CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI

Petition No. 158/MP/2019

Coram:

Shri P.K. Pujari, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member

Date of order: 15th August, 2020

In the matter of

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 seeking a declaration that the deductions made by the Respondents towards penalty imposed and capacity charges from the bills raised by the Petitioner for the months of December, 2018, January, 2019 and February, 2019 is illegal and wrongful and a consequent direction to the Respondents, to jointly and severally, pay the deducted/ withheld amounts against the bills raised for the month of December, 2018, January, 2019 and February, 2019, i.e. penalty imposed and unpaid capacity charges.

And
In the matter of

Adhunik Power and Natural Resources Limited
9B, 9th Floor,
Hanssalaya Building,
15, Barakhamba Road, Connaught Place,
New Delhi - 110 001. …….**Petitioner**

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited
NPKRR Maligai, 6th Floor,
Eastern Wing, 144, Anna Salai,
Chennai-600 002,
Tamil Nadu, India.

2. PTC India Limited
2nd Floor, NBCC Tower,
15, Bhikaji Cama Place,
New Delhi - 110 066. ….**Respondents**

Parties Present:-

Shri Deepak Khurana, Advocate APNRL
Shri Tejasv Anand, Advocate, APNRL
Shri Amit Griwan, APNRL
Shri S. Vallinayagam, Advocate, TANGEDCO
Shri Vishrov Mukherjee, Advocate, PTC
Shri Rohit Venkat, Advocate, PTC

ORDER

The instant Petition has been filed by the Petitioner, Adhunik Power and Natural Resources Limited ('APNRL'), under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') seeking declaration that the deductions made by the Respondents towards capacity charges from the bills raised by the Petitioner for the months of December, 2018 to February, 2019 is illegal and wrongful and requested for a consequent direction to the Respondents, to jointly and severally, pay the deducted/ withheld amounts against the bills raised for the said months. The Petitioner has made the following prayers:

> *"(a) Pass an Order declaring that the deductions made by the Respondents towards penalty imposed and capacity charges as detailed in the Petition from the bills raised by the Petitioner for the months of December, 2018, January, 2019 and February, 2019 is illegal and wrongful;*
>
> *(b) Direct the Respondents, jointly and severally, to forthwith pay the deducted/withheld amounts against the bills raised for the month of December, 2018, January, 2019 and February, 2019, i.e. penalty imposed and unpaid capacity charges, due to the Petitioner as detailed in Annexure P-24;*
>
> *(c) Grant carrying cost/interest @ 1.25% per month from the date(s) on which the said amount(s) became due to the Petitioner till the actual realization of the same; and*
>
> *(d) Pending hearing and final disposal of the Petition, pass an ad-interim Order directing the Respondents, jointly and severally to pay 75% of the amounts due to the Petitioner of the amount claimed above."*

Background:

2. The Petitioner has set up a 540 MW (2×270 MW) thermal power project (hereinafter referred to as 'the generating station' or 'the Project') located at Saraikela- Kharsawan in the State of Jharkhand.

3. In 2013, Respondent No.1, Tamil Nadu Generation and Distribution Corporation Limited ('TANGEDCO') invited bids for supply of power on long-term basis through tariff based competitive bidding process under Case-1 bidding. The Petitioner participated in the said bidding process through Respondent No. 2, PTC India Limited ('PTC') which emerged as the successful bidder for supply of 100 MW. The Letter of Intent (LoI) was issued by TANGEDCO on 14.11.2013. On 18.12.2013, TANGEDCO and PTC entered into a Power Purchase Agreement (in short, "Procurer-PPA") for supply of 100 MW power for a period of fifteen years. On 19.12.2013, the Petitioner entered into back-to-back PPA with PTC (in short, PTC-PPA). Procurer-PPA and PTC-PPA are collectively referred to as the 'PPAs'. Subsequently, the Petitioner participated in the auction under SHAKTI Scheme of Ministry of Coal, Government of India and offered a discount of three paise per kWh for securing coal linkage for supply of power to the extent of coal supplied under the SHAKTI Scheme. The Commission vide order dated 18.5.2018 in Petition No. 84/MP/2018 approved the supplementary PPAs dated 8.5.2018 and 10.5.2018 executed between the Petitioner and PTC, and PTC and TANGEDCO respectively.

Submissions of the Petitioner

4. The Petitioner in support of its contention and prayers has mainly submitted as under:

(a) In terms of Article 8.4.11 of PTC-PPA, PTC is under an obligation to provide a standby Letter of Credit (hereinafter referred to as "LC") in respect of payment of its monthly bills and/or the supplementary bills raised by the Petitioner. However, admittedly PTC has failed to provide LC.

(b) Article 8.3 of PTC-PPA provides for payment of monthly bills of the Petitioner for the power supplied to the Respondents by the 'Due Date' to the Petitioner. However, the Respondents have persistently delayed in making payments due and payable to the Petitioner.

(c) The Petitioner vide its letters dated 29.10.2018 and 29.11.2018 had repeatedly requested PTC to open LC in terms of Article 8.4 of PTC-PPA. PTC vide letter dated 4.12.2018 requested TANGEDCO to provide LC as a payment security mechanism for payment against supply of power from the Petitioner to TANGEDCO.

(d) The Petitioner vide its letter dated 11.12.2018 informed PTC that due to regular delay in making payment to the Petitioner as well as failure to open LC in favour of the Petitioner, the Petitioner was constrained to invoke Article 8.5.2 of the PPA w.e.f. 19.12.2018, which provides that the Petitioner can offer 25% of the contracted capacity for sale to a third party in case PTC fails to make payments to the Petitioner in terms of the PPA. The Petitioner vide said letter dated 11.12.2018 had also referred to the bills (as per regional energy accounts) for the months of September 2018 and October 2018, for which the Respondents had delayed payment and further failed to pay the amount of delayed payment surcharge. The Petitioner also informed PTC that it shall be further constrained under the compelling circumstances to resort to Article 8.5.5 of the PPA with effect from 11.1.2019, in case PTC fails to open LC and clear the Petitioner's outstanding bills and delayed payment surcharge. It was also stated that the said letter may be treated as notice under the relevant terms of the PPA.

(e) As per Article 8.5.2 of PTC-PPA, in case PTC fails to make payment by the due date, the Petitioner shall have the right to sell 25% of the contracted capacity to third parties. Further, as per Article 8.5.5 of the PTC-PPA, if LC is not fully restored by PTC/ procurer within 30 days of the non-payment by PTC/

procurer, the provisions of Article 8.5.2 of PTC-PPA shall apply with respect to 100% of the contracted capacity. As per Article 8.5.8 of PTC-PPA, in both the above situations, the Petitioner is entitled to receive the capacity charges corresponding to the contracted capacity.

(f) In response to letter of the Petitioner dated 11.12.2018, PTC vide letter dated 17.12.2018 informed the Petitioner that since PPAs are back-to-back in nature, the Petitioner cannot invoke its remedies under the above provisions of the PPA. However, the said contention of PTC is contrary to the express terms of the PPA and back-to-back nature of the PPA can in no event curtail the rights of the Petitioner. Also, PTC did not deny the delay on the part of the Respondents in making the payments as well as delay in opening of LC.

(g) The Petitioner vide its letters dated 18.12.2018 and 19.12.2018 informed PTC that in view of the persistent failure on part of the Respondents to clear the outstanding payments and delay in opening of LC, the Petitioner was constrained to invoke provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA and also requested PTC to arrange for the sale of total contracted power to the third parties with effect from 20.12.2018.

(h) Delay in making the payment towards the energy bills has also been acknowledged by TANGEDCO in its letters dated 4.1.2019, 13.2.2019 and 27.2.2019. Despite its acknowledgment, TANGEDCO vide its letters dated 13.2.2019 and 27.2.2019 informed PTC that since it has supplied power only upto 19.12.2018, TANGEDCO is not liable to pay the capacity charges for the period of non-supply of power. In the said letter, TANGEDCO stated that since in terms of Article 8.3.5 of the PPA, the delay in payment is protected by the payment of late payment surcharge and that LC has been issued in favour of PTC, claim of capacity charges for non-supply period is to be withdrawn. On these grounds, TANGEDCO raised the dispute with regard to the part of the invoice amount for the months of December 2018 and January 2019 and only arranged to clear some amount with respect to invoice raised for the above months.

(i) The refusal of TANGECO to bear the capacity charges for the period of non-supply is erroneous and misconceived being contrary to provisions of Article 8.5.8 of the PPAs, which provides that the liability of the Respondents towards payment of capacity charges for default electricity sold to third parties or remaining unsold during such periods will remain unaffected. Similarly, TANGEDCO's contention that since the Petitioner is entitled to late payment surcharge for the delayed payments by the Respondents and that it cannot invoke Article 8.5 of the PPA in such a situation, is misconceived. Entitlement to late payment surcharge for delayed payment can by no stretch of imagination be construed to restrict the rights provided to the Petitioner in terms of other provisions under the PPA. The right provided under other provisions of the PPA are in addition and not in derogation of each other.

(j) The Petitioner having come to know that PTC had received LC from TANGEDCO, it requested PTC vide its letter dated 19.2.2019 to provide LC to the Petitioner. The said request was also followed by the Petitioner vide its letters dated 16.3.2019, 26.3.2019, 30.3.2019 and 5.4.2019. However, the Petitioner has not received LC in terms of PPA till the date of filing of the instant Petition.

