

**CENTRAL ELECTRICITY REGULATORY COMMISSION,  
NEW DELHI**

**Petition No. 231/MP/2015**

**Coram:**

**Shri Gireesh B. Pradhan, Chairperson**

**Shri A.K. Singhal, Member**

**Shri A.S. Bakshi, Member**

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

**Date of Order: 29<sup>th</sup> of November, 2017**

**In the matter of**

Petition under Section 79 (1) (c) read with Section 28 of the Electricity Act, 2003.

**And**

**In the matter of**

Coastal Gujarat Power Limited  
34, Sant Tuka Ram Road Carnac Bunder,  
Mumbai-400 021

**.....Petitioner**

**Vs**

1. Western Regional Load Despatch Centre  
F-3, MIDC Area, Marole,  
Andheri (East), Mumbai-400 093

2. National Load Despatch Centre  
B-9, Qutab Institutional Area,  
Katwaria Sarai, New Delhi-110 016

3. Northern Regional Load Despatch Centre  
18-A, Shaheed Jeet Singh Sansanwal Marg,  
Katwaria Sarai, New Delhi-110 016

4. Power Grid Corporation of India Ltd.  
Saudamini, Plot No. 2, Sector 29,  
Near IFFCO Chowk, Gurgaon-122 001, Haryana

5. Gujarat UrjaVikas Nigam Limited Sardar Patel  
Vidyut Bhawan Race Course, Vadodara-390 007  
Gujarat

6. Maharashtra State Electricity Distribution Company Limited  
4th Floor, Prakashgad,  
Plot No. G-9 Bandra (East), Mumbai-400 051, Maharashtra

7. Ajmer Vidyut Vitaran Nigam Limited  
HathiBhata, Old Power House Ajmer, Rajasthan

8. Jaipur Vidyut Vitaran Nigam Limited  
Vidyut Bhawan, Janpath Jaipur, Rajasthan

9. Jodhpur Vidyut Vitaran Nigam Limited  
New Power House, Industrial Area Jodhpur, Rajasthan

10. Punjab State Power Corporation Limited  
The Mall, Patiala, Punjab

11. Haryana Power Generation Corporation Limited  
Room No. 329, Sector 6 Panchkula, 134 109, Haryana

12. Union of India  
Through Secretary, Ministry of Power  
Shram Shakti Bhavan, New Delhi-110001

... Respondents

**Parties present:**

**For Petitioner:**

Shri Amit Kapur, Advocate, CGPL  
Shri Apoorva Misra, Advocate, CGPL  
Shri Vishrov Mukerjee, Advocate, CGPL

**For Respondents:**

Shri Sitesh Mukherjee, Advocate, WRLDC  
Ms. AkanshaTyagi, Advocate, WRLDC  
Shri Raveena Dhamija, Advocate, WRLDC  
Shri M.G.Ramachandran, Advocate, Rajasthan and Gujarat  
Ms.Ranjitha Ramachandran, Advocate, Rajasthan and Gujarat  
Shri Anand K. Ganesan, Advocate, PSPCL

**ORDER**

The Petitioner, Coastal Gujarat Power Limited, has filed the present petition, under section 79(1)(c) read with Section 28 of the Electricity Act, 2003 (the Act) for

securing enforceability of its rights to sell power to third parties after following the due process stipulated under the Power Purchase Agreement entered between the Petitioner and the beneficiaries of the Mundra Ultra Mega Power Project, particularly in the context of the difference of interpretation of the scope of section 28(3)(a) of the Act between the Petitioner and National Load Despatch Centre/Regional Load Despatch Centres..

### **Background of the Case**

2. The Petitioner, Coastal Gujarat Power Limited (CGPL), a subsidiary of Tata Power Company Ltd, has set up a 4000 MW Ultra Mega Power Project at Mundra in the State of Gujarat (Mundra UMPP) based on imported coal after Tata Power Company Ltd was selected as the successful bidder based on the competitive bidding carried out in accordance with the Guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 (2003 Act). The tariff of Mundra UMPP has been adopted by this Commission under Section 63 of the 2003 Act vide order dated 19.9.2007 in Petition No. 18/2007. The Petitioner has entered into a Power Purchase Agreement (PPA) dated 22.4.2007 with the distribution companies in the States of Gujarat, Maharashtra, Rajasthan, Punjab and Haryana for supply of 3800 MW power from Mundra UMPP for a period of 25 years, namely, Gujarat UrjaVikas Nigam Limited (GUVNL), Maharashtra State Electricity Distribution Company Limited (MSEDCL), Ajmer Vidyut Vitaran Nigam Limited (AVVNL), Jaipur Vidyut Vitaran Nigam Limited (JVVNL), Jodhpur Vidyut Vitaran Nigam Limited (JdVVNL), Punjab State Power Corporation Limited (PSPCL) and

Haryana Power Generation Corporation Limited (collectively referred to as "Procurers"). The Power Purchase Agreement was amended by a Supplemental Power Purchase Agreement dated 31.7.2008.

3. Article 14.2(i) of the PPA provides that Procurer's event of default will occur if a defaulting Procurer fails to pay with respect to monthly bill or supplementary bill an amount exceeding 15% of the most recent undisputed monthly bill for a period of 90 days after the due date and the Seller is unable to recover the amount outstanding to the Seller through the collateral arrangement and letter of credit. On occurrence of such event, the Seller without prejudice to its right under Article 14.4.1 shall give a Seller Preliminary Default Notice under Article 14.4.2 to the defaulting Procurer. The Seller Preliminary Default Notice shall be followed by a consultation period of 90 days. As per Article 14.4.5 of the PPA, unless the default is remedied within the consultation period, the Seller shall have the right to sell the contracted capacity and associated available capacity to a third party from the 8<sup>th</sup> day following the expiry of the consultation period. The defaulting Procurer in such event shall have the liability to make payment of capacity charges based on the normative availability for the period of three years from the 8<sup>th</sup> day following the expiry of the consultation period and any excess realization made over and above the energy charges by sale to third parties shall be used to reduce the capacity payment charges by the defaulting Procurer. At the end of three years, the agreement shall automatically terminate qua the defaulting Procurer and the defaulting Procurer shall have no further capacity charge liability towards the Seller.

The PPA further provides that the Seller shall have the right to terminate the agreement with respect to such procurer even before the expiry of three year period and on such termination, the liability of the defaulting Procurer for future capacity charges shall cease immediately.

4. The Petitioner vide its letter dated 2.1.2013 gave a notice of termination of PPA to Ajmer Vidyut Vitaran Nigam Limited, Jaipur Vidyut Vitran Nigam Limited and Jodhpur Vidyut Vitran Nigam Limited (collectively known as “the Rajasthan Procurers”). As per the said termination notice, Rajasthan Procurers failed to establish the collateral arrangements in terms of Article 11.4.1 and 11.4.2 of the PPA dated 22.4.2007 (putting in place letter of credit, operationalizing the default escrow agreement and creating first ranking pari-passu charge on revenues and receivables) before 45 days of commercial operation of Unit 1 of Mundra UMPP i.e. by 21.1.2012. Thereafter, the Petitioner issued a Notice dated 26.3.2012 under Article 14.2(iii) of the PPA to Rajasthan Procurers to fulfill the obligations qua collateral arrangements with a period of 30 days from the date of issue of notice. On expiry of the said notice period, the Petitioner issued a Seller Preliminary Default Notice dated 26.3.2012 to the Rajasthan Procurers asking the latter to put in place the collateral arrangements within 90 days of consultation period from the date of issue of notice. The Petitioner vide its letter dated 23.8.2012 informed the Rajasthan Procurers that it no longer was obliged to supply power under the PPA on account of the latter’s failure to put in place the collateral arrangements. However, the Petitioner in the said letter informed the Rajasthan Procurers that it was offering to

continue to supply power in good faith as per the PPA till the revised tariff is mutually agreed upon or determined by this Commission (Petition No.159/MP/2012 was pending consideration of the Commission at that point of time). After commercial operation of Unit 2 and 3 of Mundra UMPP on 15.6.2012 and 12.9.2012, the Petitioner vide its letter dated 19.10.2012 asked the Rajasthan Procurers to establish enhanced letter of credit which was not established. After narrating the sequence of events as mentioned above, the Petitioner vide letter dated 2.1.2013 informed the Rajasthan Procurers that on account of failure to establish the collateral arrangements and failure pay the invoices raised (Rs.96.29 crore upto December 2012 without surcharge), supply of power would be discontinued after 24 hours after receipt of notice and the Petitioner's obligations under the PPA towards Rajasthan Procurers would stand discharged/terminated.

5. On receipt of this letter dated 2.1.2013, CMD Jaipur Vidyut Vitran Nigam Limited (JVVNL) vide letter dated 4.1.2013 informed the CEO, CGPL that the payments for the bills received have been made and bills for December 2012 were yet to be received. CMD disputed the termination notice as not valid as per the provisions of Article 14.4.5 of the PPA and advised the Petitioner to continue to supply power to Rajasthan Procurers and assured about the payment by due dates in future. CMD JVVNL also wrote another letter dated 4.1.2013 in which the Petitioner was requested not to take any ex-parte decision to terminate the PPA without giving the Rajasthan Procurers an opportunity of hearing and suggested a

joint meeting to be organized by the Petitioner to enable the Rajasthan Procurers to convince about no default on their part.

6. On 3.1.2013, the Petitioner wrote to Western Regional Load Despatch Centre (WRLDC) enclosing a copy of the letter dated 2.1.2013 and informed that with the issue of the above termination letter, the PPA between CGPL and Rajasthan Procurers stood terminated and requested WRLDC not to schedule the share of Rajasthan Procurers with effect from 0000 hrs of 6.1.2013. The Petitioner further requested WRLDC to schedule 90% of the share of other Procurers as per the PPA and facilitate sale of 10% share of Rajasthan Procurers at the Power Exchange. WRLDC in its letter dated 4.1.2013 replied that the letter of the Petitioner was referred by WRLDC to SLDC, Rajasthan who stated that the PPA had not been terminated and 10% share of Rajasthan Procurers be scheduled to them. WRLDC further informed that a dispute appeared to have arisen in the case and status quo should be maintained till the dispute was resolved.

7. The Petitioner vide its letter dated 5.1.2013 has informed WRLDC that its refusal to accept the request of the Petitioner to stop scheduling of related contracted capacity to Rajasthan Procurers violates the statutory obligations of the WRLDC in terms of Section 28(2) of the Act, and Regulations 3 and 8 of the Central Electricity Regulatory Commission (Indian Electricity Grid Code) Regulations, 2010 (Grid Code). The Petitioner has further stated in the said letter that Section 28(3) of the Act does not empower WRLDC to go into the question of validity of termination of PPA and WRLDC's decision to maintain status quo and continue scheduling of

power to Rajasthan Procurers on the ground that termination of the PPA is in dispute is not valid.

8. With reference to the Petitioner's letter dated 5.1.2013, CMDJVVNL intimated vide its letter dated 6.1.2013 that the Rajasthan Procurers have fulfilled all the obligations required under the PPA and have conveyed the same to CEO, CGPL. Among the fulfillment of the obligations, CMDJVVNL has stated that all outstanding payments including December bill have been cleared; LC amounting to Rs.48.50 crore has been opened; default escrow mechanism is operational right from 22.4.2007 and continued to be in operation; and clause 2:2:1 of the agreement to hypothecate-cum-deed of hypothecation dated 22.4.2007 clearly stipulates that first priority in pari-passu charge is in favour of CGPL. It has been stated in the said letter that there has been no breach of the PPA by Rajasthan Procurers and their shares from Mundra UMPP be continued to be scheduled.

