

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 117/MP/2017

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 22nd July, 2019

In the matter of

Petition under Section 79(1) (b) read with Section 79 (1) (f) of the Electricity Act, 2003 read with Regulation 111 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 1999 *inter alia* seeking direction to the Respondent to pay the Tariff considering 1.8.2015 to 31.3.2016 as the First Contract Year in terms of Schedule 8 of the Power Purchase Agreement 19.08.2013 executed between the Petitioner and the Respondent.

And

In the matter of

DB Power Ltd.
3rd Floor, Naman Corporate Link,
Opp. Dena Bank, C-31, G-Block,
Bandra - Kurla Complex, Bandra (E),
Mumbai- 400051 Maharashtra

...Petitioner

Versus

Tamil Nadu Generation & Distribution Corporation Ltd.
Western Wing, 6th Floor, NPKRR Maaligai,
No. 144, Anna Salai,
Chennai-600002, Tamil Nadu

...Respondent

Parties present:

Shri Gopal Jain, Senior Advocate, DB Power Ltd.

Shri Deepak Khurana, Advocate, DB Power Ltd.

Shri Vineet Tayal, Advocate, DB Power Ltd.

Shri S.Vallinayagam, Advocate, TANGEDCO

Shri G. Umpathy, Advocate, TANGEDCO



Ms. S.Amali, Advocate, TANGEDCO
Ms. M.Hemalatha, TANGEDCO

ORDER

The Petitioner, DB Power Ltd., has filed the present Petition with the following prayers:

a) Declare that the Delivery Date and the Expiry Date for supply of 117 MW power under the PPA dated 19.08.2013 are 01.08.2015 and 31.07.2030 respectively, and the Delivery Date and the Expiry Date for supply for 91 MW power under the PPA dated 19.08.2013 are 05.10.2015 and 04.10.2030 respectively; and the Tariff for the period commencing from 01.08.2015 shall be the Tariff for the First Contract Year (01.02.2014 to 31.03.2014) mentioned in Schedule 8 to the PPA and so on and consequently direct the Respondent to pay tariff for the entire term of the PPA on the said basis;

b) Direct the Respondent to pay the amount of Rs. 18,73,53,192/- towards shortfall in Tariff for the period 01.08.2015 up till 31.03.2017;

c) Direct the Respondent to pay interest @ 18% p.a. on the said amount from the day it became due and payable (i.e. the dates of supply till realization);

d) Pending hearing and final disposal of the present Petition; pass an ex-parte ad-interim Order directing the Respondent to forthwith start paying tariff stipulated for 3rd Contract year mentioned in Schedule-8 for the current Contract Year commencing from 01.04.2017 and continue to pay the tariff on the said basis for the subsequent years;

e) Pass such other and further order or orders as this Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.”

Background

2. The Petitioner incorporated under Companies Act, 1956 is a generating company within the meaning of Section 2(28) of the Electricity Act, 2003. The Petitioner has set up a 1200 MW (2x600 MW) coal based Thermal Power plant (hereinafter referred to as ‘the generating station’) at village Badadarha, in District Janjgir Champa in the State of Chhattisgarh. Apart from supplying 208 MW power to the Respondent, Tamil Nadu Generation and Distribution Company Limited (hereinafter referred to as ‘TANGEDCO’), the Petitioner is also supplying 250 MW



power from the generating station to Rajasthan Discoms through long term PPA and PSA both dated 1.11.2013 (with PTC India Ltd. as trader). The Petitioner is also supplying 5% of the net generated power to the State of Chhattisgarh under the Power Purchase Agreement dated 5.10.2011 entered into between the Petitioner and Discoms of the State of Chhattisgarh.

Submissions of the Petitioner

3. The Petitioner has mainly submitted as under:

a) Pursuant to competitive bidding process conducted by the Respondent for procurement of power under Case-1 bidding procedure in order to meet its base load power requirements,, the Petitioner was selected as successful bidder. The Petitioner and the Respondent entered into a long-term Power Purchase Agreement (PPA) dated 19.8.2013 for supply of 208 MW power commencing from 1.2.2014. The scheduled delivery date under the PPA was 1.2.2014 and the Expiry Date was 15th Anniversary of the Delivery Date.

b) Prior to execution of the PPA, in the year 2009, the Petitioner was granted LTA to the Western Region and Northern Region Grid by Power Grid Corporation of India Ltd. (hereinafter referred to as 'PGCIL/ CTU') for transmission of 705 MW power from its generating station. The Petitioner executed a long term Power Purchase Agreement dated 19.8.2013 with TANGEDCO for supply of 208 MW of power starting 1.2.2014 for a period of 25 years. Based on the PPA, the Petitioner applied vide its letter dated 23.8.2013 for change of region for 208 MW to Southern Region.

c) The Petitioner was informed by PGCIL/ CTU that a fresh LTA application would have to be filed for change of region. Accordingly, the Petitioner filed an application dated 25.11.2013 with a cheque dated 24.11.2013 for Rs. 3 lakh towards the application fee for grant of 208 MW LTA for the period from 1.2.2014 to 30.9.2028 which was accepted by PGCIL/ CTU. PGCIL/CTU vide letter dated 20.12.2013 granted LTA for 208 MW to the Petitioner from 1.8.2014 to 30.9.2028.



d)The cheque could not be encashed and was returned by ICICI Bank to PGCIL/ CTU on 19.12.2014 for the reason "drawee's signature differs". PGCIL/ CTU forwarded the ICICI Bank's intimation to the Petitioner on 22.1.2014 and the same day the Petitioner submitted a demand draft which was accepted by CTU without any protest.

e)PGCIL on 22.9.2014 issued a letter to the Petitioner treating the LTA application of the Petitioner as having been filed in January 2014 as against November 2013 on the sole ground that the cheque submitted by the Petitioner had been returned for technical reason and cancelled the LTA of 208 MW granted for the period from 1.8.2014 to 30.9.2028. Even before the issuance of letter dated 22.9.2014, the LTA for supply of the said power was not available and/or operationalized by PGCIL/ CTU.

f)Aggrieved by the above decision of PGCIL, the Petitioner filed the Petition No. 376/MP/2014 before this Commission. Vide order dated 16.2.2015, the Commission held that cheque was not an acceptable mode of payment of application fee and, therefore, the consequences of non-payment of application fee on account of dishonour of cheque had to be borne by the Petitioner. This Commission further held that the application of the Petitioner had been rightly considered by PGCIL as an application made in January, 2014 as opposed to November, 2013.

g)Aggrieved by the decision of the Commission dated 16.2.2015, the Petitioner preferred Appeal No. 50 of 2015 before the Appellate Tribunal for Electricity ("APTEL"). APTEL, vide order dated 30.3.2015, set aside the Commission`s order dated 16.2.2015 and held as follows:

"34 In the circumstances we set aside the impugned order to the extent it holds that cheque is not an acceptable mode of payment of application fee while applying for LTA under the Connectivity Regulations & Detailed Procedure. We set aside the finding of CERC that the application of the Appellant has been correctly considered by PGCIL as an application made in January 2014. We are of the opinion that the Appellant, in the peculiar facts of this case is entitled to be treated as November 2013 applicant."



h)The above order dated 30.3.2015 of the APTEL was challenged by PGCIL before the Hon'ble Supreme Court by filing an Appeal being Civil Appeal (D) No.8427/2015. The said Appeal was dismissed by the Hon'ble Supreme Court vide Order dated 5.10.2015 as being without merit.

i)In the meanwhile, pursuant to the above referred order passed by APTEL, 208 MW of LTA was granted in favour of the Petitioner. Out of 208 MW of LTA, 117 MW was operationalized by PGCIL from 1.8.2015, whereupon the supply of power to the Respondent in terms of the PPA commenced on 1.8.2015. The balance 91 MW was operationalized by PGCIL from 5.10.2015. After passing of the Order dated 30.3.2015 by APTEL, the LTA for supply of the said power was not available and/or operationalized by PGCIL till the above dates on which the LTA was operationalized.

j)The PPA defines 'Delivery Date' as the date on which the Petitioner commences supply of Aggregate Contracted Capacity (208 MW) to the Respondent. As per Article 4.1.1 of the PPA, the Scheduled Delivery Date for supply of Aggregated Contracted Capacity (208 MW) of power from the Petitioner's generating station to the Respondent was 1.2.2014. PPA also defines 'Expiry Date' as the date which is 15th Anniversary of the Delivery Date. Thus, it is clearly provided in the PPA that the supply of power, commencing from the Delivery Date, shall be for a period of 15 years.

k)Article 4.7.1 of the PPA provides that in the event of occurrence of Force Majeure Event(s) affecting the Petitioner, the Scheduled Delivery Date and the Expiry Date shall be deferred to permit the Petitioner to overcome the effects of the Force Majeure Events. Further, Article 4.7.4 of the PPA provides that as a result of such extension (deferment), the Scheduled Delivery Date and the Expiry Date newly determined shall be deemed to be the Scheduled Delivery Date and the Expiry Date for the purpose of the PPA.

l)Article 9.3 of the PPA provides that a Force Majeure means an event or circumstances or combination of events and circumstances that wholly or partly prevents or unavoidably delays an Affected Party in performance of its obligations under the PPA, 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. Article 9.7.1 of the PPA provides that no party shall be in breach of its obligations pursuant to the PPA except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event.

