

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 289/MP/2018

Coram:

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

Date of Order: 30th April, 2019

In the matter of

Petition under Section 79 (1) (b) and (f) of the Electricity Act, 2003 seeking payment of Capacity Charges and Transmission Charges as per the applicable provisions of the PPAs dated 18.1.2014 and 20.1.2014.

And

In the matter of

MB Power (Madhya Pradesh) Limited
239, Okhla Industrial Estate, Phase III,
New Delhi-110020

....Petitioner

Versus

1. Uttar Pradesh Power Corporation Limited
7th Floor, Shakti Bhawan Extension,
14, Ashok Marg, Lucknow – 226001,
Uttar Pradesh.

2. Paschimanchal Vidyut Vitran Nigam Limited
Urja Bhawan, Victoria Park,
Meerut 250001, Uttar Pradesh

3. Purvanchal Vidyut Vitran Nigam Limited
DLW Bhikharipur, Varanasi – 221004
Uttar Pradesh

4. Madhyanchal Vidyut Vitran Nigam Limited
4-A, Gokhale Marg,
Lucknow – 226001,
Uttar Pradesh.

5. Dakshinanchal Vidyut Vitran Nigam Limited
Urja Bhavan, NH - 2 (Agra - Delhi Bypass Road),
Sikandra, Agra - 282 002



6. PTC India Limited
2nd Floor, NBCC Tower,
15 Bhikaji Cama Place,
New Delhi – 110066

Parties present:

Shri Amit Kapur, Advocate, MBP(MP)L
Shri Akshat Jain, Advocate, MBP(MP)L
Shri Raghav Malhotra, Advocate, MBP(MP)L
Shri Abhishek Gupta, Advocate, MBP(MP)L
Ms Rajshree Chaudhury, Advocate, PTC
Shri Rajiv Srivastva, Advocate, UPPCL & UP Discoms
Ms. Garima Srivastva, Advocate, UPPCL & UP Discoms
Ms Gargi Srivastva, Advocate, UPPCL & UP Discoms
Shri Rohit Kumar, MBP(MP)L

ORDER

The Petitioner, MB Power (Madhya Pradesh) Limited (MBPL) has filed this Petition seeking the following reliefs:

- a) *Direct UPPCL to pay ₹15,66,58,051/- along with carrying cost to the Petitioner towards the capacity charges wrongfully deducted by UPPCL for the period from 1.4.2017 to 16.5.2017;*
- b) *Direct UPPCL to pay ₹4,10,61,232/- along with carrying cost to the Petitioner towards the transmission charges wrongfully deducted by UPPCL for the period from 01.04.2017 to 16.05.2017.*
- c) *Condone any inadvertent omissions/errors/rounding off differences/shortcomings and permit the Petitioner to add/alter the grounds and make further submissions as may be required by this Hon'ble Commission; and*
- d) *Pass such other and further order or orders as this Hon'ble Commission deems appropriate under the facts and circumstances of the present case."*

2. The Petitioner is a generating company defined under Section 2(28) of the Electricity Act, 2003 and is operating the 1200 MW (2 x 600 MW) domestic coal based thermal power project in District Anuppur, Madhya Pradesh. Both the units have been declared under commercial operation. Unit-I achieved COD in May, 2015 and Unit-II achieved COD in March, 2016. The Petitioner has entered into the following separate PPAs for supply of power from the Project:



(a) PPA dated 5.1.2011 with M.P. Power Management Company Ltd (MPPMCL), the lead procurer for discoms of the State viz., Madhya Pradesh Poorva Kshetra Vidyut Vitran Nigam Limited, Madhya Pradesh Madhya Kshetra Vidyut Vitran Nigam Limited and Madhya Pradesh Paschim Kshetra Vidyut Vitran Nigam Limited, for supply of an aggregate of 30% of the installed capacity of the Project for a period of 20 years at tariff to be determined by the State Commission;

(b) PPA dated 4.5.2011 with the Govt. of MP (MPPMCL being the nominated agency) for supply of 5% of the net power generated comprising of variable charges to be co-terminus with the life of the Project.

(c) Long-Term PPA dated 18.1.2014 between PTC and the discoms of the State of Uttar Pradesh (Procurer PPA);

(d) Back-to-back PPA dated 20.1.2014 between the Petitioner, MBPL and PTC (PTC-PPA) based on the terms of Procurer PPA.

3. The Respondent No.1, UPPCL initiated competitive bidding process by issuing Request for Proposal (RFP) on 27.7.2012 for procurement of power on long-term basis under Case-I bidding to meet the power requirements of 6000 MW. Accordingly, the Respondent No.6, PTC was selected as a successful bidder to supply 361 MW (net) power from the Project and PPA was executed with the Respondents 2 to 5 (discoms of the State of UP) on 18.1.2014. As the supply was through PTC (Respondent No.6), back-to back PPA was executed by PTC with the Petitioner on 20.1.2014. Thereafter, supply of 169 MW of power from 22.8.2015 and 192 MW from 26.8.2015 (total 361 MW) to the Procurers commenced in terms of the PPAs dated 18.1.2014 and 20.1.2014.

Submissions of Petitioner

4. In the above background, the Petitioner in this Petition has mainly submitted the following:

a) The Petitioner entered into Long Term Access Agreement (LTA Agreement) dated 17.6.2011 with Power Grid Corporation of India Limited (PGCIL) for the LTA quantum of 392 MW (200 MW for WR and 192 MW for NR).

b) On 27.7.2012, Uttar Pradesh Power Corporation Limited (UPPCL) issued Request for Proposal (RFP) for the procurement of power for long term under



Case-I Bidding procedure through tariff based competitive bidding process for supply to UP Discoms. The Petitioner participated in the bidding process through PTC and submitted its bid for supply of 361 MW power from its project. On 11.12.2013, UPPCL issued a Letter of Intent to PTC informing that PTC's bid for supply of 361 MW from the Petitioner's Project has been accepted.

(c) At the time of signing of the PPA for the supply of 361 MW of power to UP Discoms, the Petitioner had a LTA of 192 MW for Northern Region already available. Further, after signing of the PPA, the Petitioner immediately applied for the balance LTA of 169 MW (361 MW - 192 MW) and also executed LTA Agreement towards the same with Powergrid Corporation of India Ltd (PGCIL) on 4.6.2015.

(d) Since operationalization of the LTA of 169 MW by PGCIL was expected to take time due to involvement of strengthening of transmission system, the Petitioner secured corresponding Medium Term Open Access (MTOA) till 29.10.2016 from PGCIL and entered into MTOA Agreement with PGCIL on 27.2.2015 as an interim arrangement till operationalization of the LTA. The supply of power corresponding to the entire Contracted Capacity of 361 MW under the PPA(s) from the Petitioner's Project commenced from August, 2015 onwards (192 MW through LTA + 169 MW through MTOA)

(e) The ongoing MTOA of 169 MW was granted to the Petitioner till 29.10.2016 and since, there was no visibility of imminent operationalization of the corresponding LTA of 169 MW by PGCIL, the Petitioner applied for continuation of MTOA beyond 29.10.2016 for a period of 3 years and entered into another agreement on 16.12.2015.

(f) On expiry of earlier MTOA of 169 MW on 29.10.2016, the operationalization of fresh MTOA of 169 MW got delayed by PGCIL. Subsequently, PGCIL operationalized part capacity of 85 MW (against the 169 MW) with effect from 10.11.2016. On 30.11.2016, UPPCL gave its consent for scheduling of power with immediate effect under this 85 MW MTOA. Accordingly, the Petitioner started supplying 277 MW power to UP Discoms (192 MW through LTA + 85 MW through MTOA) with effect from 2.12.2016.

(g) Both the events with respect to supply of 169 MW under MTOA by the Petitioner to UP Discoms (i.e. delay in supply from 30.10.2016 till 2.12.2016 and part operationalization of MTOA to the extent of 85 MW) were on account of transmission constraints which caused delay in part operationalization of MTOA by PGCIL were beyond the control of the Petitioner and that had delayed the performance of obligation under PPA. Accordingly, the Petitioner vide its letter dated 9.12.2016 informed PTC about the occurrence of force majeure event. i.e. delay in operationalization of MTOA and part operationalization of MTOA



(h) The Petitioner vide its letter dated 2.1.2017 informed PTC that the balance MTOA of 84 MW is likely to be operationalized shortly and therefore, requested PTC to coordinate with the concerned agencies of UP and to ensure adequate arrangement/readiness in advance for prompt scheduling and off taking of power by UP Discoms from the Petitioner's project for the balance quantum of 84 MW immediately after operationalization of the MTOA by CTU.

