

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No.317/MP/2019

Coram:

**Shri P.K. Pujari, Chairperson
Shri I.S. Jha, Member
Shri Pravas Kumar Singh, Member**

Dated: 31st December, 2021

In the matter of:

Petition under Section 79 (1) (b), 79 (1) (f) and 79 (1)(k) of the Electricity Act 2003, read with Articles 21.1.2 of the PSA dated 26.12.2014 executed between the Petitioner and the Respondent No. 1/ KSEBL, seeking appropriate directions upon the Respondent for releasing the outstanding payment accrued in favour of the Petitioner on account of non-payment of the fixed charge and transmission losses in terms of the Power Supply Agreement dated 26.12.2014.

And

In the matter of:

Bharat Aluminium Company Limited,
Balco Nagar, Korba-495684
Chhattisgarh

Registered office:

Core 6, Scope complex,
7, Lodhi Road, New Delhi-110003

...Petitioner

Vs

1. Kerala State Electricity Board Limited,
Vydyuthi Bhavanam, Pattom,
Thiruvananthapuram,
Kerala 695004

2. Tamil Nadu Generation and Distribution Corporation Limited,
10th floor, NPKRR Maaligai, 144, Anna Salai,
Chennai - 600 002

...Respondents



Parties Present:

Shri Buddy Ranganathan, Advocate, BALCO
Shri Hemant Singh, Advocate, BALCO
Shri Chetan Garg, Advocate, BALCO
Shri Lakshyajit Bagdwal, Advocate, BALCO
Shri Prabhas Bajaj, Advocate, KSEBL

ORDER

The Petitioner, Bharat Aluminium Company Limited (in short 'BALCO') has filed the present Petition seeking the following relief(s):

“(a) direct the Respondent No. 1/ KSEB to make payment to the Petitioner for an amount of Rs. 13.27 crores towards Fixed Charge by considering the Normative Availability on annual basis, along with applicable interest for the power supplied during FY 17-18 and FY18-19;

(a) direct the Respondent No. 1/ KSEB to make payment to the Petitioner for an amount of Rs.46,79,000/- incurred by the Petitioner towards the Transmission Losses attributable to supply of power beyond the Normative Availability, along with applicable interest; and

(b) direct the Respondent No. 1/ KSEB to make future payments of the Fixed Charges and Transmission losses in view of the present petition and in the manner as may be decided by this Hon'ble Commission.”

Background

2. The Petitioner, BALCO has setup a coal-based thermal power plant of 810 MW (4 x 67.5 MW and 4 x 135 MW) and 1200 MW at Balco Nagar, Korba, Chhattisgarh in Western Region.

3. The Respondent No.1, KSEB, is a distribution licensee located in the State of Kerala, who has executed a long-term Power Supply Agreement (PSA) on 26.12.2014 with the Petitioner for supply of 100 MW for a period of 25 years, pursuant to a competitive bidding process conducted by the said Respondent, under the Design, Build, Finance, Own and Operate ('DBFOO') guidelines issued by the Central Government.



4. The Respondent No.2, TANGEDCO, is a distribution licensee located in the State of Tamil Nadu, who has executed a long-term Power Purchase Agreement (PPA) on 23.8.2013 and addendum to PPA dated 10.12.2013 for supply of 100 MW power for period of 15 years from September, 2015 and December, 2015, respectively, pursuant to Case-I bidding process conducted by the said Respondent.

5. In terms of the DBFOO guidelines issued by the Central Government under Section 63 of the Electricity Act, 2003 (in short 'the Act'), the Respondent No.1 KSEBL issued Request for Proposal (RFP) dated 25.4.2014 for shortlisting the eligible bidders interested for supply of power, on long term basis. Pursuant to RFP, the Petitioner participated in the bid. Thereafter, the bid submitted by the Petitioner was evaluated by the Respondent No. 1 KSEBL and after acceptance of the bid, the Petitioner was awarded Letter of Award (LOA) for supply of 100 MW. Accordingly, the Petitioner vide letter dated 1.12.2014 gave its assent to LOA issued by the Respondent No. 1 and thereafter executed the PSA dated 26.12.2014, for supply of 100 MW Round the Clock (RTC) power to the Respondent No. 1 for a period of 25 years.

Submissions of the Petitioner, BALCO

In the above background and in support of the prayers as mentioned in paragraph 1 above, the Petitioner, in the present petition, has made the following submissions vide affidavit dated 19.8.2019:

- (a) The Petitioner's power plant is situated in the State of Chhattisgarh and is supplying power to more than one State, in as much as, it has PSA/PPA with the Respondents. Therefore, the Petitioner, in terms of section 79(1)(b) of the



Act, has a composite scheme for generation and sale of electricity in more than one State and this Commission is empowered to adjudicate the disputes relating to the tariff of the generating company.

(b) Article 5.1.4 of the PSA dated 26.12.2014 mandates the Petitioner to install, operate and maintain its power station in accordance with the specifications and standards and the maintenance requirement, such that the normative availability of the power station of the Petitioner is at least 90%, during each year of the operating period. Since the normative availability of 90% is to be determined after completion of each financial year, the computation of fixed charges to be paid by the Respondent KSEBL, can only be done by considering the normative availability achieved by the power station after completion of the financial year and not on 'standalone basis' of the monthly normative availability. The Respondent No.1 is wrong in considering the monthly normative availability for payment of fixed charges, without reconciliation of the same with the annual normative availability.

(c) As per Article 21.1.2 of the PSA, the Utility (Respondent No.1) shall pay to the Supplier (the Petitioner herein) full fixed charges (part of tariff) for availability of the power station, to the extent of normative availability. Such availability of the power station can only be determined at the end of every accounting year as provided under Article 5.1.4 of the PSA on account of the fact that the normative availability as defined under the said provisions clearly provides for determination of normative availability during each year of the operation period. The petitioner is, therefore, entitled to recover fixed charges for the said normative availability to be determined on annual basis.

(d) The provisions contained under Article 21.6 of the PSA provides for 'Incentive and Damages' in the event of Availability exceeding the normative availability or in the event such availability is less than the normative availability, as the case may be. As per Article 21.6.3 of the PSA, it is clear that within 30 days of the close of every accounting year, the cumulative monthly availability for such year shall be determined and the Incentive and Damages,



as the case may be, shall be computed with reference to normative availability achieved by the power station during that particular year. The said provision clearly demonstrates that 'Incentives or Damages' shall be determined, by taking into account the normative availability achieved by the Petitioner, on yearly basis. The contract has to be read as a whole and cannot be given effect to in bits and pieces. The reading of the contract has to be plain and literal, so that each of the provisions of the contract can be given effect to. The Respondent No.1 has read the provisions under Article 21.6 of the PSA in a mischievous manner so that the Petitioner is denied of its legitimate entitlement.

