

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.: 229/MP/2017

**Coram:
Shri P. K. Pujari, Chairperson
Shri A.K. Singhal, Member
Shri A.S. Bakshi, Member
Dr. M.K. Iyer, Member**

Date of Order: 20th of July, 2018

IN THE MATTER OF:

Petition under Section 79 (1) (f) read with Section 79 (1) (b) of the Electricity Act, 2003 for adjudication of disputes between NTPC Vidyut Vyapar Nigam Limited and Power Company of Karnataka Limited related to the procurement of power pursuant to a Tariff Based Competitive Bid Process undertaken by the Power Company of Karnataka Limited.

AND

IN THE MATTER OF:

NTPC Vidyut Vyapar Nigam Limited,
NTPC Bhawan, SCOPE Complex,
Institutional Area, Lodhi Road,
New Delhi – 110 003

....Petitioner

Versus

Power Company of Karnataka Limited,
KPTCL Building,
Kaveri Bhawan, Bangalore – 560 009

....Respondent

Parties Present:

Shri M.G. Ramachandran, Advocate, NVVN
Ms. Ranjitha Ramachandran, Advocate, NVVN
Ms. Anushree Bardhan, Advocate, NVVN
Shri Abhay Kumar Srivastava, Advocate, NVVN
Shri Nishant Gupta, NVVN
Shri Anurag Gupta, NVVN

ORDER

The Petitioner, NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as 'NVVN') is a Company incorporated under the provisions of the Companies Act,



1956. NVVN is an Electricity Trader undertaking purchase of electricity from the generating companies and re-sale of the electricity to the Procurers within the scope of the term 'Trading' as defined in Section 2 (71) of the Electricity Act, 2003. NVVN has been granted an Inter State Trading License as an Electricity Trader by the Commission.

2. The Respondent, M/s Power Company of Karnataka Limited (hereinafter referred to as 'PCKL') is also a Company incorporated under the provisions of the Companies Act, 2003. PCKL is a licensee under the Electricity Act, 2003 and has been procuring electricity on behalf of the State Distribution Companies in the State of Karnataka.

3. The Petitioner has made the following prayers:

“(a) Declare that the Respondent, Power Corporation of Karnataka Limited is not entitled to forfeit the amount of ₹64.00 lakh;

(b) Hold that the Petitioner is entitled to recover a sum of ₹77,65,295 (₹64.00 lakh plus ₹13,65,295/-) from PCKL towards principal as on the date of the filing of the present petition together with interest computed at the rate of 15% per annum from 01.01.2017 till the date of the filing of the petition and thereafter from the date of the filing of the Petition till the realization;

(c) Award cost of the petition; and

(d) Pass such further order or orders as the Commission may deem just and proper in the circumstances of the case.”

Brief Facts:

4. The Respondent invited bids for procurement of power for a quantum of 900 MW under short term arrangement for the period from 15.11.2016 to 30.11.2016 through tariff based competitive bidding process as per the Ministry of Power, Government of India “Guidelines for short term (i.e. for a period of more than one day to one year)



and such procurement of Power by Distribution Licensees through DEEP e-Bidding Portal.”

5. On 9.11.2016, the Petitioner submitted an online bid for 250 MW for supply of power during the relevant period and furnished an amount of ₹64.00 lakh as Earnest Money Deposit (hereinafter referred to as 'EMD') to retain the option to increase the quoted quantum of 250 MW of initial price offer during the e- reverse auction process.

6. On 12.11.2016, NVVN participated in the reverse auction. On 15.11.2016, PCKL issued a letter of award (hereinafter referred to as 'LOA') to NVVN for purchase of 100 MW (50 MW each from BALCO TPS & JVPL, Madhya Pradesh) for the period from 17.11.2016 (instead of 15.11.2016 as envisaged at the time of issuing the bid documents) to 30.11.2016. Accordingly, the contract was executed and the EMD submitted by NVVN had, therefore, become related as a binding security for 100 MW only and not for 400 MW. The amount out of EMD of ₹64.00 lakh which was in excess of the coverage of 100 MW was to be returned by PCKL to NVVN.

7. On 16.11.2016, NVVN wrote a letter to PCKL acknowledging the LOA issued and re-stated that after detailed analysis of the Open access corridor availability, NVVN listed out the steps taken to book the maximum available Open access corridor on priority basis.

8. On 17.11.2017 as against the request for approval of 100 MW (50MW+ 50 MW) Open Access scheduling applications of NVVN, SRLDC approved open access scheduling only to the extent of 25 MW (12.5 MW + 12.5 MW).



9. On 17.11.2016, NVVN wrote to PCKL appraising it of the situation, and accordingly offered to supply 37.5 MW from an alternate source. NVVN informed PCKL that it is trying its best to arrange the remaining 37.5 MW.

10. On 18.11.2016, PCKL gave its consent for change in power source for the quantum of 37.5 MW from M/s SembCorp Gayatri Power Ltd. in lieu of M/s JPVL for the period 19.11.2016 to 30.11.2016.

11. Subsequently on 21.11.2016, NVVN wrote to PCKL that the balance 37.5 MW can also be sourced from M/s SembCorp Gayatri Power Ltd in lieu of M/s BALCO TPS and sought for PCKL's confirmation for the change in the source of power.

12. On 22.11.2016, PCKL gave its consent for change in power source for the quantum of 37.5 MW from M/s SembCorp Gayatri Power Ltd in lieu of M/s BALCO TPS for the period 23.11.2016 to 30.11.2016. As against the above, NVVN was able to arrange Open Access of 30 MW of power to be supplied from M/s SembCorp Gayatri Power Limited.

13. NVVN as against contracted quantum of 100 MW could supply 92.5 MW (12.5 MW + 12.5 MW + 37.5 MW + 30 MW) of power to PCKL. The balance 7.5 MW was not arranged by NVVN on account of transmission corridor constraint.

14. While admitting the bills raised by NVVN for the said supply, PCKL forfeited the EMD of ₹64.00 lakh & directed DISCOMs, namely, BESCO, HESCO and CESCO to make payment accordingly.

15. On 4.01.2017 and 27.3.2017, NVVN wrote to PCKL for remittance of the EMD forfeited by PCKL.

16. On 13.4.2017, PCKL refused to consider the request made by NVVN for remittance of the EMD and forfeited the earnest money.

17. On 28.6.2017, NVVN again wrote to PCKL with regard to wrongful appropriation of EMD.

18. On 7.11.2017, the Petitioner filed the present petition before the Commission.

Submissions of Petitioner:

19. The Petitioner has submitted that it participated in the reverse auction and was declared as successful bidder. PCKL issued a letter of award for purchase of 100 MW for fourteen days i.e. the period from 17.11.2016 to 30.11.2016 (instead of 15.11.2016 to 30.11.2016 as envisaged at the time of issuing the bid documents). Accordingly, the contract was executed and the EMD submitted by NVVN had, therefore, become related as a binding security for 100 MW. NVVN wrote a letter to PCKL acknowledging the Letter of Award issued and informing the steps taken to book the maximum available Open access corridor on priority basis. As against the request for approval of 100 MW (50MW + 50 MW) Open Access scheduling applications of NVVN, SRLDC approved open access scheduling only to the extent of 25 MW (12.5 MW + 12.5 MW). Accordingly, in the interest of PCKL, on 17.11.2016, NVVN wrote to PCKL appraising it of the situation, and offered to supply 37.5 MW from an alternate source. On 18.11.2016, PCKL gave its consent for change in power source for the quantum of 37.5 MW from M/s SembCorp Gayatri Power Ltd in lieu of M/s JPVL for the period 19.11.2016 to 30.11.2016. Subsequently on 21.11.2016, NVVN wrote to PCKL that the balance 37.5 MW can also be sourced from M/s SembCorp Gayatri Power Ltd in lieu of M/s BALCO TPS and sought for PCKL's confirmation for the change in the source of power. On 22.11.2016, PCKL



gave its consent for change in power source for the quantum of 37.5 MW from M/s SembCorp Gayatri Power Ltd in lieu of M/s BALCO TPS for the period 23.11.2016 to 30.11.2016. However, as against the above, it was able to arrange the open access of 30 MW of power to be supplied from M/s SembCorp Gayatri Power Limited.