9. WRLDC in its mail dated 6.1.2013 advised the Petitioner to take up with the Adjudicator of the PPA in case of any dispute with Rajasthan Procurers and WRLDC would follow the decision of the adjudicator and till then, status quo on scheduling of power from Mundra UMPP to Rajasthan Procurers would be maintained. On 6.1.2013, WRLDC informed the Rajasthan Procurers that status quo with respect to supply of power was being maintained. On 7.1.2013, WRLDC informed the Petitioner that status quo with respect to supply of power to Rajasthan Procurers was being maintained. On 8.1.2013, the Petitioner wrote a letter to WRLDC protesting the status quo with respect to scheduling of power.



10. As on the date of filing the petition before the Commission, the dispute between the Petitioner and Rajasthan Procurers has been settled pursuant to a compromise reached between the parties. However, CGPL has expressed its concern that there was and continue to be no regulations/guidelines to address the issue of scheduling of power by the RLDCs in accordance with the provisions of the PPA. In this connection, the Petitioner wrote letter dated 15.11.2013 to Secretary (Ministry of Power), letter dated 13.5.2014 to Joint Secretary (Ministry of Power), letter dated 9.4.2014 to this Commission to put in place a mechanism under which load dispatch centres are obliged to enforce the provisions of the PPA, particularly with regard to non-scheduling/regulations of supply of electricity by the defaulting procurers. The Petitioner has also written a letter to the Commission for amendment of the Regulation of Supply of Power Regulations and enacting appropriate regulation providing for a mechanism of regulation of supply of power in case of termination of PPA and for issue of appropriate directions to Load Despatch Centres.

11. In the above background, the Petitioner has filed the present petition with the following prayers:

“Declare Despatch Centre`s refusal to schedule electricity as per the directions of the generators in the instances where the PPA allows for third party sales, including in the event of termination of PPA, as illegal and contrary to the provisions of the Electricity Act;

(b) Initiate appropriate proceedings as per the procedure provided under the Electricity Act, to issue a regulation or issue appropriate guidelines/order obligating the Despatch Centers to comply with the request of generating companies to schedule power to third party if the PPA allows for the sale of power to third parties, including in the event of termination of the PPA.”

## **Case of the Petitioner**

12. The Petitioner has submitted that in terms of Section 79(1)(c) read with Section 28 of the Act, this Commission has a pre-eminent role on the matter of inter-State transmission of electricity. Since the Petition raises concerns regarding the working and understanding of the statutory role stipulated for the Load Despatch Centers under the Act, with specific reference to section 28, this Commission has the jurisdiction to entertain the present petition. The Petitioner has further submitted as under:

- (a) It is the bounden duty of the Load Despatch Centre to act in accordance with the objects of the Act which stipulates for taking measures conducive to the development of electricity industry and promoting competition therein. The stand adopted by WRLDC jeopardises the investments made by the Petitioner and creates apprehensions for future investments, thus defeating very objects of the Act.
  
- (b) Section 28(3)(a) of the Act provides that RLDCs shall be responsible for optimum scheduling and dispatch of electricity within the region in accordance with the contracts entered into with the licensees or the generating companies operating in the region. The refusal of WRLDC to schedule power on the instructions of CGPL on the ground that CGPL should either seek consent of the concerned defaulting Procurer or obtain the order of the appropriate Commission confirming the termination of the PPA are extraneous and contrary to section 28 of the Act.

(c) The Hon'ble Supreme Court in Tata Power Company Vs. Reliance Energy Limited & Others {(2009) 16 SCC 659} has upheld the generator's freedom to contract and sell power. The stand taken by WRLDC apart from being contrary to Section 28(3)(a) of the Act also violates the vested rights of the generator to sell the electricity to any third party of its choice. In this connection, the Petitioner has relied upon the judgments of the Appellate Tribunal in Tata Power Company Limited Vs. MERC &Ors {2004 ELR (APTEL) 1}, Parrys Sugar Industries Limited Vs KERC {2012 ELR (APTEL) 1228} and Sohan Mannapitlu Power Pvt. Limited Vs KERC {2014 ELR (APTEL)} and the order of this Commission dated 3.12.2007 in Petition No. 108/2007 {Tata Power Company Limited & Anr Vs. WRLDC}.

(d) If the PPA provides for third party sale of power upon termination or default, then a legal right is created in favour of the generator in the event of such default or termination. The right created under the terms of the PPA can be taken away by mutual consent of the parties or pursuant to a regulation. Therefore, the vested right of the generator to sell power to third parties cannot be taken away by the RLDCs acting in contravention of the objects of the Act and section 28 of the Act.

(e) The statutory role of RLDCs as per Section 28(3) are in disjunction with the provisions of the PPA which provides for scheduling of power to any third party. Therefore, there is an urgent necessity to evolve a mechanism to bring coherence between the PPA and the statutory role of the RLDCs for effective

implementation of PPA provisions. In accordance with the judgment of the Appellate Tribunal in Essar Power Limited V. UPERC {(2012) ELR (APTEL) 182}, the role of the Commission continues throughout the terms of the PPA in terms of sections 61 and 79 of the Act read with Paras 4.7 and 5.17 of the Competitive Bidding Guidelines.

- (f) The Central Electricity Regulatory Commission (Regulation of Power Supply) Regulations, 2010 (hereinafter “RPS Regulations”) cover a limited number of events envisaging sale of power to third parties, namely, non-payment of outstanding dues and non-maintenance of letter of credit, or any other agreed payment security mechanism. In contrast to the aforesaid, the PPAs cover additional circumstances providing for third party sale as mentioned in Article 14.2 (ii) to (vi) of the PPA. Therefore, there is an impending need to promulgate regulations and/or make guidelines including all possible scenarios identified in the PPAs. In the light of the judgment of Hon’ble Supreme Court in PTC India Limited Vs. CERC {(2010) 4 SCC 603}, the Commission has the option of either issuing regulations or an order on any aspect which is within its regulatory jurisdiction.

### **Replies of the Respondents**

13. A combined reply to the petition has been filed by Western Regional Load Despatch Centre (WRLDC), National Load Despatch Centre (NLDC), Northern Regional Load Despatch Centre (NRLDC). Replies to the petition have also been filed by Rajasthan Procurers and Gujarat UrjaVikas Nigam Limited (GUVNL). The

petitioner has filed rejoinders to the replies. The submissions of the respondents have been discussed in brief in succeeding paragraphs.

14. Western Regional Load Despatch Centre, National Load Despatch Centre, Northern Regional Load Despatch Centre (LDCs) in their combined reply dated 4.2.2016 have raised a preliminary objection with regard to maintainability of the petition, particularly with regard to amendment of the RPS Regulations. The Commission has held in several petitions that filing of the petition is not the proper process for initiating amendment to the existing regulations. Further, the LDCs have made the following preliminary submissions:

(a) The Petitioner vide its letter dated 3.1.2013 informed WRLDC that the PPA between CGPL and Rajasthan Procurers stands terminated on account of failure of Rajasthan Procurers to establish collateral arrangements and it intends to sell the balance power (10% of the contracted capacity) at Power Exchanges. However, AVVNL vide its letter dated 4.1.2013 informed that since all the payments of bills received that far has been paid and the bills for the month of December 2013 have not been received, termination letter sent by CGPL is not valid as per Article 14.4.5 of the PPA and therefore, its 10% share has to be scheduled to it.

(b) WRLDC, vide its letter dated 4.1.2013, informed the Petitioner that since there is a dispute on the termination of the PPA, status quo on scheduling would be maintained till the dispute is resolved. Subsequently, aggrieved by

the decision of the Petitioner, Rajasthan Procurers filed Writ Petition No. 403 of 2013 before the Hon`ble Rajasthan High Court. However, instead of pursuing the matter, the Petitioner withdrew the notice terminating the power supply and the matter was amicably settled between the parties.

(c) As per Section 28(3) of the Act, RLDC is required to schedule and despatch electricity in terms of existing contracts or where there is no such contract, then in terms of the applicable regulations. Therefore, RLDC cannot take any action based on the unilateral suggestion of one of the parties to the contract. The Appellate Tribunal vide its judgment dated 5.9.2014 in Appeal No. 171 of 2013 (Ravikiran Power Projects Pvt. Ltd. Vs. State Load Despatch Centre and others) has held that in case of application of NOC for such power for which there exists a valid PPA, the NOC cannot be granted while ignoring the claim of the procurers.

(d) For sale of power through open access to third party, it is to be demonstrated that finality has been attained for sale of such power to third party i.e. contract has been terminated. Rajasthan Procurers vide their letters dated 4.1.2013 and 6.1.2013 have refuted procurers' event of default and there is no such evidence from the Rajasthan Procurers not to schedule the power in their favour.

(e) RLDC is not the appropriate forum to determine whether or not a termination or default notice is valid, as such issues can only be adjudicated by the

Commission. RLDC can only schedule power as per the contract entered into between the parties.

- (f) Since the PPA along with long term access for the entire capacity of the project exists, allowing sale of power to third party on the basis of the Petitioner's letter claiming procurer's event of default, would not be in line with the Act, Grid Code and various other regulations of the Commission.
- (g) RPS Regulations apply to only those contracts where there is a specific provision for regulating the supply. In case of disputes arising out of the PPA for non-payment of outstanding dues or non-maintenance of Letter of Credit or any other agreed Payment Security Mechanism, Regulation 4 of the Power Supply Regulations will apply. Further, RPS Regulations are reversible in nature i.e. once the default is cured, power can again be scheduled to the beneficiary based on the advice of the generator. Moreover, Article 11 of the PPA is also reversible in nature as it provides that once the default is cured, the power can again be scheduled to the beneficiary.
- (h) PPA provides for two different scenarios. Article 11.4.2 of the PPA provides for a temporary arrangement i.e. collateral arrangement where power can be scheduled back to the original procurer, once the default is cured. Article 14.4 of the PPA provides for a permanent arrangement i.e. termination of PPA for Procurers' event of default. Article 11.5 of the PPA provides for third party sale in the case of procurer's event of default in making the payment by

the due date of an invoice. Article 11.5.3 (a) of the PPA enables the seller to sell the default power to any third party subject to applicable law. Therefore, in terms of the RPS Regulations, power supply can be regulated.

- (i) Article 14.4.5 of the PPA provides for the termination of PPA in case of procurer's event of default whereas Article 11.5.7 of the PPA provides that the sale to third party will cease upon payment of due amount by the procurer in default. A con-joint reading of Articles 11.5.7 and 11.4.5 of the PPA provides that if the procurer's liability to make payment of the capacity charges on normative availability continues for a period of three years and the PPA terminates only after this three years period. Therefore, harmonious construction of RPS Regulations and the PPA is necessary in order to deal with the Procurer Event of Default.

