

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No: 115/MP/2019

Coram:

Shri P.K. Pujari, Chairperson

Dr. M.K. Iyer, Member

Shri I.S. Jha, Member

Date of Order: 4th of February, 2020

In the matter of

Petition under Sections 79(1)(b) and (f) of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 for recovery of dues owed by GRIDCO to GMR Kamalanga Energy Limited under Revised Power Purchase Agreement dated 04.01.2011.

And

In the matter of

GMR-KAMALANGA ENERGY LIMITED

Skip House, 25/1 Museum Road

Bangalore – 5600025

.....Petitioner

Vs

1. GRIDCO LIMITED.

Janpath, Bhubaneswar- 751022

Orissa

2. SLDC, Odisha

SLDC Building, GRIDCO Colony,

P.O. Mancheswar Rly. Colony,

Bhubaneswar – 751017.

Respondents

...

Parties Present:

Shri Amit Kapur, Advocate, GKEL

Shri Yashaswi Kant, Advocate, GKEL

Shri Raj Kumar Mehta, Advocate, GRIDCO

Ms. Himanshi Andley, Advocate, GRIDCO

Ms. Sumitra Mohanty, GRIDCO

Shri R. Mansingh, GRIDCO

Shri Sakesh Kumar, Advocate, SLDC

Ms. Gitanjali Sharma, Advocate, SLDC

ORDER



The Petitioner, GMR Kamalanga Energy Limited ("GKEL"), a subsidiary of GMR Energy Limited ("GEL") owns and operates a coal-fired 1050 (3x350) MW generating station at village Kamalanga, District Dhenkanal in Odisha. The instant petition is filed by the petitioner under Sections 79(1)(b) and (f) of the Electricity Act, 2003 read with the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) Regulations, 2014 for recovery of dues owed by GRIDCO to the Petitioner under Revised Power Purchase Agreement dated 04.01.2011.

Background of the Case

2. The generating station of the Petitioner comprises of 3 units of 350 MW each and the Unit-1, Unit-2 and Unit-3 achieved COD on 30.4.2013, 12.11.2013 and 25.3.2014 respectively. The generating station supplies 262.5 MW gross power out of 1050 MW to GRIDCO in terms of the revised Power Purchase Agreement dated 04.01.2011 with delivery point being Orissa STU interconnection point. Supply of power to the GRIDCO commenced on 30.04.2013.

3. The Petitioner in the instant petition has disputed the PAFM% (Plant Availability Factor – Monthly) computed by SLDC Odisha during the period from 01.04.2015 to 31.03.2017. The petitioner has made the following prayers.

a) *Direct SLDC to correct PAFM% for the Project from 01.04.2015 till 31.03.2017 based on the availability declarations made by GKEL as acknowledged in terms of the methodology in Minutes of Meeting held on 12.07.2017 and detailed in letter dated 22.11.2018, 2009 Tariff Regulations, 2014 Tariff Regulations and the IEGC;*

b) *Direct GRIDCO to pay Rs. 55 Cr due from the period 01.04.2015 to 31.03.2017 forthwith based on the corrected PAFM% to GKEL;*

c) *Direct GRIDCO to pay Rs. 24 Cr or such other amount wrongly deducted by GRIDCO and to stop making any deductions from amounts due to GKEL;*

d) *Pending final adjudication, pass ad interim order injuncting GRIDCO from any further deductions;*



e) Direct GRIDCO to make Delayed Payment Surcharge amounting to Rs. 30 Cr. for the disputed period i.e. from 01.04.2015 to 31.03.2017 calculated up to 21.02.2019 towards unpaid capacity charges;

f) Direct GRIDCO to pay Rs. 59 Cr. as 75% of the disputed bill in terms of Article 9 of the GRIDCO PPA during the pendency of the present petition;

Submissions of the Petitioner

4. The petitioner vide affidavit dated 26.2.2019 has submitted that on 28.09.2006, GKEL entered into an agreement for the supply of 262.5 MW power (gross) to GRIDCO. The said agreement was revised and replaced by a Power Purchase Agreement (PPA), which was executed between GRIDCO and GKEL on 04.01.2011. The Petitioner in the instant Petition submitted the following:

- a) In accordance with the Clause 2.2 (a) of the PPA dated 04.01.2011:
- (i) Capacity up to 25% of the installed capacity is to be requisitioned by GRIDCO once every 5 years upon which such capacity shall stand allocated to GRIDCO;
 - (ii) Fixed Charges are to be paid on the basis of availability of requisitioned capacity; and
 - (iii) GRIDCO has the right to avail 25% of power sent out corresponding to the capacity requisitioned by it.

b) From the provisions of the above-stated Clause 2.2(a) of the PPA, it is evident that Capacity Charges (Annual Fixed Charges or AFC, in short) relate to the capacity requisitioned by GRIDCO. Further, GKEL's entitlement to capacity charges is irrespective of the quantum of power actually scheduled by GRIDCO.

c) Pursuant to provisions of Clause 2.2(a) of the PPA, GRIDCO vide letter dated 26.02.2013 exercised its right to off-take 25% of the installed capacity of the Project. Therefore, once the capacity is requisitioned and available, GRIDCO is obliged to pay capacity charges for the same.

d) The Commission vide order dated 29.06.2018 in Petition No. 61/GT/2016 approved the Annual Fixed Charges (AFC) in respect of GKEL for FY 2014-15 to 2018-19.

"173. The annual fixed charges approved as above are applicable corresponding to the capacity of 262.5 MW (25% of 1050 MW) which has been contracted for supply to the respondent beneficiaries."



e) It is evident from the orders of Commission in the Petition No. 77/GT/2013 and the Petition No. 61/GT/2016, letter dated 11.03.2013 and the Appeal bearing DFR No. 158 of 2019 filed by GRIDCO, that the capacity requisitioned and contracted by GRIDCO is 262.5 MW (which corresponds to 25% of installed capacity of the Project i.e. 1050 MW).

f) At the time of commissioning, all three units of the generating station were connected through LILO arrangement at 400 KV Kaniha- Meramundali line (CTU line) and scheduling was being done by SLDC till 30.03.2014. GKEL through its letter dated 16.12.2013 had requested to consider for scheduling of its power by ERLDC as per CERC order dated 19.11.2013 in Petition No. 95/MP/2013. Accordingly, from 31.12.2014 scheduling was being done by ERLDC. Thereafter, with effect from 18.03.2015, at the request of GRIDCO, connectivity of Unit 3 was shifted from CTU to STU (State Transmission Utility) and energy supply to GRIDCO is being scheduled from this Unit 3 through STU. Scheduling of energy to GRIDCO through Unit 3 is managed by SLDC.

g) In terms of the express provisions of the PPA, CERC (Indian Electricity Grid Code) Regulations 2010 (hereinafter referred to as the "IEGC" or the "Grid Code"), CERC (Terms and Conditions of Tariff) Regulations, 2009 (hereinafter to as the "2009 Tariff Regulations") and CERC (Terms and Conditions of Tariff) Regulations, 2014 (hereinafter referred to as the "2014 Tariff Regulations"), GKEL has been declaring availability corresponding to 25% of the installed capacity (262.5 MW), taking into account fuel availability.

h) However, in spite of declaring availability in the morning from the dedicated Unit-3, SLDC (on behalf of GRIDCO) started issuing verbal instructions to GKEL to reduce the energy being scheduled from the Project for supply to GRIDCO, which is not in line with the provisions of IEGC. Initially, GKEL complied with the request of SLDC during the period from 18.03.2015 to 03.12.2015. However, when it became apparent that SLDC was reducing the plant availability to power actually scheduled, GKEL refused to revise the availability declaration. As a result, between 04.12.2015 to 31.03.2017, GKEL refused to revise the availability declarations in the evening based on such verbal instructions by SLDC on behalf of GRIDCO.



i) However, in spite of valid availability declarations by GKEL, SLDC has been calculating availability on the basis of scheduled energy off-take by GRIDCO, contrary to all regulations. As a consequence, the availability being considered by GRIDCO and SLDC is lesser than the actual capacity declared and made available to GRIDCO throughout this period i.e. from 01.04.2015 to 31.03.2017, resulting in idling of the balance capacity. This is also evident from the letter dated 21.11.2015 wherein GRIDCO has admitted that scheduling was being done as per schedule or requirement intimated by SLDC. Such instructions are contrary to the provisions of the 2009 Tariff Regulations, the 2014 Tariff Regulations, IEGC and the PPA and the same has resulted in under recovery of AFC.

j) SLDC has accepted and admitted that availability of the Project has been incorrectly assessed by them for the financial years 2015-16 and 2016-17 (refer presentation made by SLDC in GRIDCO conference hall on 13.11.2018, as received by GKEL vide letter dated 22.11.2018.). However, despite admission and repeated requests, GRIDCO has failed to pay AFC for the past period, i.e. from 01.04.2015 to 31.03.2017.

k) GRIDCO and SLDC have rectified the computation methodology and accordingly payment of fixed charges is being done on the basis of availability declared by GKEL with effect from 01.04.2017 pursuant to the decision taken at the Meeting held on 12.07.2017 between GKEL, GRIDCO and SLDC.

l) The fact that verbal instructions by SLDC was a matter of practice is brought out through the Minutes of Meeting between GRIDCO, GKEL and SLDC dated 11 July 2013, which records inter-alia that GKEL was issued verbal instructions by SLDC. As per the Minutes of Meeting held between representatives of GRIDCO, SLDC and GKEL on 10.03.2015 (forwarded vide letter dated 16.03.2015), the following was *inter-alia*, deliberated and decided:

- (i) While declaring the availability for Unit 3, 25% of Odisha's share and Open Access transactions, if already approved/ to be approved for the next day, shall be taken into consideration.
- (ii) Any revision (upward/ downward) of declared capacity has to be intimated to SLDC by the IPP within the statutory time limit for necessary revision of GRIDCO's drawl on real time basis.