(i) Meantime, the Petitioner continued to follow up with PGCIL for operationalization of its LTA of 169 MW. The Petitioner came to know that operationalization of the LTA was expected shortly and that subsequent to operationalization of LTA, the ongoing partly operationalized MTOA of 85 MW would be converted to LTA.

(j) The Petitioner vide its letter dated 14.3.2017 requested PTC for advance readiness by the concerned agencies of Uttar Pradesh for prompt scheduling and off take of power by UPPCL/ UP Discoms for entire Aggregated Contracted Capacity of 361 MW immediately after the operationalization of said LTA of 169 MW. Accordingly, PTC vide its letter dated 14.3.2017 and 27.3.2017 informed UPPCL about imminent operationalization of the said LTA and requested them to make adequate arrangement to schedule the same immediately after operationalization of the said LTA.

(k) PGCIL operationalized the said LTA of 169 MW for Uttar Pradesh on 30.3.2017 and on the same day, the Petitioner informed PTC that PGCIL had operationalized the LTA for the entire quantum of 361 MW and the Petitioner is now in position to supply entire aggregated contracted capacity of 361 MW and requested PTC to off-take scheduling of entire aggregated contracted capacity with immediate effect. Accordingly, PTC vide its letter dated 30.3.2017 requested UPPCL to off take scheduling of 361 MW of power under the LTA granted to the Petitioner.

(l) The Petitioner vide its letter dated 31.3.2017 informed PTC that in the event of failure and/or delay on UPPCL's part to off - take the entire or a partial aggregate contracted capacity as defined in the PPA from 1.4.2017 onwards, the Petitioner would be entitled to claim and recover capacity charges for such un-availed capacity for such un-availed period from 1.4.2017 onwards as per the provisions of the PPA. In addition, UPPCL would also be liable to pay the transmission charges for the entire aggregate contracted capacity of 361 MW as per the transmission charges bill raised by PGCIL on the Petitioner. A copy of this letter was also marked to UPPCL and UP Discoms. Accordingly, PTC in its letter dated 31.3.2017 to UP Discoms and UPPCL reiterated the contents of the Petitioner's letter dated 31.3.2017.

(m) The Petitioner persistently followed the matter with PTC from 31.3.2017 till 16.5.2017 for scheduling of the the entire Contracted Capacity of 361 MW of power. However, despite all efforts and despite the availability of entire declared



capacity and LTA for the entire contracted capacity of 361 MW under PPA, UPPCL continued to off-take/ schedule only 277 MW.

(n) UPPCL vide its letter dated 15.5.2017 gave its consent for scheduling of entire 361 MW including the scheduling under recently granted 169 MW LTA, with immediate effect. Thereafter, the Petitioner raised invoices for the transmission charges and the capacity charges on UPPCL. However, UPPCL deducted amounts for the period 1.4.2017 till 16.5.2017 towards Capacity charges and Transmission charges.

(o) The Petitioner vide its letter dated 2.6.2017 informed PTC regarding deduction of capacity charges from April, 2017 invoice. The Petitioner further informed PTC that since the Petitioner had declared the availability of entire contracted capacity of 361 MW for dispatch to UP, the Petitioner is entitled to capacity charges for the entire contracted capacity of 361 MW and also the transmission charges for the same. The Petitioner requested PTC for reimbursement of ₹10.63 crore and to make payment as per invoice raised by the Petitioner. However, despite repeated requests and reminders, UPPCL has not made payment.

(p) The Petitioner vide letter dated 21.6.2017 informed PTC regarding the deduction of capacity charges by UPPCL from May, 2017 invoice raised by the Petitioner. The Petitioner requested PTC to make the payment as per the invoices raised by the Petitioner.

(q) The Petitioner has declared the entire contracted capacity of 361 MW for the period 1.4.2017 till 16.5.2017. However, UPPCL off-took/scheduled only 277 MW and paid the capacity charges and transmission charges corresponding to 277 MW only. UPPCL has the obligation to pay capacity charge and transmission charges for the entire contracted capacity of 361 MW.

(r) Article 4.3 of the Procurers PPA deals with 'Procurer's Obligation', which expressly stipulates that the obligation of payment of transmission charges vests with UPPCL, but if the Petitioner pays the transmission charges, the same shall be reimbursed by UPPCL. UPPCL was aware that the Petitioner was in a position to supply the entire contracted capacity of 361 MW from 1.4.2017 but it continued to avail only 277 MW. However, PGCIL raised the bill for transmission charges for entire 361 MW capacity with effect from 1.4.2017 and the Petitioner paid the said transmission charges for the entire contracted capacity of 361 MW. Therefore, UPPCL is obliged to reimburse the transmission charges paid by the Petitioner for the period from 1.4.2017 to 16.5.2017

(s) The Appellate Tribunal for Electricity in its judgment dated 13.10.2015 in Gujarat Electricity Transmission Corporation Limited v GERC & ors had held that a customer is liable to pay the transmission charges based on per MW capacity booked irrespective of the actual use of the transmission line.



(t) The Central Commission in its order dated 6.7.2017 in Petition No. 103/MP/2017 had held that a LTA customer is liable to pay the transmission charges after the COD of the transmission system executed based on the LTA. Since the Petitioner was obliged to pay the transmission charges for the entire LTA, despite power not being scheduled by UPPCL, the Petitioner is entitled for reimbursement of transmission charges of ₹4.10 crore towards Transmission charges for 84 MW capacity for the period of 46 days i.e. 1.4.2017 to 16.5.2017, along with carrying cost.

(u) As per Article 4.4 of the Procurers PPA read with PTC PPA, the Petitioner is obliged to supply power to UPPCL and UPPCL is obliged to off- take such power. If UPPCL fails to off-take power to the extent made available by the Petitioner, UPPCL shall be liable to pay Capacity charges to the Petitioner for the power not off-taken by UPPCL. Therefore, UPPCL is obliged to pay ₹15.66 and ₹4.10 crore towards the Capacity Charges and Transmission Charges, which has been wrongfully deducted by UPPCL for the period from 1.4.2017 to 16.5.2017.

(v) The Petitioner is also entitled to carrying cost as UPPCL had withheld the payment contrary to the provisions of the Procurers PPA. It is well settled principle that whenever payment is deferred or delayed, carrying cost is payable along with such deferred payment.

Accordingly, the Petitioner has submitted that the Commission may direct UPPCL to pay the amount of ₹15.66 and ₹4.10 crore towards Capacity Charges and Transmission Charges respectively along with carrying cost.

5. The Petition was admitted on 15.11.2018 and the Commission issued notice to the Respondents. In response, Respondent No. 1, UPPCL (on its behalf and on behalf of Respondents 2 to 5 herein) has filed its reply vide affidavit dated 14.12.2018. Rejoinder to the said reply has been filed by the Petitioner vide affidavit dated 27.12.2018.

Reply of UPPCL

6. The Respondent No.1, UPPCL vide its reply affidavit dated 14.12.2018 has mainly submitted the following:

a) There is no contractual relationship between the Petitioner and the Respondents No.1 to 5, i.e. UPPCL and UP Discoms. The Petitioner's rights



and obligation is premised on the PPA dated 20.1.2014 executed with PTC and has nothing to do with the Procurers PPA.

b) The Procurers PPA was approved by UPERC which confers the jurisdiction upon UPERC with respect to adjudication of any "Dispute". Article 14 of the PPA provides for 'Governing Law and Dispute Resolution'. As per Article 14.1.1 of the PPA, any legal proceeding in respect of any matters, claims or disputes, shall be under the jurisdiction of appropriate court in Lucknow. Further, as per Article 14.3.1.1, where SERC is the Appropriate Commission, all disputes between the procurers and the Seller shall be referred to SERC."

c) The provisions as contained in Article 14.1.1 and Article 14.3.1.1 (b) of the PPA are covered by clause (5) of the Section 64 of the 2003 Act. The Hon'ble Supreme Court in the case of Energy Watchdog V CERC has established the applicability of Section 64 (5) of the Act and has held that Section 64 (5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. The parties to the Procurers PPA have subjected themselves to the jurisdiction of UPERC which has approved the aforesaid PPA.

d) The concept of 'back to back PPA has no sanction under the Law. The Procurers PPA is a contractual document, which clearly specifies the inter se contractual obligations to be performed between the parties of the agreement. It cannot be held responsible for the obligations agreed between the Petitioner and PTC in the PTC PPA. Therefore, two separate PPAs cannot be said to part and parcel of the same transaction.