15. Rajasthan Procurers, vide their combined reply dated 4.2.2016 have submitted that the issue regarding the alleged default of the Rajasthan Procurers has been resolved and there is no outstanding issue in this regard. Rajasthan Procurers have submitted that Despatch Centers are responsible for supervision and control over transmission system and optimum scheduling and despatch of electricity in accordance with the contracts entered into with the licensees or the generating companies. Therefore, there can be no scheduling of power contrary to the contract or the PPA. Further, the PPA provides for sale of power to third parties which can only be made if the procurers agree to such sale of power and not otherwise. In case, the procurers of power do not concur with the sale of power to



third parties, then the Despatch Centre cannot schedule power on the unilateral pleas of termination or invalidity of the PPA, ignoring the claim of the procurers. Rajasthan Procurers have submitted that if there is any breach or default on the part of any procurers, the generator is required to get adjudication on the alleged breach or default before the Appropriate Commission before claiming that it is entitled to exercise the consequential relief provided in the PPA. Rajasthan Procurers have further submitted that the Despatch Centers neither have the authority nor the jurisdiction to decide on disputes between the parties, *inter-alia* on whether the generator is entitled to sell power to third party or not. There is already a defined role and mechanism to be adopted by the Despatch Centers as settled by the Appellate Tribunal in Appeal No. 171 of 2013 (Ravikiran Power Projects Pvt. Ltd. Vs. State Load Despatch Centre and others). As regards the various issues raised by the Petitioner, Rajasthan Procurers have submitted as under:

- (a) The actions of RLDCs are neither contrary to the objects of the Act nor Section 28 of the Act. The object of the Act cannot be construed to mean that the generating companies should be allowed to supply power as per the whims and fancies and contrary to the PPA. The RLDCs have neither sought to put any fetters on the supply of power but have sought to act as per the PPA. The RLDCs neither have the authority nor the jurisdiction to decide on the disputes between the parties *inter alia* on whether the PPA has been terminated or not or whether the generator is entitled to sell power to third parties or not. Therefore, RLDCs have rightly insisted on either concurrence

of the Procurers or the order of the Commission. As regards the freedom of the generator, it has been submitted that the Petitioner has already entered into the PPA with the Procurers including Rajasthan Procurers for supply of power and has also agreed to the limited circumstances and conditions and modalities for effecting third party sales. Having entered into the PPA, the Petitioner cannot claim that it has freedom to sell the contracted power to third parties. The Petitioner's right to sell power to third parties arises on occurrence of certain events and whether such events have occurred have to be either agreed by both parties or adjudicated by the Commission. It is not open to CGPL to circumvent the jurisdiction of the Commission by approaching RLDCs directly for sale of power to third parties.

- (b) There is no impact on the bankability or financial standing of the generators on account of the stand of RLDCs as the generator in case of default by a Procurer is free to approach the Commission and seek directions including for sale of power to third parties which will be binding on the generators.
- (c) As regards the submission of the Petitioner for coherence between Section 28 of the Act and PPA provisions, it has been submitted that the defined role and mechanism to be adopted by the Load Despatch Centres has been settled by the Appellate Tribunal in Ravikiran's case. The generator cannot be permitted to schedule power to third parties unilaterally without either the consent of the Procurer or order of the Commission. This maintains the

sanctity of the contract. There is no impediment for implementation of the PPA by requiring adjudication by the Commission.

(d) Even under Power Supply Regulations, in case of dispute on whether there is a default or not, the generator cannot unilaterally stop scheduling power to the Procurer and such dispute shall be adjudicated or orders to be issued by the appropriate authority.

(e) The present case does not merit issuance of any regulations or mechanism. The rights of the Procurers to receive supply of power as per the PPA ought not to be taken away without a proper and specific adjudication by the Commission in the facts and circumstances of each case.

16. Gujarat UrjaVikas Limited (GUVNL) in its capacity as the lead procurer has made similar submissions as those of Rajasthan Procurers which are not repeated for the sake of brevity.

### **Rejoinders of the Petitioner**

17. The Petitioner in its rejoinder to the reply of NLDC/WRLDC/NRLDC has submitted that WRLDC is a statutory authority enjoined with the responsibility to schedule power in accordance with the PPA. The refusal of WRLDC to allow the Petitioner to exercise its rights under the PPA and sell power to third parties in accordance with the provisions of the PPA is in clear violation of the functions of WRLDC prescribed under Section 28(3)(a) of the Act. As regards the RPS Regulations, the Petitioner has submitted that it sought to sell power to third parties

by exercising its rights under Article 14 of the PPA which relates to material breach of obligations and not under Article 11 and accordingly RPS Regulations have no bearing in this case. The Petitioner has submitted that in terms of Article 14.4.5 of the PPA, in the event of Procurer's default, the Petitioner has the right to sell power to third parties upon the three conditions being fulfilled, namely, issuance of a Seller's Preliminary Default Notice to the Procurers setting out the circumstances giving rise to issue of such notice; completion of consultation period of 90 days; and unless the Procurer's event of default has been remedied or parties have agreed to otherwise, the Petitioner is entitled to sell power to third parties upon expiry of 7 days after the 90 days consultation period. The Petitioner has submitted that unlike Article 17 which requires the parties to approach the Commission in case of dispute not being resolved, Article 14.4.5 is a special provision and does not require any reference or adjudication by the Commission. The Petitioner has submitted that Article 14.4.5 is a special provision outside the scope of the Article 17. The Petitioner has submitted that upon delivery of a Seller's default notice, the Procurers have the right to raise dispute vis-a-vis the Seller's Preliminary Default Notice in terms of Article 17 and take suitable measure thereunder. According to the Petitioner, the Procurer can raise dispute regarding the default notice prior to the expiry of the conditions precedent stipulated under Article 14.4.5 of the PPA. The Petitioner has also submitted that there is no requirement for any finality to have occurred for sale of power to third party since Article 14.4.5 envisages sale to third parties for a period of three years with the option to the Petitioner to terminate the PPA at any time within the said period. The Petitioner has submitted that the PPA

itself includes instances where sale to third parties is permitted without there being need to terminate the PPA. The Petitioner has submitted that there is no disjunction between the PPA and the obligations of RLDCs under the Act. The Petitioner has submitted that the alleged disjunction has been created by RLDCs by not giving effect to the terms of the PPA in complete disregard to its statutory obligations under Section 28 of the Act.

18. The Petitioner in its rejoinder to the reply of the Rajasthan Procurers has made similar submissions as made in the rejoinder to the reply of NLDC/WRLDC/NERLC which is not repeated for sake of brevity.

#### **Submissions during the hearing**

19. Learned counsel for the Petitioner submitted that insistence on prior consent of procurers/adjudication of Procurer's event of default before allowing the generating company to exercise its rights under Article 14.4.5 of the PPA results in introducing new conditions which is not permissible. Learned counsel further submitted that the actions of the Despatch Centres infringes upon the freedom given to the generating companies to contract and sell power to third parties under Article 14.4.5. Learned counsel further submitted that the RPS Regulations cover limited number of events envisaging sale of power to third parties, namely, non-payment of outstanding dues and non-maintenance of Letter of Credit or any other agreed payment security mechanism whereas the PPA covers additional circumstances providing for third party sale. Learned counsel submitted that the Petitioner is not seeking amendment of the RPS Regulations and the Commission may consider to issue appropriate

guidelines in this regard. Learned counsel for NLDC/WRLDC/NRLDC submitted that WRLDC being only a system operator could not adjudicate the dispute regarding occurrence of a procurer event of default and validity of the termination notice. Learned counsel for Rajasthan Procurers and GUVNL submitted that the petitioner's prayer, if allowed, would be against the principle of natural justice that no man can be a judge in his own cause. Learned counsel further submitted that the RLDCs do not have the authority to adjudicate whether there has been material breach of PPA or not. If the contract provides for sale of power to third parties on a default of the procurer and the generator claims the occurrence of such default but the procurer does not concur, the RLDC cannot schedule power ignoring the claim of the procurer. Learned counsel also submitted that the petitioner was obligated under Article 11.5 of the PPA to offer 25% of the contracted capacity of the defaulting procurer to other non-defaulting procurers and only in case such non-defaulting procurers waive their right to receive power, would the seller have the right to sell power to a third party. Learned counsel submitted that the Petitioner has a limited right to sell power and cannot be allowed to unilaterally direct sale of power to third parties.

**Analysis and Decision:**

20. We have considered the submissions of the Petitioner and the Respondents. Rajasthan Procurers have been allocated 10% of the contracted capacity in the in Mundra UMPP .i.e. 380 MW (JVNL: 136.80 MW, AVNL: 136.80 MW and JhVNL: 106.40 MW). The Petitioner issued a termination notice to Rajasthan

Procurers for Procurer's event of default and terminated the PPA qua Rajasthan Procurers against which Rajasthan Procurers moved the High Court of Rajasthan. Subsequently, Both the Petitioner and Rajasthan Procurers resolved the issue amicably. In the present petition, both Petitioner and the Respondents agree that the dispute between the Petitioner and Rajasthan Procurers have been amicably resolved. However, the Petitioner in the present petition has sought a declaration that the RLDC's refusal to schedule electricity as per the directions of the generator in the instances where PPA allows for third party sale including in case of termination of PPA are illegal and contrary to the provisions of the Act. The Petitioner has also sought indulgence of the Commission to initiate appropriate proceedings under the Act to issue a regulation or appropriate guidelines/order obligating the RLDCs to comply with the request of the generator to schedule power to third party if the PPA allows for sale of power to third parties, including in the event of termination of power.

21. According to the Petitioner, refusal by RLDCs to schedule power to third parties in the event of termination of PPA is in violation of the statutory responsibility vested in the RLDC under Section 28 of the Act to schedule power in terms of the contract with generating company or licensee, especially when the PPA enables the generator to sell power to third party after termination of PPA qua a beneficiary or beneficiaries. According to NLDC/WRLDC/NRLDC, the System Operator is not expected under any provisions of the Act to adjudicate the dispute between a generating company and Procurers, particularly in case of termination of PPA and

the generating company should either seek consent of the defaulting Procurer or get the matter adjudicated by the Adjudicating Authority before advising RLDCs to schedule the share of defaulting Procurer(s) to third parties. The Respondents have submitted that the Seller does not have power under the PPA to unilaterally terminate the PPA and the RLDC is under no obligation to schedule the share of powers of the defaulting Procurer, when such Procurer disputes termination of the PPA by the generator.

22. In the light of the rival submissions and the prayers in the petition, the following issues arise for our consideration:

- (a) Issue No.1: What is the scope of functions and responsibilities of RLDCs with regard to scheduling of power from a generating station for supply to the licensees in terms of Section 28 of the Act, Grid Code and PPA dated 22.4.2007 between the Petitioner and the distribution licensees of the Procuring States from Mundra UMPP?
- (b) Issue No.2: Whether WRLDC and NRLDC have discharged their statutory functions properly while dealing with the request of the Petitioner to schedule the share of power of Rajasthan Procurers to third parties on account of termination of PPA?
- (c) Issue No.3: Whether there is any requirement for issue of regulations or guidelines for regulating the scheduling function of RLDC in the event of termination of the PPA qua any Procurer(s)?



**Issue No.1: What is the scope of functions and responsibilities of RLDCs with regard to scheduling of power from a generating station for supply to the licensees in terms of Section 28 of the Act, Grid Code and PPA dated 22.4.2007 between the Petitioner and the distribution licensees of the Procuring States from Mundra UMPP?**

23. The main contention of the Petitioner is that RLDCs have not acted as per the provisions of the Section 28 of the Act by refusing to schedule power to third parties on the request of the Petitioner. Section 28 of the Act which deals with the functions and responsibilities of RLDCs is extracted as under:

“Section 28. (Functions of Regional Load Despatch Centre): --- (1) The Regional Load Despatch Centre shall be the apex body to ensure integrated operation of the power system in the concerned region.

(2) The Regional Load Despatch Centre shall comply with such principles, guidelines and methodologies in respect of the wheeling and optimum scheduling and despatch of electricity as the Central Commission may specify in the Grid Code.

