

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 594/MP/2020

Coram:

Shri P.K. Pujari, Chairperson

Shri I.S Jha, Member

Shri Arun Goyal, Member

Shri P. K. Singh, Member

Date of Order: 20.01.2022

In the matter of:

Petition under Section 79(1)(f) of the Electricity Act, 2003 along with statutory framework governing procurement of power through competitive bidding and Articles 4 and 9 of the Power Purchase Agreement dated 21.3.2013 executed between GMR Warora Energy Limited and DNH Power Distribution Corporation Limited (DNH) seeking directions to DNH to pay Capacity Charge to GWEL based on capacity declared by GWEL on day ahead basis.

And in the matter of:

GMR Warora Energy Limited,
701/704, 7th Floor,
Naman Centre, A-Wing,
BKC (Bandra Kurla Complex),
Bandra, Mumbai 400051

....Petitioner

Vs

DNH Power Distribution Company Limited,
Vidhyut Bhavan, Opposite Secretariat,
Silvassa, 396230,
Dadra and Nagar Haveli.

....Respondent

Parties Present:

Shri Sajan Poovayya, Senior Advocate, GWEL
Shri Vishrov Mukherjee Advocate, GWEL
Shri Girik Bhalla, Advocate, GWEL
Ms. Raksha Agrawal, Advocate, GWEL
Shri Karan Yambem, GWEL
Shri Anand K. Ganesan, Advocate, DNHPDCL
Shri Ashwin Ramanathan, Advocate, DNHPDCL

ORDER

The Petitioner, GMR Warora Energy Limited (GWEL), has filed the present Petition under Section 79(1)(f) of the Electricity Act, 2003 along with statutory framework governing procurement of power through competitive bidding and Articles 4 and 9 of the Power Purchase Agreement (PPA) dated 21.3.2013 executed between

the Petitioner and the Respondent, DNH Power Distribution Corporation Limited seeking directions to the Respondent to pay capacity charge to the Petitioner based on declaration of capacity on day ahead basis.

2. The Petitioner has made the following prayers:

“a) Declare that the lockdown imposed by the Government of India does not constitute a force majeure event under the DNH PPA;

b) Direct DNH to make payment of capacity charges till May, 2020 amounting to Rs.114.31 crores to GWEL forthwith along with LPS; and

c) Direct DNH to make payment of the capacity charges amounting to Rs.40,71,55,900 to GWEL for the month of June, 2020 on or before the due date i.e. 05.08.2020 and to make payment of all other amounts due to GWEL;”

Background

3. The Petitioner has developed a coal-based thermal power plant with an installed capacity of 600 MW in Warora Taluka, District Chandrapur in the State of Maharashtra (in short, ‘the Project’). The Project comprises of two units of 300 MW each. Unit-I of the Project was commissioned on 19.03.2013 and Unit 2 was commissioned on 1.9.2013.

4. The Project supplies power to the following distribution licensees:

a) 200 MW power to Maharashtra State Electricity Distribution Company Ltd. (MSEDCL) in terms of the Power Purchase Agreement dated 17.03.2010 (in short, ‘MSEDCL PPA’);

b) 200 MW power to Electricity Department of Union Territory of Dadra and Nagar Haveli (now DNH Power Distribution Co. Ltd.) in terms of the Power Purchase Agreement dated 21.03.2013 (in short, ‘DNH PPA;); and

c) 150 MW power to Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO) in terms of the following back-to-back agreements:

i. Agreement to sell dated 01.03.2013 between GMR Energy Trading Limited (“GETL”) and GWEL;

ii. Power Purchase Agreement dated 27.11.2013 between GTEL and TANGEDCO; and

iii. Power Purchase Agreement dated 03.05.2014 between GWEL and GETL.

5. The present Petition has been filed for seeking payment of capacity charges amounting to Rs.155.02 crore along with late payment surcharge (LPS) due to the Petitioner for the period from 26.03.2020 to June 2020 which have not been paid by the Respondent claiming that reduction in supply of power on account of industry shutdown in the Union Territory of Dadra and Nagar Haveli pursuant to the direction of the Government of India due to the lockdown on account of Covid-19, constitutes an event of Force Majeure under the DNH PPA.

Submissions of the Petitioner

6. The Petitioner has mainly submitted as under:

a) On 24.03.2020, the Ministry of Home Affairs, Government of India (MHA), in exercise of powers under Section 10(2)(l) of the National Disaster Management Act, 2005, issued guidelines on measures to be taken by the Central Government and the State Governments for containing the spread of Corona Virus/ COVID-19 in the country. In terms of the MHA guidelines, a lockdown was imposed in the country and all government, commercial and private establishments were directed to be closed except for those providing essential services. In terms of clause 4(g) of the MHA guidelines, power generation, transmission and distribution were recognized as essential services and exempted from the lockdown.

b) On 25.03.2020, the Ministry of Power, Government of India (MoP), issued a letter to the Secretaries of Power Departments of State Governments stating that power generation and supply is an essential service and, therefore, exempted from the restrictions imposed by lockdown. MoP further stated that since power generation utilities including Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs) supply inter-State electricity to the grid, their operations were critical for maintaining power supply across the country.

Accordingly, MoP requested to ensure that the restrictions of lockdown did not hamper the movement of staff and raw materials for these power plants.

c) On 27.03.2020, MoP issued an order to the load despatch centres, Electricity Regulatory Commissions, Central Electricity Authority, and all the generating and distribution companies, providing that in light of the negative impact of the lockdown on the liquidity of Discoms, scheduling of power will not be impacted, even if there is payment security mechanism only for 50% of the amount for which payment security mechanism is to be otherwise established contractually.

d) The Respondent vide letter dated 30.03.2020 informed the Petitioner that declaration of COVID-19 as a pandemic and consequent nationwide lockdown has resulted in disturbance of demand and supply of electricity across the country including reduction of power demand by consumers of the Respondent by about 90% and that the imposition of lockdown qualifies as a Force Majeure event in terms of Article 9 of the DNH PPA and consequently the obligations of parties shall remain suspended during continuation of the Force Majeure event. Therefore, as long as the Force Majeure event continues, the Respondent is not liable to pay capacity charges or any other charges for the period when power is not scheduled.

e) On 06.04.2020, MoP issued a clarification to its earlier letters dated 27.03.2020 and 28.03.2020 regarding the requirement of Letter of Credit (LoC) and imposition of LPS., wherein it was categorically stated that no exemption had been given to Distribution Licensees from making payment of bills within 45 days (or the period given in the PPA) of its presentation, and the obligation to pay for capacity charges under the PPA were to continue.

f) The Petitioner vide letter dated 6.4.2020 raised monthly invoice for the month of March 2020 of Rs.64,35,90,313/- having due date for payment of the said invoice in terms of the DNH PPA as 6.5.2020. Also, claim of the Respondent as regards Covid-19 being Force Majeure vide its notice dated 30.3.2020 was rejected by the Petitioner vide letter dated 7.4.2020 and stated that the Petitioner's right to claim capacity charges is based on availability declared on day ahead basis and the Respondent is liable to pay capacity charges as per availability declared by the Petitioner, irrespective of dispatch.

g) Joint Electricity Regulatory Commission for the State of Goa and Union Territories (JERC) taking *Suo Moto* cognizance of the disruption due to COVID-19 induced lockdown vide order dated 10.4.2020 directing the discoms/ electricity departments under its jurisdiction to provide moratorium on payment of fixed charges by all its industrial and commercial consumers. JERC also directed that such deferred charges would be recovered in three equal installments after 30.06.2020.

h) JERC in its aforesaid order not only specifically permitted the Respondent to recover the fixed charges from its consumers but also held that the Respondent shall be entitled to be compensated for the expenses incurred by it to tide over the difficulties in managing its affairs during the ongoing COVID-19 pandemic.

i) The Petitioner vide letter dated 06.05.2020 raised monthly invoice for the month of April 2020 amounting to Rs.40,76,06,400/- with due date for payment of being 05.06.2020. The same was declined to be paid by the Respondent vide letter dated 07.05.2020 stating that capacity charges is not payable during continuance of a force majeure event as per the DNH PPA.

j) MoP vide letter dated 15.05.2020 wrote to all power generation and transmission CPSEs (Central Public Sector Enterprises) under administrative control of MoP and all their subsidiaries regarding rebate to be given to distribution companies for the lockdown period on account of COVID-19. It was provided that, "*Deferment of capacity charges for power not scheduled, to be payable without interest after the end of the lockdown period in three equal monthly instalments.*" Evidently, these measures did not cover private generating stations such as the Project. Further, there was only deferment of payment of capacity charges while liability to pay capacity charges continued. Therefore, even as per the MoP Notifications, there is no exemption from payment of capacity charges on account of COVID-19.

k) Vide letter dated 15.05.2020, the Respondent informed the Petitioner regarding settlement of Energy Bill for the month of March 2020 as under:

- i. Rs.8.04 crore adjusted against capacity charges for the period from 26.03.2020 to 31.03.2020 on account of force majeure.