(e) The Petitioner did not participate in the bidding process and it was PTC which participated in the bidding process. The Petitioner cannot make any claim upon the answering respondent directly by saying PTC was a mere "conduit".

(f) Based on LTA agreement signed on 17.6.2011, the Central Commission vide its order dated 15.12.2017 in Petition No.141/TT/2015 had directed the Petitioner to recover compensation for the delay in providing LTA during the period from 20.5.2015 (COD of Petitioner's generating station) to 26.8.2015. Thus, the Petitioner has been awarded compensation in terms of the LTA agreement signed with the CTU for the delay in operationalization of LTA between May, 2015 and August, 2015. It is also possible that the Petitioner in a similar manner would have received compensation for delay in commissioning of ± 800 kV Champa Pooling Station - Kurukshetra HVDC transmission line also. The Petitioner has not placed on record the details of compensation received by it for the delay in operationalizing the LTA during the period from 30.10.2016 to 31.3.2017 on account of the delay in commissioning of 800 kV Champa pooling station-Kurukshetra HVDC transmission line.



(g) The intimation in respect of charging of the Champa–Kurukshetra transmission line was communicated by PTC during March, 2017. UPPCL was bound to follow the due process before providing the complete off-take of the capacity declared by Petitioner. In this regard, UPPCL had written to UPSLDC on 6.4.2017 seeking NOC for scheduling of entire power from the Petitioner's generating station. The State SLDC replied with an element of caution on 13.4.2017 that the then Available Transmission Capacity (ATC) was 7200 MW and the allocation of power from CSGS/ISGS/LTA/MTOA was more than 8087 MW. SLDC further stated that in case the inter-state power was scheduled without obtaining appropriate ATC level more than the LTA/MTOA, import power may be curtailed in real time resulting in additional financial burden in the form of capacity charges to generators and CTU charges to PGCIL without getting power.

(h) Citing above constraints, UPSLDC in its communication dated 13.4.2017 stated that the power from the Petitioner's generating station can be accommodated with the condition that UPPCL has to schedule and draw the power within specified limit of ATC. Thus, in the interest of grid security and in line with the suggestions and recommendations of UPSLDC and other statutory bodies, UPPCL approved the contended DC of the Petitioner as soon as NOC was granted for the same.

(i) The Petitioner has claimed amounts of ₹15.66 crore and ₹4.10 crore towards capacity charges and transmission charges respectively for the period between 1.4.2017 and 15.5.2017. However, the Petitioner has not submitted the proof in respect of payments pertaining to these bills.

Accordingly, the Respondents have prayed that the Petition is not maintainable and the prayers of the Petitioner may therefore be rejected.

Rejoinder of Petitioner

7. The Petitioner in its rejoinder affidavit dated 27.12.2018 has submitted the following:

a) The Petitioner has entered into the PTC-PPA with PTC, a trading licensee under the 2003 Act. The PTC-PPA incorporates the terms and conditions of the Procurer-PPA on a back-to-back arrangement for supply of power from the Petitioner's Project to the Respondents. The very purpose of executing the PTC-PPA was to enable the supply of power to the Respondents under the Procurer-PPA. The Procurer-PPA and the PTC-PPA are co-terminus and one cannot exist without the other. The role of PTC is merely of an intermediary. The actual sale and purchase of electricity takes place between the Petitioner and UP discoms.



b) It is well settled that when a trading licensee is not functioning as a merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on all the risks to the purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.

c) The UP Discoms, at the time of bidding were aware that PTC would be supplying power to the Respondents from the Petitioner's Project. The Petitioner was the developer of the generation source for supplying power to the UP discoms and PTC was acting as a trading licensee for the entire transaction. Therefore, the contention of UPPCL that there is no contractual relationship between the Petitioner and the Respondents and therefore, the present Petition is not maintainable is baseless. The supply of power by the Petitioner through PTC (trading licensee) to the UP discoms is a back-to-back arrangement and the procurement of power is regulated by this Commission.

d) The Commission has the jurisdiction in terms of Sections 3, 79 and 64(5) of the 2003 Act as interpreted by the Hon'ble Supreme Court in its judgment in Energy Watchdog v CERC & ors (2017) 14 SCC 80 (Energy Watchdog Case), read with the provisions of the revised Tariff Policy. UPPCL's reliance on Section 64(5) is misplaced. The Procurer-PPA was adopted by UPERC under Section 63 of the 2003 Act on a petition filed by the UP discoms and hence the same cannot be construed to be a Petition under Section 64(5).

e) The Respondents had raised similar contentions before the Commission in Petition No.171/MP/2016 and the Commission by its Order dated 22.6.2018 had rejected the submissions of the Respondents and held that the petition for adoption of tariff under Section 63 of the 2003 Act cannot be construed as a joint application under Section 64(5). Therefore, the Commission has the jurisdiction to adjudicate the claims of the parties and not the UPERC. The above findings of the Commission are squarely applicable to the present Petition and the erroneous contentions of the Respondents are liable to be rejected.

f) The period in dispute in the present Petition is limited to the period from 1.4.2017 to 16.5.2017 for which the Petitioner has claimed Capacity charges and Transmission charges for 84 MW (due to under off-take/ under scheduling by UPPCL to the extent of 277 MW against the Petitioner's Declared Capacity and operationalized LTA of the entire Contracted Capacity of 361 MW). However, UPPCL has raised unrelated and extraneous issues between the Petitioner and PGCIL which has absolutely no bearing on the present issue and is not germane for adjudication of the present dispute. UPPCL has raised issues which pertain to the period from 20.5.2015 to 26.8.2015, which is not the period in dispute in the present Petition. The issue raised by UPPCL is even before the commencement of power supply to the Respondents in terms of the



PPA(s), i.e., August, 2015, and as such, these claims of Respondent No. 1 merit no consideration and are liable to be rejected.

g) The Petitioner has not received any compensation on account of delay in commissioning of 800 kV Champa Pooling Station-Kurukshetra HVDC operationalization of LTA by PGCIL during the period from 30.10.2016 to 31.3.2017.

h) The Petitioner's obligation under PPA is to ensure the availability of Contracted Capacity of 361 MW and arranging LTA for evacuation of power from the Petitioner's Project (*Injection Point*) till CTU-STU interface(s) (*Delivery Point*). Further, UPPCL and UP discoms obligation is to ensure availability of interconnection facilities and evacuation of power from the Delivery Point [i.e. CTU-STU interface(s)] onwards. The Petitioner had intimated UPPCL regarding the availability of entire Contracted Capacity and corresponding LTA till the Delivery Point and had requested UPPCL to ensure availability of infrastructure beyond the Delivery Point for off take of power from 1.4.2017 onwards. Therefore, the Petitioner has fulfilled its obligation under the PPA(s) to provide the entire Contracted Capacity till the Delivery Point.

i) The UPSLDC letter dated 13.4.2017 relied upon by UPPCL is an internal communication between UPSLDC and the UPPCL which has no legal basis. The Petitioner has been in strict compliance with the terms of the PPA(s) and hence, any issue regarding the Available Transmission Capacity is between UPPCL and UPSLDC and does not have any bearing for adjudication of the present Petition.

j) The proof of payment of transmission charges has already been submitted in the Petition. Further, as per the provisions of the PPA, there is no obligation on the Petitioner to provide any Auditor's certificate. The only obligation on the Petitioner is to provide the invoices raised by PGCIL which the Petitioner has duly complied with.

Accordingly, the Petitioner has submitted that the contentions of the Respondents deserve no merit for consideration and is therefore liable to be rejected.

8. During the hearing of the Petition on 31.1.2019, the learned counsels for the Petitioner and the Respondents reiterated the submissions made in their pleadings. Accordingly, the Commission reserved its order in the Petition.



Analysis and Decision

9. After consideration of the submissions of the Petitioners and the Respondents, UPPCL/UP discoms, the following issues arise for consideration:

Issue No (A): Whether the Commission has the jurisdiction to decide the dispute?

Issue No (B): Whether transmission charges and capacity charges have been wrongfully deducted by UPPCL for the period from 1.4.2017 to 16.5.2017?

Issue No A: Whether the Commission has the jurisdiction to decide the dispute?