(k) PTC vide its e-mail dated 5.3.2019 returned the bills for the months of December 2018 to February 2019 on the ground that the availability declared by the Petitioner in the invoices is not matching with the schedules referred in the respective Regional Load Despatch Centres.

(l) The Petitioner vide its letter dated 6.3.2019 clarified that in normal circumstances, the invoices raised by the Petitioner correspond to the RLDC schedules. However, the bills for the said months were raised invoking the provisions of Article 8.5 of the PTC-PPA and that the Petitioner was forced to invoke the said provision on account of non-payment of the Petitioner's dues by the Respondents and failure to provide the LC to the Petitioner. Therefore, the Respondents are liable to pay the deducted/ withheld amounts towards the bills raised for the months of December 2018 to February 2019 including the monthly penalty as also the payment towards capacity charges for non-supply period to the tune of Rs.36,62,81,844/- along with the interest @1.25% per month from the date of the same becoming due till actual realization of the said amount.

(m) The generating station of the Petitioner is located in the State of Jharkhand and the Petitioner from the said generating station is selling power to more than one State as it is supplying power to Jharkhand Bijli Vitran Nigam Limited, Tamil Nadu Generation and Distribution Corporation Limited through PTC and also to West Bengal State Electricity Distribution Company Limited through PTC. Accordingly, the generating station of the Petitioner has a composite scheme for generation and sale of electricity as envisaged in Section 79(1)(b) of the Act and, therefore, this Commission has exclusive jurisdiction in respect of present Petition.

5. The Petition was admitted on 23.7.2019 and notices were issued to the Respondents to file their reply to the Petition by 14.8.2019. However, none of the Respondents filed their reply in the given timeframe. During the course of hearing on 17.9.2019, based on the requests of Respondents, an extension was granted upto 27.9.2019 as the last opportunity to file their reply. PTC has filed its reply to the Petition vide affidavit dated 27.9.2019 (filed on 11.10.2019). However, TANGEDCO did not file its reply in the given time frame. During the course of hearing on 12.2.2020, learned counsel appearing on behalf of TANGEDCO requested for two weeks' time to file reply to the Petition, which was objected by the Petitioner. However, TANGEDCO was permitted to file its reply by 20.2.2020 as a last opportunity. However, TANGEDCO again did not file its reply. The matter was last heard on 21.5.2020. During the course of hearing, the learned counsel for TANGEDCO made oral submissions and requested the Commission to consider the same.

Reply of the Respondent, PTC

6. PTC, vide its reply affidavit dated 27.9.2019, has submitted as under:

(a) PTC has entered into back-to-back PTC-PPA dated 19.12.2013 with the Petitioner pursuant to the Procure-PPA dated 18.12.2013 entered into between PTC and TANGEDCO for procurement of 100 MW power on a long-term basis.

(b) Although the PPAs are on back-to-back basis and the actual sale and purchase of electricity takes place between the Petitioner and TANGEDCO, PTC has been making payments to the Petitioner from its own resources irrespective of payments being received from TANGEDCO. While at present, PTC has made the payments to the Petitioner for supply of power for the month of March 2019, it has received payment from TANGEDCO for supply of power for the month of December 2018 only. However, PTC could not continue making payment to the Petitioner from its own resources indefinitely without receiving the payment from TANGEDCO.

(c) PTC as a trader undertakes operational and credit risks to a certain extent in the interest of all stakeholders so that the power supply is not disrupted. However, any penalty for the alleged default by TANGEDCO in not making payment for the power procured by TANGEDCO cannot be borne by PTC as the ultimate beneficiary of the power procured from the Petitioner's Project is TANGEDCO.

(d) Since the PPAs are back-to-back in nature, PTC tries to reduce any delay in creation of LC under Article 8.4.11 of the PPAs given its own financial capacity. Accordingly, contention of the Petitioner that PTC ought to be held liable for delay in providing LC under Article 8.4.11 of the PPA is erroneous and based on incorrect interpretation of the whole back-to-back arrangement. The ultimate beneficiary of the power supplied by the Petitioner being TANGEDCO, PTC ought not to be held liable for the same.

(e) PTC has continuously written letters to TANGEDCO to provide LC at the earliest in terms of the PPAs, viz. letters dated 6.1.2016, 4.7.2016, 22.9.2016, 1.12.2016, 13.1.2017 and 20.11.2018. However, TANGEDCO did not respond to any of these letters. On 20.2.2019, TANGEDCO issued the LC to PTC. Since this particular LC had technical issues, PTC was not in a position to issue LC in favour of the Petitioner. Technical issue relating to LC was taken up with TANGEDCO by PTC and the revised LC was issued to PTC by TANGEDCO on 1.8.2019 and immediately upon receiving the same, PTC issued LC to the Petitioner on 2.8.2019. Therefore, PTC ought not to be held responsible for the delay in issuance of LC.

(f) PTC has entered into the PPAs as a trading licensee under the Act and the PTC-PPA incorporates the terms and conditions of Procurer-PPA as back-to-back arrangement for supply of power from the Petitioner's Project to TANGEDCO.

(g) Perusal of various provisions of the Procurer-PPA and PTC-PPA makes it clear that:

(i) the very purpose of executing the PTC-PPA was to enable the supply of power to TANGEDCO under Procurer-PPA;

(ii) Procurer-PPA and PTC-PPA are co-terminus and one cannot exist without the other. Therefore, the payment obligations under the PPAs are also back-to-back; and

(iii) PTC is only paid its trading margin as per Article 6 of the PTC-PPA and not the entire tariff. Therefore, the role of PTC is that of an intermediary and actual generation and consumption of electricity takes place by the Petitioner and TANGEDCO respectively. Accordingly, the Petitioner cannot thrust liability upon PTC in this regard.

(h) It is a settled position of law that when a trading licensee is not functioning as a merchant trader, i.e. without taking upon itself the financial and commercial risks in an asymmetrical manner but passing on material risks to the purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company. In this regard, PTC has relied upon (a) the judgment of Hon'ble High Court of Delhi dated 15.5.2012 in PTC India Limited vs. Jaiprakash Ventures Limited [2012 (130) DRJ 351], (b) judgment of

Appellate Tribunal for Electricity (APTEL) dated 31.8.2016 in the matter of PTC India Limited vs. Uttarakhand Electricity Regulatory Commission & Ors. [2016 ELR (APTEL) 1176], (c) judgment of APTEL dated 4.11.2011 in the matter of Lanco Power Limited vs. HERC & Ors. [2011 ELR (APTEL) 1714], and (d) judgment of APTEL dated 9.8.2012 in the matter of Lanco Budhil Hydro Power Private Limited vs. HERC & Ors.

<u>Rejoinder of the Petitioner</u>

7. The Petitioner, vide its rejoinder dated 22.11.2019 to the reply filed by PTC, has submitted as under:

(a) In terms of the PPAs between the parties, the Respondents are under a legal and contractual obligation to make monthly payments to the Petitioner. Thus, PTC as also TANGEDCO is under an obligation to pay and ensure that timely payments are made to the Petitioner. However, PTC has not cleared the entire dues of the Petitioner for the month of March 2019 and even for subsequent months.

(b) The provisions of the PTC-PPA dated 19.12.2013 make it abundantly clear that the obligation of PTC is neither dependant nor contingent upon the obligation of TANGEDCO. Article 8 the PTC-PPA clearly provides that the obligation to provide the standby LC to the Petitioner is that of PTC only under the PTC-PPA and that the said obligation in the PTC-PPA has no nexus with the Procurer-PPA. Thus, any reference placed by PTC on delay committed by TANGEDCO is irrelevant. PTC is also in breach of the Central Electricity Regulatory Commission (Procedure, Terms and Conditions for grant of trading licence and other related matters) Regulations, 2009, in as much as it has not adhered to its obligations under the Procurer-PPA between PTC and the Petitioner.

(c) Even after receiving LC from TANGEDCO, PTC has delayed in fulfilling its obligation to provide LC to the Petitioner. LC had been provided to PTC by TANGEDCO in the month of January 2019, whereas PTC furnished the LC to the Petitioner only in the month of August 2019 i.e. after the Ministry of Power's directive in this regard to all procurers to provide LC to generators.

(d) Various judgments relied upon by PTC in its reply to contend that PTC is only an intermediary company and is not functioning as a merchant trader, have no applicability in the facts and circumstances of the present case and the reliance thereupon is wholly misplaced. Perusal of the said judgments would make it clear that all of them pertain to the issue of jurisdiction of the Commission to adjudicate the dispute under the provisions of the Act. However, the issue in the present case is with respect to interpretation of the provisions pertaining to payment security mechanism in the PPAs.

(e) The obligation of PTC pertaining to the payment security mechanism is a specific contractual obligation arising out of the PTC-PPA and if the contentions of PTC are accepted, the same will result into making the provisions pertaining to payment security mechanism redundant and otiose.

<u>Submissions during hearing</u>

8. The matter was heard on 21.5.2020. During the course of hearing, the learned counsel for the TANGEDCO submitted as under:

(a) TANGEDCO is not disputing the claims of the Petitioner.

(b) PTC-PPA has been entered into after Procurer-PPA and there is no mention of any commitment entered into by PTC with the Petitioner in Procurer-PPA. Both the PPAs have different and distinct provisions and TANGEDCO is not liable to or accountable for the terms and conditions contained in the PTC-PPA.