- ii. Rs.30.08 crore had already been released on 30.03.2020 against provisional energy bill for March 2020.
 - iii. Rs.23.00 crore, paid as advance against coal shortage, was being recovered as per directions of Hon'ble Supreme Court vide order dated 25.11.2019 wherein order of Appellate Tribunal for Electricity (APTEL) directing payment of Rs.23.00 crore was set aside.
 - iv. Rs.0.47 crore as applicable rebate on coal shortage along with Carrying Cost on released amount.
- l) In terms of the above, the Respondent released an amount of Rs.2.77 crore as final settlement for the energy bill of March 2020.
- m) The Petitioner vide letter dated 20.05.2020 requested the Respondent to immediately release the payment, wrongfully withheld.
- n) The Petitioner vide letter dated 08.06.2020, raised monthly invoice for the month of May 2020 amounting to Rs.42,01,22,720/- with due date for payment of the said invoice as 8.7.2020. On 08.06.2020, the Petitioner also raised supplementary invoice for the differential monthly invoice amount of Rs.2,44,800/- due to revision in escalation rates for capacity charge for the supply period of April 2020.
- o) The Petitioner vide letter dated 06.07.2020 raised monthly invoice for the month of June 2020 amounting to Rs.40,71,55,900/- with due date as 05.08.2020. While forwarding the monthly invoice for the month of June 2020, the Petitioner also requested the Respondent to immediately make payment of the outstanding amount towards capacity charges amounting to Rs.114.31 crore for the period from 26.03.2020 till May 2020.
- p) The Petitioner vide letter dated 08.07.2020 raised supplementary invoice for Rs.63.81 crore towards LPS on the outstanding capacity charges and Change in Law claims as on June 2020. LPS on the outstanding capacity charges (till 30.6.2020) is Rs.1.13 crore.
- q) As per DNH PPA, an event can be said to be force majeure event only when performance under the PPA have been hindered or impeded. However,

the obligation under the PPA has not been hindered or prevented in any manner on account of the lockdown. Therefore, in terms of Article 4.4 read with Article 4.5.1 of PPA, the Respondent is obligated to pay tariff for the available capacity/ declared capacity up to contracted capacity.

r) The Respondent's right to collect fixed charges from its consumers during the COVID-19 lockdown period has been upheld by JERC vide order dated 10.04.2020 and has also been assured of recovery of any additional expenditure likely to be incurred by it in terms of additional working capital requirements, etc. Therefore, refusal to pay capacity charges to the Petitioner and at the same time recovering fixed charges from its consumers by the Respondent amounts to unjust enrichment, which is not permissible.

s) The Hon'ble Delhi High Court in its judgment dated 29.05.2020 in M/s Halliburton Offshore Services Inc v. Vedanta Limited & Anr, (O.M.P (I) (COMM.) No. 88/2020 & I.A. 3696-3697/2020 held that the force majeure clauses are to be interpreted narrowly and not broadly and that there has to be a strong justification in order to invoke the force majeure clause. The Hon'ble High Court has held that, *"every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a force majeure condition. The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non-performance due to the epidemic/pandemic."*

t) In the present case, generation and supply of power have been held to be essential services that were exempt from the lockdown mandated by the MHA and the Petitioner has been declaring availability of its project as per the DNH PPA and the Grid Code, the Respondent has in no way been hindered to perform its obligations of supply of power by such lockdown and, therefore, imposition of the lockdown leading to reduced demand does not constitute a force majeure event.

u) Fluctuation in load/ demand is a normal operational reality of every distribution company and, therefore, reduction in demand/ supply of power does not fall force majeure event. Merely because DNH's performance of obligations

under the DNH PPA has become onerous or burdensome due to imposition of lockdown, the same will not qualify as an event of force majeure.

v) The concept of fixed/ capacity charges is the cornerstone of ABT (availability based tariff) Regime, wherein a generating company is entitled to reimbursement of fixed cost based on the declared capacity of its generating station. The scheduling of power by the Respondent does not have any impact on the payment of capacity charges which correspond to the plant availability declared by the generating company. In terms of Regulation 6.1 read with Annexure 1 of the Grid Code, procurers are liable to pay capacity charges to the respective generating companies corresponding to plant availability and energy charges for the scheduled dispatch.

w) APTEL in its judgment dated 22.04.2015 in Appeal No. 261 of 2013 has held that distribution licensees are under obligation to pay capacity charges as long as the generating company declares capacity, irrespective of whether the distribution licensee schedules the capacity offered by the generating station or not.

x) The cumulative availability of the Petitioner for FY 2019-20 was 86.86% and availability without considering the period of 26.03.2020 to 31.03.2020 was 85.91%. Since the availability of the Project was above normative availability of 85%, the Petitioner is entitled to recover full capacity charges in terms of Article 4.1(iv) of the DNH PPA.

y) As per Article 8.3.3 of the DNH PPA, the procurer can adjust/ setoff the amounts only in following cases:

- i. Deductions that are required by the law;
- ii. Amounts claimed by the Procurer from the Seller, through an invoice duly acknowledged by the Seller, to be payable by the Seller, and not disputed by the Seller within thirty (30) days of receipt of the said Invoice and such deduction or set-off shall be made to the extent of the amounts not disputed; and
- iii. The maximum amount that can be deducted or set-off by DNH in a Contract Year cannot exceed Rs.5 crore.

z) Therefore, the Respondent can deduct the amounts that are either backed by law or are claimed by DNH vide an Invoice duly acknowledged and not disputed by the Petitioner.

aa) The Respondent has also wrongfully deducted from invoices an amount of Rs.23.00 crore along with carrying cost of Rs.0.47 crore for coal shortage due to GWEL in terms of the order dated 16.05.2019 in Petition No. 284/MP/2018. The said amount was admitted by DNH before APTEL and the same had been recorded in Order dated 24.10.2019 in Appeal No. 283 of 2019.

Submissions of the Respondent

7. The Respondent has filed its reply vide affidavit dated 17.5.2021 and has mainly submitted as under:

a) In view of the nationwide lockdown, all the industrial and commercial activities in the Union Territories were mandated to cease operations (except for miniscule essential services), resulting in drastic reduction in power demand in the Union Territory of Dadra and Nagar Haveli.

b) Power Demand of the Respondent at the periphery of the Respondent before Lockdown is as under:

| Particulars | February-19 | March-19 | April-19 | May-19 | June-19 |
|--------------------|--------------------|-----------------|-----------------|---------------|----------------|
| Power in MU | 508.49 | 554.62 | 554.01 | 554.47 | 530.49 |
| Power in MW | 757.00 | 745.00 | 769.00 | 745.00 | 737.00 |

c) Power Demand of the Respondent at the periphery of the Respondent after lockdown is as under:

| Particulars | February-20 | March-20 | April-20 | May-20 | June-20 |
|--------------------|--------------------|-----------------|-----------------|---------------|----------------|
| Power in MU | 534.45 | 439.49 | 85.81 | 245.54 | 349.00 |
| Power in MW | 795.00 | 591.00 | 119.00 | 330.00 | 485.00 |

d) The Union Territory is highly industrialized and power demand remains very stable for each normal month and varies between 730 MW to 795 MW. The power demand was drastically reduced by 85%, 56% and 34% in the period of April 2020 to June 2020, when the economy of DNH was badly hit by the lockdown. The said reduction was only on account of factor of spreading of COVID-19 pandemic, which further resulted in the lockdown barring certain essential services. The power demand resumed in proper shape only after the opening of economic activities after June 2020.

e) While MoP directive and the Commission's order in the Suo Moto Petition only deal with claiming relief on "*Late Payment Surcharge*", the DNH PPA between the Petitioner and the Respondent envisages no payment of any tariff (including fixed/ capacity charges) as a consequence of Force Majeure. Neither MoP nor the Commission has made any changes to the terms of the DNH PPA nor can any such amendment be made. The DNH PPA provides for the force majeure events and the consequences thereof. The pandemic, the lockdown mandated by law and the collapse of demand leading to the inability of the Respondent procuring power is an event beyond the control of the Respondent and an unprecedented and unforeseen event.

f) The Petitioner has proceeded on a basic misunderstanding that the Respondent has claimed force majeure relief in terms of notification of the Ministry of Power granting relief on LPS. On the contrary, the Respondent has only relied upon these notifications to submit that the outbreak of COVID-19 and nationwide lockdown is a force majeure event as recognized by the Government.

g) There has been no notification issued by any Ministry restricting the rights of the parties to a PPA or directing payment of capacity charges *de hors* the provisions of the PPA.

h) The capacity charges under the DNH PPA are in the nature of take-or-pay liability, wherein the Respondent is required to pay capacity charges in normal circumstances, irrespective of whether the power is actually procured or not. There is no difficulty in the normal operation of the above provision in the DNH PPA, wherein the general increase or decrease in demand due to business cycles and normal conditions would require the Respondent to pay the capacity charges even if the power is not procured. However, the above is obviously subject to the force majeure clause in the DNH PPA, which provides for relief of the obligations of the parties.

i) While allowing the power purchase cost for FY 2020-21 in the matter of Annual Performance Review of FY 2020-21, JERC in its order dated 23.03/2021 in Petition No. 37/2020 has allowed total purchase power cost as Rs.2,628.41 crore for FY 2020-21. The allowed purchase cost does not include the capacity charges of the Petitioner for the period April 2020 to June

2020, which shows that JERC has also appreciated and accepted the fact that the said capacity charges is not payable to the Petitioner on account of force majeure provisions agreed in the DNH PPA.

j) JERC in its order dated 10.04.2020 as nowhere directed that the capacity charges are to be paid to the Petitioner, despite the force majeure clause. On the contrary, MoP notifications as well as the Commission's order in Petition No. 6/SM/2020 observe that relief may be claimed under the force majeure clause of the PPA.

k) The Petitioner's contention that that fluctuation in load/ demand is a normal operational reality of every distribution company and, therefore, the reduction of demand on account of Covid-19 cannot be claimed as a force majeure event, is misconceived. The reduction in demand in the present case is not a normal day to day fluctuation, but the reduction in demand in this case is on account of a force majeure event i.e. the outbreak of COVID-19 and consequent nationwide lockdown.

