

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 298/MP/2018

Coram:

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

Date of Order: 1st November, 2019

In matter of

Petition seeking adjudication of disputes between the Petitioner and the Respondent for claim of fixed charges due to unilateral termination of PPA by WBSEDCL in regard to supply of power from Koderma TPS of DVC.

And

In the matter of

Damodar Valley Corporation
DVC Towers, VIP Road,
Kolkata- 700054

....Petitioner

Vs

West Bengal State Electricity Distribution Company Limited
Block 'DJ', Sector-11, Salt Lake City,
Kolkata-700091

....Respondent

Parties present:

Shri M.G. Ramachandran, Advocate, DVC
Ms. Anushree Bardhan, Advocate, DVC
Ms. PoorvaSaigal, Advocate, DVC
Ms. Tanya Sareen, Advocate, DVC
Shri A. Patra, DVC
Shri Abhishek Kumar, Advocate, WBSEDCL
Shri Aniket Prasoon, Advocate, WBSEDCL

ORDER

The Petitioner, Damodar Valley Corporation (DVC) has filed this Petition seeking the following reliefs:

“(a) declare that the Respondent West Bengal State Electricity Distribution Company Limited is liable to pay to the Petitioner a sum aggregating to Rs.111,74,47,434 crores towards principal and delayed payment surcharge at the rate 1.5% per month



as on 31.8.2019 and further interest at the said rate effective 1.9.2018 till full payment and discharge of all the outstanding;

(b) pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.”

Background

2. The Petitioner is a statutory body established by the Central Government under the Damodar Valley Corporation Act, 1948 (hereinafter referred to as the 'DVC Act') for the development of the Damodar Valley, with three participating Governments, namely, the Central Government, the Government of West Bengal and the Government of Jharkhand. The Petitioner has been engaged in the generation, transmission, distribution, bulk/ wholesale and retail sale of electricity to consumers in the Damodar valley.

3. The generating station namely, Koderma Thermal Power Station (KTPS), Units 1&2(referred to as 'the generating station') have been established by the Petitioner wherefrom the quantum of electricity contracted under the PPA was agreed to be sold and purchased. The COD of the units of the generating station are as under:

Unit-1	18.7.2013
Unit-2	14.6.2014

4. The Petitioner has entered into a Power Purchase Agreement (PPA) with the Respondent, West Bengal State Electricity Distribution Company Limited (WBSEDCL) on 24.10.2013 for generation and sale of 200 MW of power from KTPS.

Submission of the Petitioner

5. The Petitioner, in the Petition has submitted the following:

(a) The commencement of power supply from the generating station to WBSEDCL in terms of the PPA was from 1.4.2014. In terms of the provisions of the PPA and the applicable tariff regulations of the Commission, the



Respondent WBSEDCL was required to pay the fixed and energy charges for the quantum of power declared available from the generating station and in case the power is not scheduled, the fixed charges.

(b) WBSEDCL by letter dated 1.4.2014 to DVC stated that it has been denied medium term open access for the evacuation of 200 MW power from the generating station. DVC forwarded the said letter to Central Load Despatch Centre requesting them to schedule power to WBSEDCL under Short Term Open Access (STOA) from Unit-I of the generating station.

(c) By letter dated 18.4.2014, DVC informed WBSEDCL about the technical constraints faced by Unit-I of the generating station and stated that as soon as the same is rectified, DVC will supply power to WBSEDCL from the said unit.

(d) DVC by letter dated 13.6.2014 informed Eastern Regional Power Committee (ERPC) and WBSEDCL that Unit-2 had achieved COD on 14.6.2014 at 00.00hrs and DVC was in a position to supply power to WBSEDCL as it had already supplied power to Haryana Utilities from 14.6.2014.

(e) WBSEDCL by letter dated 16.6.2014 informed DVC that the COD of the generating station and date of supply was not informed to WBSEDCL. WBSEDCL also stated that it has made alternate arrangements till September 2014 and will schedule power from the generating station on 'as and when required basis' and no fixed charges will be payable for non-scheduling of power.

(f) DVC by letter dated 16.6.2014 informed WBSEDCL that the reason for non-dispatch of power to WBSEDCL is on account of absence of open access and the responsibility of obtaining the open access in term of the PPA was that of WBSEDCL. It was also informed that as per clause 6.1.11 of the PPA, WBSEDCL is accountable to pay fixed charges in event of non-scheduling of power.

(g) WBSEDCL by letter dated 18.7.2014 issued a preliminary default notice under clause 13.3 of the PPA. DVC by reply dated 31.7.2014 reiterated that from 00.00 hrs of 14.6.2014 it has started scheduling of power to WBSEDCL, but WBSEDCL has denied for scheduling of power from KTPS Unit-2.

(h) The inability of DVC to effect supply from Unit-I from 1.4.2014 was due to technical constraints developed in the operation of the Unit-I namely the regular ash pond for disposal of ash and the ash evacuation system including for collection of ash slurry from the boilers was not ready due to reasons beyond the control of DVC. Out of 526.91 acres of land required for the power plant/ash pond, about 437 acres were made available by the Govt. of Jharkhand by 12.4.2012 in phases, of which the physical possession of only 68 acres of land was given till 12.4.2012. Accordingly, a contingency ash pond was made ready for Unit No I by April 2013 with a capacity of 7.8 lakh CUM for



collecting bottom ash slurry which could accommodate the ash slurry for a period of 6 months from the unit.

