

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No. 183/MP/2018**

**Coram:**

**Shri P.K. Pujari, Chairperson**

**Dr. M.K. Iyer, Member**

**Shri I.S. Jha, Member**

**Date of Order: 27<sup>th</sup> November, 2019**

**In the matter of**

Petition under section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 seeking extension of Scheduled Delivery Date on account of force majeure events falling within the scope of the Power Purchase Agreement dated 01.11.2013 (PTC-PPA) executed between the Petitioner and the Respondent No. 5 and as per the terms of the back to back Power Purchase Agreement executed by PTC with Jaipur Vidyut Vitran Nigam Limited (“JVVNL”), Ajmer Vidyut Vitran Nigam Limited (“AVVNL”), Jodhpur Vidyut Vitran Nigam Limited (“JVVNL”) dated 01.11.2013.

**And**

**In the matter of**

Maruti Clean Coal and Power Limited  
7<sup>th</sup>Floor, Office Tower, Ambiance Mall,  
NH-8, Gurgaon-122002

**...Petitioner**

**Versus**

1. Jaipur Vidyut Vitran Nigam Limited  
Vidyut Bhawan, Jyoti Nagar  
Near New Vidhan Sabha Bhawan  
Jaipur-302 005 (Rajasthan)
2. Ajmer Vidyut Vitran Nigam Limited  
Vidyut Bhawan, Makarwali Road,  
Panchsheel Nagar, Ajmer-305 004  
(Rajasthan)



3. Jodhpur Vidyut Vitran Nigam Limited  
New Power House, Industrial Area,  
Jodhpur-342 003 (Rajasthan)
4. Rajasthan Urja Vikas Nigam Limited  
VidyutBhawan, Janpath, Jaipur-302 005  
(Rajasthan)
5. PTC India Limited  
2nd Floor, NBCC Tower 15,  
Bhikaji Cama Place,  
New Delhi-110066
6. Chhattisgarh State Power Trading Co. Ltd.  
2<sup>nd</sup> Floor, Vidyut Sewa Bhawan  
Dangania, Raipur-492 013,  
Chhattisgarh
7. Chhattisgarh State Power Distribution Co. Ltd.  
Vidyut Sewa Bhawan  
Dangania, Raipur-492 013,  
Chhattisgarh...Respondents

**Parties present:**

Shri Matrugupta Mishra, Advocate, MCCPL.  
Shri Shourya Malhotra, Advocate, MCCPL.  
Shri Samyak Mishra, Advocate, MCCPL.  
Shri M.G Ramachandran, Sr. Advocate, Rajasthan Discoms  
Ms. Poorva Saigal, Advocate, Rajasthan Discoms  
Ms. Tanya Sareen, Advocate, Rajasthan Discoms  
Shri Ashish Anand Bernad, Advocate, PTC.  
Shri Paramhans Sahani, Advocate, PTC.

**ORDER**

The Petitioner, Maruti Clean Coal and Power Ltd. (hereinafter also referred to as MCCPL) has filed the present Petition with the following prayers:

- (a) *Hold and declare that the Revised Schedule Delivery Date is 1.4.2017 in terms of Article 4.1.1 of the Procurer PPA;*
- (b) *Hold and declare that the 1<sup>st</sup> contract year under the Procurer PPA has commenced from 1.4.2017, on which the Petitioner started supplying the Aggregate Contracted Capacity to the Respondents No. 1 to 3;*
- (c) *Direct the Respondent Nos. 1 to 3 and Respondent No. 5 to make payments of the power supplied by the Petitioner in terms of the Revised Scheduled Delivery Date.*



(d) *Pass any such other or further orders as the Commission deems fit in the facts and circumstances of the case.*

## **Background**

2. The Petitioner, Maruti Clean Coal and Power Limited (MCCPL), is a company incorporated under the Companies Act, 1956 and is a generating company within the provisions of the Electricity Act, 2003. The Petitioner has set up a 300 MW (1×300 MW) coal-based Thermal Power Plant at Korba, in the state of Chhattisgarh. The Petitioner and the Respondent No.5, PTC India Ltd. (hereinafter referred to as PTC) entered into a Power Purchase Agreement (hereinafter referred to as the “PTC-PPA”) on 01.11.2013 for supply of 250 MW Round the Clock (RTC) power for a period of twenty-five years from the Scheduled Delivery Date (SDD) of the project, for onward sale on long term basis. The PTC-PPA was executed on the understanding that PTC had executed agreement (Procurer-PPA) dated 01.11.2013 with the Respondents 1, 2 and 3 (hereinafter referred to as the Rajasthan Discoms) for sale and supply of Aggregated Contracted Capacity (ACC) of 250 MW from the power to be procured under PTC-PPA. The Procurer-PPA was executed pursuant to a Competitive Bidding Process initiated by the Respondent No. 4 (erstwhile Rajasthan Rajya Vidyut Prasaran Nigam Limited) through issuance of a Request for Proposal (RFP) for procurement of power on long-term basis under Case-I bidding process. The Petitioner is also supplying 15 MW power to the State of Chhattisgarh under the Power Purchase Agreement dated 09.12.2013 entered into between the Petitioner and the Respondent No.6 i.e. Chhattisgarh State Power Trading Co. Ltd. (CSPTCL).

3. The Petition was admitted on 20.12.2018 and notice was issued to the Respondents to file their replies. PTC has filed its reply vide affidavit dated



14.03.2019. The Respondents 1 to 4 have filed their replies vide affidavit dated 13.03.2019. The Petitioner has filed its rejoinder vide affidavit dated 23.04.2019 to the reply filed by Respondents 1 to 4. Petitioner and Respondents have also filed written submissions vide affidavits dated 13.06.2019 and 14.06.2019 respectively.

### **Submissions of the Petitioner**

4. The Petitioner has, vide affidavit dated 19.05.2018, mainly submitted as under:

(a) The obligation of the Petitioner to supply the Aggregated Contracted Capacity of 250 MW in terms of Clause 4.1 of the Procurer-PPA was subject to any Force Majeure events, which may occur. Clause 3.1.1 of the Procurer-PPA states that the supply of Power from the Scheduled Delivery Date is subject to Force Majeure events.

(b) In terms of Clause 4.2.1 read with Clause 3.1.1 of the Procurer-PPA, the Petitioner was obliged to obtain the required transmission access for delivering the Aggregate Contracted Capacity up to the Delivery Point within 12 (twelve) months of the effective date i.e. 01.11.2013 and also execute necessary agreement to that effect and provide a copy of the same to the Procurer(s). The provisions of Clauses 9.2, 9.3 and 9.7 of the Procurer-PPA provide that if the Seller is prevented from performing its obligation due to events categorized as Force Majeure events under Clause 9 of the Procurer-PPA, the Seller is entitled to relief under Clause 9 of the Procurer-PPA.

(c) The Petitioner had earlier executed a Bulk Power Transmission Agreement (BPTA) with PGCIL/CTU dated 24.02.2010 along with 6 other LTA customers for evacuating 171 MW from its power plant having target region of WR (126 MW) and NR (45 MW). However, subsequent to executing the PTC-PPA/ Procurer-PPA, the Petitioner made prompt communications to PGCIL/CTU for carrying out changes/ modifications in the BPTA for giving effect to change of beneficiaries. Accordingly, the Petitioner vide letter dated 18.01.2014 to PGCIL/CTU stated that the Petitioner has signed a back to back PPA for sale of 250 MW for a term of 25 years and, therefore, the Long



Term Access (LTA) may be revised to NR - 250 MW (PTC) and WR - 15 MW (CSPTCL).

(d) The request made by the Petitioner vide its letter dated 18.01.2014, was kept pending by PGCIL/CTU, as the Procurers i.e. Respondents 1 to 3 were required to obtain necessary approval from the Rajasthan Electricity Regulatory Commission ('RERC') for adoption of tariff and the same ought to have been conveyed to the Petitioner within 6 months of signing the PPA, as per Clause 3.2.1(C) of the PPA. At the stage of tariff approval by the RERC, some of the bidders challenged the said approval before the Hon'ble High Court of Rajasthan and before the Hon'ble Supreme Court. On 08.10.2014, the Hon'ble Supreme Court observed that the RERC can proceed to adopt the tariff. Thereafter, RERC approved the PPA and quantum of power vide its order dated 22.07.2015.

(e) After the approval of the PPA by RERC for supply of 250 MW to the Respondents 1 to 3, the Petitioner issued a letter dated 13.08.2015 to PGCIL/CTU for grant of LTA to the said Respondents (Procurers) w.e.f. the Scheduled Delivery Date as per Clause 4.1.1 of the Procurer-PPA.

(f) As only 45 MW LTA in NR was available with the Petitioner, an additional 205 MW LTA was required to be obtained for evacuation of 250 MW of power to the Respondent 1 to 3 as per the Procurer-PPA. To change the target region from WR to NR, the Petitioner vide its letter dated 18.01.2014, had applied for change of beneficiaries. In the meantime, this Commission, vide its order dated 16.02.2015 passed in Petition No. 92/MP/2014, has specifically observed that for change in the target region of LTA for more than 100 MW, a fresh application has to be made. In addition to the aforesaid, the consent/ NOC from the State Transco was also required to be attached with the LTA application. The WR Standing Committee on grant of LTA during the 20<sup>th</sup> Meeting required the Petitioner to file fresh application for grant of 205 MW to NR as the quantum of LTA for change of region from WR to NR was more than 100 MW.

(g) In view of the Scheduled Delivery Date i.e. 30.11.2016 and based on



the delay in implementing the construction of transmission corridor for evacuation of power from the Petitioner's power plant on long term basis, the Petitioner applied to the Rajasthan SLDC for permission to apply for an MTOA (Medium-Term Open Access), in order to supply the aggregated contracted capacity of 250 MW from 30.11.2016. Necessary clearance to apply for MTOA was issued by the Rajasthan SLDC only on 08.12.2015, pursuant to which MCCPL filed an application, dated 31.12.2015 with the CTU for grant of MTOA for 205 MW. The necessary clearance to make fresh application to PGCIL/CTU for grant of LTA of 205 MW was issued by the Respondent No. 4 only vide its letter dated 05.02.2016.

(h) PGCIL/CTU vide its letter dated 10.02.2016 granted MTOA to the Petitioner for supply of 205 MW to the Respondents 1 to 3. However, grant of the said MTOA was subject to the commissioning of Champa-Kurukshetra  $\pm$  800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity. In the meanwhile and without prejudice to the grant of MTOA, the Petitioner was consistently approaching PGCIL/CTU for grant of LTA of 205 MW in NR. It was in this context only and pursuant to the order passed by this Commission on 16.02.2015 in Petition No. 92/MP/2014 that the Petitioner applied for the said LTA of 205 MW yet again on 25.02.2016 vide its application No. MCCPL/PGCIL/1X300/15-16/2129.

(i) Since the said MTOA was made contingent upon commissioning of Champa-Kurukshetra  $\pm$  800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity, the Petitioner addressed a letter dated 11.07.2016 to PGCIL/CTU contending that the date of commissioning of the Champa-Kurukshetra  $\pm$  800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity was divided in two phases and the final phase was likely to be completed by December 2016 and that this date did not match the date on which MTOA was granted to be operationalized i.e. 30.11.2016 (which also happened to be SDD under the Procurer-PPA). Even the plant of the Petitioner had achieved COD on 31.07.2015. Hence, the Petitioner requested for operationalization of MTOA from the date of grant, i.e., 30.11.2016 out of the existing margin, without linking the same with the commissioning of the above line.