(c) Hon'ble High Court of Delhi in its judgment dated 15.5.2012 in the case of PTC India Limited v. Jaiprakash Ventures Limited had observed that '*a trader is treated as an intermediary. When the trader deals with the distribution company for resale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and* *commercial risks but passing on all the risks to the purchaser under resale, then there is clearly a link between the ultimate distribution company and the generator with the trader acting as only an intermediary linking company*'. PTC has specifically taken on itself the financial and commercial risks under the PTC-PPA.

(d) Under Schedule 1 of the PTC-PPA, the Petitioner and PTC have specifically agreed that the terms and conditions of Procurer-PPA shall be applicable to the Petitioner and it shall abide by, adhere to and fulfil the terms and conditions and obligations arising under the Procurer-PPA, albeit subject to certain deviations/ changes as specified therein. However, there is no similar clause in Procurer-PPA to the effect that TANGEDCO agreed to abide by and adhere to fulfil the obligations of PTC towards the Petitioner under PTC-PPA.

(e) Reference to various Articles of the PTC-PPA makes it clear that the obligation of PTC, *inter-alia*, to make payment for supply of power as well as opening of LC under the PTC-PPA is not contingent upon the payment and opening of LC by TANGEDCO in favour of PTC under Procurer-PPA. As per various letters and correspondence available on record, TANGEDCO had furnished LC to PTC in February 2019.

(f) There is no direct link between the Petitioner and TANGEDCO and it is only in Article 8.5.5 of the PTC-PPA that liability to restore the standby LC has been tied to PTC/Procurer i.e. TANGEDCO. However, PTC-PPA is bilateral contract between the parties and TANGEDCO, being non-signatory to the said contract, terms and conditions agreed under PTC-PPA cannot bind TANGEDCO.

(g) TANGEDCO, not being party to PTC-PPA, is not obliged to fulfil PTC's obligations/ duties qua payment of tariff and opening of LC therein.

(h) The Petitioner, in its various letters issued to PTC, has categorically referred to the failure of PTC in making payments and opening of LC in terms of PTC-PPA. Since PTC has failed to fulfil its obligations under the PTC-PPA, any consequent payment liability on account of invocation of Article 8.5 by the Petitioner is on PTC.

(i) TANGEDCO is only liable to pay for scheduled power and not otherwise. TANGEDCO had accordingly informed PTC that since there is deficiency in scheduling of power, it is imposing penalty and the same was accepted by PTC.

(j) The Commission in its order dated 9.8.2019 in 393/MP/2019 (JSW Hydro Energy Limited v. PTC India Limited and Ors.) has held that under the terms and conditions of the PPA with the generator, payment security mechanism in the form of monthly revolving irrevocable LC is to be provided to the generator by PTC and in terms of Regulation 7(h) of the 2010 Trading Licence Regulations, a statutory obligation is cast on PTC to carry out trading in accordance with the terms and conditions and to take such safeguards as considered necessary, with regard to payment security mechanism.

(k) The Commission in its order dated 26.3.2020 in Petition No. 127/MP/2019 and Ors., after examining provisions of PPA and PSA, had observed that even though PPA and PSA are back-to-back in nature, the billing and payment between the Petitioner (generating station) and SECI (trader) are not conditional upon billing and payment between SECI (trader) and Discoms. The said ratio squarely applies in the present case as billing and payment between the Petitioner and PTC are not conditional upon billing and payment between PTC and TANGEDCO.

(l) The genesis of the entire dispute, resulting in curtailment of power by the generator and claim of capacity charges is due to default on the part of PTC to comply with its obligations under PTC-PPA.

9. In response, learned counsel for PTC, during the course of hearing and vide its written submission, mainly reiterated the submissions made in the reply and additionally submitted as under:

(a) TANGEDCO has not denied non-payment of dues. As such, its liability to pay stands crystalized. TANGEDCO is taking hyper-technical pleas to avoid its liability. The contentions of TANGEDCO that no back-to-back arrangement for supply of power exists and that PTC has taken on the financial and commercial risks, including entering into a commercial arrangement with the Petitioner is misconceived. Contention of TANGEDCO that since it is not part of the said commercial arrangement, it is not liable towards any of the claims being made by the Petitioner is also misconceived.

(b) TANGEDCO has mis-represented before the Commission by stating that the LC was provided to PTC on 20.2.2019. TANGEDCO has failed to place before the Commission the technical issues in the said LC. TANGEDCO issued the fresh LC to PTC only on 1.8.2019 and thereafter PTC immediately issued LC to the Petitioner on 2.8.2019.

(c) Contention of TANGEDCO that provisions of PPA and PSA are different is incorrect. PTC-PPA incorporates the terms and conditions of Procurer-PPA as a back-to-back arrangement for supply of power by the Petitioner to TANGEDCO. The supply of power from an identified source i.e. from the Petitioner is mentioned in the Procurer-PPA. Moreover, TANGEDCO has given consent to the Petitioner for procurement of coal under SHAKTI Scheme and continues to receive a discount on tariff. Therefore, the contention that it is solely the liability and risk of PTC and TANGEDCO has no role to play in payment of amounts due to APNRL is erroneous and misplaced.

(d) The PPAs were entered into pursuant to case-1 competitive bidding process initiated by TANGEDCO and the generation source and supply of power from the Petitioner's Project was disclosed in the bidding documents submitted by PTC at the time of bidding. Perusal of the various provisions of the PTC-PPA and Procurer-PPA makes it clear that PTC-PPA has been executed in order to enable PTC to fulfil its obligations under Procurer-PPA and the terms and conditions of the Procurer-PPA are mirrored in the PTC-PPA. Accordingly, the submission of TANGEDCO that the PTC-PPA and the

Procurer-PPA are distinct and independent of each other, ought to be dismissed. TANGEDCO in effect is seeking to not comply with its obligations on the alleged ground that TANGEDCO is not part of the arrangement between the Petitioner and PTC.

(e) The Petitioner has taken recourse to TANGEDCO and PTC jointly in the present proceedings as well as in other proceedings, including change in law claims which have been contested by TANGEDCO in the past.

(f) TANGEDCO has mis-interpreted the judgment of Hon'ble Delhi High Court dated 15.5.2012 in the case of PTC India Limited v. Jaiprakash Ventured Limited and has failed to appreciate the difference between a trader and a merchant trader. It is only when the trader is acting as a merchant trader, i.e. where there is no identified beneficiary that the trader assumes upon itself the financial and commercial risks. However, in the present case, PTC is not functioning as merchant trader since the source of generation and the ultimate beneficiary have been identified and back-to-back agreements executed.

Analysis and Decision

10. Since there are no objections with regard to jurisdiction of the Commission and the maintainability of the Petition, we proceed to examine the issues raised by the Petitioner, on merits.

11. We have considered the submissions made by the parties. Based on the submissions made by the parties, the following issues arise for our consideration:

Issue No. 1: In terms of PTC-PPA and Procurer-PPA, whose obligation is it for payment towards supply of power by the Petitioner?

Issue No. 2: Whether payment obligation of PTC in terms of PTC-PPA is contingent upon the payment obligations of TANGEDCO under Procurer-PPA?

Issue No. 3: Whether the Petitioner has rightly invoked Article 8.5 of the PTC-PPA? Whether the Petitioner is entitled to capacity charges along with

penalties deducted/ withheld by the Respondent from the invoices for the months of December 2018, January 2019 and February 2019?

The above issues have been discussed in succeeding paragraphs.

Issue No. 1: In terms of PTC-PPA and Procurer-PPA, whose obligation is it for payment towards supply of power by the Petitioner?

12. TANGEDCO has submitted that PTC-PPA and Procurer-PPA have different and distinct provisions and there is no direct link between the Petitioner and TANGEDCO. According to TANGEDCO, PTC-PPA is a bilateral contract between the parties and TANGEDCO not being party to PTC-PPA, terms and conditions agreed under PTC-PPA cannot bind TANGEDCO. It has submitted that PTC-PPA has been entered into on 19.12.2013 i.e. after Procurer-PPA dated 18.12.2013 and there is no mention of any commitment undertaken by PTC with the Petitioner in Procurer-PPA. Accordingly, the genesis of the entire dispute, resulting in curtailment of power by the generator and claim of capacity charges is due to default on the part of PTC to comply with its obligations under the PTC-PPA.

13. *Per contra*, PTC has submitted that PTC-PPA incorporates the terms and conditions of Procurer-PPA as a back-to-back arrangement for ultimate supply of power by the Petitioner to TANGEDCO. The PPAs were entered into pursuant to Case-1 competitive bidding process initiated by TANGEDCO and the source of generation and supply of power from the Petitioner's Project was disclosed in the bidding documents submitted by PTC at the time of bidding. Perusal of various provisions of the PTC-PPA and Procurer-PPA would reveal that PTC-PPA has been executed in order to enable PTC to fulfil its obligations under Procurer-PPA and the terms and conditions of the Procurer-PPA are mirrored in the PTC-PPA. Accordingly, the submission of TANGEDCO that the PTC-PPA and the Procurer-

PPA are distinct and independent of each other ought to be rejected. According to PTC, TANGEDCO in effect is seeking to evade its obligations on the alleged ground that TANGEDCO is not part of the arrangement between the Petitioner and PTC, which is contrary to above position emerging from combined reading of the two PPAs.