(i) After the contingency pond was fully utilized, the permanent ash pond was to be used. There were protests and resistances by the local villagers in the construction and completion of the permanent ash pond. Subsequently, work for evacuation of ash slurry from contingency ash pond started in May 2014 so that unit can be made available for generation. In view of this, the operation of Unit-I was forced to be shut down from April 2014 which continued till July 2014. The above constraint is in the nature of a force majeure event under Article 8 of the PPA. The technical problems/force majeure with regard to Unit-I ceased in the month of July 2014 and DVC was in a position to supply electricity from Unit-I of the generating station from 20.7.2014.

(j) Thereafter, WBSEDCL by its letters dated 1.9.2014, 16.12.2014 and 17.3.2015, stated that DVC has failed to supply power from the generating station (Units-1 & 2) to WBSEDCL for a continuous period of 3 months (from 1.4.2014 to 1.7.2014) and therefore, the same is an event of default as per Clause 13.1 of the PPA. WBSEDCL further stated that it is not liable to pay the fixed charges for non-scheduling of power.

(k) DVC by letters dated 18.9.2014, 26.2.2015, 6.3.2015 and 6.4.2015 disputed the claim of WBSEDCL and stated that WBSEDCL is required to fulfill its obligations under the PPA. DVC became entitled to fixed charges for the quantum of power declared available by DVC to WBSEDCL from Unit-1 of the generating station from 20.7.2014 and from 14.6.2014 from Unit-2. DVC raised bills from time to time claiming fixed charges from WBSEDCL for the quantum of electricity declared available.

(l) On 13.5.2015, WBSEDCL issued letter for termination of the PPA dated 24.10.2013 under clause 13.3.4 of the PPA alleging that DVC is in default for non-supply of power to WBSEDCL for a continuous period of three months.

(m) DVC on 28.5.2015 disputed the unilateral termination of the PPA by WBSEDCL in the absence of any default of DVC with regard to availability of power from the generating station to WBSEDCL. On 7.7.2015, DVC sent another letter to WBSEDCL and called upon WBSEDCL to mutually discuss and settle the matter.

(n) By letter dated 5.8.2015, WBSEDCL stated that PPA is deemed to have been terminated due to non-receipt of any reply to the termination notice dated 13.5.2015 within 30 days of its issue. WBSEDCL further stated that the letter dated 28.5.2015 issued by DVC was received by WBSEDCL only on 23.7.2015 i.e. after 30 days of issue of termination notice.



(o) DVC vide letter dated 20.8.2015 stated that the PPA cannot be unilaterally terminated by WBSEDCL and that DVC was not responsible for non-scheduling of power from the generating station to WBSEDCL. DVC also proposed amicable resolution of the matter.

(p) DVC vide letter dated 14.9.2015 again proposed to WBSEDCL to settle the issue of scheduling of power from the generating station mutually in terms of Clause 7.1 of the PPA.

(q) WBSEDCL by letter dated 17.9.2015 informed DVC that DVC's proposal to settle the issue, after the termination of the PPA is not legally tenable. WBSEDCL reiterated that it is not liable to pay fixed charges as claimed by DVC.

(r) The stand taken by WBSEDCL on the termination of the PPA under Clause 13.3 of the PPA read with Clause 13.1(iv) of the PPA is erroneous for the reason that the said provisions will apply only if there is no supply of power from the above generating station from any of the two units for a period of three months and cannot, therefore, apply when DVC was in a position to declare available the electricity of Unit-II from 14.6.2014. Without prejudice to this, the non-supply of electricity from Unit-I till July 2014 was for force majeure reasons and, therefore, specifically excluded from the termination in accordance with Clause 13.1(iv). WBSEDCL had wrongly proceeded with the unilateral termination of the PPA and such termination is illegal.

(s) WBSEDCL by letter dated 20.3.2018 requested DVC for a confirmation regarding availability of power from KTPS to the tune of 200 MW without any liability or financial obligation on WBSEDCL. DVC by letter dated 27.3.2018 informed WBSEDCL, amongst others that the requirement of 200 MW power on long term basis to WBSEDCL can be explode from the available surplus power from other generating stations of DVC and sought confirmation for the same.

(t) WBSEDCL is bound to pay for the fixed charges for the supply of 200 MW power from KTPS for a period upto September 2015 and the failure to do so is a breach of the PPA dated 24.10.2014 on the part of WBSEDCL.

(u) In case of non-scheduling of power, declared by DVC, WBSEDCL is required to pay the deemed fixed charges to DVC. In the event of DVC declaring available the capacity from the generating station and WBSEDCL is not scheduling the power, DVC is entitled to the capacity charges/fixed charges for such quantum as determined by the Commission for the KTPS. Despite the clear position, WBSEDCL has failed to pay the capacity charges to DVC.



