

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 222/MP/2017

**Coram:
Shri P.K. Pujari, Chairperson
Dr. M.K. Iyer, Member
Shri I.S. Jha, Member**

Date of Order: 23rd of July, 2019

In the matter of

Petition under Section 79(1) (b) read with Section 79 (1) (f) and other provisions of the Electricity Act, 2003 for adjudication of disputes with the Respondents with regard to the tariff payable under the Power Purchase Agreement dated 27.11.2013.

And

In the matter of

M/s. KSK Mahanadi Power Company Limited
8-2-293/82/A/431/A, Road No.22,
Jubilee Hills, Hyderabad – 500 033,
Andhra Pradesh, India

.....Petitioner

Versus

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

...Respondent

Parties present:

Shri Anand K.Ganesan, Advocate, KSKMPCL
Shri Ashwin Ramanathan, Advocate, KSKMPCL
Shri S.Vallinayagam, Advocate, TANGEDCO
Shri G. Umpathy, Advocate, TANGEDCO
Ms. S. Amali, advocate, TANGEDCO
Ms. M.Hemalatha, TANGEDCO

ORDER

The Petitioner, KSK Mahanadi Power Company Limited, has filed the present Petition under clauses (b) and (f) of sub-section (1) of Section 79 of the Electricity Act, 2003 (hereinafter referred to as "Act") read with Article 4 of the Power Purchase



Agreement (PPA) dated 27.11.2013 with the following prayers:

“(a) Hold and declare that the Respondent is liable to pay the first year tariff as quoted, adopted and provided for in the PPA for the supply commencing from 01.08.2015 till 31.03.2016 being the first year of supply by the Petitioner to the Respondent;

(b) Pass an order directing the Respondent to pay the differential amounts of Rs. 282742785/-, being the tariff short-paid for the period till May, 2017 billing and any further tariff short-paid for the period after May, 2017 billing;

(c) Grant interest at the rate of SBIPLR for the amounts payable by the Respondent to the Petitioner, calculated from the date when the amounts became due and till the date of actual payment;

(d) Grant costs of the present proceedings in favour of the Petitioner and against the Respondent.”

Background

2. The Petitioner is in the process of establishing a 3,600 MW coal-based Thermal Power Project in District Akaltara of the State of Chhattisgarh, comprising of six units with an installed capacity of 600 MW each (hereinafter referred to as “the generating station”).

3. The Petitioner presently has the following PPAs for supply of electricity from its generating station:

(a) PPA dated 31.7.2012 with the distribution licensees of Andhra Pradesh for a capacity of 400 MW. The said capacity was earlier divided between the distribution licensees of Telangana and Andhra Pradesh, but after 15.6.2016, the entire capacity is for the distribution licensees of Andhra Pradesh.

(b) PPA dated 27.11.2013 with the Respondent, TANGEDCO for an Aggregate Capacity of 500 MW.

(c) PPA dated 18.10.2013 with the Government of Chhattisgarh for supply of 5%/ 7.5% of the net power (gross power generated minus the auxiliary consumption) under host state obligations.



(d) PPA dated 26.2.2014 with the distribution licensees of Uttar Pradesh for an Aggregate capacity of 1000 MW.

4. The Petitioner has entered into a Power Purchase Agreement dated 27.11.2013 with the Respondent, TANGEDCO for supply of a total contracted capacity of 500 MW from the generating station of the Petitioner in Chhattisgarh. The PPA was entered into pursuant to the Petitioner being selected as a successful bidder in a competitive bidding process initiated by the Respondent for procurement of electricity under Section 63 of the Act. The tariff under the PPA has been adopted by the Tamil Nadu Electricity Regulatory Commission in its order dated 29.7.2016.

Submissions of the Petitioner

5. The Petitioner has mainly submitted as under:

(a) Pursuant to the competitive bidding process initiated by the Respondent for procurement of power under case-1 bidding, the Petitioner was selected as successful bidder. The Petitioner and the Respondent entered into a long-term Power Purchase Agreement dated 27.11.2013. PPA was entered into between the Petitioner and the Respondent on 27.11.2013 for supply of 500 MW power.

(b) In terms of the bidding documents initially circulated, the Scheduled Date of Delivery for procurement of electricity was 1.10.2013; the first year of supply was from 1.10.2013 to 31.3.2014; thereafter, the supply of power for another 14 financial years from 1.4.2014 to 30.9.2028; and the total supply of electricity was for a period of 15 years.

(c) The PPA was intended to be executed by the Respondent with the successful bidder by 1.5.2013 to enable supply of electricity after 5 months of the execution of the PPA, the envisaged Scheduled Delivery Date being 1.10.2013. This was because in terms of the Open Access Regulations, a minimum period of 5 months is required from the date of application for the grant of Open Access for medium term or long term. The Respondent had taken



approval of TNERC for the deviation of the Scheduled Delivery Date being 5 months from the Effective Date instead of 4 months as in the Bidding Guidelines issued by the Ministry of Power.

(d) Pursuant to the submission of bids, there were negotiations by the Respondent with the participating bidders and thereafter revised bids at lower tariff were submitted by the bidders including by the Petitioner. Pursuant to the above process, the Petitioner was selected as the successful bidder for supply of 500 MW power. The PPA was entered into between the parties on 27.11.2013.