(j) Vide its letter dated 28.07.2016, PGCIL/CTU informed the Petitioner that as per Clause 9.4 of the Detailed Procedure, it was very clear that MTOA is to be granted only when there was availability of transmission capacity in the existing system or when the transmission system was under execution process and was to be ready before the intended time. However, vide the said letter, CTU also informed the Petitioner that any delay in commissioning of the transmission system was beyond its control and accordingly MTOA can be operationalized only from the date of implementation of the identified system.

(k) PGCIL/CTU vide letter its dated 29.07.2016 agreed to grant the LTA for remaining 205 MW in pursuance of the application made by the Petitioner on 25.02.2016 subject to signing of the LTA Agreement and fulfillment of other statutory conditions. The LTA which was to be granted to the Petitioner for supply of 205 MW to NR was linked to commissioning of transmission system which was scheduled for commissioning in the month of April 2018 and, therefore, the transmission system was not made available from the scheduled delivery date i.e. 30.11.2016.

(l) It is submitted that pursuant to continuous follow up by the Petitioner with PGCIL/CTU for regularization of LTA for 45 MW and operationalization of the 205 MW of MTOA/ LTA, PGCIL/CTU issued a letter dated 16.08.2016 to the Petitioner informing that the grant of MTOA/LTA was independent of the Petitioner's rights and obligations under the PPA and to consider Rajasthan as firm beneficiary for 45 MW would require NOC from Rajasthan STU. Further, it was yet again informed to the Petitioner that operationalization of the 205 MW MTOA was subject to the commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity.

(m) On 22.08.2016, pursuant to the non-commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity, the Petitioner was constrained to issue a notice of Force Majeure to Respondent No. 5/ PTC, thereby informing that only 45 MW of power can be supplied from 30.11.2016 on account of the reasons beyond the control of the Petitioner and since the Petitioner has been restrained from supplying the Aggregated Contracted



Capacity of 250 MW due to non-availability of the transmission system as on the Schedule Delivery Date.

(n) Pursuant to the aforesaid letter dated 22.08.2016 issued by the Petitioner, the Respondent No. 5 issued a Force Majeure notice dated 23.08.2016 to the Procurers, thereby requesting them for extension of Schedule Delivery Date for supply of the Aggregated Contracted Capacity in terms of Article 4.7.1 of the PPA, till the operationalization of the MTOA/ LTA and in the meantime allow it to supply only 45 MW of electricity for which the Petitioner already had an LTA.

(o) Pursuant to the Force majeure notice already given on 22.08.2016, the Petitioner sent an advance preliminary notice dated 26.09.2016 under Article 4.1.2 of the Procurer PPA thereby communicating the date for commencement of supply of power, and a similar letter was forwarded by the PTC/ Respondent No. 5 to Respondent No. 4 on 26.09.2016. On 27.10.2016, the Petitioner herein served a final written notice for commencement of supply of power to the Respondent No. 5 under Article 4.1.2 of the PPA and based on the aforesaid notice, the PTC/ Respondent No. 5 sent a letter to the Procurers.

(p) The Respondent No. 4/ RUVNL vide its letter dated 08.11.2016, denied the occurrence of Force Majeure events on erroneous grounds.

(q) The Petitioner entered into an LTA Agreement with PGCIL/CTU for 205 MW on 18.11.2016 for the purpose of supplying full quantum of power to the Respondents 1 to 3. But due to delay in commissioning of Champa-Kurukshetra  $\pm$  800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity, the Petitioner issued a letter dated 24.11.2016 to the Respondent No. 5, requesting it to allow to source the 205 MW quantum of power from an alternative source for supplying the same to the Respondents 1 to 3.

(r) The Respondent No. 4/ RUVNL vide its letter dated 29.11.2016 again denied the claim of Force Majeure.

(s) The Petitioner was ready and willing to supply full quantum to the extent of Aggregate Contracted Capacity to the Procurers. But due to non-



operationalization of the LTA by PGCIL/CTU on account of delay in commissioning of the transmission system against which the LTA was granted, the Petitioner was restrained from supplying the Aggregated Contracted Capacity of 250 MW and the same was beyond control of the Petitioner. With regard to operationalization of LTA/ MTOA, the Petitioner issued a letter dated 29.12.2016 to PGCIL/CTU for status of assignment of MTOA to the identified beneficiaries. Further, the Petitioner again wrote to PGCIL/CTU on the status of the said MTOA on 17.02.2017. As such, the Petitioner was consistently following up with PGCIL/CTU for the purpose of availing MTOA/ LTA in order to supply the Aggregate Contracted Capacity to the Respondents 1 to 3. However, due to the unavailability of transmission corridor, the Petitioner was constrained from supplying the Aggregate Contracted Capacity of 250 MW. However, the Petitioner was supplying 45 MW from its power plant to the beneficiaries w.e.f. 30.11.2016. The Petitioner had already commissioned its power plant in the month of July 2015 and as such, the Petitioner was always ready to supply the Aggregate Contracted Capacity from the Schedule Delivery Date i.e. 30.11.2016.

(t) The CTU operationalized LTA of balance 205 MW w.e.f. 31.03.2017 and accordingly supply of 250 MW power (the Aggregated Contracted Capacity) started from 01.04.2017. For the same, PGCIL/CTU vide its letter dated 24.03.2017 requested the Petitioner herein to open a letter of credit for Rs. 19,90,00,000/- (Rupees Nineteen Crores Ninety Lakhs only) which was subsequently complied by the Petitioner so that the LTA could be operationalized as early as possible.

(u) In view of the aforesaid facts and circumstances, due to which the Petitioner was not able to supply the Aggregate Contracted Capacity of 250 MW as on the Scheduled Delivery Date, the Petitioner was constrained to issue a letter dated 05.05.2017 thereby stating that the 1<sup>st</sup> Contract Year for the purpose of supply of Aggregate Contracted Capacity of 250 MW shall be considered as starting from 01.04.2017 and accordingly non-escalable capacity charge for the 1<sup>st</sup> contract year is payable from 01.04.2017 as per Schedule 8 of the Procurer-PPA. Due to occurrence of Force Majeure events in terms of the Procurer PPA, the Scheduled Delivery Date should be revised



from 30.11.2016 to 01.04.2017, the date on which the Force Majeure events have ceased to exist and the Petitioner was able to supply the full quantum of Aggregate Contracted Capacity.

(v) The Petitioner vide its letter dated 04.11.2017 to the Respondent No. 5 again narrated the whole sequence of events leading to the delay in commencement of supply of the Aggregated Contracted Capacity that actually began with effect from 01.04.2017, and requested that in view of those events, the first contract year should be considered from 01.04.2017 only. However, when the Respondent No. 5 took up the matter with the Respondents 1 to 4, the Respondent No. 4 vide its letter dated 12.12.2017 stated that it did not agree with the claim of considering 1<sup>st</sup> contract year from 01.04.2017 for applicability of tariff. However, it also stated that the matter was being examined.

(w) The First Contract Year for the purpose of Procurer-PPA was to commence from the date on which the Petitioner started supplying the Aggregated Contracted Capacity of 250 MW and the last contract year was to end on the 25<sup>th</sup> anniversary of the Delivery Date. But the same was subject to the Force Majeure conditions provided for under the PPA itself. As such, the Scheduled Delivery Date ought to be considered as 01.04.2017. Notwithstanding the repeated communications being made by the Petitioner, the Respondents failed to appreciate the factual scenario and did not act in accordance with the terms and conditions of the Procurer-PPA. The Respondents have neither agreed nor disputed the request made by the Petitioner.

(x) The provisions of Clause 4.7.1 of the PPA clearly provide that in the event, the affected party is not able to supply the Aggregate Contracted Capacity from the Scheduled Delivery Date as mentioned under Article 4.1.1 of the Procurer PPA, such date shall be deferred for a maximum period of 12 months as mentioned under Clause 4.7.3 of the PPA. In the present case, the Petitioner was obliged to start supply of power upto the Aggregate Contracted Capacity from the Scheduled Delivery Date i.e. 30.11.2016. However, the Petitioner was not able to supply power to the extent of 250



MW till 31.03.2017 due to the occurrence of Force Majeure event and the same squarely falls within the purview of Clause 9.3.1 of the PPA. Further, the provisions contained under Clause 4.7.1 of the PPA provides for extension/ revision of the Scheduled Delivery Date in case of occurrence of Force Majeure event affecting the seller from performing its obligations under Clause 4.1.1 of the PPA. As such, the Scheduled Delivery Date ought to have been revised by the Respondents 1 to 4 from 30.11.2016 to 01.04.2017 for the purpose of applicability of the tariff for the 1<sup>st</sup> contract year.

(y) The Petitioner has taken all reasonable measures, including but not limited to making timely applications to the CTU for grant of open access and consistent follow up and therefore the occurrence of a force majeure event affecting the Petitioner from supplying the Aggregate Contracted Capacity due to the non-availability of the transmission system cannot be attributable to the Petitioner. The Petitioner had even gone to the extent of applying for grant of MTOA in the interregnum till LTA was made available to the Petitioner, for honouring its obligation under the Procurer-PPA. Apart from that in the absence of availability of transmission system for evacuating Aggregate Contracted Capacity by the Petitioner to the Respondents, the Petitioner had also offered to supply the contracted quantum to the Respondents from alternative source of power.

(z) The Hon'ble Supreme Court of India vide its order dated 25.04.2018 reduced the total quantum to be supplied under the Procurer-PPA to the Respondents, by the Petitioner from 250 MW to 195 MW. This fact is brought to the knowledge of this Commission in good faith and to bring the same on record of this Commission. The above is without prejudice to the rights and interest of the Petitioner ensuing out of the above order dated 25.04.2018.

### **Submissions of the Respondents**

5. The Respondents 1 to 4 vide affidavit dated 13.03.2019 have mainly submitted the following:

(a) The Petitioner is mixing up the roles of Respondent No.4 Rajasthan Urja Vikas Nigam Limited and Rajasthan Rajya Vidyut Prasaran Nigam



Limited (RRVPNL). RRVPNL still exists and is the transmission licensee in the State of Rajasthan. RRVPNL used to also have the function of bulk power supply on behalf of the distribution licensees but subsequently the distribution companies directly entered into contracts with generating companies/trading licensees. Rajasthan Urja Vikas Nigam Limited was established to act on behalf of the Distribution Companies in relation to power purchase.

(b) The Petitioner has contended that the first contract year under the PPA commenced only from 01.04.2017 when the Petitioner started supplying the aggregate contracted capacity of 250 MW from the generating station established by the Petitioner and not from 30.11.2016 when the Petitioner had commenced supply of 45 MW power to the said Respondents. The Petitioner has claimed that the delay in the supply of the balance 205 MW was on account of the non-availability of the Long Term Access for conveyance of power through the Inter State Transmission Line of PGCIL/CTU. The Petitioner has, however, not arrayed PGCIL/CTU as a Respondent in the present proceedings.

(c) The commencement of supply for the purpose of Clause 2 and for computation of the Scheduled Delivery Date and Expiry Date occurred on 30.11.2016 when the 45 MW was made available by the Petitioner to the Respondents 1 to 3 and Respondent No. 5 and the same was taken delivery of by the Respondents 1 to 3 and Respondent No. 5. The scheduling and dispatch of electricity from the power station of the Petitioner commenced on the said date. It is, therefore, not appropriate for the Petitioner to claim that the commencement of the supply and the Delivery Date did not occur till 01.04.2017 when the entire 250 MW was commenced.

(d) It is submitted that the Petitioner is misreading the provisions of the PPA by referring to the aggregate contracted capacity as appearing in Clause 4.1. In terms of Clause 4.1 of the PPA, any supply up to the aggregate capacity and not the entire aggregate contracted capacity needs to be considered. The contention of the Petitioner is contrary to the plain, simple reading of the provisions of the PPA and more particularly, the



scheme and objective underlining the PPA as provided in various clauses of the PPA.