(v) WBSEDCL has not paid fixed charges for the quantum of 200 MW contracted capacity which DVC has offered with due availability declaration for supply to WBSEDCL from 14.6.2014. An amount of ₹71.24 crore has become due and payable by WBSEDCL to DVC for the capacity charges relating to the period till September 2015. Since there has been a delay on part of WBSEDCL to pay the above amount on the due date, WBSEDCL is also liable to pay late payment surcharge @1.5% per month as stated in the PPA and the Regulations notified by this Commission.

(w) The dispute between DVC and WBSEDCL involves the generation of electricity by DVC and the dispute is, therefore, required to be adjudicated by this Commission. The arbitration clause provided in the PPA for dispute resolution in terms of the Arbitration and Conciliation Act, 1996 is not to be given effect to in view of the decision of the Hon'ble Supreme Court in GUVNL vs Essar Power Limited(2008) 4SCC 755.

(x) The cause of action for filing the present petition arose in September 2015 when DVC had been raising invoices for the capacity charges on a running basis and when, WBSEDCL by letter dated 17.9.2015 rejected the bilateral discussions, in response to a proposal from DVC for amicable settlement of the dispute in terms of Clause 7.1 of the PPA.

6. Hence, the present Petition has been filed by DVC in terms of the prayer in para 1 above.

7. The Petition was admitted on 17.1.2019 and the Commission directed issue of notice to the Respondent, WBSEDCL. Reply to the Petition has been filed by WBSEDCL vide its affidavit dated 16.2.2019 and the Petitioner vide affidavit dated 15.3.2019 has filed its rejoinder to the said reply.

Reply of Respondent WBSEDCL

8. The Respondent WBSEDCL in its reply has raised preliminary objection as regards the maintainability of the claim of the Petitioner, on the ground that the same is barred by limitation. The Petitioner has made its submissions on 'limitation' and on 'merits', as under:-

(a) For the month of June 2014, invoice was raised by the Petitioner on 8.7.2014 claiming capacity charges and WBSEDCL by letter dated 22.7.2014 had disputed the said invoice and stated that the aforesaid claim does not



qualify for payment. WBSEDCL also stated that COD of Unit-II was not in line with the 2014 Tariff Regulations notified by this Commission and therefore, no power supply can be made to it from the said unit. Admittedly, Unit-I of the project was also not in operation on account of technical constraints. Further, WBSEDCL by letter dated 22.7.2014 stated that on account of failure on the part of Petitioner to supply power to it for a continuous period of three months, the same constitutes an event of default in terms of Article 13.1 of the PPA.

(b) WBSEDCL had denied its liability to pay the fixed charges right from the first invoice itself. Even before the aforesaid letter, the Respondent vide letter dated 16.6.2014 explicitly clarified to the Petitioner that it would not be liable to pay fixed/capacity charges to the Petitioner because of non-scheduling of power to them from the Project. Prior to 22.7.2014, WBSEDCL on 18.7.2014 had issued Preliminary default notice under the PPA to the Petitioner which show that WBSEDCL never acknowledged the Petitioner's right to claim capacity charges under the PPA as the Petitioner itself defaulted with its obligation under the PPA.

(c) Thus, the entire claim of the Petitioner is barred by limitation as the entire basis on which the claim for capacity charge was raised by the Petitioner was objected to and outrightly rejected from the beginning i.e. June 2014 and in any event, after the first invoice was raised by the Petitioner on 8.7.2014. WBSEDCL has throughout maintained the consistent stand and, therefore, the Petitioner ought to have raised the dispute as soon as the first invoice was formally rejected on 22.7.2014. However, the Petitioner has filed the Petition only in September 2018 and thus the entire claim towards invoices raised for the months of June 2014 to September, 2014 and from April 2015 till September 2015 is barred by limitation i.e. much after the three year period from 22.7.2014 has elapsed.

(d) In any event, the claim with respect to invoices till June 2015, the due date of which elapsed on 5.9.2015 (after 60 days from the date of such bill) is clearly barred by limitation as the Petitioner has raised the claim much beyond the three year period in respect of each such bill. When WBSEDCL had objected to the invoices and/or did not pay the invoices raised by the Petitioner on the respective due date of such invoices, then the cause of action arose for the Petitioner, for raising dispute qua the bills, once the payment period for that bill elapsed i.e. sixty days from the issuance of monthly invoices.

(e) The Hon'ble Supreme Court in its judgment dated 16.10.2015 in *A.P. Power Coordination Committee V Lanco Kondapalli Power Ltd & ors (2016) 3 SCC 468* has held that even though by itself the Limitation Act, 1963 is inapplicable to disputes brought before the SERCs, however, in the light of the



nature of the judicial power exercised by the SERCs while adjudicating the disputes, a claim cannot be allowed if it would otherwise be barred by the limitation for filing an ordinary suit before the Civil Court. This means that the principle of limitation applies to claims brought before the Commission by an aggrieved party.