(e) Schedule 8 of the PPA provides for the Quoted Tariff for each year of supply, which is the tariff as quoted by the bidders and as accepted by the Respondent. However, Schedule 8 of the PPA provides for commencement of the contract year from 1.10.2013 and the last contract year ending on 30.9.2028. These dates were perhaps mistakenly taken from the original bidding documents wherein it was envisaged that the Scheduled Delivery Date shall commence from 1.10.2013. However, since the PPA itself was entered into only on 27.11.2013, the question of the Scheduled Delivery Date being 1.10.2013 does not arise. Article 4.1 of the PPA clearly provides for the Schedule Delivery date as 1.6.2014.

(f) The supply of electricity is however subject to open access being granted for conveyance of electricity from the generating station to the State of Tamil Nadu by the nodal agency, namely Power Grid Corporation of India Limited (PGCIL). While the Petitioner applies for open access and the charges are to be reimbursed by the Respondent, the non-availability of open access for reasons not attributable to the parties is a force majeure condition under the provisions of the PPA. This is undisputed between the parties.

(g) Open access was available for the quantum of 281 MW from 1.8.2015 and the open access for the Aggregate Contracted Capacity of 500 MW was available only from 1.10.2015. The bid tariff was accepted and adopted and the PPA is for supply for a period of 15 years, commencing from first year of



operation of the PPA commencing from 1.6.2014. Since the supply of electricity is for a period of 15 years, the tariff applicable also has to be for the said 15 years. If the third-year tariff is to be applied for the period from 1.10.2015 to 31.3.2016 (which is actually the first year of supply of electricity), there would be no tariff provided in the PPA in Schedule 8 for the period after 30.9.2028. Similarly, if the third-year tariff is to be applied for the period from 1.10.2015 when the supply actually commenced and the deferred Scheduled Delivery Date, it would also affect the entire basis of bid evaluation. While the bids have been evaluated based on the 15 years quoted tariff including for the period from 1.10.2013 to 30.9.2015, there would be no supply of electricity at the said quoted tariff at all for the said period from 1.10.2013 to 30.9.2015.

(h) The Petitioner vide communication dated 30.01.2016 reiterated the provisions of the PPA and called upon the Respondent to confirm the applicability of the first year's tariff under the PPA for supply of electricity from 1.10.2015 to 31.3.2016. Since, no response was received from the Respondent in this regard, the Petitioner vide its letter dated 3.3.2016 again claimed the differential amounts. In response, the Respondent vide its letter dated 27.6.2016 has acknowledged that there was a force majeure event. The Respondent, however, stated that in terms of the PPA, the extension of the Scheduled Delivery Date can be only for a maximum period of 6 month and no extension is agreeable to the Respondent.

6. The Petition was admitted on 15.2.2018 and notice was issued to the Respondent to file its replies. The Respondent TANGEDCO has filed its reply vide affidavit dated 9.4.2018 and the Petitioner has also filed its rejoinder vide affidavit dated 16.5.2018 to the reply filed by TANGEDCO. The Petitioner and the Respondents have filed written submissions.

Submission of the Respondent

7. The Respondent TANGEDCO vide affidavit dated 9.4.2018 has submitted the following:



(a) The present claim of the Petitioner is hit by laches and conduct of the Petitioner. After commencement of supply of power, the Petitioner raised bills indicating fixed and variable charges strictly in terms of the PPA. The request made on 3.3.2016 treating the 1st year capacity charges as set out in Schedule 8 of the PPA as applicable for the contract year 2015-16; the 2nd year capacity charges to be applicable for the contract year 2016-17 and so on; and that the Petitioner may be permitted to raise supplementary bills is clearly an afterthought and barred by the principles of estoppels.

(b) The present petition seeking revision of tariff for the entire period of PPA on the ground that Scheduled Delivery Date and Expiry Date shall be deferred due to Force Majeure event permitting the Petitioner to overcome the effects of Force Majeure Events is not maintainable and deserves to be rejected at the outset. The facts stated in the petition do not entitle the Petitioner to claim revision in tariff under Force Majeure.

(c) The Petitioner cannot seek relief for shifting the commencement of the 1st contract year from 1.10.2013 to 1.8.2015 and consequently seek to shift the expiry date from 30.9.2028 to 30.9.2030. This would defeat the object of tendering which was for the period of 15 years expiring in 2028 and levelized tariff agreed between the parties under the PPA.

(d) The bills of the Petitioner from 1.8.2015 also include the escalated variable charges as on 1.8.2015 escalated from March 2013 as per Schedule 8 of the PPA.

(e) Guidelines for Determination of Tariff by Bidding Process for procurement of Power by Distribution Licensees was notified by the Ministry of Power (MOP), Government of India on 19th January 2005 and amended up to 21.7.2010.

(f) Pursuant to Competitive bidding process under Case-1 bidding procedure, the Respondent floated long term tender for procurement of power for a period of 15 years mentioning the Scheduled Delivery Date as 1.10.2013 and with agreement validity period up to the Expiry date i.e. 30.9.2028.



(g) As per the PPA, the Scheduled Delivery Date (SDD) was fixed as 1.6.2014 considering the time limit allowed in Open access Regulations to make the application and for granting Medium Term Open Access.

(h) Subsequent to the signing of the PPA the Petitioner made an application to PGCIL in the month of November 2013 for grant of LTA of 500 MW with effect from 1.6.2014 to 30.9.2028.

