

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 63/MP/2019

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

Date of order: 15th January, 2020

In the matter of:

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003, *inter alia* seeking recovery of Capacity Charges/Damages under the Power Purchase Agreements both dated 1.11.2013 entered into between the Petitioner and the Respondents.

And

In the matter of

DB Power Limited
Office Block 1 A, 5th Floor,
Corporate Block, DB City Park,
DB City, Arera Hills,
Opp. MP Nagar, Zone- I,
Bhopal – 462 016.

.....Petitioner

Vs

1. Rajasthan Urja Vikas Nigam Limited
Vidyut Bhawan, Janpath,
Jyothi Nagar, Jaipur – 302 005.
2. Jaipur Vidyut Vitran Nigam Limited
Vidyut Bhawan, Jyothi Nagar,
Nr. New Vidhan Sabha Bhawan,
Jaipur – 302 005
3. Ajmer Vidyut Vitran Nigam Limited
Vidyut Bhawan, Makarwali Road,
Panchsheel Nagar, Ajmer – 305 004.
4. Jodhpur Vidyut Vitran Nigam Limited
New Power House, Industrial Area,
Jodhpur – 342 003.
5. PTC India Limited
2nd Floor, NBCC Tower,



Parties Present:

For Petitioner : Shri Sanjay Sen, Senior Advocate, DBPL
Shri Tejasv Anand, Advocate, DBPL
Shri Vineet Tayal, Advocate, DBPL
Shri Deepak Khurana, Advocate, DBPL
Ms. Nishtha Wadhwa, Advocate, DBPL

For Respondents : Ms. Swapna Seshadri, Advocate, Rajasthan Discoms
Shri Anand K.Ganesan, Advocate, Rajasthan Discoms
Shri Rajiv Arora, Rajasthan Discoms
Shri Ravi Kishore, Advocate, PTC
Shri Rajshree Chaudhary, Advocate, PTC

ORDER

The present Petition has been filed by the Petitioner, DB Power Limited under Section 79(1) (b) read with Section 79(1) (f) of the Electricity Act, 2003 (hereinafter referred to as 'the Act') along with the following prayers:

(a) *Pass an order directing the Respondent Nos. 2-4 (for Respondent No. 2, 3 & 4 in proportion to their Contracted Capacity) as well as the Respondent No.1 and Respondent No.5 jointly and severally) to pay an amount of Rs. 546.66 crores towards the Capacity Charges, calculated on Normal Availability of Contracted Capacity for the period commencing from 30.11.2016 to 31.07.2018 along with past, pendente lite and future interest at the rate of 18% p.a.; and*

(b) *Pass such other and further order or orders as this Commission may deem fit and proper under the facts and circumstances of the present case and in the interest of justice.*

Background of the case

2. The Petitioner has set up a 1200 MW (2x600 MW) Thermal Power Plant at Village Badadarha, District Janjgir Champa in the State of Chhattisgarh (hereinafter referred to as 'the Project'). The Petitioner is supplying (a) 311 MW power to the Respondents 2 to 4 (hereinafter referred to as the Rajasthan Discoms) through Respondent No. 5, PTC India Ltd. (hereinafter referred to as PTC) in terms of the



Power Purchase Agreements (PPAs) dated 1.11.2013; (b) 208 MW power to Tamil Nadu Generation and Distribution Corporation Limited under the PPA dated 19.8.2013; and (c) 5% of net generated power to the State of Chhattisgarh in terms of the PPA dated 5.10.2011.

3. In 2012, Rajasthan Rajya Vidyut Prasaran Nigam Limited (RRVPNL), invited bids for procurement of 1000 MW +/- 10% power on long-term basis through tariff based competitive bidding process under Case -1 route in terms of Section 63 of the the Electricity Act, 2003 (hereinafter referred to as the Act) and the Guidelines issued by the Ministry of Power thereunder, on behalf of the Respondents 2, 3 and 4. Pursuant to approval of Rajasthan Electricity Regulatory Commission (hereinafter referred to as "RERC") dated 23.3.2011, Request for Procurement (RfP) document was issued on 28.5.2012.