(f) The Hon'ble Supreme Court has clearly held that limitation upon the Commission would be applicable only in respect of its judicial power to be exercised under Section 86(1)(f) of the 2003 Act. Section 86(1)(f) is *parimateria* to Section 79(1)(f) which empowers this Commission to adjudicate disputes between a generating company and the distribution company.

(g) As regards the issue of running bills is concerned, the Petitioner has used this term to justify its extensive delay in raising a dispute and in a way to elude the bar of limitation. The plea of running bills cannot in any event protect the extensive delay of the Petitioner and the same should be outrightly rejected.

(h) The reliance placed by the Petitioner to WBSEDCL letter dated 17.9.2015 is only an attempt by the Petitioner to somehow elude the bar of limitation on its claim. The letter dated 17.9.2015 did not introduce any new aspect and was a mere reiteration of WBSEDCL stand in earlier occasions (letter dated 22.7.2014). The APTEL in its judgment dated 24.4.2018 in Appeal No. 75/2017 (MSEDCL V MSERC & ors) has made it clear that if there is acknowledgment of liability, then limitation will be applicable from the date when such acknowledgement was made. If the purported defense of running bills against the bar of limitation is allowed, there would be no reason to look for acknowledgement of liability, as the plea of limitation could not have been raised in the first place, based on the premise of running bills. Hence, the claim of the Petitioner may be rejected.

(i) The Petitioner was obligated to supply 200 MW of power from its project with effect from 1.4.2014 in terms of Annexure-I of the PPA. The Petitioner has itself admitted that as on 1.4.2014, none of its units were functioning and accordingly no power was scheduled to the Respondent with effect from 1.4.2014.

(j) DVC has defaulted to commence supply of power to WBSEDCL in terms of the PPA for more than three months (1.4.2014 to 1.7.2014). The Petitioner's reliance on technical reasons and force majeure to justify its inability to supply power is in complete disregard of the provisions of the PPA. In case the Petitioner was facing force majeure, then in terms of Article 8 of the PPA, it should have informed WBSEDCL by giving notice invoking force majeure and taken appropriate steps stipulated under the PPA. Further, the notice of cessation also needs to be given by the party affected by force majeure to the



other party as regards cessation of the force majeure event. The Petitioner has not complied with the aforesaid essential measures under the PPA qua the force majeure. Therefore, the reasoning that the event of force majeure led to the delay in supplying power from Unit-I of the Project is untenable and baseless.

(k) No reply was received from the Petitioner in response to WBSEDCL letters dated 1.4.2014, 3.4.2014 and 11.4.2014 wherein WBSEDCL repeatedly followed up with Petitioner to convey the date of supply of power under the PPA. By letters dated 11.4.2014 and 17.4.2014, WBSEDCL had conveyed that it has been compelled to arrange power from alternate sources to meet its power requirement till September 2014.

(l) In view of the above circumstances, WBSEDCL was forced to arrange power from other agencies in order to meet its power demand requirement. In any event, the Petitioner has clearly admitted in its Petition that it was not in a position to supply power from Unit-I of the Project till 19.7.2014.

(m) The contention of the Petitioner that Unit-II of the Project had achieved COD on 14.6.2014 and thereafter the Petitioner was in a position to supply power in terms of the PPA is flawed. WBSEDCL by letter dated 22.7.2014 had objected to the COD of Unit-II and had clearly stated that the same was not in line with the procedure as provided under the 2014 Tariff Regulations. The breach by the petitioner to supply power in terms of the PPA for a period of three months constituted a DVC event of default in terms of Article 13.1(iv) of the PPA.

(n) The PPA defines that COD of a unit means the date declared by DVC after demonstrating the MCR or installed capacity through a successful trial run after notice to WBSEDCL and in relation to the generating station, the commercial operation means the date of commercial operation of the last unit of the station. As per the relevant provision of the 2014 Tariff Regulations, the trial shall commence after seven days' notice by the generating company to the beneficiaries and it is noted that the Petitioner has not conducted the trial run for declaration of COD of Unit-II after providing seven days advance notice to WBSEDCL.

(o) It is also not clear whether the key provisions of the technical standards regulations laid down by CEA and the Grid code have been complied with by the Petitioner. Also, upon receiving the copy of the office memorandum regarding the declaration of COD from the Petitioner, WBSEDCL observed that the said declaration was not in terms of Clause 4 of Chapter 2 of the 2014 Tariff Regulations. Therefore, it is the case of WBSEDCL that the COD declared by the Petitioner is invalid, non-est, ineffective and non-binding on the respondent.



(p) Due to breach on part of the Petitioner to supply the desired quantum of power under the PPA, WBSEDCL was constrained to serve upon the Petitioner a preliminary notice dated 18.7.2014 in terms of the PPA. In terms of Article 13.2(iv) of the PPA, the consultation period of 15 days following the issuance of preliminary notice and also seven days period following the issuance of the said notice have expired and despite that the Petitioner did not undertake steps to cure the aforesaid event of default. Therefore, WBSEDCL was constrained to issue the thirty day termination notice dated 13.5.2015 to the Petitioner as it had failed to fulfill its obligations under the PPA for supply of power for the period from 1.4.2014 till 1.7.2014.