(3) The Regional Load Despatch Centre shall -

(a) be responsible for optimum scheduling and despatch of electricity within the region, in accordance with the contracts entered into with the licensees or the generating companies operating in the region;

(b) monitor grid operations;

(c) keep accounts of quantity of electricity transmitted through the regional grid;

(d) exercise supervision and control over the inter-State transmission system; and

(e) be responsible for carrying out real time operations for grid control and despatch of electricity within the region through secure and economic operation of the regional grid in accordance with the Grid Standards and the Grid Code.

(4) The Regional Load Despatch Centre may levy and collect such fee and charges from the generating companies or licensees engaged in inter-State transmission of electricity as may be specified by the Central Commission.”

24. As per the provisions of Section 28 of the Act, the RLDCs are apex bodies to ensure integrated operation of the power system in the concerned region. RLDCs are required to comply with the principles, guidelines and methodologies in respect of wheeling and optimum scheduling and dispatch of electricity as per the Grid

Code specified by this Commission. RLDCs have been vested with the responsibilities for optimum scheduling and dispatch of electricity within the region in accordance with the contract entered into with the licensees or generating companies operating in the region. RLDCs have also been given the responsibility to monitor grid operation, keep account of the quantity of electricity transmitted through the regional grid, exercise supervision and control over the inter-State transmission system and carry out real time operation for grid control and dispatch of electricity within the region through secure and economic operation of the regional grid in accordance with Grid Standards and Grid Code. Thus, the scheduling and dispatch of electricity within a region shall be in accordance with the principles, guidelines and methodologies as specified in the Grid Code and in accordance with the contract entered into by the licensees or generating company operating within the region.

25. The role of RLDC has also been captured in Regulation 2.3 of the Grid Code which reiterates provisions of sections 28 and 29 of the Act. Regulation 6.5 of the Grid Code deals with the scheduling and dispatch procedure for long term access, medium term open access and short term open access. The relevant provisions of Regulation 6.5 of Grid Code so far as they are applicable to coal based ISGS are extracted as under:

“1. All inter-State generating stations (ISGS) shall be duly listed on the respective RLDC and SLDC web-sites. The station capacities and allocated/contracted Shares of different beneficiaries shall also be listed out.

2. Each State shall be entitled to a MW despatch up to (foreseen ex-power plant MW capability for the day) x (State's Share in the station's capacity) for all such stations. In case of hydro-electric stations, there would also be a limit on daily MWh despatch equal to (MWh generation capacity for the day) X (State's Share in the stations capacity).

3. By 8 AM every day, the ISGS shall advise the concerned RLDC, the station-wise ex-power plant MW and MWh capabilities foreseen for the next day, i.e., from 0000 hrs to 2400 hrs of the following day.

4. The above information of the foreseen capabilities of the ISGS and the corresponding MW and MWh entitlements of each State, shall be compiled by the RLDC every day for the next day, and advised to all beneficiaries by 10 AM. The SLDCs shall review it vis-à-vis their foreseen load pattern and their own generating capability including bilateral exchanges, if any, and advise the RLDC by 3 PM their drawal schedule for each of the ISGS in which they have Shares, long-term and medium-term bilateral interchanges, approved short-term bilateral interchanges.

7. By 6 PM each day, the RLDC shall convey:

(i) The ex-power plant "despatch schedule" to each of the ISGS, in MW for different time block, for the next day. The summation of the ex-power plant drawal schedules advised by all beneficiaries shall constitute the ex-power plant station-wise despatch schedule.

(ii) The "net drawal schedule" to each regional entity, in MW for different time block, for the next day. The summation of the station-wise ex-power plant drawal schedules from all ISGS and drawal from /injection to regional grid consequent to other long term access, medium term and short-term open access transactions, after deducting the transmission losses (estimated), shall constitute the regional entity-wise drawal schedule.

8. The SLDCs/ISGS shall inform any modifications/changes to be made in drawal schedule/foreseen capabilities, if any, to RLDC by 10 PM or preferably earlier.

18. Revision of declared capability by the ISGS(s) having two part tariff with capacity charge and energy charge and requisition by beneficiary (ies) for the remaining period of the day shall also be permitted with advance notice. Revised schedules/declared capability in such cases shall become effective from the 4th time block, counting the time block in which the request for revision has been received in the RLDC to be the first one.

18(a) Notwithstanding anything contained in Regulation 6.5.18, in case of forced outages of a unit, for those stations who have a two part tariff based on capacity charge and energy charge for long term and medium term contracts, the RLDC shall revise the schedule on the basis of revised declared capability. The revised declared capability and the revised schedules shall become effective from the fourth time block, counting the time block in which the revision is advised by the ISGS to be the first one.

20. If, at any point of time, the RLDC observes that there is need for revision of the schedules in the interest of better system operation, it may do so on its own, and in such cases, the revised schedules shall become effective from the 4th time block, counting the time block in which the revised schedule is issued by the RLDC to be the first one.”

As per the above provisions, the RLDCs shall decide and convey the ex-power plant “despatch schedule” to each of the ISGS and the “net drawal schedule” to each regional entity, in MW for different time block, for the next day. Subject to modifications that may be required in the dispatch schedule of ISGS and net drawal schedule of regional entities in terms of Regulations 6.5.8, 6.5.18, 6.5.18a and 6.5.20 of the Grid Code, the scheduling and drawal of electricity from the ISGS shall be carried out on day ahead basis.

26. The relevant provisions of the PPA dated 22.4.2007 between the Petitioner and Procurer States with regard to purchase and sale of available capacity and scheduled energy, third party sales on default, Procurer Event of Default, termination of PPA for Procurer’s event of default and Dispute Resolution Mechanism are extracted as under:

***“4.3 Purchase and Sale of Available Capacity and Scheduled Energy***

*4.3.1 Subject to the terms and conditions of this Agreement, the seller undertakes to sell to the Procurers, and the Procurers undertake to pay the Tariff for all the Available Capacity upto the Contracted Capacity and Scheduled Energy of the Power Station, according to their then existing Allocated Contracted Capacity, throughout the terms of this Agreement.*

*4.3.2 Unless otherwise instructed by all the procurers (jointly), the Seller shall sell all the Available Capacity up to the Contracted Capacity of the power station to each procurer’s then existing Allocated Contracted Capacity pursuant to Dispatch Instructions.*

*4.4 Right to Available Capacity and Scheduled Energy*

*“4.4.1. Subject to the other provisions of this Agreement, the entire Contracted Capacity of the Power Station and all the Units of the Power Station shall at all times be for the exclusive benefit of the procurers and the Procurers shall have the exclusive right to purchase the entire Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Available Capacity and/or Scheduled Energy.*

*4.4.2. Notwithstanding Article 4.4.1, the seller shall be permitted to sell power, being a part of the Available Capacity of the Power Station to third parties if:*

*(a) There is a part of Available Capacity which has not been Dispatched by the Procurer, ordinarily entitled to receive such part (Concerned Procurer); and*

*(b) such part has first been offered, at the same Tariff, to the other Procurers (by the RLDC and/or the Seller), who were not ordinarily entitled to receive such part and they have chosen to waive or not to exercise their first right to receive such part of the Available Capacity within two (2) hours of being so offered the opportunity to receive such part.*

*4.4.3 If a Procurer does not avail of power upto the Available Capacity by the Seller corresponding to such Procurer`s Allocated capacity, and the provisions of Article 4.4.2 have been complied with, the Seller shall be entitled to sell such Available Capacity not procured, to any person without losing the right to receive the Capacity Charges from the Concerned Procurers for such un-availed Available Capacity. In such a case, the sale realization in excess of Energy Charges shall be equally shared by the Seller within Concerned Procurer. in the event, the Seller sells such Available Capacity to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller without obtaining the prior written consent of the Procurer, the Seller shall be liable to sell such Available Capacity to such entity at tariffs being not less than the Tariff payable by the relevant Procurer whose capacity is being sold pursuant to this Article. If more than one Procurers do not avail fully of their Allocated Contracted Capacity, provisions of this Article shall be applicable to them mutatis mutandis and in such case, fifty percent (50%) of the excess over Energy Charges recovered by the Seller from sale to third party shall be retained by the Seller and the balance fifty percent (50%) shall be provided by the Seller to the Concerned Procurer/s and sold by the Seller to third parties. During this period, the Seller will also continue to receive the Capacity Charges from such Procurers. Upon the Procurers or any Procurer who has not availed of the Available Capacity, as envisaged under this Article, intimating to the Seller of its intention and willingness to avail of the part of the Available Capacity not availed of and therefore sold to the third party, the Seller shall, notwithstanding anything contained in the arrangement between the Seller and said third party, commence supply of such capacity to the Concerned Procurer/s from the later of two(2) hours from receipt of notice in this regard from the Concerned Procurer/s or the time for commencement of supply specified in such notice.”*

### **“11.5 Third party Sales on default**

11.5.1 Notwithstanding anything to the contrary contained in this Agreement, 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 this Agreement, the Seller shall follow the steps as enumerated in Articles 11.5.2 and 11.5.3.

11.5.2 On the occurrence of the event mentioned in Article 11.5.1 and after giving a notice of at least seven (7) days to the defaulting procurer(s), the Seller shall have the obligation to offer twenty five (25) per cent of the Contracted Capacity pertaining to such defaulting procurer (“Default Electricity”) to the other non-defaulting Procurers. The non-defaulting procurers have the right to receive the whole or any part of such Default Electricity by giving a notice within a further two (2) Business Days, in the following manner:

a) In ratios equal to their then existing Allocated Contracted Capacities at the same Tariff as would have been applicable to the defaulting Procurer. Provided that, if any of the non-defaulting Procurer(s) does not elect to receive the Default Electricity so offered, the Seller shall offer the balance of the Default Electricity to other non-defaulting Procurer(s) at the same Tariff in proportion to their additional requirement as intimated.

b) At a low tariff as may be specified by non-defaulting Procurer(s) to the extent of their capacity requirements, in descending order of the tariff. Provided that, the Seller has the right to obtain tariff quotes from third party(s) for sale of Default Electricity not requisitioned under (a) above. The tariff quotes received from non-defaulting Procurer(s) and such third party(s) shall be ranked in descending order of the tariff and the Seller shall sell Default Electricity in such descending order and in compliance with Article 11.5.3, to the extent applicable.

In case of both (a) and (b) above, if non-defaulting Procurer(s) receive Default Electricity, then subject to applicability of Article 11.4.2.2 of this Agreement, such non-defaulting Procurer(s) shall within seven (7) days of exercising the right of election, either open an additional Letter of Credit/enhance the existing Letter of Credit in accordance with the principles set forth in Article 11.4 or increase the value of escrow cover under the Default Escrow Agreement and related security under Agreement to Hypothecate secure payment for that part of the Default Electricity as such non-defaulting Procurer elects to receive.

Provided further within two (2) Months of such election by the non-defaulting Procurer(s), unless the event outlined in Article 11.5.7 has occurred, such Procurer(s) shall open a Letter of Credit/enhance the existing Letter of Credit in accordance with the principles set forth in Article 11.4 and shall increase the value of escrow cover under the Default Escrow Agreement and related Agreement to Hypothecation cum Deed of Hypothecation. Provided that in case the events mentioned in Article 11.4.2.2 (i), (ii) and (iii) are true, then the requirement with respect to Default Escrow Agreement and Agreement to Hypothecate cum Deed of Hypothecation in this Article 11.5.2 shall be applicable as per Article 11.4.2.2.