m) In light of the above provisions contained in the PPA and the above-stated facts, the decision of PGCIL to treat the LTA application of the Petitioner as having been filed in January 2014 as against November 2013 and cancellation of the LTA granted to the Petitioner on 20.12.2013 for supply of 208 MW power to the Respondent from 1.8.2014 to 30.9.2028, which was set aside by APTEL, as well as non-availability/non-operationalization of LTA as stated above, was a Force Majeure Event within the meaning of Article 9 of the PPA. Resultantly, in terms of Article 4.7.1 of the PPA, the Scheduled Delivery Date for 117 MW was deferred/extended to 1.8.2015 and Scheduled Delivery Date for 91 MW was deferred/extended to 5.10.2015 i.e. the days on which the LTA granted to the Petitioner was operationalized by PGCIL resulting in commencement of supply of power from the Petitioner's Project to the Respondent. Thus, in terms of the above referred provisions of the PPA, the Delivery Date for supply of power under the PPA was from 1.8.2015 for 117 MW and from 5.10.2015 for 91 MW. Accordingly, the Expiry Date, which was originally 30.9.2028 stood deferred/extended to 31.7.2030 for 117 MW and 4.10.2030 for 91 MW i.e. the 15th Anniversary of the Delivery Date.

n) The Petitioner, vide its letter dated 30.5.2014, informed the Respondent that the non-availability of long-term access resulting in delay in start of supply of power was a Force Majeure event. The said position has never been disputed by the Respondent. It may also be noted that the Respondent was a party to the above referred proceedings before this Commission as well as to the Appeal filed by the Petitioner before APTEL.

o) Article 4.1(ii) of the PPA provides that 'Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of the PPA. The Schedule 8 of the PPA stipulates the tariff quoted for all the



Contract Years, with the first Contract Year commencing from 1.10.2013 and ending on 31.3.2014. The subsequent Contract Years commence from 1st April of the relevant year and end on 31st March of the succeeding year. The last Contract Year ends on 30.9.2028. As per the Request for Proposal issued by the Respondent, the Scheduled Date of Delivery was 1.10.2013. However, inasmuch as the PPA provides that the Scheduled Delivery Date to be 1.2.2014, the first Contract Year under Schedule 8 is to be read as commencing from 1.2.2014 and ending on 31.3.2014.

p) The total duration of supply of power under the PPA is for fifteen years and accordingly the applicable tariff for each Contract Year is separately provided for in the said Schedule 8. It is on the basis of the said levelised tariff for the said fifteen years that the bid of the Petitioner was evaluated and the Petitioner was selected as successful bidder pursuant to and in terms of such evaluation. There is no provision in the PPA which stipulates or contemplates that in case of extension/deferment of the Scheduled Delivery Date and the consequent extension/deferment of the Expiry Date, the tariff for the Contract Years as stipulated in Schedule 8 to the PPA shall be re-evaluated or revised. In as much as the supply of power is for a definite and ascertained period comprising 15 years (16 Contract Years), the said tariff as stipulated in Schedule 8 has to apply throughout the said period. Consequently, it is evident that the tariff applicable for the first Contract Year beginning from 1.8.2015 for 117 MW/ 5.10.2015 for 91 MW and ending on 31.3.2016 shall be tariff which was originally applicable for the original first Contract Year i.e. from 1.2.2014 to 31.3.2014. The tariff for the subsequent Contract Years would be applicable in the similar manner i.e. the tariff for the second Contract Year commencing from 1.4.2016 and ending on 31.3.2017 shall be the tariff stipulated for the Contract Year commencing from 1.4.2014 and ending on 31.3.2015 (Original Second Contract Year) in Schedule 8 for the Second Contract Year.

q) Contrary to the unambiguous and unequivocal position as stated above, the Respondent has been paying tariff applicable for the third Contract Year mentioned in Schedule 8, for the first Contract Year commencing from 1.8.2015. Likewise, the tariff for the Second Contract Year commencing from 1.4.2016 and ending on 31.3.2017 has been paid on the basis of tariff applicable for the



Fourth Contract Year mentioned in Schedule 8 to the PPA. The payment of tariff by the Respondent is contrary to the terms of the PPA and is based on wrong understanding of the provisions of the PPA. In case tariff for the Third Contract Year mentioned in the PPA is made applicable to the First Contract year which commenced from 1.8.2015, there would be no tariff for the period after 30.9.2028. This would result in an absurd situation. Further, as stated above, in case of extension/deferment of the Delivery Date and Expiry Date, there is no provision in the PPA for re-evaluation or revision of tariff. Therefore, it is clear that the manner in which the Respondent is applying Schedule 8 is based on wrong interpretation of the PPA, resulting in shortfall in payment of tariff for the power being supplied by the Petitioner to the Respondent under the PPA.

r) The Petitioner, vide its letter dated 17.1.2017, requested the Respondent to treat 1st year capacity charges (Tariff) as set out in Schedule 8 of the PPA, as applicable for the Contract Year 2015-16 and the 2nd year capacity charges (Tariff) to be applicable for the Contract Year 2016-17 and so on and so forth. The Petitioner requested the Respondent to accept the above so that it may raise supplementary bill for the same. The Respondent has neither responded to the said letter of the Petitioner nor has it started paying the tariff as requested by the Petitioner in its letter dated 17.1.2017. In view of the above, it is clear that the tariff being paid by the Respondent to the Petitioner is not in accordance with the terms of the PPA resulting in shortfall of recovery of tariff by the Petitioner. For supply of power for the period commencing from 1.8.2015 till 31.3.2017, the Petitioner is entitled to an amount of Rs. 18,73,53,192/- towards shortfall in tariff occasioned on account of wrong application of Tariff mentioned in Schedule 8 to the PPA, by the Respondent. The Petitioner is also entitled to interest @18% p.a. on the said shortfall amount recoverable from the Respondent from the date of supply of power till the date of realization of the interest amount by the Petitioner.

4. The Petition was admitted on 22.8.2017 and notice was issued to the Respondent to file its replies. The Respondent has filed its reply vide affidavit dated 8.2.2018 and the Petitioner has also filed its rejoinder vide affidavit dated 15.5.2018



to the reply filed by TANGEDCO. The Petitioner and the Respondent has filed its written submission vide affidavit dated 13.05.2019 and 29.4.2019 respectively.

Submissions of the Respondent

5. The Respondent, vide affidavit dated 8.2.2018, has mainly submitted as under:

a) There is no prayer seeking to declare the period of delay in grant of LTA as Force Majeure. In the absence of a substantive prayer for declaring the period of delay in grant of LTA as Force Majeure period, the present petition is not maintainable in law. The period of Force Majeure is not mentioned in the Petition. No notice intimating the Procurer of the alleged Force Majeure event is produced on record by the Petitioner after 30.5.2014 as required under Article 9.5 of the PPA.

b) The present Petition seeking revision of tariff for the entire period of the PPA on the ground that Scheduled Delivery Date and Expiry date shall be deferred due to Force Majeure event and to permit the Petitioner to overcome the effects of Force Majeure event is not maintainable and deserves to be dismissed. The facts stated in the Petition do not entitle the Petitioner to any relief under Force Majeure.

c) The Petition is hit by laches and also liable to be dismissed on account of suppression of relevant facts. Further, the Petitioner cannot approbate and reprobate and seek relief for shifting the commencement of the 1st contract year from 1.2.2014 to 1.8.2015 and consequently seek to shift the expiry period from 2028 to 2030. This would defeat the object of tendering which was for the period of 15 years expiring in 2028 with levelised tariff agreed between the parties under the PPA.

d) After commencement of supply of power, the Petitioner raised bills indicating fixed and variable charges strictly in terms of PPA. Billing was made from 1.9.2015 onwards till the 1st notice raising a dispute was made on 17.1.2017 wherein extraneous issues were raised stating that the PPA provides for extension/deferment of delivery and expiry dates. The bills of the Petitioner from



1.8.2015 also include the escalated variable charges as on 1.8.2015 escalated from March 2013 as per Schedule 8 of the PPA. Therefore, the application of Schedule 8 is an erroneous interpretation of PPA resulting in shortfalls in the payment of tariff for the power being supplied by the Petitioner to the Respondent under the PPA. The request made on 17.1.2017 for treating the 1st year capacity charges as set out in Schedule 8 of PPA as applicable for the contract year 2015-16 and the 2nd year capacity charges to be applicable for the contract year 2016-17 and so on and that the Petitioner may be permitted to raise supplementary bills is clearly an afterthought and barred by the principles of estoppels.

e)The Respondent has referred to the following documents:

- (i) Guidelines for Determination of Tariff by Bidding Process for procurement of Power by Distribution Licensees was notified by the Ministry of Power (MOP), Government of India on 19th January 2005 as amended up to 21.7.2010.
- (ii) Pursuant to Competitive bidding process under Case-1 bidding procedure, the respondent, TANGEDCO floated long term tender for procurement of power for a period of 15 years mentioning the Scheduled Delivery Date as 01.10.2013 and with agreement validity period up to the Expiry date i.e. 30.9.2028.
- (iii) The Petitioner was selected as a successful bidder and the answering respondent entered into long term PPA with the Petitioner on 19.8.2013 for supply of 208 MW RTC power where the Scheduled Delivery Date (SDD) was fixed as 1.2.2014, considering the request made by the Petitioner, quoting the time limit allowed in Open Access regulations to make the application and for granting Open Access.

f)As per Schedule 5 of the PPA, expected CoD was August 2013. PGCIL vide its minutes with regard to the meeting held on 28.3.2014, stated that available ATC of 150 MW is allotted to M/s. Jindal Power Ltd from 1.5.2014 as the Petitioner has not declared COD of its dedicated transmission line. The Petitioner could have commenced supply to the Respondent to the extent of 150 MW provided they were ready with the CoD of dedicated transmission line.