l) While power generation and distribution were exempted under the MHA guidelines, the consumption of power certainly had an impact. As stated above, the entire process of generation till consumption is an instantaneous process, and electricity cannot be stored. Therefore, to contend that since power generation and distribution were exempt under the MHA guidelines, the same is outside the purview of force majeure is incorrect. The impact on consumption of power has a direct correlation with the procurement of power.

m) The Respondent is under obligation to pay capacity charges based on the declared capacity except for the duration of a force majeure event. Reliance placed by the Petitioner on the ABT Regime, the Grid Code and the judgment dated 22.04.2015 of the APTEL is misplaced, as the payment of capacity charges is subject to force majeure events.

n) The DNH PPA itself expressly provides that in case of natural force majeure events including but not limited to events such as floods, earthquake, cyclone etc., which may affect the Petitioner's ability to make power available. However, relief has been envisaged in these conditions on account of the fact, that consumption may be disrupted on account of force majeure events. This

being the case, the Petitioner cannot contend that as long as it is declaring availability, the capacity charges ought to be paid by the Respondent.

o) The Petitioner's reliance on Article 8.3.3 of the DNH PPA is misplaced. The DNH PPA under Article 9.7.1 provides that no tariff shall be paid by the Procurer in the event of a Force Majeure event. The provision under Article 8.3.3 is not even applicable in the present case.

p) Further, the Petitioner raised issues regarding deductions from its invoices for coal shortage. The Respondent had filed Civil Appeal No. 39 of 2021 before the Hon'ble Supreme Court, which in fact has also granted interim stay vide order dated 02.03.2021, thereby staying the operation of the judgment of the APTEL in Appeal No. 283 of 2018.

Written Submissions of the Petitioner

8. The Petitioner has reiterated its submissions in the Petition. It has additionally submitted as under:

a) Direction under Section 107 of the Electricity Act, 2003 issued by MoP vide letter dated 28.03.2020 makes it clear that limited relief was extended in relation to Late Payment Surcharge. The aforesaid direction did not exempt payment of tariff or LPS. Instead, it directed that LPS be limited to the cost incurred for such delay in payment and that for projects covered under Section 63 of the Electricity Act, 2003, Discoms can claim relief only with respect to LPS as per the force majeure provisions of the power purchase agreement.

b) The issue has also been clarified by MoP letter dated 06.04.2020 wherein it was stated that no exemption had been given to Distribution Licensees from making payment of bills and the obligation to pay capacity charges as per the PPA would continue.

c) The debt service obligation and payment of statutory charges by the Petitioner was not waived-off during the period of the lockdown/ restrictions. Similarly, the Petitioner was also incurring other costs which are of fixed nature i.e. employee/ establishment/ overheads costs etc. The only relaxation allowed to generating companies was deferment of payment obligation for debt

servicing. Further, the Respondent's right to receive capacity charges from its consumers was not affected.

d) The Respondent is recovering all charges including demand charges from its consumers for the COVID-19 impacted period in its monthly bills. The same is evident from DNH's invoices:

i. Invoice dated 4.5.2020 raised on Alok Industries Ltd. for the month of April 2020, wherein DNH claimed 'Demand Charges' (i.e. fixed/capacity charges) of Rs.5,38,91,200/-.

ii. Invoice dated 4.5.2020 raised on Filatex India Ltd. for the month of April 2020, wherein DNH claimed 'Demand Charges' (i.e. fixed/capacity charges) of Rs.34,00,000/-.

iii. Invoice dated 3.6.2020 raised on Alok Industries Ltd. for the month of May 2020, wherein DNH claimed 'Demand Charges' (i.e. fixed/capacity charges) of Rs.5,38,91,200/-.

iv. Invoice dated 3.7.2020 raised on Alok Industries Ltd. for the month of June 2020, wherein DNH claimed 'Demand Charges' (i.e. fixed/capacity charges) of Rs.5,63,40,800/-.

e) The Respondent has recovered the cost of power procured from GWEL as part of distribution tariff. The amount to be paid to the Petitioner was claimed by the Respondent (in Petition 19 of 2020 before JERC) as part of its Annual Revenue Requirement/ tariff filing, which was allowed by JERC vide Order dated 18.05.2020 (paragraph 5.6.4), wherein JERC approved total fixed charges for procurement from GWEL for FY 2020-21 as Rs.108.09 crores (The fixed charges were for the period up to 30.6.2020 i.e., till the expiry of the term of the PPA). The consumers were charged the tariff based on the aforesaid.

f) The Respondent has contended that JERC by way of Order dated 23.03.2021 in Petition No. 37 of 2020, while allowing the power purchase cost for FY 2020-21, did not include the capacity charges payable to the Petitioner. The said argument is an attempt by the Respondent to mislead this Commission since the approved power purchase in the order relates to the period from October 2020 to March 2021 whereas the Respondent PPA had expired on 30.06.2020. Further, JERC's Order dated 23.03.2021 is based on the Respondent's submissions which were made after the present petition was filed by GWEL.

- g) DNH has not given any explanation or denial vis-à-vis the directions of JERC to recover tariff from its consumers except to contend that it is an argument of equity. DNH has not explained how the contentions are factually incorrect.
- h) A prerequisite for force majeure is that DNH's obligations under the DNH PPA should have been hindered or impeded. DNH has not been hindered or prevented from fulfilling any of its obligations under the DNH PPA on account of the lockdown.
- i) Article 9.4.1(e) of the DNH PPA specifically excludes 'insufficiency of finances or funds or the agreement becoming onerous to perform' from qualifying as a force majeure event. Merely because an agreement has become onerous to perform, would not qualify as force majeure. There must be a legal or physical impossibility in performance of obligations. 'Commercial impossibility'/'onerous to perform' has been rejected as a force majeure event.
- j) The Appellate Tribunal for Electricity in Damodar Valley Corporation v. Jharkhand State Electricity Regulatory Commission has held that waiver of fixed charges by Jharkhand State Electricity Regulatory Commission for the months from April 2020 – June 2020, on account of imposition of lockdown, is arbitrary and inequitable.

Written Submission of the Respondent

9. The Respondent in its written submission has mainly reiterated its submissions in the reply. It has additionally submitted as under:

- a) The contention of the Petitioner that the ability to make payments based on scheduled power has not been affected is misconceived. This is for the reason, that the inability to make payments is only a consequence of the force majeure event and is not the force majeure event itself. The ability to make payment necessarily has to be seen in context of whether the Respondent is in a position to procure power or not.
- b) In case of an *earthquake, cyclone, act of war, industry wide labour strike etc.* which are specific events expressly provided as force majeure events under the PPA, it is not necessary that there may be an impact on the performance obligation of the Respondent to make payments. However, the

clause recognizes that in case there is a drastic reduction in the power demand, the same would certainly impact the ability of the Respondent to procure power.

c) The Petitioner has sought to interpret the PPA as if relief can only be claimed for such a Force Majeure event which impacts the obligations of both parties, and not just one. In other words, the Petitioner's contention is that so long as the Petitioner is in a position to make power available, the Respondent has to necessarily pay the capacity charges irrespective of any force majeure event which impact the ability of the Respondent to procure power. This can certainly not be the interpretation.

d) The Ministry of Finance (GOI) vide notification OM No. F 18/4/2020-PPD dated 19/02/2020 i.e. even before the issuance of the MHA Guidelines, had on the matter of '*Force Majeure Clause*' clarified that '*Disruption due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause*'. The Ministry of New and Renewable Energy (MNRE) vide OM No. 283/18/2020-GRID SOLAR dated 20.03.2020 had also conveyed similar view and decided that disruption due to spread of corona virus in China or any other country will be covered in the Force Majeure Clause.

e) Demand charges on the consumers do not correlate to the fixed charges payable to the generators. The demand charges are neither determined in such a manner, nor do they compensate for the fixed charges. In the tariff order dated 18.05.2020 for the year 2020-21, JERC has accepted that there would be a substantial impact on account of the pandemic and then decided to proceed on the basis of 'Business as Usual' as the tariff petition was filed much prior to the pandemic and lockdown and that sufficient data was not available. JERC also held that the impact would be considered in the true-up exercise.

f) The availability from the Project prior to April 2020, had mostly been below 200 MW. However, immediately after the lockdown, from 01.04.2020, the Petitioner started declaring full availability of 200 MW consistently. Evidently, the Petitioner has acted in a mala fide manner to claim additional capacity charges, as it was fully aware that the Respondent was not in a position to schedule any power.

Analysis and Decision

10. After considering the submissions of the parties and perusal of documents placed on record, the following issues arise for our consideration:

(a) Whether the provisions of the PPA regarding notification of force majeure event has been complied with in the present case?

(b) Whether Covid-19 led lockdown and consequent reduction in the demand of the Respondent constitute a force majeure event absolving it from making payment towards Capacity Charges under the PPA?

The above issues have been dealt with in the subsequent paragraphs.

Issue (a): Whether the provisions of the PPA regarding notification of force majeure event has been complied with in the present case?

11. The Respondent has primarily argued that the Covid-19 led lockdown which resulted into a significant reduction in its demand and affected its ability to procure power from the Petitioner, constitutes a force majeure event and, therefore, the Respondent is not obligated to make payment of Capacity Charges to the Petitioner under the PPA.