(q) Only when power was available from the project and WBSEDCL had not scheduled such power, then WBSEDCL would have been liable to pay fixed charges to the petitioner. If Unit-I is not in operation and COD of Unit-II is not in line with the 2014 Tariff Regulations, the availability cannot be declared or the same needs to be treated as 'nil'. Since the Petitioner has defaulted in its obligations for supply of power for a continuous period of three months and as the COD of Unit-II was not in conformity with the 2014 Tariff Regulations, WBSEDCL has validly terminated the PPA on account of 'DVC event of default' under the PPA.

(r) WBSEDCL informed the Petitioner by letter dated 1.4.2014 that it has not been allowed MTOA by the CTU because the period for open access is not more than three months. WBSEDCL further requested the Petitioner to supply the aforesaid quantum of power to it under STOA mode, because of the time lag of six months in getting approval from CTU. The Petitioner would not have incurred any financial, technical or operational hurdles in supplying power to WBSEDCL under STOA. All financial obligations related to procurement of power under STOA were to be borne by WBSEDCL and, therefore, the Petitioner ought not to have created any issue based on non-availability of MTOA/LTA. WBSEDCL was in substantial compliance of the aforesaid provision and there has been no material breach of the PPA by not arranging MTOA in terms of Article 3.2 of the PPA.

9. Accordingly, WBSEDCL has submitted that there is no merit in the contentions of the Petitioner and the Petition ought to be dismissed.

10. The matter was thereafter heard on 20.3.2019 and the Commission after hearing the parties at length reserved its order in the Petition. At the request of the Respondent WBSEDCL vide letter dated 22.3.2019, the Commission had granted time to WBSEDCL to file its written submissions. Accordingly, the Respondent



WBSEDCL has filed its written submissions vide affidavit dated 13.4.2019. The written submissions of WBSEDCL are mainly on the line of argument put forward by it in its reply dated 16.2.2019.

Analysis and Decision

11. Based on the submissions of the parties, the issues which emerge for consideration are as under:

Issue No. 1: Whether the claim of the Petitioner for fixed charges is barred by limitation?

Issue No. 2: Was the Petitioner affected by force majeure as regards its Unit-1?

Issue No. 3: Is the contention of the Respondent valid that COD of Unit-2 is not in accordance with the provisions of the 2014 Tariff Regulations?

Issues No. 4: Is the Petitioner entitled for any relief? If so, what relief should be granted to the Petitioner?

12. Issues 1, 2 and 3 are inter-connected and, therefore, we take them up together.

Issue No. 1: Whether the claim of the Petitioner for fixed charges is barred by limitation?

Issue No. 2: Was the Petitioner affected by force majeure as regards its Unit-1?

Issue No. 3: Is the contention of the Respondent valid that COD of Unit-2 is not in accordance with the provisions of the 2014 Tariff Regulations?

13. The Petitioner has submitted that WBSEDCL has not paid for the quantum of 200 MW contracted capacity of power which the Petitioner had offered with due availability declaration from Unit-2 for supply from 14.6.2014. Accordingly, the Petitioner has submitted that an amount of ₹71.24 crore towards capacity charges for the months of June 2014 to September 2014 and from April 2015 to June 2015 has become due and payable by WBSEDCL to the Petitioner till September 2015.



14. The Petitioner has also stated that due to the delay on the part of WBSEDCL to pay the above amount within the due dates, WBSEDCL is also liable to pay Late Payment Surcharge at the rate of 1.5% per month, amounting to ₹40.50 crore (as on 31.8.2018) as specified in the PPA and as per provisions of the 2014 Tariff Regulations notified by this Commission.

15. The Petitioner has further stated that the cause of action for filing the present Petition arose in September 2015 when the Petitioner has been raising invoices on a running basis and also when WBSEDCL, in response to a proposal from the Petitioner for an amicable settlement, had vide its letter dated 17.9.2015, rejected the bilateral discussions.

16. The Respondent, WBSEDCL in its reply has submitted that the claim of the Petitioner is barred by limitation as it had, by letter dated 22.7.2014 disputed the first invoice dated 8.7.2014 raised by the Petitioner for the month of June 2014. The Respondent has stated that it had clarified to the Petitioner that it would not be liable to pay the capacity/fixed charges to the Petitioner since Unit-I of the Project was not in operation due to technical constraint and COD of Unit-II was not in line with provisions of the 2014 Tariff Regulations.

17. The Respondent has further submitted that since there has been a failure on the part of the Petitioner to supply power for a continuous period of three months from 1.4.2014 to 1.7.2014, the same constitutes an event of default in terms of Article 13.1 of the PPA. Accordingly, the Respondent has submitted that the entire claim of the Petitioner for payment of capacity charges for the months of June 2014 to September 2014 and from April 2015 to June 2015 is barred by limitation and the non-payment of the same cannot be agitated by the Petitioner in the instant Petition. Referring to the judgment of the Hon'ble Supreme Court in A.P. Power



Coordination Committee Vs Lanco Kondapalli Power Ltd & ors [(2016) 3 SC 468], the Respondent has stated that the provisions of the Limitation Act, 1963 will be applicable to claims brought before this Commission and the plea of running bills cannot in any event protect the extensive delay of the Petitioner in filing the Petition.