14. We have considered the submissions of the parties. It is not in dispute that TANGEDCO had initiated the competitive bidding process by issuance of RfP dated 21.12.2012 for procurement of 1000 MW (+/- 20%) base load power on long-term basis under Case-I bidding. In response to the said RfP, the Petitioner desirous of supply of power to TANGEDCO, entered into 'Exclusive PPA' with PTC on 4.3.2013 and the said PPA formed part of the bid submitted by PTC in response to bid invited by TANGEDCO. PTC was selected as a successful bidder premised on the 'Exclusive PPA' dated 4.3.2013. Thus, even at the time of bidding and after PTC was selected as successful bidder and had signed the Procurer-PPA dated 18.12.2013, there is no doubt that TANGEDCO was aware that PTC would be supplying power from the Petitioner's Project.

15. It is important to refer to various provisions of Procurer-PPA and PTC-PPA. Some relevant ones are reproduced below:

a. Procurer-PPA provides as under:

"Power Station" is defined to mean the Adhunik Power and Natural Resources generation facility of installed capacity of 540 MW, located as Padampur Village, Saralkela Kharsawan, Jharkhand State.

"Trading Licensee" is defined to mean the Seller which is an Electricity Trader and has submitted an exclusive power purchase agreement executed with the Developer.

"Developer" is defined to mean the owner of the Power Station from which the Seller shall supply the aggregate contracted capacity to the Procurer.

SCHEDULE 5: Details of Generation Source and Supply of Power.

…

(A) Details of generation source

Sl. No.	*Particulars*	*Details*
1	*Location of power station (Specify pace, district and state)*	*Adhunik Power & Natural Resources Limited Vill: Padampur, P.O: Kandra, Dist: Saraikela Kharsawan, Jharkhand 832402*

b. PTC-PPA provides as under:

"(A) The Parties to this Agreement (PTC-PPA) have decided to enter into this Agreement on the understanding that PTC has already entered into a Power Purchase Agreement dated 18.12.2013 (hereinafter referred to as the "Procurer PPA") with Tamil Nadu Generation and Distribution Company Limited (hereinafter referred to as the "Procurer").

(B) PTC is a company engaged in trading of electricity and has been established with an objective, inter alia, to carry out in India and abroad, the business of purchase of all forms of electrical power from independent power producers, captive power plants and other generating companies, state electricity boards, state government statutory bodies, licensees, power utilities, and sale of all forms of electrical power to the state electricity boards, power utilities, transmission companies, bulk consumers of power and other organizations buying power, whether in the private or public sector.

(C) Tamil Nadu Generation and Distribution Corporation Limited (hereinafter referred to as "TANGEDCO" or "Procurer"), having its Corporate office at, NPKRR Maligal, 6th Floor, Eastern Wing, 144 Annasalai, Chennai – 600002, Tamil Nadu, India, has initiated a bidding process dated 21.12.2012 ("Tender") for procurement of 1000 MW power (± 20%) at Delivery Point for a period of fifteen (15) years on Case-I bidding procedure as per the terms and conditions outlined in the Request for Proposal Document ("RFP"). A copy of the RFP is attached as Annexure-2. The objective of the competitive bidding process is to select bidders for supply of minimum 50MW and maximum up to 1000 MW ± 20% power on long term basis under Case-1 bidding procedure for meeting the Procurer Base load requirement of power for a period of 15 years. The successful bidders shall enter into a Power Purchase Agreement with Procurer ("Procurer PPA") as per the drat PPA enclosed in RFP.

(D) The Company, a generating company as defined in the Electricity Act, 2003 is implementing the Thermal Power Plant having capacity of 540 MW (2x270 MW) being set up in Vill: Padampur, P.O.: Kandra Dist.: Saraikela-Kharsawan Jharkhand 832402, India, and all the facilities works and related assets required for efficient operation of

the Power Station ("Project"). The Unit – I of the Project is commissioned on 21st January 2013 and Unit – II is commissioned on 19th May 2013 (hereinafter referred to as "COD").

(E) PTC and the Company have finalized tariff, quantum and modalities related to the power to be procured from the Project from the Scheduled Delivery Date as specified in the Tender, for onward sale on a long-term basis. PTC and Company have agreed to enter into this Agreement and to abide by and adhere to the rights and obligations of PTC under the Procurer PPA on a back to back basis except to the extent anything mentioned otherwise herein under this Agreement for the purposes of Procurer PPA.

(F) …Pursuant to the Letter of Intent, PTC has signed the Procurer-PPA with the Procurer. This PTC-PPA is being entered on a back-to-back basis between the Parties herein to enable PTC to fulfil its duties and obligations under the Procurer-PPA and in furtherance to the requirements of the Procurer-PPA, all obligations of PTC and the Developer under the Procurer-PPA have to be complied with by the Company herein. The Company has examined the provisions of the Procurer-PPA and has understood its role, obligations and duties to enable PTC fulfil its obligations under the Procurer-PPA on a back to back basis except to the extent anything mentioned otherwise herein under this agreement for the purposes of Procurer-PPA. It is clearly understood between the Parties that the objective of the PTC-PPA is to enable PTC fulfil its duties and obligations under the Procurer-PPA. The Procurer-PPA is annexed herewith as Annexure-1 to this PTC-PPA and is the basis for the execution of the PTC-PPA.

(G) To record the above understanding and to establish the commitment of Company to sell and PTC to purchase power from the Project, the Parties have entered into this Agreement. The provisions of the Procurer-PPA signed between PTC and the Procurer shall be applicable mutatis mutandis to this Agreement except to the extent anything mentioned otherwise herein under this agreement…"

Article 2

"2.1.1 This Agreement shall become effective upon the date of execution of this Agreement. The validity shall be same as mentioned in Procurer(s)-PPA.

2.1.2 The term of this Agreement shall be co-terminus with the Procurer(s)-PPA when it shall automatically terminate, unless terminated earlier, pursuant to Article 2.2."

Article 6

"6.1 The Tariff payable by PTC to Company under this Agreement shall be the amount payable to PTC by Procurer as per the provisions of Schedule 4 of the Procurer-PPA minus PTC Trading Margin as specified herein-below:"

Article 14.11

"*14.11 Purpose of the Agreement*

The Parties herein understand that this PTC-PPA is being entered into to enable PTC fulfil its obligations under the Procurer-PPA for continuous and uninterrupted supply of power to the Procurer under the Procurer-PPA."

16. From the above provisions of Procurer-PPA, we note that it clearly recognizes the generating station of the Petitioner as the source of supply of power through PTC. Moreover, the definition of 'trading licensee', also acknowledges the 'Exclusive PPA' executed between PTC and the Petitioner. Similarly, provisions of PTC-PPA clearly states that the PTC-PPA is being entered into on back-to-back basis with Procurer-PPA to enable the Petitioner to sell and PTC to purchase power from the Petitioner for onwards sale to TANGEDCO under Procurer-PPA. PTC-PPA also provides that unless terminated earlier, it shall be co-terminus with Procurer-PPA.

17. Thus, it is evident from the above that both the PPAs are inextricably linked to each other and the rights and obligations arising out of any one PPA are also reflected in the other PPA. The provisions of the PPAs unambiguously indicate that both PTC-PPA and Procurer-PPA are back-to-back agreements and therefore, establish the nexus between the generating company i.e. the Petitioner and TANGEDCO, even though power was supplied through PTC, which is an inter-State trading licensee.

18. In this regard, it would be relevant to refer the decision of APTEL dated 4.11.2011 in Appeal No. 15 of 2011 in the case of Lanco Power Limited v Haryana Electricity Regulatory Commission and Ors., wherein the APTEL has, *inter-alia*, held as under:

> *"18. The trading activity has been recognized as a distinct activity under the Act. The Statement of objects and reasons of the Act provides as under:*
>
> > *"(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorized to fix ceilings on trading margins, if necessary".*
>
> *19. The term trading has been defined in Section 2 (71) of the Act as under:*

"(71) "trading" means purchase of electricity for resale thereof and the expression "trade" shall be construed accordingly;

20. Unlike the generation, transmission, wheeling and retail sale, there is no tariff determination for trading. The trading is based on margin only. Thus, the trading being a purchase of electricity for re-sale, the trader would get a margin to be determined by the Central Commission under Section 79(1)(j) of the Act or by the State Commission under Section 86(1)(j) of the Act. Section 66 of the Electricity Act provides for the development of the market. The same reads as below:

"66. Development of market. The Appropriate Commission shall endeavour to promote the development of a market (including trading) in power in such manner as may be specified and shall be guided by the National Electricity Policy referred to in Section 3 in this regard"

21. So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

…………….

24. In other words, even though the Haryana Power (R-2) was not the party to the PPA dated 19.10.2005 and the Amended Agreement dated 18.9.2006, the parties to the PPA have intended that the power sold under the PPA to be further sold to Haryana Power (R-2), the ultimate beneficiary for the purpose of distribution to the consumers of the State of Haryana. As such the Haryana Power (R-2) is entitled to enforce the terms of PPA. To put it in a nut shell, the sale of entire contracted capacity of 300 MW by the Appellant, is intended for resale by PTC (R-3) to Haryana Power (R-2) and as such, the ultimate sale of entire 300 MW to Haryana Power (R2) was under the PSA.

25. According to the Respondents in this Appeal, the PPA and PSA are back to back arrangements. On the other hand, the Appellant has contended that there is no nexus or privity in respect of the PPA dated 19.10.2005 entered into between Lanco Power, the Appellant, PTC (R-3) and the PSA dated 21.9.2006 entered into between the PTC (R-3) and Haryana Power (R-2).

26. Now let us see as to whether there has been nexus between the PPA and PSA.

……………

38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that that PPA is linked to the PSA. Those clauses are reproduced herein:

"(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project for onward sale by PTC.