12. Article 9.5 of the PPA, which provides for Notification of Force Majeure Event, reads as under:

"9.5 Notification of Force Majeure Event

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

Provided that such notice shall be a pre-condition to the affected party's entitlement to claim relief under this Agreement. Such notice shall include full particulars of the event of Force Majeure, its effect on the Party claiming relief and the remedial measures proposed. The Affected Party shall give the other Party regular (and not less than monthly) reports on the progress of those remedial measures and such other information as the other Party may reasonably request about the Force Majeure Event.

9.5.2. The Affected party shall give notice to the other Party of (i) the cessation of the relevant event of Force Majeure; and (ii) the cessation of the effects of such event of

Force Majeure on the performance of its rights or obligations under this Agreement, as soon as practicable after becoming aware of these cessations."

13. As per the aforesaid provisions of the DNH PPA, affected party claiming any relief under the agreement is required to give notice to the other party regarding occurrence of a force majeure event as soon as reasonably practicable but not later than 7 (seven) days after the date of which such party knew or should reasonably have known of the commencement of the force majeure event. Further, the provisions provide that such notice shall be a pre-condition to the affected party's entitlement to claim any relief under the agreement.

14. In the present case, the Respondent vide its letter dated 30.03.2020 had issued notice regarding the claimed force majeure event, wherein by referring to the Ministry of Home Affairs (MHA) Notification dated 24.03.2020, it had intimated the Petitioner regarding existence of force majeure for unprecedented disturbance/ reduction in supply and demand of electricity on account of industry shut down mandated by the Government of India and other lock-down due to spread of Covid-19 and that the Respondent will not liable for payment of capacity charges or any other charges for the period which power is not scheduled or less scheduled during the pendency of the force majeure event. The relevant extract of the aforesaid letter is reproduced as under:

".....Keeping in view the above information, a notice is hereby given for the existence of force-majeure for unprecedented disturbance/ reduction in supply and demand of electricity on account of industry shut down mandated by the Government of India and other lock-down due to spread of coronavirus. On account of said event, there is complete lock down and abnormal & unexpected reduction in the power demand (i.e. nearly 90%) which will result into the very minimal or nil revenue generation/realisation. Accordingly, it may also be noticed that DNHPDCL is not liable for payment of capacity charges or any other charges whatsoever for the period for which power is not scheduled or less scheduled (i.e. proportionately) during the pendency of the force majeure event. It may also be noticed that DNHPDCL would also not be liable for any other claim, loss or damage on account of failure to carry out any of the terms of agreed PPA including payment of capacity charges or other charges whatsoever as agreed in the PPA. The said payment is suspended till the continuation of the said event. At the same time, it is requested that the capacity charges and other charges should not be

included in the monthly bill for the period for which power scheduling is not been done or less done (i.e. proportionately) on account of said event.

Kindly treat the preset notice as a notice of force majeure under the terms of the PPA..."

15. In view of the above, the Respondent has complied with the provisions of Article 9.5 of the PPA insofar as the requirement of issuance of notice regarding force majeure is concerned.

16. The issue is answered accordingly.

(b) Whether Covid-19 led lockdown and consequent reduction in the demand of the Respondent constitute a force majeure event absolving it from making payment towards Capacity Charges under the DNH PPA?

17. The claim of the Petitioner is based on premise that entitlement to claim capacity charges is based on the declaration of plant availability by the Petitioner and when the Petitioner has declared its plant availability, on day ahead basis, it is entitled to claim the capacity charges. The Petitioner has submitted that scheduling of power does not have a bearing on liability for payment of the capacity charges. The Petitioner has submitted that in terms of Article 4.4 read with Article 4.5.1 of the PPA, the Respondent is obligated to pay tariff for the available capacity/ declared capacity up to contracted capacity and this obligation is in no manner impeded by the lockdown or Covid-19 pandemic. The Petitioner has also relied upon provisions of Regulation 6.1 read with Annexure 1 of the Grid Code to contend that procurer is liable to pay to the respective generating companies capacity charges corresponding to plant availability and energy charges for the scheduled dispatch.

18. With regard to Force majeure, the Petitioner has submitted that COVID-19, lockdowns and Government circulars are not events of force majeure under the DNH PPA. The Petitioner has contended that a prerequisite for force majeure under clause 9 of the DNH PPA is that obligations under the PPA should have been hindered or impeded and that none of the events cited by the Respondent has hindered or

prevented the Respondent from fulfilling any of its obligations under its PPA. Fluctuation in load/ demand is a normal operational reality of every distribution company and, therefore, reduction in demand/ supply of power by the Respondent to its consumers was never contemplated to be a force majeure event under the PPA. Further, all notifications/ circulars, be it of MHA (dated 24.03.2020) or MoP (dated 25.03.2020), have recognized power generation and distribution as 'essential services', and exempted from such lock down. In this regard, the Petitioner has placed reliance on the decision of Hon'ble Bombay High Court in Standard Retail Pvt. Ltd. v. G. S Global Corp. Ltd. The Petitioner has submitted that the Respondent's reliance on the Ministry of Finance ('MoF') Notification dated 19.02.2020 to claim that outbreak of Covid-19 pandemic is a natural calamity and, therefore, falls within the definition of force majeure event is misplaced. The said MoF Notification is limited to supply chain disruption and does not apply to the operational projects.

19. The Petitioner has submitted that, on one hand, the Respondent is recovering all charges including demand charges from its consumers for the Covid-19 impacted period in its monthly bills while on the other hand, the Respondent is claiming occurrence of force majeure when it comes to making payment to the Petitioner. In support of its claim, the Petitioner has placed on record copies of invoices raised by the Respondent to its consumers for the months of April 2020, May 2020 and June 2020.

20. The Petitioner has submitted that amount to be paid to the Petitioner was claimed by the Respondent as part of its Annual Revenue Requirement/ tariff filing in Petition No. 19 of 2020 which was the tariff petition for FY 2020-21, which was allowed by JERC vide Order dated 18.05.2020 wherein JERC approved total fixed charges for procurement from the Petitioner for FY 2020-21 as Rs.108.09 crore.

21. The Petitioner has also submitted that the fact that JERC only permitted moratorium in making payment on account of lock down, proves that there was no force majeure event. The Petitioner has also submitted that the Respondent's obligation to pay tariff under DNH PPA is neither predicated upon its financial position nor on the power demand from its consumers.

22. Per contra, the Respondent has submitted that the power demand drastically reduced by 85%, 56% and 34% during the period of lockdown in the month of April 2020, May 2020 and June 2020 respectively, compared to power demand just before the lockdown. The said reduction was only on account of COVID-19 pandemic, which resulted in the lockdown barring certain essential services. The power demand resumed in proper shape only after the opening of economic activities after June 2020. Therefore, outbreak of COVID-19, and the consequent lockdown leading to a disruption of the economy amounts to a force majeure event under the PPA. The pandemic and the national lockdown disturbed the very basis of the PPA. Without any demand in DNH, there can be no procurement of power under the PPA and, therefore, reduction in demand due to nationwide lockdown cannot be compared to the usual variations in the demand.

23. The Respondent has further submitted that demand charges on the consumers do not correlate to the fixed charges payable to the generators. The demand charges are neither determined in such a manner, nor do they compensate for the fixed charges in the tariff order dated 18.5.2020 for the year 2020-21. Further, while allowing the power purchase cost for FY 2020-21 in the matter of Annual Performance Review of FY 2020-21, JERC in its order in Petition No. 37/2020 dated 23.03.2021 has allowed total purchase power cost as Rs.2,628.41 crore for FY 2020-21. The allowed purchase cost does not include the capacity charges of the Petitioner for the period from April 2020 to June 2020.

24. The Respondent has contended that its obligation to make payment only comes into the picture where there is no effect on its ability to procure power. The Respondent has submitted that the outbreak of Covid-19 pandemic and consequent national lockdowns has been held to be force majeure events by various courts in the Country and has placed its reliance on the decisions in (i) Halliburton Offshore Services Inc. v. Vedanta Ltd., 2020 SCC Online DI 542, (ii) MEP Sanjose Talaja Mahuva Road Pvt. Ltd. v. NHAI, 2021 SCC Online Del 3288, (iii) R. Naryanan v. Govt. of Tamil Nadu and Ors. by Madras High Court in W. P. (MD) No. 19596 of 2020 and W.M.P (MD) Nos. 16318 & 16320 of 2020.

25. It has been further submitted by the Respondent that as held in the State of AP v. NTPC [(2002) 5 SCC 203], the production (generation), transmission, delivery and consumption are simultaneous, almost instantaneous. Therefore, there can certainly not be any procurement, if the consumption is impacted due to force majeure event. The obligation of the Respondent to make payments for capacity charges also includes the ability to procure power. It would be absurd to contend that while the procurement ability of the Respondent is impacted by force majeure event, its payment obligation would continue. The contention of the Petitioner that the ability to make payments has not been affected is also misconceived as the inability to make payment is only a consequence of force majeure event and is not force majeure event itself. The ability to make payment necessarily has to be seen in context of whether the Respondent is in position to procure power or not. If the contention of the Petitioner is to be accepted, there would be no force majeure clause at all applicable to the Respondent. The force majeure clause in PPA applies to the benefit of both the parties by its plain language. It is also well settled that while interpreting the contracts, one must look at the business efficacy of the transaction as intended by the parties to the contracts.

26. The contention of the Petitioner that it is being unjustly enriched by not paying capacity charges to the Petitioner while it is receiving the fixed charges from the consumer is not only factually incorrect but is also based on equity and not on any provisions of the PPA. It is settled law that there cannot be claim based on equity where there is a contract in place. Reliance has been placed on the decision of APTEL in Alps Industries Ltd. v. UERC and Anr. dated 14.7.2021 in Appeal No. 329 of 2019. Also, the demand charges on the consumers do not correlate to the fixed charges payable to the generators. The demand charges are neither determined in such a manner nor do they compensate for fixed charges.