(e) The Respondent No.1 vide its letter dated 1.5.2019, while rejecting the claim of the Petitioner with respect to the amount payable towards fixed charges, has stated that Article 21.6.3 of the PSA does not provide for reconciliation of fixed charges during the accounting year, on cumulative monthly availability. A plain and simple reading of Article 5.1.4, Article 21.1.2 and Article 21.6.3 of the PSA would reveal that the claim of the Petitioner has been rejected without reading the contract as a whole.

(f) Keeping in view the provisions of the PSA, the Petitioner vide letter dated 24.5.2019, requested the Respondent No.1 to make payment of differential amount recoverable towards the fixed charges amounting to Rs. 2.20 crore for 2017-18 and Rs.11.07 crore for 2018-19, in terms of the PSA dated 26.12.2014.

(g) As per Article 5.6.1 and Article 5.6.2 of the PSA, the Petitioner is liable to bear transmission losses for all the inter-State and intra-State transmission of electricity from the point of connection to the delivery point, which the Petitioner shall adjust in cash, in its monthly invoice, which is the product of transmission loss (expressed in kWh) and tariff.

(h) The tariff paid for the units of energy supplied upto the 'normative availability' is the sum of the fixed charge and fuel charge, whereas, for the energy units despatched to the Respondent No.1, over and above the



Normative Availability, the Petitioner is entitled for payment of incentive to the tune of 50% fixed charges and 100% fuel charges. Therefore, when the tariff payable during a month for excess supply of power beyond the normative availability is not recovered fully, the Petitioner cannot be made liable to bear the transmission losses qua the full tariff for supply of power beyond the normative availability. However, the Respondent No.1 while making payments of the monthly invoices has been adjusting the transmission losses from the monthly bills of the Petitioner by taking into account the full tariff (100% Fixed charges+ 100% Fuel charges), even for units of energy supplied over and above the Normative Availability.

(i) As per prevailing industry norms, the transmission losses are calculated in relation to the billed rate of energy. Therefore, when the billed rate of supply of power beyond 90% is not the full tariff (fixed charges + fuel charges), then the Petitioner cannot be made liable to bear the full transmission losses for the energy units supplied by the Petitioner over and above the Normative Availability. It is highly uncalled for to make the Petitioner liable to bear the entire transmission losses towards the energy units supplied over and above the Normative Availability, when it is not recovering full tariff. Accordingly, the Petitioner vide its letter dated 25.4.2019 also raised the demand for payment of the illegal deduction made by the Respondent No.1 towards transmission losses amounting to Rs.4679754/- for 2017-18 and 2018-19.

(j) The Respondent No.1, vide its letter dated 1.5.2019, rejected both the claims of the Petitioner, thereby denying payment towards fixed charges and transmission losses. The said Respondent despite admitting that the claim raised by the Petitioner is relevant, had rejected the said claim without any rhyme or reason. The statement of the Respondent in the said letter that the claim of the Petitioner is relevant in the event tariff is regulated by Appropriate Commission, is liable to be rejected as the Respondent has failed to appreciate that the tariff at which the Petitioner is supplying power has been adopted under Section 63 of the Electricity Act, 2003 ('the Act'). This stand of the said



Respondent is nothing but a result of misinterpretation of Article 21.6.3 of the PSA.

(k) Article 39 of the PSA defines the term 'fixed charges' to have the same meaning as set forth under Article 21.1.2 of the PSA. This clearly means that full fixed charges are payable at normative availability, on annual basis. Further Article 21.6.1 and Article 21.6.2 of the PSA provides for claiming 'Incentive' for supply of power beyond the normative availability and for payment of 'Damages' in case the availability is less than the normative availability. This further means that in case accounting of 'Incentives or Damages' is done on monthly basis, then the same has to be reconciled on annual basis, and the difference, if any, has to be paid to the Petitioner, along with interest.

(l) The Commission in its order dated 14.5.2019 in Petition No. 77/MP/2018 has held that the availability of contracted capacity has to be done on 'annual basis' since the provisions of the PPA do not provide for computation to be done on 'standalone monthly basis'. Even in terms of the 2014 Tariff Regulations notified by the Commission, the capacity charges are yearly charges, which are adjusted based on 'annual availability' of the generating station.

Hearing dated 7.7.2020

6. The Petition was heard on 7.7.2020 through video conferencing and the Commission vide Record of Proceeding admitted the Petition and directed the parties to complete the pleadings. The Respondent No. 1 has filed its reply vide affidavit dated 29.7.2020 and the Petitioner has filed its rejoinder to the said reply vide affidavit dated 9.9.2020.

Reply of the Respondent KSEBL

7. The Respondent No.1 KSEBL vide its reply affidavit has mainly submitted as under:



(a) The charges for the supply of power from the project are governed by Article 21 and Article 22 of the PSA. Article 21.1 of the PSA deals with the definition of tariff. As per Article 21.1.1, the utility shall pay to the supplier, tariff, comprising the sum of fixed charge and fuel charge payable by the utility to the supplier for Availability and for supply of electricity, as the case may be, in accordance with the provisions of the PSA, which is defined as 'Tariff'. As per Article 21.1.2, as a part of Tariff, the utility shall pay to the supplier an amount, determined in accordance with provisions of Article 21, as a fixed charge, for availability of the power station, to the extent of normative availability thereof. As per this provision, fixed charge is paid for 'Availability' of the power station to the extent of normative availability. Availability is defined under Article 5.1.4 of the PSA.

(b) As per Article 21.4.1 of the PSA, the 'Indexed Fixed Charge' computed as per the provisions under Article 21.2 and Article 21.3 shall be the fixed charge payable for availability in each month of the relevant accounting year. Thus, the fixed charges payable in each month is calculated based on the availability of the station in each month, as per provisions under Article 21.4 of the PSA.

(c) The summary of the various provisions under Article 21.4, Article 21.5 and Article 21.6 of the PSA stipulating the conditions for payment of fixed charges are:

(i) Fixed charges for a month are payable based on 'availability' of the contracted capacity from the station in the month (Article 21.4.1);

(ii) The supplier shall not, for and in respect of any day, be entitled to receive payment of fixed charge for availability exceeding 90% thereof and in the event it supplies electricity to the utility in excess of such 90%, such excess supply shall be eligible only for payment of fuel charges and incentive dues, under Article 21.4.4;

(iii) The supplier shall notify, no later than 15 days prior to the commencement of a month, its maintenance schedule for that month and any reduction in availability arising as a result thereof;



(iv) In the event availability in any month exceeds the normative availability, the supplier shall, in lieu of fixed charges, be entitled to an incentive, which shall be calculated and paid at the rate of 50% of the fixed charge for availability in excess of normative availability. Provided, however, that any incentive hereunder shall be due and payable to the extent of despatch of the power station (Article 21.6.1);

(v) In the event availability in any month is less than the normative availability, the fixed charge for such month shall be reduced to the extent of shortfall in normative availability and in addition, any reduction below the availability of 85% shall, subject to the provisions of Article 21.7, be multiplied by a factor of 0.25 to determine the Damages payable for such reduction in availability (Article 21.6.2);

(vi) The parties expressly agree that within 30 days of the close of every accounting year, the cumulative monthly availability for such year shall be determined and the Incentives and Damages, as the case may be, shall be computed with reference to the normative availability for that year. The amount so arrived at shall be adjusted against the 'Incentives or Damages' determined for the respective months of the year and the balance remaining shall be adjusted in the following monthly invoice.