(e) The Respondents 1 to 4 have not disputed the liability to pay tariff in terms of provisions of the PPA. Claim for tariff by the Petitioner as at prayer (b) for computation with reference to 01.04.2017 (and not 30.11.2016) is patently erroneous and is liable to be rejected.

(f) The aggregate contracted capacity cannot be interpreted as a starting point for the supply of electricity, particularly, in the context that the obligation of the Petitioner is to supply the quantum of the contracted capacity up to the aggregate contracted capacity. The Petitioner will not be supplying in any year to the full extent of 250 MW. The tariff terms and conditions provided in the PPA also is with reference to the Target Availability or the Normative Availability and there is no penalty provided for not supplying the equivalent 250 MW throughout the year (24x7). The interpretation made by the Petitioner in regard to the commencement of the supply of the aggregate contracted capacity will lead to an anomalous and absurd result.

(g) As regards the claim for the delay in regard to 205 MW, the Petitioner is required to establish to the satisfaction of this Commission the following:

- (i). There was a delay on account of PGCIL/CTU not operationalizing the Long Term Access without there being any default or failure or factor attributable to the Petitioner;
- (ii). The Petitioner had taken all reasonable steps to mitigate the effect of alleged Force Majeure of the non-availability of the Long Term Access from PGCIL/CTU or in regard to the transmission line envisaged for conveyance of power including that the Petitioner took reasonable steps to secure the Open Access through other lines as in the case of 45 MW and PGCIL/CTU was notable to provide LTA/ MTOA;
- (iii). PGCIL/CTU did not offer any other open access by way of STOA or MTOA or LTA for evacuation of power till the identified Long Term Access was available. In this regard, the claim for Force Majeure pleaded by the Petitioner in terms of Article 9.2.2 of the PPA can be entertained only if the Petitioner establishes to the satisfaction of the Commission the ingredients as provided under Article 9.3.1.



(h) In absence of the Petitioner establishing that it could not avoid the effect of Force Majeure Event even if it had taken reasonable care as a prudent utility consistent with the prudent utility practice, the Petitioner is not entitled to any relief. Further, in terms of Article 9.6 of the PPA, the Petitioner is required to perform such part of the obligation to the extent not prevented by a Force Majeure Event.

(i) The Petitioner has not produced all communications with PGCIL/CTU. The Petitioner had executed BPTA only for 45 MW for Northern Region even though the Petitioner participated in the bid for 250 MW. By the admission of Petitioner itself, it wrote only on 18.01.2014 even though the PPA had been executed on 01.11.2013. Even then Petitioner only wrote a letter and did not fulfill the procedure of filing of the fresh application and relinquishing the old capacity. Further it is denied that the request was kept pending by PGCIL/CTU due to any pendency of approval from RERC. It is further submitted that the Order dated 16.02.2015 was based on the law as existing, in particular with reference to the change in region/location. Attempt of the Petitioner to portray the fresh application as a new requirement arising out of the said Order dated 16.02.2015 or WR Standing Committee is wrong. The Petitioner has not annexed the Standing Committee meeting minutes. Further the Petitioner despite the above only applied for LTA for Northern Region on 25.02.2016.

(j) The Petitioner claims to have sought NOC for both MTOA and LTA but has produced the NOC only for LTA. It is also not clear when the Petitioner applied for such NOC. When the Petitioner itself had delayed the application, it cannot claim any delay. The Petitioner has also not produced Annexure P-7 - a copy of the Letter dated 10.02.2016 by PGCIL/CTU. The Petitioner has also not substantiated that it was consistently approaching PGCIL/CTU. Even as per the Petitioner, it submitted a fresh application for 205 MW LTA for Northern Region only on 25.02.2016 even though PPA had been signed on 01.11.2013. Further the fact that NOC was required for 45 MW is not a new requirement and the Petitioner should have applied for the same in a timely manner.



(k) The Respondents did not admit that there was an existence of Force Majeure Event. In terms of Clause 9.2.2 of the PPA, delay in establishment of the Inter State Transmission Line is not a Force Majeure. Clause 9.2.2 of the PPA provides that an event of Force Majeure affecting the Central Transmission Utility will alone be considered as a Force Majeure event.

(l) It is wrong and denied that the Petitioner is entitled to treat the first contract year as commencing from 01.04.2017. The provisions of the Clause 4.6.1 of the PPA relied upon by the Petitioner need to be read with various other provisions of the PPA. It is incorrect to allege that in terms of Clause 4.6.1 of the PPA, the first contract year will commence only from 01.04.2017, i.e., when the Aggregate Contracted Capacity is made available. It is for the Petitioner to establish to the satisfaction of the Commission that there is an existence of Force Majeure affecting the Central Transmission Utility and further the Petitioner did not have any other reasonable avenue for evacuation of power.

6. The Respondent No.5 vide affidavit dated 14.03.2019 has mainly submitted that it is a company having a license to trade in inter-State supply of electricity and had after being successful in the bids entered into back to back agreements for purchase and sale of power with Petitioner on 01.11.2013 ("PTC-PPA") on one hand and with Respondents 1,2 and 3 on the other hand on 01.11.2013 ("Procurer-PPA"). Thus, the entire transaction is on back to back basis.

### **Rejoinder of the Petitioner**

7. In response to the reply dated 13.03.2019 of Respondents 1 to 4, the Petitioner has filed its rejoinder vide affidavit dated 23.04.2019 and has mainly submitted the following:

(a) There has been no mix up of facts as regards RUVNL and RRVPNL as alleged by the Respondents. In fact, in the petition, the Petitioner has mentioned that RUVNL i.e. the Respondent No. 4 has been established for purchase of power on behalf of the Discoms in the State of Rajasthan.



(b) The petitioner has not made PGCIL/CTU as party as they do not have any contractual obligation with respect to the PPA executed between the Petitioner and Respondent No. 5 as well as the PPA entered between Respondent No. 5 and Respondents 1 to 3.

(c) The respondents have wrongly and erroneously interpreted the definitions provided in the Procurer-PPA. Interpretation of the Respondents that Scheduled Delivery Date will be 30.11.2016 in terms of definition as provided in Clause 1 of the Procurer-PPA read with Clause 4.1 of the Procurer PPA, is wrong. This is because of the fact that the Respondents have failed to acknowledge Clause 3.1.1 and Clause 4.7.1 of the Procurer-PPA wherein it is specifically provided that the scheduled delivery date can be revised and altered subject to occurrence of force majeure event. In accordance with the Clause 3.1.1 and Clause 4.7.1 of the PPA, the scheduled delivery date is entitled to be revised on account of force majeure event.

(d) The Respondents' interpretation of the term 'up to Aggregated Contracted Capacity' is incorrect. Since full plant capacity is not tied up in the long term PPA, the Article 5.2.1 of PPA provides first right to Rajasthan Discoms over 92.59% of the power station's net capacity. The Petitioner cannot schedule this power of 250 MW to any other buyer. The Respondent is confusing Annual Equivalent Energy with contractual capacity.

(e) The Petitioner vide its series of letter requested PGCIL/CTU to approve LTA and also informed regarding the scheduled date of delivery. Further, the Petitioner also informed the Respondents through a series of letters regarding delay in supply of aggregated contracted capacity i.e. 250 MW from the scheduled date of delivery, i.e., 30.11.2016. Since LTA granted by PGCIL/CTU was linked with the commissioning of 765 kV D/C Jabalpur-Orai transmission line which was scheduled for commissioning by March 2018, Petitioner applied for grant of MTOA for balance 205 MW for the interim period. The MTOA of 205 MW power from MCCPL, 1x300 MW TPP was granted vide letter dated 10.02.2016. The MTOA was linked to



commissioning of  $\pm 800$  KV HVDC Champa-Kurukshetra transmission line. PGCIL/CTU vide MoM dated 23.03.2017 preponed the operationalization of 205 MW LTA with the commissioning of  $\pm 800$  KV HVDC Champa-Kurukshetra transmission line making MTOA redundant and was cancelled. So due to efforts of the Petitioner, full contracted capacity was scheduled w.e.f. 01.04.2017 as against 31.03.2018 (date of commissioning of 765 KV D/C Jabalpur-Orai transmission line).

(f) The contention of the Respondents that the Petitioner had executed the BPTA only for 45 MW in NR even though the petitioner participated in the bid for 250 MW is misconstrued. BPTA being referred to by the Respondents, was executed much prior to the execution of the Procurer-PPA as well as PTC-PPA.

(g) The Petitioner has filed requisite documents along with the present rejoinder in response to the allegation made by the Respondent. (NOC dated 08.12.2015 for MTOA, PGCIL/CTU letter dated 10.02.2016).

### **Written Submission of Respondents**

8. The Respondents 1- 4 vide affidavit dated 14.06.2019 have additionally submitted the following:

(a) The principal provision dealing with the supply of power is Clause 4 of the PPA wherein Clauses 4.1.1 and 4.2.1(b) refer to the commencement of supply as up to the aggregate contracted capacity. The Clause 4.4.1 refers to available capacity up to the contracted capacity, an expression similar to that contained in Article 4.1.1, namely up to the contracted capacity. The term 'Available capacity' is a defined term under the PPA as "*Shall have the meaning ascribed thereto in ABT*".

(b) The ABT (Availability Based Tariff) mechanism also deals with available capacity, not as installed capacity or contracted capacity but what is capable of being made available by the generator during each settlement period. Similarly, Clause 9.7.1(c) of the PPA also deals with Force Majeure not being applicable to capacity that could be made available. The



conceptual and salient aspect is the capacity that could be declared available within the contracted capacity and not the entire contracted capacity. In light of the above, when a quantum of 45 MW power supply was commenced by the Petitioner to the three Rajasthan Discoms in proportion to the allocated Aggregate Contracted Capacity as per Schedule 1, there was a commencement of supply of power within the scope of Clauses 4.1.1 and 4.2.1(b) as well as Clause 4.4.1 of the PPA.

(c) The availability has to be in terms of the Availability Based Tariff, the normative availability etc. and, therefore, is not with reference to 100% of the contracted capacity of 250 MW i.e. it does not envisage that the aggregate contracted capacity of 250 MW will always be declared available and/or scheduled or that until the Aggregate Contracted Capacity is declared available, there will not be commencement of supply. Such an interpretation goes contrary to the Clause 4.1.1 of the PPA.

(d) If the Petitioner decides commencing supply of a specific quantum of power on a regular basis adopting the scheduling and dispatch mechanism under the ABT, the same duly constitute commencement of supply. If such supply is against the contracted capacity, then the conditions specified in Clause 4.4.1 read with Clause 4.4.2(b) of the PPA stand satisfied. Since there is a commencement of supply within the meaning of Schedule 8 quoted tariff provision, the first contract year would be from the Scheduled Delivery Date i.e. 30<sup>th</sup> November 2016 to 31<sup>st</sup> March 2017.

(e) Supply of 45 MW on a regular basis cannot be treated as infirm power or ad-hoc supply when for the entire period from 30.11.2016 to 31.03.2017, the power was scheduled and dispatched. The said scheduling was accepted by the Petitioner and the Petitioner functioned as a generating company supplying power to the distribution licensees through an Intermediary Trader in terms of the provisions of Section 62 read with Section 79(1)(b) of the Electricity Act, 2003.