27. We have considered the submissions of the parties. As the issue involved requires examination of occurrence of a force majeure event, if any, it would be pertinent to refer to the relevant articles of the PPA. Article 9.3 and Article 9.4 of the PPA, which deal with 'force majeure', read as under:

“

9.3 Force Majeure

9.3.1 A 'Force Majeure' means **any event or circumstance or combination of events and circumstances including those stated below that wholly or partly prevents or unavoidably delays an Affected Party in the performance of its obligations under this Agreement**, but only if and to the extent that such events or circumstances are not within the reasonable control, directly or indirectly, of the Affected Party and could not have been avoided if the Affected Party had taken reasonable care or complied with Prudent Utility Practices:

i. Natural Force Majeure Events

Act of God, including, but not limited to lightning, drought, fire and explosion (to the extent originating from a source external to the site), earthquake, volcanic eruption, landslide, flood, cyclone, typhoon, tornado, or exceptionally adverse weather conditions which are in excess of the statistical measures for the last hundred (100) years,

ii. Non-Natural Force Majeure Events

1. *Direct Non-Natural Force Majeure Events attributable to the Procurer*
 - a) *Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (under the State Government of the Procurer or the Central Government of India) of any material assets or rights of the Seller; or*

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by the Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development/ operation of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality (under the State Government of the Procurer or the Central Government of India) which is directed against the supply of power by the Seller to the Procurer, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

2. *Direct Non-Natural Force Majeure Events not attributable to the Procurer*

a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (other than those under the State Government of the Procurer) of any material assets or rights of the Seller; or

b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development / operation of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.

c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality (other than those under the State Government(s) of the Procurer or the Central Government of India) which is directed against the supply of power by the Seller to the Procurer, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

3. *Indirect Non-Natural Force Majeure Events*

a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo:, revolution, riot, insurrection, terrorist or military action; or

b) radioactive contamination or ionizing radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Station by the Affected Party or those employed or engaged by the Affected Party.

c) Industry wide strikes and labour disturbances having a nationwide impact in India.

9.4 Force Majeure Exclusions

9.4.1 Force Majeure shall not include (i) any event or circumstance which is within the reasonable control of the Parties and (ii) the following conditions, except to the extent that they are consequences of an event of Force Majeure:

- a. Unavailability, late delivery, or changes in cost of the plant, machinery, equipment, materials, spare parts, Fuel or consumables for the Power Station;
- b. Delay in the performance of any contractor, sub-contractor or their agents excluding the conditions as mentioned in Article 9.2;
- c. Non-performance resulting from normal wear and tear typically experienced in power generation materials and equipment;
- d. Strikes or labour disturbance at the facilities of the Affected Party;
- e. Insufficiency of finances or funds or the agreement becoming onerous to perform; and
- f. Non-performance caused by, or connected with, the Affected Party's:
 - i. Negligent or intentional acts, errors or omissions;
 - ii. Failure to comply with an Indian Law; or
 - iii. Breach of, or default under this Agreement or any other RFP Documents.

.....”

28. As per the definition of force majeure under Article 9.3 of the DNH PPA, any event or circumstance or combination of events and circumstances can be termed as force majeure only in case (i) the same wholly or partly prevents or unavoidably delays an affected party in the performance of its obligations under the agreement, (ii) only if and to the extent such events or circumstances are not within the reasonable control, directly or indirectly of the affected party and (iii) could not have been avoided if the Affected Party has taken reasonable care or complied with Prudent Utility Practices. All the above three are pre-requisites for making any event or circumstance or combination of them force majeure and absence of any of them would render such event or circumstance or combination of them beyond the scope of force majeure. The said article further categorizes the various force majeure events, albeit non-exhaustively, into Natural Force Majeure Events and Non-Natural Force Majeure Events.

29. Article 9.7 of the PPA provides for available relief for a force majeure event, which reads as under:

"9.7 Available Relief for a Force Majeure Event

9.7.1 Subject to this Article 9:

(a) no Party shall be in breach of its obligations pursuant to this Agreement except to the extent that the performance of its obligations was prevented, hindered or delayed due to a Force Majeure Event;

(b) every Party shall be entitled to claim relief in relation to a Force Majeure Event in regard to its obligations, including but not limited to those specified under Article 4.7;

(c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurer for the part of Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the Seller, for the duration of such Natural Force Majeure Event affecting the Seller. For the balance part of the Contracted Capacity, the Procurer shall pay the Tariff to the Seller, provided during such period of Natural Force Majeure Event affecting the Seller, the balance part of the Power Station is declared to be Available for scheduling and dispatch as per ABT for supply of power by the Seller to the Procurer(s);

In case of a Natural Force Majeure Event affecting the Procurer no Tariff shall be paid by the Procurer(s) to the Seller for the duration of such Natural Force Majeure Event affecting the Procurer(s) ;

(d) If the average Availability of the Power Station is reduced below eighty percent (80%) of Normative Availability for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) Months, as a result of an Indirect Non Natural Force Majeure Event, then, with effect from the end of such two (2) consecutive months or four (4) non consecutive months so long as the daily average Availability of the Power Station continues to be reduced below eighty percent (80%) of Normative Availability in case of base load procurement as a result of an Indirect Non Natural Force Majeure Event of any kind, the Procurer(s) shall make payments for Debt Service, subject to a maximum of Capacity Charges based on Normative Availability which are due under the Financing Agreements and these amounts shall be paid from the date, being the later of a) the date of cessation of such Indirect Non Natural Force Majeure Event and b) the completion of sixty (60) days from the receipt of the Financing Agreements by the Procurer(s) from the Seller, in the form of an increase in Capacity Charge.

Provided payments for such Debt Service shall be limited to the Debt Service proportional to the Contracted Capacity of the Procurer from the Power Station.

Provided such Capacity Charge increase shall be determined by Appropriate Commission the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Debt Service in a situation where the Indirect Non Natural Force Majeure Event had not occurred.

Provided that the Procurer will have the above obligation to make payment for the Debt Service only (a) after supply of power from the Power Station affected by such Indirect Non Natural Force Majeure Event has started, and (b) only if in the absence of such Indirect Non Natural Force Majeure Event, the Availability of Power Station would have resulted in Capacity Charges equal to Debt Service.

(e) If the average Availability of the Power Station is reduced below Normative Availability for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) Months, as a

result of a Direct Non Natural Force Majeure Event attributable to the Procurer, then, with effect from the end of such two (2) consecutive months or four (4) non consecutive months and for so long as the daily average Availability of the Power Station of the Seller continues to be reduced below Normative Availability as a result of a Direct Non Natural Force Majeure Event attributable to the Procurer, the Seller may elect through a written notice to the Procurer, to deem the Availability to be equal to Normative Availability from the end of such two (2) consecutive months or four (4) non consecutive months, regardless of its actual Available Capacity. In such a case, the Procurer shall be liable to make payment of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Direct Non Natural Direct Force Majeure Event attributable to the Procurer in the form of an increase in Capacity Charge.

Provided such Capacity Charge increase shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity Charges in a situation where the Direct Non Natural Force Majeure Event attributable to the Procurer had not occurred.

(f) If the average Availability of the Power Station is reduced below Normative Availability for over two (2) consecutive months or for any non consecutive period of four (4) months both within any continuous period of sixty (60) Months, as a result of a Direct Non Natural Force Majeure Event not attributable to the Procurer, then, with effect from the end of such two (2) consecutive months or four (4) non consecutive months and for so long as the daily average Availability of the Power Station of the Seller continues to be reduced below Normative Availability as a result of a Direct Non Natural Force Majeure Event not attributable to the Procurer, the Seller may elect through a written notice to the Procurer, to deem the Availability to be equal to Normative Availability from the end of such two (2) consecutive months or four (4) non consecutive months, regardless of its actual Available Capacity. In such a case, the Procurer(s) shall be liable to make payment for Debt Service, subject to a maximum of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Direct Non Natural Direct Force Majeure Event not attributable to the Procurer in the form of an increase in Capacity Charge.

Provided such Capacity Charge increase shall be determined by Appropriate Commission on the basis of putting the Seller in the same economic position as the Seller would have been in case the Seller had been paid Capacity Charges in a situation where the Direct Non Natural Force Majeure Event not attributable to the Procurer had not occurred.

(g) Deleted."

30. As per Article 9.7.1(a), no party shall be in breach of its obligation pursuant to the agreement except to the extent that performance of its obligations was prevented, hindered or delayed due to force majeure event. Whereas, Article 9.7.1(b) provides that every party shall be entitled to claim relief in relation to a force majeure event in regard to its obligations, including but not limited to those specified in Article 4.7 of the PPA. Article 9.7.1(c) to 9.7.1(f) of the PPA provide for the extent of reliefs available to

the affected party in case of natural force majeure event, indirect non-natural force majeure event, direct non-natural force majeure events attributable to Procure and direct non-natural force majeure events not attributable to Procurer.

31. Keeping in mind the aforesaid contractual provisions of the PPA, we now proceed to examine the claims of the Respondent as to whether the Covid-19 led lockdown and consequent reduction in the demand of the Respondent owing to such lockdown constitute force majeure event absolving it from making payment towards Capacity Charges under the PPA.