(d) As per provisions of the PSA, fixed charges for a month are computed based on the monthly availability. The supplier shall not be eligible to receive payment of fixed charge for availability exceeding 90%. Incentive is computed monthly if the monthly availability exceeds the normative availability. Damages are levied if the monthly availability is below the availability of 85%. Yearly reconciliation of availability with reference to normative availability for an accounting year is determined only for computation of Incentives and Damages and not for fixed charges in the DBFOO framework.

(e) The above provisions in the PSA were interpreted in this manner by the Petitioner during the years 2017-18 and 2018-19. During these years, the Petitioner had not raised any claim on annual reconciliation of fixed charges in the annual reconciliation invoice. It is clear from the actions of the Petitioner that they have understood and acted upon the provisions in the agreement in the same manner as this response and there was no dispute in the manner of interpretation of the provisions of the agreement. The present action of the



Petitioner is only an attempt to misinterpret the provisions and claim amounts that are not legally due.

(f) In response to the Petitioner's letter dated 25.4.2019, the Respondent vide letter dated 1.5.2019 has not admitted the claim as it was against the settled position, based on the provisions in the PSA. The Petitioner has so far not raised any claim for annual reconciliation of fixed charges for 2019-20.

(g) As per Article 5.6.1 and Article 5.6.2 of the PSA, the Petitioner is liable to bear transmission losses for all inter-State and intra-State transmission of electricity from the point of connection to the delivery point. The product of such transmission losses (expresses in kWh) and the 'Tariff' shall be due and payable by the supplier to the utility and shall be adjusted in the relevant monthly invoice. As per this provision, the charges payable for adjustment of transmission loss in the monthly bills have to be paid at the tariff for the month irrespective of availability. As per definition of tariff as per Article 21.1 of the PSA, tariff includes fixed charge and fuel charge payable for the month. Payments given to the generator above the normative Availability is 'Incentive'. There is no stipulation in the PSA that if the plant achieves availability above 90%, the amount corresponding to transmission loss has to be worked out based on incentive.

(h) The annual reconciliation of fixed charges is not provided in the PSA. The PSA provides for only annual reconciliation of incentives and damages with respect to normative availability at the end of the year. The computation of transmission losses is not related to availability of each month but applicable to transmission losses from point of grid connection to delivery point, as on the bid date and tariff payable comprising of fixed charges and fuel charges for the month. There is no provision in the PSA to segregate the transmission losses against the units scheduled above 90% availability and those scheduled below 90% availability.



(i) As per Article 21.4.1 of the PSA, the 'indexed fixed charge' computed as per provisions under Article 21.2 and Article 21.3 shall be fixed charge payable for availability in each month of the relevant accounting year. Thus, the fixed charge payable in each month is calculated based on availability of the station in each month as per provisions of Article 21.4 of the PSA. There is no provision in the PSA for computation of annual availability and reconciliation of fixed charges with respect to annual availability.

(j) The Commission's order dated 14.5.2019 in Petition No. 77/MP/2018 relates to PPA executed under case-1 bidding and the said PPA has provision for calculation of cumulative availability for a contract year and that too for the purpose of calculation of incentive only. That order cannot be equated to the present case. The terms and conditions specified in the PPA under case-1 bidding cannot be compared with the framework of PSAs under DBFOO guidelines, wherein the risk of fixed charges is mitigated in different ways i.e. Article 21.4.2. Unlike other PPAs, wherein the risk in fixed charges receivable by the supplier, is not mitigated, the annual reconciliation and payment of fixed charges are not envisaged in DBFOO PSAs. Hence, availability has to be at least 90% on monthly basis, for claiming full fixed charges, for the accounting year.

(k) During 2017-18 and 2018-19, the Petitioner has been adjusting the transmission losses from the point of grid connection to the delivery point as determined by the Appropriate Commission as on bid date and monetizing the losses as on bid date with the tariff comprised of fixed charge and fuel charges for the month as per Article 5.6.2 of the PSA. The manner of interpretations of the provisions are already settled between the parties and the present action of the Petitioner is only an attempt to misinterpret the provisions and to claim amounts that are not legally due.

Rejoinder of the Petitioner BALCO to reply of Respondent KSEBL



8. The Petitioner in its rejoinder affidavit dated 9.9.2020 has mainly submitted the following:

A. Payment of fixed charges considering normative availability on annual basis

(a) It is clear from Article 5.1.4 of the PSA that the normative availability of the Petitioner's power plant, in terms of the PSA, is 90% and the same has to be computed on yearly basis. There is no concept of determination of normative availability on monthly basis, otherwise, the same would have been stated in specific terms in the PSA. A plain and simple reading of the provisions under Article 5.1.4, Article 21.1.2 and Article 21.6.3 would reveal that the claim of the Petitioner has been rejected, without reading the contract as a whole.

(b) As per Article 21.1.2 of the PSA, the Respondent KSEB shall pay to the supplier, the full fixed charge (part of tariff) for availability of the power station to the extent of normative availability. Thus, full capacity/ fixed charges are payable to the Petitioner in the event it is able to achieve normative availability (90%) annually. Such availability of the power station can only be determined at the end of the accounting year, as provided under Article 5.1.4 of the PSA since normative availability as defined, clearly provides for determination of normative availability during each year of the operation period. The Petitioner in terms of the above provisions is entitled to recover fixed charges for the said normative availability to be determined on annual basis.

(c) Article 21.6 of the PSA provides for incentive in the event of availability exceeding the normative availability, or Damages in case of such availability being less than normative availability. As per Article 21.6.3 of the PSA, it is clear that within 30 days of the close of every accounting year, the cumulative monthly availability for such year shall be determined and the fixed cost is required to be reconciled, with the availability achieved at the end of the accounting year.