(f) The claim of the Petitioner is that the Delivery Date definition refers to the Seller commencement of supply of Aggregate Contracted Capacity to



the Procurer. The Petitioner is reading the definition of delivery date in isolation and in a selective manner contrary to the scheme of the PPA. The Delivery Date is dealt in the definition clause with the stipulation that the same would apply unless repugnant to the context Article 1.1. The main operating clause is 4.1.1. This clause does not speak about commencing supply of Aggregate Contracted Capacity. Clause 4.1.4 and 4.2.1(b) speak about up to the Aggregate Contracted Capacity in the context of commencement of supply. Secondly, there cannot be commencement of the supply of the Aggregate Contracted Capacity in an absolute manner, namely, that 250 MW is to be supplied. Thirdly, the relevant aspect is the capacity which the generator is in a position to make available. The declaration of availability dealt in various provisions of the PPA is different from the Aggregate Contracted Capacity. The tariff quoted in Schedule 8 of the PPA is also with reference to the declared availability or normative availability or per unit tariff and not a tariff for 250 MW. In view of the above, it is not appropriate for the Petitioner to selectively read the definition of the term 'Delivery date' in Article 1 to contend that unless the supply commences with the Aggregate Contracted Capacity of 250 MW in absolute terms, there is no supply of electricity.

(g) The Petitioner for its own advantage decides to commence supply of electricity to the Rajasthan Discoms for 45 MW (because of restricted transmission capacity available). The Petitioner cannot thereafter claim that the commencement of the supply with 45 MW does not constitute the commencement of supply under Clause 4.1, Clause 4.2 and Schedule 8 of the PPA in regard to Tariff applicable.

(h) Clauses 4, 3.3.1 and 3.3.2 are to be read together. It refers to the agreement being reached between the Petitioner and the Procurer within 12 months from the effective date revising the Scheduled Delivery Date. There has been no such agreement. This provision applies where both the parties agreed to commence supply before the Scheduled Delivery Date.

(i) Clause 4.7.1 of the PPA is conditional on the Seller being prevented from performing its obligation under Clause 4.1.1. If the Seller has



commenced the supply consistent with Clause 4.1.1, with the quantum voluntarily agreed to be supplied from 30.11.2016, the conditions for extension of time for the Scheduled Delivery Date or revised Scheduled Delivery Date will not arise.

(j) The Petitioner is wrongly contending that Schedule 8 will become meaningless if the Petitioner is not allowed to sell the 205 MW power for a period of 4 months and that the 25 year duration of the PPA from the Scheduled Delivery Date to the extent of 205 MW will get reduced by 4 months. This is a consequential fact of the Petitioner deciding to commence supply of power of 45 MW from 30.11.2016 knowing fully well that the transmission capacity for 205 MW is not available. It is quite possible that the transmission capacity might not have been available to the petitioner even on 01.04.2017.

(k) If the Petitioner's contention that it was affected by Force Majeure is accepted, obviously it relates only to 205 MW. It did not prevent the Petitioner from commencement of the supply on 30.11.2016. The consequence of Force Majeure is not dealt under Clause 4.7, namely, extension of time for commencement of the supply. If the Force Majeure condition is to be accepted, it would be a Force majeure situation within the scope of Article 9 of the PPA. In such a case, the available relief is under Clause 9.7.1. The Petitioner will be entitled to claim relief in relation to Force Majeure in regard to its obligation if the Petitioner was prevented by Force Majeure reason from commencing supply only to the extent of such prevention, in regard to the remaining quantum – Article 9.7.1(c) specifically contemplates performance and therefore, commencement of supply.

(l) The Scheduled Delivery Date cannot be considered to be extended to 01.04.2017 when the Petitioner has commenced supply of power for 45 MW from 30.11.2016. If the Scheduled Delivery Date is 30.11.2016, then the first contract year as per Schedule 8 commences on 30.11.2016. The Schedule 8 read with definition of Contract Year makes it clear that the commencement of the first contract year is linked to Scheduled Delivery Date and not to Delivery Date.



(m) The claim for tariff computation with reference to 01.04.2017 is, therefore, patently erroneous and is liable to be rejected. In terms of Clause 9.2.2 of the PPA, the delay in the establishment of Inter-State Transmission Line is not a Force Majeure event. Clause 9.2.2 of the PPA provides that an event of Force Majeure affecting the Central Transmission Utility will alone be considered as a Force Majeure.

### **Written Submission of Petitioner**

9. Petitioner vide affidavit dated 13.06.2019 has additionally submitted the following:

(a) The commencement of supply/scheduling of power was to start in terms of the stipulations under clause 4.1.1 of the Procurer-PPA. As per Schedule 1 of the aforesaid Procurer-PPA, the three beneficiaries to receive power from the Petitioner's Project through PTC (Respondent No. 5) are (i) Jaipur Vidyut Vitran Nigam Limited (contracted capacity of 97.50 MW); (ii) Ajmer Vidyut Vitran Nigam Limited (contracted capacity of 72.50 MW); (iii) Jodhpur Vidyut Vitran Nigam Limited (contracted capacity of 80MW).

(b) The Petitioner had LTA for 45 MW for the Northern Region/NR (Respondents 1, 2 and 3 fall under the Northern Region) as per Bulk Power Transmission Agreement dated 24.02.2010 (BPTA) read with subsequent amendments from time to time, executed with PGCIL/CTU on tentative target region basis. Under the said BPTA, the Petitioner had contracted for the evacuation of 171 MW from its Project/power plant with a target region of WR (126 MW) and NR (45 MW) on tentative target region basis, i.e. there were no firm beneficiaries. In view thereof, it was necessary that the Petitioner required Northern Region LTA for an additional quantum of 205 MW as the Aggregate Contracted Capacity was 250 MW for Respondents 1 to 3.

(c) The request of the Petitioner (by way of the letter dated 18.01.2014 to PGCIL/CTU) was put on hold pending the final disposal of the grant of the necessary approval for the aforesaid beneficiaries, i.e. Respondents 1, 2 and 3 from RERC in respect of adoption of PPA and tariff. Further, owing to



various challenges to the said adoption of tariff by certain parties before the Hon'ble High Court of Rajasthan and Hon'ble Supreme Court, the entire process got further delayed. In terms of Article 3.2.1(C) of the Procurer PPA, the adoption of tariff ought to have been conveyed to the Petitioner within 6 (six) months from the date of execution of the said Procurer PPA, i.e. 01.11.2013. The Hon'ble Supreme Court vide its order dated 08.10.2014 directed that RERC may proceed with adoption of tariff. Subsequently, RERC finally adjudicated and approved the tariff and quantum of power vide its order dated 22.07.2015.

(d) In the letter dated 28.07.2016, PGCIL/CTU has admitted that in terms of Clause 9.4 of the Detailed Procedure, grant of MTOA is to be only given effect to when there is availability of transmission capacity/facilities (required for the evacuation of power on a long term basis) in the existing system or in a situation wherein the transmission system is under execution phase and is envisaged to be commissioned prior to the estimated date of complete commissioning.

(e) The Petitioner was incurring huge financial losses on account of not being able to schedule the entire Aggregate Contracted Capacity from 30.11.2016. However, non-availability of requisite transmission corridor/network and consequently, the non-operationalization of the LTA with effect from the 30.11.2016, constrained the Petitioner to regularly follow up with PGCIL/CTU, but to no avail.

(f) Further, PGCIL/CTU vide its letter dated 29.07.2016, approved the grant of LTA for the Petitioner's Project for the remaining quantum of 205 MW in furtherance of the application that had been made by the Petitioner on 25.02.2016. The said grant of LTA in respect of additional 205 MW was made subject to the signing/execution of a fresh BPTA (LTA Agreement) and also other statutory formalities. The aforesaid grant was yet again made contingent upon the execution/commissioning of the Jabalpur-Orai transmission corridor.

(g) Thereafter, by way of the letter dated 23.08.2016, the Petitioner



submitted its formal request for the extension of the Scheduled Delivery Date from 30.11.2016 until the date when the aforesaid transmission is ready and/or commissioned and the LTOA is finally operational. The Petitioner, in making the aforesaid request relied upon the Clause 4.7.1 of the PPA. A bare perusal of the Clause 4.7.1 of the PPA, clearly evidences that the provisions of the PPA itself envisage the revision and/or extension of the Scheduled Delivery Date in a situation wherein, the Seller of power defaults in its obligation of commencing supply/scheduling of power from 30.11.2016, i.e. Scheduled Delivery Date. In the aforesaid context, it is of utmost significance to highlight herein that the PPA casts an obligation upon the Petitioner to necessarily commence the supply of entire contracted power on 30.11.2016. Further, the use of “shall be responsible” reinforces the aforesaid averment.

(h) Stipulation under Article 4.7.1 is mandatory in its operation and the same is unequivocal. The clear stipulation to that effect, i.e. ‘*shall be deferred*’ and thus, it becomes crystal clear that occurrence of any force majeure event that reasonably or expressly restrains the Petitioner from commencing the supply of Aggregate Contracted Capacity of 250 MW would necessarily mandate the extension of the Scheduled Delivery Date and the Expiry Date stipulated under the said PPA.

(i) Moreover, a prima-facie assessment of the afore-stated stipulation makes it clear that if the Petitioner herein is constrained by effect of force majeure events recognized under the PPA, the said Schedule Delivery Date can be deferred to a future date subject to the extension being not more than twelve (12) months from the stipulated Schedule Delivery Date, i.e. 30.11.2016. Thus, the Petitioner is entitled to the benefit of Article 4.7.1 read with Article 9.7.1(b) of the Procurer-PPA in light of the occurrence of the aforesaid force majeure events.

(j) Moreover, even though the Article 4.4.1 provisions for the supply of lesser quantum than the Aggregate Contracted Capacity, it is clear that the Delivery Date for the purposes of the said PPA is to be construed from the date when the Petitioner commences supply of the Aggregate Contracted Capacity, i.e. 250 MW. It is relevant to mention herein that in terms of the



Clause 4.6.1 of Schedule 4, in a situation wherein the Seller supplies power prior to the Delivery Date, the tariff for such supply shall be Quoted Tariff of the first Contract Year with escalation for the relevant period only for energy charge. Accordingly, the period of 25 years (i.e. the term of the Procurer PPA) shall be construed from such delivery date, i.e. 01.04.2017. Unless the afore-stated averment (interpretation as extended by the Petitioner herein) is attributed and/or acknowledged Article 4.1, 4.7, 2.2 read with Schedule 8 shall be rendered redundant and ineffective. A reference may be made to Article 4.7.1 or 4.1.1 or 3.3.3, wherein there is no reference of 'revised delivery date' rather the Schedule Delivery Date is to be shifted or revised looking at the facts and circumstances of the case.

### **Analysis and Decision**

10. Based on the petition, replies, rejoinders and other materials placed on record, the issues under consideration of the Commission are whether the claim of the Petitioner as regards delay in operationalization of LTA is a force majeure event in terms of the PPA and whether the Petitioner is entitled to shift in Schedule Delivery Date as per PPA?

11. The Petitioner has signed the PTC-PPA on 01.11.2013 and PTC has signed back to back PPA i.e. Procurer-PPA with the Respondents 1 to 3 on the same date i.e. 01.11.2013 with the Schedule Delivery Date as 30.11.2016 for supply of Aggregate Contracted Capacity of 250 MW power for a period of 25 years i.e. up to 29.11.2041.

12. The Petitioner has submitted that its obligation to supply the Aggregated Contracted Capacity of 250 MW in terms of Clause 4.1 of the Procurer-PPA was subject to any force majeure events and that the Clause 3.1.1 of the Procurer-PPA states that the supply of Power from the Scheduled Delivery Date is subject to force majeure events. Also, the provisions of Clauses 9.2, 9.3 and 9.7 of the



Procurer-PPA provide that if the Petitioner is prevented from performing its obligation due to force Majeure events under Clause 9 of the Procurer-PPA, it is entitled to relief under Clause 9 of the Procurer-PPA.