4. The Petitioner, through PTC, participated in the said bidding process and was declared as successful bidder (L-2), which was initially offered the quantum of 311 MW. However, pursuant to the negotiation undertaken with the bidders for increase in capacity of the individual bidders, the Petitioner, through PTC, was offered the increased capacity of 410 MW and consequently was issued Letter of Intent (LoI) for supply of 410 MW power from the Petitioner's Project. Accordingly, the Petitioner entered into a Power Purchase Agreement with Respondent 5, PTC (PPA-1) on back-to-back basis of the Power Purchase Agreement entered into between the Respondent 5, PTC with Respondents 2 to 4 (PPA-2), both dated 1.11.2013.

5. Subsequently, RRVPNL filed Petition before RERC on behalf of Rajasthan Discoms under Section 63 of the Act for adoption of tariff for 1010 MW power to be procured from the successful bidders including 410 MW power to be procured from



the Petitioner. However, the Respondents 2 to 4, thereafter filed an application seeking reduction in the quantum of power to be procured from 1010 MW to 500 MW from the successful bidders on the basis of recommendation of Energy Assessment Committee (EAC) constituted by Government of Rajasthan. RERC allowed the said application vide its order dated 22.7.2015 and reduced the quantum of power to be procured from 1010 MW to 500 MW, which resultantly led to reduction in the quantum under the PPAs from 410 MW to 250 MW.

6. Aggrieved by this reduction in quantum by RERC vide its order dated 22.7.2015, the Petitioner and other generators preferred appeals before the Appellate Tribunal for Electricity (hereinafter referred to as 'APTEL') in Appeals No. 191 of 2015 and 235 of 2015 wherein APTEL vide judgment dated 2.2.2018 set aside RERC's order dated 22.7.2015 to the extent it accorded approval to reduction of procurement of power from 1010 MW to 500 MW and held that the Petitioner was entitled to supply 410 MW power for which consequential orders were to be passed by RERC.

7. The aforesaid judgment of APTEL dated 2.2.2018 was challenged by the Rajasthan Discoms along with another generator, SKS Power Chhattisgarh Limited before Hon'ble Supreme Court by Civil Appeal Nos. 2502-2503 of 2018 and batch. While the Respondents challenged the judgment on the aspect of increase in quantum from 500 MW to 1000 MW by the APTEL, SKS Power Chhattisgarh Limited challenged the aforesaid judgment on the aspect of increased quantum awarded to the Petitioner by means of negotiation. Hon'ble Supreme Court disposed of the said Appeals and affirmed the judgment of APTEL dated 2.2.2018 except for quantum of power to be supplied by the Petitioner to 311 MW instead of 410 MW. The Hon'ble



Supreme Court further directed that successful bidders (L-1 to L-5) shall be entitled to supply power in terms of original offered amount and accordingly, PPAs stood revised to 311 MW and the amendment to PPAs was executed on 15.5.2018. Relevant portion of the judgement of Hon`ble Supreme Court dated 25.4.2018 is extracted as under:

“We are in agreement with the earlier conclusion of the APTEL. We are of the view that the direction of reduction of capacity from 1000 MW to 500 MW by the State Commission was correctly set aside. Since L-1 to L-1 were represented before this Court, we direct that they shall be entitled to supply of power in terms of the originally offered amount, mentioned above, in accordance with Para 3.5 of the Request for Proposal. The power supply will now be reduced to a total of 906 MW. The State Commission may now go into the issue of approval for adoption of tariff with regard to L-4 and L-5. All Letters of intent (LOIs) shall stand modified in terms of the above. All the appeal shall stand disposed of in terms of the above order.”

8. RERC noted the compliance of the Hon`ble Supreme Court order and amendment to the PPAs vide order dated 29.5.2018.

9. Meanwhile, the Petitioner had commenced supply of reduced quantum of 175 MW of power to the Respondents from 30.11.2016, which was increased to 250 MW w.e.f. 27.3.2017. The Petitioner started supplying 311 MW power in terms of the order of the Hon`ble Supreme Court and the amendment to the PPAs w.e.f. 1.8.2018.

Submissions of the Petitioner

10. The Petitioner has mainly submitted as under:

(a) In terms of the PPAs, the Respondents were jointly and severally, obligated to off-take and schedule 410 MW quantum of power from the Scheduled Delivery Date (hereinafter referred to as “SDD”) i.e. 30.11.2016. Therefore, the action of the Respondents 1 to 4, in filing the application before the RERC for reducing the quantum of power to be procured from 1010 MW to 500 MW, which has resulted in reduction of Petitioner’s quantum of power from



410 MW to 250 MW under the PPAs, was illegal and in breach and contravention of the terms and conditions of the PPAs.

(b) On account of aforesaid conduct of the Respondents 1 to 4, the Petitioner though ready, could not supply 160 MW (410 MW – 250 MW) power from the SDD i.e. 30.11.2016 to the actual date of commencement i.e. 1.8.2018 pursuant to the Hon'ble Supreme Court's order dated 25.4.2018.