(i) Initially, PGCIL vide letter dated 28.7.2015 granted part LTA for 281 MW with effect from 1.8.2015 and vide letter dated 1.10.2015 granted full LTA for 500 MW with effect from 5.10.2015.

(j) The Article 4.7.1 (c) is applicable only when performance of the Seller is affected by contractor's performance and not due to delay in allocation of LTA. There is no Force Majeure event which would entitle any relief to the Petitioner under Article 9.2.4 of PPA.

(k) From the reading of the Article 4.7.3 and 4.7.5 of the PPA with the facts of the present case, the only Force Majeure event affecting the performance of the Seller's contractors constitute "the event of Force Majeure affecting Seller" and hence the Petitioner cannot categorize Force Majeure event occurred due to non-availability of corridor under the Article 4.7.1 (c) to claim extension of Scheduled Delivery Date/ Expiry date.as per the above provisions, if the Seller fails to commence supply on the extended Scheduled Delivery Date of 1.8.2015, due to the reasons specified in Article 4.7.1(c), then time extension is allowed for newly determined Scheduled Delivery Date of 1.8.2015 and also to the expiry date of 30.9.2028 subject to the maximum period of Six (6) months. Since, the Petitioner commenced supply of power on 1.8.2015, the question of extension of expiry date as per Article 4.7.5 does not arise.

(l) Evaluation of tender was done considering the Scheduled Delivery Date as 1.10.2013 and Expiry date as 30.9.2028 and a levelized tariff of Rs.5.486 per kWh was arrived at. This tariff was further re-negotiated to Rs.4.91 per kWh. At the time of floating the tender, bids were invited up to 30.9.2028 and the expiry date was fixed as 30.9.2028.



(m) If the expiry date is extended beyond 30.9.2028, the levelized tariff for the period from 1.8.2015 to 30.7.2030, will become Rs. 5.058 per kWh, thereby the financial commitment of the respondent will increase from Rs.4.91 per kWh to Rs.5.058 per kWh.

(n) The PPA executed between the Petitioner and the Respondent is valid up to 30.9.2028 and if at all extension is to be given, it should be by mutual agreement between both the parties. No party to the agreement can be forced to act against its own volition.

(o) There is no privity of contract between the Respondent and PGCIL. The transmission service agreement is exclusively between the Petitioner and PGCIL. The PPA entered into between the Petitioner and the Respondent does not have provision for any compensation or change in contract year or tariff to be adopted by the Respondent in the event of delay in getting LTA by the Petitioner from PGCIL. If the Petitioner has incurred a loss due to delay in grant of open access by PGCIL, the Petitioner is required to claim damages from PGCIL.

Rejoinder of the Petitioner

8. The Petitioner vide its rejoinder dated 16.5.2018 has mainly submitted as under:

(a) The provisions of the PPA are clear and unambiguous with regard to start date for supply of electricity and the Respondent has completely misconstrued the provisions of the PPA in relation to the applicable tariff and is erroneously paying the Petitioner that tariff for the subsequent years.

(b) By application of Article 4.7 of the PPA, the Scheduled Delivery Date is 1.10.2015 when the force majeure of non-availability of open access ceased to exist. In terms of Article 4.7.1 and 4.7.5, the Scheduled Delivery Date stands deferred to 1.10.2015 (which is also the Delivery Date as the supply of the Aggregate Contracted Capacity has actually commenced) and the Expiry Date stands deferred to the 15th Anniversary of the Delivery Date, namely to



30.9.2030.

(c) The Schedule Delivery Date as per the PPA is 1.6.2014 and as neither party have sought to terminate the Agreement as per Article 3.4.3 of the PPA, any increase in time period of fulfillment of Conditions Subsequent automatically leads to extension in the Schedule Delivery Date.

Written submission of the Petitioner

9. The Petitioner vide its written submission dated 29.4.2019 has mainly submitted as under: -

(a) The fact of there being a force majeure due to non-availability of open access is an admitted position, also being expressly admitted in writing by the Respondent.

(b) The PPA provides for an automatic extension of time and revised Scheduled Delivery Date and Expiry Date, which is after the force majeure event has ceased to exist.

(c) The quoted tariff is for 15 years. The tariff is also to be paid for 15 years, and it cannot be that the tariff is only for 13 years.

(d) The tariff is evaluated for 15 years for bid acceptance. If the tariff is only applied for 13 years, the entire evaluation and bidding process would be vitiated.

(e) The Petitioner has raised the issue of the revision in the Scheduled Delivery Date and Expiry Date immediately upon the supply commencing and claiming the first year tariff also.

(f) Contract year 2013-14 cannot in any event be the first year, when the PPA was itself signed only on 27.11.2013 with the Scheduled Delivery Date as per Article 4.1.1 being on 1.6.2014. This got shifted to the next financial year on account of the force majeure event.



(g) As a consequence of the non-payment of the first year tariff by the Respondent for the year 2015-16 and also for succeeding years, there is substantial loss and prejudice caused to the Petitioner. Total principal amount to be recovered till 31.5.2017 is Rs. 28,27,42,785/- and the total principal amount as on 31.3.2019 would work out to Rs. 76,57,99,433/- (Approx.) which would further accumulate for the future period beyond 31/03/2019 till the decision of the Commission. In addition, the Petitioner is also entitled to interest at the rate of SBIPLR per annum as provided for in Article 8.3.5 of the PPA on the principal amounts recoverable.