Thus, it is a Seller event of default. In any event, the Petitioner cannot claim Force Majeure beyond 1.5.2014. Admittedly, the dedicated evacuation line which is Petitioner's obligation and necessary for availing LTA was operationalised by the Petitioner only on 20.6.2014. Thus, the non-operationalisation of LTA earlier was due to the Seller event of default and not Force Majeure as claimed by the Petitioner.

g) On 21.4.2014, in the minutes of meeting of the Long-term Access meeting of WR & SR constituents held on 28.3.2014 for allocation of 150 MW of available transmission capacity from new grid to SR, it was stated that though the Petitioner declared CoD of first unit out of the 2x600 MW plant, on 23.2.2014, however, power is not being scheduled from the unit. WRLDC informed that it has not received any communication regarding declaration of COD, and that the dedicated transmission line of the Petitioner shall be completed only by end of May 2014. In the said meeting, DB Power and BALCO were advised by WRLDC that they should inject LTA power into the grid only after commissioning of the dedicated transmission line. From the minutes of this meeting it is evident that the available ATC of 150 MW was allocated to Jindal Power Ltd. from 1.5.2014 and not to the Petitioner as the Petitioner was not ready with its dedicated transmission line.

h) As per Article 2.2.1 of the PPA, upon occurrence of the expiry date, this agreement shall, subject to Article 2.4, automatically terminate, unless mutually, extended by all the parties on mutually agreed terms and conditions, at least (180) days prior to the expiry date, subject to approval of the Tamil Nadu Electricity Regulatory Commission.

i) A conjoint reading of the Article 3.1.1, 3.1.1(b), 3.1.1(c) and 3.1.1(i) of the PPA specifically provides that the Seller has to satisfy the conditions set out in Article 3.1. The three exceptions which absolve the Seller from the conditions are Force Majeure or Procurer's failure to comply with their obligation under Article 3.2.1 of the PPA or if any activities are specifically waived in writing by the Procurer. The Petitioner has based its relief on Force Majeure. However, no notice of Force Majeure was served by the Petitioner on the Respondent for the period after 20.6.2014. In the absence of any notice of Force Majeure by the



Petitioner as provided for under Article 9.5.1, no relief can be claimed under Force Majeure.

j) The provisions of Articles 3.1.1, 3.4.3 and 3.4.6 state that if Force Majeure event affects the seller in fulfillment of conditions stipulated in Article 3.1.1, time extension is allowed till the seller has satisfied all the conditions and as a result the scheduled delivery date/revised Scheduled Delivery Date is extended up to the period of Force Majeure event and the seller is bound to commence supply of power on the extended Scheduled Delivery Date i.e. on 1.8.2015 and no tariff adjustment is allowed on account of extension of period. Extension of time period is allowed only for Scheduled Delivery Date and not for Expiry Date. As a result of extension of Scheduled Delivery Date, the Sellers liability to commence supply of power starts from the date of allocation of corridor (1.8.2015) and the Petitioner commenced supply of 117 MW of RTC power on 1.8.2015.

k) Article 4.7.1 (c) of the PPA is applicable only when performance of the Seller is affected by contractor's performance and not due to delay in allocation of LTA. There is no Force Majeure event which would entitle any relief to the Petitioner under the above Article of the PPA.

l) As per the Article 9.3.1 of the PPA, non-availability of Open Access is treated as Force Majeure without any liability on either side. Therefore, the period till the grant of LTA from the Scheduled Delivery Date has been considered as Force Majeure event i.e. up to operationalisation of 117 MW on 1.8.2015. The claim of the Petitioner is against the express provisions of this Article of the PPA.

m) The only Force Majeure event affecting the performance of the Seller's contractors constitute "the event of Force Majeure affecting Seller" and hence the Petitioner cannot categorise Force Majeure event occurred due to non-availability of corridor under the Article 4.7.1(c) to claim extension of Scheduled Delivery Date/Expiry date. As per the above provisions, if the Seller fails to commence supply on the extended Scheduled Delivery Date of 1.8.2015, due to the reasons specified in Article 4.7.1(c), then time extension is allowed for newly determined Scheduled Delivery Date of 1.8.2015 and also to the expiry date of



30.9.2028 subject to the maximum period of Six (6) months. Since the Petitioner commenced supply of power on 1.8.2015, the question of extension of expiry date as per Article 4.7.5 does not arise.

n)The Petitioner has availed the escalations as provided in schedule 6 of the PPA for each of the applicable contract year from 6.3.2013. Having availed the escalation and invoiced as per the terms and conditions of the PPA from 2015, the Petitioner cannot maintain the plea sought for in the present Petition. The plea and prayer of the Petitioner in the present Petition is against the express terms and conditions of the PPA agreed between the parties.

o)The Expiry Date was fixed as 30.9.2028 at the time of floating the tender and tariff quotes were invited up to 30.9.2028. Evaluation of tender was done considering the Scheduled Delivery Date as 1.10.2013 and Expiry date as 30.9.2028 and levelized tariff of Rs.4.91 per kWh was arrived at. Based on the levelized tariff, the Petitioner was selected as the lowest tenderer and the other tenderers were requested to match the price of the Petitioner. The levelized tariff of Rs.4.91 per kWh was also adopted by the Tamil Nadu Electricity Regulatory Commission (TNERC). If the expiry date is extended beyond 30.9.2028, the levelized tariff for the period from 1.8.2015 to 30.7.2030, will become Rs.5.167 per kWh, thereby the financial commitment of the Respondent will increase from Rs.4.91 per kWh to Rs.5.167 per kWh. Change of first year contract was never in issue when the tender of the Petitioner was selected as lowest tender, during execution of agreement and before TNERC for adoption of tariff. There is no provision under the PPA for such escalation/revision of Tariff. The levelised tariff calculated for all bidders for the power to be delivered on the Scheduled Delivery Date as signed and agreed between the parties to the PPA cannot be altered to suit the convenience of the Petitioner.

p)Under the provisions of Article 3, only Scheduled Delivery Date could be extended without any tariff adjustment. Further, the Petitioner commenced supply of power from the extended Scheduled Delivery Date of 1.8.2015 pursuant to Article 3 of PPA. The provisions of Article 4 and Article 4.7.1 of PPA are not applicable in the present case.



q)As per Schedule 6 of the PPA, energy charges are to be escalated from the bid deadline of 6.3.2013 with the escalation index issued from time to time by CERC. Though the supply of power started from 1.8.2015, the energy charge paid to the Petitioner on the commencement date was the escalated energy charge from 6.3.2013. This calculation will be adopted till 30.9.2028. (i.e. quoted energy charge at the time of bid is escalated from 6.3.2013 till 30.9.2028 with applicable escalation index for a period of 5478 days, nearly 15.5 years). If the expiry date is extended up to 2030, the financial commitment is extended for a further period of 2 years from 6.3.2013 to 30.7.2030 which is not acceptable to the Respondent.

r)The tender was issued to meet the power requirement up to 2028 and accordingly, evaluation of tender was carried out and levelized tariff of Rs.4.91 per kWh was discovered for the entire contract period of 15 years up to 30.9.2028. The same was adopted by the TNERC. The Power procurement up to 30.9.2028 was a pre-determined action plan which cannot be altered at any cost for the sake of Petitioner's convenience which will result in additional financial commitment to the respondent and in turn to the consumers of Tamil Nadu by way of tariff revision.

s)There is no privity of contract between the Respondent and PGCIL. The transmission service agreement is exclusively between the Petitioner and PGCIL. The PPA entered into between the Petitioner and the Respondent does not have provision for any compensation or change in contract year or tariff to be adopted by Respondent in the event of delay in getting LTA by the Petitioner from PGCIL.PGCIL and the Petitioner should have an indemnity agreement between them to indemnify each other's loss. The Respondent is not responsible and liable to the Petitioner for any loss which is not due to any act or omission of the Respondent.

Rejoinder of the Petitioner

6. In response to the reply dated 8.2.2018 of the Respondent, the Petitioner has filed its rejoinder vide affidavit dated 15.5.2018 and has mainly submitted the



following:

a) Force majeure events as set out in the Petition have never been disputed by the Respondent. Admittedly, the Respondent failed to give any response to the notices of force majeure issued by the Petitioner. Therefore, inasmuch as the Respondent has never disputed or denied the force majeure events at the relevant and contemporaneous time, there was no occasion for the Petitioner to seek a declaration to as suggested by the Respondent, and consequently the objection of the Respondent is misconceived and untenable.

b) Perusal of Paras 4-14 of the Petition clearly shows that the LTA was operationalized by the PGCIL only on 1.8.2015 (for 117 MW) for the remaining 91 MW on 5.10.2015. Thus, *the force majeure* event i.e. non-availability of LTA, which was prevailing on the Scheduled Delivery Date i.e. 1.2.2014 ceased on 1.8.2015 (for 117 MW supply) and on 5.10.2015 (for the remaining 91 MW supply). The contention of the Respondent that the period of *force majeure* is not specified is self-contradictory inasmuch as in the reply itself the Respondent has proceeded to divide the period of force majeure into two halves one prior to 20.6.2014 and the second after 20.6.2014 till the date of commencement of supply of power.

