, no tariff shall be paid by the procurer for the part of contracted capacity or part thereof affected by a natural force majeure event affecting the developer, for the duration of such natural force majeure. For the balance part of the contracted capacity, the Procurer shall pay tariff to the Seller, provided that the balance part of the power station is declared to be available for scheduling and dispatch as per ABT (availability-based tariff) mechanism for supply of power by the Seller to the Procurer.

i) Details of system constraints are:

<i>Date and reporting hours</i>	<i>Reason for curtailment & blocks curtailed</i>
November 2015	
On 22.11.15 (5.00 hrs)	Due to reduction of ATC to 1000 MW on account of Shut down of Raichur Bus-2: from 29 th block to 96 th block curtailed.
On 27.11.15 (00.20 hrs)	Due to shut down of pole II at BHVTY and subsequent ATC reduction in WR-SR path: from 29 th block to 83 rd block curtailed.

<i>Date and reporting hours</i>	<i>Reason for curtailment & blocks curtailed</i>
December 2015	
On 03.12.15 (6.15 hrs)	Due to ATC Violation (S1-S2): from 31 st block to 96 th block curtailed.
On 12.12.15 (20.00 hrs 11.12.15)	Due to shut down of 765 Raichur Bus-2 and subsequent ATC reduction in WR-SR ATC to 1000 MW: from 29 th block to 96 th block curtailed.
On 26.12.15 (22.03 hrs of 25.12.15)	Due to shut down of 765 Raichur Bus-2 and subsequent ATC reduction in WR-SR ATC to 1800 MW: from 28 th block to 80 th block (75%) and 81 st block to 88 th block (70%) curtailed
January 2016	
02.01.16 (11.40 hrs)	Due to tripping of 765 Raichur – Solapur-II SRLDC: from 49 th block to 96 th block curtailed.
02.01.16 (22.35 hrs)	Raichur–Solapur II outage 0-24 hrs on 03.01.16: 24 hrs curtailed.
03.01.16 (20.30 hrs)	04.01.2016: from 1 st block to 96 th block 24 hrs 100% curtailed.
04.01.16 (21.40 hrs)	05.01.2016: from 1 st block to 96 th block 24 hrs 100% curtailed.
06.01.16 (22.28 hrs)	07.01.2016: 1 to 12 hrs 100% curtailed.
07.01.16 (11.09 hrs)	07.01.2016: 12 to 24 hrs 100% curtailed.
07.01.16	All above transactions restored from 14.30 hrs.
08.01.16 (22.42 hrs)	09.01.2016 ER-SR ATC Violation: from 21 st block to 96 th block 100% curtailed.
09.01.16 (21.00 hrs)	10.01.2016 Revival of HVDC Talcher Kolar Pole II: from 89 th block to 96 th block 100% curtailed.
10.01.16 (01.50 hrs)	10.01.2016 ER-SR ATC Violation Talcher Kolar Bi Pole S/D: from 21 st block to 96 th block 100% curtailed. Restored from 85 th block to 96 th block.
10.01.16 (20.00 hrs)	STOA & MTOA curtailment for 11.01.2016: from 21 st to 96 th block. Restored from 85 th to 96 th block.
11.01.16 (19.30 hrs)	STOA, MTOA curtailment for 12.01.2016: from 21 st block to 96 th block curtailed. Restored from 85 th block to 96 th block. Restored from 21:00 hrs.
12.01.16 (18.56 hrs)	ER-SR ATC Violation: from 21 st block to 96 th block 100% curtailed.
14.01.16 (11.08 hrs)	ER-SR ATC Violation: from 49 th block to 96 th block 50% curtailed.
21.01.16 (11.45 hrs)	From 55 th block to 96 th block 60% curtailed. Revised from 60 th block to 96 th block 40% curtailed. Restored from 86 th block.

j) It was only due to the transmission corridor restrictions by the transmission service provider that the procurer could not avail the contracted quantum with the Petitioner No. 1. The responsibility of delivering power at the

delivery point of the procurer is that of the seller. The seller defaulted in its obligation to deliver the contracted quantum of power at the delivery point of the procurer from November 2015 to January 2016 to TANGEDCO.