20. NVVN has submitted that it had arranged for open access and supply of 92.5 MW of power (12.5 +12.5+ 37.5+ 30) to be available to PCKL as against 100 MW for which the letter of award was issued. The balance 7.5 MW was not arranged for reasons beyond the control of NVVN and on account of transmission corridor constraints. NVVN had submitted that it had arranged for substantial part (92.5% of the quantum) of the quantum of electricity for which the letter of award was given to NVVN by PCKL.

21. NVVN has submitted that Article 6 of the RFP (bidding document) stipulates as under:-

“6. BIDDING PROCESS

6.1 PKCL has issued an RfP for procurement of power on short term basis as per the details mentioned in Article 3 above and the RfP has been uploaded on the DEEP e-Bidding portal.

6.2 EARNEST MONEY DEPOSIT (EMD) / BANK GUARANTEE (BG)

6.2.1. The Bidders are required to submit EMD for the maximum capacity which they wish to offer (in single bid or sum total of multiple bids) @ ₹30,000/- per MW per month on RTC (30 days, 24 hours) basis and same shall be reduced on pro-rata basis in case bids are invited on hourly basis, in the form of Bank Guarantee /e-Bank Guarantee issued by any Nationalized / Scheduled Bank or Electronically Transfer through payment gateway provided by MSTC Ltd. in the portal, if available.

For Example: For a requirement of 1 MW for 15 days for 4 hours, the EMD shall be ₹30,000 x (15 days / 30 days) x (4 hrs. / 24 hrs.) = ₹2,500/-

6.2.2. The original EMD needs to be submitted before the opening of the Non-Financial Technical Bid to PCKL.

6.2.3. The EMD shall be forfeited:



a. If Bidder withdraws bid during Bid Validity Period except as provided in the Guidelines.

b. For non-submission of Contract Performance Guarantee as specified in this RFP document, by Successful Bidder(s).

c. EMD shall be forfeited if the successful bidder fails to obtain transmission corridor / open access approval to deliver the awarded contracted quantum at delivery point during the contract period.

6.2.4. The EMD shall be refunded to the unsuccessful Bidders within 10 days of expiry of Bid validity period.

6.2.5. The EMD of the Successful Bidder(s) shall be refunded after furnishing the Contract Performance Guarantee (CPG).”

22. NVVN has submitted that Article 11 of the RFP (bidding document) stipulates as under:-

“11. E – REVERSE AUCTION (e-RA)

11.1 The shortlisted Bidders after elimination will be intimated individually by system generated emails only.

11.2 The Reverse auction should start within 120 minutes of opening of Initial Price Offers and shall continue for a period of next 120 minutes without any extension (automatic or otherwise).

11.3 During the Reverse Auction the Bidders will have the option of reducing the tariff quoted by them in decrements of one paise or multiples thereof and to increase the quantum quoted by them by 1 MW or multiples thereof. During the Reverse Auction the prevailing Lowest Tariff would be visible to all the Bidders.

11.4 The Bidders will have the option to increase the quantum of power upto corresponding to the value of EMD submitted along with IPO, but decrease the Tariff during the e-Reverse Auction process.”

23. NVVN has submitted that Article 23 of the RFP (bidding document) stipulates as under:-

“23. PAYMENT OF LIQUIDATED DAMAGES FOR FAILURE TO SUPPLY THE INSTRUCTED CAPACITY.

23.1 Both The parties would ensure that actual scheduling does not deviate by more than 15% of the contracted Power as per the approved open access on monthly basis.

23.2 In case deviation from Procurer side is more than 15% of either contracted energy for which open access has been allocated or the energy corresponding to actual availability, whichever is lower on monthly basis, Procurer shall pay



compensation at 20% of Tariff per kWh for the quantum of shortfall in excess or permitted deviation of 15% while continuing to pay open access charges as per the contract i.e. from delivery point onwards.

23.3 In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Bidder shall pay compensation to Procurer at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.”

24. NVVN has submitted that in the facts and circumstances mentioned above, PCKL had no right to appropriate the EMD of ₹64.00 lakh and such appropriation is contrary to the provisions of the Bid Documents floated by PCKL. In terms of Article 6.2.3 of the Bid Documents, the forfeiture of EMD could occur only under specified circumstances as stated in the said Article, inter alia, if there is a failure on the part of NVVN to obtain the transmission corridor/Open Access approval. Therefore, the issue of forfeiture would arise only if the transmission corridor/open access is otherwise available and there is a default/ failure attributable to NVVN. In the present case, non-availability of transmission corridor/open access approval is not on account of any failure on the part of NVVN but for reasons beyond the control. In any event the EMD can be forfeited only to the extent of the transmission corridor/ open access being not arranged for the awarded contracted quantum.

25. NVVN has submitted that Article 6.2.3 (c) stipulates that the forfeiture is related to *“deliver the awarded contracted quantum at the delivery point during the contract period.”* i.e. the forfeiture is related to the extent the transmission corridor/ open access approval being not available to deliver the quantum. Even if it is assumed that there was a failure on the part of NVVN to obtain transmission corridor/ open access approval qua the contracted quantum of 100 MW, the same is only to the extent of 7.5 MW. Therefore, EMD proportionate to 7.5 MW can only be appropriated by PCKL at the maximum i.e. $(7.5 \times 0.3 \times 14/30)$ ₹1.05 lakh and the balance amount of



₹62.95 lakh needs to be returned to NVVN. There is no cause for PCKL to appropriate the entire Earnest Money Deposit of ₹64.00 lakh. Hence, the maximum liability of NVVN even assuming alternatively but not admitting that there was a failure on the part of NVVN is ₹1.05 lakh only.

26. NVVN has submitted that despite the non-liability of NVVN to have any part of the EMD to be forfeited, PCKL proceeded to {a} forfeit the entire amount of ₹64.00 Lacs; and {b} in addition thereto recovered a further sum of ₹13,65,295/- (Rupees Thirteen lakh Sixty Five Thousand and Two Hundred Ninety Five) for shortfall in supply of electricity including adjustment for transmission losses, from the payments due to NVVN from the various bills raised on 1st December 2016 for supply of electricity. The PCKL has wrongly adjusted the amount of ₹13,65,295/- on account of shortfall in the supply of electricity and transmission losses as the shortfall in supply is to be counted only with regard to quantum for which the open access is taken i.e. 92.5% and not for 100%. The shortfall of 7.5% (100% - 92.5%) is subject only to forfeiture of EMD under Article 6.2.3 {c} of the bid terms for not obtaining the Open Access and the same cannot be subjected again to liquidated damages under Article 23 of the bid terms. A claim for liquidated damages for 7.5% is double jeopardy and patently illegal. Further, the entire claim for liquidated damages of ₹13,65,295/- is not admissible as the shortage in the supply is within the scope of 15% of the contracted energy namely less than 15 MW. The claim of liquidated damages by PCKL is therefore contrary to Article 23 and is not sustainable.