c) The Petitioner vide its letter dated 20.12.2013 had informed the Respondent that since full quantum of the LTA was granted by PGCIL from 1.8.2014, such delay was *force majeure* event under the PPA. On account of the fact that the LTA was not operationalized by PGCIL, the Petitioner thereafter issued notice dated 30.5.2014 of *force majeure* in this regard

d) The allegation of the Respondent that LTA for 150 MW was not allocated by PGCIL to the Petitioner in May 2014 as the Petitioner was not ready with the COD of dedicated transmission line is completely incorrect and misconceived. The Respondent is guilty of suppressing material facts and is reading the Minutes of Meeting dated 28.3.2014 in isolation. After the said Minutes of 28.3.2014, further meetings took place on 21.5.2014 and 15.7.2015, the minutes of which would show that the capacity of LTA was not available in May 2014, and the time frame of which was time & again extended and revised, with the LTA of the Petitioner ultimately being operationalized, as stated above,



commencing from 1.8.2015 (for supply of 117MW) and from 5.10.2015 (for supply of remaining 91MW). It is erroneous on part of the Respondent to seek to bifurcate and divide the period of force majeure into two halves one prior to 20.6.2014 and the second after 20.6.2014 till the date of commencement of supply. The time period of force majeure for non-availability of LTA was subsisting throughout i.e. commencing from the scheduled delivery date (1.2.2014) till the actual date when the aggregated contracted capacity was supplied (5.10.2015).

e) Allegation of the Respondent that the Petitioner cannot claim *force majeure* event since it was not ready with its dedicated transmission line (and that the Petitioner had erroneously claimed that its plant was ready for commercial operation vide its communication dated 28.1.2014), is also not tenable. Apart from the fact that the allegations of the Respondent concerning the Petitioner's communication dated 28.1.2014 are denied as being erroneous and misconceived, it is submitted that since the LTA was not operationalised for supply of aggregated contracted capacity till 5.10.2015, the Respondent cannot seek to draw adverse inferences, if any, against the Petitioner for non-supply of power, and thereby seek to disentitle the period up till 5.10.2015 as a force majeure event.

f) The Petitioner had issued notice dated 30.5.2014 to the Respondent regarding *force majeure* wherein it was categorically and specifically stated that operationalization of the LTA by PGCIL has been deferred and "*any delay in start of supply from DBPL due to non-availability of open access may kindly be treated as force majeure.*" Thus, till the time LTA was operationalized by the PGCIL and supply of power commenced, the *force majeure* event was prevailing. This position has never been disputed by the Respondent and the dispute now sought to be raised in the reply is clearly and afterthought and without any merit. Immediately upon operationalization of the LTA by PGCIL w.e.f. 1.8.2015 (for 117MW) and w.e.f. 5.10.2015 (for 91MW), which was the only impediment, the supply of power had commenced to the Respondent, which itself shows that cessation of force majeure is in the knowledge of the Respondent.



g) Aspect of escalation is independent of the issues raised and reliefs sought for in the present Petition. The escalated variable charges would have even otherwise be payable to the Petitioner, had the operationalization of the LTA coincided with the scheduled delivery date i.e. 1.2.2014. In such a scenario, the Petitioner herein, apart from being entitled to 1st year capacity charges as set out in Schedule 8 of the PPA, would also be entitled to escalated variable charges for the contract year 2014-15, being escalated from March 2013. The relief sought in the present Petition is to treat the contract year 2015-16 as the 1st Contract year as set out in Schedule 8 of the PPA due to *force majeure* events. The said relief would not overlap and otherwise be hit by the Petitioner's otherwise admitted contractual right to escalated variable charges. Further, the said relief claimed cannot also be said to have been waived by the Petitioner for not having expressly raised at the time of commencement of supply in August 2015, as sought to be averred by the Respondent. The said averment of the Respondent is against the express terms of the PPA, more specifically Article 15.5.2 in terms of which provides that *Neither the failure by either Party to insist on any occasion upon performance of the terms, conditions and provisions of this Agreement nor time or other indulgence granted by one Party to the other Parties shall act as a waiver of such breach or acceptance of any variation or the relinquishment of any such right under this Agreement, which shall remain in full force and effect*".

h) The contention of the Respondent that the extension of time period is allowed only for Scheduled Delivery Date and not for Expiry Date leads to absurd consequences, none of which is disputed or denied by the Respondent.

i) The Respondent has contended that non-availability of LTA corridor is not a *force majeure* event inasmuch as the *same does not* affect the performance of Seller's contractor. This contention is again misconceived inasmuch as Article 9.2.4 deals with only those *force majeure* events which effect Seller's contractors. *Force Majeure* event is not confined to Seller's contractors. The said Article 9.2.4 is not applicable to the present case. It is pertinent to note that in the Para 21 of the submissions dated 8.2.2018, the Respondent itself has admitted that non-availability of open access is a *force majeure* event under the PPA.



j) The fact that non-availability of open access is a force majeure without any liability on either side has no relevance for the purpose of adjudication of the issues raised in the present Petition. In fact, it is not even the Respondent's case that it would incur any liability on account of the reliefs sought in the present Petition. The Petitioner is only seeking implementation of the PPA, including financial obligations, which has been entered into between the parties.

k) The Respondent's purported interpretation of Schedule 8 is erroneous. The Petitioner is not seeking to apply the rate under one Contract Year to the supply made in a different Contract Year as alleged. There will not be any increase in the financial commitment of the Respondent as alleged. There is no escalation or revision of tariff as alleged. There is no alteration in the levelised tariff as alleged.

l) There is no extension of the term of PPA sought by the Petitioner as contended by the Respondent, inasmuch as the Contract Year itself commences from 1.8.2015 and the term of the PPA remains 15 years. The term of the PPA is determined on the basis of First Contract Year commencing from 1.8.2015. There is no alteration in the power procurement plan inasmuch as the term (duration) of the PPA remains the same.

m) The contention of the Respondent that it does not have any privity of contract with PGCIL, is irrelevant. The Petitioner is not claiming any compensation from the Respondent for any alleged breach by PGCIL. The Petitioner is only seeking implementation of the provisions of the PPA and Petitioner's entitlement under the PPA.

n) The Respondent has vaguely alleged in the reply that it had to arrange for the quantum agreed to by the Petitioner from other sources. However, no material or evidence has been placed on record by the Respondent in support of its arguments in this regard.

Written Submission of Respondent

7. The Respondent vide affidavit dated 29.4.2019 has mainly submitted the following:



a)PGCIL intimated the Petitioner on 28.7.2015 of the operationalisation of part LTA to the extent of 117 MW permitting the Petitioner to evacuate power to the Respondent from 1.8.2015. The balance quantum of 208 MW was granted to the Petitioner from 5.10.2015. Pursuant to the grant of LTA on 28.7.2015 to an extent of 117 MW, the Petitioner started supplying power from August 2015. As per the PPA dated 19.8.2013 the Schedule Delivery Date was 1.2.2014. The Petitioner raised bill dated 31.8.2015 for the supply made during the month of August 2015, rightly charging energy rates as per the PPA which was the 3rd contract year of the PPA. The bills were claimed from August 2015 to January 2017 in terms of the PPA and the payments were made by the Respondent accordingly.

b)The Petitioner for the first time vide its letter dated 17.1.2017 requested the Respondent to treat the capacity charges [tariff as set out in Schedule 8 of the PPA as applicable for the contract year 2015-16 and the 2nd year capacity charges for the contract year 2016-17 and so on and so forth].

c)The Petitioner thereafter made a claim demanding a sum of Rs. 18.75 crore for the period from 1.8.2015 till 31.3.2017 which is the subject matter of the present Petition.

d)In any event, the Petitioner cannot claim Force Majeure beyond 1.5.2014. The dedicated evacuation line is the Petitioner's obligation for availing LTA which was operationalised by the Petitioner only on 20.6.2014. Thus, the non-operationalisation of LTA earlier was due to the Seller event of default and not Force Majeure as claimed by the Petitioner.

e)The issue of change of first year contract was never raised when the tender of the Petitioner was selected as lowest tender, during execution of agreement or before approval by TNERC of adoption of tariff.

f)The Petitioner's claim of extension of expiry date with respect to Article 4.7.1 is not applicable as supply commenced from 1.8.2015. This article applies on account of default on the part of the seller to commence supply even after corridor allocation and hence the claim of Petitioner is not maintainable.



g)The PPA between the Petitioner and Respondent is a statutory contract under Section 63 of Electricity Act, 2003, duly approved by TNERC. Article 2.2.1 of the PPA provides for extension of the agreement on mutually agreed terms subject to the approval of the Appropriate Commission. Thus, it is not open to the Petitioner to seek extension of time on the basis of the plea raised herein.

h)Further, it is well settled law that where a statute requires a particular act to be done in a particular manner, the act has to be done in that manner alone [(2005) 13 SCC 477 at para 5 reported in Competent Authority Vs. Barangore Jute Factory &Ors]. Thus, the extension of PPA as sought for by the Petitioner is not tenable on facts but also not permissible in law as the bid was for the period up to 2028 and no extension can be sought as a mandamus from this Commission.

Written Submission of the Petitioner

8. The Petitioner, vide affidavit dated 13.5.2019, has mainly submitted as under:

(a)The assertion of the Respondent that if the Petitioner had achieved COD by 1.5.2014, it could have availed off allocation of part LTA of 150 MW, is misconceived. Even if the Petitioner had achieved COD of its dedicated transmission line by 1.5.2014, the Petitioner could not have availed of part LTA of 150 MW, as the said quantum would have been distributed on pro-rata basis amongst the other generators, which would have resulted in small quantum of allocation of 150 MW in favour of the Petitioner. The said position is strengthened from the clarification given by WRLDC in the minutes of meeting dated 28.3.2014.

(b)The contention of the Respondent that had the Petitioner achieved COD by 1.5.2014, it could have availed of allocation of part LTA of 150 MW, is also misconceived in view of the judgment of the APTEL in the case of Jindal Power Ltd. Vs. CERC and others dated 20.5.2015, wherein it has been clearly held that part LTA cannot be granted. In fact of the said judgment, the part allocation of the above 150 MW in favour of Jindal Power Ltd. came to be set aside.