k) Initially, TANGEDCO passed the monthly bills of November 2015 to January 2016 without taking into account the system constraint. Subsequently, the above bills were revised and the recovery was made in the monthly bill of January 2016. A dispute notice was issued to the Petitioner No. 1 on 31.3.2016.

l) TANGEDCO made the payment for the quantum injected at interconnection point of the seller. But in the case of system constraint, generator cannot inject the contracted capacity of power at the interconnection point itself and the contracted capacity is not available to the procurer at the delivery point. Therefore, there is no question of reduced off take by the procurer when the available quantum itself was the quantum injected by the seller at the interconnection point. Payment of capacity charges by the procurer for reduced availability of power at the delivery point of TANGEDCO is not envisaged in the PPA. It is due to force majeure in the transmission system that the contracted quantum was not injected by the seller at the interconnection point due to the curtailment in quantum by SRLDC. There is no backing down by TANGEDCO at the relevant point of time.

m) As per the provision of Article 9.3.1 of PPA, in case of force majeure event due to transmission constraint, there is no liability on either side. It is the admitted case of the Petitioners that there occurred a transmission constraint.

n) As per Article 4.4.1 of PPA, the procurer undertook to pay tariff for all of the available capacity up to the Contracted Capacity and corresponding Scheduled Energy. The available capacity in November 2015, December 2015 and January 2016 was as per the schedule allowed by RLDC. The available capacity can be up to the contracted capacity. There is a clear distinction between available capacity and contracted capacity in the PPA.

o) The reliance placed by the Petitioners on Article 5 of PPA is misplaced. Under this Article, it is an obligation on the seller to offer for sale the contracted capacity to the procurer at the interconnection point and arrange for transmission up to the Injection Point. This Article 5 has nothing to do with the obligation to pay the tariff under the PPA. Payment of tariff and liability to pay is as per Article 4.4.1 and Article 9 of the PPA.

Rejoinder of the Petitioner to the reply of Respondent TANGEDCO

5. The Petitioner in its Rejoinder to the reply filed by TANGEDCO has additionally submitted as under:

a) In terms of Clause 4.2 of Schedule 4 of the PPA, the Petitioner No. 1 is entitled to recover tariff in the form of Capacity Charges from the Respondent. The Petitioner No. 1 raised monthly bills (November 2015 to March 2016), which have been computed strictly within the four corners of the formula provided under Schedule 4.2.2 of the PPA.

b) Tariff is mandated to be calculated as per Schedule 4 of the PPA. The contracted capacity has to be taken at 150 MW at all times and under all circumstances. Further, as per schedule 4 of the PPA, contracted capacity is a fixed component which cannot be altered or modified by the parties under any circumstance.

c) Article 4.4 of the PPA obligates the Respondent to pay Tariff, in the monthly/ supplementary bills raised by the Petitioner No. 1, as determined in accordance with Schedule 4 of the PPA, qua the available capacity up to the contracted capacity and the scheduled energy.

d) The Respondent is under contractually obligation to pay tariff computed on the contracted capacity or declared capacity, in accordance with the formula stipulated under Schedule 4.2.2 of the PPA. As such, the PPA provides no avenue to either of the parties, much less unilaterally, to deviate from the terms

as envisaged therein, in any manner whatsoever, which includes Schedule 4.2 providing the mechanism of computation of tariff payable by the Respondent.

e) Without prejudice and assuming without admitting, that there occurs a force majeure situation, then, as per schedule 4 of the PPA, only the cumulative or declared availability can be reduced. However, the contracted capacity which is a fixed component envisaged in the formula under the PPA, cannot be altered or modified by either of the parties, including the Respondent. It is a settled principle of law that parties to a contract cannot approbate and reprobate, and have to honour the commitments under such contract. Thus, the Petitioner No. 1 is entitled to recover full capacity charges from the Respondent, in the circumstances.

f) As per Article 5.1 of the PPA, the Petitioner No. 1/ Seller was obligated to supply power to the Respondent, the contracted capacity. The Petitioners declare the normative availability at power plant bus bar as per the PPA. During the period of alleged dispute, the Petitioner No. 1 was always ready and, in a position, to supply the contracted capacity to the Respondent, which is evident from its capacity declarations.