(c) The aforesaid act of the Respondents is also a Procurer Event of Default under the PPAs inasmuch as the same is in contravention of the terms of the PPAs and is a breach/ default of the PPAs owing to which the Petitioner was not able to supply 160 MW capacity to the Respondents from 30.11.2016 till 31.7.2018, which ought to be considered as deemed to have been supplied under the PPAs and accordingly, the Petitioner is entitled to payment of Capacity Charges for 160 MW for the aforesaid period.

(d) While making the application for reduction of quantum from 1010 MW to 500 MW, the Respondents were aware of the consequences of such application and the damages to be paid to the Petitioner under the PPAs if the quantum of power is not scheduled.

(e) The Petitioner vide its notice dated 10.12.2018 requested the Respondents to pay an amount of Rs. 510.82 crore towards the Capacity Charges, calculated on Normal Availability of Contracted Capacity from the period commencing from 30.11.2016 to 25.4.2018 during which the Petitioner could not supply 410 MW quantum of power on account of Respondents' breach and default. The Respondent No. 1, vide its letter dated 10.1.2019 denied the claim of the Petitioner by stating that the PPAs were subject to the adoption of tariff by RERC and since the RERC had adopted the tariff for only 250 MW, the Respondents cannot be held responsible and that the Petitioner had not raised any claim for capacity charges before APTEL or before the Hon'ble Supreme Court and therefore, cannot agitate such claims now.



(f) The aforesaid contentions of the Respondent No. 1 are erroneous inasmuch as it was on the Respondents' application and prayer that the quantum of power was reduced by RERC, which was thereafter set aside by the APTEL and affirmed by the Hon'ble Supreme Court. Further, the proceeding before the APTEL and Hon'ble Supreme Court was in respect of order of RERC reducing the quantum of supply and the Petitioner could not have made any claim for capacity charges in the said proceedings as the same was not the subject matter of the proceedings.

(g) The Respondent No. 5, vide its letter dated 25.1.2019 has denied the legitimate claim of the Petitioner on the ground that since the ultimate purchaser of the electricity is Respondent 1 and since the Respondent 1 has already denied the claim of the Petitioner, PTC is not liable for the claims.

11. The Petition was admitted on 4.6.2019 and notices were issued to the Respondents to file their replies. The Respondents 1 to 4, vide their affidavit dated 26.6.2019 have filed their common reply. The Petitioner has filed its rejoinder to the reply of the Respondents 1 to 4 vide its affidavit dated 17.8.2019.

Reply of the Respondents 1 to 4

12. The Respondents 1 to 4, vide their common reply, have mainly submitted as under:

(a) The Petitioner has in the present Petition, while demanding the capacity charges, has primarily traversed the basic principle of electricity law that the capacity charges can only be raised against the actual scheduled capacity.

(b) The competitive bidding process conducted by the Respondents was subject to the regulatory jurisdiction of the RERC and the LoI and PPAs were also subject to the adoption of the tariff by RERC. The Petitioner is seeking to



give the PPA a higher status than the terms of approval and adoption of the tariff by RERC.

(c) The rights and obligations of the parties are as expressly provided for in the PPA and the Petitioner cannot claim any relief contrary to the term and conditions of the PPAs.

(d) It was in terms of the order of RERC dated 22.7.2015 wherein the RERC held that the quantum of only 500 MW was liable to be approved considering the demand in the State as recommended by the Energy Assessment Committee (EAC) and adopted the tariff for only 250 MW capacity in respect of the PPAs with the Petitioner.

(e) Subsequently, APTEL vide its judgment dated 2.2.2018, *inter-alia*, held that the Petitioner was entitled to supply the capacity to the extent of 410 MW for which consequential orders were to be passed by RERC. Thus, it was only by virtue of this order, the quantum of 410 MW, for which the Petitioner is claiming fixed charges, had been directed to be approved by APTEL for which the consequential orders were to be passed by RERC.