10. To determine whether this Commission has the jurisdiction to decide the dispute, it is required to determine (1) whether there exists a composite scheme for generation and supply of power to more than one State (2) whether there is privity of contract between the Petitioner and the Respondent discoms of UP, and (3) whether back to back arrangement for supply of power from generating station to the distribution licensee through trader amounts to supply of power by a generating company to a distribution licensee.

(a) Composite Scheme

11. As stated, the Petitioner, MBPL is supplying power to the host State of MP and to the discoms of the State of UP from its power project situated in State of MP. It has entered into separate long term PPA dated 5.1.2011 and 4.5.2011 for supplying power from its power plant to the State of MP and PPAs dated 18.1.2014 and 20.1.2014 for supplying power to the discoms in the State of UP through the Respondent No.6 PTC, an electricity trader. In addition to this, the Petitioner has been supplying power to various other States under short term basis. It is therefore evident that the Petitioner, MBPL is supplying electricity to multiple States from the same generating station and such supply is governed by binding arrangements, namely the PPAs. Sub-section (b) of Section 79(1) of the 2003 Act provides that Central Commission shall regulate the tariff of generating company, if such generating company enters into or otherwise have



a composite scheme for generation and sale of electricity in more than one State. The Hon'ble Supreme Court vide its judgment dated 11.4.2017 in Civil Appeals titled Energy Watchdog v CERC & ors (2017 (4) SCALE 580) while upholding the jurisdiction of this Commission for regulating the tariff of projects which meet the composite scheme, has explained the term 'composite scheme' as under:

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

12. The Hon'ble Supreme Court while interpreting the term 'composite scheme' under Section 79(1)(b) of the 2003 Act held that this Commission has the jurisdiction to regulate the tariff of generating stations having a composite scheme for generation and sale of power to more than one State, whose tariff has been adopted under Section 63 of the 2003 Act. Since the Petitioner, MBPL is supplying power to multiple States through PPAs, its generating station has a 'composite scheme' for generation and sale of power to more than one State. Hence, in the light of the decision of the Hon'ble Supreme Court we are of the view that this Commission has the jurisdiction to regulate the tariff of the Project of the Petitioner and thereby adjudicate the disputes raised in the present Petition in terms of Section 79 (1) (b) & (c) read with 79(1)(f) of the 2003 Act. Accordingly, the Petition is maintainable.



(b) Privity of Contract

13. The Petitioner has submitted that the Procurer-PPA and the PTC-PPA form part and parcel of the same transaction wherein power is generated by the Petitioner and off-taken by the Procurers through PTC, a trading licensee. The Petitioner has pointed out that the role of PTC is that of a conduit between the Petitioner and the Respondent discoms of UP and has submitted that the two PPAs are inextricably linked to each other and the rights and obligations under the Procurer-PPA were mirrored in the PTC-PPA. The Respondent, UPPCL has submitted that there is nothing in the PPA dated 18.1.2014 which would suggest that the Procurers owed any obligation towards the Petitioner. It is only through conduit PTC that the Petitioner, in terms of the PPA dated 20.1.2014 could invoke its rights and duties. The Respondent has further submitted that though the PTC-PPA dated 20.1.2014 obligates the Petitioner and PTC to comply with the obligations of PTC in Procure-PPA dated 18.1.2014, there is no corresponding obligation upon the Respondent discoms, in terms of the PPA dated 18.1.2014, towards the Petitioner. The Respondents have stated that there is no provision in the PPA dated 18.1.2014 which would suggest that the Procurer has any obligation towards the Petitioner and it is only through PTC, the Petitioner could invoke its rights and duties. The Petitioner in its rejoinder has contended that the PTC-PPA dated 20.1.2014 incorporates the terms and conditions of the Procurer-PPA dated 18.1.2014 as a back to back arrangement for supply of power from the Petitioner's Project to the Respondent discoms. The Petitioner has further pointed out that PTC-PPA has been executed in order to enable PTC to fulfill its obligations under the Procurer-PPA and that the Procurer-PPA and PTC-PPA are co-terminus and one cannot exist without the other. The Petitioners have also submitted that the Respondent at all times was aware of the source of intended supply as is evident from the documents namely the LOI dated 11.12.2013 and the Request for Proposal (RFP) dated 27.7.2012. Referring to



the judgments of the Appellate Tribunal in PTC India vs Uttarakhand Electricity Regulatory Commission & ors, Lanco power Ltd v HERC & ors, Lanco Budhil Hydro Power Private Ltd vs HERC & ors and the judgment of the Hon'ble High Court of Delhi in PTC V Jaiprakash Ventures Ltd (2012 (130) DR 351), the Petitioner has contended that when a trading licensee is not functioning as a merchant trader, then there is clearly a link between the ultimate distribution company and the generator with the trader acting as an intermediary linking company.

14. We have considered the submissions of the parties and examined the legal position on the issues raised. As stated earlier, Respondent No.1, UPPCL had initiated competitive bidding process by issuance of RFP dated 27.7.2012 for procurement of 6000 MW base load power on long term basis by UPPCL on Case-I basis. Clause 2.1.2.2 (g) of the said RFP provides that in case the bidder was a trading licensee, it should have executed an exclusive PPA for the quantity of power offered in its bid and copy of the same was to be furnished with the bid. The Petitioner desirous of supplying power to the Respondent discoms, entered into an exclusive PPA with PTC on 21.9.2012 and the said PPA formed part of the bid submitted by PTC before UPPCL. Thereafter, PTC was selected as a successful bidder premised on the PPA dated 21.9.2012. Thus, even at the time of bidding and after PTC was selected as a successful bidder and had signed the Procurer-PPA dated 18.1.2014, the Respondent, discoms were aware that PTC would be supplying power from the Petitioner's Project.

15. It is observed that PTC had submitted its offer for 361 MW clearly indicating the source of supply of power from the generating station of the Petitioner, MBPL. The offer of PTC was accepted by UPPCL and accordingly, LOI dated 11.12.2013 in favour of PTC was issued for supply of 361 MW of power to UPPCL on a long term basis. The relevant portion of the LOI dated 11.12.2013 is extracted hereunder:



“This is to inform you that the process of evaluating the bids received pursuant to the final RFP, including the “bid” has been concluded. We are pleased to inform you that your proposal and offer received by way of the bid for the generation source MB power (Madhya Pradesh) Limited for 361 MW has been accepted and M/s PTC India Limited is hereby declared as the successful bidder for the generation source MB Power (Madhya Pradesh) Limited as per clause 3.5 of the Final RFP and consequently, this Letter of Intent (hereinafter referred to as the “LOI”) is being issued.”

16. PTC after accepting the LOI had acted upon the same by entering into Procurer–PPA dated 18.1.2014 with the Respondent discoms and PTC-PPA dated 20.1.2014 with the Petitioner, MBPL. The Respondent, UPPCL has submitted that there is nothing in the PPA dated 18.1.2014 which would suggest that the Procurers owed any obligation towards the Petitioner and it is only through the ‘conduit’ PTC that the Petitioner, in terms of the PPA dated 20.1.2014 could invoke its rights and duties. In view of the above, we find that this submission of the Respondent discoms is devoid of merits. Reference can also be made to some of the provisions of the Procurer-PPA and the PTC-PPA, as under:

Procurer-PPA dated 18.1.2014

“1.1 Definitions

Declared Capacity: shall mean the power station’s net capacity at the relevant time at the interconnection point (expressed in MW) as declared by the seller in accordance with the Grid Code and dispatching procedures as per the Availability Based Tariff.

Developer: shall mean the owner of the power station from which the seller shall supply the Aggregate Contracted Capacity to the Procurers.

Interconnection Point: shall mean the point where the power from the power station switchyard bus of the seller is injected into the interstate/intrastate transmission system (including the dedicated transmission line connecting the power station with the interstate/ intrastate transmission system).

Power Station: shall mean MB Power (Madhya Pradesh) Ltd. power generation facility of installed capacity of 2x600 MW, located at villages Laharpur, Murra, Guwari, Jaithari, Belia in District: Annupur, Madhya Pradesh.

Trading licensee: shall mean the seller which is an electricity trader and has submitted an exclusive power purchase agreement executed with developer.