(d) The Respondent KSEBL is reconciling only penalties imposed on the Petitioner, with respect to not achieving normative availability on monthly basis,



with the availability achieved annually. Therefore, it makes no sense that the Respondent is not following the same principle for reconciling the fixed charges with the annual availability. Since normative availability is to be achieved on annual basis, the computation for the purpose of determining incentive and Damages as provided under Article 21.6 of the PSA, can only be done, after taking into account the yearly normative availability and not the monthly availability. This means incentive and damages have to be considered based on whether the Petitioner has supplied power at normative availability, on annual basis. The same principle has to be followed for the purpose of payment of fixed charges.

(e) In the event the Petitioner achieves normative availability in a particular accounting year, then it cannot happen that the Petitioner cannot recover full fixed charges. Otherwise there is no relevance of having Article 21.1.2 in the PSA. As a corollary, if the Petitioner is not able to achieve normative availability (90%), then the fixed charges has to be computed with respect to the said shortfall in availability, determined on annual basis. The conduct of the Respondent KSEBL in computing the fixed charges on a monthly basis and thereafter, not reconciling the same on annual basis, is wrongful and contrary to the intent and spirit of the PSA.

(f) The contract has to be read as whole and cannot be given effect to in bits and pieces. The reading of the PSA has to be plain and in literal sense, so that each provisions of the contract can be given effect to. The Respondent KSEBL has read the provisions under Article 21.6 of the PSA in a mischievous manner, so that the Petitioner is denied of its rightful and legitimate entitlement towards fixed charges.

B. Payment towards transmission losses for supply of power beyond normative availability

(g) The contention of the Respondent KSEBL that it is not liable to refund the excess liability towards transmission losses collected from the Petitioner qua the supply of power beyond normative availability, is erroneous and



misplaced. In terms of Article 5.6 of the PSA, the Petitioner is alible to bear the transmission losses for all inter-State and intra-State transmission of electricity from the point of connection to the delivery point, which the Petitioner shall adjust in its monthly invoice, which is the product of transmission loss (in kWh) and Tariff.

(h) The 'Tariff' paid for the energy units supplied upto normative availability is the sum of fixed charge and fuel charges, whereas, for the energy units dispatched to the Respondent KSEBL, over and above the normative availability, the Petitioner is entitled for 'Tariff' calculated in terms of 'incentive' to the tune of 50% fixed charges and 100% fuel charges. However, the Respondent KSEBL while making payments of the monthly invoices, has been adjusting the transmission losses from the monthly bills of the Petitioner, by taking into account the full 'Tariff' (100% fixed charges + 100% Fuel charges), even for energy units supplied over and above the normative availability on an annual basis.

(i) As per PSA, the transmission losses are calculated in relation to the billed rate of energy. Therefore, when billed rate for supply of power beyond 90% is not full 'Tariff' (fixed charges + fuel charges), then the Petitioner cannot be made liable to bear the transmission losses, calculated by multiplying with full 'Tariff', for the energy units supplied by the Petitioner, over and above the normative availability. It is highly uncalled for to make the Petitioner liable to bear transmission losses, computed at full 'Tariff' towards energy units supplied over and above normative availability, on an annual basis, when it is not recovering full 'tariff'. The liability to bear the transmission loses attributable towards excess supply of power can only be imposed commensurate with the 'Tariff' as appearing in Article 5.6.2 of the PSA.

(j) Since Article 21.6 of the PSA provides the mechanism to allow 'incentive' to the Petitioner, in case the normative availability is more than 90%, the transmission losses as provided in Article 5.6.1 and Article 5.6.2 of the PSA, should also be computed on the 'incentive' payable by Respondent



KSEBL. Thus, the transmission losses incurred by the Petitioner for supply of power over and above the normative availability ought to be given to the Petitioner.

(k) The contention of the Respondent KSEBL that the yearly reconciliation of normative availability is merely carried out for the purpose of calculating 'incentive' and 'damages' and not for the purpose of determining fixed charge is completely erroneous as it would tantamount to fixed charges being merely computed, but not paid. The Respondent has failed to rely upon the definition of 'incentive' which is provided under Article 39 of the PSA. 'Incentive' is also 'tariff' which is payable by the Respondent KSEBL to the Petitioner, when power is supplied over and above normative availability.

(l) Article 18.6 of the PSA has no relevance to the issue raised in the present petition as the said provision is not applicable for shortfall in normative availability, on monthly basis. The reconciliation of fixed costs recovered monthly, has to be done at the end of financial/ accounting year, on the basis of normative availability for the said year.

Hearing dated 4.6.2021

9. The matter was heard through video conferencing on 4.6.2021 and the Commission, after hearing the learned counsel for the parties, permitted the parties to file their written submissions, and reserved its order in the petition.

Written Submissions of the Petitioner, BALCO

10. The Petitioner in its written submissions dated 24.6.2021 has mainly reiterated its submissions made in the petition and rejoinder, as extracted above. However, the Petitioner, in support of its contention that fixed charges have to be reconciled with availability existing at the end of the financial year, as compared to the normative availability of 90%, has relied upon the judgments of the Hon'ble Supreme Court in



MOH Uduman & ors vs MOH Aslum (1991) 1 SCC 412, Bank of India & anr vs K. Mohandas & anr (2009) 5 SCC 313 and the judgment of APTEL in Shapoorji Pallonji Energy (Gujarat) Pvt Limited vs GERC (2017 SCC Online APTEL 35) and contended that the contract must be read as whole and the provisions shall be interpreted to bring them into harmony with other provisions. The Petitioner has also relied upon the judgments of the Hon'ble Supreme Court in DLF Universal & ors vs Director T&C Planning, Haryana (2010)1 SCC 1, State (NCT of Delhi) vs UOI (2018) 8SCC 501 and the Commission's order dated 13.5.2021 in SB Energy one Pvt Ltd vs SECI & ors and submitted that the Commission ought to purposively interpret the PSA in the present case and allow the prayer of the Petitioner.

Written Submissions of the Respondent KSEBL

11. The Respondent KSEBL in its written submissions dated 25.6.2021 has mainly reiterated its submissions made in its reply, as extracted above. In addition, the Respondent has relied upon the judgments of the Hon'ble Supreme Court in Rajasthan State Industrial Development & Investment Corporation vs Diamond & Gem Development Corporation Ltd (2013) 5 SCC 470 and United India Insurance Ltd vs Harchand Rai Chandan Lal (2004) 8 SCC 644 and contended that where the terms of a contract, especially a commercial contract, such as the PSA, in the present case, are clear and unambiguous, the Courts/ Tribunals/ Commissions shall apply the principle of *literal interpretation* and any interpretation which goes against the literal meaning of the provisions of the contract, shall be rejected. Also, referring to the judgments of the Hon'ble Supreme Court in GUVNL vs Solar Semiconductor Power Co (I) Pvt Ltd (2017) 16 SCC 498, GUVNL vs EMCO Ltd & anr (2016)11 SCC 182, GUVNBL vs ACME Solar Technologies (Guj) Pvt Ltd (2017) 11 SCC 801 and