32. Before considering the realm of operation of force majeure, it is important to highlight two fundamental principles which should be kept in mind while dealing with principles of contract. First is the Latin maxim *Pacta Sunt Servanda* i.e. purpose of the contract in accordance with the terms of the contract. The other principle is *Rebus Sic Stantibus* i.e. discharge of contractual obligations owing to events which had occurred, destroying the basic assumption which the parties had made at the time of entering the contract.

33. As regards Covid-19 led lockdown, it would be pertinent to note that the order of the Ministry of Home Affairs dated 24.3.2020, whereby the guidelines providing for the measures to be taken for containment of Covid-19 were issued, clearly exempted the units and services relating to generation, transmission and distribution from the lockdown. The relevant extract of above guidelines reads as under:

"1. Office of the Government of India, its Autonomous/ Subordinate Offices and Public Corporations shall remain close.

Exceptions:

Defence, central armed police forces, treasury, public utilities (including petroleum, CNG, LPG, PNG)(disaster management, power generation and transmission units, post offices, National Informatics Centre, Early Warning Agencies

4. Commercial and private establishment shall be closed down.

Exceptions:

....
g. *Power generation, transmission and distribution units and services...*”

34. Further, the Ministry of Power vide its letter dated 25.3.2020 had also recognized that power generation is an essential service for securing smooth and uninterrupted power flow across and within the States and operations of inter-State generating stations are critical for maintaining the power supply. Accordingly, in order to provide the uninterrupted operation of such generator, the Ministry had also asked the concerned authorities to provide various permission to such generating stations.

The relevant extract of the said letter reads as under:

“Subject: Essential operation of power generation utilities and permission for material movement needed by them during the nation-wide lockdown for Covid-19 outbreak.

..2. Power Generation is an essential service for securing smooth and uninterrupted power flow across and within the states. In the current scenario of Covid-19 outbreak and nationwide lockdown announced by Hon'ble Prime Minister, there will be need to ensure uninterrupted power generation.

3. The power generation utilities under Ministry of Power, Ultra Mega Power Projects (UMPPs) and Independent Power Plants (IPPs), hereafter referred to as "interstate power generating stations", supply inter-state electricity to the grid. Hence, their operation are critical for maintaing power supply across the country.

4. In order to provide uninterrupted operation of "interstate power generating stations", the following support is requested from your office.

....c. Waiver from section 144, Nationwide Lockdown, Curfew or any other limitation on number of people to gather in locations like ash pond, raw water intake, Power Generating Stations and other related locations where it may be required for operation and maintenance activities of generation and associated equipment....”

35. Thus, in terms of the above, the activities relating to generation, transmission and distribution were exempted from the nationwide lockdown imposed for restricting spreading of the Covid-19. Therefore, it cannot be argued that such lockdown per se has in any way affected the Respondent, being the distribution licensee in the Union Territory of Dadra and Nagar Haveli, in performing its functions and obligations under the agreement.

36. The Respondent has sought to argue that the reliance on above notification providing for exemption from lockdown is misconceived as the exemption was for the

purpose that power supply should not be disconnected. However, the said argument, in our view, is misconceived. On one hand, the Respondent has sought to rely upon the Notifications issued by Ministry of Finance, MNRE and MoP in contending that Covid-19 and nationwide lockdown have been considered as force majeure therein, whereas on the other hand, it has sought to contest the applicability of the Ministry of Home Affairs Order dated 24.3.2020 clearly exempting services relating to generation, transmission and distribution from the lockdown. Such approbation and reprobation on the part of the Respondent cannot be permitted. In view of the categorical exemption from the Covid-19 led nationwide lockdown to all the activities and services relating to generation, transmission and distribution in terms of MoHA Order dated 24.3.2021, in our view, such lockdown cannot be considered as force majeure event that prevents, hinders or delays the Respondent/ distribution licensee in performing its obligations as specified in the DNH PPA.

37. The Respondent has also relied upon the decisions in (a) Halliburton Offshore Services Inc. v. Vedanta Limited 2020 SCC OnLine Del 542, (b) MEP Sanjose Mahuva Road Pvt. Ltd. v. National Highway Authority of India Limited, 2021 SCC OnLine Del 3288 and (c) decision of Hon'ble Madras High Court dated 1.2.2021 in R. Naryanan v. Govt. of Tamil Nadu & Ors. to contend that the outbreak of Covid-19 and nationwide lockdown have been held to be force majeure events. We have gone through the judgments as relied upon by the Respondent and find that none of them will come to the aid to the Respondent as they are distinguishable on the facts since in none of cases the parties were clearly exempted from the nationwide lockdown in terms of MHA Order dated 24.3.2020. Although in the case listed under (a) the issue of the Contractor therein, namely, Haliburton Offshore Services Inc. being exempted from the lockdown in terms of letter of Director General Hydro Carbons dated 26.3.2020 was raised and present, it remained contentious. However, in the present case, we have already observed that the activities relating to the generation,

transmission and distribution were clearly exempted from lockdown in terms of MHA's Order dated 24.3.2020. In fact, the Hon'ble Bombay High Court in the matter of Standard Retail Pvt. Ltd. v. G. S Global Corp. Ltd. has refused to grant relief under force majeure clause on account of imposition to lockdown to a set of steel importers on one of the grounds that distribution of steel had been declared as an essential service and no restrictions were imposed on its movements. The relevant extract of the said decision is reproduced as under:

“4. Having heard learned Counsel for the Petitioners and learned Senior Counsel for the Respondent No. 1 (in the first 3 Petitions), Learned Counsel for the Respondent No. 1 (in the last 2 Petitions), the learned Counsel for the Respondent No. 3-Bank (in the first 3 Petitions), in my view the Petitioners are not entitled to any ad-interim reliefs for the reasons stated herein-below:

[...]

(d) The Notifications/Advisories relied upon by the learned Senior Counsel for the Respondent No. 1 does suggest that the distribution of steel has been declared as an essential service. There are no restrictions on its movement and all ports and port related activities including the movement of vehicles and manpower, operations of Container Freight Station and warehouses and offices of Custom Houses Agents have also been declared as essential services. The Notification of the Director General of Shipping, Mumbai, states that there would be no container detention charges on import and export shipments during the lockdown period.”

38. The Hon'ble Delhi High court in its judgment dated 29.5.2020 titled M/s Haliburton Offshore Services versus Vedanta Limited raised a question, whether COVID-19 can provide succour to a party in breach of contractual obligations? The Hon'ble High Court answered as under:

*“62. The question as to whether COVID-19 **would justify non-performance or breach of a contract has to be examined on the facts and circumstances of each case. Every breach or non-performance cannot be justified or excused merely on the invocation of COVID-19 as a Force Majeure condition.** The Court would have to assess the conduct of the parties prior to the outbreak, the deadlines that were imposed in the contract, the steps that were to be taken, the various compliances that were required to be made and only then assess as to whether, genuinely, a party was prevented or is able to justify its non- performance due to the epidemic/pandemic”*

39. In Alopi Parshad & Sons Ltd. v. Union of India, the claim of the appellant for enhanced prices for supply of ghee for Army personnel during the second world war was rejected by the Hon'ble Supreme Court despite enormous scarcity and enhanced procurement expenses owing to conditions of war and it was categorically held by the

Hon'ble Supreme Court that the parties to an executory contract are often faced with a turn of events which they did not at all anticipate, such as, an abnormal rise or fall in prices, a sudden depreciation of currency etc. However, the same does not per se affect the bargain they have made.

40. We have also perused some other relevant provisions of the DNH PPA as under:

4.4 Purchase and sale of Available Capacity and Scheduled Energy

4.4.1

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

4.4.2

Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity up to the Contracted Capacity to the Procurer pursuant to Dispatch Instructions given by the Procurer.

4.5 Right to Contracted Capacity and Scheduled Energy

4.5.1

*Subject to provisions of this Agreement, **the entire Aggregate Contracted Capacity shall be for the exclusive benefit of the Procurer** and the Procurer shall have the exclusive right to purchase the entire Aggregate Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Contracted Capacity and/or Scheduled Energy*

8.1.1

From the commencement of supply of power, Procurer shall pay the Seller the monthly Tariff Payment, on or before the Due Date, comprising of Tariff for every Contract Year, determined in accordance with this Article 8 and Schedule 4. All Tariff Payments by the Procurer shall be in Indian Rupees.

Schedule 4.1 (ii)

The Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of this Agreement.

SCHEDULE4: TARIFF

4.1 General

- i) The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.
- ii) The Tariff shall be paid in two parts comprising of Capacity Charge and Energy Charge as mentioned in Schedule 8 of this Agreement.
- iii) For the purpose of payments, the Tariff will be Quoted Tariff as specified in Schedule 8, duly escalated as provided in Schedule 6 for the applicable Contract Year.
- iv) The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond eighty five

percent (85 %) as provided in this Schedule. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule.

41. From the above provisions of the PPA, we observe that the Petitioner is under obligation to keep ready the entire aggregate contracted capacity for the exclusive benefit of the Respondent and the Respondent is under corresponding obligation to pay tariff for all of the available capacity up to the contracted capacity and corresponding scheduled energy.

42. Further, the tariff is payable in two parts i.e. capacity charges and energy charges. While the former is payable on the basis of the Availability of the generating station, the latter correspond to the energy scheduled from the generating station based on the requisition of the Procurer. As rightly pointed out by the Petitioner, the scheduling of power does not have any bearing on the capacity charges, which correspond to the availability declared by the generating companies as per ABT mechanism, the Grid Code and provisions of the DNH PPA and not to the off-taking of power by the Procurer based on its load/ demand. Thus, in our view, the obligation of the Procurer to make the payment of Capacity Charges under the agreement does not have any linkage with the off-taking of the power by the Procurer on the basis of its varying demand.