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, for sale of such power from the Project.

(F) A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement".

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

……….

42. Thus, it is clear that the PPA and PSA are interconnected and inextricably linked to each other and as such there is privity between the Appellant which is the power generator and the Haryana Power (R-2) which is a deemed licensee who is the ultimate beneficiary of the PPA as well as the party to the PSA.

……….

50. As per the terms of the PPA entered into between the Lanco Power, the Appellant and PTC (R-3), the PTC was required to enter into power sale agreement with the purchaser for onward sale of power from the Appellant's project. Thus the requirement to execute the PSA was an intrinsic and material provision of the PPA since the performance of the PPA was completely dependent upon the execution of the PSA. Thus, the PPA and PSA are the two documents which are heavily inter-dependent on one another for their sustenance. In order to refer to this aspect, it would be proper to quote the relevant provisions of the PPA.

……………..

55. It may be pointed out that on 21.9.2006, PTC (R-3) executed the PSA with the Haryana Power (R-2) as per its inexorable obligations under the PPA. This PSA was in fact veritable reproduction of the PPA. This is borne out from not only the findings of the State Commission while passing the impugned order but also from the very clauses of the PSA. Some of the relevant clauses of the PSA demonstrating that the said PPA and PSA were entwined and that the sustenance on one was dependent on the other which are reproduced below:

"Recital C PTC has entered into a Power Purchase Agreement (hereinafter referred to as "PPA) on 19thOctober, 2005 as amended further vide an amendment agreement dated 18thSeptember, 2006 with M/s. Lanco Amarkantak Power Private Ltd., (the "Company"), a Generating Company as defined under the Electricity Act, 2003 and which the implementing a coal based thermal power station at Pathadi Village, Korba District, Chhattisgarh, India, to purchase the power and energy output from its unit with an installed capacity of 300 MW, Phase II proposed to be set up (the "Project"), for a period of twenty five (25) years from the Commercial Operation Date of the Project".

56. In fact, Clause 3.1 (i) states that the PSA will not be effective until the conditions precedent as laid down in the PPA are duly satisfied. In terms of the clause 4.1 (v) of the PSA, it was explicitly agreed that PTC could not terminate the PPA except with prior consent of the Purchaser. As per clause 4.1 (ix), it was PTC's obligation to participate and require the Company to participate in the Tariff Determination process as required by the Appropriate Commission.

57. As per clause 4.2 (i), it was the purchaser's obligation to make available any information required by the PTC in order to assist the Company to achieve Financial Close. Clause 15.1.2 (iii) of the PSA, is a provision which has been introduced specifically keeping in mind the clause 16.6.5 introduced into the PPA through the amendment dated 18.9.2006. The reading of the said clause of the PSA will conclusively demonstrate that the same has been drafted in consonance with the amended PPA for the benefit of Haryana Power (R-2)."

18. In the above judgment, APTEL has clearly held that when PPA (PTC-PPA in this case) and PSA (Procurer-PPA in this case) are inter-connected and inextricably linked to each other and are back-to-back agreements, there is clearly a link between the generating company and the end beneficiary i.e. distribution licensee and in such cases, distribution licensee can seek to enforce the terms of the PPA though not being party therein. Therefore, the contention of TANGEDCO that TANGEDCO is not liable for any payment against the claim made by the Petitioner under the aforesaid contractual arrangement lacks merit.

19. We also note that TANGEDCO had no objection to supplementary PPAs when a Petition was filed by the Petitioner and order dated 18.5.2018 was passed by the Commission in Petition No. 84/MP/2018 wherein the Commission approved supplementary PPAs in respect of the PTC-PPA and Procurer-PPA. Relevant extract of the order is as under:

"17. The Petitioner, in order to match the levelised tariff of `4.91 per kWh, has by letter dated 16.4.2018 to PTC revised their Quoted Escalable Energy Charge as `0.222 per kWh by offering a discount of `0.019 per kWh. Accordingly, the financial bid as per Schedule 8 of the Procurer PPA dated 18.12.2013 has been revised and enclosed as Annexure-III to the supplementary PPAs dated 8.5.2018 and 10.5.2018. Consequent to change of source from linkage and captive coal to linkage from the bidding process under the SHAKTI Scheme, Format 4.13(A) containing details of the generation source and primary fuel and Format 4.13 (B) containing details of primary fuel, furnished by the Petitioner at the time of bidding has been amended. Similarly, the definition of "Fuel" and "Monthly Bill" or "Monthly Invoice" in Article I and 1.1 respectively has also been amended. In addition to amendment to clause 4.2.1 in Schedule 4 of the PPAs dated 18.12.2013/19.12.2013, Schedule 4A has been inserted to provide for the methodology for adjustment of discount in the monthly bills to the Procurers.

18. Since the amendments to the Procurer PPA dated 18.12.2013 and PTC-APNRL PPA dated 19.12.013 have been carried out through supplementary PPAs dated 8.5.2018 & 10.5.2018 by the parties pursuant to the SHAKTI Scheme, we approve the said amendments in terms of Article 15 of the PPAs. Issues, if any, arising out of such adjustment shall be mutually settled by the parties."

20. We also note that a Petition No. 17/MP/2019 was filed by the Petitioner to claim compensation under change in law events in respect of the same PPAs. In that Petition, the following was stated by PTC as recorded in order dated 19.8.2019 of the Commission:

"Reply of PTC
10. PTC in its reply dated 14.5.2019 has submitted that PTC having a licence to trade in inter-State supply of electricity had entered into back to back agreements for purchase and sale of power. Therefore, the entire transaction was on back to back basis. The Commission may examine the issues as raised by the Petitioner in light of the applicable laws and Regulations."

21. In the above-mentioned Petition No. 17/MP/2019, TANGEDCO had raised issues such as the Petition suffering from delays and laches, notice not being served in timely manner, some claims not being applicable, claims being covered by escalation indices issued by the Commission, non-applicability of change in law provisions of the PPAs on the plea that taxes/ duties have to be paid by the Petitioner, proper documents not being placed and so on. However, it did not raise any issue regarding maintainability of the Petition or it not being liable to pay compensation on basis of it not being a party to the PTC-PPA. Relevant extract from the order dated 19.8.2019 is as under:

"12. Since there are no objections with regard to jurisdiction and the maintainability of the Petition, we proceed to examine the issues raised by the Petitioner, on merits."
-----
53. The above said decision is also applicable in the case of the Petitioner in the instant case. Therefore, increase in Clean Energy Cess on coal is admissible to the Petitioner as a Change in Law event under Article 10 of the PPA. Accordingly, the Petitioner is entitled to recover such increase in Clean Energy Cess from 1.1.2016as per applicable rate of Clean Energy Cess in proportion to the coal as per the parameters of the applicable Tariff Regulations of this Commission or actually consumed whichever is lower, for generation and supply of electricity to TANGEDCO. As on the cut-off date, Clean Energy Cess was Rs. 50/MT which the Petitioner was

expected to factor in the bid. Thereafter, the applicable rate of Clean Energy Cess for the purpose of change in law compensation computation shall be based on the relevant date/son which changes in rate of Clean Energy Cess occurred. The change in law amount would be worked out, on the basis of the notified new rates less Rs. 50 as applicable as on cut of date, per MT of coal consumed. The Petitioner is directed to furnish along with its monthly, regular and/or supplementary bill(s), the computations duly certified by the auditor to TANGEDCO. The Petitioner and TANGEDCO are directed to carry out reconciliation on account of these claims annually. It is pertinent to mention that the Clean Energy Cess has been abolished with effect from 1.7.2017. Accordingly, the Change in Law in Clean Energy Cess has been allowed upto 30.6.2017. With effect from 1.7.2017, the Petitioner shall be entitled for GST Compensation Cess in terms of the Commission's order dated 14.3.2018 in Petition No. 13/SM/2017."

Thus, while granting compensation for change in law, considering all aspects, the Commission directed the Petitioner to submit relevant documents directly to TANGEDCO to claim compensation. Notably, documents were not required to be routed through PTC.

22. Therefore, we are not inclined to accept the plea of TANGEDCO that no claims can be raised against it and that TANGEDCO is not liable for any payment against the claim made by the Petitioner. Furthermore, the back-to-back nature of the PPAs implies that under the aforesaid contractual arrangement between the parties, TANGEDCO is liable to pay to PTC those amounts which the PTC is liable to pay to the Petitioner. Thus, obligation of payment for the supply of power by the Petitioner not only rests on PTC under PTC-PPA, but by virtue of back-to-back nature of the PPAs, also rests on TANGEDCO under Procurer-PPA. Therefore, both PTC and TANGEDCO, are required to fulfil their respective obligations, including payment towards supply of power by the Petitioner and furnishing of Stand by Letter of Credit (in short 'LC') therein. Therefore, in our view, in the event of failure on the part of PTC and/or TANGEDCO to discharge their obligations under the PTC-PPA or

Procurer-PPA respectively, the Petitioner can bring a claim against PTC as well as TANGEDCO.

Issue No. 2: Whether payment obligation of PTC in terms of PTC-PPA is contingent upon the payment obligation of TANGEDCO under Procurer-PPA?

23. Having held that the PPAs being inextricably linked to each other and back-to-back in nature and that both PTC and TANGEDCO are responsible for ensuring payment for supply of power by the Petitioner, it is pertinent to examine as to whether payment obligation of PTC in terms of PTC-PPA is contingent upon the payment obligations of TANGEDCO under Procurer-PPA.