18. The Petitioner in its rejoinder has clarified that consequent upon the termination of the PPA by the Respondent on 13.5.2015, there were requirements for the parties to undertake mutual discussions for amicable resolution of the disputes in terms of Article 7.1 of the PPA. It has stated that the period of consultation before any action could be taken in terms of Article 7.1 is 90 days from 7.7.2015 i.e. 5.10.2015. The Petitioner has added that the Respondent had taken a stand by rejecting the process of amicable resolution by letter dated 17.9.2015 and thereafter, the Petitioner has filed this Petition within the limitation period of three years and, therefore, the same is valid and maintainable.

19. The matter has been examined. While the Petitioner has contended that the Petition is maintainable as the same has been filed within the limitation period, pursuant to the Respondent rejecting the process of amicable settlement by its letter dated 17.9.2015, the Respondent has argued that the capacity charges were not payable as per invoice dated 8.7.2014, as the non-scheduling of power by the Petitioner for a continuous period of three months from 1.4.2014 till 1.7.2014 constituted an event of default in terms of Article 13.1(iv) of the PPA and the same was made known to the Petitioner by its letter dated 22.7.2014. Accordingly, the Respondent, while contending that the Petitioner ought to have raised the dispute as soon as the first invoice was formally rejected on 22.7.2014, has submitted that the entire claim of the Petitioner is barred by limitation, as the Petition has been filed after the expiry of three years from the aforesaid date.



20. It could be observed from the above that the plea of limitation raised by the Respondent is in respect of the Petitioner's invoices starting from 8.7.2014, which the Respondent has expressed its inability to pay, on the ground that the Petitioner had not scheduled power to it for a continuous period of three months, which constituted a DVC event of default in terms of Article 13.1(iv) of the PPA. Therefore, in order to decide the question of limitation, it has become necessary to examine if the invocation of Article 13.1 by the Respondent is just and proper in the fact and circumstances of the case. Article 13.1(iv) of the PPA provides as under:

"13 EVENTS OF DEFAULT AND TERMINATION

13.1 DVC Event of Default

The occurrence and continuation of any of the following events, unless any such events occurs as a result of the force majeure event or a breach by WBSEDCL of its obligations under this Agreement, shall constitute a DVC Event of Default:

(i) xxxx

(iv) If DVC fails to supply power at a stretch of three months unless it is a force majeure event"

13.3 Procedure and Termination for cases of DVC's Event of Default

13.3.1 Upon the occurrence and continuation of any OVC Event of Default under Article 13.1 WBSEDCL shall have the right to deliver to DVC a WBSEDCL preliminary default notice ("WBSEOCCL Preliminary Default Notice"), which shall specify in reasonable detail the circumstances giving rise to the issuance or such notice.

13.3.2 Following the issuance of WBSEDCL Preliminary Default Notice, a consultation period of fifteen(15) days or such longer period as the parties may agree, shall apply.

13.3.3 During the consultation period, the Parties shall, save as otherwise provided in this Agreement, continue to perform their respective obligations under this Agreement.

13.3.4 After the period of seven (7) days following the expiry or the consultation period, unless the parties not having otherwise agreed to the contrary or DVC Event of Default giving rise to the said consultation period has not been remedied, WBSEDCL shall be simultaneously entitled to issue thirty (30) days notice for termination of this Agreement.

13.3.5 If DVC fail to cure the event of default in the manner provided in this Agreement, WBSEDCL in addition to its right to specifically enforce this agreement shall also have the right to terminate this Agreement for such event of default even before the expiry of the Term of this Agreement, provided on such termination, the liability of DVC to supply such power shall cease immediately."



21. In terms of Article 13.1(iv) above, in case of failure of the Petitioner to supply power for a continuous period for three months, the same shall constitute Petitioner's event of default, except in case of force majeure. WBSEDCL has alleged that DVC failed to supply power from scheduled date of supply of power from 1.4.2014 till 30.6.2014 which constituted DVC's Event of Default.

22. The Petitioner has submitted that supply of power to the Respondent from the scheduled date of 1.4.2014 was delayed on account of technical constraints in Unit-I of the generating station due to non-availability of regular ash pond for disposal of ash and ash evacuation system as adequate land was not made available by the Govt. of Jharkhand. As per the Petitioner, non-availability of land for ash pond by Government of Jharkhand constituted a force majeure event in terms of Article 8 of the PPA and therefore, it does not constitute DVC Event of Default under Article 13(1)(iv) of the PPA.

23. The question to be decided is whether non-availability of land for ash pond on account of delay in getting land from Government of Jharkhand is covered under Article 8 of the PPA. The said article is extracted as under:

"8. FORCE MAJEURE

Neither party shall be liable for any claim for any loss or damage whatsoever arising out of failure to carry out the terms of the Agreement to the extent that such failure is due to force majeure event such as war, rebellion, mutiny, civil commotion, riots, strike, lock-out, force of nature, accident, Act of God or any other reason which are beyond the control of the concerned party. Any party claiming the benefit of this clause shall reasonably satisfy the other party of the existence of such an event and give a written notice within a reasonable time to the other party to this effect and the said party will inform immediately after such eventuality has come to an end or ceased to exist. Generation/drawal of power shall be started as soon as practicable by the parties concerned after such eventuality has come to an end or ceased to exist."