Written submission of the Respondent

10. The Respondent in its Written Submissions dated 29.4.2019 has submitted as under:

(a) As per Article 3 of the PPA, extension of time is allowed only for Scheduled Delivery Date and not for Expiry Date. As a result of extension of Scheduled Delivery Date, the seller's liability to commence supply of power starts from the date of allocation of corridor (1.8.2015) and the Petitioner commenced supply of 281 MW of RTC power on 1.8.2015. The claim for extension of expiry date with respect to Article 4.7.1 is not applicable as supply commenced from 1.8.2015. The issue of change of first year contract was never raised either when the tender of the Petitioner was selected as lowest tender or execution of agreement and even before TNERC while approving tariff.

(b) The expiry date for supply of power under PPA was fixed as 30.9.2028 at the time of floating the tender and tariff quotes were invited only up to 30.9.2028. The evaluation of tender was done considering the Scheduled Delivery Date as 1.10.2013 and Expiry date as 30.9.2028 and after negotiations, the levelized tariff of Rs. 4.91 per kWh was arrived which was approved by the TNERC. In the event of extension beyond 30.9.2018, the levelized tariff for the period from 1.8.2015 to 30.7.2030, will become Rs. 5.058 per kWh, thereby the financial commitment of the Respondent would be affected.



(c) The claim of the Petitioner in the present Petition is barred by the principles of estoppels which is applicable to the present case. In support, the Respondent has relied upon the APTEL judgment in Appeal No. 74 of 2007 in Ajmer Vidyut Vitran Nigam Limited Vs. Rajasthan Electricity Regulatory Commission, others and 1981 All England Law Reports 577 at page 584 in Amalgamated Investment and Property Co. Ltd. (in liquidation) Vs. Texas Commerce International Bank Ltd., Hon`ble Supreme Court judgment in the case of Competent Authority Vs. Barangore Jute Factory and others [(2005) 12 SCC 477].

Analysis and Decision

11. We have considered the submissions of the Petitioner and the Respondent and all the documents available on record. Based on the Petition, replies, rejoinders and other materials placed on record, the following issues emerge for the consideration of the Commission:

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

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

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

We discuss the above issues in subsequent paragraphs:

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

12. The Respondent has contended that the claim made by the Petitioner is hit by delay and laches and is barred by the principles of estoppels. The Respondent has submitted that after commencement of supply of power, the Petitioner raised bills indicating fixed and variable charges strictly in terms of the PPA. Billing was done from 1.8.2015 onwards till the 1st notice raising a dispute was made on 3.3.2016



where in extraneous issues were raised stating that the PPA provides for extension/deferment of delivery and expiry dates. These bills of the Petitioner from 1.8.2015 also include the escalated variable charges as on 1.8.2015 escalated from March 2013 as per Schedule 8 of the PPA. The Respondent has submitted that the Petitioner having correctly understood the terms of the PPA and claiming tariff for supply of power for the period from 1.8.2015 till 29.2.2016, the claim raised in the letter dated 3.3.2016 is an afterthought and hit by laches and estoppels by conduct.

13. Per contra, the Petitioner has submitted that it was originally billing the Respondent considering the first contract year as 1.10.2013 to 31.3.2014 as per the Respondent`s direction. The Petitioner apprised the Respondent vide letter dated 30.12.2016 that the tariff in terms of the PPA is to be revised based on observations from the Internal Audit and, the Petitioner issued supplementary bill for the first contract year commencing from Scheduled Delivery Date considering 1st August, 2015 to 31st March, 2016 . In response, the Respondent in its letter dated 27.4.2016 stated that *“on scrutinizing the supplementary bill claimed by KSK vide ref (3) cited, it is noticed that KSK has not calculated energy tariff based on their financial bid dated 2.7.2013 as per the provisions of PPA. Hence, the supplementary bill of KSK is returned herewith. Further in future you are requested to claim the bills based on the rates quoted in Schedule 8 of PPA”*. The Petitioner vide its letter dated 5.5.2016 clarified that the tariff payable claimed by the Petitioner is in terms of the PPA. The Petitioner has submitted that the Respondent is silent on the Bill Disagreement Notices being sent from time to time on a monthly basis, as and when the Respondent communicated on non-admission of the tariff on account of contract year.



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

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

15. In the light of the above judgment, the limitation period prescribed for money claims in the Limitation Act, 1963 i.e. 3 years will be applicable for filing the application before the Commission. Since the Petitioner vide its letter dated 30.1.2016 had informed the Respondent regarding revision of tariff in terms of the PPA and issued supplementary bill for the first contract year commencing from Scheduled Delivery Date considering 1.8.2015 to 31.3.2016, the present petition is not hit by delay and laches. Accordingly, we reject the contention of the Respondents.

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

16. As per the bidding document, the Schedule Delivery Date (SDD) was



1.10.2013 and the Expiry Date was 30.9.2028 (15th anniversary of the schedule delivery date). The PPA was signed on 27.11.2013 wherein Article 4.1.1 of the PPA provides the scheduled delivery date in accordance with the provisions of the agreement as 1.6.2014. However, Schedule 8 of the PPA provides for commencement of the contract year from 1.10.2013 and the last contract year ending on 30.9.2028. It also provides the quoted tariff starting from 1.10.2013 to 30.9.2028.

17. The Petitioner has submitted that in the original bidding documents, it was envisaged that the Scheduled Delivery Date shall commence from 1.10.2013. However, since, the PPA itself was entered into only on 27.11.2013; the question of the commencement of the contract year being 1.10.2013 does not arise.