24. During the course of hearing, learned counsel for TANGEDCO submitted that various Articles of the PTC-PPA makes it clear that the obligation of PTC, *inter-alia*, to make payment for supply of power as well as opening of LC under the PTC-PPA is not contingent upon the payment and opening of LC by TANGEDCO in favour of PTC under Procurer-PPA. He further submitted that the Petitioner, in its various letters issued to PTC, has categorically referred to the failure of PTC in making payment and opening of LC in terms of PTC-PPA. Since PTC has failed to fulfil its obligations under the PTC-PPA, any consequent payment liability on account of invocation of Article 8.5 by the Petitioner, is on PTC. Learned counsel referred to the order of the Commission dated 26.3.2020 in Petition No. 127/MP/2019 wherein the Commission had observed that even though PPA and PSA are back-to-back in nature, the billing and payment between the generating station and trader are not conditional upon billing and payment between trader and Discoms.

25. On the other hand, PTC has argued that TANGEDCO has not denied non-payment of the Petitioner’s dues. As such, its liability to pay stands crystalized and

TANGEDCO is raising hyper-technical pleas to avoid its liability. The contention of TANGEDCO that no back-to-back arrangement for supply of power exists and that PTC has taken on the financial and commercial risks, including entering into a commercial arrangement with the Petitioner is misconceived. PTC-PPA incorporates the terms and conditions of Procurer-PPA as back-to-back arrangement for supply of power by the Petitioner to TANGEDCO. Perusal of various provisions of the PTC-PPA and Procurer-PPA make it clear that PTC-PPA has been executed in order to enable PTC to fulfil its obligations under Procurer-PPA and the terms and conditions of Procurer-PPA are mirrored in PTC-PPA.

26. In this regard, the relevant provisions of the PTC-PPA read as under:

> *"Article 6: Tariff, Payment Terms and Payment Security:*
>
> *6.1 The Tariff payable by PTC to Company under this Agreement shall be the amount payable to PTC by Procurer as per the provision of Schedule 4 of the Procurer-PPA minus PTC Trading Margin as specified herein below:*
> *i) PTC shall charge Trading Margin as follows:*
>
> *a) In case the Company achieves normative Availability of 85% or more from the Coal Linkage* of CIL/Coal block, the Trading Margin of PTC will be 2.5% of Capacity Charges plus Energy Charges or 10 Paisa/unit whichever is lower.*
>
> *b) In case the Company could not achieve Normative Availability of 85% from the Coal Linkage of CIL/Coal block, the Trading Margin of PTC will be 2.5% of Capacity Charges plus Energy Charges or 8 Paisa/unit whichever is lower.*
>
> *ii) It is clarified that PTC shall not charge any amount higher than that which is specified hereinabove for the duration of this Agreement i.e. PTC-PPA as PTC Trading Margin and in the event of the Central Electricity Regulatory Commission (CERC) reducing/capping the Trading Margin of Trading Licensee(s) through regulations then in that case PTC shall retain only that amount as specified by the CERC through regulations for Agreements of such nature and duration as PTC Trading Margin and any excess amount shall be passed on the Company.*
>
> *6.2 Company affirms that it has reviewed the said "Schedule 4: Tariff" of the Procurer-PPA and the same shall be binding upon the Company.*
>
> *6.3. The invoicing would be done by Company to PTC as per the terms of this Agreement i.e. PTC-PPA and PTC would in turn invoice the Procurer as per the Procurer-PPA.*

6.4 PTC shall make payments to the Company for power supplied within Due Date (i.e. due date as per the Procurer-PPA plus (1) day). PTC will be entitled to rebate as per the Article 8.3.6 of the Procurer-PPA.
…..
Article 8- Billing and Payment
The terms of Billing and Payments as provided under this Article 8 of the Procurer-PPA will be applicable to the Parties, in addition to the terms under Article 6 of this Agreement. However, the Article 8.2.1, 8.3.4, 8.3.6, 8.4, 8.5, 8.6.1, 8.6.2, 8.6.3, 8.8.2 and 8.8.3 shall stand substituted as provided below:
For avoidance of any doubt it is further clarified that "Due Date" with regard to Billing and Payment under PTC-PPA shall mean 'the due date as defined under the Procurer-PPA (+) plus one (1) day….."
…..
8.4 Payment Mechanism

Adequate payment security shall be made available to the company. The payment security may constitute

1. *Payment mode is Direct*
2. *Stand by Letter of Credit (LC)/Bank Guarantee*

8.4.1 Subject to Article 8.4.2 an amount payable under an invoice shall be paid on or before the due date by direct payment as per the provisions of this PTC-PPA.
…
8.4.11 Stand by Letter of Credit

8.4.11.1 PTC shall provide to the Company, in respect of payment of its Monthly Bills and/or Supplementary Bills, stand by letter of credit opened and maintained by PTC. PTC shall provide stand by letter of credit to the Company Twenty Five (25) days before the scheduled delivery date (when actual power flows) as per the Procurer-PPA.

8.4.11.2 PTC shall open a Stand by Letter of Credit through a scheduled bank at Delhi, India in favour of the Company, to be made operative from a date prior to the Due Date of its first Monthly Bill under this agreement. The Stand by Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually for an amount equal to:

i) for the first Contract year, equal to one point one (1.1) times the estimated average monthly billing based on Normative Availability;
ii) for each subsequent Contract Year, equal to the one point one (1.1) times the average of the monthly Tariff Payments to the previous Contract Year.

PTC shall cause the scheduled bank issuing the Stand by Letter of Credit to intimate the Company, in writing regarding establishing of such Stand by Letter of Credit.

Provided that the Company shall not draw upon such Stand by Letter of Credit prior to the Due Date of the relevant Monthly Bill and/or Supplementary Bill and shall not make more than one drawal in a Month.

Provided further that if at any time such Stand by Letter of Credit amount falls short of the amount specified in Article 8.4.11.2 otherwise than by reason of drawal of such Stand by Letter of Credit by the Company, PTC shall restore such shortfall within nine (9) days.

8.4.11.3 If the Stand by Letter of Credit is insufficient to pay for the due payments to the Company or is not replenished for the drawals made, then within a period of nine (9) days from the date such shortfall in the Standby Letter of Credit occurs, the Stand by Letter of Credit shall be reinstated to the requisite amount specified in this Agreement.

8.4.11.4 If PTC fails to pay a Monthly Bill or Supplementary Bill or part thereof within and including the Due Date as per the PTC-PPA, then subject to Article 8.6.7, the Company may draw upon the Stand by Letter of Credit and accordingly the bank shall pay without instruction from PTC, an amount equal to such Monthly Bill or Supplementary Bill or part thereof plus Late Payment Surcharge if applicable in accordance with Article 8.4.3 by presenting to the scheduled bank issuing the Stand by Letter of Credit, the following documents:

i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid by PTC;

ii) a certificate from the Seller to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date; and

iii) calculations of applicable Late Payment Surcharge, if any.

8.4.11.5 PTC shall ensure that the Stand by Letter of Credit shall be renewed not later than forty three (43) days prior to its expiry.

8.4.11.6. All costs relating to opening and maintenance of the Letter of Credit shall be borne by PTC, however, Letter of Credit negotiation charges shall be borne and paid by the Company.

8.4.11.7 Where necessary, the Stand by Letter of Credit may also be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument as mutually agreed by PTC and the Company.

27. In terms of Articles 6 and 8 of the PTC-PPA, PTC is required to pay to the Petitioner as per the tariff agreed under Procurer-PPA minus its trading margin. Also, PTC is required to pay towards the supply of power to the Petitioner by the Due Date, as defined under the Procurer-PPA, plus one day. In terms of Article 8.4, PTC is required to provide adequate payment security to the Petitioner, *inter-alia*, by providing Stand by Letter of Credit/ Bank Guarantee. In terms of Article 8.4.11.1, PTC is required to provide Stand by Letter of Credit to the Petitioner 25 days before the Scheduled Delivery Date under Procurer-PPA and to be renewed annually for an amount as specified in Article 8.4.11.2. PTC is also required to restore and renew the Stand by Letter of Credit, from time to time as per Articles 8.4.11.3 and 8.4.11.5.

Further, Article 8.4.11.4 enables the Petitioner to draw upon the Stand by Letter of Credit, in case PTC fails to pay monthly bills/ supplementary bills by Due Date as provided in PTC-PPA. Perusal of the above Articles of the PTC-PPA reveal that billing and payment including the provision pertaining to furnishing of LC between the Petitioner and PTC are not conditional or contingent upon the payment and furnishing of LC by TANGEDCO to PTC.