(iii) In case of revision of schedule by SLDC, such revision shall become effective from the 4th time block. The loss of generation would be considered for Plant Availability Factor – Monthly (“PAFM”) computation.

m) On 12.07.2017, a meeting was held between representatives of GRIDCO, SLDC and GKEL to discuss the methodology of PAFM/ PAFY calculation by SLDC, wherein the following was decided/ deliberated:

(i) SLDC will accept the entitlement/DC in line with the entitlement mentioned in the GRIDCO PPA dated 04.01.2011.

(ii) Provisions of CERC Tariff Regulation for determination of PAFM/ PAFY can be complied in its entirety while working out the monthly energy accounting.

(iii) GRIDCO can avail its full entitlement i.e. 262.5 MW (25% of Installed Capacity or 247 MW ex-bus capacity) irrespective of availability of units connected to CTU.

n) During the above-mentioned meeting on 12.07.2017, the following methodology was agreed upon for acceptance of entitlement and DC of GRIDCO’s share of power by SLDC which would result in more entitlement for GRIDCO:

Sl. No.	Unit Availability and DC (a)	DC for GRIDCO	Remarks
1.	247<DC<=330	247	25% share
2.	DC<=247	DC	Provided no power to be sold outside through OA
3.	If DC of Unit 3=0 (on account of shutdown /break down/annual maintenance etc.)	As requisitioned by GRIDCO up to its entitlement from Units 1 and 2	The POC loss and charges, OA charges and other related charges shall be borne by GKEL. This scheduled power would be treated as deemed generation availability for the purpose of PAFM
4.	In case of backing down instruction by SLDC	Acceptance will be same as DC before backing down instruction	Such deemed generation to be considered for PAFM calculation

o) It was also agreed in the meeting that GRIDCO would always have the first priority of availing its entitlement from Unit-3, after which any Open Access schedule would be considered. It was also agreed that the above methodology would be applicable with effect from 01.04.2017 as PAFY% was to be determined for a complete financial year to determine the Annual Fixed Charges payable to GKEL.

p) On 19.02.2018, GKEL wrote to GRIDCO clarifying the points raised by GRIDCO in terms of a letter dated 30.01.2018. GKEL stated that it had written



to SLDC for revision of schedule prior to FY 2017-18 in accordance with the 2014 Tariff Regulations and the Grid Code.

q) On 30.05.2018, SLDC wrote to GRIDCO stating that the PAFM/ PAFY of GKEL shall be made in line with the prevailing CERC Tariff Regulations and Orders by the SLDC and that the monthly bill shall be based on the three part tariff as per CERC Tariff Regulations and shall be settled by GRIDCO based on Monthly Energy Accounting and DSM statement issued by SLDC. SLDC also stated that it has already computed the PAFM/ PAFY for Unit 3 as per the above methodology w.e.f. 01.04.2017.

r) On 12.06.2018, GKEL again took up the matter with SLDC and reiterated its stand as taken in letter dated 06.05.2017.

s) On 26.09.2018, GRIDCO filed Petition No. 63 of 2018 before the Odisha Electricity Regulatory Commission ("OERC"). In the Petition, GRIDCO has *inter-alia*, submitted that based on Clause 2.2 of the PPA, the gross contracted capacity of GRIDCO works out to be 262.5 MW (i.e. 25% of the total present installed capacity of 1050 MW). The PAFM/PAFY was worked out relying on conditions laid down in Clause 2.2 of the GRIDCO PPA. Since Tariff for the Project is determined by the CERC, the provisions of 2014 Tariff Regulations have to be followed for working out the PAFM/PAFY in respect of the power supplied to GRIDCO. The meeting convened on 12.07.2017 among representatives of GRIDCO, SLDC and GKEL was also referred to wherein methodology was devised for determination of PAFM/PAFY. It submitted that the Minutes of Meeting held on 12.07.2017 was agreed to by the Board of Directors of GRIDCO in their 175th Meeting on 09.05.2018 and GRIDCO requested OERC to treat the Minutes of Meeting held on 12.07.2017 as part of the PPA with effect from 01.04.2017.

t) On 13.11.2018, a presentation was made by SLDC to GRIDCO regarding the methodology for calculation of PAFM/PAFY for the period 2015-16 and 2016-17 in respect of power supplied by GKEL. The presentation was forwarded vide letter dated 22.11.2018. The presentation made by SLDC *inter-alia*, stated that in terms of Minutes of Meeting dated 12.07.2017, GKEL, GRIDCO and SLDC had agreed and adopted a methodology for PAFM/ PAFY which was in line with the Tariff Regulations framed by the Central Electricity



Regulatory Commission. It was stated that on 12.06.2018, GKEL had written to SLDC to re-compute the PAFM for FY 2015-16 and FY 2016-17 as per the regulatory provisions and that in view of SLDC, PAFM for FY 2015-16 and 2016-17 should be calculated as per regulations. Thus, full DC would be considered although schedule injection was not as per DC and GKEL will be entitled for full fixed cost during the above period.

u) On 03.12.2018, GKEL took up the matter with GRIDCO referring to meetings held on 13.11.2018 and 24.11.2018. It further reiterated the issues on 25.01.2019 and 30.01.2019.

v) Regulations framed by this Commission are in the nature of subordinate legislation and will prevail over contractual provisions including existing/ concluded contracts. The above position has been confirmed by the Hon'ble Supreme Court in *PTC India Ltd. vs. CERC*, reported as (2010) 4 SCC 603 and by the Appellate Tribunal for Electricity (APTEL) in terms of Judgment dated 06.04.2017 in Appeal No. 126 of 2016 titled *Odisha Power Generation Corporation Limited vs. Odisha Electricity Regulatory Commission & Ors.* ("Judgment dated 06.04.2017"). Therefore, notwithstanding anything to the contrary in the GRIDCO PPA, availability has to be computed in accordance with the IEGC and the 2014 Tariff Regulations.

w) GRIDCO and SLDC have accepted that PAFM and availability was incorrectly computed and that it requires revision in terms of Minutes for Meeting held on 12.07.2017; letter dated 22.11.2018; Petition No. 63 of 2018 filed by GRIDCO before OERC; and by revising methodology from 01.04.2017.

x) In terms of Article 9 of the GRIDCO PPA, GRIDCO is obligated to pay 75% of a disputed bill. Further in terms of the GRIDCO PPA (Clause 7.2), GRIDCO is liable to make payment for Delayed payment surcharge (DPS) to GKEL for the afore-mentioned period.

Submissions of the Respondent GRIDCO

5. The Respondent No. 1, GRIDCO vide affidavit dated 17.07.2019 submitted the following:

a) The petition is barred by limitation and/or suffers from gross delays and laches. The petition is, therefore, liable to be dismissed summarily.



b) Petitioner ought to have raised this issue before OERC through separate petition or in the application for approval of PPA but it chose not to do so. It is submitted that this Commission does not have the jurisdiction to entertain the present petition.

c) The issue raised in the present petition pertains to interpretation of a clause in the PPA and the same ought to have been raised by GKEL in Case No. 63 of 2018 regarding approval of PPA.

d) The Petitioner has deliberately suppressed the fact that it followed the same principle for submitting Day Ahead Declared Capacity to ERLDC during FY 2014-15 towards supply of power to GRIDCO which had been adopted by SLDC for FY 2015-16 and FY 2016-17.

e) The Meeting dated 12.07.2017 wherein it was agreed between GKEL, GRIDCO and SLDC to consider Declared Capacity (DC) with respect to availability of STU connected Unit #3 with effect from 1st April, 2017 onwards, it was discussed in detail why it is difficult to apply the same principle for the past period as well. Moreover, the methodology adopted by SLDC for FY 2015-16 and FY 2016-17 is in consonance with the provision in the subsisting PPA dated 04.01.2011 and Section 32 of the Electricity Act, 2003 and is thus prudent and justified.

f) GKEL itself had followed the same PPA clause religiously while scheduling power to GRIDCO under the contract when all three Units were connected at CTU for the period from 31st March, 2014 to 17th March, 2015.

g) Prior to commencement of supply of power to GRIDCO w.e.f. 18.03.2015 from its Unit#3 (350 MW) connected to STU through Dedicated Transmission Line, different issues were addressed vide Meeting dated 10.03.2015 which inter-alia includes treatment of over/ under injection of power (which is otherwise addressed under UI Regulation for Central Generating Stations) and supply of Firm Power corresponding to 25% of energy sent out from the Thermal Station.



h) Based on the Minutes of Meeting dated 10.03.2015, the Petitioner GKEL executed a Short Term Open Access Agreement dated 26.03.2015 with GRIDCO to address under injection of power to meet Open Access schedule from the same STU connected Unit #3. Accordingly, the Petitioner had also submitted Bank Guarantee of required amount to GRIDCO.

i) As per Clause 5.3.2 and 5.3.3 of the Power Purchase Agreement dated 04.01.2011, energy account issued by SLDC shall be binding on all the parties for billing and payment purposes and GKEL shall prepare and submit bills to the beneficiaries including GRIDCO on the basis of such energy accounts.

j) However, the Petitioner GKEL never made any effort to approach ERLDC/ SLDC for issuance of certified Monthly Energy Accounting Statement reflecting Plant Availability Factor for the month (PAFM) for the period from 30th April-2013 till March, 2017. Had any steps been taken by GKEL in this regard, the matter would have been settled at the very inception.