11.5.3 If all the non-defaulting Procurers do not make the election to receive the Default Electricity or a part thereof, within two (2) Business Days of it being so offered under and as per Article 11.5.2, or all such Procurers expressly waive their first right to revive the same, the Seller shall have the right (but not the obligation) to make available and sell the Default Electricity, or a part thereof to a third party, namely:

- (a) Any consumer, subject to applicable Law; or
- (b) Any licensee under the Electricity Act, 2003.

11.5.4 If the Collateral Arrangement is not fully restored by the Defaulting Procurer within thirty (30) days of the non-payment by a Procurer of an Invoice by its Due Date, the provisions of Article 11.5.2 and Article 11.5.3 shall apply with respect to one hundred (100) per cent of the Contracted Capacity. Provided that in case the events mentioned in Article 11.4.2.2 (i), (ii) and (iii) are true, then this Article 11.5.4 shall be applicable as per Article 11.4.2.2.

11.5.5 Provided that, in the case of Article 11.5.3 or 11.5.4, the Seller shall ensure the sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not at a price less than the Energy Charges.

11.5.6 In case of third party sales or sales to any other non-defaulting Procurers as permitted by this Article 11.5, the adjustment of the surplus revenue over Energy Charge (applicable to the defaulting Procurer) attributable to such electricity sold, shall be adjusted as under:

- (a) The surplus upto the Tariff shall be used towards the extinguishment of the subsisting payment liability of the defaulting Procurer towards the Seller; and
- (b) The surplus if any above the Tariff shall be retained by the Seller.

The liability of the defaulting Procurer towards making Capacity Charge payments to the Seller even for electricity sold to third parties or other non-defaulting Procurers during such periods will remain unaffected. Provided such Capacity Charge payment liability shall cease on the date which occurs on the Expiry of a period of 3 years and hundred days from the date of occurrence of a Procurer Event of Default under Article 14.2 provided if prior to such date, such Procurer Event of Default has not ceased and regular supply of electricity for a period of at least 90 continuous days has not occurred.

11.5.7 Sales to any person or Party, other than the defaulting Procurer under Article 11.5 shall cease and regular supply of electricity to the defaulting Procurer in accordance with all the provisions of this Agreement shall commence and be restored to the later of the two following dates or any date before this date at the option of Seller:

- (a) The day on which the defaulting Procurer pays the amount due to the Seller and renews the Letter of Credit and restores Default Escrow Account (if applicable) as mentioned in Article 11.4.2.1; or

- (b) *The date being “x” days from the date on which the defaulting Procurer pays the amount due to the Seller, where “x” days shall be calculated in accordance with Schedule 3.”*

#### **“14.2 Procurer Event of Default**

*The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure Event or a breach by the Seller of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting Procurer:*

- i) A defaulting procurer fails to pay (with respect to a monthly Bill or Supplementary bill) an amount exceeding 15 % of the most recent undisputed Monthly Bill, for a period of ninety (90) days after the Due Date and the Seller is unable to recover the amount outstanding to the Seller through the collateral Arrangement and letter of Credit;*
- ii) The defaulting Procurer repudiates this Agreement and does not rectify such breach even within a period of thirty (30) days from a notice from the Seller in this regard; or*
- iii) Except where due to any Seller’s failure to comply with its obligations, the defaulting Procurer(s) is in material breach of any of its obligations pursuant to this Agreement or of any of the RFP Project Documents where the procurers and the Seller are Parties, and such material breach is not rectify by the defaulting Procurer within thirty (30) days of receipt of notice in this regard from the Seller to all the procurers; or*
- iv) Any representation and warranties made by any of the Procurer in Schedule 10 of this Agreement being found to be untrue or inaccurate. Provided however, prior to considering any event specified under this sub-article to be an Event of Default, the Seller shall give a notice to the concerned Procurer in writing of at least thirty (30) days or*
- v) If (a) any procurer becomes voluntarily or involuntarily the subject of any bankruptcy or insolvency or winding up proceedings and such proceedings remain uncontested for a period of thirty (30) days, or (b) any winding up or bankruptcy or insolvency order is passed against the Procurer or (c) the Procurer goes into liquidation or dissolution or has a receiver or any similar officer appointed over all or substantially all of its assets or official liquidator is appointed over all or substantially all of its assets or official liquidator is appointed to manage its affairs, pursuant to law, except where such dissolution or liquidation of such Procure is for the purpose of a merger, consolidation or reorganization and where the resulting entity has the financial standing to perform its obligations under this Agreement and has credit worthiness similar to such Procurer and*



*expressly assumes all obligations of such Procurer under this Agreement and is in a position to perform them; or;*

- vi) *Occurrence of any other event which is specified in this Agreement to be a material breach or default of the Procurers.”*

**“14.4 Termination for Procurer Events of Default:**

*14.4.1 Upon the occurrence and continuation of any Procurer Event of Default pursuant to Article 14.2 (i), the Seller shall follow the remedies provided under Articles 11.5.2.*

*14.4.2 Without in any manner affecting the rights of the Seller under Article 14.4.1, on the occurrence of any Procurer Event of Default specified in Article 14.2 the Seller shall have the right to deliver to all the Procurers a Seller Preliminary Default Notice, which notice shall specify in reasonable detail the circumstances giving rise to its issue.*

*14.4.3 Following the issue of a Seller Preliminary Default Notice, the Consultation Period of ninety (90) days or such longer period as the Parties may agree, shall apply.*

*14.4.4 During the Consultation Period, the Parties shall continue to perform their respective obligations under this Agreement.*

*14.4.5 (i) After a period of seven (7) days following the expiry of the Consultation Period and unless the Parties shall have otherwise agreed to the contrary or the Procurer Event of Default giving rise to the Consultation Period shall have been remedied, the Seller shall be free to sell the Allocated Contracted Capacity and associated Available Capacity of Procurer/s committing Procurer/s Event of Default to any third party of his choice. Provided such Procurer shall have the liability to make payments for Capacity Charges based on Normative Availability to the Seller for the period three (3) years from the eighth day after the expiry of the Consultation Period. Provided further that in such three year period, in case the Seller is able to sell electricity to any third party at a price which is in excess of the Energy Charges, then such excess realization will reduce the Capacity Charge payments due from such Procurer/s. For the avoidance of doubt, the above excess adjustment would be applied on a cumulative basis for the three year period. During such period, the Seller shall use its best effort to sell the Allocated Contracted Capacity and associated Available Capacity of such Procurer generated or capable of being generated to such third parties at the most reasonable terms available in the market at such time, having due regard to the circumstances at such time and the pricing of electricity in the market at such time. Provided further, the Seller shall ensure that sale of power to the shareholders of the Seller or any direct or indirect affiliate of the Seller/shareholders of the Seller, is not a price less than the Tariff,*

*without obtaining the prior written consent of such Procurer/s. Such request for consent would be responded to within a maximum period of 3 days failing which it would be deemed that the Procurer has been given his consent. Provided further that at the end of the three year period, this Agreement shall automatically terminate but only with respect to such Procurer/s and thereafter, such Procurer/s shall have no further Capacity Charge liability towards the Seller. Provided further, the Seller shall have the right to terminate this Agreement with respect to such Procurer/s event before the expiry of such three year period provided on such termination, the future Capacity Charge liability of such Procurer/s shall cease immediately.”*

## **“17.2 Amicable Settlement**

*17.2.1 Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement including its existence or validity or termination (collectively “Dispute”) by giving a written notice to the other Party, which shall contain:*

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

*17.2.2 The other Party shall, within thirty (30) days of issue of dispute notice issued under Article 17.2.1, furnish:*

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

*17.2.3 Within thirty (30) days of issue of notice by any Party pursuant to Article 17.2.1 or Article 17.2.2, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amiably within thirty (30) days of receipt of the notice referred to in the preceding sentence, the Dispute shall be referred to Dispute Resolution in accordance with Article*

## **17.3 Dispute Resolution**

*17.3.1 Where any dispute arises from a claim made by any Party for any change in or determination of the tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the tariff or (ii) relates to any matter agreed to be referred to the Appropriate Commission under Articles 4.7.1, 13.2, 18.1 or clause 10.1.3 of Schedule 17 hereof, such dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time. The obligations of*

*the Procurers under this Agreement towards the Seller shall not be affected in any manner by reason of inter-se disputes amongst the Procurers.*

*17.3.2 If the dispute arises out of or in connection with any claims not covered in Article 17.3.1 such Dispute shall be resolved by arbitration under the Indian Arbitration and Conciliation Act, 1996 and the Rules of the Indian Council of Arbitration, in accordance with the process specified in this Article. In the event of such dispute remaining unresolved as referred to in Article 17.2.3 hereof, any party to such dispute may refer the matter to registrar under the Rules of the Indian Council of Arbitration.*

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#### *17.4 Parties to Perform Obligations*

*Notwithstanding the existence of any Dispute and difference referred to the Appropriate Commission or the arbitral tribunal as provided in Article 17.3 and save as the Appropriate Commission or the arbitral tribunal may otherwise direct by a final or interim order, the Parties hereto shall continue to perform their respective obligations (which are not in dispute) under this Agreement.”*

27. As per the provisions of Article 4.3 of the PPA, the Seller undertakes to sell to the Procurers and Procurers undertake to pay the tariff to the Seller for all the available capacity upto the contracted capacity and the scheduled energy of the Mundra UMPP throughout the terms of the Agreement. Further, the Seller shall sell all available capacity upto the contracted capacity to each procurer in proportion to each procurer's then existing allocated contracted capacity pursuant to dispatch instructions. It is pertinent to mention that dispatch instructions are issued by RLDC through dispatch schedules to ISGS (in this case the Petitioner) and drawal schedule to the regional entities (in this case the Procurers of Mundra UMPP). Therefore, in normal circumstances, RLDCs shall schedule the power from the Mundra UMPP to the Procurer States in accordance with the provisions of the Grid Code, keeping in view the provisions of Article 4.4.3 ad 4.4.4 of the PPA.

28. The PPA provides that in certain circumstances, the share of power of a Procurer(s) from the Mundra UMPP may be scheduled in favour of other Procurers or to third parties. Sales to third party are permitted under the PPA under the following provisions:

- (i) When a part of the capacity remains un-requisitioned (Article 4.4.3);
- (ii) In case of Procurer's event of payment default for making payment of invoices by due date (Article 11.5.3);
- (iii) In case of termination for Procurer's events of default (Article 14.4.5).

#### **Third Party Sale under Article 4.4.3 of the PPA**

29. As per the provisions of Article 4.4.1 of the PPA, the Procurers have the exclusive rights to purchase the entire contracted capacity from the Seller and the Seller is not permitted to allow any third party to obtain entitlement in the Available Capacity except as provided in Article 4.4.2. According to Article 4.4.2, the Seller can sell a part of the Available Capacity to third parties if the said available capacity has not been despatched by the Procurer who is ordinarily entitled to receive such part (concerned Procurer) and such part has been offered at the same tariff to other Procurers by the RLDC and/or the Seller and the other Procurers have chosen to waive or not to exercise their first right to receive such part of Available Capacity within two hours of being offered such opportunity. Article 4.4.3 states that if a Procurer does not avail power upto its Available Capacity corresponding to its allocated capacity and the provisions of Article 4.4.2 have been complied with, the

Seller shall be entitled to sell such Available Capacity not procured to any person without losing the right to receive capacity charges from the concerned Procurer for such un-availed Available Capacity. The sale realization in excess of energy charges shall be equally shared by the Seller with the concerned Procurer. Under this provision, the Seller and/or RLDC shall offer the capacity of the concerned Procurer to other Procurers and only in cases where the other Procurers waive or do not exercise their right of first refusal, then the Seller can sell this power to third parties. For sale to third parties, it requires revision of drawal schedule of the defaulting Procurer in the Mundra UMPP in favour of the third parties. RLDCs which are responsible for drawal of schedule or revision of schedule are required to act on the instructions of the Seller while deciding the scheduling and dispatch of electricity in respect of the Procurer who has not scheduled its share of power. In our order dated 5.10.2014 in Petition No.310/MP/2015, we have held that "revision of schedule for sale of URS power to third parties shall not be permitted. Concerned ISGS may seek short term open access for sale of URS power to third parties". Once the Seller identifies the third party for sale of such power and obtains the short term open access, the concerned RLDC shall schedule such power to the third party accordingly. As regards the sale of un-requisitioned power to other Procurers including third parties, the Commission has prescribed certain procedures in the order dated 5.10.2014 in Petition No.310/MP/2015 and order dated 17.10.2017 in Petition No.16/SM/2015. The concerned RLDC shall keep the procedures in view while scheduling power for sale to third party.