(c) The submission of the Respondent that 'extension of time period is



allowed only for Scheduled Delivery Date and not for expiry date, is in the teeth of and contrary to express provisions of the PPA. As per Article 4.7.1 of the PPA, in the event that the seller is prevented from performing its obligations under Article 4.1.1 by the Revised Schedule Delivery Date, Scheduled Delivery Date and Expiry Date shall be deferred. Further, As per Article 4.7.5 of the PPA, the Scheduled Delivery Date and the Expiry Date newly determined shall be deemed to be the Scheduled Delivery Date and the Expiry Date for the purposes of this Agreement.

(d)The contention of the Respondent that the time extension cannot be beyond six months as per Article 4.7.2 of the PPA is misconceived. Article 4.7.2 of the PPA limiting the extension of time to a maximum period of six months is applicable only to the events specified in Article 4.7.1 (a). In the present case, non-availability of open access is a force majeure events affecting the seller, which is a reason falling under Article 4.7.1 (c).

(e)Force majeure events have never been disputed by the Respondent. Admittedly, the Respondent failed to give any response to the notices of force majeure issued by the Petitioner.

(f)Period of force majeure is clearly set out in the Petition. The force majeure event i.e. non-availability of LTA, which was prevailing on the Scheduled Delivery Date i.e.1.2.2014 ceased on 1.8.2015 (for 117 MW only) and on 5.10.2015 (for the remaining 91 MW supply). Therefore, the contention of the Respondent that the period of force majeure is not specified is self-contradictory in as much as the Respondent in the reply itself has proceeded to divide the period of force majeure into two halves one prior to 20.6.2014 and the second after 20.6.2014 till the date of commencement of supply of power.

(g)There will not be any increase in the financial commitment of the Respondent as alleged. There is no escalation or revision of tariff as alleged by the Respondent. Total duration of supply of power under the PPA is for fifteen years and, accordingly the applicable tariff for each contract year is separately provided for in the PPA. There is no provision in the PPA, which stipulates that in case of extension/deferment of the Scheduled Delivery Date and the



consequent extension/deferment of the Expiry Date, the tariff for the contract years, as stipulated in Schedule 8 of the PPA, shall be re-evaluated or revised. Therefore, the PPA cannot be reduced to a term less than 15 years as the same would be against the provisions of the PPA.

(h)The aspect of escalation is independent the issues raised and reliefs sought for by the Petitioner in the present Petition. The escalated variable charges would have even otherwise been payable to the Petitioner, had the operationalization of the LTA coincided with the scheduled delivery date i.e. 1.2.2014. In such a scenario, the Petitioner, apart from being entitled to 1st year capacity charges as set out in Schedule 8 of the PPA, would also be entitled to escalated variable charges for the contract year 2014-15, being escalated from March 2013. The relief sought in the present Petition is to treat the contract year 2015-16 as the 1st contract year as set out in Schedule 8 of the PPA due to force majeure events. The said relief would not overlap the otherwise be hit by the Petitioner's otherwise admitted contractual right to escalated variable charges.

Analysis and Decision

9. We have considered the submissions of the Petitioner and the Respondent and perused materials on record. The following issues emerge for the consideration of the Commission:

Issue No. 1: Whether the Petition suffers from delay and laches?

Issue No. 2: Whether the claim of Petitioner as regards delay in operationalization of LTA is a force majeure event in terms of the PPA?

Issue No. 3: Whether the Petitioner is entitled to shift the Schedule Delivery Date and Expiry Date as per PPA?

We deal with the above issues in subsequent paragraphs.

Issue No. 1: Whether the Petition suffers from delay and laches?

10. The Respondent has contended that the claim made by the Petitioner is hit by delay and laches and is barred by the principles of estoppels, in as much as, the request for extension of the term of the agreement i.e. for extension/deferment of the delivery and expiry date was made available on 17.1.2017, which was much after the



commencement of the billing from 1.8.2015 onwards. The Respondent, in support of its contention, has relied upon the APTEL judgment in Appeal No. 74 of 2007. Per contra, the Petitioner has submitted that the Petitioner had at the contemporaneous and relevant time addressed notices dated 3.1.2014 and 30.5.2014 to the Respondent, wherein it was expressly and categorically averred that the non-availability of open access be treated as a force majeure event. The Petitioner has submitted that in terms of the PPA, more specifically Article 4.7.1 read with Article 4.7.5, a force majeure event affecting the seller automatically translates into an extension/deferment of the term of the agreement i.e. extension/deferment of the delivery and expiry dates. The Petitioner has submitted that it is wholly erroneous on the part of the Respondent to seek to refer to the Petitioner's communication dated 17.1.2017 in isolation and de hors the gamut of facts, and thereby seeking to contend that the present claim of the Petitioner is hit by delay and laches and is barred by the principles of estoppel.

11. We have considered the submissions of the Petitioner and Respondents. Though no period of limitation has been prescribed in the Electricity Act, 2003 for filing the Petition for adjudication of the disputes, the Hon`ble Supreme Court in Andhra Pradesh Power Co-ordination Committee Vs. Lancon Kondapalli Power Limited [(2016) 3SCC 468] has held that the claims coming for adjudication before the Commission cannot be entertained or allowed if otherwise the same is not recoverable in a regular suit on account of law of limitation. Relevant extract of the said judgment is as under:-

“30...In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not



recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”

In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable, in the absence of any period of limitation for filing the application before the Commission. Since the supply of power under PPA commenced on 1.8.2015 and the present Petition has been filed by the petitioner on 2.5.2017, the present petition is not hit by delay and laches. Accordingly, we reject the contention of the Respondents in this regard.

Issue No. 2: Whether the claim of Petitioner as regards delay in operationalization of LTA is a force majeure event in terms of the PPA?

12. As per RFP, the Schedule Delivery Date was 1.10.2013 and the expiry date was 30.9.2028 (15th anniversary of the schedule delivery date). The PPA was signed on 19.8.2013 wherein the delivery date was changed to 1.2.2014. However, the expiry date was still maintained as 30.9.2028. The Respondent has submitted that the schedule delivery date was shifted from 1.10.2013 (in RFP) to 1.2.2014 (in PPA) as per the requirement of the Petitioner for applying and obtaining LTA from PGCIL/CTU.

13. In the year 2009, the Petitioner was granted LTA to the Western Region and Northern Region by PGCIL/CTU for transmission of 705 MW power from its generating station. The Petitioner executed a long term Power Purchase Agreement dated 19.8.2013 with TANGEDCO for supply of 208 MW of power with schedule starting of supply of power from 1.2.2014. Based on the PPA, the Petitioner applied for change of region for 208 MW to Southern Region vide its letter dated 23.8.2013. However, PGCIL/CTU did not allocate the LTA to the Southern Region as requested



by the Petitioner but asked the Petitioner to submit a fresh application as per format prescribed in this regard. The Petitioner submitted a fresh LTA application to PGCIL on 25.11.2013, accompanied by a cheque dated 24.11.2013 for Rs. 3 lakh and requested PGCIL/ CTU to grant LTA from 1.2.2014 to 30.9.2028. According to the Petitioner, it lost three months due to instruction of PGCIL/ CTU to submit a fresh application for change of LTA to Southern Region.

14. Based on the Petitioner's application dated 24.11.2013, PGCIL/CTU vide letter dated 20.12.2013 granted LTA to the Petitioner for 36 MW from 1.6.2014 and for total quantum of 208 MW from 1.8.2014 to 30.9.2028. Relevant portion of the letter dated 20.12.2013 granting the LTA is extracted as under:

"The request of DB Power was examined by CTU along with other such requests and studies were carried out for the same. Since no margins were available on the existing corridor, it was proposed to grant LTA with the commissioning of Solapur-Raichur 765 kV corridor. Accordingly, it was agreed in the Joint Standing Committee meeting that LTA may be granted after six months of synchronization of Southern Region with NEW grid i.e. 1.8.2014

The LTA of 208 MW from DB Power Plant to TANGEDCO is hereby granted....."

15. The annexure to the above-mentioned letter dated 20.12.2013 reads as follows:

'The applicant has requested for LTA from 01.02.2014. Since 208 MW is available on existing corridor from 01.06.2014, the LTA of 36MW has been granted from 01.06.2014 on the pro-rate basis as per submission of PPA and request for LTA of 1208MW received by CTU. This quantum shall continue till scheduled exchange of power starts on Solapur-Raichur 765 kV corridor.

"With the commissioning of Solapur-Raichur 765 kV corridor and additional transmission system identified at Annexure-1, additional ATC of 1250MW is available after six months of synchronization of SR & NEW grid i.e. from 01.08.2014. Therefore full quantum of 208MW is granted from 01.08.2014. However in case of unavailability of transmission system identified at Annexure-1, the LTA quantum and its start date shall be reviewed accordingly.

16. The Petitioner has submitted that subsequent to receipt of letter dated 20.12.2013 from PGCIL/CTU, it notified the same to the respondent vide its communication dated 3.1.2014 stating that the "PPA provides for treating non-availability of open access as force majeure and hence, the same is intimated to



you." It has, therefore, submitted that the Petitioner notified the respondent promptly after becoming aware of the fact that full contracted power would be delivered only w.e.f.1.8.2014.