k) GKEL had signed Joint Reconciliation Statement of power supplied to GRIDCO during the period from FY 2013-14 to FY 2016-17 on 30.05.2018 without any such objection regarding the quantum of power supplied every month during the period under dispute which has been derived based on the methodology adopted by SLDC for PAFM calculation, presently disputed by the Petitioner.

l) The PAFM Statements were issued by SLDC on 20.02.2015, 11.04.2017, 21.06.2017 and 01.07.2017 based on request of GRIDCO vide letters dated 08.09.2014, 20.01.2016, 17.12.2016 and 02.05.2017. Moreover, as GKEL itself followed the same clause for FY 2014-15, it never complained before GRIDCO when 25% of energy sent out was considered for payment as per the Minutes of Meeting dated 10.03.2015 effective up to March, 2017.

m) Even after pronouncement of first Tariff Order dated 12.11.2015 in Petition No.77/GT/2013, there is no correspondence from GKEL with GRIDCO/SLDC which reflects that GKEL had approached SLDC for issuance of monthly energy accounting statement towards transaction of power with



GRIDCO or had raised the issues as being presented before the Commission now in the present petition.

n) GKEL kept on raising claim towards monthly fixed charges based on PAFM calculated on its own during the period under dispute instead of requesting SLDC for certified monthly energy accounting statement. GRIDCO has never accepted PAFM claimed by GKEL as per its own calculation.

o) GKEL never raised dispute regarding Clause 2.2(a) of the PPA since commencement of supply of scheduled power to GRIDCO w.e.f. 30.04.2013 till 06.05.2017. Further GKEL did not raise the issue of modifying the said Clause 2.2(a) for the past period in their submission in Case No. 63 of 2018 filed by GRIDCO before OERC for approval of the Power Purchase Agreements. Accordingly, in the final PPA approval order dated 09.04.2019 in Case No. 63 of 2018, OERC has approved the Minutes of Meeting dated 12.07.2019 as part of the PPA w.e.f. April, 2017 onwards but not given any direction with regard to the past period.

p) Board of GRIDCO also declined to revise the PAFM calculation for the past period i.e. FY 2015-16 and FY 2016-17 as proposed by GKEL vide letter dated 03.12.2018 on similar principle as adopted from April, 2017 onwards based on the Minutes of Meeting dated 12.07.2017.

q) In 179th meeting of Board of Directors of GRIDCO held on 22.01.2019, it was observed that as per proposal of GKEL, if Declared Capacity by GKEL is considered with respect to availability of STU connected Unit #3 (350 MW) for FY 2015-16 and FY 2016-17 and revision of PAFM is considered, GKEL has to supply shortfall power at Energy Charge Rate (ECR) based on Special Forward E-Auction coal commensurate with the additional fixed charges payable to the Petitioner.

r) The existing PPA provides for declaration of capacity in favour of GRIDCO by considering 25% of Station Availability (i.e. 25% of power sent out from the Power Plant) as admitted by the Petitioner in their letter dated 13.05.2015, 20.05.2015 and 18.08.2015. Instead the Petitioner unilaterally started submitting Declared Capacity (DC) on Day-Ahead basis with respect to availability of only the Unit #3 connected with STU. Thus, in absence of any



such provision to consider availability of STU connected Unit #3 (instead of 25% availability for the whole Station) in the existing PPA, SLDC has prudently worked out PAFM for FY 2015-16 and FY 2016-17.

s) GRIDCO has never stated that the gross contracted capacity under existing Power Purchase Agreement (PPA) is anything other than 262.5 MW. Until the PAFM statements were issued by SLDC on request of GRIDCO in April, 2017, the Petitioner never disputed the quantum of energy considered at 25% of energy sent out i.e. final schedule of thermal station based on the Minutes of Meeting dated 10.03.2015 effective up to March, 2017 and accepted the payments without protest.

t) It is wrong and misleading to suggest that connectivity of Unit #3 was shifted from CTU to STU on request of GRIDCO. It was as per provisions under PPA dated 04.01.2011.

u) The Petitioner had submitted the Declared Capacity (DC) considering 25% of power sent out from the thermal station and not as per the provisions of the 2009 Tariff Regulations or the 2014 Tariff Regulations, as applicable.

v) There is no such document on record in support of contentions of the Petitioner regarding verbal instructions of SLDC to reduce the energy being scheduled from the project for supply to GRIDCO.

w) The Petitioner did not take any action for issuance of PAFM statement by SLDC in compliance with provisions under the Grid Code and raising monthly energy bills based on it.

x) The Petitioner is silent about the differential capacity not supplied to GRIDCO and sold outside when all three Units were connected with CTU. Moreover, in reply to request letters of GKEL dated 13.05.2015 and 20.05.2015, vide its letter dated 29.05.2015 GRIDCO has given consent for sale of power up to 150 MW through Short Term Open Access from STU connected Unit#3 which continued up to 25th March, 2018. Therefore, there was any idle capacity.

y) The Petitioner raised no such objection when real time operations were going on during FY 2015-16 and FY 2016-17. It was also allowed Open Access up to 150 MW which otherwise would not have been possible if strictly 247 MW



of net contracted capacity is to be supplied to GRIDCO from its STU connected Unit #3 (350 MW). Moreover, GRIDCO has also not availed scheduled power corresponding to full net contracted capacity but only about 25% of energy sent out from the Thermal Station.

z) SLDC acted without waiting for the views sought from GRIDCO vide letter dated 27.06.2018. Moreover, SLDC has never communicated any such anomalies in assessment of Declared Capacity (DC) for FY 2015-16 and FY 2016-17 to GRIDCO. Moreover, SLDC had submitted its views vide letter dated 22.11.2018 just two days prior to the meeting held with GKEL and SLDC to discuss GRIDCO's views wherein it was explained in detail why it is difficult to review the PAFM for the past period. Thereafter, vide letter dated 03.12.2018 GKEL gave its proposal which was not accepted by Board of GRIDCO.

aa) The gross contracted capacity of GRIDCO is 262.5 MW (Net capacity 247 MW) when all three Units were available and in operation. Otherwise, the entitlement of GRIDCO stands at 25% of energy sent out from the Thermal Station at any point of time so as to avoid extra financial burden vis-à-vis merit order dispatch. It was also noted in the Minutes of Meeting dated 12.07.2017 that difficulties arise in confirming availability of all three Units of the Petitioner connected with both CTU (Unit#1 & Unit#2) and STU (Unit#3). Moreover, the Petitioner was allowed sale of power through Open Access up to 150 MW until March 2018 vide GRIDCO's letter dated 29.05.2015 and submission of valid Bank Guarantees by the Petitioner every year on/ before due date.

bb) PAFM issue was considered with respect to availability of Unit #3 w.e.f. April 2017 as per Minutes of Meeting dated 12.07.2017. Vide letter dated 30.01.2018, GRIDCO had clearly intimated GKEL the reasons for not claiming DPS (Delayed Payment Surcharge) due to difference in billed and paid amount on account of non-consideration of PAFM as issued by SLDC and consideration of ECR based on alternate source coal. GRIDCO had again intimated citing the reasons for non-payment of DPS to GKEL vide letters dated 20.01.2016, 27.04.2017, 30.01.2018 and 11.10.2018.

cc) Vide its letter dated 27.02.2019, GRIDCO had intimated its Board's decision in response to the proposal of GKEL to supply 50% of shortfall energy



which was not availed by GRIDCO during FY 2015-16 and FY 2016-17 within next two year period at energy charges based on special forward E-auction coal.

dd) SLDC has admitted that it had acted as per the PPA in force between the parties. Thus, there is nothing wrong in the methodology adopted by SLDC which is in conformity with Section 32 of the Electricity Act, 2003. Moreover, the Petitioner had received fixed charges proportionate to the firm power supplied during FY 2015-16 and FY 2016-17 and balance capacity of Unit#3 was allowed for sale through Open Access as explained above.

ee) Commission may direct the Petitioner to clarify the reasons of not raising monthly energy bills on GRIDCO in compliance with the provisions under Clause 5.3 of the PPA dated 04.01.2011 even after pronouncement of Tariff order dated 12.11.2015 by CERC in Petition No. 77/GT/2013.

ff) Assuming but not accepting the fact that the 2009 Tariff Regulations and 2014 Tariff Regulations shall override the PPA provisions, it is submitted that the availability of CTU connected Units during the past period cannot be ascertained by SLDC at present. Moreover, vide letter dated 27.02.2019 GRIDCO had intimated that it will avail such power (i.e. power corresponding to Declared Capacity with respect to Unit#3, as allegedly claimed by the Petitioner now) as and when required by GRIDCO within the period of next one year (March, 2019 to February, 2020).

gg) The contracted capacity of a beneficiary is not based on the Regulations but the Contract/ PPA/ MoU in effect and thus the contentions of the Petitioner are misplaced. Reference may be made to the order of Hon'ble Supreme Court of India whereby it set aside APTEL's order dated 06.04.2017 in the matter of OPGC Vs. OERC vide order dated 19.04.2018 in Civil Appeal No. 9485 of 2017 and upheld the provisions of PPA over the Regulations.

hh) It was interpreted by SLDC, GRIDCO as well as GKEL that availability of 262.5 MW is inter-related with availability of all three thermal Units as per the provisions of the PPA and the same is evident from GKEL's letters dated 13.05.2015, 20.05.2015 and 18.08.2015.



ii) Views of GRIDCO mentioned in Minutes of Meeting dated 12.07.2017 have been misinterpreted to take advantage of principle adopted for prospective period. OERC vide order dated 09.04.2019 in Case No.63 of 2018 had approved the said Minutes as part of the PPA prospectively with effect from April, 2017 and the Petitioner did not raise any grievance in this regard before OERC for the past periods. Further, the petitioner has attempted to ignore the fact that in the Minutes of Meeting dated 12.07.2017 it was mentioned that the PAFM issue pertaining to past period shall be discussed separately.

jj) Rs. 4 Crores is being deducted per month by GRIDCO on account of downward revision in Annual Fixed Charges fixed in the CERC order dated 29.06.2018 in Petition No.61/GT/2018 for the Control Period FY 2014-19.