### **Third Party Sale under Article 11.5.3 of the PPA**

30. Article 11.5 of the PPA provides for the sale of power by the Seller to third party in the event of default by a Procurer to pay an invoice by the due date through the payment mechanism provided in the Agreement. Due date has been defined as the thirtieth day after the monthly bill or a supplementary bill is received and acknowledged by the Procurer by which date such bill is payable by the said Procurer. On occurrence of such event of default, the Seller after giving a notice of 7 days to the defaulting Procurer(s) shall have the obligations to offer 25% of the contracted capacity of the defaulting Procurer(s) to non-defaulting Procurers who shall have the right to receive whole or part of such electricity (default electricity) by giving a notice within 2 business days at the same tariff as would have been applicable to the defaulting Procurer(s). Where collateral arrangement is not fully restored by the defaulting Procurer within 30 days from the due date of payment, then 100% of the contracted capacity can be offered to non-defaulting Procurers for sale. If the default electricity is not requisitioned by the non-defaulting Procurer(s), the Seller may call for tariff quotes at a lower tariff from the non-defaulting Procurer(s) in descending order of tariff as well as from the third parties. The tariff quotes received from the non-defaulting procurer(s) and the third parties shall be ranked in descending order of tariff. If the non-defaulting Procurer(s) do not make the election to receive the default electricity or part thereof at such descending order of tariff within two working days of it being offered or expressly waive their first right to receive the same, the Seller shall have the right to sell the default electricity or part thereof to a third party who may be either a consumer or a licensee under the

Act. The liability of the defaulting Procurer towards payment of capacity charge to the Seller for electricity sold to non-defaulting Procurer(s) or the third party shall remain unchanged and shall cease on a date which occurs after expiry of period of three years and hundred days from the date of occurrence of Procurer's event of default. Under Article 11.5.7 of the PPA, sale to the defaulting Procurer or third party shall cease and the regular supply of electricity shall commence from the date that the defaulting Procurer pays the amount due to the seller and renews the letter of credit and restores the default escrow account. Thus under these provisions, the Seller can sell 25% or 100% (where the collateral arrangement has not been restored) of share of the defaulting Procurer to third party(ies) where the non-defaulting Procurers have either elected or have not exercised their first right to receive the power of the defaulting Procurer. Once the Seller identifies the third party for sale of such power and obtains the short term open access, the concerned RLDC shall schedule such power to the third party. Since the decision to sell the power of defaulting Procurer to non-defaulting Procurers/third parties, selection of non-defaulting Procurers/third parties and ranking the tariff quotes received from non-defaulting Procurers/third parties take place at the end of the Seller, in our view, it is responsibility of the Seller to place the relevant correspondences and documents before the concerned RLDC to establish that all procedural requirements of the PPA in terms of this Article have been complied with. This is necessary because under the Act, RLDC is required to dispatch and schedule the power in accordance with the contract which requires certain conditions to be fulfilled before third party sale under Article 11.5 of the PPA.

31. Before scheduling power for third party sale on the request of the Seller under Article 11.5.3 of the PPA, RLDC shall verify the following documents:

- (a) Copy of Seller's invoice showing the due date of payment for the month for which default has taken place;
- (b) Copy of the notice of at least 7 days after the due date of the invoice to the defaulting Procurer;
- (c) Reply of the defaulting Procurer, if any.
- (d) Letter of offer to non-defaulting Procurers for sell of 25% or 100% (as may be applicable) of the share of the defaulting Procurer;
- (e) Responses of all non-defaulting Procurers if any received within two business days expressly waiving their right to receive the default electricity.
- (f) Documents that short term open access for such third party sale has either obtained or applied for;
- (g) An affidavit containing the following: (i) In case notice under (b) above has been disputed by the defaulting Procurer, a declaration that the dispute has not been mutually resolved with the defaulting Procurer and the Seller shall indemnify RLDC from any consequence of the dispute raised by the defaulting Procurer at the appropriate forum; (ii) In the absence of any response by the non-defaulting Procurers to the offer under (d) above, a declaration that the non-defaulting



Procurers have neither made any selection nor have exercised their first right to receive such electricity under Article 11.5.2 of the PPA within the stipulated period; (iii) a declaration that the Defaulting Procurer has not made the payment due and not renewed its Letter of Credit and not restored Default Escrow Account, where applicable, before the date of approaching RLDC for scheduling for third party sale.

32. On receipt of the information/documents as mentioned in para 31 above, RLDC shall schedule the power from the share of the defaulting Procurer for third party sale as per the instructions of the Seller as per the provisions of the Grid Code. If during the subsistence of third party sale, the defaulting Procurer remedies the default in terms of Article 11.5.7, the Seller shall immediately inform the concerned RLDC to terminate scheduling for third party sale and resume scheduling to the defaulting Procurer.

#### **Third Party Sale under Article 14.4.5 of the PPA**

33. Article 14.2 deals with Procurer's Events of Default which include the following:

- (a) If a defaulting Procurer fails to pay with respect to monthly bill or supplementary bill an amount exceeding 15% of the most recent undisputed monthly bill for a period of 90 days after the due date and the Seller is unable to recover the amount outstanding to the Seller through the collateral arrangement and letter of credit.

- (b) The defaulting Procurer repudiates the PPA and does not rectify the breach within a period of 30 days from the date of notice from the Seller;
- (c) Where the defaulting Procurer is in material breach of any of its obligations pursuant to the agreement or any of the RfP project documents and such material breach has not been rectified within period of 30 days from a notice from the Seller;
- (d) Any representation and warranties made by any of the Procurer in Schedule 10 of the PPA being found untrue or inaccurate, subject to giving a notice of 30 days to the concerned Procurer;
- (e) If any Procurer becomes the subject of any bankruptcy or insolvency or winding up proceedings which remain uncontested by such procurer for 30 days; or any bankruptcy or insolvency or winding up order is passed against the said Procurer; or if such Procurer goes into liquidation or dissolution or has a receiver or liquidator appointed over all or substantially all of its assets except where such dissolution or liquidation is for the purpose of merger, consolidation or reorganization and the resulting entity has financial standing and credit worthiness and expressly assumes all obligations of the Procurer under the PPA;
- (f) Occurrence of any other event which is specified in the PPA to be a material breach or default of the Procurers.

34. Under Article 14.4 deals with the termination of PPA on account of Procurer's events of default under Article 14.2 of the PPA. Article 14.4.1 deals with Procurer's event of default arising under Article 14.2 (i) i.e. where a Procurer fails to pay with respect to any monthly bill or supplementary bill an amount exceeding 15% of the most recent bill for a period of 90 days and the Seller is unable to recover the amount outstanding to the Seller through collateral arrangement or Letter of credit. For this default, the Seller has two options. It can pursue the remedy available under Article 11.5.2. In the alternative, it can pursue the remedy available under Article 14.4.2 to 14.4.5 of the PPA. In respect of the defaults arising under Article 14.2(ii) to (vi), the Seller can pursue the remedy under Articles 14.4.2 to 14.4.5 of the PPA. Under Article 14.4.2, the Seller shall give a Seller Preliminary Default Notice under Article 14.4.2 to the defaulting Procurer. The Seller Preliminary Default Notice shall be followed by a consultation period of 90 days or such longer period as the parties may agree. During the consultation period, the Parties shall continue to perform their respective obligations under the PPA. As per Article 14.4.5 of the PPA, unless the default is remedied within the consultation period, the Seller shall have the right to sell the contracted capacity and associated available capacity of the defaulting Procurers to a third party of its choice from the 8<sup>th</sup> day following the expiry of the consultation period. The defaulting Procurer in such event shall have the liability to make payment of capacity charges based on the normative availability for the period of three years from the 8<sup>th</sup> day following the expiry of the consultation period and any excess realization made over and above the energy charges by sale to third parties shall be used to reduce the capacity payment charges by the

defaulting Procurer. At the end of three years, the agreement shall automatically terminate qua the defaulting Procurer and the defaulting Procurer shall have no further capacity charge liability towards the Seller. The PPA further provides that the Seller shall have the right to terminate the agreement with respect to such Procurer even before the expiry of three year period and on such termination, the liability of the defaulting Procurer for future capacity charges shall cease immediately.

35. Since all these events leading to the termination of the PPA are taking place at the end of the Seller and defaulting Procurer, the Seller while seeking scheduling of power to third parties subsequent to termination of the PPA qua the defaulting Procurer is required to place all relevant correspondences and documents before the concerned RLDC to satisfy that procedural requirements of the PPA in terms of this Article have been complied with. Before scheduling power for third party sale on the request of the Seller under Article 14.4.5 of the PPA, RLDC shall verify the following documents to be submitted by the Seller:

- (a) In case of default under Article 14.2(i), whether the Seller has initiated action under Article 11.5 of the PPA and if so, documentary proof thereof;
- (b) In case of default under Article 14.2 {including 14.2(i)}, copy of the Seller Preliminary Default Notice given under Article 14.4.2 of the PPA;
- (c) Reply of the defaulting Procurer to the Seller Preliminary Default Notice, if any;

- (d) A declaration that the consultation period of 90 days or such longer period as may be agreed between the parties have elapsed (clearly indicating the commencement date and end date of consultation period) and the event of default giving rise to consultation period has not been remedied by the defaulting Procurer;
- (e) Document showing that short term open access for such third party sale has either been obtained or applied for;
- (f) If Seller intends to terminate the PPA before expiry of the 3 year notice, then the date from which such termination shall be effective. Copy of letter intimating the intended date of termination to the defaulting Procurer shall be submitted.
- (g) An affidavit containing the following: (i) In case notice under (b) above has been disputed by the defaulting Procurer, a declaration that the dispute has not been mutually resolved with the defaulting Procurer and the Seller shall indemnify RLDC from any consequence of the dispute raised by the defaulting Procurer at the appropriate forum; (ii) a declaration as mentioned in (d) above.

36. On receipt of the information/documents as mentioned in para 35 above, RLDC shall schedule the power from the share of the defaulting Procurer for third party sale as per the instructions of the Seller as per the provisions of the Grid

Code. At the end of three years, the PPA shall automatically terminate qua the defaulting Procurer and RLDC shall take of the said defaulting Procurer from the list of Procurers of the Mundra UMPP. If the Seller intends to terminate the PPA before expiry of the three year period, then the Seller shall produce a document showing that the intended date of termination has been intimated to the defaulting Procurer. On receipt of such instruction alongwith the copy of intimation to the defaulting Procurer, RLDC shall take off the defaulting Procurer from the list of Procurers of the Mundra UMPP. After termination of PPA qua the defaulting Procurer, RLDC shall schedule the concerned capacity to either third parties or any new Procurer(s) who have entered into the PPA with the Seller as intimated by the Seller to RLDC. There is no provision under Article 14.4.5 that if the defaulting Procurer remedies the default after the commencement of third party sale and before the scheduled or intended date of termination, scheduling of share of power shall be restored to the defaulting Procurer. In our view, if both the Seller and defaulting Procurer agree to withdraw the third party sale and termination notice and submit affidavits either jointly or separately in this regard, then it will be considered that the remedies prescribed under Article 14.5 have been abandoned and RLDC shall schedule power to the concerned Procurer in terms of the PPA.