43. It is also not in dispute that the Petitioner had declared the availability at the injection point. Had there been understanding between the parties that the payment of fixed charges shall be subject to schedule of energy, the Party would have expressed recorded in the PPA. Since the payment of the fixed charges was never subject to schedule of energy and, therefore, the Respondent cannot be permitted to argue that it has been affected by the force majeure and is absolved from the liability of making payment of capacity charges.

44. The Commission vide order dated 03.04.2020, passed order in Suo Moto Petition No. 6/SM/2020 held as under (emphasis added):

“13. Keeping in view the directions issued by the Government of India under section 107 of the Act and to address the difficulties faced by the distribution companies (beneficiaries of the generating stations and long term customers of inter-State transmission systems) on account of the unprecedented situation arising out of the restrictions placed by the Central Government and State Governments on the movement of public and opening of offices and establishments etc., the Commission in exercise of its powers under Regulation 76 of the 2019 Tariff Regulations relaxes the provisions of Regulation 59 of 2019 Tariff Regulations to provide that if any delayed payment by the distribution companies to the generating companies and inter-State Transmission licensees beyond 45 days from the date of the presentation of the bills falls between 24.03.2020 and 30.06.2020, the concerned distribution companies shall make the payment with LPS at the reduced rate of 12% per annum that translates into 1% per month.

14. It is clarified that if the period of 45 days beyond the due date of the presentation of the bill by the generating companies or inter-State transmission licensees, as the case may be, falls before 24.03.2020 or after 30.06.2020, the concerned distribution company shall be liable to pay the LPS as per Regulation 59 of the 2019 Tariff Regulations

*16. As per the directions issued under Section 107 of the Act, the generating companies whose tariff has been determined under Section 63 of the Act by this Commission, relief **on the Late Payment Surcharge for payment which become delayed beyond 45 days (from the date of presentation of the bill) during the period from 24.03.2020 to 30.06.2020 may be claimed in terms of the force majeure provisions of the respective power purchase agreements (PPAs)**”*

45. A plain reading of the above order shows that no relief has been given from the obligation of payment towards the capacity charges. The only relief which has been given is the relief towards the late payment surcharge and that the generating companies whose tariff has been determined under Section 63 of the Electricity Act, 2003, shall be required to claim relief on the Late Payment Surcharge for payment which become delayed beyond 45 days (during the period from 24.03.2020 to 30.06.2020), in terms of the force majeure provisions of the PPA.

46. We also note that JERC vide order dated 10.04.2020 has allowed deferred recovery of demand charges by the Respondent from its consumers and that the Respondent would be adequately compensated for the expenses towards additional borrowings. The relevant extract of order dated 10.04.2020 is reproduced as under:

“It is pertinent to mention here that due to above mentioned unprecedented and grave situation in the country, Ministry of Power Govt. of India has issued statutory direction under Section 107 of the Electricity ACT, 2003 to CERC to provide adequate relief to DISCOMs. The CERC vide its Order dated 03.04.2020 has directed as under:

.....

The Commission acknowledges the gravity and unprecedented nature of the situation prevailing in the country affecting on one hand the ability of the DISCOMs/EDs to pay to the generators, maintain the distribution infrastructure and serve bills to the consumers and on the other hand the ability of the consumers to pay the dues on time given the fact that the conventional channels of payment are generally not accessible. Besides, the industrial and commercial consumers are staring at a situation of low production/demand on services which would severely impact their ability to pay Fixed Charges of electricity at this time.

The Commission opines that in the present situation, while some relief has been made available to the DISCOMs/EDs by CERC under the directions of Govt. of India, some respite also needs to be given to the electricity consumers who are adversely impacted by the Lockdown situation. In order to mitigate, to some extent, the difficulties being faced by the consumers of the territories under the jurisdiction of JERC, the Commission has decided as under:

1) DISCOMs/EDs shall have the flexibility to raise bills to their consumers in the following manner

a. by direct meter reading wherever possible.

b. by provisional billing.

c. by encouraging the consumers to take their own meter readings. The DISCOM/ED can make a WhatsApp number available to the consumers to facilitate the same.

d. by serving the electricity bills by electronic means such as email, sms, WhatsApp etc.

2) DISCOMs/EDs shall encourage all sorts of digital payments without demanding the Bank transaction charges from the consumer. This amount can be considered as collection expenses for the DISCOM/ED in ARR.

3) DISCOMs shall extend the due date for payment of electricity bills (including those already raised) where the due dates fall between 24th March,2020 and June 30,2020 by further two weeks without Late Payment Sur Charge (LPSC). Provided further that if such extended due date falls beyond 30th June, 2020, it will not be extended beyond 30th June, 2020.

4) The Commission has powers to modify its tariff orders under Section 62 of Electricity Act 2003. In exercise of this power Commission has reduced LPSC @ 1% p.m. instead of 2% p.m. as provided in its tariff orders dated 20th May 2019. This relaxation is purely of temporary nature for the period starting from 24th March 2020 to 30th June 2020.

5) A moratorium on payment of Fixed Charges is provided to all industrial and commercial consumers for the bills raised during the period from 24/3/2020 to 30/6/2020, which they can avail if they so desire. These deferred charges shall be recovered in an equated manner over next three bills to be raised after 30th June'2020.

The Commission hereby directs the DISCOMs/ EDs under the jurisdiction of JERC to strictly comply with the aforesaid decisions of the Commission and further directions, if any, to be issued from time to time.

The Commission further feels that the Distribution Licensees will be required to borrow/avail additional working capital over and above those specified in the Regulations. Also, there will be other additional costs required to be incurred for

continuing of operations in the present situation of crisis. Associated with this, there will be an additional working capital interest. The Commission will consider the additional expenses that are likely to be incurred by the Distribution Licensees on all these accounts while evaluating the APR of FY 2020-21.”

47. The above order does not support the contention of the Respondent that it is not liable to make payment for capacity charges. In fact, the right of the Respondent to collect the fixed charges from its consumers for the period during the lockdown has been upheld by JERC and the recovering of such charges has not been forgone by the Respondent. While the submission of the Respondent to the extent that the demand charges are not determined in such a manner to compensate the Respondent for fixed charges is appreciated, it does not alter that fact that its right to collect the demand charges from its consumers, the structure of which despite being skewed in realities, are primarily to cater to the fixed cost of the distribution licensee which also includes therein the capacity charges payable to the generating stations has been upheld by JERC. In its orders dated 10.04.2020 and 18.05.2020, JERC has indicated that the additional expenses that are likely to be incurred by the Respondent will be taken into account. Therefore, in our view, it would be inappropriate and unfair on part of the Respondent to deny the capacity charges to the generating station to cater to its fixed cost and simultaneously to recover the fixed charges from its consumers during the period of lockdown to cater to its fixed cost.

48. On the lines of this Commission's order dated 03.04.2020, JERC also provided some safeguard and protection to the Discoms, and industrial consumers. However, JERC also did not issue any protection toward the payment of fixed charges.

49. Another argument which the Respondent has put forward is that while allowing the power purchase cost for FY 2020-21 in the matter of Annual Performance Review of FY 2020-21, JERC in its order dated 23.03.2021, while allowing total purchase power cost as Rs.2,628.41 crore for FY 2020-21 has not included the capacity

charges of the Petitioner for the period from April 2020 to June 2020 and accepted the fact that the said capacity charges is not payable to the Petitioner on account of force majeure provisions agreed in the said PPA.

50. In response, the Petitioner has submitted that the said argument is an attempt by the Respondent to mislead the Commission since the approved power purchase in the order relates to the period from October 2020 to March 2021 whereas the DNH PPA had expired on 30.06.2020. Further, JERC's Order dated 23.03.2021 is based on the Respondent's submissions which were made after the present petition was filed by GWEL.

51. We have considered the submissions. The Respondent has itself excluded the data pertaining to capacity charges to be paid to the Petitioner from the submissions made to JERC for approval of power purchase cost for FY 2020-21. And based on submissions of the Respondent, JERC has approved the quantum of power purchase. Therefore, the contention of the Respondent that the JERC in its order dated 23.3.2021 has not included the capacity charges of the Petitioner for the period April 2020 to June 2020, is misplaced.