18. As per the bidding documents power supply was scheduled to be commenced from 1.10.2013. Since, there was delay in the bidding procedure; the PPA which was earlier intended to be signed on 1.5.2013 was finally signed on 27.11.2013.

19. Thus, the PPA was signed on 27.11.2013 wherein the delivery date was changed to 1.6.2014. However, the expiry date was still maintained as 30.9.2028.

20. The Petitioner on 27.11.2013 applied LTA for 500 MW for the period from 1.6.2014 to 30.9.2028. PGCIL vide its letter dated 25.9.2014 informed the Petitioner about grant of LTA in respect of only 179 MW of power from Chhattisgarh to Tamil Nadu, due to delay in commissioning of Champa Pooling Station. Further, PGCIL vide letter dated 28.7.2015 intimated the Petitioner regarding operationalization of part LTA to the extent of 281 MW with effect from 1.8.2015 and finally on 1.10.2015 PGCIL granted LTOA for the entire quantum of 500 MW to the Petitioner.

21. The Petitioner has submitted that there were capacity constraints for transfer



of power from the Western/ Northern region to the Southern region and the open access was made available by PGCIL much beyond the Scheduled Delivery Date. The non-availability of open access is a Force Majeure event.

22. From the perusal of the documents, we note that the Petitioner promptly applied for LTA after signing of the PPA. It is also observed that on receipt of grant of part LTA of 281 MW on 28.7.2015 from PGCIL, the Petitioner started supplying power of 281 MW to the Respondent w.e.f. 1.8.2015. Further, PGCIL granted LTA for entire quantum of 500 MW and accordingly, the aggregate quantum of 500 MW was supplied by the Petitioner w.e.f. 1.10.2015.

23. The Respondent vide affidavit dated 10.4.2018 has submitted that the notice of Force Majeure was not served by the Petitioner on the Respondent. In the absence of any notice of Force Majeure by the Petitioner as provided for under Article 9.5.1, no relief can be claimed under Force Majeure.

24. The Petitioner vide its rejoinder dated 16.5.2018 has submitted that there is no dispute on the occurrence of the force majeure event in terms of the PPA. The Petitioner has furnished the letter of communications dated 30.1.2016 which indicates that the Petitioner has mentioned the reference of Article 9.3.1 of the PPA regarding treatment of non- availability of open access as Force Majeure event. The Petitioner has further submitted that the same has been acknowledged by the Respondent vide its letter dated 20.2.2016.

25. Article 9.3.1 of PPA deals with force majeure event. The relevant extract of the Article 9.3.1 reads as under:

"9.3.1 A ' Force Majeure' means any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or



unavoidably delays an Affected Party in the performance of its obligations under this Agreement, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

Any restriction imposed by PGCIL in scheduling of power due to breakdown of transmission /grid constraint shall be treated as force Majeure without any liability on either side (Non availability of open access is treated as Force Majeure)”

26. Further, Article 9.5.1 of PPA provides regarding the notification of Force Majeure. The relevant extract of the Article 9.5.1 reads as under:

“9.5.1 The Affected Party shall give notice to the other Party of any event of Force Majeure as soon as reasonably practicable, but not later than seven (7) days after the date on which such Party knew or should reasonably have known of the commencement of the event of Force Majeure. If an event of Force Majeure results in a breakdown of communications rendering it unreasonable to give notice within the applicable time limit specified herein, then the Party claiming Force Majeure shall give such notice as soon as reasonably practicable reinstatement of communications, but not later than one (1) day after such reinstatement.”

27. The Petitioner vide its letter dated 30.1.2016 intimated the Respondent that non-availability of open access is to be treated as Force Majeure. The relevant portion of the said letter dated 30.1.2016 is extracted as under:

“As you are aware, as per Article 9.3.1 of the PPA, non-availability of open access is treated as Force Majeure”

28. Further, the Petitioner vide letter dated 3.3.2016 has intimated the Respondent regarding the shifting of the scheduled delivery date. The extract of the letter dated 3.3.2016 is reproduced as under: -

“As per the tariff for the First Contract Year shall be as per Schedule 8 (in page 98), as quoted by us in the RfP and the tariff thereafter is for each Contract Year and the last Contract Year is the 15th anniversary.

From the definition of Contract Year, the financial year in which the Scheduled Delivery Date would occur, the last Contract Year shall end on the date immediately before the Scheduled Delivery Date and further the last Contract Year of this Agreement shall end on the last day of the Term of this Agreement i.e. 15 years from Delivery Date. Accordingly, in the instant case the Scheduled Delivery Date is 1st Aug 2015 and the Delivery Date is 5th Oct 2015 and the Contract Year 1 shall be the financial year 2015-16.