37. We have noticed that under the PPA, the Seller has the freedom to sell power to third parties under Article 11.5 as well as under Article 14.4.5 in the event of default of a Procurer to make payments. Under Article 11.5.1 of the PPA, the trigger point is the default on account of payment of an invoice through payment

security mechanism by due date (30<sup>th</sup> of receipt of monthly bill or supplementary bill by the concerned Procurer). Under 14.4.1 read with Article 14.2(i), the trigger point occurs when the defaulting Procurer fails to pay (with respect to a monthly bill or supplementary bill) an amount exceeding 15% of the most recent undisputed monthly bill for a period of 90 days after the due date and the Seller is unable to recover the same through Collateral Arrangement and Letter of Credit. On occurrence of default under 11.5, the Seller shall have to give a notice of 7 days to the defaulting Procurer under Article 11.5.2 and thereafter, the Seller shall have the obligation to offer 25% of the contracted capacity of the defaulting Procurer (default electricity) to non-defaulting Procurers (100% in case of non-restoration of collateral arrangement within 30 days of non-payment of an invoice by the Procurer by due date). If at the end of 90 days period, 15% of the monthly bill or supplementary bill still remains outstanding, it is permissible to the Seller to initiate action under Article 14.4.2 to 14.4.5 of the PPA.

38. For the implementation of the provisions of sale to third parties under Articles 4.4.1, 11.5 and 14.4.5 of the PPA, it is necessary for the Seller to submit all relevant information or documents to concerned RLDC. If any of the procedural requirements are not complied with, concerned RLDC shall inform the Seller about the same and is not obliged to act on the instructions of the Seller to schedule power to the third parties till the procedural requirements are rectified by the Seller. This exercise does not take away the freedom of the generator to sell power to the third parties and is in conformity with the responsibility vested in the RLDCs to

ensure “optimum scheduling and dispatch of electricity in the region in accordance with the contract.” In so far as the defaulting Procurer is concerned, it is required to act within the notice period and rectify the events of default on its part and if there is a dispute, resort to the dispute resolution mechanism available to it under the PPA before expiry of the period leading to third party sale or termination of the PPA, as the case may be. If the defaulting Procurer resorts to dispute resolution mechanism, it shall keep the concerned RLDC and NLDC informed so that the RLDCs shall maintain the status quo during the period when the dispute resolution mechanism is in process. During and on conclusion of the dispute resolution mechanism, the concerned RLDC shall act on the decision emerging out of such dispute resolution process. For example, if the parties come to an amicable settlement during the notice period, then the concerned RLDC shall act on the amicable settlement. If either party approaches the Commission for adjudication of the dispute, the despatch and scheduling of power of the share of defaulting Procurer shall be carried out by the concerned RLDC in accordance with the interim direction, if any, and final decision of the Commission. If the defaulting Procurer acts in time in pursuance of the remedies available to it under the PPA before the third party sale or termination becomes effective as per the notice of the Seller and keeps the concerned RLDC informed, this will facilitate concerned RLDC to discharge its responsibility to schedule and despatch power in accordance with the PPA. If the defaulting Procurer does not pursue the remedy available to it under the PPA, it will be at its own risk and cost and the concerned RLDC in such cases is not required to seek a confirmation from the defaulting Procurer before permitting third



party sale of the default electricity. On the basis of information available with concerned RLDC from the Seller and defaulting Procurer, if the RLDC is of the view that disputed question of facts and law are involved, it shall not judge the issue and shall advise both parties to approach the Commission for appropriate directions and till issue of appropriate directions by the Commission, the status quo in scheduling and despatch of share of power of the defaulting Procurer shall be maintained. If the concerned RLDC faces any difficulty in discharge of its functions under Section 28 of the Act in view of the conflicting claims and instructions by the Seller and defaulting Procurer and which cannot be handled in accordance with the clarifications/guidelines given in this order, it shall be at liberty to bring the difficulties to the notice of the Commission through an appropriate applications. If the RLDC is found to have not acted with the provisions of the PPA read with the clarifications/guidelines issued in this order, they shall be liable for appropriate action as permissible under the Act.

39. The Petitioner has raised a legal issue that the dispute resolution under Article 17 is not required to be resorted to in case of termination of PPA by the Seller qua a defaulting Procurer under Article 14.4.5 of the PPA. The Petitioner has submitted that its right to sell power to third parties under Article 14.4.5 arises on the following conditions being fulfilled: (a) Issuance of a Seller's Preliminary Default Notice to the Procurers setting out circumstances giving rise to the issue; (b) Completion of a Consultation Period of 90 days; (c) Unless the Procurer Event of Default has been remedied or parties have agreed to otherwise, the Petitioner is

entitled to sell power to third parties upon expiry of 7 days after the 90 days consultation period. The Petitioner has submitted that it has complied with Article 14.4.5 of the PPA in as much it had served the Seller Preliminary Default Notice upon the Rajasthan Procurers and had performed its obligations during the consultation period. The Petitioner in its rejoinder to the reply of Rajasthan Procurers has submitted as under:

“6. It is submitted that unlike Article 17 which requires parties to approach this Hon’ble Commission in case a dispute is not resolved, Article 14.4.5 does not contemplate any reference to or adjudication by this Hon’ble Commission. It is submitted that Article 14.4.5 is a special contractual provision outside of Article 17. Article 14.4.5 deals with default, not dispute and does not involve referring the matter to any adjudicatory body. Upon delivery of a Seller’s Preliminary Default Notice, the Procures have the right to raise dispute vis-à-vis the Seller’s Preliminary Default Notice in terms of Article 17 and take suitable measures thereunder. This is reflected by the fact that the time period prescribed under Article 14.4.5 is 90 days whereas consultation process under Article 17.2.3 is only 30 days. Hence, procurers can raise dispute (regarding the default notice) before Hon’ble Commission even prior to expiry of conditions precedent stipulated under Article 14.4.5.”

With regard to the above submission of the Petitioner that default under Article 14.4.5 of the PPA does not contemplate any reference to adjudication and hence outside the purview of Article 17, we are of the view that such an interpretation is not correct. Article 17 of the PPA deals with dispute resolution. As per 17.2.1 either party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with the PPA including its existence or validity or termination (collectively “dispute”). Therefore, termination of PPA is included in the dispute between the Seller and Procurers to be solved through amicable settlement or through dispute resolution mechanism. If the dispute cannot be resolved through amicable settlement, it can be referred to either the

Commission for adjudication or to arbitration. In so far as dispute before the Commission is concerned, it shall relate to any change in determination of tariff or any matter related to tariff or claims made by any party which partly or wholly relate to any change in tariff or determination of any of such claims could result in change in tariff. Perusal of the Article 14.3 reveals that most of the Events of Default mentioned therein have implication for tariff and therefore, fall within the purview of Article 17.3.1 of the PPA requiring adjudication by the Commission. We are therefore of the view that the defaulting Procurer is not debarred to raise a dispute under Article 17.3 before the Commission in a case covered under Article 14.4.5 of the PPA before the expiry of the consultation period.

40. In the light of the above discussion, we are of the view that the concerned RLDC is required to be satisfied with respect to the compliance of procedural requirements of Articles 4.4.1, 11.5 and 14.4.5 of the PPA by the Seller before commencement of third party sale. In case, the RLDC is in receipt of any communication from the defaulting Procurer disputing the claim of the Petitioner, the concerned RLDC shall advise the defaulting Procurer to seek available remedy as per the provisions of the PPA. If the concerned RLDC is satisfied that all procedural requirements have been complied with by the Seller and the defaulting Procurer has neither remedied the default nor pursued the remedy available under the PPA before the date commencement of the third party sale as per the notice of the Seller, the concerned RLDC shall schedule power to third party as per the instruction of the Seller. However, RLDCs being independent statutory bodies, it is

necessary to insulate them from competing commercial claims. Therefore, the Commission is of the view that in such cases, the Seller must indemnify the concerned RLDC through an indemnity bond before RLDC schedules power to third parties. If the defaulting Procurer before the commencement of third party sale claims to have remedied the default and the defaulting Procurer produces documentary evidence in that regard and submits an Indemnity bond to indemnify the RLDC from any liability arising out of scheduling of power to the defaulting Procurer during the subsistence of the period of third party sale as notified by the Seller, the concerned RLDC shall schedule the power to the defaulting Procurer. If there is any dispute with regard to whether the default has been remedied or not by the defaulting Procurer, either party is liberty to seek the available remedy under the PPA.

41. In case of termination of PPA under Article 14.4.5, the Commission is of the view that if the defaulting Procurer does not remedy the default nor invokes the dispute resolution mechanism under the PPA before the expiry of the consultation period, the Seller has the liberty to terminate the PPA qua the defaulting Procurer after following the provisions of the said regulations i.e. sale of power to the third party from the 8<sup>th</sup> day of the completion of consultation period for a period of three years with liability of the defaulting Procurer to pay capacity charges or before the expiry of the three years period without the liability of the defaulting Procurer to pay the capacity charges. If the RLDC is satisfied that the procedural requirements have been complied with by the Seller under Article 14.5 of the PPA with regard to the

termination of PPA qua the defaulting Procurer and the Seller provides an Indemnity bond to the RLDC to indemnify against any liability of RLDC arising out of the non-scheduling of power to the defaulting Procurer on account of termination of PPA, the concerned RLDC shall cease to schedule power to the defaulting Procurer and schedule the power to the other Procurers or third parties as advised by the Seller.

**Issue No.2: Whether WRLDC and NRLDC have discharged their statutory functions properly while dealing with the request of the Petitioner to schedule the share of power of Rajasthan Procurers to third parties on account of termination of PPA?**

42. In the first prayer, the Petitioner has sought a declaration that the refusal by WRLDC to schedule electricity where the PPAs allow for third party sale including the event of termination of PPA as illegal and contrary to the provisions of the Act. The Petitioner has agreed that despite the notice dated 2.1.2013 to WRLDC requiring non-scheduling of electricity to Rajasthan Procurers, WRLDC continued to schedule electricity to Rajasthan Procurers, negating the provisions of the PPA. WRLDC has submitted that the Petitioner vide its letter dated 3.1.2013 informed WRLDC that the PPA between CGPL and Rajasthan Procurers stood terminated on account of failure of Rajasthan Procurers to establish collateral arrangements and CGPL intended to sell power at the Power Exchange. WRLDC has submitted that AVVNL vide its letter dated 4.1.2013 informed WRLDC that since all the payments of bills have been made and the bills for the month of December, 2013 have not been received, the termination letter sent by CGPL is not valid as per Article 14.4.5 of the PPA and therefore, the share of Rajasthan Procurers should be scheduled to them. WRLDC has further submitted that since a dispute had been

raised with regard to the termination of the PPA, it decided to maintain the status quo with regard to scheduling and advised the Petitioner to either get the consent of the Rajasthan Procurers or get a decision from the Commission. Rajasthan Procurers have submitted that since RLDCs neither have the authority nor the jurisdiction to decide the dispute between the parties inter-alia whether the PPA has been terminated or not or whether the generator is entitled to sell power to third parties nor not, the RLDCs have rightly insisted on either concurrence of the procurers or the order of the Commission.