27. NVVN has submitted that PCKL admitted Open Access charges after deducting the transmission withdrawal losses. Open Access charges are to be paid as per corridor quantum booked and transmission losses cannot be deducted from it. The



matter was taken up with PCKL. Vide letter dated 16.9.2017, PCKL has admitted the total claim for ₹18,59,530/- against the Open Access charges. However, the payment of ₹3,75,650/- out of ₹18,59,530/-, against Open Access charges, is still pending. Therefore, PCKL is not entitled to the forfeiture of the earnest money deposit or liquidated damages as claimed by it. NVVN has submitted that PCKL is required to return to it the entire amount of ₹64.00 lakh and also ₹13,65,295 together with interest at the rate of 15% per annum from the date of the forfeiture and adjustment i.e. 31.12.2016 till the date of return of the amount to NVVN and further liable to pay the cost of the proceedings.

28. NVVN has submitted that the Commission has the jurisdiction to entertain the present petition as the procurement of power proposed by PCKL under the Tender Documents was enabling the bidders to supply power on Inter State basis with the generating companies situated outside the State of Karnataka. In terms of the decision of the Hon'ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors.* in Civil Appeal No. 5399-5400 of 2016 decided on 11.04.2016, the Commission has the jurisdiction in the matter.

Submissions of Respondent:

29. The hearing in the Petition was held on 22.02.2018 and 19.04.2018 The extracts of the Record of Proceedings held on 19.04.2018 is as under:

“3. None appeared on behalf of the Respondent, PCKL. On a specific query by the Commission if copy of the Petition was served on the Respondent, the learned counsel for the Petitioner replied in the affirmative. The Commission however observed that the Respondent may be given time to file its reply/written submissions in the matter, as a last chance.

4. Accordingly, the Commission directed the Respondent to file its reply/ written submissions, on affidavit, on or before 14.5.2018, with advance copy to the Petitioner who shall file its rejoinder/response by 22.5.2018. No extension of time shall be granted for any reason whatsoever. In case no reply/written submissions are filed



within the due date mentioned, the matter shall be decided based on available records.”

30. The Respondent has submitted its reply on 31.05.2018. PCKL has submitted that it is a Special Purpose Vehicle (SPV) of the Karnataka Distribution companies. It is responsible for capacity addition by way of setting up of new power projects through bidding process as well as long term, medium term and short term procurement of power procuring power from various sources including purchase of power through Energy Exchange, bilateral transactions.

31. PCKL has submitted that it invited bids for procurement of power for a quantum of 900 MW under short-term arrangement for the period from 15.11.2016 to 30.11.2016 through tariff based competitive bidding process as per the Ministry of Power Guidelines for short term and such procurement of power by Distribution licensees through DEEP e-bidding portal, in view of the urgent requirement of power in the State of Karnataka. It has invited tender on the request made by the Distribution Companies in Karnataka – BESCO (500MW), HESCO (200MW) & CESC-Mysore (200MW) because of deficit of power. The deficit in power was due to the following reasons:

- (a) Hydro Generation had been restricted to 10 MU per day, due to lesser hydro availability owing to poor monsoon.
- (b) Though BTPS-3 was commissioned, the unit was under unscheduled outages.
- (c) YTPS unit-1 which was scheduled for commissioning in the month of September -16 was not yet commissioned.



(d) Considerable increase in Demand as against Projected ESCOMs Requirement.

(e) There was inconsistency in quantum to be cleared in the power exchanges.

32. PCKL submitted that the bids were to be invited from the companies who can supply readily available power upto delivery point to meet the base load requirements of the Karnataka Distribution Companies. However, in order to ensure the availability of full tender quantum to meet the shortage of power in the State, it sought deviations to the "Tariff based Bidding Guidelines" notified by Ministry of Power for procurement of short term power (i.e. for a period of more than one day to one year) from KERC and the same stands approved. The additional Article 6.2.3 (c) as a deviation in the bidding guidelines was also approved by KERC which stipulates as under:

"EMD shall be forfeited if the successful bidder fails to obtain transmission corridor/open access approval to deliver the awarded contracted quantum at delivery point during the contract period".

33. PCKL has submitted that it was the responsibility of the Petitioner to ensure the availability of transmission corridor. According to the RFP, full LOA quantum was to be made available to the Respondent irrespective of the constraints. The tender for short term purchase was issued by the Respondent to meet the urgent requirement within the State and therefore, there was no scope of any relaxations being sought by the bidders. The Petitioner had failed to appreciate the same and had not checked the corridor availability and had not anticipated that the entire quantum could not be made available due to corridor constraints. Thus, overlooking of the tender conditions by the Petitioner deprived the beneficiaries in availing the full contracted quantum. Substantial quantum which was supplied was allowed by PCKL



to be arranged from the alternate sources as the Petitioner could obtain open access approval ranging from 25 to 32.5 MW of power out of the 100 MW.

34. On 09.11.2016, the Petitioner submitted an online bid for 250 MW capacity for supply of power during the relevant period and furnished an amount of ₹64.00 lakh as EMD to retain the option to increase the quoted quantum of 250 MW of initial price offer to 400 MW during the e- reverse auction process. The Petitioner qualified under bucket filling method for offering 100 MW and LOA was issued to the Petitioner for supplying 100 MW quantum power after duly obtaining approval from the Karnataka Electricity Regulatory Commission.

35. The Respondent has submitted that in the LOA issued to the Petitioner, the quantum indicated is as detailed below:

Source	Region	Quantum in MW	Rate in ₹/unit @ KPTCL Periphery
Vedanta Ltd. (BALCO, Chhattisgarh)	WR	50	3.75
JVPL, Madhya Pradesh	WR	50	4.0
TOTAL		100	

36. The Respondent has submitted that the Petitioner could get open access approval only for 12.5 MW from M/s. JPVL, Madhya Pradesh from 19.11.2016 to 30.11.2016 and requested it to provide consent to supply balance 37.5 MW power from alternate source of M/s. Sembcorp Gayatri Power Ltd. located in Andhra Pradesh. The request of the Petitioner was allowed. Subsequently, on 21.11.2016, the Petitioner again requested PCKL to provide consent to supply balance 37.5 MW Round the Clock (RTC) Power from alternate source of M/s. Sembcorp Gayatri Power Ltd. located in Andhra Pradesh from 23.11.2016 to 30.11.2016 against the generation source of M/s. Vedanta Ltd., BALCO, Chattisgarh. Again the request of



the Petitioner was acceded to. Hence, the Petitioner had accorded approval for supply of power from alternate sources to an extent of total 75 MW whereas the Petitioner applied for open access only for 30 MW in respect of M/s. Vedanta Ltd (BALCO), Chattisgarh.