(f) The APTEL's judgment was challenged before the Hon'ble Supreme Court, wherein the Hon'ble Supreme Court vide its order dated 25.4.2018 upheld the quantum of 1000 MW and held that it could not be reduced after the bidding process was over. The Hon'ble Supreme Court further held that the quantum for individual bidders could not be increased by means of negotiation. Thus, the quantum of 410 MW for the Petitioner as directed by the APTEL was set aside by the Hon'ble Supreme Court by restoring it back to 311 MW. Accordingly, on 2.5.2018, modified Lol was issued to the Petitioner for 311 MW and parties executed the amendment to the PPAs dated 1.11.2013, governing the rights and obligation of the parties pursuant to the order of Hon'ble Supreme Court.

(g) In the amendment to the PPAs, no right was reserved by the Petitioner in relation to the quantum of capacity to be supplied or the tariff in relation to the quantum of capacity that the Petitioner is entitled to. For the capacity of 410



MW corresponding to which the Petitioner is claiming the capacity charges, the tariff was never adopted by RERC. Therefore, by operation of law, there was no right of the Petitioner to claim any right for supply of 410 MW or otherwise claim capacity charges corresponding to the same.

(h) Throughout the proceedings before the APTEL and Hon'ble Supreme Court, the only claim of the Petitioner was on the quantum of power that it was entitled to supply to the Respondents. There was no claim for any capacity charges. In any event, without capacity of 410 MW being approved and adopted by RERC, the question of the Petitioner claiming any relief for tariff payments in relation to the capacity of 410 MW does not arise.

(i) The Petitioner did not even had the open access capacity for the full quantum of 410 MW for which the capacity charges is being claimed. The Petitioner had open access for only 175 MW from 30.11.2016 to 26.3.2017 and for 250 MW from 27.3.2017. The declaration of availability for the Petitioner at all points of time was only to the extent of 250 MW upto the execution of the amendment PPAs and approval by RERC. The increased capacity of 311 MW was supplied by the Petitioner only from 1.8.2018 from which date there is no dispute on the tariff payments.

(j) Further, in terms of Article 4.4 of the PPAs, the Respondents are liable to pay tariff for all the available capacity upto the contracted capacity and corresponding scheduled energy. Accordingly, the Respondents have paid the capacity charges for the available capacity.

(k) The claim for capacity charges based on normative availability is misconceived. capacity charges is corresponding to the available capacity and there is no deeming provision for the availability to be considered. The Petitioner is claiming capacity charges corresponding to 410 MW even for the period after the decision of the Hon'ble Supreme Court dated 25.4.2018 wherein it has been held that capacity to be considered under the PPAs with the Petitioner is 310 MW. For this capacity of 310 MW, fresh Lol was to be issued in terms of the Hon'ble Supreme Court direction and the PPA was also



executed and approved by RERC on 29.5.2018. Thereafter, it was for the Petitioner to obtain open access and commence the supply.

Rejoinder of the Petitioner to Reply of Respondents 1 to 4

13. The Petitioner, vide its rejoinder dated 17.8.2019, has mainly submitted as under:

(a) The contentions of the Respondents that the claim of the capacity charges can only be raised against the actual scheduled capacity is erroneous. The claim of the Petitioner is for compensation for the loss/ damage caused to the Petitioner in the form of capacity charges on account of breach committed by the Respondents 1 to 4 in seeking reduction of power to 250 MW instead of 410 MW. Accordingly, the question of scheduling power over and above 250 MW at the relevant point of time did not arise.

(b) The Respondents have also erred in contending that the supply of power could not commence before the adoption of tariff under the Act and no bidder has any vested right in adoption of tariff. RERC was to adopt the tariff for 410 MW in respect of Petitioner's PPAs had it not been for the application filed by the Respondents 2 to 4 seeking reduction in the quantum of supply contrary to and in breach of the provisions of the PPAs.

(c) There were only two issues which were the subject matter before the RERC, APTEL and Hon'ble Supreme Court, namely, (i) the legality of reduction of quantum of power for adoption of tariff to 500 MW from 1010 MW, and (ii) the legality of increase in quantum to individual bidder by means of negotiation. Thus, in view of the limited issues being adjudicated, the Petitioner had neither the opportunity nor the occasion to make any claim for capacity charges/damages in the said proceedings.