g) Article 9.3.1 of the PPA describes an event of force majeure. It is clearly stipulated under the said article that any restrictions or curtailment of contracted capacity, imposed by Power Grid Corporation of India Limited (PGCIL)/ Regional Load Despatch Centre (RLDC)/ State Load Despatch Centre (SLDC) in scheduling of power and thereby reducing the scheduled energy or contracted capacity to be injected by the Seller or Petitioner No. 1 at the Interconnection point is a simplicitor force majeure event. However, Article 9.3.1.(i) of the PPA, stipulates natural force majeure events. The specific occurrences envisaged therein, constituting natural force majeure events, do not provide for occurrences of grid constraints, in the form of either curtailment or restrictions on scheduled energy/ contracted capacity.

h) As per Article 9.7.1(a) of the PPA, it is stipulated that no party shall be in breach of its obligations in the event of occurrence of force majeure events. The same means that the Petitioners shall not be imposed with any charges on account of breach of contract, in the event power could not be supplied due to simplicitor force majeure events.

i) When an event is not a “natural force majeure event”, the tariff cannot be curtailed by the procurer. The seller, on account of occurrence of a simplicitor force majeure event, is not entitled to energy charges, since energy would not be supplied for the period which is covered by such event. As regards the fixed/ capacity charges, the formula provided under schedule 4 of the PPA shall have to be mandatorily followed. The parties to the PPA consciously did not provide that the tariff liability would be suspended on account of occurrence of a simplicitor force majeure event. Article 9.7.1(a) of PPA only stipulates that there would not be any adverse levy upon the person/ entity suffering from simplicitor force majeure event. However, the same does not mean that the seller will not be entitled to the fixed/ capacity charges to be computed as per schedule 4 of the PPA.

j) The Respondent is contractually obligated to pay tariff, computed on the contracted capacity or declared capacity, in accordance with the formula stipulated under schedule 4.2.2 of the PPA. As such, the PPA provides no avenue to either of the parties to deviate from the terms as envisaged therein, in any manner whatsoever, which includes Schedule 4.2 providing the mechanism of computation of tariff payable by the Respondent.

Written Submissions of the Parties

6. The Petitioner and Respondent have also filed their written submissions dated 28.10.2021, in which they have reiterated their earlier submissions.

Analysis and Decision

7. After hearing the learned counsels of the parties and perusal of documents placed on record, the only issue which arises for our consideration is, whether grid constraint can be considered as a natural force majeure event, resulting into reduction of the contracted capacity and thereby non-payment of tariff to the Petitioners by the Respondent.

8. The case of the Petitioners is based on the premise that the Petitioners declared availability up to the full contracted capacity as provided under PPA, for the period from November 2015 to March 2016 and that as per schedule 4 of the PPA, capacity charges are payable to it upon declaring the contracted capacity at normative availability (i.e. 85%) and not on the basis of actual energy scheduled from the grid by the procurer. Therefore, the Petitioners are entitled to recover the capacity charge without any reduction in the contracted capacity in terms of the tariff formula provided in schedule 4 of the PPA. The Petitioners have submitted that lower scheduling of energy by the Respondent on account of grid constraint cannot lead to amendment of the formula provided under schedule 4 of the PPA.

9. The Petitioners have also contended that the Respondent issued bill dispute notice against the monthly bill dated 04.12.2015 and 03.02.2016 for November 2015 and March 2016 respectively, beyond the limitation of 30 days i.e. on 29.01.2016 and 31.03.2016 which is in contravention of Article 8.6.2 of PPA. Therefore, the Respondent is barred to raise any dispute, whatsoever qua supply for months of November 2015 and March 2016.