37. The Respondent has submitted that the energy that should have been supplied as per the alternative supply approval communicated by the Respondent was 7063920 kWh (period from 23.11.2016 to 30.11.2016) against which the energy supplied by the Petitioner was only 3503630 kWh. The amount deducted at the rate of 20% of the tariff in accordance with Article 23 works out to ₹13,65,295/-. The break-up of the scheduled and supplied energy is given as under:

Energy Scheduled from original source (A)	4535392 kWh
Energy supplied from alternative source (B)	3503630 kWh
Quantum of Energy should have been scheduled including approval of alternative source @ delivery Point	11599313 kWh
85% of above (approved quantum from original source and expected supply from alternative source of 75 MW)	9859416 kWh
Less: Actual energy scheduled @ delivery Point including supply of original source and alternative source	8039022 kWh (A + B)
Difference in energy	1820393 kWh
Liquidated damages@ 20% of the tariff (₹ 3.75 per *20%)	₹1365295

38. The Petitioner has claimed reimbursement of open access charges claimed beyond delivery point as ₹18,80,530/- (i.e. KPTCL Transmission and SLDC Charges). The Respondent has allowed ₹15,88,930/- to the Distribution Companies for reimbursement of open access charges paid by the Petitioner beyond delivery point. The same has been paid by the Distribution Companies. The details for reimbursement of open access charges is as detailed below:

ESCOMs	BESCOM	HESCOM	CESC	Total (Amt. in ₹)
Reimbursement of open access charges	8,82,810	3,53,060	3,53,060	15,88,930

39. Out of ₹18,80,530/- claimed by the Petitioner, the amount of ₹2,91,600/- has been disallowed due to revision/cancellation of scheduled/approved quantum by the Petitioner. Therefore, there is no amount which is due to be paid by PCKL to the Petitioner.

40. The Respondent has submitted that in view of the fact that the Petitioner could not obtain the necessary open access approvals/transmission corridor for the contracted capacity, the EMD of the Petitioner was forfeited in accordance with Article 6.2.3 of the RFP, as reproduced below:

“6.2.3 The EMD shall be forfeited:

- a. If Bidder withdraws the bid during Bid validity period except as provided in the Guidelines.
- b. For non-submission of Contract Performance Guarantee as specified in this RFP document, by Successful Bidder(s).
- c. EMD shall be forfeited if the successful bidder fails to obtain transmission corridor/open access approval to deliver the awarded contracted quantum at delivery point during the Contract period.”

41. The Respondent has submitted that there was no provision in the RFP regarding the EMD being in respect of a particular quantum, and it was to secure the fulfillment of conditions of RFP by the bidder. Therefore, the entire EMD of ₹64 lakh deposited by the Petitioner was supposed to be forfeited. The Respondent has submitted that it has forfeited the EMD of ₹64 lakh in accordance with the provisions of the RFP.

42. The Respondent has further submitted that the deduction of ₹13.65 lakh towards liquidated damages has also been made according to Article 23 of the RFP. Article 23 of the RFP stipulates as under:

“23. PAYMENT OF LIQUIDATED DAMAGES FOR FAILURE TO SUPPLY THE INSTRUCTED CAPACITY.

23.1 Both the parties would ensure that actual scheduling does not deviate by more than 15% of the contracted Power as per the approved open access on monthly basis.

23.2 In case deviation from Procurer side is more than 15% of either contracted energy for which open access has been allocated or the energy corresponding to actual availability, whichever is lower on monthly basis, Procurer shall pay compensation at 20% of Tariff per kWh for the quantum of shortfall in excess or permitted deviation of 15% while continuing to pay open access charges as per the contract i.e. from delivery point onwards.

23.3 In case deviation from Seller side is more than 15% of contracted energy for which open access has been allocated on monthly basis, Bidder shall pay compensation to Procurer at 20% of Tariff per kWh for the quantum of shortfall in excess of permitted deviation of 15% in the energy supplied and pay for the open access charges to the extent not availed by the Procurer.”

43. The Respondent has submitted that the deduction of EMD and levy of liquidated damages has been made strictly in terms of the bidding documents. The short term power purchase tender was issued by PCKL to meet the urgent requirement in the State and therefore, only the bidders who could supply readily available power upto delivery point were called to participate and bidders (including the Petitioner) were bound to strictly follow the terms and conditions of the RFP and other bidding documents without seeking any deviations and relaxations. Despite the said scenario, the proposal of the Petitioner for deduction of only ₹14 lakh pertaining to the 100 MW contracted quantum and the refund of ₹50 lakh to the Petitioner is under consideration.

44. The Respondent has submitted that according to Article 25.1 of the RFP, the jurisdiction regarding bidding documents has been conferred on the Courts in the



State in which the Respondent has its headquarters. The said Article 25.1 of the RFP reads as follows:

“25.1 All matters arising out of or in connection with the Bid document and/or the bidding process shall be governed by and construed in accordance with Indian Law and the Courts in the State in which PCKL has its headquarters shall have exclusive jurisdiction.”

45. The Respondent has submitted that in the LOA, it is clearly mentioned that all the terms and conditions of the RFP shall be applicable. Therefore, the jurisdiction has been agreed to be conferred on KERC in view of the bidding documents.

46. The Respondent has submitted that *Energy Watchdog Judgment {2017 (14) SCC 80}* of the Hon'ble Supreme Court as cited by the Petitioner also takes note of the agreement of parties about the jurisdiction of the State Commission in light of Section 64(5) of the Electricity Act, 2003 and observes as follows:

“29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non obstante Article which would indicate that in all cases involving inter-State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

47. The Respondent has submitted that the KERC has the jurisdiction to adjudicate upon the present dispute as vested with KERC in view of terms and conditions in the Bidding documents. The Respondent has submitted that in view of the above the petition may be dismissed.

Analysis and Decision:

48. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records. The brief facts of the case are that the Respondent invited bids for procurement of power for a quantum of 900 MW under short term arrangement for the period from 15.11.2016 to 30.11.2016 through tariff based competitive bidding process as per the Ministry of Power, Government of India 'Guidelines for short term (i.e. for a period of more than one day to one year) Procurement of Power by Distribution Licensees through Tariff based bidding process". The Petitioner has submitted an online bid for 250 MW for supply of power during the relevant period and furnished an amount of ₹64.00 lakh as Earnest Money Deposit. NVVN was declared as successful bidder and PCKL issued a letter of award for purchase of 100 MW (50 MW from BALCO TPS & 50 MW from JVPL, Madhya Pradesh) for the period from 17.11.2016 (instead of 15.11.2016) to 30.11.2016. The contract was executed and the EMD, therefore, became related as a binding security for 100 MW. NVVN informed PCKL about the steps taken to book the maximum available Open Access corridor on priority basis. However, as against the request for approval of 100 MW (50MW+ 50 MW) Open Access scheduling applications of NVVN, SRLDC approved Open Access scheduling only to the extent of 25 MW (12.5 MW + 12.5 MW). Accordingly, NVVN offered to supply 75MW (37.5 MW + 37.5 MW) from an alternate source. On 18.11.2016, PCKL gave its consent for change in power source for the quantum of 37.5 MW from M/s SembCorp Gayatri Power Ltd in lieu of M/s JPVL for the period 19.11.2016 to 30.11.2016. On 22.11.2016, PCKL gave its consent for change in power source for the quantum of 37.5 MW for the period 23.11.2016 to 30.11.2016 to be sourced again from M/s SembCorp Gayatri Power Ltd in lieu of M/s BALCO TPS. However, NVVN applied



for Open Access only to the tune of 30 MW in respect of M/s BALCO, Chattisgarh and revised/ curtailed the approved quantum from 28.11.16 onwards. Thus, NVVN could arrange for Open Access and supply 92.5 MW of power (12.5 +12.5+ 37.5+ 30 MW) as against 100 MW for which the letter of award was issued. The balance 7.5 MW remained as shortfall. As per NVVN, the balance power of 7.5 MW could not be arranged for reasons beyond their control and on account of transmission corridor constraints. PCKL proceeded to forfeit the entire amount of ₹64.00 lakh and in addition thereto recovered a further sum of ₹13,65,295/- for shortfall in supply of electricity including adjustment for transmission losses, from the payments due to NVVN from the various bills raised on 1st December 2016 for supply of electricity.