13. The Petitioner has submitted that in terms of Clause 4.2.1 read with Clause 3.1.1 of the Procurer-PPA, the Petitioner was obliged to obtain the required transmission access for delivering the Aggregate Contracted Capacity up to the Delivery Point within 12 (twelve) months of the effective date i.e. 01.11.2013 and also execute necessary agreement to that effect.

14. The Petitioner has submitted that it had earlier executed a Bulk Power Transmission Agreement (BPTA) with PGCIL/CTU dated 24.02.2010 along with 6 other LTA customers for evacuating 171 MW from its power plant having target region of WR (126 MW) and NR (45 MW). However, subsequent to executing the PTC-PPA/ Procurer-PPA, the Petitioner made prompt communications to PGCIL/CTU for carrying out changes/ modifications in the BPTA for giving effect to change of beneficiaries. Accordingly, the Petitioner vide letter dated 18.01.2014 to PGCIL/CTU stated that the Petitioner has signed PPA for sale of 250 MW for a term of 25 years and, therefore, the Long Term Access (LTA) may be revised to NR for 250 MW (PTC) and to WR for 15 MW (CSPTCL).

15. The Petitioner has submitted that its request for change of target region was kept pending by PGCIL/CTU as the Respondents 1 to 3 were required to obtain necessary approval from the Rajasthan Electricity Regulatory Commission (RERC) for adoption of tariff.

16. The Petitioner has submitted that as per Clause 3.2.1(C) of the PPA, approval of RERC should have been conveyed by the Respondents 1 to 3 within 6



months of signing the PPA. However, some of the bidders had filed a petition before the Hon'ble High Court of Rajasthan and before the Hon'ble Supreme Court. It was only after Order dated 08.10.2014 of the Hon'ble Supreme Court that RERC proceeded to adopt the tariff and subsequently approved the PPA and quantum of power vide its order dated 22.07.2015.

17. The Petitioner has submitted that after the approval of the PPA by RERC, the Petitioner issued a letter dated 13.08.2015 to PGCIL/CTU for grant of LTA to the Respondents 1 to 3 w.e.f. the Scheduled Delivery Date as per Clause 4.1.1 of the Procurer-PPA. As only 45 MW LTA in NR was available with the Petitioner, an additional 205 MW LTA was required to be obtained.

18. The Petitioner has submitted that this Commission vide its order dated 16.02.2015 in Petition No. 92/MP/2014 has observed that for change in the target region of LTA for more than 100 MW, a fresh application has to be made. In addition to the aforesaid, the consent/ NOC from the State Transco was also required to be attached with the LTA application. The WR Standing Committee on grant of LTA during the 20<sup>th</sup> Meeting required the Petitioner to file fresh application for grant of 205 MW to NR as the quantum of LTA for change of region from WR to NR was more than 100 MW.

19. The Petitioner has submitted that due to delay in implementing the construction of transmission corridor for evacuation of power from the Petitioner's power plant, the Petitioner applied to the Rajasthan SLDC for permission to apply for MTOA (Medium-Term Open Access), in order to supply the aggregated contracted capacity of 250 MW from 30.11.2016. Necessary clearance to apply for MTOA was issued by the Rajasthan SLDC only on 08.12.2015, pursuant to which



the Petitioner filed an application, dated 31.12.2015 with PGCIL/CTU for grant of MTOA for 205 MW.

20. The Petitioner has submitted that PGCIL/CTU vide its letter dated 10.02.2016 granted MTOA to the Petitioner for supply of 205 MW to the Respondents 1 to 3 subject to commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity having likely date of commissioning of final phase of the said line as December 2016. Therefore, the Petitioner addressed a letter dated 11.07.2016 to PGCIL/CTU stating that this date did not match the date on which MTOA was granted to be operationalized i.e. 30.11.2016 and requested for operationalization of MTOA from the date of grant i.e. 30.11.2016 out of the existing margin, without linking the same with the commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW. In response, PGCIL/CTU vide its letter dated 28.07.2016, informed the Petitioner that MTOA is to be granted only when there was availability of transmission capacity in the existing system or when the transmission system was under execution process and was to be ready before the intended time. Vide the same letter, PGCIL/CTU also informed the Petitioner that any delay in commissioning of the transmission system was beyond its control and accordingly MTOA can be operationalized only from the date of implementation of the identified system.

21. The Petitioner has submitted that PGCIL/CTU vide its letter dated 29.07.2016 agreed to grant the LTA for remaining 205 MW in pursuance of the application made by the Petitioner on 25.02.2016, but it was linked to commissioning of transmission system (765 kV D/C Jabalpur-Orai transmission line) which was scheduled for commissioning in the month of April 2018 and,



therefore, the transmission system was not made available from the scheduled delivery date i.e. 30.11.2016.

22. The Petitioner has submitted that on 22.08.2016, it issued a notice of force majeure to Respondent No. 5/ PTC, thereby informing that only 45 MW of power can be supplied from 30.11.2016 on account of the reasons beyond the control of the Petitioner due to non-availability of the transmission system as on the Schedule Delivery Date. PTC in turn issued a force majeure notice dated 23.08.2016 to the Procurers, thereby requesting them for extension of Schedule Delivery Date for supply of the Aggregated Contracted Capacity in terms of Article 4.7.1 of the PPA, till the operationalization of the MTOA/ LTA and in the meantime allow it to supply only 45 MW of electricity for which the Petitioner already had an LTA.

23. The Petitioner has submitted that it sent an advance preliminary notice dated 26.09.2016 under Article 4.1.2 of the Procurer PPA thereby communicating the date for commencement of supply of power and PTC in turn communicated the same to Respondent No. 4 on the same date. Thereafter, on 27.10.2016, the Petitioner served a final written notice for commencement of supply of power to PTC under Article 4.1.2 of the PPA and based on the aforesaid notice, PTC sent a letter to the Procurers. However, the Respondent No. 4/ RUVNL vide its letter dated 08.11.2016, denied the occurrence of force majeure events on erroneous grounds.

24. The Petitioner has submitted that it entered into an LTA Agreement with PGCIL/CTU for 205 MW on 18.11.2016 for the purpose of supplying full quantum of power to the Respondents 1 to 3. But due to delay in commissioning of



Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity, the Petitioner issued a letter dated 24.11.2016 to PTC offering it to supply 205 MW quantum of power from an alternative source for supplying the same to the Respondents 1 to 3. The Respondent No. 4/ RUVNL vide its letter dated 29.11.2016 again denied the claim of Force Majeure.

25. The Petitioner has submitted that it was ready and willing to supply full quantum to the extent of Aggregate Contracted Capacity to the Procurers, but due to non-operationalization of the LTA/MTOA by PGCIL/CTU on account of delay in commissioning of the transmission system against which open access was granted, the Petitioner was restrained from supplying the Aggregated Contracted Capacity of 250 MW and the same was beyond control of the Petitioner.

26. The Petitioner has submitted that with regard to operationalization of LTA/MTOA, it issued letters dated 29.12.2016 and 17.02.2017 to PGCIL/CTU for status of assignment of MTOA to the identified beneficiaries. Finally, PGCIL/CTU operationalized LTA of balance 205 MW w.e.f. 31.03.2017 and accordingly supply of 250 MW power (the Aggregated Contracted Capacity) started from 01.04.2017.

27. The Petitioner has submitted that it issued a letter dated 05.05.2017 thereby stating that the 1<sup>st</sup> Contract Year for the purpose of supply of Aggregate Contracted Capacity of 250 MW should be considered as starting from 01.04.2017 and accordingly non-escalable capacity charge for the 1<sup>st</sup> contract year should be payable from 01.04.2017 as per Schedule 8 of the Procurer-PPA. It also stated that due to occurrence of force majeure events, the Scheduled Delivery Date should be revised from 30.11.2016 to 01.04.2017, the date on which the force



majeure events ceased to exist, and the Petitioner was able to supply the full quantum of Aggregate Contracted Capacity.

28. The Petitioner has submitted that vide its letter dated 04.11.2017 addressed to PTC, it again narrated the whole sequence of events leading to the delay in commencement of supply of the Aggregated Contracted Capacity and requested that in view of those events, the first contract year should be considered from 01.04.2017 only. However, the Respondent No. 4 vide letter dated 12.12.2017 stated that they did not agree with the claim of considering 1<sup>st</sup> contract year from 01.04.2017 for applicability of tariff. Notwithstanding the repeated communications being made by the Petitioner, the Respondents failed to appreciate the factual scenario and did not act in accordance with the terms and conditions of the Procurer-PPA.

29. The Petitioner has submitted that Clause 4.7.1 of the PPA clearly provide that in the event, the affected party is not able to supply the Aggregate Contracted Capacity from the Scheduled Delivery Date as mentioned under Article 4.1.1 of the Procurer PPA, such date shall be deferred for a maximum period of 12 months as mentioned under Clause 4.7.3 of the PPA. In the present case, the Petitioner was to start supply of power up to the Aggregate Contracted Capacity from the Scheduled Delivery Date i.e. 30.11.2016. However, the Petitioner was not able to supply power to the extent of 250 MW till 31.03.2017 due to the occurrence of Force Majeure event and the same squarely falls within the purview of Clause 9.3.1 of the PPA. Further, the provisions contained under Clause 4.7.1 of the PPA provides for extension/ revision of the Scheduled Delivery Date in case of occurrence of Force Majeure event affecting the seller from performing its obligations under Clause 4.1.1 of the PPA. As such, the Scheduled Delivery Date



ought to have been revised by the Respondents 1 to 4 from 30.11.2016 to 01.04.2017 for the purpose of applicability of the tariff for the 1<sup>st</sup> contract year.

30. Per contra, the Respondents 1 to 4 have submitted that the Petitioner is mixing up the roles of Respondent No. 4 Rajasthan Urja Vikas Nigam Limited and Rajasthan Rajya Vidyut Prasaran Nigam Limited (RRVPNL). RRVPNL still exists and is the transmission licensee in the State of Rajasthan. RRVPNL used to also have the function of bulk power supply on behalf of the distribution licensees but subsequently the distribution companies directly entered into contracts with generating companies/ trading licensees. Rajasthan Urja Vikas Nigam Limited was established to act on behalf of the Distribution Companies in relation to power purchase.

31. The Respondents 1 to 4 have submitted that though the Petitioner has claimed that the delay in the supply of the balance 205 MW was on account of the non-availability of the LTA/ MTOA for conveyance of power through ISTS, but the Petitioner has not arrayed PGCIL/CTU as a Respondent in the present proceedings.

32. The Respondents 1 to 4 have submitted that the commencement of supply for the purpose of Clause 2 and for computation of the Scheduled Delivery Date and Expiry Date occurred on 30.11.2016 when the 45 MW was made available by the Petitioner to the Respondents 1 to 3 and the same was taken delivery of by the Respondents 1 to 3. It is, therefore, not appropriate for the Petitioner to claim that the commencement of the supply and the Delivery Date did not occur till 01.04.2017 when the entire 250 MW was commenced. They have submitted that the Petitioner is misreading the provisions of the PPA by referring to the aggregate



contracted capacity. In terms of Clause 4.1 of the PPA, any supply up to the aggregate capacity and not the entire aggregate contracted capacity needs to be considered.

33. The Respondents 1 to 4 have submitted that Aggregate Contracted Capacity cannot be interpreted as a starting point for the supply of electricity, particularly, in the context that the obligation of the Petitioner is to supply the quantum of the contracted capacity up to the aggregate contracted capacity. The Petitioner will not be supplying in any year to the full extent of 250 MW and it would rather be Target Availability or Normative Availability.