PTC-PPA dated 20.1.2014

Recitals

G:It is clearly understood between the parties that the objective of the PTC-PPA is to enable PTC fulfil its duties and obligations under the Procurer-PPA. The procurer-



PPA is annexed herewith as Annexure-1 to this PTC-PPA and is the basis for execution of the PTC-PPA

H:*The provision of the Procurer-PPA signed between PTC and the Procurer be applicable mutatis mutandis to this agreement except to the extent anything mentioned otherwise herein under this agreement for the purpose of the Procurer-PPA*

J: *In the above context, the parties agree that they shall perform their respective obligations and functions in strict compliance with the letter and spirit of this agreement and also in strict compliance with the Procurer-PPA.*

Article 2.1.1: *This agreement shall become effective upon the date of execution of this Agreement. The validity shall be same as mentioned in the Procurer-PPA.*

Article 2.1.2: *The term of this agreement shall be co-terminus with the Procurer-PPA when it shall automatically terminate, unless terminated earlier, Pursuant to article 2.2.*

Article 6.1: *The tariff payable by PTC to company under this agreement shall be the amount payable to PTC by procurer as per the provision of schedule 4 of the Procurer-PPA minus PTC trading margin as specified herein below.....*

Article 14.11: *Purpose of the Agreement: The parties herein understand that this PTC-PPA is being entered into to enable PTC fulfil its obligations under the Procurer-PPA for continuous and uninterrupted supply of power to the Procurer under the Procurer-PPA.*

17. It is evident from the above that both the PPAs are inextricably linked to each other and the rights and obligations' arising out of any one PPA are also reflected in the other PPA. Further, the LOI issued by UPPCL on 11.12.2013 had recognised the generating station of the Petitioner as the source for supply of power to it through PTC. It is also undisputed that PTC had supplied power to UPPCL from the generating station of the Petitioner since August, 2015 in terms of the said LOI. Thus, the LOI dated 11.12.2013 read with the provisions of the PPAs unambiguously establish the nexus between the generating company of the Petitioner and the Respondent discoms, even though power was supplied through PTC, which is an inter-State trading licensee. Hence, the contention of UPPCL that it has no privity of contract or arrangement with MBPL lacks merit. We, therefore, hold that the present Petition filed by MBPL for adjudication of disputes against Respondent, discoms of UP is maintainable under Section 79(1)(b) read with Section 79(1)(f) of the 2003 Act.



(c) Supply of Power through a Trader

18. The issue whether the supply of power by a generating company to a trading licensee and supply of the said power by the trading licensee to the distribution companies through back to back arrangements would be subject to the regulatory jurisdiction of the Regulatory Commission arose for consideration in Appeal No.15/2011 (Lanco Power Limited v HERC & ors) before Appellate Tribunal for Electricity and in OMP 677 of 2011 {PTC India Limited Vs. Jaiprakash Power Ventures Ltd.} before Hon'ble High Court of Delhi. In Appeal No.15/2011, Lanco Power Limited had a PPA with PTC and PTC had a back to back PSA with Haryana Utilities. Lanco Power Limited raised a preliminary objection that since power was supplied by the generator to PTC India Limited which is a trader, the Haryana Electricity Regulatory Commission would not have jurisdiction to determine the tariff. The Tribunal after considering the provisions of Sections 79, 86 and 66 of the Act has in its judgment dated 4.11.2011 has observed as under:

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

.....
61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumers is one interconnected transaction and is regulated at each level by the statutory Commissions in a manner so that the objective of the Act are fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i.e. the sale from generator to a trading licensee is to be kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act becoming completely ineffective and completely failing to serve the objective for which it was created.

19. In OMP No. 677/2011 (PTC India Limited v Jaiprakash Power Ventures Limited), PTC India Limited had challenged the Arbitral Award dated 28.4.2011 in the dispute between PTC India Limited and Jaiprakash Power Ventures Limited under Section 34 of the Arbitration and Conciliation Act, 1996. One of the issues framed by the Hon'ble



High Court of Delhi was whether the decision of the majority of the Tribunal that CERC had no power to determine the tariff for electricity supplied by a generating company to a trading licensee suffered from patent illegality or was otherwise opposed to public policy. The Hon'ble High Court after examining the relevant provisions of the Act, the Statement of Reasons of the Act and the various decisions of the Hon'ble Supreme Court and Appellate Tribunal observed in its judgment dated 15.5.2012 as under:

“52. In order to examine the above issue, first the relevant portion of the SOR of the EA requires to be referred to. Paras 4(ix) and (x) of the SOR acknowledge that under the EA, trading in electricity was for the first time being recognized as a distinct activity. The said clauses read as under: “(ix) Trading as a distinct activity is being recognized with the safeguard of the Regulatory Commissions being authorised to fix ceilings on trading margins, if necessary. (x) Where there is direct commercial relationship between a consumer and a generating company or a trader the price of power would not be regulated and only transmission and wheeling charges with surcharge would be regulated.”

53. A careful reading of Clause 4(x) of the SOR shows that it talks of direct commercial relationship between (i) a consumer and a generating company; (ii) a consumer and a trader. In the chain of supply of electricity, it is possible that a generating company makes a direct supply to a consumer. Sometimes, a trader could also be an intermediary in the supply by the generating company to the consumer. Such supplies would not be regulated by the appropriate Commission. Where there is a direct transfer of electricity from either the generating company to the consumer or from a trader to the consumer then the tariff would not be subject to regulation. However, where a trader or trading licensee sells electricity to a distribution licensee which in turn supplies to the consumer, the tariff would be subject to regulation.

55. The words "supply of electricity by a generating company to a distribution licensee" occurring in Section 62 would, in the above context, envisage apart from a direct supply from a generating company to a distribution licensee, also a supply from a generating company to a trading licensee who in turn sells to a distribution licensee. The trader could intervene either in the supply by a generating company to a consumer or he could intervene in the supply by a generating company to the distribution licensee. The latter transaction would certainly form the subject matter of regulation by the appropriate Commission within the meaning of Section 62 read with Para 4 (x) of the SOR.

56. It appears inconceivable that where a trading licensee is selling to a distribution licensee and not directly to a consumer, the tariff for such a supply by the generating company to the trading licensee would not be amendable to the regulatory jurisdiction of CERC or SERC under Section 62 of the EA. An interpretation to the contrary would defeat the rights of the consumers which are intended to be protected by the CERC and SERCs. The only freedom was given to the direct commercial relationship between a generating company and consumer where presumably there would be bulk consumption by such consumer. However, in cases like the present one where the trader is selling electricity to a distribution licensee who is eventually selling or supplying electricity to the consumer, the tariff would necessarily have to be regulated. Otherwise, every generating company would route the sale of electricity through a trading licensee to evade the applicability of the regulatory framework of EA.”



64. The Tribunal in the present case did not discuss the changed legal position as a result of the decisions of the APTEL subsequent to Gajendra Haldea and Lanco-I in light of the altered decisions of the Supreme Court including the one in the GUVNL case. It went by only a literal and not a purposive and contextual interpretation of Section 62 EA. The majority of the Tribunal was, therefore, in error in holding that the transaction involving supply by a generating company to a trading licensee was outside the purview of regulation by the CERC under Section 79 (1) (f) read with Section 62 of the Act.”

20. The above judgement was challenged before the Division Bench of the Hon“ble High Court of Delhi in FAO (OS) No. 244/2012 (Jaiprakash Power Venture Pvt Limited v PTC India Limited). Subsequently, the said FAO was withdrawn and there was no further challenge to the judgement dated 15.5.2012 in OMP No. 677/2011. The decision in the said OMP has attained finality which clearly provides that when power is supplied by a generating company to a distribution licensee through the intervention of a trading licensee for ultimate consumption of consumer, the tariff would be subject to the regulatory jurisdiction of the Regulatory Commission. Since in this case electricity was supplied from the generating station of Petitioner to the Respondent UP discoms through PTC based on back to back arrangements, such supply of power shall be subject to the regulatory jurisdiction of this Commission including adjudication of any dispute with reference to supply of such power and tariff thereof.