49. NVVN has submitted that PCKL had no right to appropriate the EMD of ₹64.00 lakh and such appropriation is contrary to the provisions of the Bid Documents floated by PCKL. In terms of Article 6.2.3 of the Bid Documents issued, the forfeiture of EMD could occur only under specified circumstances as stated in the said Article, inter alia, if there is a failure on the part of NVVN to obtain the transmission corridor/Open Access approval. Therefore, the issue of forfeiture would arise only if the transmission corridor/open access is otherwise available and there is a default/failure attributable to NVVN. In the present case, the non-availability of transmission corridor/open access approval is not on account of any failure on the part of NVVN but for reasons beyond the control. In any event, the EMD can be forfeited only to the extent of the transmission corridor/ open access being not arranged for the awarded contracted quantum. It has further submitted that Article 6.2.3 (c) stipulates that the forfeiture is related to *“deliver the awarded contracted quantum at the delivery point during the contract period.”* i.e. the forfeiture is related to the extent the transmission corridor/ open access approval being not available to deliver the



quantum. However, even if, it is assumed that there was a failure on the part of NVVN to obtain transmission corridor/ open access approval qua the contracted quantum of 100 MW, the same is only to the extent of 7.5 MW. Therefore, EMD proportionate to 7.5 MW can only be appropriated by PCKL at the maximum i.e. $(7.5 \times 0.3 \times 14/30)$ ₹1.05 lakh and the balance amount of ₹62.95 lakh needs to be remitted back to NVVN. There is no cause for PCKL to appropriate the entire Earnest Money Deposit of ₹64.00 lacs. Hence, the maximum liability of NVVN is upto ₹1.05 lakh only. Furthermore, PCKL had wrongly adjusted the amount of ₹13,65,295/- on account of shortfall in the supply of electricity and transmission losses. The shortfall in supply is to be counted only with regard to quantum for which the Open Access is taken i.e. 92.5% and not for 100%. The shortfall of 7.5% (100% - 92.5%) should be subjected only to forfeiture of EMD under Article 6.2.3 (c) of the bid terms for not obtaining the Open Access and the same cannot be subjected again to liquidated damages under Article 23 of the bid terms. A claim for liquidated damages for 7.5% is double jeopardy and patently illegal and is not sustainable. Vide letter dated 16.9.2017 PCKL has admitted the total claim for ₹18,59,530/- against the Open Access charges. However, the payment of ₹3,75,650/- out of ₹18,59,530/- against Open Access charges, is still pending. Therefore, PCKL is not entitled to the forfeiture of the earnest money deposit or liquidated damages as claimed by it. NVVN has further submitted that the Commission has the jurisdiction to adjudicate on the present petition. As per the Tender Documents, the bidders were to supply power on Inter State basis with the generating companies situated outside the State of Karnataka. NVVN has placed its reliance on the decision of the Hon'ble Supreme Court in *Energy Watchdog v. Central Electricity Regulatory Commission and Ors.* in Civil Appeal No. 5399-5400 of 2016 decided on 11.04.2016.



50. **Per Contra**, PCKL has submitted that the bids were to be invited from the companies who can supply readily available power upto delivery point to meet the base load requirements of the Karnataka Distribution Companies. However, in order to ensure the availability of full tender quantum to meet the shortage of power in the State, it sought deviations to the “Tariff based Bidding Guidelines” notified by Ministry of Power for procurement of short term power (i.e. for a period of more than one day to one year) from Karnataka Electricity Regulatory Commission and the same stands approved. According to the RFP, full LOA quantum was to be made available to the NVVN irrespective of the constraints. The tender for short term purchase was issued by the PCKL to meet the urgent requirement within the State and therefore, there was no scope of any relaxations being sought by the bidders. NVVN was duty bound to check the corridor availability but the Petitioner failed to check the corridor availability and also could not anticipate that the entire quantum could not be made available due to corridor constraints. PCKL submitted that the total energy scheduled to be supplied was 9859416kWh (i.e. 85% of 11599313 kWh) against which the total energy supplied by the NVVN was only 8039022 KWh. The amount of the differential was 1820393 kWh. Therefore, the Liquidated Damages were levied which works out to ₹13,65,295/-in accordance with Article 23 of the bidding document. PCKL has allowed ₹15,88,930/- to the Distribution Companies for reimbursement of open access charges paid by the Petitioner beyond delivery point. The same has been paid by the Distribution Companies. Out of ₹18,80,530/- claimed by the Petitioner, the amount of ₹2,91,600/-has been disallowed due to revision/cancellation of scheduled/approved quantum by the Petitioner. Therefore, there is no amount which is due to be paid by PCKL to the Petitioner. There is no provision in the RFP regarding the EMD being in respect of a particular quantum,



and it was to secure the fulfillment of conditions of RFP by the bidder. Therefore, the entire EMD of ₹64.00 lakh deposited by the Petitioner was supposed to be forfeited in accordance with the provisions of the RFP. The Respondent has further submitted that the deduction of ₹13.65 lakh towards liquidated damages has also been made according to Article 23 of the RFP. PCKL submitted that the short term power purchase tender was issued by it to meet the urgent requirement in the State and therefore, the only the bidders who could supply readily available power upto delivery point were called to participate. Bidders (including NVVN) were bound to follow the terms and conditions of the RFP and other bidding documents without seeking any deviations and relaxations. Despite the said scenario, the proposal of the Petitioner for deduction of only ₹14 lakh pertaining to the 100 MW contracted quantum and the refund of ₹50 lakh to the Petitioner is under consideration. PCKL has further submitted that according to Article 25.1 of the RFP, the exclusive jurisdiction regarding bidding documents has been conferred on the Courts in the State in which the Respondent has its headquarters. In the LOA, it is stated that all the terms and conditions of the RFP shall be applicable. Therefore, the jurisdiction has been agreed to be conferred on KERC as per the bidding documents. PCKL has placed its reliance on *Energy Watchdog Judgment {2017 (14) SCC 80}* of the Hon'ble Supreme Court which takes note of the agreement of parties about the jurisdiction of the State Commission in light of Section 64(5) of the Electricity Act, 2003. PCKL has submitted that the KERC has the jurisdiction to adjudicate upon the present dispute arises out of the Bidding documents and therefore, the petition may be dismissed.

51. The Commission observes that none appeared on behalf of the Respondent throughout the proceedings. However, the Commission still allowed PCKL to file its



reply. PCKL filed its reply on 31.05.2018. From the submissions of the parties, the following issues arise before this Commission:

- (a) **Issue No. 1:** Whether the Commission has the jurisdiction to adjudicate in the present Petition?
- (b) **Issue No. 2:** Whether the Respondent is entitled to forfeit the Earnest Money Deposit amounting to ₹64.00 lakh as deposited by the Petitioner?
- (c) **Issue No. 3:** Whether the Respondent is entitled to recover a sum of ₹13,65,295/- as Liquidated Damages for the shortfall in supply of electricity including adjustment for transmission losses, from the payments due to the Petitioner from the various bills raised on 1st December 2016 for supply of electricity?
- (d) **Issue No. 4:** Whether the Petitioner is entitled to recover a sum of ₹77,65,295/- (₹64.00 lakh plus ₹13,65,295/-) from the Respondent towards principal as on the date of the filing of the present petition together with interest computed at the rate of 15% per annum from the date of the filing of the petition till realization?

52. No other issue was pressed or claimed.

53. We may now discuss the issues one by one:

Issue No. 1: Whether the Commission has the jurisdiction to adjudicate in the present Petition?