10. Per contra, the Respondent has submitted that Article 9.3 of the PPA stipulates that any restrictions or curtailment of contracted capacity, imposed by

Power Grid Corporation of India Limited (PGCIL)/ Regional Load Despatch Centre (RLDC)/ State Load Despatch Centre (SLDC) in scheduling of power and thereby reducing the scheduled energy or contracted capacity to be injected by the seller at the Interconnection point is a force majeure event. Thus, payment of capacity charges for the reduced availability of power at the delivery point is not envisaged in the PPA. It is due to force majeure that the contracted quantum was not injected by the Petitioner at the interconnection point and that supply of lower than the contracted quantum was not on account of non-requisitioning by TANGEDCO at the relevant point of time. As per Article 9.7.1(c) of PPA, no tariff shall be paid by the procurer for contracted capacity or part thereof affected by a natural force majeure event for the duration of such natural force majeure event.

11. We have considered the submissions of the parties. Before we proceed further, it is necessary to set out the relevant provisions of the PPA dated 27.11.2013 executed between the parties, which are as under:

“4.2 Seller's Obligations

4.2.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:

a) obtaining all Consents, Clearances and Permits other than those obtained under Article 3.1.1 and maintaining all Consents, Clearances and Permits in full force and effect during the Term of this Agreement; The Seller shall further ensure that the Developer maintains all Consents, Clearances and Permits in full force and effects during the Term of this Agreement.

b) the commencement of supply of power, up to the Aggregated Contracted Capacity, to the Procurer not later than the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be, such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurer's scheduling and dispatch requirements throughout the Term of this Agreement;

4.4 Purchase and sale of Available Capacity and Scheduled Energy

4.4.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurer, **and the Procurer undertakes to pay Tariff for all of the Available Capacity up to the Contracted Capacity** and corresponding Scheduled Energy.

4.4.2 Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity up to the Contracted Capacity to the Procurer pursuant to Dispatch Instructions given by the Procurer.

8.6 Disputed Bill

8.6.1 If a Party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other Party by the Due Date, such Bill shall be taken as conclusive.

8.6.2 If a Party disputes the amount payable under a Monthly Bill, Provisional Bill or a Supplementary Bill, as the case may be, that Party shall, within thirty (30) days of receiving such Bill, issue a notice (the "Bill Dispute Notice") to the invoicing Party setting out: i) the details of the disputed amount; ii) its estimate of what the correct amount should be; and iii) all written material in support of its claim.

8.6.6 If the Parties do not amicably resolve the Dispute within fifteen (15) days of receipt of Bill Disagreement Notice pursuant to Article 8.6.4, the matter shall be referred to Dispute resolution in accordance with Article 14.

9.3 Force Majeure

9.3.1 A 'Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

Any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission /grid constraint shall be treated as Force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure)

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

.....

9.7.1 Subject to this Article 9:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.7;

- (c) For the avoidance of doubt, it is clarified **that no Tariff shall be paid by the Procurer for the part of Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the Developer**, for the duration of such Natural Force Majeure Event affecting the Developer. For the balance part of the Contracted Capacity, the Procurer shall pay the Tariff to the Seller, provided during such period of Natural Force Majeure Event affecting the Developer, the balance part of the Power Station is declared to be Available for scheduling and dispatch as per ABT for supply of power by the Seller to the Procurer;

In case of a Natural Force Majeure Event affecting the Procurer, no Tariff shall be paid by the Procurer to the Seller for the duration of such Natural Force Majeure Event affecting the Procurer;”

12. It is undisputed that Petitioner No.1 has entered into PPA dated 27.11.2013 and as per the PPA, the Petitioners are under obligation to supply contracted capacity of 150 MW to the Respondent and in turn, the Respondent is under obligation to pay tariff for all of the available capacity up to the contracted capacity.

13. After supply of power commenced from 22.10.2015, the Petitioner No. 1, for the period of November 2015 and December 2015, raised bills upon the Respondent on 04.12.2015 and 04.01.2016 respectively. The Respondent vide bill dispute notice no.1/2016 dated 29.01.2016 disputed these bills and sought revision of the calculation of the incentive by taking into consideration the period of grid constraint which occurred during the months of November 2015 and December 2015.