We have been billing for the supplies made from Scheduled Delivery Date i.e. 1st August 2015 based on the Tariff for the FY 2015-16 in Schedule 8 (i.e. Contract Year



3) based on discussions with TANGEDCO. However, it has been pointed out that the Tariff for supply during FY 2015-16 shall be as per Contract Year 1 and not as per Contract Year

Since in accordance with clause 4.7.1, clause 9.3.1 of the PPA, the Scheduled Delivery Date has been 01.8.2015, and accordingly the Contract Year 1 tariff will be applicable from 01.8.2014 till 31.3.2016. We are herewith submitting the Supplementary Bill for the differential amounts payable by TANGEDCO”

29. It is clear from the above that there is an express provision (Article 9.3.1 in the PPA) which provides that non-availability of open access is an event of Force Majeure. Both the parties were aware of such provision of the PPA and accordingly, the PPA was signed. Moreover, the Respondent vide its letter dated 20.2.2016 has itself admitted that non-availability of open access is force majeure event. The Relevant portion of the said letter dated 20.2.2016 is extracted as under:

“Whereas there were transmission constraints in transmission of power for NEW Region to Southern Region and as per Article 9.3.1, grid constraint/non-availability of long term access be treated as Force Majeure without any liability on either side. Therefore, TANGEDCO considered Force Majeure protection up to the date of operationalization of LTA by PGCIL”.

30. Thus, the Respondent having agreed that there were transmission constraints for transfer of power and that non-availability of LTA is a force majeure event, cannot now go back and submit that no notice was served. Hence, we are not inclined to agree with the Respondent that there was a requirement of notice of Force Majeure to be served.

31. Having decided that non-availability of LTA was an event of force majeure, we now proceed to assess the duration for which the Petitioner was affected by force majeure. The Petitioner was able to supply power to the Respondent only after LTA was operationalized to it by PGCIL from 1.8.2015 for 281 MW and for full quantum of 500 MW from 1.10.2015. Thus, period up to 1.8.2015 for 281 MW and that up to 1.10.2015 for remaining 219 MW is covered under force majeure.



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

32. The first invoice was raised by the Petitioner on 1.9.2015, for the power supplied from 1.8.2015. The Respondent has submitted that in the first invoice there was no mention of the dispute regarding the tariff adopted and based on the invoice, all the payments were made. However, the Petitioner vide letter dated 3.3.2016 intimated the Respondent that the tariff for supply during financial year 2015-16 shall be as per first Contract Year and not as per third Contract Year and further submitted that the first Contract Year tariff will be applicable from 1.8.2015 till 31.3.2016. Accordingly, the Petitioner enclosed the Supplementary Bill for the differential amount of Rs. 14,63,34,889/- payable by the Respondent for the period from August 2015 to February 2016.

33. The Respondent vide its reply dated 10.4.2018 has submitted that the request made vide letter dated 3.3.2016 by the Petitioner for treating the 1st year tariff charges as set out in Schedule 8 of PPA as applicable for the contract year 2015-16 and the 2nd year capacity charges to be applicable for the contract year 2016-17 and so on, is an afterthought.

34. Article 3 of the PPA titled "Conditions Subsequent to be satisfied by Seller/Procurer" requires that the seller shall have LTA in place subsequent to PPA but before delivery date. Article 3.1, 3.4.3 and 3.4.6 of the Article 3 of the PPA read as follows: -

"3.1 Satisfaction of conditions subsequent by the Seller

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

a) Deleted



- b) *The Seller shall have obtained all the necessary permission for the long term open access for the intrastate transmission system from the Power Station bus bar to the injection Point (except in case of dedicated transmission lines) and shall have executed all necessary agreements for such transmission access and provided a copy of the same to the Procurer;*
- c) *The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurer;*
- d) *The Seiler shall have acquired and taken the possession of the balance area of land out of the total land requirement as mentioned in the proposal filed before the competent authority at the RFP stage.;*
The Seller shall submit the letter of possession and equivalent documents for such area of land as mentioned above to the Procurer,
- e) *The Seller shall have awarded the Engineering, Procurement and Construction contract ("EPC contract) or main plant contract for boiler, turbine and generator ("BTG"), for setting up of the Power Station and shall have given to such contractor an irrevocable NTP and shall have submitted a letter to this effect to the Procurer;*
- f) *The Seller shall have obtained all Consents, Clearances and Permits required for supply of power to the Procurer as per the terms of this Agreement;*
- g) *The Seller shall have sent a written notice to the Procurer indicating the Aggregate Contracted Capacity and total Installed Capacity for each unit and for the Power Station as a whole expressed in MW;*
- h) *The Seller shall have achieved Financial Closure and has provided a certificate from the lead banker to this effect;*
- i) *The Seller is permitted to apply for Open Access under Medium Term Open Access in case Long Term Open Access Is granted from a day later than the Scheduled Delivery date.*

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

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

35. It is observed that Article 3.4.3 read with Article 3.4.6 of the PPA provides for extension of period for fulfillment of the Conditions Subsequent as mentioned in Article 3.1 thereby extending scheduled delivery date or the revised scheduled



delivery date, as the case may be, by a period for which the Seller has been affected by force majeure event. We note that as per Article 3.1.1(c), obtaining LTA is a Condition Subsequent.

36. We have held earlier that non-availability of LTA is a force majeure event affecting the Petitioner (Seller). As has been held in Para 31 above, the period up to 1.8.2015 for 281 MW and that up to 1.10.2015 for remaining 219 MW is covered under force majeure. Therefore, the time period for fulfilment of the Conditions Subsequent as mentioned in Article 3.1 (operationalization of LTA in the instant petition) shall get extended by the period for which the Seller was affected by force majeure in terms of Article 3.4.3. Even though the period of force majeure extended beyond 6 months, the Respondent or the Petitioner did not exercise its right to terminate the contract in terms of Article 3.4.3 of PPA. Thus, in terms of proviso to Article 3.4.6, Schedule Delivery Date shall get extended for an equal period for which increase in period for fulfilment of conditions subsequent is allowed. As has been held in Para 31 above, the deemed/ extended scheduled delivery date, for the purpose of granting relief to the Petitioner under Force Majeure event, stands extended up to 1.8.2015 for 281 MW and up to 1.10.2015 for 219 MW.