28. Similar Provisions as in PTC-PPA are contained in Procurer-PPA, which are reproduced below:

> *"8.3 Payment of Monthly Bills*
> *8.3.1 The Procurer shall pay the amount payable under the Monthly Bill on the Due Date to such account of the Seller, as shall have been previously notified by the Seller in accordance with Article 8.3.4 below.*
>
> *8.3.2 All payments made by the Procurer shall be apportioned by the Seller in the following order of priority:*
> *i) towards Late Payment Surcharge, if any;*
> *ii) towards the earlier unpaid Monthly Bill(s) if any; and*
> *iii) towards the then current Monthly Bill.*
> *…..*
>
> *8.4 Payment Security Mechanism*
>
> *Adequate payment security shall be made available to the bidders. The payment security may constitute*
> *1. All payments payable to the Seller under Invoice shall be paid through RTGS within Due date.*
> *2. Stand by Letter of Credit (LC)/Bank Guarantee*
>
> *8.4.1. Subject to Article 8.4.1 an amount payable under an invoice shall be paid on or before the Due Date by direct payment as notified in RFP.*
> *…*
> *8.4.11 Stand by Letter of Credit.*
>
> *8.4.11.1 The Procurer shall provide to the Seller, in respect of payment of its Monthly Bills and/or Supplementary Bills, stand by letter of credit opened and maintained by the Procurer. The Procurer shall provide stand by letter of credit to the Seller one (1) month before the scheduled delivery date (when actual power flows).*
>
> *8.4.11.2 The Procurer shall open a Stand by Letter of Credit through a scheduled bank at Chennai, India in favour of the Seller, to be made operative from a date prior to the Due Date of its first Monthly Bill under this agreement. The Stand by Letter of Credit*

shall have a term of twelve (12) Months and shall be renewed annually for an amount equal to:

i) for the first Contract year, equal to one point one (1.1) times the estimated average monthly billing based on Normative Availability;

ii) for each subsequent Contract Year, equal to the one point one (1.1) times the average of the monthly Tariff Payments to the previous Contract Year.

The Procurer shall cause the scheduled bank issuing the Stand by Letter of Credit to intimate the Seller, in writing regarding establishing of such Stand by Letter of Credit.

Provided that the Seller shall not draw upon such Stand by Letter of Credit prior to the Due Date of the relevant Monthly Bill and/or Supplementary Bill and shall not make more than one drawal in a Month.

Provided further that if at any time such Stand by Letter of Credit amount falls short of the amount specified in Article 8.4.11.2 otherwise than by reason of drawal of such Stand by Letter of Credit by the Seller, the Procurer shall restore such shortfall within seven (7) days.

8.4.11.3 If the Stand by Letter of Credit is insufficient to pay for the due payments to the Seller or is not replenished for the drawals made, then within a period of seven (7) days from the date such shortfall in the Standby Letter of Credit occurs, the Stand by Letter of Credit shall be reinstated to the requisite amount specified in this Agreement.

8.4.11.4 If the Procurer fails to pay a Monthly Bill or Supplementary Bill or part thereof within and including the Due Date , then subject to Article 8.6.7, the Seller may draw upon the Stand by Letter of Credit and accordingly the bank shall pay without instruction from the Procurer, an amount equal to such Monthly Bill or Supplementary Bill or part thereof plus Late Payment Surcharge if applicable in accordance with Article

8.4.3 by presenting to the scheduled bank issuing the Stand by Letter of Credit, the following documents:

i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid by the Procurer beyond the Due Date;

ii) a certificate from the Seller to the effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has remained unpaid beyond the Due Date; and

iii) calculations of applicable Late Payment Surcharge, if any.

8.4.11.5 The Procurer shall ensure that the Stand by Letter of Credit shall be renewed not later than forty five (45) days prior to its expiry.

8.4.11.6. All costs relating to opening and maintenance of the Letter of Credit shall be borne by the Procurer, however, Letter of Credit negotiation charges shall be borne and paid by the Seller.

8.4.11.7 Where necessary, the Stand by Letter of Credit may also be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument as mutually agreed by the Procurer and the Seller. "

29. The above Articles in Procurer-PPA are mostly on the lines of PTC-PPA with minor changes in the time frame such as 'Due Date', furnishing/ reinstating of LC, etc. indicating their back-to-back nature and inter-connectedness thereby implying that TANGEDCO is liable to pay to PTC and that PTC is liable to pay to the Petitioner. However, payment to the Petitioner by PTC including furnishing LC in favour of the Petitioner is not conditional upon the payment to be made and furnishing of LC by TANGEDCO to PTC.

30. PTC has contended that since PPAs are back-to-back in nature, the financial obligations of PTC qua payment against supply of power and furnishing of LC under PTC-PPA is subject to the payment and furnishing of LC by TANGEDCO under Procurer-PPA. PTC has further contended that it is not functioning as a Merchant Trader in the instant case and its role is that of an intermediary between the Petitioner and TANGEDCO without taking upon itself the financial and commercial risks. In support of its contentions, PTC has relied upon various judgments of APTEL and Hon’ble High Court of Delhi.

31. It is not in dispute that the terms of PPAs i.e. PTC-PPA as well as Procurer-PPA make it clear that supply to TANGEDCO is from an identified source i.e. the Petitioner’s generating station and that end consumer/ ultimate beneficiary of the Petitioner’s generating station to the extent of 100 MW is TANGEDCO. Also, as noted above, both the PPAs are back-to-back in nature and are inextricably linked. However, having said that, in our view in terms of provisions of Articles 6 and 8 of the PTC-PPA, it does not follow that the payment obligation of PTC to the Petitioner is conditional upon corresponding obligation of TANGEDCO. The commercial and

financial risk undertaken by trader has to be ascertained from the express provisions of the PPAs, which in present case clearly establish that they are not conditional as claimed by PTC. We also note that in PTC-PPA, PTC has suitably modified time-frame for various financial obligations qua the Petitioner such as 'Due Date' for payment of invoices, for furnishing/ reinstating of LC, etc., which appears to be solely for the purpose of safeguarding/ limiting its commercial and financial risks.

32. It is also pertinent to note that PTC itself has stated that it has been making payment to the Petitioner from its resources irrespective of whether it has received the payment from TANGEDCO. In our view, it clearly indicates that even PTC has recognized and understood that its obligation of payment to the Petitioner under PTC-PPA is not subject to receipt of the corresponding payment by TANGEDCO under Procurer-PPA. It is settled law that parties' own understanding and conduct is a relevant factor in the process of interpretation of terms of the contract. In this regard, Hon'ble Supreme Court in its judgment in the case of Godhra Electricity Co. Ltd. and Another v. State of Gujarat and Another [(1975)1SCC 199] has held as under:

> *"11. In the process of interpretation of the terms of a contract, the court can frequently get great assistance from the interpreting statements made by the parties- themselves or from their conduct in rendering or in receiving performance under it. Parties can, by mutual agreement, make their own contracts; they can also, by mutual agreement, remake them. The process of practical interpretation application, however, is not regarded by the parties as a remaking of the contract; nor do the courts so regard it. Instead, it is merely further expression by the parties of the meaning that they give and have given to the terms of their contract previously made. There is no good reason why the courts should not give great weight to these further expressions by the parties, in view of the fact that they still have the same freedom of contract that they had originally. The American Courts receive subsequent actions as admissible guides in interpretation. It is true that one party cannot build up his case by making an interpretation in his own favour. It is the concurrence therein that such a party can use against the other party. This concurrence may be evidenced by the other party's express assent thereto, by his acting in accordance with it, by his receipt without objection of performances that indicate it, or by saying nothing when knows that the first party is acting on reliance upon the interpretation."*

33. PTC has argued that it cannot make payment indefinitely from its own resources. The rights/ remedies available to the Petitioner under PTC-PPA are on back-to-back basis of rights/ remedies available to PTC under Procurer-PPA. Perusal of the provisions of Procurer-PPA clearly indicates that PTC has appropriate remedy available in case TANGEDCO fails to provide LC or make timely payments of dues for the energy supplied. Needless to say, both PTC and TANGEDCO have failed in making payment to the Petitioner against bills raised and providing LC in terms of the PTC-PPA/ Procurer-PPA and the same has led to filing of this Petition.

34. Thus, in our view, in terms of the provisions of the PTC-PPA, the Respondent PTC is liable to make payment to the Petitioner for electricity supplied to TANGEDCO and also provide LC to the Petitioner in terms of the PTC-PPA.

Issue No. 3: Whether the Petitioner has rightly invoked Article 8.5 of the PTC-PPA? Whether the Petitioner is entitled to capacity charges along with penalties deducted/ withheld by the Respondents from the invoices for the months of December 2018, January 2019 and February 2019?

35. The Petitioner has submitted that despite repeated requests, the Respondents have not only failed to make timely payment to the Petitioner but also failed to open LC in favour of the Petitioner. Accordingly, the Petitioner was constrained to invoke Article 8.5.2 read with Article 8.5.5 of the PTC-PPA (Third Party Sales on Default) w.e.f. 20.12.2018. However, the Respondents have not only deducted/ withheld the capacity charges towards the 'default electricity' but also imposed penalty on the Petitioner in the invoices raised by the Petitioner for the months of December 2018 to February 2019, which is contrary to provisions of Article 8.5.8 of the PTC-PPA. Accordingly, the Petitioner has prayed that the Respondents may be directed to forthwith pay the deducted/ withheld amount

against the bills raised by the Petitioner for the months of December 2018 to February 2019 i.e. penalty imposed and unpaid capacity charges.

36. PTC, in its letter dated 17.12.2018 has contended that since the PTC-PPA and Procurer-PPA are back-to-back in nature, the Petitioner's action towards supply of 25% of power or 100% of power to third party is not tenable as PTC itself has not received payment security mechanism from TANGEDCO, whereas TANGEDCO in its letters dated 13.2.2019 and 27.2.2019 has submitted that TANGEDCO is not liable to payment for capacity charges for the non-supply period. TANGEDCO in the said letters has further stated that since the payment delay is protected by the late payment surcharge in terms of Article 8.3.5 of the PPA and that LC has been opened in favour of PTC as per its request, the claims towards capacity charges for non-supply period is to be withdrawn.