52. Further, the relevant extracts of Tariff Petition No. 19/2019 (True-up of FY 2018-19, Annual Performance Review of FY 2019-20, Aggregate Revenue Requirements (ARR) and Determination of Retail Tariff for FY 2020-21) filed by DNH Power Distribution Corporation Limited before JERC is as under:

"5.6.4. Total power purchase quantum and cost approved by Commission Accordingly, based on the above, the energy availability and the power purchase cost approved by the Commission for FY 2020-21 have been shown in the following table:

Table 85: Power Purchase Quantum and Cost approved by the Commission for FY 2020-21

| Details of The Stations | Units Purchased (MUs) | Variable Charges (INR Crore) | Fixed Charges (INR Crore) | Total Charges (INR Crore) | Per Unit Cost (INR/KWh) |
|------------------------------|-----------------------|------------------------------|---------------------------|---------------------------|-------------------------|
| KSTPS | 374.95 | 54.82 | 25.55 | 80.37 | 2.14 |
| KSTPS 3 | 158.36 | 22.47 | 18.42 | 40.89 | 2.58 |
| VSTPP-I | 300.13 | 54.72 | 25.23 | 79.95 | 2.66 |
| VSTPP-II | 238.75 | 41.37 | 16.15 | 57.52 | 2.41 |
| VSTPP-III | 268.23 | 47.50 | 25.82 | 73.33 | 2.73 |
| VSTPP-IV | 334.39 | 57.63 | 42.87 | 100.50 | 3.01 |
| KGPP | 261.11 | 72.46 | 50.37 | 122.83 | 4.70 |
| GGPP | 153.24 | 45.53 | 45.07 | 90.60 | 5.91 |
| Sipat-I | 621.37 | 94.73 | 68.94 | 163.67 | 2.63 |
| Sipat-II | 224.43 | 34.49 | 27.63 | 62.11 | 2.77 |
| Mauda | 193.86 | 61.53 | 56.72 | 118.25 | 6.10 |
| VSTPS-V | 190.06 | 34.48 | 25.87 | 60.35 | 3.18 |
| Mauda 2 | 218.26 | 69.34 | 52.38 | 121.72 | 5.58 |
| Solapur | 89.15 | 31.22 | 61.41 | 92.63 | 10.39 |
| LARA | 203.28 | 51.58 | 25.15 | 76.73 | 3.77 |
| Gadarwara | 137.00 | 50.04 | 31.15 | 81.19 | 5.93 |
| BARH | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| Dhuwaran | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| Kharagaon | 203.28 | 49.40 | 6.52 | 55.91 | 2.75 |
| FSTPS | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| KhSTPS I | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| RSTPS | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| TSTPS | 0.00 | 0.00 | 0.00 | 0.00 | 0.00 |
| KHSTPP-II | 20.88 | 4.44 | 4.02 | 8.46 | 4.05 |
| Subtotal - NTPC | 4,190.73 | 877.75 | 609.26 | 1,487.01 | 3.55 |
| NSPCL - Bhilai | 575.92 | 198.60 | 116.66 | 315.26 | 5.47 |
| NPCIL | | | | | |
| KAPS | 79.13 | 19.55 | 0.00 | 19.55 | 2.47 |
| TAPS | 289.49 | 87.26 | 0.00 | 87.26 | 3.01 |
| Subtotal | 368.62 | 106.82 | 0.00 | 106.82 | 2.90 |
| Others | | | | | |
| RGPPL | 0.01 | 0.00 | 0.00 | 0.00 | |
| EMCO Energy Ltd. (GMR Group) | 363.65 | 85.30 | 108.09 | 193.39 | 5.32 |
| Subtotal | 363.66 | 85.30 | 108.09 | 193.39 | 5.32 |
| Total | 5,498.93 | 1,268.47 | 834.01 | 2,102.48 | 3.82 |
| Other Sources | | | | | |
| Indian E. Exchange/Bilateral | 0.00 | 0.00 | 0.00 | 0.00 | |

| Details of The Stations | Units Purchased (MUs) | Variable Charges (INR Crore) | Fixed Charges (INR Crore) | Total Charges (INR Crore) | Per Unit Cost (INR/KWh) |
|-----------------------------------|-----------------------|------------------------------|---------------------------|---------------------------|-------------------------|
| UI | 0.00 | 0.00 | 0.00 | 0.00 | |
| Solar | 5.38 | 0.00 | 0.00 | 0.00 | |
| Non Solar | 175.20 | 45.38 | 0.00 | 45.38 | 2.59 |
| Solar REC | 0.00 | 0.00 | 0.00 | 0.00 | |
| Non Solar REC | 0.00 | 18.60 | 0.00 | 18.60 | |
| Solar (SECI) | 744.60 | 367.83 | | 367.83 | 4.94 |
| Wind (SECI) | 744.60 | 367.83 | | 367.83 | 4.94 |
| Open Market Operation | 15.89 | 5.17 | 0.00 | 5.17 | 3.25 |
| Subtotal - Other Sources | 1,685.67 | 804.81 | 0.00 | 804.81 | 4.77 |
| Power Purchase Cost Total | 7,184.60 | 2,073.28 | 834.01 | 2,907.29 | 4.05 |
| PGCIL CHARGES | | | | 377.49 | |
| POSOCO | | | | 1.00 | |
| WRPC | | | | 0 | |
| Reactive charges | | | | 0 | |
| MSTCL | | | | 0 | |
| Intra-state transmission charges | | | | 41.45 | |
| Subtotal | | | | 419.94 | |
| Grand Total of Charges | 7,184.60 | | | 3,327.23 | 4.63 |
| Other Charges (GMR Change in Law) | | | | 13.76 | |
| Grand Total of Charges | 7,184.60 | 2,073.28 | 834.01 | 3,340.99 | 4.65 |

The Commission approves the quantum of power purchase as 7,184.60 MU at the generator periphery with a total cost of INR 3340.99 Crore for FY 2020-21. The Average Power Purchase Cost (APPC) for FY 2020-21 has been computed at the DNH Periphery excluding the transmission charges and cost of purchase of renewable energy. The same shall be used for the purpose of compensation / payment of surplus power at the end of each settlement period in case of Net-metering consumers by the Petitioner.”

53. We observe from the above extracts that JERC vide order dated 18.05.2020 approved total fixed charges for procurement from the Petitioner for FY 2020-21 as Rs.108.09 crore. However, same was excluded by the Petitioner at the time of filing of Annual Performance Review of FY 2020-21. Thus, the contention of the Respondent that JERC in its order dated 23.03.2021 excluded the capacity charges for the period of April 2020, May 2020 and June 2020 is not tenable.

54. It is also observed that the Respondent is claiming the electricity charges from its consumers for the COVID-impacted period in its monthly bills. The detail of some of the invoices, as placed on record by the Petitioner is as under:

| Sr. No. | Invoice Dated | Bill Period | Name of Consumer | Net Amount (in Rs.) |
|----------------|----------------------|----------------------|-----------------------------|----------------------------|
| 1. | 4.5.2020 | 1.4.2020 to 1.5.2020 | M/S Alok Industries Limited | 7,80,26,944 |
| 2. | 3.6.2020 | 1.5.2020 to 1.6.2020 | M/S Alok Industries Limited | 14,92,11,832 |
| 3. | 3.7.2020 | 1.6.2020 to 1.7.2020 | M/S Alok Industries Limited | 24,29,92,329 |
| 4. | 4.5.2020 | 1.4.2020 to 1.5.2020 | M/S Filatex India Limited | 42,01,405 |
| Total | | | | 47,44,32,510 |

55. It is clear that the Petitioner is claiming the electricity bills from its consumers but at the same time is claiming exemption from the payment of capacity charges for the period of nationwide lockdown. The Respondent has not denied the invoices raised by it.

56. However, we do not find any need to go into or discuss this issue in detail on the ground that the Respondent was well aware of the fact that the liability of payment of capacity charges to the Petitioner was subject to the outcome of the present proceedings and accordingly, ought to have made necessary and adequate provisions

for the same, if at all the said liability crystallizes. In view of the findings of the Commission in the foregoing paragraphs, the issue as to whether the Capacity Charges to be payable to the Petitioner for the period of April 2020 to June 2020, have been approved and factored into the ARR of Respondent is not germane to the present proceedings.

57. Also, nothing has been brought on record to show that force majeure provision had also been invoked by the Respondent in respect of the other generators with whom it had the arrangement of supply at that time. The Respondent is definitely procuring power from other generators as the Respondent has submitted that its normal load requirement is over 700 MW of which only about 200 MW was procured from the Petitioner (till DNH PPA expired on 30.06.2020).

58. In view of the above discussions, the submission of the Respondent that Covid-19 pandemic led lockdown and consequent reduction in demand constitute force majeure event absolving the Respondent from making payment of capacity charges under the PPA deserves to be rejected and accordingly, the Respondent is directed to make payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 within 60 days from the date of this order.

59. The issue is answered accordingly.

Late Payment Surcharge

60. The Petitioner has sought late payment surcharge on the delayed payment of the capacity charge. The relevant provisions of the PPA pertaining to late payment surcharge is as under:

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

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

61. In order dated 03.04.2020, the Commission has decided in Petition No. 6/SM/2020 (quoted in earlier part of this order) that “*the generating companies whose tariff has been determined under Section 63 of the Act by this Commission, relief on the Late Payment Surcharge for payment which become delayed beyond 45 days (from the date of presentation of the bill) during the period from 24.03.2020 to 30.06.2020 may be claimed in terms of the force majeure provisions of the respective power purchase agreements (PPAs)*”. There is no denying the fact that COVID-19 pandemic has adversely affected the liquidity position of all stakeholders of power sector, including the Respondent. Therefore, we feel it appropriate that in the given facts and circumstances, it is a fit case for exercise of our regulatory power, and accordingly, we direct that delayed payment of the bills which falls between 24.03.2020 to 30.06.2020, shall be payable at the reduced rate of 12% per annum that translates into 1% per month. The same shall be paid within 60 days of this order.

62. The summary of our decision is as under:

a) The outbreak of the COVID-19 pandemic did not dislodge the obligation of the Respondent. Since the Petitioner has declared its capacity on day ahead basis, the Respondent is under obligation to pay the capacity charges, along with late payment surcharge.

b) The delayed payment of the bills which falls between 24.03.2020 to 30.06.2020, shall be payable at the reduced rate of 12% per annum that translates into 1% per month.

c) Payment of the capacity charges to the Petitioner for the period from April 2020 to June 2020 along with late payment surcharge shall be payable within 60 days from the date of this order.

63. The Petition No. 594/MP/2020 is disposed of in terms of above discussions and findings.

Sd/-
(P. K. Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member

Sd/-
(P.K. Pujari)
Chairperson