24. In our considered view, the constraints faced by the Petitioner in respect of Unit-1 of the project, which resulted in failure of the Petitioner to supply power to the Respondent, cannot be construed as a force majeure event, in terms of Article 8 of the PPA. The constraint of non-availability of land for the ash pond cannot be said to be beyond the control of the Petitioner as the Petitioner was aware of the delay in availability of land and the Petitioner could have made contingency arrangement for the ash disposal till the ash pond was ready. Further, according to the said article, any affected party intending to claim force majeure upon occurrence of such event, is required to notify the other party immediately on occurrence of such force majeure event and also of the cessation of such force majeure event. Though the Petitioner in its letter dated 18.4.2014 has notified the Respondent that Unit-1 is affected by constraints which was being attended by the concerned wing of DVC and was expected to come into service very soon, the Petitioner had not indicated the nature of constraints and whether the Petitioner was claiming the said constraint under force majeure in terms of the PPA. In our view, the Petitioner has not complied with the requirement of Article 8 of the PPA to claim the benefit of force majeure.

25. The Petitioner has submitted that it has declared the COD of Unit-2 from 14.6.2014 and was in a position to supply power to the Respondents. However, the Respondent did not schedule the power from Unit-2. The Petitioner has submitted that since the supply of power from the generating station could commence from Unit-2 w.e.f. 14.6.2014 which is within a period of 3 months reckoned from 1.4.2014, the invocation of Article 13.1(iv) of the PPA by the Respondent is erroneous as the said provision will apply only if there is no supply of power from the generating station from any of the two units, for a period of three months. On



the other hand, the Respondent by its letter dated 18.7.2014 objected to the said declaration of COD of the said unit on the ground that it was not in accordance with the provisions of the 2014 Tariff Regulations and accordingly invoked Article 13.1 of the PPA for non-supply of power and issued preliminary default notice on the Petitioner for events of default.

26. We have considered the submissions of the Petitioner and Respondent. It is noticed that the Petitioner has declared the COD of Unit-2 of the generating station w.e.f. 00:00 hrs of 14.6.2014 and intimation to that effect has been sent to all concerned including the Respondent by letter dated 13.6.2014. DVC in its letter dated 16.6.2014 has intimated the following:

“In terms of PPA executed on 24.10.2013 between DVC and WBSEDCL your allocation from Koderma Thermal Power Station (KTPS) is 200 MW (20%). In terms of Clause 3.2 of PPA, WBSEDCL is liable to obtain Open Access as required from CTU for evacuation of power. You are aware that COD of KTPS Unit-2 has been declared w.e.f. 00:00 hrs of 14.6.2014 and as per your allocation 20% power is to be scheduled to WBSEDCL on Declared Capacity (DC).

It has been observed that, power is not being scheduled due to absence of Open Access for which WBSEDCL is liable to complete all formalities.

As per Clause 6.1.11, in the event of non-Scheduling of power, WBSEDCL shall be liable to bear the Fixed Charges for the same.

In view of the above, it is to inform you that, for non-scheduling of power, in absence of requisition by WBSEDCL, WBSEDCL will be liable to bear fixed charge based on DC.”

27. However, WBSEDCL has not scheduled the power from Unit-2 of the generating station on the ground that the COD of the Unit-2 has not been declared as per the CERC Regulations. WBSEDCL in its letter dated 18.7.2014 has replied as under:-

“With reference to the above PPA already executed between DVC & WBSEDCL on 24th October, 2013 for supply of 200 MW of Power from Koderma Thermal Power Station (KTPS), following observations were made:-



- 1) That as per the provisions of the agreement as stated above, DVC has to commence supply of Power from KTPS w.e.f. 1.4.2014 but till date no power has been supplied to WBSEDCL from Koderma.
- 2) That DVC has confirmed COD of KTPS Unit No. 2 from 14.6.2014 vide their letter no. Coml/COD/KTB/Unit #2/695 dated 13.6.2014. but it is observed that declaration of COD by DVC for Unit No. 2 is not in line with the CERC (Terms and Conditions of Tariff) Regulations, 2014, more specifically under Clause 4 (1) of Chapter-2 of the CERC Regulations, 2014.
- 3) That due to non-observance of CERC Regulations, 2014 and non-supply of power from Koderma Unit, the agreement becomes ineffective and inoperative due to default on your part.
- 4) That under the above circumstances, WBSEDCL has not other alternative and constraint to invoke Clause 13.1 of the PPA relating to events of default and termination.
- 5) That under Clause 13.3.1 of the PPA, in case of occurrence and continuation of the event of default under Article 13.1 of the same, WBSEDCL has the right to issue preliminary default notice on DVC.