34. The Respondents 1 to 4 have submitted that the principal provision dealing with the supply of power is Clause 4 of the PPA wherein Clauses 4.1.1 and 4.2.1(b) refer to the commencement of supply as up to the aggregate contracted capacity. The Clause 4.4.1 refers to available capacity up to the contracted capacity, an expression similar to that contained in Article 4.1.1, namely up to the contracted capacity. The term 'Available capacity' is a defined term under the PPA as *"Shall have the meaning ascribed thereto in ABT"*. The ABT (Availability Based Tariff) mechanism also deals with available capacity, not as installed capacity or contracted capacity but what is capable of being made available by the generator during each settlement period. When a quantum of 45 MW power supply was commenced by the Petitioner, there was a commencement of supply of power within the scope of Clauses 4.1.1 and 4.2.1(b) as well as Clause 4.4.1 of the PPA.

35. The Respondents 1 to 4 have submitted that as regards claim for delay in regard to 205 MW, the Petitioner is required to establish that there was delay on account of PGCIL/CTU not operationalizing the LTA without there being any



default or failure or factor attributable to the Petitioner; that the Petitioner had taken all reasonable steps to mitigate the effect of alleged force majeure event; and that PGCIL/CTU did not offer any other open access by way of STOA or MTOA or LTA for evacuation of power till the identified Long Term Access was available.

36. The Respondents 1 to 4 have submitted that the Petitioner applied to PGCIL/CTU for change in target region only on 18.01.2014 even though the PPA had been executed on 01.11.2013. While applying to the PGCIL/CTU, the Petitioner did not fulfill the procedure of filing of fresh application and relinquishing the old capacity. It is not appropriate for the Petitioner to submit that due to the Order of the Commission dated 16.02.2015 in Petition No. 92/MP/2014, it had to make a fresh application. In fact, the said Order of the Commission only clarified what already existed in the Regulations and any attempt by the Petitioner to portray the fresh application as a new requirement arising out of the said Order dated 16.02.2015 is wrong.

37. The Respondents 1 to 4 have submitted that in terms of Clause 9.2.2 of the PPA, delay in establishment of the Inter State Transmission Line is not a force majeure event and that only an event of force majeure affecting the CTU shall be considered as a force majeure event.

38. The Respondents 1 to 4 have submitted that the Clauses 4, 3.3.1 and 3.3.2 are to be read together. It refers to the agreement being reached between the Petitioner and the Procurer within 12 months from the effective date revising the Scheduled Delivery Date. There has been no such agreement. This provision applies where both the parties agreed to commence supply before the Scheduled



Delivery Date.

39. The Respondents 1 to 4 have submitted that the Petitioner is wrongly contending that Schedule 8 will become meaningless if the Petitioner is not allowed to sell the 205 MW power for a period of 4 months and that the 25 year duration of the PPA from the Scheduled Delivery Date to the extent of 205 MW will get reduced by 4 months. This is a consequential fact of the Petitioner deciding to commence supply of power of 45 MW from 30.11.2016 knowing fully well that the transmission capacity for 205 MW is not available. It is quite possible that the transmission capacity might not have been available to the petitioner even on 01.04.2017.

40. The Respondents 1 to 4 have submitted that the Scheduled Delivery Date cannot be considered to be extended to 01.04.2017 when the Petitioner has commenced supply of power for 45 MW from 30.11.2016. If the Scheduled Delivery Date is 30.11.2016, then the first contract year as per Schedule 8 commences on 30.11.2016. The Schedule 8 read with definition of Contract Year makes it clear that the commencement of the first contract year is linked to Scheduled Delivery Date and not to Delivery Date.

41. PTC/ Respondent No. 5 has submitted that it is a company having a license to trade in inter-State supply of electricity and had after being successful in the bids entered into back to back agreements for purchase and sale of power with Petitioner on 01.11.2013 ("PTC-PPA") on one hand and with Respondents 1 to 3 on the other hand on 01.11.2013 ("Procurer-PPA"). Thus, the entire transaction is on back to back basis.



42. As regards contention of the Respondents concerning RUVNL and RRVPNL, the Petitioner has submitted that there has been no mix up of facts as regards RUVNL and RRVPNL as alleged by the Respondents and that the Petitioner has mentioned that RUVNL i.e. the Respondent No. 4 has been established for purchase of power on behalf of the Discoms in the State of Rajasthan.

43. As regards PGCIL/CTU not being made party in the Petition, the Petitioner has submitted that PGCIL/CTU does not have any contractual obligation with respect to either the PTC-PPA or the Procurers-PPA.

44. The Petitioner has submitted that the Respondents' interpretation of the term 'up to Aggregated Contracted Capacity' is incorrect. It has submitted that since full plant capacity is not tied up in the long term PPA, the Article 5.2.1 of PPA provides first right to the Rajasthan Discoms over 92.59% of the power station's net capacity. The Petitioner cannot schedule this power of 250 MW to any other buyer.

45. We have considered submissions of the Petitioner and the Respondents and carefully perused the records. Some definitions and provisions of the PPA are as under:

***“Scheduled Delivery Date:*** shall have the meaning ascribed thereto in Article 4.1 of this Agreement.

***Aggregate Contracted capacity:*** with respect to the Seller, shall mean the aggregate capacity in 250MW contracted with the Procurer(s) for supply at; the Interconnection Point from the Power Station's Net Capacity.

***Effective Date:*** shall have the meaning ascribed thereto in Article 2.1 of this Agreement;

***Available Capacity:*** shall have the meaning ascribed thereto in ABT



### **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 within twelve (12)' months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the Procurers' failure to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the Procurers jointly.*

a) Deleted

b) *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(s);*

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(s);*

d) *The Seller shall ensure that the Developer has acquired and taken the possession of the balance area of land out of the total land requirement as mentioned. The Seller shall submit the letter of possession and equivalent documents for such area of land as mentioned above to the Procurer(s).*

e) *The Seller shall ensure that the Developer 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 the Seller shall have submitted a letter to this effect to the Procurer(s);*

f) *The Seller shall have obtained all Consents, Clearances and Permits required for supply of power to the Procurer(s) as per the terms of this Agreement. In case a Project Company is incorporated and the Consents, Clearances and Permits have been obtained in the name of a company other than the Project Company, all such Consents, Clearances and Permits shall have been transferred in the name of such Project Company;'*

g) *The Seller shall have sent a written notice to all the Procurer(s) 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 ensure that the Developer shall have achieved Financial Closure and has provided a certificate from the lead banker to this effect;*

i) xxxx

### **3.2 Satisfaction of conditions subsequent by the Procurer(s)**

**3.2.1** *The Procurer(s) agree(s) and undertake(s) to duly perform and complete the following activities at the Procurer's own cost and risk within six (6) Months from the Effective Date, unless such completion is affected by any Force Majeure event or*



due to the Seller's failure to comply with their obligations under Article 3.1.1 of this Agreement or if any of the activities is specifically waived in writing by the Seller:

a)xxxx

b)xxxx

c) The Procurer(s) shall have obtained the order of the Rajasthan Electricity Regulatory Commission for adoption of the tariff under Section 63 of the Electricity Act 2003 and given a copy of the same to the Seller.

### **3.3 Joint responsibilities of tile Procurer(s) and the Seller**

**3.3.1** The Lead Procurer and the Seller shall have jointly agreed on the specific date(s) for commencement of supply of power and quantum of the Contracted Capacity to be supplied to Procurer(s) from each such date. Such mutually agreed date(s) shall not be later than the Scheduled Delivery Date, and the total quantum of power shall be equal to the Aggregate Contracted Capacity.

**3.3.2** These date(s) shall be mutually agreed upon within twelve (12) Months and shall be, the Revised Scheduled Delivery Date(s) for the respective quantum of power.

### **4.1 Commencement of Supply of Power to Procurer(s):**

4.1.1 The Seller shall be responsible to commence supply of power upto the Aggregate Contracted Capacity by the Scheduled Delivery Date in accordance with the provisions of this Agreement, which is 30.11.2016. However, the Seller and the Procurer(s) may mutually agree for commencement of supply of power in a phased manner from the Revised Scheduled Delivery Date(s) as specified in Article 3.3 of this Agreement.

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

### **4.2 . Seller's Obligations**

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

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

b) the commencement of supply of power, up to the Aggregated Contracted Capacity, to the Procurer(s) no later than the Scheduled Delivery Date or the Revised Scheduled Delivery Date(s), as the case may be, such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurers' scheduling and dispatch requirements throughout the Term of this Agreement;

c) obtaining all the necessary permissions for the long term open access for the intrastate transmission system for evacuation of power from the Power Station bus bar to the Injection Point (except in case of dedicated transmission



lines) and execute all necessary agreements for such transmission access and provide a copy of the same to the Procurer (s);

d) Obtaining open access for transmission of Aggregated Contracted Capacity of power from the Injection Point to the Delivery Point;

e) Ensuring that the Power Station is owned by the Developer throughout the Term of this Agreement free and clear of encumbrances, except those expressly permitted by the Seller through the power purchase agreement between the Seller and Developer;

f) Ensuring that the Developer of the Power Station procures electricity at the Power Station (including construction, commissioning and start-up power) and complies in a timely manner all formalities for getting such a supply of electricity;

g) providing on a timely basis, all relevant information to the Procurer(s) which may be required for receiving power at the Delivery Point; and .

h) fulfilling all obligations undertaken by the Seller under this Agreement.

i) Seller to ensure that the Developer(s) has executed the Fuel Supply Agreement and further ensure that a copy of the same is provided to the Procurer(s) at least 18 months prior to the Scheduled Delivery Date.

#### **4.4 Purchase and sale of Available Capacity and Scheduled Energy**

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

#### **4.6 Alternative Source of Power Supply.**

**4.6.1** During the Operating Period, if the Seller is unable to provide supply of power to the Procurer(s) up to the Aggregate Contracted Capacity from the Power Station except due to a Force Majeure Event or due to a Procurer Event of Default, the Seller is free to supply power up to the Aggregate Contracted Capacity from an alternative generation source to meet its obligations under this Agreement. Such power shall be supplied to the Procurer(s) at the same Tariff as per the terms of this Agreement and subject to provisions of Article 4.6.2. In case the transmission and other incidental charges, including but not limited to application fees for open access, RLDC/SLDC charges, etc., applicable from the alternative source of power supply are higher than the applicable Transmission Charges from the Injection Point to the Delivery Point, the Seller would be liable to bear such additional charges.

#### **4.7 Extensions of Time**

**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(s), or
- c) Force Majeure Events affecting the Seller,



the Revised Scheduled Delivery Date(s), 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(s) through the use of due diligence, to overcome the effects of the Force Majeure Events affecting the Seller or the Procurer(s), or till such time such Event of Default; is rectified by the Procurer(s).

**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 twelve (12) Months, any of the Parties may choose to terminate the Agreement as per the provisions of Article 11.5:

## **9.2. Affected Party**

**9.2.1** An affected Party means any of the Procurers or the Developer whose performance has been affected by an event of Force Majeure.

**9.2.2** An event of Force Majeure affecting the CTU/STU or any other agent of the Seller, which has affected the transmission facilities from the Power Station to the Delivery Point, shall be deemed to be an event of Force Majeure affecting Seller.

**9.2.3** Any event of Force Majeure affecting the performance of the Developer's contractors shall be deemed to be an event of Force Majeure affecting Seller only if the Force Majeure event is affecting and resulting in:

- a) late delivery of plant, machinery, equipment, materials, spare parts, Fuel, water or consumables for the Power Station; or
- b) a delay in the performance of any of the Developer's contractors.