Submissions of the Respondent No. 2, SLDC Odisha

6. The Respondent, SLDC Odisha, vide affidavit dated 30.07.2019, submitted the following:

a) The present petition is a dispute between GRIDCO and the Petitioner based on a MoU between the State Government and the Petitioner and, therefore, the Petitioner should have approached OERC to resolve the dispute instead of CERC. The Petitioner is situated in State of Odisha and supplies power to GRIDCO, the state utility under a PPA. The delivery point is also Odisha STU interconnection point. Also, there is no composite scheme of supply of power, as the remaining power generated by it might be sold elsewhere.

b) Section 1.0 of the PPA executed between GRIDCO and the Petitioner dated 04.01.2011, defines “capacity charges” as under:

*“1.0 Capacity charges are Annual Fixed Charges as determined by the Appropriate Commission in proportion to the **capacity purchased** (for a block of 5 years) by GRIDCO and shall be paid on monthly basis.”*

Accordingly, the capacity should be determined on basis of 25% of the power generated by the generating station of the Petitioner which was scheduled for GRIDCO.

c) The Petitioner used to forward the energy scheduled by the buyers other than GRIDCO from all the units of its generating station including the unit



connected with the STU (unit-3) on day-ahead basis. The quantum of power to be scheduled for GRIDCO was computed by SLDC considering, the power scheduled for other buyers as 75%. Accordingly, GRIDCO's share was computed as one third of the power scheduled for other buyers. This method was adopted by SLDC to comply with the provision of the PPA, i.e. "25% (Twenty five percent) of the power sent out from the Thermal Power Station of M/s GKEL". This was accepted by the Petitioner without any objection during FY 2015-16 and 2016-17. The injection schedule for GRIDCO submitted by M/s GKEL was not considered by SLDC since the same was not based on any provisions of PPA and was submitted randomly.

d) The petitioner through its letter No. GKEL/SLDC/2018-19/812 dated 12.06.2018) requested SLDC to revise the PAFM for FY 2015-16 and 2016-17 retrospectively which was never raised by the Petitioner during the said period. This indicates that the Petitioner has taken the opportunity of the decision taken in the meeting on 12.07.2017 and requested to extend the same methodology of PAFM calculation for earlier period also.

e) SLDC sought the views of the beneficiary (GRIDCO) on the above matter. To discuss the above issue, a meeting was held on 13.11.2018 between SLDC, GKEL and GRIDCO where SLDC made a presentation indicating the impact of PAFM during FY 2015-16 and 2016-17, in case the PAFM calculation methodology is adopted in line with that for FY 2017-18 onwards. The Petitioner has misinterpreted the presentation made by SLDC in the meeting and SLDC never accepted or admitted that the availability of the Petitioner's plant was incorrectly assessed. Further, the period as indicated in the MoM dated 11.07.2013 is not related to present case.

f) SLDC never instructed GKEL to reduce the schedule. Rather GKEL was forwarding the day ahead availability through a schedule in line with the provisions of the PPA i.e. considering 25% as State's share of the energy sent out from their generating station (i.e. one third of the energy schedule for other buyers).

g) During the month of October-2015, SLDC had accepted the day ahead Declared Capacity submitted by GKEL in full. However, at some point of times



the dispatch schedule was made over and above the entitlement of GRIDCO as per mutual agreement between GRIDCO and M/s GKEL to meet the State's power requirement which should not be taken as a reference.

Rejoinder of the Petitioner

7. The petitioner vide affidavit dated 5.8.2019, filed rejoinder to reply dated 17.07.2019 filed by Respondent No. 1 as under:

a) GRIDCO's submission that GKEL ought to have raised the issue before OERC is erroneous.

b) Prior to this Commission's Order dated 12.11.2015 in Petition No. 77/GT/2013, GRIDCO was being billed on provisional basis. However, upon determination of tariff (including capacity charges) in terms of the 77/GT/2013 Order, GKEL raised bills post 12.11.2015. Therefore, bills *inter-alia* with proper computation of PAFM were issued only after the issuing of order in Petition No.77/GT/2013.

c) GRIDCO's contention that the present Petition is barred by limitation is misplaced. Minutes of Meeting dated 12.07.2017 clearly states that issues relating to calculation of PAFM/PAFY for the earlier period would be discussed and addressed in a separate meeting. Thus, GRIDCO accepted the existence of a dispute and elected to address the same in subsequent meetings. GKEL, by way of Letter dated 03.12.2018 had mentioned that a meeting was convened on 13.11.2018 and 24.11.2018 to discuss the issue of PAFM for the period FY 2015-16 and FY 2016-17. GKEL requested GRIDCO to pay arrears for the above-mentioned period. Furthermore, as against payment of arrears and in order to settle the PAFM issue amicably, GKEL offered to supply 50% of the shortfall energy which was not availed by GRIDCO at special rates and GRIDCO, vide letter dated 27.02.2019 accepted the said offer. Once GRIDCO accepted the offer made by GKEL, it cannot be permitted to contend that the claim raised by GKEL is barred by limitation. This is in consonance with the principle of Section 18 of the Limitation Act, 1963. GKEL was constrained to file the Petition only upon refusal by GRIDCO to pay the amounts due to GKEL. Accordingly, the present Petition is within limitation.



d) Further, by way of letter dated 27.04.2017, GRIDCO has admitted to paying an advance of Rs. 100 Crore (as arrear) including outstanding amount due to PAFM for the FY 2013-14, FY 2014-15, FY 2015-16, FY 2016-17. In the said letter, GRIDCO has stated that the arrear bills are based on the PAFM calculation provided by GKEL instead of considering the duly certified monthly energy accounting statement issued by SLDC. Accordingly, at the very least, limitation can be considered from letter dated 27.04.2017. Even then, the present Petition is within limitation.

e) GRIDCO's reliance on judgment dated 19.04.2018 of Hon'ble Supreme Court's in Civil Appeal No. 9485 of 2017 is misplaced as the Hon'ble Supreme Court itself recognises that the applicable regulations provide for an exception and permit provisions of the PPA to be applied. The Hon'ble Supreme Court agreed that there is no dispute with the proposition that the Regulations override provisions of the PPA. The operative portion of Order dated 19.04.2018 is extracted hereunder: -

"5. We have heard learned counsel for the parties. Learned counsel for the appellant submits that there is no dispute with the proposition that the Regulations override the PPA but in the present case the Regulations itself provide for a carve out enabling the Notification dated 21.06.2008 and the PPA to be applied. [...]"

The above issue stands settled in terms of Judgment of the Hon'ble Supreme Court Constitution Bench in *PTC India Ltd. vs. CERC*, reported as (2010) 4 SCC 603 which states that the Regulations would override provisions of the PPA.

f) SLDC cannot compute PAFM for the Project contrary to the applicable Regulations. As per Clause 2.26 of the Odisha Grid Code Regulations, 2015 ("Odisha Grid Code"), SLDC is only permitted to certify the availability of the Project and is not authorised to calculate PAFM. Accordingly, SLDC acted contrary to law in computing PAFM while disregarding the capacity declared by GKEL.

g) Article 2.2 of the PPA clearly states that the capacity allocated to GRIDCO is 25% of the installed capacity of the Project, i.e. 262.5 MW (25% of 1050 MW). However, GRIDCO, at all times would have the right to purchase 25% of the power sent out by the Project. GRIDCO cannot be permitted to rely



only on the latter part of the Clause to claim that capacity allocated to GRIDCO corresponds to 25% of the power sent out from the Project.

h) Capacity allocated to GRIDCO is fixed at 25% of the installed capacity of the Project. The same is fixed by the PPA for a block of 5 years. Therefore, the Availability Based Tariff (ABT) regime mandates that generators are paid capacity charges to recover the cost of setting up the asset/ infrastructure in order to make available the capacity, if scheduled by the Discom. Thus, the initial capacity declared by GKEL ought to be considered for payment of Capacity Charges.

i) GRIDCO's contention that GKEL followed the same methodology disputed by it for scheduling power to GRIDCO, is misplaced. During the period when all three units were connected to the CTU and till 03.12.2015, GKEL had been lowering its declared availability to the power scheduled by GRIDCO based on verbal instructions of SLDC. From 04.12.2015, GKEL has been declaring availability without revising the same. However, in spite of valid declaration of availability, SLDC has computed PAFM on the basis of scheduled energy off-take by GRIDCO, which is contrary to the applicable regulations.

j) GRIDCO's contention that GKEL raised no objection and signed the Joint Reconciliation Statement of Power supplied to GRDICO during FY 2013-14 to FY 2016-17 is misplaced. As on 30.05.2018 (when GKEL signed the Joint Reconciliation Statement of Power Supplied to GRIDCO), all parties were aware of the dispute raised by GKEL regarding wrong computation of PAFM. Furthermore, GRIDCO and SLDC themselves had accepted, by way of Minutes of Meeting dated 12.07.2017 that the earlier methodology for computing PAFM was incorrect.

k) Additionally, the Joint Reconciliation Statement pertains to power supplied to GRIDCO and is a representation of energy scheduled as per GKEL and GRIDCO. The same doesn't capture the details of PAFM. In the present dispute, GKEL has disputed that the power supplied to GRIDCO cannot be equated to determine the same as the capacity declared by GKEL.