(d) As far as the contention of the Respondents that the Petitioner did not reserve any rights in relation to quantum of capacity to be supplied or tariff in relation to the quantum of capacity that the Petitioner is entitled to is concerned, the subject matter of Amendment to the PPAs dated 1.11.2013 was only to record the arrangement as regards quantum of power to be supplied in terms of



the order dated 25.4.2018 passed by the Hon'ble Supreme Court and there was no need for the Petitioner to reserve any right to claim capacity charges as contended by the Respondents 1 to 4.

(e) As regards the contention of the Respondents that the Petitioner did not have the open access capacity for the full quantum of 410 MW for which the capacity charges are claimed, the Petitioner has submitted that the issue of availability of open access in respect of the claim of the Petitioner is irrelevant. For the claims of capacity charges arising out of breach/ default of the Respondents 2 to 4, there is no requirement in the PPA for the Petitioner to have open access for the aggregate contracted capacity of 410 MW and it is not in dispute that the Petitioner was always ready to supply 410 MW power from its Project, had the quantum not been reduced by RERC on the application filed by the Respondents. Regardless of this, the Petitioner had applied for LTA for 410 MW on 13.5.2014 and it was only on account of the application for reduction of quantum of power filed by the Respondents 1 to 4 and the consequent order passed by RERC thereon that the original application for grant of LTA was closed by PGCIL. The Respondents are now seeking to take advantage of their own wrong which cannot be permitted.

(f) The reference and reliance on the Article 4.4 of the PPAs by the Respondents is also misplaced as the applicability of the said Article is "*subject to the terms and conditions of the Agreement*" and having committed the breach/ default of their fundamental obligations and representations under the PPAs, the Respondents cannot contend that the claim of the capacity charges can only be raised against the actual scheduled capacity.

(g) At Schedule 7-Representation and Warranties, of the PPAs, the Respondents had given an unambiguous and unequivocal representation that it intended to procure 1000 +/- 10% base load power for a period of 25 years for meeting its base load requirements of power and thus, filing of subsequent application by the Respondents is contrary to and in breach of representations and warranties given by the Respondents 1 to 4 in terms of PPA.



14. The Petitioner and the Respondents have filed their respective written submissions. The Petitioner and the Respondents 1 to 4, in their respective written submissions have mainly reiterated the submissions made in the earlier pleadings and are not reproduced for the sake of brevity. The Respondent 5, PTC, in its written submission, has mainly submitted as under:

(a) The Petition and the prayers of the Petitioner are not maintainable on the ground that the any supply/ purchase of power are subject to the approval by the appropriate Commission which in the present case is RERC and, therefore, any supply of power beyond the quantum approved and adopted by RERC is not permissible under the Act.

(b) The procurers i.e. Respondents 2 to 4, under the PPA, had to obtain the approval of RERC for adoption of tariff under Section 63 of the Act and the entire bidding process and the PPA was subject to the orders passed by RERC.

(c) APTEL held the Petitioner was entitled to supply 410 MW, but the supply of said quantum of power was also to be approved by RERC.

(d) Subsequently, the Hon'ble Supreme Court in its order dated 25.4.2018 further held that only the capacity which was originally offered in the bidding process was to be considered and accordingly the modified Letter of Intent was issued in favour of Petitioner to supply 311 MW of power and amendments to the PPAs were executed.

(e) The claim of the Petitioner is for the capacity charges for 410 MW of power which was never approved and adopted by the Appropriate Commission i.e. RERC and the approval and adoption by RERC was only upto the extent of 250 MW of power which was enhanced to 311 MW pursuant to the order of Hon'ble Supreme Court.

(f) The supply of power of 250 MW by the Petitioner to the Respondents 2 to 4 through PTC on back-to-back basis was as per the order of RERC. All



the terms and conditions of the PPA-2 executed between PTC and the Respondents 2 to 4 are incorporated in the PPA-1 executed between PTC and the Petitioner.

Analysis and Decision

15. Based on the submissions made by the parties, the issue that arises for consideration of the Commission is as to whether the Petitioner is entitled to payment of capacity charges for the quantum of power it was not allowed to supply to the Respondents? If yes, what should be the quantum of power for which capacity charges shall be paid?. This is discussed in the succeeding paragraphs.