FCI vs Chanda Constructions (2007) 4 SCC 697, the Petitioner has submitted that it is not permissible for any party to seek reliefs which are contrary to/ prohibited/ impermissible under the provisions of the contract and any such reliefs which are contrary to express provisions of the contract or beyond the provisions of the contract are unsustainable in law. It has argued that Article 21.6.3 specifically provides that annual reconciliation shall only be carried out in relation to the Incentives and Damages and consciously omits any annual reconciliation of fixed charges, thereby demonstrating that fixed charges are to be paid for 'Availability' in each month. The Respondent has added that the Article 1.4.2(a) of the PSA states that in case of ambiguity or discrepancies within the PSA, between two or more clauses, the provision of specific clause, relevant to the issue under consideration, shall prevail over those in other clauses. It has also pointed out that in terms of Article 5.6.2, the transmission losses "*due and payable*" by the Petitioner in each month is to be computed in the following manner:

Monthly Transmission Losses payable by Petitioner	$\begin{aligned} &\text{Energy supplied at interconnection point in the month (in units)} \\ &\quad \times \\ &\quad \text{Transmission Losses as on Bid Date (4.22\%)} \\ &\quad \times \\ &\quad \text{TARIFF for the said month} \end{aligned}$
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12. The Respondent has stated that the contention of the Petitioner to split the defined term "Tariff" is impermissible and unsustainable in law, and deserves to be rejected by this Commission. It has also submitted that the Petitioner has attempted to wriggle out of its contractual obligation contained in Article 5.6.2 of the PSA to pay the transmission losses and thereby shift the burden on the Respondent KSEBL.

Analysis and Decision



13. Based on the submissions of the parties, the issues which emerge for our consideration are the following:

(i) **Issue No. A:** *Whether the Petitioner is entitled for payment of fixed charges, considering normative availability on annual basis; and*

(ii) **Issue No. B:** *Whether the Petitioner is entitled for payment towards transmission losses attributable for supply of power beyond normative availability?*

The above issues are dealt in the succeeding paragraphs.

14. Before proceeding, we extract hereunder, some of the provisions of the PSA dated 26.12.2014, relied upon by the parties in the present case:

Article 5: Obligations of the Supplier:

5.1.1 xxxx

xxxxx

5.1.4 *The Supplier shall install and maintain the power station in accordance with the Specifications and Standards and the maintenance Requirements such that the Availability of the contracted capacity of the power stations is at least 90% (ninety per cent) thereof during each year of the Operation Period (**the Normative Availability**);*

21.1 Tariff

21.1.1 *The Utility shall pay to the Supplier tariff comprising the sum of Fixed Charge and Fuel Charge payable by the utility to the Supplier for Availability of electricity as the case may be, in accordance with the provisions of this Agreement. (**the Tariff**).*

21.1.2 *As a part of the Tariff, the utility shall pay to the Supplier an amount, determined, in accordance with the provisions of this Article 21, as the Fixed Charge for Availability of the Power Station to the extent of Normative Availability thereof (**the Fixed Charge**)*

21.2 Base Fixed Charge;

21.2.1 *The parties agree that the Fixed Charge shall, in accordance with the offer of the Supplier for the base Year, be Rs 3.25 (Rupees Three and paise twenty five) per kWh, to which the amount, if any, determined in accordance with the provisions of Clauses 21.2.2 or 21.2.3, as the case may be, shall be added or deducted, as the case may be, and the sum thereof (the initial Fixed Charge) shall be revised annually in accordance with the provisions of Clauses 21.2.4 to determine the base fixed charge for the relevant Accounting Year (the base fixed charge)*

21.3 Indexed fixed Charge;

The Base Fixed Charge determined for each Accounting Year in accordance with provisions of Clause 21.2 shall be revised annually to reflect 30% (thirty per cent) of the variation on WPI occurring between January 31 immediately preceding the Bid



Date and January 31 immediately preceding the Accounting Year for which such Revision is undertaken (the Indexed Fixed Charge). For the avoidance of doubt and by way of illustration, if (a) the Bid date occurs in February 2015 (b) COD occurs in May 2019 and (c) WPI increases by 20% (twenty per cent) between January 31, 2015 and January 31, 2019, the Indexed Fixed Charge for the Accounting Year commencing from April 1, 2019 shall be 106% (one hundred and six per cent) of the Base Fixed Charge for that Accounting Year.

21.4 Computation of Fixed Charge;

21.4.1 Subject to the provision of this clause 21.4, the Base Fixed Charge as corrected for variation on WPI Index in accordance with clause 21.3, shall be the Fixed Charge payable for Availability in each month of the relevant Accounting Year.

21.4.2 Upon occurrence of a shortfall in the Minimum Fuel Stock, Availability shall be deemed to be reduced in accordance with the provisions of Clause 21.5.2 and the Non-Availability arising as a consequence thereof shall, for the purposes of payment of Fixed Charge, be deemed to be Availability to the extent of 70% (seventy per cent) of the Non-Availability hereunder. For the avoidance of doubt, the Parties expressly agree that if Fuel Shortage is caused by an action or omission attributable to the Supplier, it shall not be reckoned for the purposes of computing Availability hereunder. By way of illustration, the Parties agree that in the event the Non-Availability arising on account of shortfall in supply of Fuel is determined to be 50% (fifty per cent), the Supplier shall, with respect to the Non-Availability arising on account thereof in accordance with the provisions of Clause 21.5.2, be entitled to a Fixed Charge as if the Availability is equivalent to 70% (seventy per cent) of such Non-Availability. For the avoidance of doubt, the Parties agree that the Supplier shall not be liable to pay the Damages specified in Clause 21.6.2 if Non-Availability shall arise as referred to in this Clause 21.4.2.

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21.4.4 The obligations of the Utility to pay Fixed Charges in any Accounting Year shall in no case exceed an amount equal to the Fixed Charge due and payable for and in respect of the Normative Availability of 90% (ninety per cent) computed with reference to the entitlement of the Utility in Contracted Capacity (the "Capacity Charge"). Provided, however, that in the event of Despatch of the Power Station beyond such [90% (Ninety per cent)], Incentive shall be payable in accordance with the provisions of Clause 21.6.1. For the avoidance of doubt, the Capacity Charge referred to herein shall be equal to and computed with reference to the maximum Availability of [90% (Ninety per cent)] of the Contracted Capacity.

21.4.5 Pursuant to the provisions of Clause 21.4.4, the Supplier shall not, for and in respect of any day, be entitled to receive payment of Fixed Charge for Availability exceeding [90% (Ninety per cent)] thereof and in the event it supplies electricity to the Utility in excess of such [90% (Ninety two per cent)], such excess supply shall be eligible only for payment of Fuel Charge, save and except the payment of Incentive due under the provisions of Clause 21.4.4.