37. We have noted the submissions of the parties. In this regard, it is relevant to refer to the Article 8.5 of the PTC-PPA, which is extracted as under:

> *"Schedule-I Deviations from the Procurer-PPA*
>
> *8.5. Third Party Sales on Default*
>
> *8.5.1 Upon the occurrence of an event where PTC has not made payment by the Due Date of an Invoice through the Payment Mechanism provided in the PTC-PPA, the Company shall follow the steps as enumerated in Articles 8.5.2 and 8.5.4.*
>
> *8.5.2 On the occurrence of the event mentioned in Article 8.5.1, Company and PTC shall make joint efforts to sell the contracted power to third parties as per the terms and conditions of the Procurer(s)-PPA and PTC-PPA after giving a notice of at least seven (7) days to the Procurer, the Company/PTC shall have the right to offer twenty five (25) per cent of the Contracted Capacity pertaining to defaulting Procurer ("Default Electricity") for sale to third parties.*
>
> ***…8.5.4 : Deleted***
>
> *8.5.5 If the Standby Letter is not fully restored by PTC/Procurer within thirty (30) days of the non-payment by the PTC/Procurer of an Invoice by its Due Date, the provisions of Article 8.5.2 shall apply with respect to one hundred per cent (100%) of the Contracted Capacity.*

…

8.5.8 The liability of PTC towards making Capacity Charge payments to the Company even for Default Electricity sold to third parties or remaining unsold during such periods will remain unaffected."

38. Thus in terms of the above provisions, even in case of failure on the part of PTC to make payment to the Petitioner for supply of power, the PTC-PPA conceives joint efforts on the part of the Petitioner and PTC to sell power of TANGEDCO to third parties in terms of PTC-PPA and Procurer-PPA after giving a 7 days' notice to TANGEDCO. In such an event, either the Petitioner or PTC can sell 25% power to third parties. Further, if the Standby LC is not fully restored by PTC or TANGEDCO within 30 days of non-payment by PTC or TANGEDCO, then the Petitioner or PTC can sell 100% of capacity to third parties. During the period of sale to third parties, PTC shall have the liability to pay the capacity charges.

39. Similar provisions are contained in the Procurer-PPA, which are reproduced below:

"8.5 Third Party Sales on Default

8.5.1 Upon the occurrence of an event where the Procurer has not made payment by the Due Date of an Invoice through the Payment Mechanism provided in Article 8.4 of this Agreement, the Seller shall follow the steps as enumerated in Articles 8.5.2 and 8.5.5.

8.5.2. On occurrence of the event mentioned in Article 8.5.1 and after giving a notice of at least seven (7) days to the Procurer, the Seller shall have the right to offer twenty five (05) per cent of the Contracted Capacity pertaining to Procurer ("Default Electricity") for sale to third-parties.

....

8.5.5 If the Standby Letter of Credit is not fully restored by the Procurer within thirty (30) days of the non-payment by the Procurer of an invoice by Due Date, the provisions of Article 8.5.2 shall apply with respect to one hundred percent (100%) of the Contracted Capacity.

....

8.5.8 The liability of the Procurer towards making Capacity Charge payments to the Seller event for Default Electricity sold to third parties or remaining unsold during such period will remain unaffected."

Under the above provision of Procurer-PPA, in case of failure to make payment, PTC has the option to sell power to third parties and is entitled for recovery of capacity charges from TANGEDCO.

40. The Petitioner vide its letter dated 11.12.2018 informed PTC regarding delay in payment of the monthly invoices by the due date as well as failure to provide LC in favour of the Petitioner. The Petitioner in the said letter also indicated that the Petitioner would be constrained to invoke provisions of Article 8.5.2 read with Article 8.5.8 of the PTC-PPA in case LC is not provided to the Petitioner and outstanding dues are not paid along with late payment surcharge. The Petitioner also informed PTC to consider the said letter as notice under Article 8.5.2 to enable PTC to take needful action. In response, PTC vide its letter dated 17.12.2018 contested the invocation under said Articles by the Petitioner only on the ground that the PPAs entered into between the parties are back-to-back in nature. It also forwarded the said letter of the Petitioner dated 11.12.2018 to TANGEDCO vide its letter dated 12.12.2018. Thus, requirement of notice in terms of provisions of the PPAs has been satisfied. Subsequently, the Petitioner vide its letter dated 18.12.2018, once again citing the outstanding dues and non-opening of LC, intimated to PTC that it would invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA and requested PTC to arrange for sale of total contracted capacity to third parties w.e.f. 20.12.2018.

41. PTC has contended that since the PPAs are back-to-back in nature and there was delay in payment and opening of LC by TANGEDCO under Procurer-PPA, the

Petitioner could not have invoked Article 8.5.2 read with Article 8.5.5 of the PTC-PPA. TANGEDCO has not disputed the entitlement of the Petitioner in the present proceeding and did not file any reply to the Petition and in the hearing also, the submissions of TANGEDCO were limited to the aspect of liability being that of PTC and not that of TANGEDCO. However, TANGEDCO in its correspondence has contested the same on the ground that the delayed payment is protected by provisions of late payment surcharge as provided in the PPAs. In our view, such contention of TANGEDCO is not acceptable. Under Article 8.5.2 read with 8.5.5 of the PTC-PPA, the Petitioner has been conferred right to exercise Third Party Sale if PTC has not made any payment within due date through the payment security mechanism. This right cannot be restricted on the grounds of the back-to-back nature of the PPA as contended by PTC or that the delayed payment is protected by late payment surcharge as contended by TANGEDCO. It is prerogative of the Petitioner to exercise the rights conferred on it in terms of said Article of the PTC-PPA as long as the conditions/ circumstances specified therein are fulfilled. One provision of the PPA (i.e. Late Payment Surcharge) cannot be read and interpreted in a manner so as to negate or render meaningless and otiose the other provisions of the PPA (i.e. relating to Third Party Sales on Default). Such an interpretation sought to be placed by TANGEDCO on the provisions of the Procurer-PPA is contrary to settled principles of law.

42. It is not in dispute that there has been delay on part of the Respondents to make timely payment towards the invoices raised by the Petitioner. TANGEDCO in its letter dated 4.1.2019 has clearly admitted that since it is facing severe financial crisis, payment towards energy bills under long-term PPAs are outstanding.

TANGEDCO further informed that steps are being taken by it to mobilize funds through various sources and sequential payment will be maintained as and when financial position would improve. PTC in its various letters as well as submissions has taken a stand that since the PPAs are of back-to-back nature, the liability of PTC to make payment as well as furnishing of LC is subject to receipt of the same from TANGEDCO under Procurer-PPA.

43. It is also not in dispute that neither payment security mechanism in the form of LC was provided to the Petitioner in terms of Article 8.4.11 of the PTC-PPA to cater to the invoices raised by the Petitioner, nor the invoices raised by the Petitioner were being paid by the due date in terms of the PPAs. Accordingly, in our view, the Petitioner was entitled to invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA which provides for third party sale of default electricity and consequently to receive the capacity charges towards such default electricity in terms of Article 8.5.8 of the PTC-PPA.

44. According to TANGEDCO, it had provided LC in favour of PTC in February 2019. However, PTC has contested that since the said LC was technically not correct, it was not in a position to open LC in favour of the Petitioner. According to PTC, TANGEDCO provided the revised LC only on 1.8.2019 and the same was issued in favour of the Petitioner on 2.8.2019. It is noted that TANGEDCO has not refuted the contentions of PTC regarding the technical issue with LC provided in February 2019. Regardless of the above, the period in question in the present proceeding is from December 2018 to February 2019 and admittedly during this

period, no LC was issued in favour of the Petitioner towards payment security mechanism. Accordingly, the Petitioner was entitled to invoke the provisions of Article 8.5.2 read with Article 8.5.5 of the PTC-PPA and issue of LC by TANGEDCO to PTC or technical problems with LC as contended by PTC is of no consequence as far as invoking these provisions is concerned.

Carrying Cost

45. The Petitioner has also prayed for grant of carrying cost/ interest @1.25% per month from the date on which the said amount became due till the actual realisation of the same. In this regard, Article 8.4.3 of the PTC-PPA provides for late payment surcharge as under:

> *"8.4.3 Any payment properly due from one party to the another pursuant to this agreement and remaining unpaid after the due date shall bear interest from the date the payment was due, such interest to accrue from day to day at a rate equal to SBIPLR for the time being and from time to time, from the due date until the amount due is actually received by the payee.*
>
> *'Due Date'' shall mean the thirty first (31st) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the PTC or if such day is not a Business Day, the immediately succeeding Business Day, by which date such Monthly Bill or a Supplementary Bill is payable by PTC."*

46. In the foregoing paragraphs, we have already held that the Petitioner is entitled to refund of the capacity charges including the penalty withheld/ deducted by the Respondents, the same being contrary to the provisions of the PTC-PPA and Procurer-PPA. Therefore, PTC is liable to pay such amount including the late payment surcharge in terms of Article 8.4.3 of the PTC-PPA. Further, PPAs being back-to-back in nature, PTC shall be entitled to the said amount from TANGEDCO in

terms of Procurer-PPA and such payment shall be made by TANGEDCO to PTC with late payment surcharge in terms of provisions of the Procurer-PPA.

47. The Petition No. 158/MP/2019 is disposed of in terms of the above.

Sd/-	sd/-	sd/-
(Arun Goyal)	**(I.S. Jha)**	**(P.K. Pujari)**
Member	**Member**	**Chairperson**