54. The Petitioner has submitted that the Commission has the jurisdiction to adjudicate on the petition as the procurement of power proposed by PCKL under the



Tender Documents was enabling the bidders to supply power on inter-State basis with the generating companies situated outside the State of Karnataka. NVVN is an Inter State Trading Licensee. The transaction envisaged was, therefore, procurement of power from the generating stations situated outside the State of Karnataka and supply of the same to PCKL on Inter State basis. Whereas the Respondent has submitted that according to Article 25.1 of the RFP, the jurisdiction regarding bidding documents has been conferred on the Courts in the State in which the Respondent has its headquarters. In the 'letter of award' it is clearly mentioned that all the terms and conditions of the RFP shall be applicable. Since, the Petitioner has accepted the Terms and conditions of the RFP therefore, the jurisdiction has been agreed to be conferred on KERC in view of the bidding documents. Both the Petitioner and the Respondent have placed their reliance on the Judgement of the Hon'ble Supreme Court in the case of *Energy Watchdog Judgment {2017 (14) SCC 80}*.

55. The Commission observes that in the instant petition, in view of the urgent requirement of power in the State of Karnataka, PCKL invited bids for the Short term (for the period from 17.11.2016 to 30.11.2016) procurement of power through tariff based competitive bidding process through DEEP e-bidding portal from Generators/Trading Licensees/ State Utilities/ Captive Power Plants/ Co-generators / Distribution Licensees, The scheme was ratified by KERC vide its letter No. KERC/S/F-32/Vol-11/2016-17/1976 dated 14.11.2016. It is observed that PCKL originally approved the procurement of RTC power for the quantum of 50 MW from M/s Vedanta Ltd (BALCO, Chattisgarh) and 50 MW from JVPL, Madhya Pradesh. Further, since SRLDC approved Open Access scheduling only to the extent of 25 MW the procurement of RTC power for the quantum of 75 MW from an alternate



source M/s SembCorp Gayatri Power Ltd situated in Andhra Pradesh was also allowed.

56. The Commission would like to examine as to whether the arrangement for sale/purchase as in the present petition qualifies as Composite Scheme within the meaning of Section 79(1)(b) of the Electricity Act , 2003. The issue of Composite Scheme has been dealt with in detail by the Hon'ble Supreme Court in the case of *Energy Watchdog Judgment {2017 (14) SCC 80}*. The relevant extract is as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79 itself in Sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in Sub-clauses (a), (b), and (d), and "intra-state" in sub-clause (c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the Appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the Appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State.

...

24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a "composite scheme". This makes it clear that the expression "composite scheme" does not have some special meaning-it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.”

57. From the above it is observed that if under a scheme there is generation or sale of electricity in more than one State, then the same is covered under the expression of the “composite scheme” and is consequently under the jurisdiction of the Central



Commission. In the instant case PCKL approved the procurement of RTC power from M/s Vedanta Ltd (BALCO), Chattisgarh), JVPL, Madhya Pradesh and M/s SembCorp Gayatri Power Ltd., Andhra Pradesh. Further, the power generators were not located within the State of Karnataka and the power was being sourced from other States viz. Madhya Pradesh, Chattisgarh and Andhra Pradesh. Thus, it is the clear case of composite scheme and the Commission is of the view that it has the jurisdiction to adjudicate the matter.

58. Further, the Respondent has also placed its reliance on Article 25.1 of the RFP alongwith Para no. 27 of the *Energy Watchdog Judgment {2017 (14) SCC 80}*.

Article 25.1 of the RFP stipulated as under:

“25.1 All matters arising out of or in connection with the Bid document and/or the bidding process shall be governed by and construed in accordance with Indian Law and the Courts in the State in which PCKL has its headquarters shall have exclusive jurisdiction.”

59. The Respondent has submitted that in the LOA, it is clearly mentioned that all the terms and conditions of the RFP shall be applicable. Therefore, the jurisdiction has been agreed to be conferred on KERC in view of the bidding documents. As per the Respondent, the jurisdiction of KERC is further established in view of the provision of the Section 64(5) of the Act. The Respondent has submitted that the Hon'ble Supreme Court in the case of *Energy Watchdog Judgment {2017 (14) SCC 80}* as cited by the Petitioner also takes note of the agreement of parties about the jurisdiction of the State Commission in light of Section 64(5) of the Electricity Act, 2003 and observes as follows:

“29. That this definition is an important aid to the construction of Section 79(1)(b) cannot be doubted and, according to us, correctly brings out the meaning of this expression as meaning nothing more than a scheme by a generating company for generation and sale of electricity in more than one State. Section 64(5) has been relied upon by the appellant as an indicator that the State Commission has



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

60. The Commission observes that in its Order dated 21.02.2018 in Petition No. 131/MP/2016 in the case titled *GMR-Kamalanga Energy Limited & Ors. Vs. Dakshin Haryana Bijli Vitran Nigam Limited & Ors.* it was held as under:

“22. The matter has been examined. Section 64(5) of the 2003 Act provides as under:

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

23. This provision clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission based on the application of the parties concerned even in cases involving inter-state supply. In our view, Section 64(5) has no application in cases of tariff discovered under competitively bidding process and adopted by the Commission under Section 63 of the 2003 Act. As Section 64 provides for the procedure for determination of tariff under Section 62, the Section 64(5) would be applicable only in respect of determination of tariff under Section 62 of the 2003 Act. Further, the submission of the Bihar State Power Companies that the parties had invoked the jurisdiction of the State Commission and hence the jurisdiction of the Central Commission is not in conformity with Section 64(5) is not tenable and the same is contrary to the facts on record. It is noticed that the Bihar State Power Companies had invoked the jurisdiction of the State Commission and had filed Case No 6/2012 for adoption of tariff and Case No. 14/2014 for preponement of supply of 260 MW power from the Project. By no stretch of imagination can these petitions be construed as joint application by the parties under Section 64(5) invoking the jurisdiction of the State Commission. Moreover, the issue of jurisdiction was neither raised by the said Respondents nor decided by the State Commission in these petitions.”

61. The Commission is of the view that Section 64(5) has no application in cases of tariff discovered under competitively bidding process and adopted under Section 63 of the 2003 Act. As Section 64 provides for the procedure for determination of tariff under Section 62, the Section 64(5) would be applicable only in respect of



determination of tariff under Section 62 of the 2003 Act. Hence, it is a case of inter-state and is covered under Section 79(1) (b). Thus, the Commission is of the view that it has the jurisdiction to adjudicate the matter.

Issue No. 2: Whether the Respondent is entitled to forfeit the Earnest Money Deposit amounting to ₹64.00 lakh as deposited by the Petitioner?

and

Issue No. 3: Whether the Respondent is entitled to recover a sum of ₹13,65,295/- as Liquidated Damages for the shortfall of energy including adjustment for transmission losses, from the payments due to the Petitioner from the various bills raised on 1st December, 2016 for supply of electricity?