17. The Petitioner has submitted that on 22.1.2014 i.e. one month after grant of LTA (on 20.12.2013), the PGCIL/ CTU informed the Petitioner that ICICI Bank vide its communication dated 19.12.2013 had returned the cheque of Rs. 3 lakh dated 24.11.2013 submitted with LTA application dated 25.11.2013 for the reason "drawee's signature differs. The Petitioner has submitted that on receipt of communication from PGCIL/CTU and without wasting any time, it submitted a demand draft of Rs.3 lakh on the same day i.e. 22.1.2014 towards the application made on 25.11.2013. The Petitioner has contended that though PGCIL/ CTU was aware of the return of the cheque by ICICI Bank on 19.12.2013, but it took almost one month to intimate the Petitioner about the return of the cheque and intimated it to the Petitioner only on 22.1.2014.

18. The Petitioner has stated that in a meeting held on 21.5.2014, it was informed that PGCIL/ CTU had deferred the earlier granted LTA (36 MW from 1.6.2014 and for 208 MW from 1.8.2014 vide LTA grant letter dated 20.12.2013). The Petitioner has stated that it informed the Respondent of the same vide letter dated 30.5.2014 and also stated "*hence, any delay in start of supply from DBPL due to non-availability of open access may be treated as force majeure*".

19. The Petitioner has further submitted that the PGCIL/ CTU on 22.9.2014 (eight months after 22.1.2014 i.e. date on which demand draft in lieu of dishonoured cheque was accepted by it, informed the Petitioner that LTA application submitted by the Petitioner on 25.11.2013 would be treated as having been submitted in January



2014 on the ground that cheque for application fee submitted in November 2013 had been returned by the bank and that the demand draft was submitted only in January 2014. Aggrieved by the said decision of the PGCIL/CTU, the Petitioner approached the CERC through Petition No. 376/MP/2014. CERC in its order dated 16.2.2015 in Petition No. 376/MP/2014 held that cheque was not an acceptable mode of payment and that PGCIL had rightly considered the LTA application of the Petitioner as a January 2014 application.

20. The Petitioner filed an appeal in APTEL against the Order dated 16.2.2015 of CERC. APTEL vide its judgment dated 30.3.2015 in Appeal No. 50 of 2015, set aside the Order of the Commission and allowed the Petitioner's LTA application as a November 2013 application. The relevant portion of the judgment of APTEL is quoted hereunder:

“24. Now the next question which was rightly framed by CERC is whether the Appellant's application has been correctly considered by PGCIL as an application made in January 2014. In our opinion the answer to this question must be in the negative. For this we have to only refer to certain observations made by CERC about the conduct of PGCIL. CERC has observed that PGCIL should have as per Clause 3.6 of the Detailed Procedure rejected the Appellant's application as being incomplete. PGCIL by accepting the cheque created an impression that payment through cheque is permissible. CERC further observed that ICICI bank had sent a mail to PGCIL about signature mismatch on 19.12.2013. PGCIL should have immediately informed the Appellant about the dishonour of the cheque and rejected its application. Instead vide its letter dated 20.12.2013 PGCIL intimated about the grant of LTC to the Appellant. PGCIL obviously did not link the non realization of cheque with the issue of letter granting LTA. CERC further observed that PGCIL intimated about non realization of cheque to the Appellant only on 22.1.2014 i.e. more than one month after it was returned by ICICI Bank. CERC further observed that PGCIL accepted a DD submitted on the same day. Even at that stage, it was incumbent on PGCIL to inform the Appellant that the priority of its application has been shifted from November 2013 to January 2014 when the draft was received and its LTA application would be considered accordingly. CERC further rightly commented that PGCIL did not do so and in the minutes of the meetings held on 28.3.2014 & 21.5.2014 and in the agenda for the meeting dated 01.9.2014 PGCIL treated the application of the Appellant as having been made in November 2013.

25. We concur with the above observations of the CERC. If according to the PGCIL cheque was not correct mode of payment, it ought to have rejected it at the outset. It not only accepted it, but in its various meetings raised no issue about it, granted LTA on submission of DD in place of cheque and as late as on 22.9.2014 sent a letter to the Appellant intimating to it about shifting its priority. We are also of the opinion that



Respondent No. 2 has placed undue reliance on the word “non-refundable” appearing in Regulation 6. The word non-refundable only means that the fee will not be refunded. It does not suggest any particular mode of payment.....

xxxx

34. In the circumstances we set aside the impugned order to the extent it holds that cheque is not an acceptable mode of payment of application fee while applying for LTA under the Connectivity Regulations & Detailed Procedure. We set aside the finding of the CERC that the application of the Appellant has been correctly considered by PGCIL as an application made in January 2014. We are of the opinion that the Appellant, in the peculiar facts of this case is entitled to be treated as November 2013 applicant.”

21. In terms of the APTEL judgment dated 30.3.2015, the Petitioner on 15.7.2015 was granted notional LTA for 208 MW from 1.8.2014 considering its LTA application as an application made in November 2013. PGCIL vide its communications dated 28.7.2015 and 1.10.2015 communicated that part LTA for 117 MW would be operationalized from 1.8.2015 and that remaining LTA for 91 MW would be operationalized from 5.10.2015.

22. Consequent upon operationalization of LTA w.e.f. 1.8.2015 for 117 MW and remaining 91 MW from 5.10.2015, the Petitioner started supply of power to the Respondent and billed the capacity charges as well as energy charges for third contract year as provided in schedule 8 of the PPA i.e. corresponding to the year 2015-16. Similarly, for the power supplied during 2016-17, the Petitioner billed capacity charges as well as energy charges for fourth contract year as provided in schedule 8 of the PPA i.e. for 2016-17.

23. On 17.1.2017, the Petitioner notified to the Respondent the above position as per clause 9.3.1 of the PPA that *“even though as per terms of the PPA, the scheduled delivery date is 1.2.2014, the terms of PPA provide for extension of Scheduled delivery date in case of force majeure. It is a fact that due to non-availability of open access which is a force majeure event under the PPA, the supply of power could commence only on 1.8.2015, as a result whereof, the scheduled*



delivery date stands deferred and is to be considered as 1.8.2015. As such, the 1st year capacity charges (Tariff) as set out in Schedule 8 of the PPA, should be applicable for the FY 2015-16 (for the period from 1.8.2015 to 31.3.2015 and the 2nd year capacity charges should be applicable for the FY 2016-17 and so on and so forth". The Petitioner has submitted that it requested the Respondent for acceptance of the above so as to enable the Petitioner to raise supplementary bill for the same. According to the Petitioner, the Respondent did not respond to the said letter of the Petitioner nor paid the tariff as requested by the Petitioner in its letter dated 17.1.2017. The Petitioner has submitted that the tariff being paid by the Respondent to the Petitioner was not in accordance with the terms of the PPA and resulted in shortfall of recovery of tariff by the Petitioner. For supply of power for the period commencing from 1.8.2015 till 31.3.2017, the Petitioner is entitled to an amount of Rs. 18,73,53,192/- towards shortfall in tariff occasioned on account of wrong application of tariff mentioned in Schedule 8 to the PPA, by the Respondent. The Petitioner has submitted that finding no response from the Respondent in this regard, it has preferred the instant Petition.

24. Article 9.3.1 of PPA deals with force majeure event. The relevant extract reads as follows:

"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 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 of the force majeure, non-availability of open access



shall be treated as force measure without any liability.

25. On basis of above provision in the PPA, the Petitioner has stated that non-availability of the open access is a force majeure event for seller. We note that the Respondent in its reply has also accepted that *"As per clause 9.3.1 of the PPA, non-availability of open access is treated as Force-majeure without any liability on either side and hence the period till grant of the LTA from the Scheduled Delivery date has been considered as a force majeure event i.e. up to operationalization of 117 MW on 1.8.2015."*

26. We thus note that in the PPA, there is a clear provision that non-availability of open access (in the present case LTA) is a Force Majeure event and the same has been accepted by the Respondent. We, therefore, hold that the delay in operationalization of LTA by the PGCIL/ CTU was a force majeure event in terms of Article 9.3.1 of the PPA.

27. We now proceed to examine whether requirements related to notice of force majeure in terms of provisions of PPA has been complied with. Article 9.5.2 of the PPA provides as under:

"9.5.2 The Affected Party shall give notice to other Party of (i) the cessation of the relevant event of Force Majeure, and (ii) the cessation of the effects of such event of Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of each of these cessations."

28. We notice that the Petitioner after signing of PPA on 19.8.2013 requested PGCIL/ CTU on 23.8.2013 that out of 705 MW LTA granted to it during 2009 for WR and NR, 208 MW may be shifted to SR for supply of power to the Respondent. In our view, the Petitioner promptly applied for LTA after signing of the PPA. Further,



pursuant to direction of PGCIL/ CTU to submit fresh application, the Petitioner submitted LTA application to PGCIL/ CTU on 25.11.2013. However, the Petitioner should have been aware of the requirements for change in region in the LTA and should have applied for change of target region through a proper application, without waiting for directions from PGCIL/CTU.

29. It is also observed that on receipt of letter dated 20.12.2013 from PGCIL/ CTU vide which the Petitioner was granted LTA of 36 MW from 1.6.2014 and of 208 MW from 1.8.2014 and not from 1.2.2014 as requested, the Petitioner notified to the Respondent vide its letter dated 3.1.2014 stating that the non-availability of open access may be treated as a force majeure event as per PPA. The Petitioner also stated that *“hence, any delay in start of supply from DBPL due to non-availability of open access may be treated as force majeure”*. Further, on 30.5.2014, the Petitioner sent a notice to the Respondent informing it about the meeting held on 21.5.2014, where PGCIL/ CTU deferred the operationalization of the LTA granted to the Petitioner earlier. The letter date 30.5.2014 concluded by stating that *“hence, any delay in start of supply from DBPL due to non-availability of open access may be treated as force majeure”*.