21.5 Declaration of Availability;

21.5.1 Unless otherwise notified by the Supplier, the declared Availability shall, subject to the provisions of Clause 21.5.2, be deemed to be 100% (one hundred per cent) thereof at all times.

21.5.2 In the event Fuel stocks decline below the Minimum Fuel Stock, Availability



shall be deemed to be reduced proportionate to the reduction in Minimum Fuel Stock, and shall be deemed as Non-Availability on account of Fuel Shortage. Provided that the Utility may, in its sole discretion, Despatch the Power Station for the full or part Non-Availability hereunder and to the extent of such Despatch, the Utility shall pay the full Fixed Charge due and payable in accordance with this Agreement. For the avoidance of doubt and by way of illustration, if the actual stock of Fuel is 80% (eighty per cent) of the Minimum Fuel Stock at the commencement of any day, the Availability for that day shall be deemed to be 80% (eighty per cent) and the Non-Availability on account of Fuel Shortage shall be notified by the Supplier to the Utility accordingly.

21.5.3 In the event that any shortfall in supply of electricity to the Utility occurs on account of any deficiency in transmission between the Point of Grid Connection and Delivery Point, the Availability shall be deemed to be reduced to the extent of reduction in transmission of electricity, and the reduction referred to hereinabove shall be deemed as Non-Availability on account of deficiency in transmission. For the avoidance of doubt and by way of illustration, the Parties agree that if such deficiency in transmission is equal to 20% (twenty per cent) of the entitlement of the Utility in the Contracted Capacity, the Availability shall be deemed to be 80% (eighty per cent) and the Non-Availability hereunder shall be notified by the Supplier to the Utility forthwith.

21.5.4 The Supplier shall notify, no later than 15 (fifteen) days prior to the commencement of a month, its maintenance schedule for that month and any reduction in Availability arising as a result thereof. The Supplier shall, as soon as may be, notify any modifications of its maintenance schedule and shall confirm, with or without modifications, the reduction in Availability no later than 48 (forty eight) hours prior to its occurrence.

21.5.5 In the event that the Availability at any time is determined to be lower than 100% (one hundred per cent) of the Contracted Capacity or the reduced Availability notified hereunder, an event of mis-declaration of Availability (the "Mis-declaration") shall be deemed to have occurred. In such an event, the Availability for the relevant month shall, for the purposes of payment of Fixed Charge, be deemed to be reduced by the same proportion that Availability bears to Mis-declaration, as if the Mis-declaration had occurred for a period of one month. For the avoidance of doubt, the Parties agree that deductions on account of Mis-declaration shall be made from the subsequent payments due to the Supplier under this Agreement.

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21.6 Incentive and Damages;

21.6.1 In the event that the Availability in any month exceeds the Normative Availability, the Supplier shall, in lieu of a Fixed Charge, be entitled to an Incentive which shall be calculated and paid at the rate of 50% (fifty per cent) of the Fixed Charge for Availability in excess of Normative Availability. Provided, however, that any Incentive hereunder shall be due and payable only to the extent of Despatch of the Power Station. For the avoidance of doubt and by way of illustration, in the event the Availability in any month shall exceed the Normative Availability by 3% (three per cent) of the Contracted Capacity but the Despatch during that month shall exceed 1% (one per cent) of the entitlement of the Utility in the Contracted Capacity, the Incentive payable hereunder shall be restricted to such 1% (one per cent) only.

21.6.2 In the event that Availability in any month is less than the Normative Availability, the Fixed Charge for such month shall be reduced to the extent of shortfall in



Normative Availability and in addition, any reduction below the Availability of 85% (eighty five per cent) shall, subject to the provisions of Clause 21.7, be multiplied by a factor of 0.25 (zero point two five) to determine the Damages payable for such reduction in Availability. For the avoidance of doubt, the Parties agree that the Damages to be deducted for any reduction below the aforesaid Availability of 85% (eighty-five per cent) shall be 25% (twenty-five per cent) of the Fixed Charge which is reduced on account of shortfall in Availability below such 85% (eighty-five per cent).

21.6.3 The Parties expressly agree that within 30 (thirty) days of the close of every Accounting Year, the cumulative monthly Availability for such year shall be determined and the Incentive or Damages, as the case may be, shall be computed with reference to the Normative Availability for that year. The amount so arrived at shall be adjusted against the Incentives or Damages determined for the respective months of the year and the balance remaining shall be adjusted in the following Monthly Invoice.

Article 39: Definitions;

'Accounting Year' means the financial year commencing from the first day of April of any calendar year and ending on the thirty first day of March of the next calendar year;

'Availability' shall have the same meaning as set forth in clause 5.1.4 and the term 'Available' shall be construed accordingly;

'Fixed Charge' shall have the same meaning as set forth in Clause 21.1.2;

'Normative Availability' shall have the same meaning as set forth in clause 5.1.4;

'Tariff' shall have the same meaning as set forth in clause 21.1.1;

Issue No. A: Whether the Petitioner is entitled for payment of fixed charges, considering normative availability achieved on annual basis?

15. The Petitioner has submitted that on a combined reading of Article 5.1.4 and Article 21.1.2 of the PSA, it is clear that full fixed charges are payable by the Respondent KSEBL, if the Petitioner has been successful in maintaining the availability of the generating station to the extent of normative availability, which as per Article 5.1.4 of the PSA can only be determined at the end of every accounting year. It has also contended that Article 21.6.3 of the PSA makes it clear that within 30 days of the close of every accounting year, the cumulative monthly availability for such year shall be determined and the fixed charges shall be reconciled with the 'availability' achieved at the end of the accounting year. Accordingly, the Petitioner has sought payment of Rs 13.27 crore by the Respondent KSEBL, towards fixed



charges during 2017-19, by considering the normative availability on 'annual' basis instead of on 'monthly' basis.

16. Per contra, the Respondent KSEBL has submitted that as per provisions of the PSA (Articles 21.4, 21.5 and 21.6), the fixed charges for a month are computed based on 'monthly' availability and the supplier (Petitioner herein) shall not be eligible to receive payment of fixed charges for availability, exceeding normative availability of 90%. The Respondent has also pointed out that 'incentive' is computed, if the monthly availability exceeds 'normative availability' and damages are levied if the monthly availability falls below 85%. It has further submitted that Article 21.6.3 of the PSA is clear and unambiguous in stipulating that the yearly reconciliation of availability with reference to normative availability for an accounting year is determined only for computation of 'incentives' and 'damages' and not for 'fixed charges', under the DBFOO framework laid down by MOP, GOI. The Respondent has contended that fixed charges are to be paid for availability in each month of the relevant accounting year and there is no provision in the PSA for computation of annual availability and reconciliation of fixed charges with respect to annual availability. Accordingly, Respondent KSEBL has submitted that the relief sought by the Petitioner may be rejected.