16. RRVNPL invited bids for procurement of 1010 MW of power on behalf of the Respondents 2 to 4. The Petitioner (through PTC) participated in the competitive bidding process and was declared the successful bidder (L-2). Initially, the Petitioner was offered to supply 311 MW power. However, pursuant to negotiation undertaken with the bidders, the Petitioner (through PTC) was offered 410 MW and Lol was issued for this capacity. Subsequently, based on the application filed by the Respondents, RERC vide its order dated 22.7.2015 reduced the quantum of power procured from 1010 MW to 500 MW which resulted in reduction in quantum of the Petitioner from 410 MW to 250 MW. The said order dated 22.7.2015 was challenged by the Petitioner and other generator before the APTEL. APTEL vide its judgment dated 2.2.2018 held that the Petitioner was entitled to supply 410 MW and directed RERC to pass consequential orders in this regard.

17. The Petitioner has submitted that action of the Respondents 1 to 4 to reduce the quantum of power to be procured from 1010 MW (as per the competitive bidding process) to 500 MW resulted in reduction of the Petitioner's quantum to 250 MW under the PPAs. The Petitioner has termed it illegal and in breach and contravention



of the terms and condition of the PPAs and Guidelines of the Central Government. It has submitted that due to this action of the Respondents, the Petitioner was not able to supply 160 MW of power, which the Petitioner was otherwise entitled to and ready to supply, from Scheduled Delivery Date. Accordingly, the Petitioner has submitted that the Rajasthan Discoms are liable to pay Rs. 546.66 crore towards the capacity charges by way of damages and compensation.

18. *Per contra*, the Respondents have submitted that the quantum of 410 MW from the Petitioner was never approved and adopted by RERC and the said PPAs could have come into the force only after the approval by the Appropriate State Commission and that RERC vide its order dated 22.7.2015 approved quantum of power to be procured from the Petitioner to the extent of 250 MW only. The Respondents have further submitted that since the Petitioner did not raise any claim on the capacity charges in the proceedings before APTEL or Hon'ble Supreme Court, such claim cannot be raised by the Petitioner independently before this Commission.

19. We have considered the submissions made by the parties. It is undisputed that the Respondents 1 to 4 had initiated the competitive bidding process for procurement of 1010 MW +/- 10% in order to meet its requirements and the same was approved by RERC vide its order dated 23.3.2011. It is also undisputed that after the completion of competitive bidding process, the Respondents had filed an application before the RERC seeking reduction in the procurement quantum from 1010 MW to 500 MW on basis of recommendations of Energy Assessment Committee. Based upon application of the Respondents, RERC, vide its order dated 22.7.2015, approved the proposal of the Respondents to procure 500 MW (including



250 MW in respect of the Petitioner) instead of 1010 MW. Thus, the Petitioner could supply power upto 250 MW only despite having entered into PPA with the Rajasthan Discoms for 410 MW.

20. The aforesaid order of RERC was challenged by the Petitioner before the APTEL, wherein APTEL vide its judgment dated 2.2.2018 in Appeal No. 235 of 2015 set aside the order of RERC and *inter alia*, observed as under:

“16.11.... It would reveal that the RRVPN had attempted by seeking for the directions for approval of deviation regarding reduction in procurement of 1000 MW power through Case -I bidding in terms of the petition filed by it for adoption of tariff (No.431/13) from the State Commission to subvert the entire bidding procedures contemplated in the Government of India’s guidelines and Request for Proposal (RFP). In fact, the Commission ought to have not allowed/entertained such deviation contained in the petition.

16.12. When RRVPN chose to file its Petition No. 431/13 seeking for the adoption of the tariff by the Appellant(s), after accepting the Evaluation Committee’s report certifying the Appellant(s) as successful bidder under clause 3.5.3 of the Request for Proposal (RFP), the RRVPN cannot be permitted to act in any manner other than just to honour the LOI & PPA. As mentioned earlier, the only exception available to RRVPN (R-2) under clause 3.5.12 of RFP was that it could have rejected the bids of the quoted tariff if it was found to be not aligned with the market conditions. In the present case, the same had not been done in view of the fact that the Evaluation Committee declared that the rate quoted by the Appellant(s) was aligned with the market rates. Moreover, the rates/tariff were quoted for supply of 1000 MW power as stipulated by procurer in bidding documents and cannot be assumed for lesser quantity at the same terms & conditions.”

Thus, APTEL has observed that the application filed by the Respondents was contrary to the competitive bidding process under Section 63 of the Act ignoring the various procedures contemplated in the Guidelines and RfP and that the Respondents can not be permitted to act in any manner other than to honour the provisions of the PPA and Lol.