**9.2.4** Similarly, any event of Force Majeure affecting the performance of the procurers' contractor for setting up or operating Interconnection Facilities shall be deemed to be an event of Force Majeure affecting Procurer(s) only if the Force Majeure event is resulting in a delay in the performance of Procurer's contractors.

## **9.3 Force Majeure**

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

### *i. Natural Force Majeure Events*

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

### *ii. Non-Natural Force Majeure Events*



1. *Direct Non-Natural Force Majeure Events attributable to the Procurer(s)*

a) *Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (under the State Government(s) of the Procurer(s) or the Central Government of India) of any material assets or rights of the Seller. Or*

b) *the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal: to grant any Consents, Clearances and Permits required for the development! Operation - of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.*

c) *any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality (under the State Government(s) of the Procurer(s) or the Central Government of India) which is directed against the supply of power by the seller to the Procurer(s), provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.*

2. *Direct Non-Natural Force Majeure Events not attributable to the Procurer(s)*

a) *Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (other than those under the State Government(s) of the Procurer(s) of any material assets or rights of the Seller; or*

b) *the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development / operation of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.*

c) *any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality (other than those under the State Government (s) of the Procurer(s) or the Central Government of India) which is directed against the supply of power by the Seller to the Procurer(s), provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.*

3. *Indirect Non-Natural Force Majeure Events*

a) *any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or*

b) *radioactive contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event mentioned above excluding circumstances where the*



*source or cause of contamination or radiation is brought or has been brought into or near the Power Station by the Affected Party; or those employed or engaged by the Affected Party.*

*c) Industry wide strikes and labour disturbances having a nationwide impact in India.*

### **9.6 Duty to Perform and duty to Mitigate**

**9.6.1** *To the extent not prevented by a Force Majeure Event pursuant to Article 9.3, the Affected Party shall continue to perform its obligations pursuant to this Agreement. The Affected Party shall use its reasonable efforts to mitigate the effect of any Force Majeure Event as soon as practicable.*

46. The Petitioner was unable to supply 250 MW w.e.f. the Scheduled Delivery Date (SDD) i.e. 30.11.2016 and could supply only 45 MW from that date. Subsequently, upon operationalization of LTA for remaining 205 MW by PGCIL/CTU, the Petitioner started supplying the total quantum of 250 MW w.e.f. 01.04.2017. Inability to supply the full quantum of 250 MW to the Respondents w.e.f.30.11.2016 has been attributed by the Petitioner to occurrence of Force Majeure events. It has, therefore, requested that in terms of Schedule 8 of the PPA, it should be allowed the 1<sup>st</sup> year's tariff from 2017-18 when it started supplying 250 MW and not from 2016-17 when it could supply only 45 MW.

47. The Petitioner, before winning the bid, had executed Bulk Power Transmission Agreement (BPTA) with PGCIL/CTU on 24.02.2010 for evacuation of 171 MW from its generating station with a target region of Western Region (WR) for 126 MW and of Northern Region (NR) for 45 MW. Consequent upon winning the bid to supply power to the Respondents 1 to 3 and upon signing the PPA on 1.11.2013, the Petitioner requested PGCIL/CTU vide letter dated 18.01.2014 to revise the earlier LTA (that was granted vide BPTA dated 24.02.2010) to NR for 250 MW (JVVNL – 97.5 MW, AVVNL – 72.5 MW and JVVNL – 80 MW) and WR for 15 MW.



48. The Petitioner was not granted revised LTA as per its request dated 18.01.2014. Later, when the Petitioner on 13.08.2015 requested PGCIL/CTU for grant of LTA as per its earlier request dated 18.01.2014, the Petitioner was asked to submit a fresh application in line with Connectivity Regulations and Detailed Procedures thereunder for balance quantum of 205 MW in the Northern Region. Necessary clearance to make fresh application to PGCIL/CTU for grant of LTA of 205 MW was issued by RUVNL on 05.02.2016 and pursuant to this, the Petitioner applied for LTA of 205 MW on 25.02.2016. In the meanwhile, not having been granted LTA by PGCIL/CTU, the Petitioner had filed an application dated 31.12.2015 for grant of MTOA for 205 MW. Based on the application dated 31.12.2015, PGCIL/CTU vide its letter dated 10.02.2016 granted MTOA to the Petitioner, subject to commissioning of Champa-Kurukshetra±800kV HVDC 1<sup>st</sup> pole of 3000 MW capacity.

49. The Petitioner has contended that as per Clause 3.2.1(C) of the PPA, approval of RERC should have been conveyed by the Respondents 1 to 3 to the Petitioner within 6 months of signing the PPA. However, this approval was delayed since some of the bidders had approached the Hon'ble High Court of Rajasthan and the Hon'ble Supreme Court. It was only after Order dated 08.10.2014 of the Hon'ble Supreme Court that RERC proceeded to adopt the tariff and subsequently approved the PPA and quantum of power vide its order dated 22.07.2015.

50. We note that the Petitioner had submitted request for revision of LTA on 18.01.2014, but the same was not considered by PGCIL/CTU. The Petitioner also does not seem to have followed up with PGCIL/CTU for grant of LTA against its application dated 18.01.2014. It was only after a gap of over 18 months, on 13.08.2015, that the Petitioner requested PGCIL/CTU about grant of LTA as per



its application of 18.01.2014. Thereafter, the Petitioner submitted fresh LTA application only on 25.02.2016 subsequent to which PGCIL/CTU initiated steps to grant LTA to the Petitioner. The follow up by the Petitioner with PGCIL/CTU dated 13.08.2015 and subsequent submission of completed application on 25.02.2016 was much after the Order dated 08.10.2014 of Hon'ble Supreme Court. The Petitioner submitted its MTOA application for 205 MW to PGCIL/CTU on 31.12.2015, which is also much after the order of the Hon'ble Supreme Court. Thus, in our view, delayed communication by the Respondents (on account of petitions filed in Hon'ble High Court/ Hon'ble Supreme Court) did not have any effect on filing of application for LTA/MTOA by the Petitioner.

51. The petitioner has also contended that due to order of this Commission dated 16.02.2015 in Petition No. 92/MP/2014, a fresh application had to be made by it since change in quantum to NR was more than 100 MW in case of the Petitioner and for this purpose, the consent/ NOC from the State Transco was also required to be attached with the LTA application. The Petitioner has submitted that this resulted in delay in grant of LTA since its earlier application of 18.01.2014 was not considered and it had to file afresh.

52. The 5<sup>th</sup> proviso to Regulation 12(1) of the Central Electricity Regulatory Commission (Grant of Connectivity, Long-term Access and Medium-term Open Access in inter-State Transmission and related matters) Regulations, 2009 provides as under:

*“Provided also that in cases where there is any material change in location of the applicant or change by more than 10 MW in the quantum of power to be interchanged using the inter-State Transmission system or change in the region from which electricity is to be procured or to which supplied, a fresh application shall be made, which shall be considered in accordance with these regulations.”*



53. Further, the relevant extract of the order dated 16.02.2015 in petition no. 92/MP/2014 is as under:

*“116. In the light of the above discussion, the Fourth proviso (fifth proviso after the amendment) shall be implemented by CTU as under:*

*xxxx*

*(d) In cases of change in quantum of power to the same region (for which LTA has been granted) by less than 100 MW, written requests shall be considered by CTU. If a subsequent request is made for the same region and the quantum of change of power in the first and second requests taken together exceeds 100 MW, then CTU shall ask for fresh application when the second request is made.*

*xxxx*

*139. The summary of our decisions in these petitions is enumerated below:*

*xxxx*

*(k) For change of region or for injection of power of more than 100 MW in the region in which LTA has been granted, fresh applications will be required to be made. The LTA customers will be required to relinquish the capacity surrendered in the previous region in accordance with the Connectivity Regulations and Detailed Procedure. (Para 116)”*

54. We observe that order of the Commission dated 16.02.2015 in Petition No. 92/MP/2014 only reiterated what was already provided for in the Connectivity Regulations. The initial application for LTA preferred by the petitioner on 18.1.2014 was not as per the Connectivity Regulations which mandated the Petitioner to file a fresh application for the grant of LTA in view of the fact that the Petitioner was ‘relinquishing’ over 100 MW and seeking grant of LTA for an additional quantum of 205 MW for NR, i.e., more than 100 MW change from Western Region to Northern Region. We, therefore, do not agree with the contention the Petitioner that it was required to file a fresh application consequent upon aforesaid order of the Commission. Non-submission of correct application is a lapse on the part of the petitioner and it is incorrect to state that any delay occurred on account of aforesaid order of the Commission. Even otherwise, the Petitioner submitted the fresh LTA application on 25.02.2016 that is almost one year after the aforesaid Order of the Commission.



55. Due to delay in obtaining LTA, the Petitioner applied to the Rajasthan SLDC for permission to apply for an MTOA (Medium-Term Open Access) so that it can supply the aggregated contracted capacity of 250 MW from 30.11.2016. After obtaining necessary clearance from Rajasthan SLDC on 08.12.2015, the Petitioner made an application on 31.12.2015 with the PGCIL/CTU for grant of MTOA for 205 MW. PGCIL/CTU vide its letter dated 10.02.2016 granted MTOA to the Petitioner, but it was subject to the commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity. The Petitioner has further submitted that in the meanwhile, the Petitioner was also pursuing with PGCIL/CTU for grant of LTA of 205 MW.

56. Since the said MTOA was made contingent upon commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity, the Petitioner addressed a letter dated 11.07.2016 to PGCIL/CTU contending that commissioning of the transmission line was likely to be in December 2016, while its MTOA was granted from 30.11.2016. The Petitioner requested for operationalization of MTOA from the date of grant i.e. 30.11.2016 out of the existing margin in transmission system, without linking the same with the commissioning of the above line. However, vide its letter dated 28.07.2016, PGCIL/CTU informed the Petitioner that MTOA can be granted only when there was availability of transmission capacity in the existing system or when the transmission system was under execution process and was to be ready before the intended time.

57. While the Petitioner was pursuing grant of MTOA, PGCIL/CTU vide letter its dated 29.07.2016 addressed to the Petitioner agreed to grant the LTA for



remaining 205 MW in pursuance of the application made by the Petitioner on 25.02.2016. But the LTA which was to be granted to the Petitioner for supply of 205 MW was linked to commissioning of transmission system (765 kV Jabalpur-Orai transmission line) scheduled for commissioning in the month of April 2018. Thus, the Petitioner has stated that neither the MTOA nor LTA could be granted to it by PGCIL/CTU from 30.11.2016 to enable the Petitioner to supply Aggregate Contracted Capacity of 250 MW to the Respondents.

58. Therefore, on 22.08.2016, the Petitioner issued a notice of Force Majeure to Respondent No. 5/ PTC, informing that only 45 MW of power can be supplied from 30.11.2016 on account of non-availability of the transmission system as on the Scheduled Delivery Date. PTC, in turn, issued a Force Majeure notice dated 23.08.2016 to the Procurers, thereby requesting them for extension of Schedule Delivery Date for supply of the Aggregated Contracted Capacity in terms of Article 4.7.1 of the PPA, till the operationalization of the MTOA/LTA and in the meantime allow it to supply only 45 MW of electricity for which the Petitioner already had an LTA. Thereafter, the Petitioner sent an advance preliminary notice to PTC dated 26.09.2016 under Article 4.1.2 of the Procurer-PPA and a final notice on 27.10.2016. PTC, in turn, took up the matter with the Rajasthan Discoms.