Due to above circumstances, WBSEDCL under Clause 13.3 of the PPA serve this preliminary default notice on DVC due to events of default. However, Clause 13.4.2 of the PPA, is also application subsequent to the Unit of Default Notice.”

28. It is, therefore, evident that COD of Unit-2 had been declared by the Petitioner on 14.6.2014 and the Petitioner was in a position to supply the quantum of power to the Respondent with effect from 14.6.2014 which was within the three month period from 1.4.2014. However, the Respondent had failed to schedule the quantum of power and in its letter dated 18.7.2014 has justified its non-scheduling of power on the ground that the Petitioner has not declared the COD in accordance with the CERC Tariff Regulations. In our view, the objection regarding the COD by WBSEDCL is an afterthought having been taken after one month of the declaration of the COD about which intimation has been given by the Petitioner to WBSEDCL. Further, power is also being scheduled to Haryana from the same generating station without any objection with regard to the COD of Unit-2. The Respondent cannot unilaterally conclude that the COD of Unit-2 was not in accordance with the provisions of the 2014 Tariff Regulations and refuse to draw the quantum of power as agreed by it in the PPA. By not scheduling the quantum of power declared



available by the Petitioner from the project, there has been a failure on the part of the Respondent to perform its obligations under the PPA. Since the Respondent has failed to draw power from Unit-2 of the generating station which was made available to it within a period of 3 months from 1.4.2014, no case is made out regarding the Petitioner's event of default in terms of Article 13.1 (iv) of the PPA. Accordingly, we hold that the invocation of Article 13.1(iv) on the Petitioner by the Respondent is unjust and arbitrary and not in accordance with the provisions of the PPA.

29. In the above background, the contention of the Respondent that the Petition, filed after the expiry of three years from the *date of rejection* of the Petitioner's claim for fixed charges vide Respondent letter dated 22.7.2014 is barred by limitation, is untenable. Therefore, the submissions of the Respondent that the Petitioner's monthly invoice for fixed charges from June 2014 is unlawful and therefore does not qualify for payment by the Respondent stands rejected. Consequent upon this, the other pleas of the Petitioner with regard to survival of cause of action on the grounds of (i) rejection of bilateral discussions by WBSEDCL letter dated 17.9.2015 and (ii) 'running bills', for the purposes of limitation, do not survive for consideration.

Issue No. 4: Is the Petitioner entitled for any relief? If so, what relief should be granted to the Petitioner?

30. The Petitioner has submitted that the Respondent is bound to pay fixed charges for 200 MW electricity from the generating station for the period upto September 2015 and the failure to do so, is a breach of the PPA dated 24.10.2013 on the part of the Respondent. The Petitioner has also submitted that in case of non-scheduling of power declared by the Petitioner, the Respondent is required to



pay the deemed fixed charges (capacity charges) to the Petitioner for such quantum as determined by this Commission.

31. The Petitioner has further submitted that the Respondent has not paid for the quantum of 200 MW contracted capacity which the Petitioner has offered with due availability declaration for supply from Unit-1 of the generating station from 20.7.2014 and from 14.6.2014 from Unit-2 to the Respondent. Accordingly, it has submitted that an amount of ₹71.24 crore has become due and payable by the Respondent to the Petitioner towards the fixed charges related to the period till September 2015.

32. The Petitioner has also stated that since there has been a delay on the part of the Respondent to pay the aforesaid amount on the due date, the Respondent is liable to pay the Late Payment Surcharge (LPS) at the rate of 1.5% per month in terms of provisions of the 2014 Tariff Regulations. The total amount due including LPS as on 31.8.2018 as worked out by the Petitioner is ₹1117447434/.

33. In response, the Respondent has submitted that since there has been no scheduling of power from the Project, WBSEDCL is not liable to pay the fixed charges and the LPS as claimed by the Petitioner.

34. The submissions have been considered. It is noticed that the Respondent pursuant to the preliminary default notice dated 18.7.2014 issued to the Petitioner under Article 13.1 of the PPA had issued letter dated 13.5.2015 for termination of the PPA dated 24.10.2013 in terms of Article 13.3.4 of the PPA. Though certain correspondences were exchanged between the parties subsequent to the letter of termination, the Respondent vide its letter dated 17.9.2015 informed the Petitioner that since the termination notice was issued on 13.5.2015, no contract exists



between the parties and, therefore, the claim for the fixed charges is not legally tenable. The Petitioner vide its letter dated 27.3.2018 had stated that “in the meanwhile termination of PPA had been accepted by the Petitioner”. However, no specific date has been mentioned in the letter. In the absence of any date, the termination will take effect from 13.5.2015, and not from 17.9.2015 as claimed by the Petitioner.

35. In the light of the above discussion, we hold that the Respondent is liable to pay to the Petitioner the fixed charges in terms of the tariff determined by this Commission for this generating station from 20.7.2014 till 13.5.2015 along with LPS in terms of the 2014 Tariff Regulations. We direct that the Petitioner shall raise bills accordingly supported by Auditor’s certificate and the Respondent shall make payment within 60 days of raising the bills by the Petitioner.

36. Petition No. 298/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