37. The petitioner in its submission has further contended that expiry date may also be extended by the same period so as to maintain the contract period as 15 years. In this regard, the Petitioner has referred to Article 4.7.5 of the PPA. The Article 4.7 of the PPA titled 'Extension of Time' reads as follows:

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

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



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

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

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

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

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

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

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

40. Article 4.7.4 provides that if the parties have not agreed within thirty days after the performance has ceased to be affected by the relevant circumstance, on the time period by which the Revised Scheduled Delivery Date, Scheduled Delivery Date or



the Expiry Date should be deferred by, any Party may raise the Dispute to be resolved in accordance with Article 14. In terms of the Article 4.7.4 of the PPA, the parties were required to agree on the extension of Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date once the force majeure event was over. Though neither the Petitioner nor the Respondent have done so, we note from the submissions of the Respondent that Respondent has no issue with the extension of Scheduled Delivery Date till 1.8.2015 for 281 MW and till 1.10.2015 for 219 MW i.e. the dates from which actual supply started. However, the Respondent has contested the extension of the expiry date.

41. The Article 14 of the PPA provides as under:

“14.2.1 Amicable Settlement

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

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

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

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

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

14.3 Dispute Resolution

14.3.1 Dispute Resolution by the Appropriate Commission

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

b) Where SERC is appropriate commission, all disputes between the procurer and the



seller shall be referred to SERC.'

42. We note that it was only vide the Petitioner's letter dated 3.3.2016 that the dispute has been raised by the Petitioner that the tariff for supply during financial year 2015-16 shall be as per the first Contract Year and not as per third Contract Year and further submitted that the first Contract Year tariff will be applicable from 1.8.2015 till 31.3.2016. Since the Respondent did not accept the request of the Petitioner to treat 1st year capacity charges (Tariff) as set out in Schedule 8 of the PPA, as applicable for the Contract Year 2015-16 and the 2nd year capacity charges (Tariff) to be applicable for the Contract Year 2016-17 and so on and so forth, the Petitioner has approached the Commission.

43. We note that in terms of Article 14 of the PPA, a party is entitled to raise any claim by initiating notice to the other party, which shall contain the description, grounds and all written material in support of the dispute. We also note that the Article 14 does not prescribe any time limit till which dispute can be raised by the parties. In the instant case, the parties should have reached an agreement as regards the Revised Scheduled Delivery Date, Scheduled Delivery Date or the Expiry Date within 30 days of Force Majeure Event getting over. Else the parties should have approached the appropriate Commission for resolution of dispute. But neither party did so and it was only after the letter dated 3.3.2016 of the Petitioner addressed to the Respondent that the issue came to the fore.

44. The Respondent has submitted that the Petitioner cannot approbate and reprobate and seek relief for shifting the commencement of the 1st contract year from 1.10.2013 to 1.8.2015 and consequently seek to shift the expiry period of 30.9.2028 to 30.9.2030. In the first invoice raised by the Petitioner, there was no such mention



of shifting of the commencement of 1st contract year from 1.10.2013 to 1.8.2015. Therefore, the Petitioner's raising of the dispute by way of letter dated 3.3.2016 is an afterthought.

45. In our view, it was responsibility of both the parties to decide upon the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date once Force Majeure ceased to exist. We have already noted at paragraph 29 above that the Respondent has agreed that non-availability of LTA was an event of force majeure. Now, the Respondent cannot shy away from its responsibility merely by stating that the Petitioner raising dispute after first invoice or so is an afterthought. In view of the above, prayer of the Petitioner needs to be given consideration and matter regarding the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date needs to be decided since the parties have not agreed to these dates within the stipulated period of 30 days as provided in Article 4.7.4 of the PPA even though the matter has been raised in the Commission after almost 2 years of force majeure having ceased to exist.

46. In this regard, the Respondent has submitted that the PPA executed between the Petitioner and the Respondent is valid up to 30.9.2028 and if at all extension was needed it should be by mutual agreement between both the parties. The shifting of the commencement of the 1st contract year from 1.10.2013 to 1.8.2015 and consequently shifting of the expiry period of 30.9.2028 to 30.9.2030 would defeat the object of tendering which was for the period of 15 years expiring in 2028 and levelized tariff having been agreed between the parties under the Power Purchase Agreement. Hence, the present Petition seeking revision of tariff for the entire period of PPA on the ground that Scheduled Delivery Date and Expiry Date shall be



deferred due to Force Majeure event permitting the Petitioner to overcome the effects of Force Majeure Events is not maintainable.

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

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

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

50. Article 4.7.1 of the PPA provides the principle for extension of Expiry Date stating that *"the Revised Scheduled Delivery Date, Scheduled Delivery Date and the Expiry Date shall be deferred, subject to the limit prescribed in Article 4.7.2, for a reasonable period but not less than 'day for day' basis, to permit the Seller or the Procurer through the use of due diligence, to overcome the effects of the Force*



Majeure Events affecting the Seller or the Procurer, or till such time such Event of Default is rectified by the Procurer.” We note that such extension has to be for a reasonable period but should not be less than ‘day to day’ basis for the period for which the party is affected by force majeure event.