43. We have considered the submissions. The Petitioner has referred to its letters dated 2.1.2013, 4.1.2013 and 8.1.2013, WRLDC/POSOCO letters/e-mails dated 4.1.2013, 6.1.2013, 6.1.2013, and 7.1.2013 in support of its contention with regard to the refusal of WRLDC to schedule power to third parties, however these letters are not placed on record. Some of these letters and other correspondences have been placed on record alongwith the combined reply filed by NLDC/WRLDC/NRLDC. On perusal of the said correspondences, it is noticed that the Petitioner had written a letter dated 2.1.2013, for termination of the PPA qua Rajasthan Procurers. The said letter is extracted as under:-

“1. This communiqué bears reference to Article 11.4.1 and 11.4.2 of the Power Purchase Agreement dated 22<sup>nd</sup> April, 2007 executed between all Procurers including AVVNL, JdVVNL, JVVNL and the Seller for their respective shares allocated from the 4000 MW Ultra Mega Power Project and Mundra, Gujarat (‘PPA’) and the above referred notices and correspondences issued to you from time to time seeking establishment of Collateral Arrangements pursuant to your obligations under the PPA.

2. As you are aware:-

- (a) As per Article 11.4.1 and 11.4.2 of the PPA, each Procurer is required to furnish and establish the Collateral Arrangements in favour of CGPL on or before forty five (45) days prior to commercial operation date of Unit 1, comprising:
- (i) Putting in place individual letters of credit or suitable value and compliant with approved terms.
  - (ii) Operationalizing the default escrow arrangement, and
  - (iii) Creating first ranking pari-passu charge on revenues routed through the default escrow account as also the receivables under the respective Deeds of Hypothecation.
- (b) Unit 1 was commissioned on 7<sup>th</sup> March, 2012 after synchronization with due notice and knowledge of the Procurers. For the off-take relatable to Unit 1, the above Collateral Arrangements were to have been put in place by 21<sup>st</sup> January, 2012.
- (c) Due to your failure to fulfill the obligations qua the Collateral Arrangements in spite of repeated and regular reminders, CGPL was constrained to issue Notice dated 26<sup>th</sup> March, 2012 under Article 14.2 (iii) of the PPA asking you to put in place the Collateral Arrangements as per the PPA within 30 days from the date of issuance of the said notice.
- (d) Since the said default was not cured by you even after the expiry of the said 30 days period, CGPL was constrained to issue a Seller Preliminary Default Notice No. CGPL-UMPP/O&M/JVVNL/LC-109 dated 4<sup>th</sup> May, 2012, asking you to put in place the Collateral Arrangements as per the PPA within 90 days from the date of issuance of the Seller Preliminary Default Notice being the 'Consultation Period'.
- (e) The 90 days Consultation Period got over on 1<sup>st</sup> August, 2012 and the seven day period thereafter got over on 8<sup>th</sup> August, 2012.
- (f) On account of the failure to establish the Collateral Arrangements, which is one of your material obligations under the PPA, on 23<sup>rd</sup> August, 2012, CGPL without prejudice to its rights under the PPA, issued a communiqué stating that it was no longer obliged to supply power under the PPA. However, without prejudice to the above, CGPL offered to continue to supply power in good faith as per the terms of the PPA till the revised tariff is mutually agreed upon or determined by Central Electricity Regulatory Commission.
- (g) In the meanwhile, Unit 2 and Unit 3 were commissioned on 30<sup>th</sup> July, 2012 and 27<sup>th</sup> October, 2012 respectively and Procurers including yourselves were kept informed about the same, accordingly, appropriate Collateral Arrangements as required under the PPA were supposed to be established on or before 15<sup>th</sup> June, 2012 and 12<sup>th</sup> September, 2012 for Units 2 and 3 respectively.

- (h) On 19<sup>th</sup> October, 2012, CGPL issued a communiqué to Rajasthan Discoms seeking Letter of Credit for the enhanced value post commissioning of Unit 4 being as under:

<b>Discom</b>	<b>Amount of LC (Rs. in Crore)</b>
JVVNL	17.46
JdVVNL	13.58
AVVNL	17.46

3. On account of your continued failure in establishing the Collateral Arrangements and in context of persistent non-payment of the invoices raised by us for the power supplied to you under the PPA, CGPL is constrained to issue the Notice. Payments from JVVNL and JdVVNL Discoms have been received for the power supplied for the period March, 2012 to June, 2012 and March, 2012 to July, 2012 respectively while from AVVNL we have received payment up to September, 2012. The invoices raised for supply during July, 2012 to December, 2012 aggregating a sum of Rs. 96.29 crore (excluding delayed payment surcharge for the month of December, 2012) remain outstanding from all Rajasthan Discoms, unsupported by the required Collateral Arrangements.
4. In view of the persistent and willful failure of Rajasthan Discoms to establish Collateral Arrangements in terms of the PPA till date, CGPL is left with no other option but to withdraw/rescind the good faith offer to supply power to Rajasthan Discoms made vide its letter dated 23<sup>rd</sup> August, 2012. CPL will accordingly stop supplying power to you from 00:00 Hrs after expiry of 24 hours from the date of receipt of this Notice and consequently, CGPL's obligations under the PPA stands discharged/terminated vis-à-vis Rajasthan Discoms for all the aforesaid reasons."

44. On perusal of the letter dated 2.1.2013 as quoted above, it is noticed that the Petitioner in its letter dated 28.3.2012 had given a notice under Article 14.2 (3) of the PPA asking the Rajasthan Procurers to put in place the Collateral Arrangements as per the PPA within the period of 30 days. Further, the Petitioner issued a Seller Preliminary Default Notice on 4<sup>th</sup> May, 2012 to the Rajasthan Procurers to cure the default within 90 days of the consultation period. The 90 days of consultation period got over on 1.8.2012 and 7 days period got over on 8.8.2012. The Petitioner vide letter dated 23.8.2012 issued a letter stating that it was no longer obliged to supply power under the PPA to Rajasthan Procurers. However, the Petitioner offered to



continue to supply power in good faith as per the terms of the PPA till the revised tariff is mutually agreed upon or determined by the Commission. The Petitioner in the letter dated 2.1.2013 has stated that on account of continued failure in establishing the Collateral Arrangements and persistent non-payment of the invoices, it is withdrawing its good faith offer and terminating the PPA qua Rajasthan Procurers and supply of power would be stopped from 00:00 hrs after expiry of 24 Hrs. from the date of receipt of this Notice. Thereafter, the Petitioner vide its letter dated 3.1.2013 requested WRLDC that with the issue of the termination letter dated 2.1.2013, the Rajasthan Procurers would not be scheduled power from 00:00 hrs of 6.1.2013. Before expiry of the date of 6.1.2013, CMD, JVVNL requested WRLDC not to take an ex-parte decision without giving an opportunity of hearing to Rajasthan Procurers claiming that there is no default on their part on the issue. Thereafter, WRLDC advised the Petitioner to file all information regarding the dispute on PPA with Rajasthan Procurers and take up the matter with adjudicator in case of any dispute with the Rajasthan Procurers. The Petitioner vide its letter dated 5.1.2013 has written to WRLDC that the action on the part of WRLDC to question the validity of termination of the PPA amount to usurping jurisdiction of the appropriate legal forum which is not vested in WRLDC and warned that the stand of WRLDC in scheduling power to Rajasthan Procurers is arbitrary, illegal and without any basis. It is further noticed that CMD, JVVNL vide its letter dated 6.1.2013 has informed WRLDC that they have fulfilled all the obligations under the PPA.

45. The sequence of events as narrated above shows that the Petitioner had given the notice for non-scheduling of power to Rajasthan Procurers from 00:00 hrs of 6.1.2013 subsequent to its termination of PPA. However, before the said date, the Rajasthan Procurers have disputed the claims of the Petitioner for termination of the PPA vide their letter dated 4.1.2013. That being the case, WRLDC could not have been forced by the Petitioner to schedule the power. Further, the contention of the Petitioner that WRLDC by not scheduling power as per the instructions of the Petitioner has questioned the termination of PPA or usurped the jurisdiction of appropriate legal forum is not correct. WRLDC has no jurisdiction to adjudicate the disputed claims between the Petitioner and the Rajasthan Procurers. It can neither act on the instructions of the Petitioner as the termination of PPA has been disputed. Under the circumstances, WRLDC decided to maintain the status-quo and advised the Petitioner to get an appropriate order from the adjudicator of the PPA in case of dispute with the Rajasthan Procurers. In our view, WRLDC has acted on its best judgment in the circumstances of the case. It is further pertinent to mention that the Rajasthan Procurers filed S.B. Civil Writ Petition No. 401/2013 before the High Court of Rajasthan challenging the termination order of the Petitioner. However, both Petitioner and Rajasthan Procurers reached an amicable settlement and withdrew the Writ Petition. The relevant extract of the order of the Hon'ble High Court is as under:-

“It is averred in the Petition that the matter has been amicably settled between the parties and the payments are also being made regularly. Discoms have also agreed for fresh creation of charge. In such view of the matter, CGPL has withdrawn the notice on 2.1.2013 and Discoms have prayed withdrawal of the Writ Petition.”

The subsequent action of the Petitioner to amicably settle the dispute with the Rajasthan Procurers and withdraw the termination notice vindicates the stand of WRLDC that it is not the proper forum to adjudicate the dispute between the parties and the decision should be obtained from the proper forum. In view of the same, we are not inclined to grant any relief on the first prayer of the Petitioner. In any case, the Commission has given guidelines in this order to be followed by the RLDCs in future in cases of third party sale and termination of PPA.

**(c) Issue No.3: Whether there is any requirement for issue of regulations or guidelines for regulating the scheduling function of RLDC in the event of termination of the PPA qua any Procurer(s)?**

46. The Petitioner in its second prayer has submitted that appropriate proceedings be initiated to issue a regulation or issue appropriate guidelines/order obligating the RLDCs to comply with the request of the generating companies to schedule power to third party if the PPA allows for sale to third parties, including in the event of termination of the PPA. Learned counsel for the Petitioner during the hearing submitted that the RPS Regulations cover only limited number of events envisaging sale of power to third parties, namely, on account of non-payment of outstanding dues and non-maintenance of letter of credit or any other agreed payment security mechanism. The Petitioner has submitted that there are other instances where the generators are entitled to schedule power to third parties as enumerated in Article 14.4(ii) to (vi) of the PPA. The Petitioner has submitted that there is impending requirement to promulgate regulations and/or make guidelines including all possible scenarios identified in the PPAs.

47. We have considered the submissions of the Petitioner. During the hearing, Learned Counsel for the Petitioner submitted that the Petitioner is not seeking any amendment to the RPS Regulations and the Commission may consider to issue appropriate guidelines in this regard. In this order, the Commission has already given the guidelines for guidance of the RLDCs, Seller and the Procurers to deal with the cases of third party sales under the PPA in different contingencies including in case of termination of PPA. Accordingly, all concerned shall comply with the provisions of the PPA and the guidelines given in this order. Accordingly, the second prayer of the Petitioner is disposed of.

48. The petition is disposed of in terms of the above.

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

Sd/-  
**(A.S.Bakshi)**  
Member

Sd/-  
**(A.K. Singhal)**  
Member

Sd/-  
**(Gireesh B. Pradhan)**  
Chairperson