l) GRIDCO's contention that GKEL never raised the issue of computation of PAFM before OERC during Case No. 63 of 2018 and thus, cannot be



permitted to raise the same in the present proceedings, is erroneous. It is submitted that Case No. 63 of 2018 filed by GRIDCO before OERC was for approval of PPA, including Minutes of Meeting dated 12.07.2017 and which clearly stated that issue of PAFM for previous period would be deliberated upon in subsequent meetings. In fact, proceedings before OERC (including approval of Minutes of Meeting dated 12.07.2017) are an acceptance by GRIDCO that PAFM was being computed erroneously.

m) GRIDCO has relied on Minutes of Meeting dated 10.03.2015 to contend that GKEL has ignored the fact that GRIDCO never availed such scheduled power corresponding to the assumed declared capacity with respect to the availability of Unit #3 and that GKEL concealed the fact that GRIDCO had allowed Short Term Open Access for sale up to 150 MW outside the State to avoid any idling of capacity. GRIDCO's reliance on Minutes of Meeting dated 10.03.2015 is erroneous as Capacity Charges is for compensating the generator for the capacity made available for sale to the Discoms. Therefore, GRIDCO is liable to pay Capacity Charges regardless of power being scheduled by GRIDCO. Accordingly, GRIDCO's rejection of liability to pay GKEL Rs. 56 Crores on the basis that GRIDCO never availed the corresponding quantum of power is erroneous and ought to be rejected.

n) GRIDCO's reliance on Letters dated 13.05.2015 and 20.05.2015 is misplaced. SLDC was incorrectly computing PAFM as per 25% of power sent out instead of certifying availability as per 25% of the installed capacity, which is contrary to the GRIDCO PPA and the Regulations. Additionally, any quantum of power sold by GKEL on Open Access was only excess capacity left after accounting for GRIDCO's capacity of 262.5 MW. Further, SLDC used to give NOC only after accounting the GRIDCOs share.

o) SLDC and GRIDCO have accepted that the methodology adopted by SLDC to compute PAFM of the Project was incorrect and that it required revision in terms of Minutes for Meeting held on 12.07.2017; letter dated 22.11.2018; Petition No. 63 of 2018 filed by GRIDCO before OERC; and accepting revision of methodology from 01.04.2017. It is trite law that once a party has made an admission, it is bound by it. The Hon'ble Supreme Court in *Karam Kapahi vs Lal Chand Pubic Charitable Trust and Anr* reported as (2010)



4 SCC 753 held that once an admission has been made by a party, the Court is to consider the same in rendering its judgment.

p) In terms of Clause 9 of the PPA, GRIDCO is obligated to pay 75% of a disputed bill. In terms of Clause 7.2 of the PPA, GRIDCO is also liable to make payment for Delayed payment surcharge (DPS) to GKEL for the aforementioned period.

q) By letter dated 03.12.2018, GKEL requested GRIDCO to release arrear payable to GKEL on account of incorrect computation of PAFM for FY 2015-16 and FY 2016-17. As a goodwill gesture and with the objective to amicably resolve the dispute, GKEL had offered to supply 50% of the shortfall energy (on Special forward e-auction coal cost) which was not availed by GRIDCO.

r) GRIDCO is bound under the doctrine of promissory estoppel and legitimate expectation. Once GRIDCO admitted during meeting held on 12.07.2017 that PAFM was being computed wrongly and accepted GKEL's offer vide letter dated 27.02.2019, GRIDCO is bound by the same. GRIDCO is estopped from stating that the PAFM was computed correctly by SLDC in the previous period. Accordingly, GRIDCO cannot be permitted to deny the same and submit a contrary position before this Commission. Hon'ble Supreme Court in a catena of Judgments has held that if based on a Government Representation a party alters its position then the said party has the legitimate right to seek enforcement of the said representation.

8. The petitioner vide affidavit dated 5.8.2019 filed rejoinder to reply dated 30.07.2019 filed by Respondent No. 2 (SLDC Odisha) as under:

a) GKEL supplies power from its Project in terms of the following long-term power purchase agreements:

- (i) 262.5 MW gross power to GRIDCO in terms of the PPA dated 28.09.2006 (amended on 04.01.2011);
- (ii) 350 MW gross power to Haryana Discoms based on competitive bidding through the back-to-back arrangements; and
- (iii) 282 MW gross power to Bihar SEB based on competitive bidding in terms of the PPA dated 09.11.2011.



b) GKEL supplies power to two or more States and, thus, it has a composite scheme of generation and sale of power. The issue of jurisdiction of this Commission to adjudicate upon disputes pertaining to GKEL and GRIDCO have attained finality in terms of the judgment of Hon'ble Supreme Court in Energy Watchdog vs. CERC & Ors. reported as (2017) 14 SCC 80 wherein the Hon'ble Supreme Court dismissed GRIDCO's appeal (Civil Appeal No. 5415 of 2016) and held that composite scheme means nothing more than generation and supply of electricity in more than one State. Further, that in cases where there is a composite scheme, Section 79(1)(b) is attracted and jurisdiction lies only with this Commission. Accordingly, SLDC's contention that GKEL ought to have approached OERC, is erroneous and ought to be rejected.

c) SLDC's contentions that it computed PAFM based on provisions of the PPA by considering GRIDCO's share as 1/3rd of the energy sent to other procurers is misplaced. In doing so, SLDC could not have ignored provisions of the applicable regulations such as the Grid Code, the 2009 Tariff Regulations and the 2014 Tariff Regulations. In recognition of the above position, GRIDCO and SLDC agreed to revise and adopt the correct methodology for computing PAFM in Minutes of Meeting dated 12.07.2017. The Meeting recognised the error in computing PAFM for past period inasmuch as PAFM was not being computed as per provisions of the PPA and that the capacity allocated to GRIDCO was 25% of the installed capacity and not 25% of the power sent out from the Project.

d) SLDC's contention that GKEL never objected to PAFM for FY 2015-16 and 2016-17 and that it took opportunity provided by Minutes of Meeting dated 12.07.2017, is misplaced and ought to be rejected. GKEL had raised a dispute regarding PAFM Report issued by SLDC for April 2016 to March 2017 by way of Letter dated 06.05.2017, stating that the same is against the provisions of the GRIDCO PPA and the applicable regulations of this Commission. Further, Minutes of Meeting dated 12.07.2017 clearly states that issue of PAFM for previous period would be deliberated upon in subsequent meetings. Accordingly, GKEL has not acted in an opportunistic manner.

e) Apart from instruction from SLDC to back-down, there is no evidence to show that GKEL had any other reason to revise its availability declaration.



SLDC was instructing GKEL in order to reduce GRIDCO's liability of payment of full Capacity Charges. Furthermore, GKEL had sufficient coal stock for operating the Project and SLDC never issued any communication enquiring from GKEL as to why availability declarations were revised on a consistent basis. It is pertinent to note that whenever GRIDCO sought supply of additional power, GKEL was in a position to supply the same. Further, all sales under STOA by GKEL were only after meeting GRIDCO's requirement and in light of the coal stock position.

f) SLDC's rejection of October 2015 data as for some points of time, the dispatch schedule was over and above GRIDCO's entitlement is misplaced. GRIDCO in terms of letter dated 02.09.2015 had intended to procure the entire ex-bus power generated from Unit #3 of the Project and had submitted that cost of additional power would be settled as per tariff determined by this Commission. This was for the period of two months namely, September 2015 and October 2015. Therefore, the dispatch is over and above GRIDCO's entitlement.

Additional Submission by Respondents & Response of the Petitioner

9. Respondent No.1, GRIDCO vide affidavit dated 29.08.2019, has reiterated its earlier submissions and the same are not reproduced here for the sake of brevity. Respondent No.1, vide affidavit dated 07.11.2019, in response to the submission of Petitioner dated 24.10.2019, submitted additional written submission as follows.

a) The reconciliation for the period from 30.04.2013 to 31.03.2014 was carried out jointly and the Joint Reconciliation Statements for the said period were duly signed by GKEL and GRIDCO on 30.05.2018.

b) The Joint Reconciliation Statements are in respect of quantum of Scheduled Power supplied by GKEL to GRIDCO during the period from 27th January, 2013 to 31st March, 2017 based on Minutes of Meeting dated 05.04.2014 and 10.03.2015 signed between GRIDCO, GKEL and SLDC keeping in view the subsisting contract and accordingly the monthly PAFM statements were issued by SLDC adopting the principle as explained in the



MoM dated 12.07.2017. Moreover, even though dispute was raised by GKEL prior to 30.05.2018, there is not even a whisper in this regard in the Reconciliation Statements signed by GKEL.

c) GRIDCO has never admitted that the method of computing PAFM for the period 01.04.2015 to 31.03.2017 was incorrect. Vide letter dated 27.02.2019, GRIDCO intimated GKEL regarding in-principle approval of the proposal submitted by GKEL vide letter dated 03.12.2018, with the variation of period from March, 2019 to February, 2020. However, this letter cannot be interpreted to imply that GRIDCO has accepted the PAFM calculation to be incorrect in any manner whatsoever.

d) Vide letter dated 11.10.2018, GRIDCO has explained to the Petitioner regarding the downward revision in Annual Fixed Charges that is on account of order of CERC dated 29.06.2018 in Petition No.61/GT/2016. Therefore, the downward revision is not on account of the PAFM assumed by GRIDCO.

10. The Respondent SLDC vide affidavit dated 27.08.2019, in response to ROP of hearing dated 08.08.2019, has submitted the day ahead declared capacity and Despatch schedule, in 15 minutes time blocks, for period from 01.04.2015 to 31.03.2017.