21. The Appellate Tribunal in Lanco Power Ltd v HERC & ors had decided that when power is supplied to a trading licensee which has back to back arrangements for supply of the same power to the distribution licensees, the Appropriate Commission has the power to determine the tariff. The Hon’ble High Court of Delhi in PTC India Ltd v Jaiprakash Power Ventures Ltd has categorically held that when the trading licensee intervenes in the process of supply of electricity by a generating company to the distribution licensee, the transaction would be subject matter of regulation under Section 62 of the Act. In the context of JP Power Venture Ltd, the High Court has held that the transactions involving the supply of power by the generating company to PTC would be regulated by CERC since PTC is selling the power to the distribution



licensees for eventual supply to the consumers. It is pertinent to mention that this Commission relying on the judgement of Hon'ble High Court had decided the jurisdiction of this Commission in case of supply of power by GMR Kamalanga Ltd to Haryana Utilities through PTC India Limited. The jurisdiction of the Commission was upheld by the Appellate Tribunal in its judgement dated 7.4.2016 against which GRIDCO filed Civil Appeal No. 5415/2016. The Hon'ble Supreme Court in its judgement dated 11.4.2017 in Energy Watchdog case upheld the jurisdiction of the Commission. In the light of the settled legal position and the factual matrix of the present case, the contentions of the Respondent, UPPCL/UP discoms with regard to absence of jurisdiction of this Commission to adjudicate the dispute between MBPL/PTC and UPPCL are rejected. We hold that the Petition filed by the Petitioner to adjudicate the disputes is maintainable before this Commission under Section 79(1)(b) read with section 79(1)(f) of the 2003 Act.

(d) Jurisdiction of the Civil Courts at Lucknow or the State Commission

22. The Respondent, UPPCL has further contended that in terms of Article 14.1.1 of the PPA, any legal proceedings in respect of any matters, claims or disputes under the PPA shall be under the jurisdiction of the appropriate Courts in Lucknow. It has also submitted that the provisions of Article 14 of the said PPA is covered by section 64(5) of the 2003 Act and the Hon'ble Supreme Court in the Energy Watchdog case has approved the applicability of section 64(5) of the 2003 Act.

23. The matter has been considered. It is noticed that Article 14.3.1 provides for Dispute Resolution by the "Appropriate Commission". Article 14.3.1.1(a) provides for the following:

"Where CERC is the Appropriate Commission, any dispute arising from a claim made by any party for any change in or determination of 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 such claims could result in change in tariff, shall be subjected to adjudication by the Appropriate Commission.”

24. As stated, the generating station of the Petitioner has a composite scheme for supply of power in more than one State. Hence, the ‘Appropriate Commission’ in terms of Article 14.3.1.1(a) will be the Central Commission to deal with any of the claims/disputes raised by the Petitioner under the PPA dated 18.1.2014 / 20.1.2014. The submissions of the Respondents, UP discoms are, therefore, rejected.

25. The Respondents, UP discoms have referred to the findings of the Hon’ble Supreme Court in the Energy Watchdog judgment as regards Section 64(5) of the 2003 Act and has contended that the State Commission (UPERC) only has jurisdiction in the matter. Section 64(5) of the 2003 Act provides as under:

“64(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.

26. With regard to Section 64(5), the Hon’ble Supreme Court in its judgment dated 11.4.2017 had observed the following:

“Section 64(5) has been relied upon by the Appellant as an indicator that the State Commission has jurisdiction even in cases where tariff for inter-State supply is involved. This provision begins with a non-obstante clause which would indicate that in all cases involving inter- State supply, transmission, or wheeling of electricity, the Central Commission alone has jurisdiction. In fact this further supports the case of the Respondents. Section 64(5) can only apply if, the jurisdiction otherwise being with the Central Commission alone, by application of the parties concerned, jurisdiction is to be given to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. We, therefore, hold that the Central Commission had the necessary jurisdiction to embark upon the issues raised in the present cases.”

27. In our view, the findings of the Hon’ble Supreme Court on Section 64(5) do not in any manner support the argument of the Respondent that the Central Commission will not have jurisdiction in such matters relating to inter-State supply of power. In the above quoted para, the Hon’ble Supreme Court has observed that the non-obstante



clause in Section 64(5) clearly indicates that in case of inter-State supply, transmission and wheeling, the Central Commission alone has the jurisdiction. Notwithstanding the jurisdiction being with Central Commission, by application of the parties concerned, the jurisdiction can be given under Section 64(5) to the State Commission having jurisdiction in respect of the licensee who intends to distribute and make payment for electricity. "By application of the parties concerned" would mean the parties to the inter-State supply in terms of Section 64(5) of the Act i.e. parties to the inter-State supply involving territories of the two States. In the present case, the Petitioner has entered into PPAs for generation and supply of power to two States i.e. State of MP and the State of UP on long term basis. In respect of the UP discoms PPA dated 18.1.2014, the Respondent, UP discoms have invoked the jurisdiction of the State Commission (UPERC) for adoption of tariff in terms of the said PPA. By no stretch of imagination can the said Petition be construed as a joint application by the parties under Section 64(5) for invoking the jurisdiction of the State Commission. In our considered view, even though tariff discovered under competitive bidding process was adopted by the State Commission under Section 63 of the 2003 Act, Section 64(5) has no application in the present case since the generating station is supplying power to more than one State and in terms of the judgment of the Hon'ble Supreme Court in Energy Watchdog case, the jurisdiction for regulating the tariff of the generating station of the Petitioner vests with this Commission.

28. It is pertinent to mention that the Respondents i.e UPPCL/UP discoms had raised the same issues in Petition No. 224/MP/2018 filed by the Petitioner seeking adjudication of disputes with regard to calculation of penalties for maintaining Availability below 80% for a contract year. The Commission by order dated 18.1.2019 had rejected the above submissions of the Respondents UPPCL/UP discoms and had granted relief to the Petitioner. In the above background, we find no merit in the



submissions of the Respondent, UPPCL/UP discoms and accordingly the same is rejected. The Petition is therefore maintainable.

Having dealt with the objections of the Respondents UPPCL/UP discoms as above and held that the Petition is maintainable, we proceed to examine the issues raised by the Petitioner, on merits.

Issue No (B): Whether transmission charges and capacity charges have been wrongfully deducted by UPPCL for the period from 1.4.2017 to 16.5.2017?

(a) Transmission Charges

29. The Petitioner has submitted that the Respondent, UPPCL has wrongfully deducted transmission charges and capacity charges for the period of 46 days (from 1.4.2017 till 16.5.2017) in contravention of the provisions of the Procurer-PPA dated 18.1.2014 and the applicable regulatory framework governing the payment of transmission charges. It has further submitted that in terms of Clause 4.3.1(a) & (b) and Clause 4.4.1 (Schedule 4-Tariff) of the Procurer-PPA dated 18.1.2014, the obligation for payment of Transmission charges vests with the Respondent UPPCL and if the petitioner pays for the transmission charges, the same are to be reimbursed by UPPCL to the Petitioner. The Petitioner has also submitted that the Respondent, UPPCL was aware that the Petitioner was in a position to supply the entire contracted capacity of 361 MW from 1.4.2017 onwards, but chose not to schedule any power from the Petitioner until 16.5.2017. However, as the LTA of 169 MW was operationalized by PGCIL on 30.3.2017 (in addition to ongoing LTA of 192 MW), PGCIL raised the bill for 361 MW on the Petitioner with effect from 1.4.2017 and the Petitioner had paid the transmission charges for the entire contracted capacity of 361 MW for the period commencing from 1.4.2017. According to the Petitioner, the Respondent UPPCL ought to have reimbursed the transmission charges paid by the Petitioner for the period from 1.4.2017 to 16.5.2017 since the Petitioner had informed UPPCL and declared the



availability of the entire contracted capacity. Referring to the judgment dated 13.10.2015 of the Tribunal in Appeal No. 6 of 2015 (GETCL vs GERC & anr), the Petitioner has submitted that since the Petitioner was obligated to pay the transmission charges for the entire quantum of LTA, despite power not being scheduled by UPPCL, the transmission charges ought to be reimbursed to the Petitioner. Accordingly, the Petitioner has prayed for a direction on UPPCL to reimburse the transmission charges for 84 MW (361-277) for the period of 46 days (1.4.2017 to 16.5.2017) along with the carrying cost.