30. The Respondent has contended that no notice of Force Majeure was served by the Petitioner on the Respondent for the period after 20.6.2014 and that in absence of any notice of Force Majeure by the Petitioner as provided for under Article 9.5.1, no relief can be claimed under Force Majeure. To this, the Petitioner has submitted that Respondent was a party to the Petitions before the CERC and subsequently before the APTEL and there was no need to send any specific notice of force majeure. We note that the same event of force majeure that was notified to the



Respondent by the Petitioner by its letters dated 3.1.2014 and 30.5.2014 continued until APTEL vide judgment dated 30.3.2015 directed PGCIL/ CTU to treat the Petitioner's case as a November 2013 applicant for LTA. Eventually, LTA was operationalized on 1.8.2015 for 117 MW and on 5.10.2015 for 91 MW by PGCIL/ CTU. We tend to agree with the Petitioner since the Respondent, being a Party before this Commission and APTEL, was aware of the proceedings and, therefore, there was no need for sending a separate notice of force majeure.

31. In view of the above, we are of the view that the Petitioner has kept the Respondent informed about status of grant of LTA by PGCIL/ CTU and, therefore, requirement of Article 9.5 of the PPA as regards notice to the Procurer for force majeure event is satisfied. Also, from the chronology of events as indicated in paragraphs above, it is noted that Petitioner cannot be faulted for non-action at any stage.

32. Having decided that non-availability of LTA to the Petitioner was an event of force majeure and that the Petitioner has complied with provisions of notice of force majeure, we now proceed to assess the duration for which the Petitioner was affected by force majeure. In this regard, the Respondent has referred to minutes of meeting held on 28.3.2014, wherein PGCIL/CTU has stated that available ATC of 150 MW was allotted to M/s. Jindal Power Ltd from 1.5.2014 as the Petitioner had not declared COD of its dedicated transmission line. The Respondent has further submitted that admittedly the dedicated evacuation line which was the Petitioner's obligation and was necessary for availing LTA, was put into operation by the Petitioner only on 20.6.2014. The Respondent has, thus, submitted that it was a Seller event of default and that the Petitioner cannot claim Force Majeure for the



period prior to 20.6.2014.

33. We have already held above that non-availability of LTA to the Petitioner by PGCIL/ CTU was an event of force majeure. However, to be eligible for any relief under force majeure, the Petitioner should have completed its obligations required under PPA for being in readiness to supply power. No party can be entitled to claim relief of a provision when it itself is at fault. In the instant case, the Petitioner was not ready to supply power till 19.6.2014 as its dedicated transmission line was declared under commercial operation only on 20.6.2014. Accordingly, for the period of 139 days between 1.2.2014 to 19.6.2014, the Petitioner cannot be granted relief under force majeure event since it would not have been possible for the Petitioner to inject power without dedicated transmission system being in place, even if LTA was available.

34. In view of the above, it is held that though non-availability of LTA is a force majeure event in terms of the PPA, considering the declaration of commissioning of dedicated transmission system of the Petitioner only on 20.6.2014, the period of 139 days i.e. from 1.2.2014 to 19.6.2014 is not allowed under force majeure event for the purpose of granting any relief to the Petitioner under force majeure event. Further, though the Petitioner commissioned the dedicated transmission system on 20.06.2014, the Petitioner was able to supply power to the Respondent only after LTA was operationalized by PGCIL/ CTU from 1.8.2015 for 117 MW and from 5.10.2015 for full quantum of 208 MW. Thus, period from 20.6.2014 to 31.7.2015 for 117 MW and that from 20.6.2014 to 4.10.2015 for remaining 91 MW are covered under force majeure event.

Issue No. 3: Whether the Petitioner is entitled to shift in Schedule Delivery Date and Expiry Date as per the provisions of the PPA?



35. Article 3 of the PPA titled "Conditions Subsequent to be satisfied by Seller/Procurer" requires that the seller shall have LTA in place subsequent to PPA but before delivery date.

Articles 3.1, 3.4.3 and 3.4.6 of the Article 3 of the PPA read as follows:

"3.1 Satisfaction of conditions subsequent by the Seller

3.1.1 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk on or before the scheduled delivery date, unless such completion is affected by any Force Majeure event or due to the Procurer's failure to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurer

a) Deleted

b) The Seller shall have obtained all the necessary permission for the long term open access for the intrastate transmission system from the Power Station bus bar to the injection Point (except in case of dedicated transmission lines) and shall have executed all necessary agreements for such transmission access and provided a copy of the same to the Procurer;

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

d) The Seiler shall have acquired and taken the possession of the balance area of land out of the total land requirement as mentioned in the proposal filed before the competent authority at the RFP stage.;

The Seller shall submit the letter of possession and equivalent documents for such area of land as mentioned above to the Procurer,

e) The Seller shall have awarded the Engineering, Procurement and Construction contract ("EPC contract) or main plant contract for boiler, turbine and generator ("BTG"), for setting up of the Power Station and shall have given to such contractor an irrevocable NTP and shall have submitted a letter to this effect to the Procurer;

f) The Seller shall have obtained all Consents, Clearances and Permits required for supply of power to the Procurer as per the terms of this Agreement;

g) The Seller shall have sent a written notice to the Procurer indicating the Aggregate Contracted Capacity and total Installed Capacity for each unit and for the Power Station as a whole expressed in MW;

h) The Seller shall have achieved Financial Closure and has provided a certificate from the lead banker to this effect;

i) The Seller is permitted to apply for Open Access under Medium Term Open Access in case Long Term Open Access Is granted from a day later than the Scheduled



Delivery date.”

3.4.3 In case of inability of the Seller to fulfil any one or more of the conditions specified in Article 3.1 due to any Force Majeure event, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1, shall be extended for the period of such Force Majeure event, subject to a maximum extension period of ten(10) months, continuous or non-continuous in aggregate. Thereafter, this Agreement may be terminated by either the Procurer or the Seller by giving a Termination Notice of at least seven (7) days, in writing to the other Party. The termination of the Agreement shall take effect upon the expiry of the last date of the said notice period.

*3.4.6 No Tariff adjustment shall be allowed on account of any extension of time arising under any of the sub-articles of Article 3.4;
Provided that due to the provisions of Articles 3.4.3, 3.4.4 and 3.4.5, any increase in the time period for completion of conditions subsequent mentioned under Article 3.1, shall also lead to an equal extension in the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be.*

36. It is observed that Article 3.4.3 read with Article 3.4.6 of the PPA provides for extension of period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1 thereby extending scheduled delivery date or the revised scheduled delivery date, as the case may be, by a period for which the Seller has been affected by force majeure event. We note that as per Article 3.1.1(c), obtaining LTA is a Condition Subsequent.

37. We have held earlier that non-availability of LTA is a force majeure event affecting the Petitioner (Seller). As has been held in Para 34 above, the period from 20.6.2014 to 31.7.2015 for 117 MW and that from 20.6.2014 to 4.10.2015 for remaining 91 MW are covered under force majeure event. Therefore, the time period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1 (operationalization of LTA in the instant Petition) shall get extended by the period for which the Seller was affected by force majeure in terms of Article 3.4.3. Even though the period of force majeure extended beyond 10 months, the Respondent or the Petitioner did not exercise its right to terminate the contract in terms of Article 3.4.3 of PPA. Thus, in terms of proviso to Article 3.4.6, schedule delivery date shall get



extended for an equal period for which increase in period for fulfillment of conditions subsequent is allowed. As has been held in Para 34 above, for the period of 139 days between 1.2.2014 to 19.6.2014, the Petitioner cannot be granted relief under force majeure since it would not have been possible for the Petitioner to inject power without dedicated transmission system being in place even if LTA was available. After excluding this period of 139 days, the deemed/extended scheduled delivery date, for the purpose of granting relief to the Petitioner under force majeure event, works out to 15.3.2015.

38. Further, the Petitioner has submitted that expiry date may also be extended by the same period so as to maintain the contract period as 15 years. In this regard, the Petitioner has referred to Article 4.7.5 of the PPA. The Article 4.7 of the PPA titled 'Extension of Time' reads as follows:

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

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

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

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

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

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



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

39. We note that the Article 4.7.1 provides that Revised scheduled delivery date, scheduled delivery date and expiry date shall be deferred to overcome the effects of the force majeure. In the instant petition, the Petitioner is affected by force majeure specified in Article 4.7.1(c) i.e. "Force Majeure Event affecting Seller" and is thus covered under the Article 4.7.3. Article 4.7.3 provides that if such Force Majeure Event continues even after the maximum period of six months, any of the parties may choose to terminate the Agreement as per the provisions of Article 11.5.

40. In the instant case, the force majeure event of non-availability of LTA continued for more than six months. However, neither the Petitioner nor the Respondent chose to terminate the agreement.

41. Article 4.7.4 of this Article provides that if the parties have not agreed within thirty days after the performance has ceased to be affected by the relevant circumstance, on the time period by which the Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 14. In terms of the Article 4.7.4 of the PPA, the parties were required to agree on the extension of Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date once the force majeure event was over. Though neither the Petitioner nor the Respondent have done so, we note from the submissions of the Respondent that the Respondent has no issue with the extension of scheduled delivery date till 1.8.2015 for 117 MW and till 5.10.2015 for 91 MW i.e. the dates from which actual supply started. However, the Respondent has contested the extension of the expiry date.