11. Respondent No. 2, SLDC Odisha vide affidavit dated 24.10.2019, further submitted that SLDC has never issued verbal instruction to revise declared capacity. The copies of the e-mails enclosed by the Petitioner are correspondences made from their side for submission/ revision of Declared Capacity (DC) which is a usual practice. It does not prove that SLDC has issued verbal instructions for revision of Declared Capacity (DC).

12. The Petitioner vide affidavit dated 14.10.2019, in response to the Respondents submissions dated 27.08.2019 (SLDC) and 30.08.2019 (GRIDCO), further submitted that the fact that verbal instructions by SLDC was a matter of



practice, is brought out through MoM between GRIDCO, GKEL and SLDC dated 11.07.2013, which records inter-alia that GKEL were issued verbal instructions by SLDC for compliance. The said Minutes were signed by representatives of SLDC and GRIDCO and thus had agreed to this position. The Petitioner has further submitted that reliance on the order dated 29.06.2018 in Petition No. 61/GT/2016 to deduct Rs. 4 Crore per month is misplaced. The downward revision is based on the PAFM assumed by GRIDCO which is incorrectly computed.

Analysis & Decision

13. We have considered the submissions of the Petitioner, replies of the respondents, rejoinders of the petitioner, additional submissions of the parties and documents available on record. The following issues arise for our consideration:

Issue No. 1: Does the Commission have jurisdiction to deal with the dispute?

Issue No. 2: Is the Petition barred by limitation and suffers from delays and laches?

Issue No. 3: What should be the methodology for computation of PAFM for the period from 01.04.2015 to 31.03.2017?

We deal with the issues one by one in the following paragraphs.

Issue No. 1: Does the Commission have jurisdiction to deal with the dispute?

14. The Petitioner has admittedly entered into following long-term PPAs for supply of power from the generating station:

(a) Supply of 262.5 MW to Grid Corporation of Odisha Limited (GRIDCO) in terms of PPA dated 28.9.2006 as amended on 4.1.2011 with delivery point as Odisha STU interconnection point.

(b) Supply of 282 MW gross power, to Bihar State Electricity Board in terms of PPA dated 9.11.2011, with delivery point as the Bihar STU interconnection point.

(c) Supply of 350 MW gross power, to Haryana Discoms in terms of PPA dated 7.8.2008, with delivery point as Haryana STU bus bar.



15. We note that a Petition No. 77/GT/2013 was filed by the petitioner for approval of tariff of the generating station for the period from the date of COD of Unit-I i.e. 30.4.2013 till 31.3.2014 and the Commission by interim order dated 3.1.2014 held that the Commission has the jurisdiction to determine the tariff of the generating station of the petitioner under Section 62 read with Section 79(1)(b) of the Electricity Act, 2003. Against the said order, the Respondent No.1, GRIDCO filed Appeal No.74/2014 before the APTEL challenging the jurisdiction of the Commission. This appeal was clubbed along with similar other appeals. During the pendency of the said appeals, the Commission determined the tariff of the generating station vide its order dated 12.11.2015 for the period from COD of Unit-I till 31.3.2014, subject to final decision of the Tribunal in the said appeals. The petitioner filed Appeal No. 35/2016 before APTEL on various issues against the order of the Commission dated 12.11.2015. GRIDCO also filed Appeal No. 45/2016 before APTEL challenging the order dated 12.11.2015 on certain issues, including the jurisdiction of the Central Commission to regulate the tariff of the project.

16. During the pendency of the appeals as aforesaid, the full bench of the Tribunal by its judgment dated 7.4.2016 in Appeal Nos. 100/2013 and 98/2014 and other similar appeals (including Appeal No.74/2014 filed by GRIDCO), upheld the jurisdiction of the Commission to determine the tariff of the generating station of the Petitioner. The relevant portion of the judgment of APTEL dated 7.4.2016 is extracted hereunder:

“309. Appeal No.74 of 2014 has been filed against Order dated 3/1/2014 passed by the Central Commission in Petition No.77/GT/2013. By the said order dated 3/1/2014, the Central Commission, while relying upon its common order dated 18/12/2013 passed in Petition No.79/MP/2013 and Petition No.81/MP/2013, has held that it has jurisdiction to entertain a petition for determination of tariff under Section 79(1)(b) of the said Act. There is no dispute that GMR Kamalanga Energy Limited, the petitioner therein was supplying power to procurers in more than one State from its power plant at Kamalanga in the State of Orissa. We have already answered Issue No.3 of the Agreed



Issues that the supply of power to more than one State from the same generating station of a generating company, ipso facto, qualifies as „Composite Scheme“ to attract the jurisdiction of the Central Commission under Section 79 of the said Act. In view of this, Appeal No.74 of 2014 is devoid of any merit and is dismissed.”

17. Against the judgment of the Tribunal, GRIDCO filed Civil Appeal No. 5415 of 2016 before the Hon'ble Supreme Court. Subsequently, the Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeal No. 5415/2016 dismissed the said appeal filed by GRIDCO thereby upholding the jurisdiction of the Commission for determination of tariff of the generating station of the petitioner. The Hon'ble Supreme Court in its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors [(2017 (4) SCALE 580)] while upholding the jurisdiction of this Commission, held as under:

“22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in sub-sections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in sub-clauses (a), (b), and (d), and “intra-state” in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission’s jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being the case, we are constrained to observe that the expression “composite scheme” does not mean anything more than a scheme for generation and sale of electricity in more than one State.

....
24. Even otherwise, the expression used in Section 79(1)(b) is that generating companies must enter into or otherwise have a “composite scheme”. This makes it clear that the expression “composite scheme” does not have some special meaning – it is enough that generating companies have, in any manner, a scheme for generation and sale of electricity which must be in more than one State.” 25. Thus, in terms of the above judgment, the Hon'ble Supreme Court while interpreting the term “composite scheme” under Section 79(1)(b) of the Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State.



In view of the above, the jurisdiction of the generating station lies with this Commission.

18. The Commission has subsequently determined the tariff of the generating station of the Petitioner for the period from 01.04.2014 to 31.03.2019 vide order dated 30.05.2018 in Petition No. 61/GT/2016 and the bills are being raised based on this order by the Petitioner and being paid by the Respondent No. 1. The issue of jurisdiction having been settled, the Respondents cannot raise the same issue again. Thus, this contention of the Respondents is rejected.

Issue No. 2: Is the Petition barred by limitation and suffers from delays and laches?

19. The Respondents have submitted that the petition is barred by limitation and/or suffers from gross delay and laches and, therefore, is liable to be dismissed summarily. Though the Respondents have not elaborated as to how this petition is barred by limitation, it seems to be based on the fact that the disputes relate to the FY 2015-16 and FY 2016-17 and the Petition has been filed in 2019. Therefore, the Respondents have claimed that it is barred by limitation.

20. The petitioner vide its rejoinder dated 5.8.2019 has submitted that prior to the Commission's order dated 12.11.2015 in Petition No. 77/GT/2013, GRIDCO was being billed on provisional basis. However, upon determination of tariff (including capacity charges) in terms of the order in 77/GT/2013, GKEL raised bills post 12.11.2015 based on order of the Commission in Petition No. 77/GT/2013.

21. Petitioner has further submitted that in the meeting held on 12.07.2017, the issues relating to calculation of PAFM for the period from 01.04.2017 onwards was decided to be revised while for the earlier period (up to 31.03.2017), it was decided that the same would be discussed and addressed in a separate meeting. Thus, it has



submitted that GRIDCO accepted the existence of a dispute and elected to address the same in the subsequent meetings.

22. Petitioner has also submitted that a meeting was convened on 13.11.2018 and 24.11.2018 to discuss the issue of PAFM for the period FY 2015-16 and FY 2016-17. GKEL requested GRIDCO to pay arrears for the above-mentioned period and as against payment of arrears, it offered to supply 50% of the shortfall energy which was not availed by GRIDCO at special rates. GRIDCO, vide letter dated 27.02.2019 has accepted the said offer. The Petitioner has thus contended that once GRIDCO accepted the offer made by the Petitioner, it cannot be permitted to contend that the claim raised by Petitioner is barred by limitation.

23. The Petitioner has placed its reliance on Section 18 of the Limitation Act, 1963. The Petitioner has further, submitted that it was constrained to file the Petition only upon refusal by Respondent 1 to pay the amounts due to Petitioner. Section 18 of the Limitation Act, 1963 provides as follows:

“18. Effect of acknowledgment in writing.—

(1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.

(2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.

Explanation.—For the purposes of this section,—

(a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;

(b) the word “signed” means signed either personally or by an agent duly authorised in this behalf; and

(c) an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.



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

“30...In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view.”

In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable, in the absence of any period of limitation for filing the application before the Commission.

25. We have considered the submission of the Petitioner and the Respondents. We note that the Petition was filed on 05.02.2019 and as such, any claim of the Petitioner has to be seen with regard to this date. It is observed that Respondent No. 1 was aware of the dispute and accordingly vide its letter dated 27.04.2017, Respondent 1 admitted to paying an advance of Rs. 100 Crore (as arrear) including outstanding amount due to PAFM for the FY 2013-14, FY 2014-15, FY 2015-16, FY 2016-17. In the said letter, Respondent No. 1 stated that the arrears are based on the PAFM calculation provided by Petitioner instead of considering the duly certified monthly energy accounting statement issued by SLDC.



26. The Petitioner has submitted that it has been denied capacity charges for the period from 01.04.2015 to 31.03.2017 by the Respondent No. 1, GRIDCO on account of alleged wrong calculation of PAFM by the Respondent No. 2, SLDC Odisha. It has further submitted that after the meeting held on 12.07.2017, PAFM methodology has been revised by the Respondents and the Petitioner has been getting the correct capacity charges w.e.f. 01.04.2017.