21. The Respondents have primarily contended that the said PPAs could not have come into force without the approval of RERC and, therefore, the question of the Petitioner claiming any relief in relation to the capacity charges for 410 MW does



not arise. The Respondents have also submitted that since the RERC adopted the PPA only with respect to 250 MW, the Respondents could not have procured the capacity in excess of 250 MW contrary to the order of RERC.

22. It is noted that similar contentions were also made by the Respondents before APTEL; the relevant extract of the judgment of APTEL is as under:

“16.15 In view of the fact that the bid documents and the Request for Proposal documents on the basis of the Government guidelines as well as the bid process had already been approved by the State Commission before inviting the bids and since Evaluation Committee had already concluded the bid process by declaring the Applicant(s) as successful bidder and in view of the fact that on that basis, the RRVPN filed a Petition before the State Commission for adoption of the said tariff, the above process has established certain rights of the parties.

16.16 According to the Respondents No. 2 to 5, the signed PPA may be valid and enforceable only when it is approved by the Commission. It is noted that the draft PPA was duly approved by the State Commission by its Order as early as on 23.03.2011 and therefore, there does not appear any further necessity for a separate approval required for the approval of the PPA. ...”

In view of the above observations of APTEL, we are not inclined to accept this contention of the Respondents that it could not have procured power without approval of RERC.

23. The Respondents 1 to 4 and another generator, namely, SKS Power Generation (Chhattisgarh) Limited challenged the APTEL judgment dated 2.2.2018 before the Hon'ble Supreme Court in Civil Appeal Nos. 2502-2503 of 2018 and the batch. The issues under the challenge were; (i) increase in quantum from 500 MW to 1000 MW by APTEL as raised by the Respondents 1 to 4, and (ii) increase in quantum awarded to the bidders including the Petitioner by means of negotiation as raised by the generator, SKS Power.

24. Hon'ble Supreme Court vide its judgment dated 25.4.2018 held as under:

“The bidding process for procurement of 1000 mega watt power was concluded and the result of the evaluation was as follows:



Rank	Qualified Bidder Name	Levelized Tariff (Rs/Kwh)	Capacity offered	Cumulative Capacity offered	Average cumulative Tariff (Rs./Kwh)
L-1	PTC- Maruti Clean Coal and Power Limited	4.517	195	195	4.517
L-2	PTC-DB Power Limited	4.811	311	506	4.698
L-3	LPL-Lanco Babandh Power Limited	4.943	100	606	4.738
L-4	PTC-Athena Chhattisgarh Power Limited	5.143	200	806	4.839
L-5	SKS Power Generation (Chhattisgarh) Limited	5.300	100	906	4.890
L-6	IPL-Lanco Vidarbha Thermal Power Limited	5.490	100	1006	4.949
L-7	PTC- MB Power (Madhya Pradesh) Limited	5.517	200	1206	5.043
L-8	KSK Mahanadi Power Company Limited	5.572	475	1681	5.193
L-9	Jindal Power Limited	6.038	300	1981	5.321
L-10	LPL-Lanco Amarkantak Power Limited	7.110	100	2081	5.407

Thereafter, the Rajasthan Electricity Regulatory Commission ("State Commission" for short) was moved for reduction of the capacity from 1000 mw to 500 mw. Letters of Intents (Lols) were allotted for different quantity i.e. higher quantities than were bid for, in the case of L-1 to L-3. The State Commission approved the reduction of capacity from 1000 mw to 500 mw.

The Appellate Tribunal for Electricity (APTEL) held as follows:

" The contention of the Respondents as well as State Commission that even after the bidding process is completed and PPA signed, the stipulated power capacity of 1000 MW for procurement can be reduced is contrary to the provisions of the Act as well as bidding guidelines. Once the petition has been filed on the recommendation of the Evaluation Committee seeking for the adoption of tariff after it is discovered, it is not open for the Respondents (Procurer) and the State Commission to reduce procurement of power stipulated in the bidding documents and PPA(s) already executed between the parties."

In view of above, the APTEL held that reduction of capacity was not permissible after the bidding process was complete. The APTEL further directed as follows:

"Hence, the impugned order dated 22.07.2015 is liable to set aside. The State Commission shall be required to pass appropriate/revised order enabling the Appellants namely DB Power Ltd. and Lanco Power Ltd. to supply the contracted power under the respective PPA (dated 01.11.2013) viz. 410 MW & 350 MW, respectively expeditiously in the interest of justice and equity."