62. Since, Issues No. 2 and 3 are inter-related, the same are being taken up together for discussions. NVVN has submitted that as against the request for approval of Open Access of 100 MW it had supplied 92.5 MW (12.5 +12.5+ 37.5+ 30 MW) of power to PCKL. NVVN has argued that it could not arrange the balance 7.5 MW of power for reasons beyond its control and on account of transmission corridor constraints. In view of the shortfall, PCKL forfeited the entire Earnest Money Deposit of ₹64 lakh towards shortfall which is contrary to the provisions of Article 6.2.3 of the Bid Documents. Even if it is assumed that there was a failure on the part of NVVN to obtain transmission corridor/ open access approval qua the contracted quantum of 100 MW, the same is only to the extent of 7.5 MW. NVVN has submitted that *firstly*, EMD proportionate to 7.5 MW can only be appropriated by PCKL at the maximum i.e. $(7.5 \times 0.3 \times 14/30)$ ₹1.05 lakh and the balance amount of ₹62.95 lakh needs to be returned to NVVN. *Secondly*, In addition, PCKL has recovered a further sum of ₹13,65,295/- for shortfall in supply of electricity including adjustment for transmission losses, from the payments due to NVVN from the various bills raised on 1st December 2016 for supply of electricity on account of shortfall in the supply of electricity. The shortfall of 7.5% (100% - 92.5%) is subject only to forfeiture of EMD under Article 6.2.3 (c) of the bid terms for not obtaining the Open Access and the



same cannot be subjected again to liquidated damages under Article 23 of the bid terms. A claim for liquidated damages for 7.5% is double jeopardy and patently illegal. The entire claim for liquidated damages of ₹13,65,295/- is not admissible as the shortage in the supply is within the scope of 15% of the contracted energy, namely, less than 15 MW. *Lastly*, Open Access charges are to be paid as per corridor quantum booked and transmission losses cannot be deducted from it. NVVN has submitted that PCKL has admitted the total claim for ₹18,59,530/- against the Open Access charges. However, the payment of ₹3,75,650/- out of ₹18,59,530/-, against Open Access charges, is still pending. Therefore, PCKL is not entitled to the forfeiture of the earnest money deposit or liquidated damages as claimed by it. NVVN has submitted that PCKL is required to return the entire amount of ₹64.00 lakh and also ₹13,65,295 together with interest at the rate of 15% per annum from the date of the forfeiture and adjustment i.e. 31.12.2016 till the date of return of the amount to NVVN and further liable to pay the cost of the proceedings.

63. **Per contra**, PCKL has submitted that as per scheme, the bids were to be invited from the companies who can supply readily available power upto delivery point to meet the base load requirements of the Karnataka Distribution Companies. It was the responsibility of NVVN to ensure the availability of transmission corridor. PCKL has submitted that NVVN had failed to appreciate the same and had not checked the corridor availability and had not anticipated that the entire quantum could not be made available due to corridor constraints. Thus, overlooking of the tender conditions by the Petitioner deprived the beneficiaries in availing the full contracted quantum. NVVN was to supply 7063920 kWh (period from 23.11.2016 to 30.11.2016) of the energy against which the energy supplied by the NVVN was only 3503630 kWh. Hence, it deducted amount at the rate of 20% of the tariff in



accordance with Article 23 that works out to ₹13,65,295/-. According to PCKL, NVVN has claimed reimbursement of open access charges claimed beyond delivery point as ₹18,80,530/- (i.e. KPTCL Transmission and SLDC Charges). However, PCKL has allowed ₹15,88,930/- to the Distribution Companies for reimbursement of open access charges paid by the Petitioner beyond delivery point. The same has been paid by the Distribution Companies. Out of ₹18,80,530/- claimed by the Petitioner, the amount of ₹2,91,600/- has been disallowed due to revision/cancellation of scheduled/approved quantum by the Petitioner. Therefore, there is no amount which is due to be paid by PCKL to the Petitioner. PCKL has submitted that EMD was forfeited in accordance with Article 6.2.3 of the RFP and the deduction of ₹13.65 lakh towards liquidated damages has also been made according to Article 23 of the RFP. Despite the said scenario, the proposal of PCKL for deduction of only ₹14.00 lakh pertaining to the 100 MW contracted quantum and the refund of ₹50.00 lakh to the Petitioner is under consideration.

64. We have considered the submissions of the Petitioner and PCKL, it is noticed that NVVN was declared as successful bidder for 100 MW of electricity to be supplied to the PCKL. NVVN requested SRDLC for approval of Open Access of 100 MW viz. 50 MW of electricity to be sourced from M/s JVPL, Madhya Pradesh and 50MW of electricity to be sourced from M/s Vedanta Ltd. (BALCO, Chattisgarh). However, SRLDC approved Open Access only to the extent of 25 MW (12.5 MW + 12.5 MW). NVVN offered PCKL to supply 75 MW i.e. 37.5 MW from an alternate source M/s SembCorp Gayatri Power Ltd, Andhra Pradesh in lieu of M/s JPVL, Madhya Pradesh and balance 37.5 MW from an alternate source M/s SembCorp Gayatri Power Ltd, Andhra Pradesh in lieu of M/s BALCO TPS, Chattisgarh for the period of 23.11.2016 to 30.11.2016. PCKL has categorically given its approval on



both occasions. NVVN had made the alternate arrangements with the approval of PCKL with no additional financial liability to PCKL.

65. Further, NVVN has placed on records copies of 'Acceptance for Scheduling letter' issued by SRLDC as under:

Power scheduled from JPVL (original source)							
	Letter No.	Scheduling		Capacity Approved	Total Hours	Days	Total Energy
		From	To	MW	Hrs.		MWh
1	SRLDC/2016/22613/F dated 17.11.2016	20.11.16	20.11.16	12.5	7	1	87.5
		21.11.16	30.11.16	12.5	12	10	1500
Power scheduled from SembCorp in lieu of JPVL (alternate source)							
2	SRLDC/2016/22651/C dated 18.11.2016	19.11.16	19.11.16	37.5	24	1	900
3	SRLDC/2016/22670/C dated 19.11.2016	20.11.16	20.11.16	37.5	24	1	900
4	SRLDC/2016/22678/D dated 20.11.2016	21.11.16	21.11.16	37.5	24	1	900
5	SRLDC/2016/22694/F dated 21.11.2016	22.11.16	30.11.16	37.5	24	9	8100
Total							12387.5

Power scheduled from Vedanta Ltd. (BALCO, Chattisgarh) (original source)							
	Letter No.	Scheduling		Capacity Approved	Total Hours	Days	Total Energy
		From	To	MW	Hrs.		MWh
1	SRLDC/2016/22614/F dated 17.11.2016	20.11.16	20.11.16	12.5	7	1	87.5
		21.11.16	30.11.16	12.5	12	10	1500
Power scheduled from SembCorp in lieu of Vedanta Ltd. (BALCO, Chattisgarh) (alternate source)							
2	SRLDC/2016/22746/C dated 23.11.2016	24.11.16	24.11.16	30	24	1	720
3	SRLDC/2016/22759/F dated 24.11.2016	25.11.16	25.11.16	30	24	1	720
4	SRLDC/2016/22787/D dated 24.11.2016	26.11.16	26.11.16	30	24	1	720
5	SRLDC/2016/22759/F dated 25.11.2016	27.11.16	30.11.16	30	24	4	2880
Total							6627.5

It is apparent from the above that the total power scheduled was 19015 MWh (i.e. 12387.5 MWh + 6627.5 MWh) from 17.11.2016 to 30.11.2016.

66. The Commission observes that PCKL issued the tender for short term purchase to meet urgent requirement within the State and therefore, there was no scope of any relaxations being sought by the bidders. It was the responsibility of NVVN to ensure the availability of transmission corridor as per LOA. From the above, the Commission observes that NVVN had failed to obtain the corridor for supply of the entire quantum of 100 MW. Thus, the beneficiaries could not avail the full contracted quantum of energy. PCKL has forfeited entire EMD amounting to ₹64.00 lakh. PCKL has stated that it has proposed to its Board of Directors to forfeit ₹14 lakh (100 MW X 30,000/MW X 14days/30 days) and refund the balance ₹50 lakh out of ₹64 lakh of EMD deposited by NVVN. NVVN has submitted that there was a failure on the part of NVVN to obtain transmission corridor/ open access approval qua the contracted quantum of 100 MW, to the extent of 7.5 MW and therefore, EMD proportionate to 7.5 MW can only be appropriated by PCKL i.e. maximum to ₹1.05 lakh ($7.5 \times 0.3 \times 14/30$) and the balance amount of ₹62.95 lakh needs to be refunded.