27. We also observe from the minutes of meeting dated 12.07.2017 that the decision on PAFM calculation for the period prior to 01.04.2017 was to be taken subsequently. The same stand has been taken by the Respondents before OERC in Petition No. 63 of 2018. It is evident from these that the dispute between the parties has been acknowledged by the parties and they were in correspondence on the issue. Therefore, in terms of the Section 18 of the Limitation Act, 1963 and judgment of the Hon'ble Supreme Court in the matter of Andhra Pradesh Power Co-ordination Committee Vs. Lanco Kondapalli Power Limited [(2016) 3SCC 468] as quoted above, the present petition is not barred by limitation since the meeting on this issue has been held as late as 12.07.2017 and the petition has been filed on 05.02.2019. Also, the acceptance by GRIDCO on 27.02.2019 of the offer of the Petitioner to supply 50% of the shortfall energy which was not availed by GRIDCO at special rates, is a testimony to acceptance of dispute between the parties.

28. Therefore, we are of the view that the petitioner has been pursuing the case for settlement with Respondent No.1 and had approached the Commission after it could not resolve the issue amicably. As such, in terms of Section 18 of limitation Act 1963, Petition is not barred by the limitation. It does not suffer from delays and laches as submitted by the Respondents.



What should be the methodology for computation of PAFM for the period from 01.04.2015 to 31.03.2017?

29. The Petitioner has submitted that methodology adopted by the Respondents for computation of PAFM for the disputed period i.e. from 01.04.2015 to 31.03.2017 is not correct as the PAFM was computed by Odisha SLDC based on the actual energy scheduled by GRIDCO, which is contrary to the methodology prescribed by the Commission in the 2014 Tariff Regulations.

30. The 2014 Tariff Regulations applicable for the tariff block (2014-19) under dispute read as follows with respect to declared capacity and computation of capacity charges including calculation of PAFM:

“(15) 'Declared Capacity' or 'DC' in relation to a generating station means, the capability to deliver ex-bus electricity in MW declared by such generating station in relation to any time-block of the day as defined in the Grid Code or whole of the day, duly taking into account the availability of fuel or water, and subject to further qualification in the relevant regulation

[...]

20. *Components of Tariff:*

(1) The tariff for supply of electricity from a thermal generating station shall comprise two parts, namely, capacity charge (for recovery of annual fixed cost consisting of the components as specified in Regulation 21 of these regulations) and energy charge (for recovery of primary and secondary fuel cost and limestone cost where applicable).

[...]

30. *Computation and Payment of Capacity Charge and Energy Charge for Thermal Generating Stations:*

(1) The fixed cost of a thermal generating station shall be computed on annual basis, based on norms specified under these regulations, and recovered on monthly basis under capacity charge. The total capacity charge payable for a generating station shall be shared by its beneficiaries as per their respective percentage share / allocation in the capacity of the generating station.”

(3) The PAFM up to the end of a particular month and PAFY shall be computed in accordance with the following formula:

$$PAFM \text{ or } PAFY = 10000 \times L: DC \prod_{i=1}^N \{ N \times IC \times (100 - AUX) J\%$$

Where,

PAFM= Percent Plant Availability factor achieved up to the end of the month



AUX=Normative auxiliary energy consumption in percentage.

DCi =Average declared capacity (in ex-bus MW), for the ith day of the period i.e. the month or the year as the case may be, as certified by the concerned load dispatch centre after the day is over.

JC =Installed Capacity (in MW) of the generating station

N= Number of days during the period.”

Thus, in accordance with the 2014 Tariff Regulations, PAFM needs to be calculated based on the availability declaration by the generating station (the Petitioner in the present case). There is no provision to declare availability on the basis of the energy scheduled (by the Respondent No.1).

31. While the Petitioner has submitted that the provisions of the 2014 Tariff Regulations would be applicable for calculation of PAFM in the present case, the Respondents have relied on provisions of Clause 2.2(a) of the PPA to argue that the methodology adopted by them for calculation of PAFM is correct. The Petitioner has submitted that the Respondents have been selectively applying provisions of the Clause 2.2(a) of the PPA in denying the claim of capacity charges to the Petitioner.

32. The Respondents have also submitted that the provisions of the 2014 Tariff Regulations do not override the provisions of the PPA. As regards overriding effect of the regulations framed by the Commission, the Hon'ble Supreme Court in PTC India Ltd. vs. CERC [(2010) 4 SCC 603] had held as under:

“59. Summary of Our Findings:

(i) In the hierarchy of regulatory powers and functions under the 2003 Act, Section 178, which deals with making of regulations by the Central Commission, under the authority of subordinate legislation, is wider than Section 79(1) of the 2003 Act, which enumerates the regulatory functions of the Central Commission, in specified areas, to be discharged by Orders (decisions).

(ii) A regulation under Section 178, as a part of regulatory framework, intervenes and even overrides the existing contracts between the regulated entities inasmuch as it casts a statutory obligation on the regulated entities to align their existing and future contracts with the said regulations.

.....

(vi) Applying the principle of "generality versus enumeration", it would be open to the Central Commission to make a regulation on any residuary item under Section 178(1) read with Section 178(2)(ze). Accordingly, we hold that the CERC was



empowered to cap the trading margin under the authority of delegated legislation under Section 178 vide the impugned notification dated 23.1.2006.”

Thus, contention of the Respondent No. 1 that the regulations framed by the Commission (the provisions of the 2014 Tariff Regulations in the instant case) will not have an overriding effect, is incorrect.

33. Since provisions of regulations framed by this Commission override PPA provisions inconsistent with the regulations, we hold that irrespective of provisions in the PPA, the calculation of PAFM and consequent capacity charges payable by the Respondent No.1 are required to be done in accordance with the provisions of the 2014 Tariff Regulations. Also, in view of the provisions of the 2014 Tariff Regulations as regards calculation of PAFM and thereby payment of capacity charges, we hold that methodology adopted by the SLDC Odisha for calculation of PAFM based on the energy scheduled by the GRIDCO, is incorrect.

34. On one hand, the Respondents have submitted that their method of calculation of PAFM based on PPA provisions is correct and that the provisions of the 2014 Tariff Regulations are not applicable in the instant case, on the other, we observe that the Respondents have decided to the contrary in the meeting held on 12.07.2017. In this meeting, the Petitioner and the Respondents have agreed that w.e.f. 01.04.2017, computation of PAFM shall be as per the applicable Tariff Regulations of the Commission. Thus, the Respondents have, in a sense, argued that the provisions of the 2014 Tariff Regulations are applicable to their case only from 01.04.2017 which, in our view, is unacceptable. Thus, we observe that there is no dispute after 01.04.2017 and the petitioner is only seeking that same methodology (that is agreed to be implemented with effect from 01.04.2017) should be applied and adopted for the past period of 01.04.2015 to 31.03.2017.



35. In the meeting that was held on 12.07.2017 amongst the Petitioner and the Respondents, the Petitioner stated as follows:

“1. Presently, if Unit-3 (connected to STU) is available to its ex-bus capacity of 247 MW (262.5MW- AEC @ 5.75%) and declared so on day ahead basis, GKEL is not receiving full Annual Fixed Charge (AFC) as SLDC is not accepting the schedule for full declared capacity.

*2. 1st Para of Clause 2.2 (a) of the revised PPA dated 4.1.2011 stipulates as follows:
“The capacity allocated to GRIDCO shall be up to 25 (Twenty Five) percent of the installed capacity of the thermal power station as requisitioned by GRIDCO once in each 5 (Five) year block period.”*

3. CERC, in tariff order dated 12.11 .2015 in Petition No 77 /GT/ 2013, has fixed Annual Fixed Charges (AFC) for 262.5 MW i.e. 25% of 3x350MW (Installed Capacity) apportioning total Annual Fixed Charges for the 262.5 MW.

Present Methodology adopted by SLDC for calculation of declared capacity/ entitlement of Odisha share as per PAFM report is based on actual energy drawl by GRIDCO in MU and not on the declared capacity/ entitlement declared by GKEL, is contrary to the provision of CERC (Terms and Conditions of Tariff) Regulation 2014.”

36. In the said meeting, SLDC expressed its difficulty in calculation of PAFM/PAFY and stated as under:

“SLDC also expressed its various difficulties involved in determining the PAFM/PAFY (%) in view of the stipulation made in the last part of the clause 2.2 (a) of revised PPA which is inconsistent to CERC Tariff Regulation 2014 in force for the calculation of PAFM/PAFY (%).”

37. The Respondent No. 1 in the said meeting stated as follows:

“Provision under Clause 2.2(a) of Revised PPA dated 04.01.2011 should be read in its entirety. The said clause also further stipulates as under:

“XXXX GRIDCO shall at all times have the right to purchase on behalf of Government of Odisha up to 25% of the power sent out from the Thermal Power Station. XXXXXX”

Therefore, it becomes imperative on the part of GRIDCO to consider 25% of power sent out as its entitlement which varies on day-ahead basis based on availability of Units of GKEL connected to both CTU and STU.”

38. After deliberations during the meeting, the Petitioner and the Respondents agreed as follows:

(a) SLDC will accept the entitlement/ DC in line with the entitlement mentioned in Revised PPA dated 04-01-2011.



(b) Provisions of CERC Tariff Regulation for determination of PAFM/PAFY can be complied in its entirety while working out the monthly energy accounting.

(c) Further, GRIDCO shall always have the first priority of availing its entitlement from Unit#3, after which any Open Access schedule may be considered.