17. We have considered the matter. Some of the provisions of the PSA, which have been relied upon by the parties are extracted in paragraph 14 above for reference. Article 5.1.4 of the PSA mandates the Petitioner to install, operate and maintain its power station in accordance with the specification and standards, such that the 'normative availability' of the power station is at least 90%, during each year of the



operation period. Article 39 (dealing with definitions) of the PSA provides that 'Availability' shall have the same meaning as set forth in clause 5.1.4 and the term 'Available' shall be construed accordingly. Definition also provides that 'Normative Availability' shall have the same meaning as set forth in clause 5.1.4. In our view, 'Availability' as well as 'Normative Availability' having been defined in Article 39 read with Article 5.1.4 of the PSA itself, any other meaning sought to be ascribed to these terms is not acceptable. It is clear from wording of Article 5.1.4 of the PSA that 'Availability' as well as 'Normative Availability' have to be on 'annual' basis contrary to the arguments of the Respondent KSEBL that these are on 'monthly' basis.

18. The Respondent KSEBL has relied upon provisions of Articles 21.4, 21.5 and 21.6 to contend that 'availability' has to be on monthly basis. We note that Article 21 mainly deals with the fixed charges payable by the Respondent, KSEBL to the supplier of electricity, i.e. the Petitioner. Article 21.1.1 of the PSA specifies that the Respondent KSEBL shall pay to the Petitioner, the 'tariff' comprising of the sum of fixed charge for availability of the power station and fuel charge for the supply of electricity. Article 21.1.2 of the PSA provides that the Respondent KSEBL shall pay to Petitioner an amount, determined in accordance with the provisions of Article 21 as fixed charges, for availability of power station, to the extent of normative availability thereof. While Article 21.4.4 of the PSA specifies that the Petitioner is not entitled for fixed charges for generation in excess of 90% of the availability, Article 21.4.5 of the PSA stipulates that the Petitioner is eligible to get incentive for the excess generation above 90% availability (as per Article 21.6.1 of the PSA). In terms of Article 21.6.1 of the PSA, the incentive rate shall be 50% of the fixed charge, but the incentive is limited to actual despatch and not for generation corresponding to



availability. Further, Article 21.6.2 of the PSA stipulates for dis-incentive, when the actual availability falls below 85%. As per Article 21.6.3, the parties agree that within 30 days of the close of every counting year, the cumulative monthly availability for such year shall be determined and the incentive or damages, as the case may be, determined for the respective months of the year and the balance remaining shall be adjusted in the following monthly invoice.

19. Laying emphasis on provision of Article 21.4.1 that provides that *“the Base Fixed Charge as corrected for variation on WPI Index in accordance with clause 21.3, shall be the Fixed Charge payable for Availability in each month of the relevant Accounting Year”*, the Respondent KSEBL has contended that the fixed charges for a month are payable based on availability of the contracted capacity from the power station in the month and in the event the ‘availability’ in any month is less than the normative availability’, the fixed charge for such month shall be reduced to the extent of shortfall in normative availability. In our view, this submission of the Respondent is misconceived. It is settled law that the provisions of the contract have to be given full effect to and cannot be read in a narrow and pedantic manner to deny any rightful claims under the contract. While Article 21.1.1 obligates the Respondent KSEBL to pay ‘tariff’ to the Petitioner comprising of fixed charges and fuel charge for supply of power in terms of the agreement, Article 21.1.2 of the PSA obligates the Respondent KSEBL to pay an amount determined in accordance with Article 21 as ‘fixed charge’ (as part of tariff) for availability of the power station, to the extent of ‘normative availability’, which, as per Article 5.1.4 of the PSA is 90% of the contracted capacity, during each year of the operating period. Thus, on a harmonious reading of the provisions of Article 21 of the PSA and Article 5.1.4 of the



PSA, it becomes evident that the fixed charges payable for 'availability' in each month is with reference to the normative availability (90%) achieved during each accounting year. In short, the fixed charges payable for availability in each month is to be reconciled to the extent of the normative availability achieved by the Petitioner during the year.

20. Also, the submission (on basis of provision of Article 21.6.3 of the PSA) of the Respondent KSEBL, that the yearly reconciliation of availability, with reference to normative availability, is only for computation of incentives and damages and not for fixed charges, cannot be accepted considering the fact that the fixed charges determined in accordance with the provisions under Article 21 of the PSA and payable for availability for each month, is with reference to the normative availability during year. More so, when the definition itself provides for annual 'Availability' in terms of Article 5.1.4 of the PSA, It cannot be that the PSA only provides for annual reconciliation of incentives and damages, as the case may be, with reference to the normative availability achieved during the year, and not for determination of fixed charges. As pointed out by the Petitioner, in the various judgments furnished, the provisions of the contract have to be harmoniously construed and purposive interpretation be given, in order to prevent it from being frustrated.

21. In the circumstances, we reject the submissions of the Respondent KSEBL and hold that the Petitioner is entitled for payment of fixed charges, with reference to the normative availability achieved on annual basis. Accordingly, the Respondent KSEBL shall undertake the reconciliation of the fixed charges and make the differential payment for 2017-18 and for 2018-19 as sought by the Petitioner, within 60 days from the date of this order.



22. Issue No. A is answered accordingly.

Issue No. B: Whether the Petitioner is entitled for payment towards transmission losses attributable for supply of power beyond normative availability?

23. The Petitioner has submitted that in terms of the provisions under Article 5.6 of the PSA, the Petitioner is liable to bear the transmission losses for all inter-State and intra-State transmission of electricity from the point of grid connection to the delivery point, as on bid date, which the Petitioner shall adjust in its monthly invoice. It has also submitted that for energy units dispatched to Respondent KSEBL, over and above the normative availability, the Petitioner is entitled for 'tariff' calculated in terms of incentive to the tune of 50% fixed charges and 100% fuel charges. The Petitioner has submitted that the Respondent KSEBL, while making payment of monthly invoices, has been adjusting the transmission losses from the monthly bills of the Petitioner by taking into account the full tariff (100% fixed charges + 100% fuel charge), even for energy units supplied over and above the normative availability, on an annual basis. It has submitted that as per PSA, the transmission losses are calculated in relation to the billed rate of energy and when the billed rate for supply of power beyond 90% is not the full tariff, then the Petitioner cannot be made liable to bear the transmission losses, calculated by multiplying with full 'tariff', for the energy units supplied by the Petitioner over and above the normative availability. The Petitioner has added that the PSA demonstrates that the transmission losses shall be paid by the Petitioner, commensurate with the 'tariff' payable by the Respondent KSEBL during a particular month. It has further stated that the liability to bear the transmission losses attributable towards excess supply of power, can only be imposed commensurate with the 'tariff' as stated under Article 5.6.2 of the PSA,



which is to be recovered by the Petitioner on account of excess supply made annually beyond normative availability. The Petitioner, while pointing out that 'incentive' as defined under Article 39 of the PSA is also 'tariff', has submitted that since the provision of Article 21.6 of the PSA provides for a mechanism to allow 'incentive' to the Petitioner in case of supply of power beyond normative availability, the transmission losses as provided under Article 5.6.1 and Article 5.6.2 of the PSA, should also be computed on the 'incentive' payable by the Respondent KSEBL. Accordingly, the Petitioner has prayed for a direction on the Respondent KSEBL to make payment of Rs.46,79,000/- incurred by the Petitioner towards the transmission losses attributable to supply of power beyond normative availability.