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

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

52. The Petitioner has prayed to declare that the Respondent is liable to pay the first year tariff as quoted, adopted and provided for in the PPA for the supply commencing from 1.8.2015 till 31.3.2016 being the first year of supply by the Petitioner to the Respondent.

53. We observe that the Scheduled Delivery Date as per the bidding document was 1.10.2013 and the Expiry Date was 15th anniversary of the Delivery Date i.e. 30.9.2028. Article 1.1 of the Article 1 regarding definition and interpretation of the PPA dated 27.11.2013 provides the definition of “Aggregate Contracted Capacity” as under:-

“Aggregate Contracted Capacity:- With respect to the Seller shall mean the aggregate capacity in 500 MW contracted with the Procurer for supply at the Interconnection point from the Power Station’s Net Capacity.”

54. In terms of the above definition in the PPA, the Aggregate Contracted Capacity is 500 MW. However, the Petitioner has started supply of 281 MW from 1.8.2015 and 500 MW from 1.10.2015. Thus, it appears that neither the Petitioner and nor the Respondent had envisaged part supply at the time of signing the PPA. If



the revised start date is considered to be the start date of supply of Aggregate Contracted Capacity i.e. 1.10.2015, there would be issue regarding tariff for supply from 1.8.2015 to 30.9.2015. Therefore, for the purpose of revision of start date, we consider the date 1.8.2015 to be the Revised Schedule Delivery Date.

55. Further, neither of the parties chose to terminate the contract nor agreed to the duration of extension of the expiry date. Upon combined reading of Article 4.7.1 (that prescribes extension to be not less than day to day basis) and Article 4.7.3 (that gives options to the parties to decide on termination of agreement after six months of continuance of force majeure), we are of the view that the Expiry Date of the PPA shall be extended by six months. In terms of provisions of Article 4.7.4 of the PPA, the parties were to agree to extension of Expiry Date which has not happened in the instant case. The Petitioner has raised a dispute vide its letter dated 3.3.2016 and when no response was received from the Respondent, the Petitioner has filed the instant Petition. Therefore, we are not inclined to consider extension of Expiry Date beyond six months. However, it is up to the parties to reach a settlement in this regard, if they so decide. Accordingly, the expiry date is re-fixed as 31.3.2029 i.e. six months from the Expiry Date as mentioned in the PPA (30.9.2028).

56. In view of the above, the Schedule Delivery Date of 1.10.2013 in Schedule 8 of the PPA (for Schedule Delivery Date) shall be substituted by 1.8.2015. Similarly, the Expiry Date of 30.9.2028 in the Schedule 8 of the PPA shall be substituted by 31.3.2029. Thus, the first contract year tariff (2013-14) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2015-16. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for 2016-17 i.e. the second year of actual power



supply and so on.

57. The Petitioner has prayed to direct the Respondent to pay the differential amount of Rs. 28,27,42,785/-, towards shortfall in tariff for the period till May 2017 and any further tariff short-paid for the period after May 2017 billing. We are not inclined to decide on the exact amount to be paid by the Respondent. However, we direct the Petitioner to revise its bills for power supplied to the Respondent in terms of the Extended Scheduled Delivery Date as decided above. The Respondent shall make payment within 60 days of raising of bills by the Petitioner failing which it would be required to pay late payment surcharge in terms of the relevant provision of the PPA.

58. The Petitioner has further prayed for grant of interest at the rate of SBIPLR for the amounts payable by the Respondent to the Petitioner, calculated from the date when the amounts became due and till the date of actual payment. We are not inclined to accept this request since it was the Petitioner who continued to raise bills upon the Respondent without a decision on the extension of Schedule Delivery Date.

59. The Respondent has submitted that as per Schedule 6 of PPA, energy charges are to be escalated from the bid deadline of 6.3.2013 with the escalation index issued from time to time by CERC. The Respondent has stated that though the supply of power started from 1.8.2015, the energy charges paid to the petitioner on the commencement date was the escalated energy charge from 6.3.2013. This calculation will be adopted till 30.9.2028. (i.e. quoted energy charge at the time of bid is escalated from 6.3.2013 till 30.9.2028 with applicable escalation index for a period of 5478 days, nearly 15.5 years). The Respondent has submitted that if the expiry date is extended up to 2030, the financial commitment for the Respondent is



extended to a further period of about 2 years starting from 6.3.2013 to 30.7.2030 which is not acceptable to the Respondent.

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

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

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

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

- (a) Non-availability of LTA to the Petitioner is a Force Majeure event in terms of the PPA.
- (b) On account of Force Majeure, the deemed/ extended scheduled delivery date shall be 1.8.2015 i.e. the date from which seller started the supply.



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

(d) The first contract year tariff (2013-14) as per original dates in the Schedule 8 of the PPA shall now be the applicable tariff for 2015-16, i.e. the first year of power supply. Similarly, the second contract year tariff (2014-15) as per original dates in Schedule 8 of the PPA shall now be the applicable tariff for the 2016-17 i.e. the second year of power supply and so on.

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

(f) No interest will be payable for difference in bills for the past period. However, if the Respondent does not pay the differential tariff within 60 days of raising of bills, it shall be liable to pay late payment surcharge as per rates provided in the PPA.

63. The Petition No. 222/MP/2017 is disposed of in terms of the above.

Sd/-
(I.S. Jha)
Member

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

sd/-
(P. K. Pujari)
Chairperson