67. As per Article 6.2.3 (c), *“EMD shall be forfeited if the successful bidder fails to obtain transmission corridor/open access approval to deliver the awarded contracted quantum at delivery point during the contract period”*. The Commission is of the view that the availability of the Transmission Corridor is one of the critical elements of the short term purchase contracts for which the bidder is duty bound to ensure availability without scope of any relaxation. As per Article 6.2, NVVN was required to submit EMD for the maximum capacity @ ₹30,000/- per MW per month on RTC (30 days, 24 hours) basis with the condition that the same shall be reduced on pro-rata basis in case bids are invited on hourly basis. Further, Article 6.2 is sufficed by an example i.e. for a requirement of 1 MW for 15 days for 4 hours, the EMD shall be $\text{₹}30,000 \times (15 \text{ days} / 30 \text{ days}) \times (4 \text{ hrs.} / 24 \text{ hrs.}) = \text{₹}2,500/-$.



68. The Commission observes that Article 6.2.3(c) has two components for calculation of EMD viz. *firstly*, quantum of energy and *secondly*, duration of contract period. In the instant case, the LOA was contracted for 100 MW for 14 days, therefore, NVVN was required to submit the EMD amounting to ₹14.00 lakh (i.e. $100\text{MW} \times ₹30,000/- \text{ per MW} \times 14\text{days}/30\text{days}$) instead of ₹64.00 lakh (forfeited by PCKL). Further, it is observed that NVVN failed to obtain transmission corridor/ open access approval qua the contracted quantum of 100 MW. Therefore, in terms of Article 6.2.3 (c), EMD is liable to be forfeited. However, the forfeiture should be proportionate to the 'quantum' and 'duration' of failure on the part of NVVN. The Commission accordingly, is of the view that PCKL should compute proportionate amount of the forfeiture based on the 'actual quantum and duration' of energy supplied vis-a vis the 'contracted quantum and duration' of energy to be supplied and refund the balance amount to NVVN. As per the calculations placed below, the Commission directs PCKL to forfeit EMD amounting to ₹6,07,708/- and to refund the balance amount of ₹57,92,292/- to NVVN:

	MW	No. of Hours Energy was required to be supplied	No. of days Energy required to be supplied	@₹30000/- Per MW for 30 days	Amount (₹)
	A	B	C	D	$E = (A*B*C*D) / (24 * 30)$
Contracted EMD	100	24	14	30000	1400000
Energy Sourced from	MW	No. of Hours Energy was supplied	No. of days Energy was supplied	@₹30000/- Per MW per month	Amount (₹)
	A	B	C	D	$E = (A*B*C*D) / (24 * 30)$
JPVL	12.5	7	1	30000	3645.8
	12.5	12	10	30000	62500
SembCorp in lieu of JPVL	37.5	24	12	30000	450000



Vedanta (BALCO)	12.5	7	1	30000	3645.8
	12.5	12	10	30000	62500
SembCorp in lieu of Vedanta (BALCO)	30	24	7	30000	210000
Total					792291.6
EMD to be forfeited					1400000-792291.6= 607708.4
EMD to be refunded					6400000- 607708.4=5792291.6 Or say 57,92,292/-

69. The next issue is of Liquidated Damages. The Commission observes that PCKL had recovered a sum of ₹13,65,295/- as Liquidated Damages from the payments due to NVVN from various bills raised on 1st December, 2016 for supply of electricity. As per Article 23 of the bidding document, it is stipulated that both the parties have to ensure that actual scheduling does not deviate by more than 15% of the contracted Power as per the approved open access on monthly basis and in case deviation is more than prescribed 15% of either contracted energy for which open access has been allocated or the energy corresponding to actual availability, whichever is lower on monthly basis then NVVN has to pay compensation at 20% of tariff per kWh for the quantum of shortfall in excess or permitted deviation of 15% while continuing to pay open access charges as per the contract i.e. from delivery point onwards.

70. The Commission observes that PCKL has quantified liquidated damages with respect to the quantum of power to be supplied from 'alternate source' i.e. M/s SembCorp in lieu of M/s Vedanta Ltd. (BALCO, Chattisgarh) for 8 days (23.11.2016 to 30.11.2016) as below:

Quantum of Energy should have been scheduled including approval of alternative source @ delivery Point	11599313 kWh
85% of above (approved quantum from original source and expected supply from alternative source of 75 MW)	9859416 kWh
Less: Actual energy scheduled @ delivery Point including supply of original source and alternative source	8039022 kWh
Difference in energy	1820393 KWh
Liquidated damages@ 20% of the tariff (₹3.75 per *20%)	₹13,65,295

71. From the documents submitted it appears that the above figures are based on meter readings which reflect consumption/use on the part of PCKL and not necessarily the actual supply from NVVN sources. On the other hand, NVVN has provided the documentary evidence of energy scheduling and supply from SRLDC. This is clearly the actual energy scheduled/supplied. Accordingly, the Commission relies on these documents and finds the following position in respect of the 8 days i.e. from 23.11.2016 to 30.11.2016 for which liquidated damages has been computed by PCKL:-

Quantum of energy should have been scheduled from alternative source @ delivery Point (37.5 MW X 8 Days X 24 Hrs. X 1000)	72,00,000 kWh
85% of above	61,20,000 kWh
Less: Actual energy scheduled (30 MW X 7 Days X 24 Hrs. X 1000) as per copies of 'Acceptance for Scheduling letter' issued by SRLDC	66,27,500 kWh
% of the energy supplied	92.05%
Difference in energy	Nil
Liquidated damages@ 20% of the tariff (₹3.75 per *20%)	Nil

72. It is apparent from the above that the quantum of energy supplied by NVVN is 6627.5 MWh which is 92.05% of the energy contracted for 8 days i.e. from 23.11.2016 to 30.11.2016. Therefore, NVVN has supplied the quantum of energy within the permitted deviation of 15%. In view of the above, the Commission holds that PCKL has wrongly levied the penalty of ₹13,65,295/- which needs to be refunded to NVVN. Admittedly, PCKL has already recovered amount of ₹2,91,600/- that has been charged due to revision/cancellation of scheduled/approved quantum. Therefore, we direct PCKL to refund the entire penalty of ₹13,65,295/- to NVVN.

Issue No. 4: Whether the Petitioner is entitled to recover a sum of ₹77,65,295/- (₹64.00 lakh plus ₹13,65,295/-) from the Respondent towards principal as on the date of the filing of the present petition together with interest computed at the rate of 15% per annum from the date of the filing of the petition till realization?

73. In the light of discussion held in Issue No. 2 and 3 as dealt in Paras 73 to 77 above, PCKL is directed to refund ₹71,57,587/- (₹57,92,292/- plus ₹13,65,295/-) to NVVN within 15 days of the date of the order failing which NVVN is entitled for late payment interest @9% per annum for the delayed period beyond 15 days.

74. Accordingly, the Petition No. 229/MP/2017 is disposed of.

sd/-
(Dr. M. K. Iyer)
Member

sd/-
(A. S. Bakshi)
Member

sd/-
(A.K. Singhal)
Member

sd/-
(P.K. Pujari)
Chairperson