24. Per contra, the Respondent KSEBL has contended that in terms of Articles 5.6.1 and 5.6.2 of the PSA, the charges payable for adjustment of transmission losses in the monthly bills have to be paid at the tariff for the month, irrespective of availability. It has also stated that in terms of Article 21.1 of the PSA, 'tariff' includes fixed charges and fuel charges, payable for the month, and the payments given to the generator above the normative availability is 'incentive'. The Respondent has stated that there is no stipulation in the PSA that if the power station achieves an availability above 90%, the amount corresponding to transmission loss has to be worked out on 'incentive'. The Respondent has pointed out that the Petitioner has been adjusting the transmission losses from the point of grid connection to the delivery point as determined by the Appropriate Commission as on the bid date and monetising the losses as on the bid date, with the tariff comprising of fixed charges and fuel charges for the month, as per Article 5.6.2 of the PSA. It has further contended that the 'availability' of any month does not have any bearing on the



computation of transmission losses, which are limited to the transmission losses determined as on the bid date.

25. The matter has been examined. Article 5.6 of the PSA provides for the obligation relating to transmission losses as under:

5.6 Obligation relating to transmission losses;

5.6.1 The Supplier shall be liable for the transmission losses in all inter-state and intra-state transmission of electricity from the Point of Grid Connection to the Delivery Point. For the avoidance of doubt, the parties expressly agree that transmission of electricity shall be undertaken solely at the risk and cost of the Supplier and all liabilities arising out of any transmission losses on inter-state and intra-state transmission lines shall be borne by the Supplier. The Parties further agree that the obligation of the Supplier to bear the transmission losses shall be restricted to the level of losses determined by the Central Commission as on the Bid Date (Appendix I) for this project and any differential (higher or lower) arising from revision in the level of losses thereafter by the Central Commission shall be borne by the Utility.

5.6.2 The supplier represents and warrants that it has ascertained and assessed the applicable transmission losses from the Point of Grid Connection to the Delivery Point as determined by the Appropriate Commission for and in respect of the Bid Date, and expressed in the form of their proportion to the electricity supplied hereunder at the Point of Grid Connection. The Supplier acknowledges, agrees and undertakes that the product of such transmission losses (expresses in kWh) and the Tariff shall be due and payable by the Supplier to the Utility and shall be adjusted in the relevant Monthly Invoice. For the avoidance of doubt and by way of illustration, the Parties agree that if the transmission losses in any month are equivalent to 1 (one) lakh units and the Tariff payable for that month is Rs. 3 (Rupees three) per kWh, an amount of Rs. 3,00,000 (Rupees Three Lakh) shall be due and payable by the Supplier to the Utility and shall be adjusted in the Monthly Invoice for that month”

26. Article 39 of the PSA defines the term ‘Incentive’ as under:

‘Incentive’ means a payment due to the Supplier, in accordance with the provisions of this Agreement, for any delivery, performance or outcome, as the case may be, which is better than the standards specified in respect thereof;

27. It is evident from Article 5.6.1 and Article 5.6.2 of the PSA, that the Petitioner is liable to bear the transmission losses for all inter-State and intra-State transmission of electricity from the point of connection to the delivery point. We also note that Article 5.6.1 of the PSA provides that “*For the avoidance of doubt, the parties expressly agree that transmission of electricity shall be undertaken solely at the risk*



and cost of the Supplier and all liabilities arising out of any transmission losses on inter-state and intra-state transmission lines shall be borne by the Supplier.” The obligation of the Petitioner to bear the transmission losses has been restricted to the level of losses determined by the Central Commission as on the bid date for this project and any differential (higher or lower) arising from revision in the level of losses thereafter by the Commission, is required to be borne by the Respondent KSEBL.

28. The Petitioner has submitted that it is not liable to bear the transmission losses calculated by considering full ‘tariff’ (i.e. 100% fixed charge +100% fuel charge) for supply of units over and above normative availability, as it is entitled for ‘incentive’ (50% fixed charge + 100% fuel charge) for such supplies above normative availability. In short, the Petitioner has contended that ‘incentive’ is also ‘tariff’ and since the Petitioner recovers only 50% fixed charges (plus 100 fuel charges) for supply of units above normative availability, the adjustment of transmission losses from the monthly bills of the Petitioner, considering full ‘tariff’, by the Respondent KSEBL is erroneous. In our view, this contention of the Petitioner is misconceived considering the fact that while the term ‘incentive’ as per Article 39 of the PSA refers to payment due to the Petitioner in accordance with the provisions of this agreement, the words ‘*Tariff shall be due and payable*’ in Article 5.6.2 of the PSA is the ‘tariff’ as clearly defined under Article 21.1 of the PSA, which includes fixed charge and fuel charge. As rightly pointed out by the Respondent KSEBL, the Petitioner cannot be permitted to split the term ‘tariff’ defined under the PSA as (i) tariff upto 90% availability each month and (ii) tariff for power supplied above normative availability. More so, when the provisions of the PSA do not permit as such. There exists no



provision in the PSA to segregate the transmission losses against the units scheduled above 90% availability and those scheduled below 90% availability. Also, there is no stipulation in the PSA that if the power station achieves availability above 90%, the transmission losses have to be worked out based on 'incentive'. According to us, the 'availability' of any month does not have any bearing on the computation of transmission losses, as the transmission losses are limited to the same being determined as on the bid date, which is 4.22% at the tariff for the month. We, therefore, find no anomaly in the adjustment of transmission losses by the Respondent KSEBL, in the monthly bills of the Petitioner, as the same is in terms of the PSA. In the above circumstances, we reject the submissions of the Petitioner and hold that the Petitioner is liable for payment towards the transmission losses attributable for supply of power beyond normative availability.

29. Issue No. B is answered accordingly.

30. Petition No. 317/MP/2019 is disposed of as above.

Sd/-
(P. K. Singh)
Member

Sd/-
(I.S. Jha)
Member

Sd/-
(P.K. Pujari)
Chairperson