We are in agreement with the earlier conclusion of the APTEL. We are of the view that the direction of reduction of capacity from 1000 mw to 500 mw by the State Commission was correctly set aside. Since L-1 to L-5 were represented before this Court, we direct that they shall be entitled to supply of power in terms of the originally offered amount, mentioned in above, in accordance with para 3.5 of the Request for Proposal. The power supply will now be reduced to a total 906 mw. The State



Commission may now go into the issue of approval for the adoption of tariff with regard to L-4 and L-5. All Letters of Intent (Lols) shall stand modified in terms of the above.

All the appeals shall stand disposed of in terms of the above order.”

25. In view of the judgements of APTEL and Hon'ble Supreme Court, it is now for consideration whether the Petitioner is entitled to claim compensation, once it has been held that the application filed by the Respondents before RERC for reduction in quantum of power after completion of the bidding process was contrary to the provisions of the Act, the Guidelines and PPA/ Lol.

26. The Respondents have contended that since the Petitioner did not make any claim on the capacity charges in the proceedings before APTEL or Hon'ble Supreme Court and such claim being consequential to the order of APTEL/ Hon'ble Supreme Court (whereafter RERC approved the capacity for 311 MW), it cannot be raised independently before this Commission. We are not in agreement with this contention of the Respondents. We observe that issues in the proceedings before the APTEL and Hon'ble Supreme Court were limited to adjudicating on legality of (i) reduction of quantum of power for adoption of tariff from 1000 MW to 500 MW; and (ii) increase in quantum of individual bidders by means of negotiations. In our view, the Petitioner is not restricted to raise a claim for compensation in terms of judgement of Hon'ble Supreme Court dated 25.4.2018 which has held that the Respondents were not correct in procuring power only to the extent of 250 MW despite the fact that the Petitioner was selected for supplying 311 MW through a competitive bidding process.

27. The Respondents 1 to 4 have further contended that the Petitioner cannot claim any compensation since it was not in a position to supply power to the Respondents since it did not have open access for 410 MW for which the capacity



charges are being claimed. The Respondents have also submitted that the Petitioner declared availability of its power plant only to the extent of 250 MW till judgement of Hon'ble Supreme Court and that the increased capacity of 311 MW was supplied by the Petitioner only from 1.8.2018.

28. We are of the view that had the original quantum of supply of 311 MW been maintained, the Petitioner would have arranged for LTA for the said capacity and declared the availability accordingly. When the quantum was restricted to 250 MW, the Petitioner sought LTA and declared the capacity accordingly. Therefore, the LTA and declaration of availability for the period from 30.11.2016 till 1.8.2018 cannot be used to deny the relief to the Petitioner flowing from the judgment of the Hon'ble Supreme Court.

29. The Respondents have further contended that the capacity charges are only corresponding to available capacity and there is no provision in the PPA for payment of deemed capacity charges. The Respondents have also contended that any relief can only be claimed in terms of the PPA and not *de hors* the PPA itself. In support of its contentions, the Respondents have also relied upon the Article 12.6 of the PPA.

30. We have considered the submissions of the Petitioner and the Respondents. In our view, absence of any provision for 'deemed capacity charges' in the PPA cannot be a ground for denial of relief to the Petitioner flowing from the judgment of the Hon'ble Supreme Court. It has been held by the Hon'ble Supreme Court that bidders L-1 to L-5 including the Petitioner shall be entitled to supply of power in terms of the originally offered amount in terms of para 3.5 of the RfP and accordingly, the LOI's were modified. In other words, the quantum of power to be supplied under the PPA stood modified from 250 MW to 311 MW as per the



directions of the Hon'ble Supreme Court. The Petitioner shall be entitled to the consequential relief of modification of the contracted capacity from 250 MW to 311 MW for the period from 30.11.2016 till 31.7.2018.

31. Accordingly, we direct the Petitioner to calculate and claim the compensation in the terms of capacity charges for 61 MW (311 MW–250 MW) for the period from 30.11.2016 to 31.7.2018 after offsetting the capacity charges, if any, earned on the said capacity during the relevant period. The Petitioner is directed to share all relevant documents including calculation with the Respondents while claiming compensation.

32. The Petition No. 63/MP/2019 is disposed of in terms of the above.

Sd/-
(I.S.Jha)
Member

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

sd/-
(P.K. Pujari)
Chairperson