14. We observe that the Respondent vide its bill dispute notice no.1/2016 dated 29.1.2016 raised dispute on the following two counts:

- a) Revision of Incentive Calculation: The Petitioner had calculated the cumulative availability for the month of November, 2015 and December, 2015 as 100% without considering the grid constraint on 22.11.2015, 27.11.2015,

3.12.2015, 15.12.2015 and 26.12.2015. Therefore, the amount of incentive payment differs.

b) Difference in Energy Calculation: TANGEDCO had taken the contracted capacity quantum on 1.12.2015 as 121 MW from 00.00 hrs based on the approval accorded by PGCIL whereas the Petitioner had taken the contracted capacity of 121 MW from 7.00 hrs onwards. Therefore, there is difference in calculation of capacity charge payment.

15. The Petitioner vide its letter dated 10.03.2016 acknowledged the Respondent's letter dated 29.01.2016 and agreed for revision after calculating the monthly incentive payment.

16. Subsequently, for the supply of power for the months of January 2016, February 2016 and March 2016, the Petitioner No. 1 raised bills on 03.02.2016, 02.03.2016 and 02.04.2016 respectively. The Respondent issued bill dispute notice no.2/2016 dated 31.03.2016 with respect to bills for the months of January 2016 and February 2016, and bill dispute notice no.3/2016 dated 21.04.2016 with respect to bill for the month of March 2016. In bill dispute notices dated 31.03.2016 and 21.04.2016, the Respondent not only disputed the bills for months of January 2016, February 2016 and March 2016 but also disputed the earlier bills of November 2015 and December 2015. Vide the bill dispute notices dated 31.03.2016 and 21.04.2016, the Respondent, relying upon the provisions of Article 9.7.1(c) of the PPA contended that the grid constraint is a 'natural force majeure event' and thereby unilaterally reduced the contracted capacity. The relevant extract of letter dated 31.03.2016 (the Respondent issued similar letter dated 21.04.2016 pointing out discrepancies in the bill for the month of March 2016) is as under:

“During the month of Nov’15, Dec’15 and Jan’16 there were SLDC transmission constraints of 5,09,500 kwh, 40,51,125 kwh, 2,31,88,750 kwh in scheduling of power to TANGEDCO which is a Force majeure event affecting the seller. M/s GMRETL accounted the constraints and calculated the capacity charge.

9.7.1 (c) of PPA, Available Relief for a Force Majeure Event, reads as below:

‘c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurer for the part of Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the Developer, for the duration of such Natural Force Majeure Event affecting the Developer. For the balance part of the Contracted Capacity, the Procurer shall pay t h e Tariff to the Seller, provided during such period of Natural Force Majeure Event affecting the Developer, the balance part of the Power Station is declared to be Available for scheduling and dispatch as per ABT for supply of power by the Seller to the Procurer’

Clause 9.3.1 of PPA (para 2) reads as below:

‘Any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission /grid constraint shall be treated as Force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure)’

As per the above provision, TANGEDCO deducted the energy restricted due to transmission/ grid constraint in the contracted energy for the month of Nov’15, Dec’15 and Jan’16 in contract year FT 2015-16. Revised method of calculation has been adopted during processing of Jan’16 Energy Bill is enclosed as annexure.

Due to the above dispute, there is difference in the payment of Rs.58,92,618/- for the month of January’16 and Rs.4,35,09,744/- for the month of Feb’16.”

17. We, thus, note that the dispute that was raised by the Respondent vide bill dispute notice no.1/2016 related to calculation of incentive during the period of grid constraint, while vide bill dispute notice no. 2/2016 and bill dispute notice no.3/2016, the Respondent also contended that it was not liable to pay tariff for the period of grid constraint by relying on provisions of Article 9.7.1(c) read with Article 9.3.1 of PPA. Moreover, vide bill dispute notice no. 2/2016, the Respondent also raised disputes related to bills for the months of November 2015 and December 2015. While the Petitioner No. 1 had agreed to revise the bills vide its letter dated 10.03.2016 in response to bill dispute notice no.1/2016 (relating to calculation of incentives), it refused to revise the bills in response to bill dispute notice no. 2/2016 and bill dispute

notice no. 3/2016 as those related to payment of tariff and not only calculation of incentives.