42. The Article 14 of the PPA stipulates as follows:

14.2.1 Amicable Settlement

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

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

14.2.1.2 *The other Party shall, within thirty (30) days of issue of Dispute Notice issued under Article 14.2.1.1, furnish:*

- (i) Counter-claim and defences, if any, regarding the Dispute; and*
- (ii) All written material in support of its defences and counter-claim.*

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

14.3 Dispute Resolution

14.3.1 *Dispute Resolution by the Appropriate Commission*

14.3.1.1 a) *where any Dispute arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.*

b) *Where SERC is appropriate commission, all disputes between the procurer and the seller shall be referred to SERC*

14.3.2.2 *Deleted.*

43. We note that it was only vide the Petitioner's letter dated 17.1.2017 that the dispute has been raised. The Respondent did not reply to the request of the Petitioner to treat 1st year capacity charges (Tariff) as set out in Schedule 8 of the PPA, as applicable for the Contract Year 2015-16 and the 2nd year capacity charges (Tariff) to be applicable for the Contract Year 2016-17 and so on and so forth.

44. We note that in terms of Article 14 of the PPA, a party is entitled to raise any claim by initiating notice to the other party, which shall contain the description, grounds and all written material in support of the dispute. We also note that the



Article 14 does not prescribe any time limit till which dispute can be raised by the parties. In the instant case, the parties should have reached an agreement as regards the Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date within 30 days of force majeure event getting over. Else the parties should have approached the Appropriate Commission for resolution of dispute. However, neither party did so and it was only after the letter dated 17.1.2017 of the Petitioner addressed to the Respondent that the issue came to the fore. Respondent has submitted that after billing for almost two years, the Petitioner's raising of the dispute by way of letter dated 17.1.2017 is an afterthought.

45. In our view, it was responsibility of both the parties to decide upon the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date once force majeure ceased to exist. We have already noted that the Petitioner kept the Respondent informed about the non-availability of the LTA through notices and by impleading it in Petitions before this Commission and APTEL. Now, the Respondent cannot shy away from its responsibility merely by stating that the Petitioner raising dispute after two years or so is an afterthought. In view of the above, prayer of the Petitioner needs to be given consideration and matter regarding the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date needs to be decided since the parties have not agreed to these dates within the stipulated period of 30 days as provided in Article 4.7.4 of the PPA even though the matter has been raised after almost 15 months of force majeure having ceased to exist.

46. In this regard, the Respondent has submitted that (i) as per PPA, expiry date was fixed at 30.9.2028; (ii) the Article 3 of PPA only allows for extension of delivery date due to any force majeure event affecting either party; and (iii) PPA does not



allow the extension of expiry date. Regarding Petitioner's reliance on Article 4 according to which all dates i.e. Revised Scheduled Delivery date, Scheduled Delivery Date and Expiry Date can be extended if any party is affected by force majeure event, the Respondent has averred that the Petitioner's claim of extension of expiry date with respect to Article 4.7.1 is not applicable as supply commenced from 1.8.2015. According to the Respondent, provision of this Article applies on account of default on the part of the seller to commence supply even after corridor allocation and hence the claim of the Petitioner is not maintainable.

47. In our view, a plain reading of Article 4.7.4 and Article 4.7.5 read with Article 4.7.1(c) of the PPA clearly provide for extension of expiry date on account of Force Majeure Events affecting the Seller. As such, we are not in agreement with the Respondent's submission that there is no provision of extending the expiry date under the PPA.

48. The Respondent has also submitted that the entire process of bidding was with the aim to meet the power requirement up to 2028 and accordingly evaluation of tender was carried out thereby discovering levelized tariff of Rs.4.91 per kWh for the entire contract period of 15 years up to 30.9.2028. The same was adopted by the TNERC. The Respondent has submitted that power procurement up to 30.9.2028 was a pre-determined action plan which cannot be altered at any cost for the sake of the Petitioner's convenience since it will result in additional financial implication for the Respondent and in turn to the consumers of Tamil Nadu by way of tariff revision. It has, therefore, stated that the Expiry Date should not be revised.

49. We are unable to agree with the above contention of the Respondent as the PPA has clear provision as regards extension of Expiry Date.



50. Article 4.7.1 of the PPA provides the principle for extension of Expiry Date stating that *“the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.7.2, for a reasonable period but not less than 'day for day' basis, to permit the Seller or the Procurer through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or the Procurer, or till such time such Event of Default is rectified by the Procurer.”* We note that such extension has to be for a reasonable period but should not be less than ‘day to day’ basis for the period for which the party is affected by force majeure event.

51. Further, Article 4.7.3 of the PPA reads as follows with regard to Force majeure Events affecting seller (as given in Article 4.7.1(c)):

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

52. Neither of the parties chose to terminate the contract nor agreed to the duration of extension of the expiry date. Upon combined reading of Article 4.7.1 (that prescribes extension to be not less than day to day basis) and Article 4.7.3 (that gives options to the parties to decide on termination of agreement after six months of continuance of force majeure), we are of the view that the expiry date of the PPA shall be extended by six months. In terms of provisions of Article 4.7.4 of the PPA, the parties were to agree to extension of Expiry Date which has not happened in the instant case. The Petitioner has raised a dispute vide its letter dated 17.1.2017 and when no response was received from the Respondent, the Petitioner has filed the instant Petition. Therefore, we are not inclined to consider extension of Expiry Date beyond six months. However, it is upto the parties to reach a settlement in this



regard, if they so decide. Accordingly, the expiry date is re-fixed as 31.3.2029 i.e. six months from the Expiry Date as mentioned in the PPA (30.9.2028).

53. In view of the above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 15.3.2015. Similarly, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be substituted by 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2014-15, even though the actual supply had not started during this period. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16 i.e. the first year of actual power supply and so on.

54. The Petitioner has prayed to direct the Respondent to pay the amount of Rs. 18,73,53,192/- towards shortfall in tariff for the period from 1.8.2015 to 31.3.2017. We are not inclined to decide on the exact amount to be paid by the Respondent. However, we direct the Petitioner to revise its bills for power supplied to the Respondent in terms of the Extended Scheduled Delivery Date as decided above. The Respondent shall make payment within 60 days of raising of bills by the Petitioner failing which it would be required to pay late payment surcharge in terms of the relevant provision of the PPA.

55. The Petitioner has also prayed to direct the Respondent to pay interest @18% p.a. on the said amount (Rs. 18,73,53,192/-) from the day it became due and payable (i.e. the dates of supply till realization). We are not inclined to accept this request since it was the Petitioner who continued to raise bills upon the Respondent without a decision on the extension of Schedule Delivery Date. Since the Respondent cannot



be faulted, the claim of the Petitioner for payment with interest for past period is not acceptable.

56. The Respondent has submitted that as per Schedule 6 of the PPA, energy charges are to be escalated from the bid deadline of 6.3.2013 with the escalation index issued from time to time by CERC. The Respondent has stated that though the supply of power started from 1.8.2015, the energy charges paid to the Petitioner on the commencement date was the escalated energy charge from 6.3.2013. This calculation will be adopted till 30.9.2028 (i.e. quoted energy charge at the time of bid is escalated from 6.3.2013 till 30.9.2028 with applicable escalation index for a period of 5478 days, nearly 15.5 years). The Respondent has contended that if the expiry date is extended up to 2030, the financial commitment for the Respondent is extended to a further period of about 2 years after the current expiry date of 30.9.2028 and the same is not acceptable to it.

57. The Article 6.1.1 of Schedule 6 of the PPA with regard to Escalable Index stipulates as follows:

“6.1.1 The index ("Escalation Index") to be applied for escalation of Quoted Escalable Capacity Charges, Quoted Escalable Energy Charges, Quoted Escalable Inland Transportation Charges, Quoted Escalable Overseas Transportation Charges and Quoted Escalable Fuel Handling Charges shall be computed by assuming that as on the date of the Bid Deadline (for Quoted Escalable Energy Charges, Quoted Escalable Inland Transportation Charges, Quoted Escalable Overseas Transportation Charges and Quoted Escalable Fuel Handling Charges) and Scheduled Delivery Date (for Quoted Escalable Capacity Charges) or Revised Scheduled Delivery Date, as the case may be, the value of such Escalation Index Is 100. Thereafter for each Month after the Bid Deadline (for Quoted Escalable Energy Charges, Quoted Escalable Inland Transportation Charges, Quoted Escalable Overseas Transportation Charges and Quoted Escalable Fuel Handling Charges) and Scheduled Delivery Date (for Quoted Escalable Capacity Charges) or Revised Scheduled Delivery Date, as the case may be, the value of the Escalation Index shall be computed by applying the per annum inflation rate specified by CERC for payment of Escalable (or indexed) Capacity Charge and Escalable Energy Charge, as per the provisions of this Agreement”



58. In view of the above provision, we are of the view that payment of energy charges as per the CERC escalation index is unavoidable due to extension of Schedule Deliver Date. However, in this instant case, the expiry date has been extended only till 31.3.2029 which lies within the same financial year i.e. 2028-29 in which the original expiry date of 30.9.2028 lies. As such, the Respondent will have no additional financial burden in terms of escalable components of tariff.

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

(a) Non-availability of LTA to the Petitioner is a force majeure event in terms of the PPA.

(b) On account of force majeure, the deemed/extended scheduled delivery date shall be 15.3.2015 taking into account non-availability of dedicated transmission system of the Petitioner up to 19.6.2014.

(c) On account of force majeure, the Expiry date of the PPA shall be extended up to 31.3.2029 i.e. six months after the expiry date as per PPA.

(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2014-15, even though the actual supply has not started during this period. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for the 2015-16 i.e. the first year of power supply and so on.

(e) The Petitioner is entitled to recover the difference in terms of the above extended schedule delivery date and revised tariff for respective contract years.



(f) The Petitioner shall not be entitled for any interest for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates specified in the PPA.

60. The Petition No. 117/MP/2017 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

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

Sd/-
(P. K. Pujari)
Chairperson