(d) The above methodology shall be applicable w.e.f. 1st April 2017 as PAFY is required to be determined for a complete financial year to determine the Annual Fixed Charges payable to the generator.

(e) The issues relating to calculation of PAFM/PAFY for earlier period is to be discussed and addressed in a separate meeting.

39. The minutes of this meeting was approved by the Board of Directors of GRIDCO in the 175th meeting held on 09.05.2018. Thus, it is observed that GRIDCO has itself recognised that it is required to comply with the provisions of the 2014 Tariff Regulations as regards calculation of PAFM (and thereby making payment of capacity charges) and the parties agreed to do so w.e.f. 01.04.2017. It is also observed that the parties agreed that the methodology of calculation of PAFM/PAFY not being consistent with the 2014 Tariff Regulations, they need to separately address and decide the issue for the period prior to 01.04.2017.

40. We also observe that with regard to PAFM calculation for the disputed period i.e. from 01.04.2015 to 31.03.2017, the Respondent No. 2, SLDC Odisha, vide letter 22.11.2018 has referred to the '*Discussions in the presentation dated 13.11.2018 of PAFM calculation methodology of GMR by SLDC*' as under:

"Views of SLDC

- The PAFM(%) for the period 2015-16 & 2016-17 will be calculated as per the provision of the regulation only.
- For the FY 2015-16 & 2016-17 full DC of M/s GMR will be considered for PAFM (%) computation although the schedule injection was not as per DC during that period as the scheduling was done as per the PPA dated 04-01-2011.
- In that case, M/s GMR will recover the full fixed cost during the above period in spite of not injecting power due to reduced schedule.



• *GRIDCO may insist M/s GMR to compensate the balance quantum of energy which was not scheduled by paying variable cost only.”*

41. In our view, the parties have already agreed that the provisions of the 2014 Tariff Regulations are applicable in the present case and that the methodology for computation of PAFM w.e.f. 01.04.2017 has been aligned as per the Regulations. Therefore, the only issue that remains to be decided by us is whether the Respondent No. 1 should pay capacity charges to the Petitioner in line with the 2014 Tariff Regulations for the period prior to 01.04.2017 also.

42. The Respondents are opposing the application of the provisions of the 2014 Tariff Regulations for the past period i.e. from 01.04.2015 to 31.03.2017 on the following grounds:

a) Calculation of PAFM based on the energy scheduled by GRIDCO was in terms of clause 2.2 of the revised PPA. After agreeing to the change in methodology w.e.f. 01.04.2017 in the meeting of 12.07.2017, GRIDCO has got the same approved by its Board and the PPA has been amended after filing petition no. 63 of 2018 before OERC.

b) Regarding availability of units connected with CTU i.e. unit-1 and unit-2, it is difficult to obtain information during real time operation as the Petitioner was submitting its DC to ERLDC.

c) For the past period, it is difficult to prove that the Units #1 & #2 were capable of generating up to their final revised declared capacity.

d) GKEL raised no objection and signed the Joint Reconciliation Statement of Power supplied to GRIDCO during FY 2013-14 to FY 2016-17.

43. The Petitioner and the Respondent No.1 have relied upon provisions of Clause 2.2(a) of the PPA. The relevant provisions of the PPA are as under:

“1.0 Definitions

.....

Capacity Charges:



Capacity Charges are Annual Fixed Charges as determined by the Appropriate Commission in proportion to the capacity purchased (for a block of 5 years) by GRIDCO and shall be paid on a monthly basis.

2.2 Entitlement of Power for GRIDCO:

*(a) The capacity allocated to GRIDCO shall be up to 25 (Twenty Five) percent of the installed capacity of the thermal power station as requisitioned by GRIDCO once in each 5 (Five) year block period. GRIDCO shall at all times have the right to purchase on behalf of Government of Orissa up to 25% (Twenty five percent) of the **power sent out from the Thermal Power Station excluding the quantum of power in excess of 80% Plant Load Factor and infirm power with variable cost.** GRIDCO shall requisition the capacity up to (Twenty Five) percent six months prior to the commencement of each 5 years block period.*

A. IN THE CASE OF 25% POWER Capacity (Fixed) Charges: The capacity charges shall be determined by OERC as per the terms and conditions of tariff issued from time to time and shall be related to target availability. Recovery of capacity charges below the level of target availability shall be on pro rata basis. Further, it is to be calculated proportionate to the capacity requisitioned and allocated to GRIDCO.

44. The Respondents have submitted that they have calculated PAFM for the period from 01.04.2015 to 31.03.2017 in terms of the above-mentioned provisions of the PPA. They have interpreted that these provisions imply that capacity charges are payable on basis of energy sent out and not on basis of availability declared by the Petitioner. Per contra, the Petitioner has submitted that the Respondents are selectively reading the provisions of the PPA.

45. Having held that the provisions of the PPA in so far as they are not in line with the provisions of the 2014 Tariff Regulations, are not enforceable, we do not find it necessary to deal with the PPA provisions. The payment of capacity charges is to be done based on availability declaration by the Petitioner in terms of the 2014 Tariff Regulations.

46. The Respondents have stated that for the period prior to 01.04.2017, it is difficult to obtain information with respect to availability of units connected with CTU (Unit #1 and Unit #2) during real time operation as GMR was submitting its DC to ERLDC. It has also stated that for the past period, it is also difficult to prove that the



Units #1 & Unit #2 were capable of generating up to their final revised declared capacity. In this regard, Commission observes that during the disputed period i.e. from 01.04.2015 to 31.03.2017, only the Unit #3 was supplying power to the Respondent No. 1 and the same was connected to the STU. The petitioner was declaring availability of Unit #3 with respect to GRIDCO's entitlement and SLDC was involved in the process of scheduling. As such, the stand taken by the Respondents is not tenable as the power was not being supplied to GRIDCO from the CTU connected Units (Unit #1 and Unit #2).

47. With regard to the stand taken by the respondents that the Petitioner raised no objection and signed the Joint Reconciliation Statement of Power supplied to GRIDCO during FY 2013-14 to FY 2016-17, the Petitioner has submitted that the same is misplaced as Joint Reconciliation Statement pertained to power supplied to GRIDCO which just represented the energy scheduled as per the Petitioner vis-à-vis as per GRIDCO and the same does not capture the details of PAFM. In our view, the reconciliation of energy supplied and received is not material for the purpose of addressing the dispute in hand as the same is not related to the availability declared by the petitioner.

48. From the perusal of the affidavit dated 27.8.2019 submitted by the SLDC Odisha in response to the ROP of hearing dated 29.10.2019, it is clear that during the disputed period, GRIDCO has been scheduling the Unit #3 of the station from 80 MW to 320 MW depending upon its requirement against the gross capacity allocation of 262.5 MW. If contention of GRIDCO that it is liable to pay only to the extent of energy scheduled is accepted, the generator shall not be receiving the full capacity charges corresponding to the capacity that has been allocated/ blocked for GRIDCO.



It would go against the very basis of availability based tariff (ABT) mechanism on which the regulations of the Commission are based.

49. The tariff of the generating station of the Petitioner is determined by the Commission and hence the availability, capacity charges, scheduling and despatch shall be governed by the regulations of the Commission irrespective of the PPA provisions even for the period before 01.04.2017 as has been agreed to by the petitioner, respondent and SLDC for the period after 01.04.2017.

50. The Petitioner has also prayed for payment of Delayed Payment Surcharge (DPS) for the unpaid amount of capacity charge for the disputed period i.e. from 01.04.2015 to 31.03.2017. We note from the submissions of the petitioner that prior to the Commission's order 12.11.2015 in Petition No.77/GT/2013, the petitioner billed GRIDCO on provisional basis. However, consequent to the above order of the Commission, the petitioner, starting from December, 2015 billed GRIDCO in terms of PAFM computations as per prevailing 2014 Tariff Regulations. It is observed from the Annexure-P-36 (page 511 of the petition) that petitioner also raised supplementary bills dated 31.12.2015 (bill nos.26 to 33) for the period from 1.4.2015 to 30.11.2015 based on PAFM computations as per prevailing 2014 Tariff Regulations. However, it is also true that the Petitioner has not been paid full capacity charges for the disputed period as per provisions of the 2014 Tariff Regulations since the Respondents have been paying capacity charges based on energy scheduled/ delivered and not on basis of availability declared by the Petitioner. In our view, due to incorrect PAFM prepared by the Respondent No. 2 (SLDC Odisha), the Petitioner was not being paid capacity charges due to it based on its availability declaration. Therefore, it is due to the fault of the Respondents that the Petitioner has not been paid full capacity charges for the period from 01.04.2015 to 31.03.2017. In our view, the Respondents



cannot be allowed to benefit on account of their own fault and, therefore, the Petitioner needs to be compensated for not having received due amount. Accordingly, in our considered view, the Respondent No.1 is liable to pay DPS/ LPS as per provisions of the 2014 Tariff Regulations. .

51. Accordingly, we direct the Respondent No. 2 to correct the PAFM for the project for the disputed period i.e from 01.04.2015 to 31.03.2017 based on the original availability declarations made by GKEL. The Respondent No. 1 shall pay the capacity charges (along with late payment surcharge) to the petitioner based on the corrected PAFM as calculated by the Respondent no.2 in terms of 2014 Tariff Regulations, within one month from the date of issue of this order.

52. This order will not come in the way of the understanding reached between the parties for supply of 50% of the shortfall energy by the Petitioner which was not availed by GRIDCO at special rates and which has been accepted by GRIDCO vide letter dated 27.02.2019.

53. The Petition No. 115/MP/2019 is disposed of in terms of the above.

Sd/-

**(IS Jha)
Member**

Sd/-

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

Sd/-

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