18. We note that Article 9.3.1 of PPA provides that:

“In case of a Natural Force Majeure Event affecting the Procurer, no Tariff shall be paid by the Procurer to the Seller for the duration of such Natural Force Majeure Event affecting the Procurer”.

We also note that natural Force Majeure Events as per PPA are:

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

19. The Respondent has contended that it is not liable to pay tariff in case of grid constraint claiming the same to be a force majeure event. However, as we have noted in paragraph 18 above, as per Article 9.3.1 of PPA, no tariff is payable by the Respondent only for natural force majeure events and the definition of natural force majeure event does not include grid constraint.

20. We further note that Article 9.3.1 of PPA provides as under:

“any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission /grid constraint is a force majeure and does not cast liability on either side”.

21. We are of the considered view that when there is a specific provision in PPA that declares that grid constraint is a force majeure event, the contention of the Respondent that grid constraint is a natural force majeure event is not tenable. The Supreme Court in Civil Appeal No.11133 of 2011 (M/s Adani Power (Mundra) Ltd. Vs Gujarat Electricity Regulatory Commission and Ors.) vide judgement dated 02.07.2019 has observed as under:

“32. We further find that the Commission as well as the Appellate Tribunal has lost sight of one another important principle of law. This Court in the case of *J.K. Cotton Spinning and Weaving Mills Co. Ltd. Vs. State of Uttar Pradesh*, reported in AIR 1961 SC 1170, while construing the provisions of Clause 5(a) and Clause 23 of the U.P. Industrial Disputes Act and the U.P. Government Order issued under the U.P. Industrial Disputes Act, has observed thus:

“(10) Applying this rule of construction that in cases of conflict between a specific provision and a general provision the specific provision prevails over the general provision and the general provision applies only to such cases which are not covered by the special provision, we must hold that cl. 5(a) has no application in a case where a special provisions of cl. 23 are applicable.”

33. The said principle has been reiterated by this Court in its judgment in the case of *Maharashtra State Board of Secondary and Higher Secondary Education and Ors. Vs. Paritosh Bhupeshkumar Sheth and Ors.* reported in (1984) 4 SCC 27. Para 20 of the said judgment reads thus:

“20. We consider that the above approach made by the High Court is totally fallacious and is vitiated by its failure to follow the well established doctrine of interpretation that the provisions contained in a statutory enactment or in rules/regulations framed thereunder have to be so construed as to be in harmony with each other and that where under a specific section or rule a particular subject has received special treatment, such special provision will exclude the applicability of any general provision which might otherwise cover the said topic

34. Xxx”

22. In view of above, the contention of the Respondent that grid constraint is a natural force majeure event and that it is not liable to pay tariff for that period, is rejected. That being the case, relief contemplated in Article 9.7.1(c) of PPA is not available to the Respondent since such relief is only for natural force majeure events.

23. The Petitioner has also claimed late payment surcharge as envisaged under article 8.3.5 of the PPA. Article 8.3.5 reads as under:

‘8.3.5 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 Procurer to the Seller at the rate equal to SBI-PLR 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.’

24. In view of the above discussion, we are inclined to set aside the bill dispute notices dated 31.03.2016 and 21.04.2016 issued by the Respondent and accordingly, both the bill dispute notices are hereby set aside. Consequently, we hold that the Respondent is liable to make payment for capacity charges as per schedule 4 of PPA corresponding to the contracted capacity of 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016 irrespective of grid constraint and is also liable to pay late payment surcharge for the unpaid amount in terms of Article 8.3.5 of PPA. The Respondent is directed to make the payment along with late payment surcharge within one month of issuing of the Supplementary Bill incorporating the late payment surcharge by the Petitioner.

25. Having decided the matter against the Respondent, we find that there is no need to deal with contention of the Petitioners that the Respondent's claims are also time-barred as the Respondent did not issue bill dispute notices within the stipulated period of 30 days as required under Article 8.6.2 of PPA.

26. In terms of above, Petition No. 114/MP/2019 is disposed of.

Sd/
(Pravas Kumar Singh)
Member

Sd/
(Arun Goyal)
Member

Sd/
(I.S. Jha)
Member