(b) Capacity Charges

30. The Petitioner has submitted that the Respondent UPPCL has wrongly deducted the capacity charges payable to the Petitioner for the declared capacity of 361 MW for the period of 46 days (1.4.2017 to 16.5.2017). The Petitioner has submitted that it was ready and available to supply the entire aggregated contracted capacity of 361 MW to UPPCL from the date of operationalization of LTA of 169 MW by PGCIL from 30.3.2017. This fact was also brought to the notice of UPPCL by the Petitioner's letters dated 30.3.2017 & 31.3.2017, wherein it had requested UPPCL to ensure off-take of the entire aggregated contracted capacity with immediate effect. The Petitioner has further submitted that UPPCL was aware that it would be liable to pay capacity charges under the PPA if UPPCL does not off-take the entire aggregated contracted capacity made available by the Petitioner. The Petitioner has pointed out that in terms of clauses 4.4.1 and clause 4.1 (Schedule-4-tariff), the Petitioner is obligated to supply power to UPPCL and UPPCL is obligated to off-take such power. If UPPCL fails to off-take the power to the extent made available by the Petitioner, then UPPCL is liable to pay capacity charges to the Petitioner for the power not off-taken by UPPCL. Accordingly, the Petitioner has submitted that the deductions by UPPCL in payment of capacity charges amounting to ₹156658051/- is illegal and UPPCL may be directed to



pay the full capacity charges deducted by UPPCL from the invoices of April 2017 and May 2017 raised by the Petitioner.

31. Per contra, the Respondent UPPCL has referred to the Commission's order dated 15.12.2017 in Petition No. 141/TT/2015 directing the Petitioner to recover compensation for delay in providing LTA during the period 20.5.2015 to 26.8.2015 and has submitted that the Petitioner may furnish the details of the compensation received from the CTU for the delay in operationalization of LTA during the period 30.10.2016 to 31.3.2017 on account of delay in commissioning of \pm 800kV Champa Pooling station – Kurukshetra HVDC Transmission line. It has further submitted that in the interest of grid security and in line with the suggestions and recommendations of UPSLDC, the entire contracted capacity was approved as soon as NOC was granted for the same. The Respondent has submitted that PTC commenced supply of 169 MW from Petitioner generation source on 16.5.2017 after taking UPPCL's consent on 15.5.2017 and since the commencement of supply of aggregated 361 MW through PTC from the generation source was delayed and could be done in phases due to delay in commissioning of Champa-Kurukshetra transmission line, UPPCL cannot make payments for the said period without the Petitioner establishing in terms of the PPA that the said non-performance was due to force majeure conditions. The Respondent has further submitted that the claims of the Petitioner must be backed by Auditor's certificate that can justify the payments done by the Petitioner on actual basis. The Petitioner in its rejoinder has objected to the above submissions and has stated that the issue regarding Champa-Kurukshetra transmission line raised by UPPCL pertains to period between 20.5.2015 to 26.8.2015 and the same does not relate to the period in dispute in the present Petition. The Petitioner has clarified that bills for transmission charges and capacity charges along with proof for payments made by the Petitioner



have been annexed to the Petition and in terms of the PPAs there is no obligation on the part of the Petitioner to provide any auditors certificate for the same.

Analysis and Decision

32. The matter has been examined. Some of the provisions in the Procurer-PPA dated 18.1.2014 with regard to the obligations of the Respondent UP discoms are noted hereunder:

“4.3 Procurers’ Obligations

4.3.1 Subject to the terms and conditions of this Agreement, the Procurers shall:

a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be;

b) be responsible for payment of the Transmission Charges (from the Injection Point onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurers. The Procurers shall reimburse any of the above charges, if paid by the Seller;

4.4 Purchase and sale of Available Capacity and Scheduled Energy

4.4.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to sell to the Procurers, and the Procurers undertakes to pay Tariff for all of the Available Capacity up to the Contracted Capacity and corresponding Scheduled Energy.

“4 SCHEDULE 4: TARIFF

4.1 General

(iv) The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond Ninety Percent (90%) as provided in this Schedule. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule.

4.4 Transmission/Wheeling Charges and RLDC/SLDC Charges

4.4.1 The payment of Transmission Charges/Wheeling Charges to the CTU/STU, from the Injection Point to the Delivery Point shall be paid by the Seller and would be reimbursed by the Procurers.”

33. Also, Article 4.2.1(d) of the Procurer-PPA provides with the obligation of the Petitioner to obtain open access for transmission of aggregated contracted capacity of power from injection point to delivery point. As per Article 4.3.1(a) above, the Respondents are under obligation to ensure the availability of interconnection facilities and evacuation of power from the delivery point before the scheduled delivery date or revised scheduled delivery date as the case may be. However, Article 4.3.1(b) of the



said PPA provides that the Respondent UP discoms are responsible for payment of transmission charges, limited to contracted capacity and further reimburse the charges, if any, paid by the Petitioner.

34. The original scheduled delivery date for sale of power from the generating station of the Petitioner to UPPCL was 30.10.2016. By mutual consent of both the parties to prepone the delivery date, the Petitioner commenced the sale of power on 26.8.2015 with LTA of 192 MW and one year MTOA of 169 MW. The said MTOA was granted by CTU to the Petitioner valid up to 29.10.2016. Thereafter, the Petitioner applied for MTOA for 169 MW for a period of three years to be made effective from 30.10.2016. However, the operationalization of MTOA for 169 MW got delayed and the CTU could operationalize only a part MTOA for 85 MW with effect from 10.11.2016. Thereafter, the Petitioner commenced supply of the 85 MW under part MTOA from 2.12.2016. Subsequently, the Petitioner on 2.1.2017 wrote to PTC, with copy to respondents informing that the CTU would be operationalizing MTOA for balance 84 MW to UP and requested PTC to coordinate with the Respondents to ensure adequate arrangements in advance for prompt scheduling and off-take of power by UP from the Petitioner's Project for the balance quantum of 84 MW immediately after operationalization of MTOA by CTU. It was also given to understand by PGCIL that the operationalization of the balance LTA of 169 MW was expected shortly and subsequent to this, the partly operationalized MTOA for 85 MW (against the granted quantum of 169 MW) would be converted to LTA. Based on the Petitioner's letter dated 14.3.2017, PTC vide its letters dated 14.3.2017 and 27.3.2017 addressed to UPPCL, informed UPPCL about the operationalization of the LTA of 169 MW by PGCIL and to make arrangements thereof. By letter dated 30.3.2017, UPPCL was requested to ensure off-take / scheduling of entire aggregated contracted capacity of MW with immediate effect. Despite this,



UPPCL continued to off-take / schedule only 277 MW for a period of 46 days from 1.4.2017 till 16.5.2017.

35. The details of the quantum, period, mode etc. of power scheduled by the Petitioner to UPPCL from the Project as tabulated by the Petitioner are as under:-

Sr. No	Period	Scheduled Quantum	Mode	Remarks
1	26.8.2015 to 29.10.2016	361 MW	192 MW - LTA + 169 MW - MTOA	Entire Contracted Capacity supplied;
2	30.10.2016 to 1.12.2016	192 MW	192 MW - LTA	MTOA of 169 MW not operationalized by PGCIL;
3	2.12.2016 to 31.3.2017	277 MW	192 MW - LTA + 85 MW - MTOA	Part operationalization of MTOA by PGCIL to the extent of 85 MW (vis-à-vis granted MTOA of 169 MW)
4	1.4.2017 to 16.5.2017 (46 days)	277 MW	192 MW - LTA + 85 MW - MTOA	Entire Contracted Capacity of 361 MW declared with LTA in place. However, UPPCL off-took/ scheduled only 277 MW. (not scheduling 84 MW for 46 days by UPPCL).
5	17.5.2017 onwards	361 MW	361 MW - LTA	UPPCL started scheduling entire Contracted Capacity of 361 MW.

36. The Petitioners obligation in terms of the PPA was to ensure the availability of contracted capacity of 361 MW by arranging LTA for evacuation of power from the Petitioners Project till CTU-STU interface and the obligation of the Respondents discoms was to ensure the availability of interconnection facilities and evacuation of power from the delivery point onwards. It is evident from the various correspondences made by the Petitioner to PTC and in turn by PTC to the Respondent UP discoms during the period from 2.1.2017 till 30.3.2017, that the Petitioner was in a position to supply the entire aggregated contracted capacity of 361 MW through LTA (192 MW *plus* 169 MW) to the Respondent UP discoms from 1.4.2017. However, the UP discoms continued to off take/ schedule only 277 MW till 16.5.2017 for reasons better known to it. Though the Respondent UP discoms in their reply has not specifically



denied the claims of the Petitioner with regard to transmission charges and capacity payable, they have sought to justify their stand based on the compensation alleged to have been claimed /received by the Petitioner from PGCIL/CTU on account of the delay in operationalization of LTA by PGCIL from 30.10.2016 till 31.3.2017 due to delay in commissioning of the Champa Pooling Station-Kurukshetra HDVC Transmission line by PGCIL. This submission of the Respondent UP discoms cannot be accepted as the dispute in the present Petition is limited to the non-payment of Transmission charges & Capacity charges by Respondents UPPCL/UP discoms for the period from 1.4.2017 to 16.5.2017. Even otherwise, the Petitioner has denied receipt of any compensation from PGCIL with regard to the delay in commissioning of the Champa Pooling station-Kurukshetra HDVC Transmission line. Also, the reliance made by the Respondents UP discoms on UPSLDC letter dated 13.4.2017 (with regard to grid security concerns) to justify the non-scheduling of the entire contracted capacity of 361 MW by the Respondents UPPCL/UP discoms during the period from 1.4.2017 to 16.5.2017 cannot also be accepted as same is an internal communication between UPSLDC and the Respondent UPPCL/UP discoms. The Respondents, in our view, cannot raise extraneous issues to deny the legitimate claims of the Petitioner. According to us, the Petitioner has fulfilled its obligation under the PPAs to provide the entire contracted capacity of 361 MW till the delivery point but the Respondents have failed to off-take/schedule the same from the delivery point, which is contrary to the provisions of the PPA. The liability of the customer to pay transmission charges based on per MW capacity booked irrespective of the actual use of the transmission line has been settled by the Tribunal in its judgment dated 13.10.2015 in Appeal No. 6 of 2015 (GETCO v. GERC & anr) as under:

“11.The Respondent no.2 is bound by the terms and conditions of the BPTA. Under the BPTA Respondent no.2 reserved capacity of 275 MW on the Intra-State Transmission Network. Respondent no.2 has not terminated the BPTA or surrendered the capacity. The above capacity has been blocked for the Respondent no.2 by the



Appellant and cannot be given to others. In terms of the Open Access Regulations, Respondent no.2 is liable to pay the transmission charges as determined by the State Commission based on per MW capacity booked irrespective of the actual use of the transmission line. Respondent no.2 is bound to pay the transmission charges as per the Regulation irrespective of whether it had used the transmission or not.”

37. In the above background, we are of the considered view that the Respondent UPPCL/UP discoms are liable to pay the transmission charges to the Petitioner for the entire contracted capacity of 361 MW for the period from 1.4.2017 till 16.5.2017. It is noticed that the LTA of 169 MW (in addition to 192 MW) was operationalized by PGCIL on 30.3.2017 and PGCIL has raised the bill for 361 MW on the Petitioner with effect from 1.4.2017 and the Petitioner has also paid the transmission charges for the entire contracted capacity of 361 MW for the period from 1.4.2017 to 16.5.2017. However, the Respondent, UPPCL had deducted a total amount of ₹41061232/- towards transmission charges from its invoices for the period April, 2017 and May, 2017 contrary to the provisions of the PPA. Since the Respondent, UPPCL/UP discoms are liable for payment of transmission charges for the entire contracted capacity of 361 MW for the said period, we direct the reimbursement of the said amounts to the Petitioner. The Petitioner has furnished the details of invoices and proof of payment of transmission charges to PGCIL as Annexure-44 and Annexure-46 to the Petition. The prayer of the Respondent UP discoms for submission of Auditor's Certificate by Petitioner as proof of payments cannot be entertained as the provisions of the PPA do not provide for the same. Accordingly, the Respondents UPPCL/UP discoms are directed to reimburse the said amount deducted by the Respondents from the invoices raised by the Petitioner for the period 1.4.2017 till 16.5.2017.

38. Article 4.4.1 of the Procurer-PPA provides that the seller undertakes to sell to the Procurers and the procurers undertake to pay tariff for all the available capacity up to the contracted capacity and corresponding schedule energy. As stated above, the Petitioner had declared the entire contracted capacity of 361 MW to Respondents,



UPPCL/UP discoms from 1.4.2017 and the same was also sent to the concerned agencies viz., SLDC, NRLDC and WRLDC. Despite this, the Respondent, UPPCL had not off-taken/scheduled the entire contracted capacity of 361 MW for the period 1.4.2017 to 16.5.2017, but has instead scheduled only 277 MW. As the Petitioner had declared the entire availability of aggregate contracted capacity of 361 MW from 1.4.2017 onwards, the Respondent UPPCL was liable pay capacity charges to the Petitioner for the same. The unilateral deduction of capacity charges by Respondent, UPPCL/UP discoms based on 277 MW (361-84) has resulted in under recovery of capacity charges by the Petitioner and is contrary to the provisions of the PPA. It is observed that the Petitioner had raised invoices dated 29.4.2017 and 4.5.2017 for ₹480340592/- for the period from 1.4.2017 to 30.4.2017 and Invoice dated 31.5.2017 and 5.6.2017 for ₹549860738/- for the period from 1.5.2017 to 31.5.2017 on Respondents UPPCL/UP discoms towards payment of capacity charges. However, the Respondent UPPCL vide its letters dated 9.5.2017 and 6.6.2017 has deducted an amount of ₹106343328/- and ₹50314723/- (totaling ₹156658051/-) from the invoices for capacity charges for April, 2017 and May, 2017 respectively. Since the Respondents, UPPCL/UP discoms are liable for payment of capacity charges to the Petitioner for the entire contracted capacity of 361 MW for the period from 1.4.2017 till 16.5.2017, we direct the refund of the said amounts deducted by the Respondents to the Petitioner.

(c) Carrying Cost

39. The Petitioner has also submitted that it is entitled to carrying cost/interest on the above said amounts withheld by the Respondent UPPCL contrary to the provisions of the PPA dated 18.1.2014 and the applicable regulations. It has further submitted that it is settled law that whenever a payment is deferred or delayed, then carrying cost is payable along with the deferred payment. It has also submitted that the principle of



carrying cost is well established in the various judgments of the Hon'ble Supreme Court and the Tribunal. Referring to the judgment of the Tribunal in M/s SLS Power Ltd. V APERC & ors and Adani Power Ltd V CERC & ors, the Petitioner has submitted that carrying cost is the compensation for time value of money or monies denied at the appropriate time and paid after a lapse of time. Accordingly, the Petitioner has submitted that the amounts deducted by Respondent UPPCL towards Capacity charges and Transmission charges ought to be refunded to the Petitioner along with carrying cost. The Petitioner has however pointed out that Article 8.3.5 of the Procurer-PPA recognizes Late Payment Surcharge in case of delay in payment of a Monthly Bill by the Procurers beyond the due date.

Analysis and Decision

40. The matter has been considered. As stated above, the Respondents UPPCL have deducted a total amount of ₹156658051/- towards capacity charges and ₹41061232/- towards Transmission charges from invoices of the Petitioner for the period from 1.4.2017 to 16.5.2017 contrary to the provisions of the PPA which was otherwise payable on the due date at the end of the relevant month. Articles 8.3.5 and 8.8.3 of the Procurer-PPA dated 18.1.2014 provides as under:

“8.3.5 In the event of delay in payment of monthly bills by any procurers beyond its due date, a late payment surcharge shall be payable by such procurers to the seller at the rate of two (2) percent in excess of the applicable SBAR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded and Monthly rest, for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary bill.”

Xxxxx

8.8.3 In the event of delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable in the same terms applicable to the Monthly Bill in Article 8.3.5.”

41. Due date has been defined in the PPA as under:

“Due Date” means the thirtieth (30th) day after a Monthly Bill or a Supplementary Bill is received and duly acknowledged by the Procurer (or, if such day is not a Business Day, the immediately succeeding Business Day) by which date such monthly bill or supplementary bill is payable by such Procurer.”



42. Due date has been defined as the thirtieth day after a monthly bill or supplementary bill is received and duly acknowledged by the Procurers. Article 8.3.5 deals with late payment surcharge in case of delay in payment of monthly bills by the Procurer beyond the due date. In terms of Article 8.8, tariff payments for change in parameters, pursuant to provisions in Schedule 4 shall be raised as supplementary bills. Article 8.8.3 deals with late payment surcharge in case of delay in payment of supplementary bills. In the present case, the Respondent, UPPCL has unilaterally deducted total amount of ₹156658051/- towards Capacity charges and ₹41061232/- towards Transmission charges from invoices of the Petitioner for the period from 1.4.2017 to 16.5.2017, contrary to the provisions of the PPA. In our view, the Respondents UPPCL/UP discoms are liable to pay the late payment surcharge on the said deducted amount from the date of deduction till the date of payment at the rate envisaged in Articles 8.3.5 and 8.8.3 of the PPA.

43. Petition No. 289/MP/2018 is disposed of in terms of the above.

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

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

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