59. The Respondent No. 4/ RUVNL, on behalf of Rajasthan Discoms, vide its letter dated 08.11.2016, denied the occurrence of Force Majeure events. The Petitioner issued another letter dated 24.11.2016 to PTC, requesting it to allow to source the 205 MW quantum of power from an alternative source for supplying the same to the Respondents 1 to 3. The Respondent No. 4/ RUVNL vide its letter dated 29.11.2016 again denied the claim of Force Majeure.



60. The Petitioner has thus contended that it was ready and willing to supply full quantum to the extent of Aggregate Contracted Capacity to the Procurers, but due to non-operationalization of the LTA/MTOA by PGCIL/CTU on account of delay in commissioning of the transmission system, against which the LTA/MTOA was granted, the Petitioner was restrained from supplying the Aggregated Contracted Capacity of 250 MW and the same was beyond its control.

61. Subsequently, PGCIL/CTU operationalized LTA for balance quantum of 205MW w.e.f. 31.03.2017 and accordingly supply of 250 MW power (Aggregate Contracted Capacity) was started by the Petitioner from 01.04.2017. The Petitioner issued a letter dated 05.05.2017 stating that the 1<sup>st</sup> Contract Year for the purpose of supply of Aggregate Contracted Capacity of 250 MW should be considered as starting from 01.04.2017 and that due to occurrence of Force Majeure events, the Scheduled Delivery Date should also be revised from 30.11.2016 to 01.04.2017. The Petitioner vide its letter dated 04.11.2017 to PTC again narrated the whole sequence of events leading to the delay in commencement of supply of the Aggregate Contracted Capacity. However, when PTC took up the matter with the Respondents 1 to 4, the Respondent No. 4 vide its letter dated 12.12.2017 stated that it did not agree with the claim of considering 1<sup>st</sup> contract year from 01.04.2017 for applicability of tariff.

62. Thus, the Petitioner has contended that it was unable to supply the contracted power of 250 MW w.e.f. 30.11.2016 due to delay in operationalization of LTA/MTOA by PGCIL/CTU and, therefore, it has prayed that the day from which it supplied the full quantum of contracted power i.e. 01.04.2017 should be treated as the Scheduled Delivery Date. It has also prayed that accordingly, it should be granted 1<sup>st</sup> year's tariff (in terms of Schedule 8 of the PPA) from the financial year



2017-18. The Petitioner has contended that non-operationalization of LTA/MTOA by PGCIL/CTU is an event of Force Majeure in terms of the Clause 9 of the PPA. (relevant extract is at paragraph 45 of this Order).

63. We note that Clause 9.2.2 and Clause 9.3.1 are two relevant clauses in the PPA that are applicable to the case of the Petitioner. While Clause 9.2.2 is a specific clause dealing with transmission facilities, Clause 9.3.1 is a general clause of Force Majeure that may affect the Petitioner. As per clause 9.2.2 of the PPA, to claim benefit of Force Majeure, the Petitioner needs to establish that due to Force Majeure events affecting the CTU/STU or any other agent of the Petitioner, the transmission facilities from the Power Station to the Delivery Point has been affected. Clause 9.3.1 lists out the events of Force Majeure by which the Petitioner itself may be affected.

64. The Petitioner has attributed the reasons for its not being able to supply power from 30.11.2016 (Scheduled Delivery Date) to non-operationalization of LTA/MTOA for balance quantum of 205 MW by PGCIL/CTU. This event of non-operationalization of LTA/MTOA by PGCIL/CTU has been argued by the Petitioner to be an event of Force Majeure. However, we note that there is no such provision in the PPA that can be invoked to consider non-operationalization of LTA/MTOA by PGCIL/CTU as a Force Majeure event. In terms of Clause 9.2.2 read with Clause 9.3.1 of the PPA, the Petitioner can claim benefit of Force Majeure only when CTU/STU or any other agent of the Petitioner is affected by Force Majeure event. Thus, we need to see if the Petitioner's case is covered under the Clause 9.2.2 of the PPA (i.e. if the Petitioner's case has been delayed due to Force Majeure events affecting CTU/ STU or any other agent of the Petitioner as regards



transmission facilities) or any other Clause under provisions of Clause 9.3.1 of the PPA.

65. We note that after submitting a deficient LTA application on 18.01.2014, the Petitioner did not follow up with PGCIL/CTU on its application. It was only on 13.08.2015, the Petitioner followed up the application, with PGCIL/CTU, when PGCIL/CTU asked the Petitioner to submit a fresh application for LTA since the case of the Petitioner involved change of region (from Western Region to Northern Region) for more than 100 MW. It was only on 25.02.2016, two years after the initial application dated 18.01.2014 and signing of PPA dated 01.11.2013 that the Petitioner made a fresh LTA application as per the provisions of Connectivity Regulations. Its MTOA application was also submitted to PGCIL/CTU only on 31.12.2015 and even that is more than two years after the PPA was signed on 01.11.2013. Having submitted the applications for MTOA/LTA after over two years of signing PPAs, the Petitioner cannot now claim that non-operationalization of LTA/MTOA by PGCIL/CTU was a Force Majeure event.

66. We also note that consequent upon MTOA application of the Petitioner dated 31.12.2015, the PGCIL/CTU vide its letter dated 10.02.2016 granted MTOA to the Petitioner for 205 MW subject to commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity. The Petitioner was aware that the likely date of commissioning of this line was December 2016 and it wrote a letter to this effect to PGCIL/CTU on 11.07.2016 contending that the SDD was 30.11.2016 and that the likely date of commissioning of the line did not match with its SDD. Thus, the Petitioner was aware right from the time it was granted MTOA that the transmission system on which it has been granted MTOA will not be commissioned before December 2016. MTOA granted to the Petitioner never got



materialized as the Petitioner was granted and operationalized LTA on the same line against its application dated 25.02.2016 to PGCIL/CTU.

67. Similarly, when the Petitioner was offered LTA by PGCIL/CTU on 765 kV Jabalpur-Orai transmission line on 29.07.2016, the Petitioner was aware that the line would be commissioned only in April 2018 and that its LTA can be operationalized only after that.

68. Thus, the Petitioner was aware that its MTOA can be operationalized earliest by December 2016 and its LTA can be operationalized in April 2018 right at the time of grant of MTOA and LTA respectively. Therefore, the Petitioner was aware that it would not be able to supply balance quantum of 205 MW w.e.f. 30.11.2016 in absence of LTA/MTOA. In fact, the Petitioner wrote to the Respondent No. 5/ PTC on 22.08.2016 (which PTC communicated to the Rajasthan Discoms on 23.08.2016) that it would be able to supply power only to the extent of 45 MW w.e.f. SDD and not the full quantum of 250 MW. The Petitioner claimed occurrence of Force Majeure event as reasons for not being able to supply full quantum of 250 MW while the Respondents 1 to 4 denied existence of any such Force Majeure event vide its letters dated 08.11.2016 and 29.11.2016.

69. The Petitioner has submitted that PGCIL/CTU operationalized the LTA for balance 205 MW on 31.03.2017 (with commissioning of Champa-Kurukshetra± 800 kV HVDC 1<sup>st</sup> pole of 3000 MW capacity) and supply of full quantum of 250 MW started w.e.f. 01.04.2017. We note that PGCIL vide its earlier letter dated 29.07.2016 had offered to grant LTA to the Petitioner on the 765 kV Jabalpur-Orai transmission line that was likely to be commissioned in April 2018. Thus, the



Petitioner's LTA having been operationalized in March 2017 was, in fact, almost one year earlier than the earlier communicated date by PGCIL vide letter dated 29.07.2016. In such a situation, in terms of provisions of Clause 9.2.2 of the PPA, we do not find that any case is made out by the Petitioner that Force Majeure event affected the PGCIL/CTU as far as providing transmission access to the Petitioner is concerned.

70. Though Force Majeure in respect of the Petitioner as regards the transmission line has to be seen only after it applied for LTA, any Force Majeure event affecting the PGCIL/CTU in commissioning of the  $\pm 800$  kV HVDC 1<sup>st</sup> pole Champa-Kurukshetra transmission line got over on 24.03.2017 with declaration of COD of the line. The Commission approved COD of transmission line as 24.03.2017 vide Order dated 22.02.2018 in Petition No. 13/TT/2017; the relevant extract is as under:

"4. xxxx

*Asset 1: Pole-I of the  $\pm 800$  kV, 3000 MW Champa Pooling Station and Kurukshetra HVDC Terminals along with  $\pm 800$  kV Champa Pooling station -Kurukshetra HVDC Transmission Line*

xxxx

*16. We have considered the submissions of the petitioner regarding the COD of the instant assets. In support of COD of Asset-1, the petitioner has submitted the RLDC Certificate regarding trial operation, CEA Certificate for energisation of the transmission element and CMD certificate as required under grid code. Taking into consideration the RLDC certificate, CEA certificates and CMD certificate, the COD of Asset-1 is approved as 24.3.2017 and considered for the purpose of tariff computation."*

71. The Petitioner has enclosed letter of PGCIL/CTU dated 24.03.2017 (Ref.No. C/Comm/LTA:205MW/MCCPL/LC/2017) that required the Petitioner to open an LC for Rs. 1990 lakhs. This letter of PGCIL/CTU dated 24.03.2017 has referred to two other letters (copies of which have not been supplied by the Petitioner), one dated 15.03.2017 (ref. no. C/CTU-Plg/LTA/W/2016/MCCPL/Up)



and another dated 24.03.2017 (ref. no. C/CTU-Plg/LTA/W/2016/MCCPL/Op). While the letter dated 15.03.2017 related to revised intimation of LTA, the letter dated 24.03.2017 referred to operationalization of LTA for 205 MW. The Petitioner has not placed on record any documents to explain why it could not open LC and did not start supplying power immediately after receiving letter of PGCIL/CTU dated 24.03.2017. Petitioner started supplying 250 MW w.e.f 01.04.2017. Thus, the Petitioner had sufficient opportunity, after the communication dated 24.03.2017 from PGCIL/CTU, to start supplying the full quantum of 250 MW before 01.04.2017, i.e., in the financial year 2016-17, the first contract year as per the PPA dated 01.11.2013.

72. The Petitioner has not stated any Force Majeure event affecting the STU or any of its other agents for its case to be covered under Clause 9.2.2 of the PPA.

73. Further, we do not find that the case of the Petitioner is covered under any of the provisions of Clause 9.3.1 of the PPA either.

74. In view of the above, the Petitioner has failed to establish that it is affected by any event of Force Majeure in terms of Clause 9.3.1 or Clause 9.2.2 of the PPA. Accordingly, its claim of relief under Force Majeure in terms of the PPA is not sustainable and hence rejected.

75. The Petitioner has also submitted that PTC vide its letter dated 24.11.2016 offered to supply 205 MW power to the Respondent Discoms from an alternate source since LTA/MTOA for 205 MW was not available on SDD. But the Rajasthan Discoms declined to off take such power vide their letter dated 29.11.2016 stating that provision of Clause 4.6 of the PPA was only relevant when the power station is unable to supply power and did not apply to a situation when the Petitioner



could not obtain open access. In our view, these facts are not relevant to determine occurrence of Force Majeure events under Clause 9.2.2 or Clause 9.3.1 of the PPA.

76. The Petitioner has also placed its reliance upon provisions of Clause 4.7 which provides for deferment of SDD. Having decided that the Petitioner did not suffer from any Force Majeure events, we do not find it necessary to deliberate on provisions of this clause.

77. Having rejected the petitioner's claim of force majeure, the prayers related to shifting the Scheduled Delivery Date or grant of 1<sup>st</sup> year's tariff w.e.f. 2017-18 do not survive.

78. Petition No. 183/MP/2018 is disposed of in terms of the above.

**Sd/  
(I.S. Jha)  
Member**

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

**Sd/  
(P. K. Pujari)  
Chairperson**

