

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Petition No.183/MP/2019**

**Coram:**

**Shri I. S. Jha, Member  
Shri Arun Goyal, Member  
Shri P. K. Singh, Member**

**Date of Order: 12<sup>th</sup> January, 2023**

**In the matter of**

Petition under Section 79(1)(b) and 79 (1)(f) of the Electricity Act, 2003 seeking adjudication of disputes arising out of the Agreement for Power Procurement (APP) executed between Petitioner and Respondents No. 2 to 5.

**And**

**In the matter of**

Jindal India Thermal Power Limited,  
Plot No. 2, Pocket C, 2nd Floor, Nelson Mandela Road,  
Vasant Kunj, New Delhi - 110070

**.....Petitioner**

**Versus**

1. Railway Energy Management Company Limited,  
Core-1, 12<sup>th</sup> Floor, SCOPE Minar, Laxmi Nagar, Delhi-110 092

2. Northern Railway State of Haryana,  
Northern Railway, Headquarters office,  
Baroda House, New Delhi -110001

3. Northern Railway State of Delhi,  
Northern Railway, Headquarters office,  
Baroda House, New Delhi -110001

4. West Central Railways, State of Rajasthan,  
TRD Depot (West Central Railway),  
Railway Station Area, Kota-324002, Rajasthan

5. Western Central Railway,  
State of Madhya Pradesh (WCR-MP)  
Office West Central Railway, Indira Market,  
Jabalpur-482001

**.....Respondents**

**Parties Present:**

Shri Amit Kapur, Advocate, JITPL  
Shri Akshat Jain, Advocate, JITPL  
Shri Pratyush Singh, Advocate, JITPL  
Shri Amit Mittal, Advocate, JITPL  
Shri Pulkit Aggarwal, Advocate, Indian Railways REMCL  
Shri Pulak Srivastava, JITPL  
Shri Sanjay Singh, REMCL  
Shri Manish Towari, REMCL

**ORDER**

Jindal India Thermal Power Limited (JITPL), (hereinafter referred to as 'the Petitioner'), has filed the present Petition under Section 79 (1)(f) read with Section 79 (1)(b) of the Electricity Act 2003 ("Act") for adjudication of disputes amongst JITPL and the Respondents i.e. Northern Railway, State of Haryana; Northern Railway, State of Delhi; West Central Railways, State of Rajasthan; and Western Central Railways, State of Madhya Pradesh. The Petitioner has made the following prayers:

*"(a) Direct Respondent No.2 to 5 to return the Performance Security totalling to Rs. 23,90,00,000/- (Rupees Twenty-Three Crores Ninety Lacs Only) submitted through Bank Guarantee No. 1731316BG000037, 1731316BG000037, 21641LG007116 and 21641LG013316;*

*(b) Direct Respondent No.2 to 5 to furnish Letter of Credit/ Letter of Assurance in terms of Article 13.2 of the APP.*

*(c) Direct Respondent No.2 to 5 to pay the Bank Charges totalling to Rs. 93,91,030/- incurred by the Petitioner to keep the Bank Guarantee alive beyond the period stipulated under Article 9.3 of the APPs along with carrying cost.*

*(d) Grant any relief as this Hon'ble Commission may deem fit."*

**Background:**

2. The Petitioner is a company incorporated under the provisions of the Companies Act, 1956 and engaged in the business of generation of electrical power. The Petitioner has set up a 1200 MW (2 X 600 MW) coal based Thermal Power Station in Angul District, in the State of Odisha and is a Generating Company within the meaning of Section 2(28)

of the Act.

3. The Respondent No.1, Railway Energy Management Company Ltd (REMCL) is a Joint Venture Company between the Indian Railways and RITES Limited. The Respondents No. 2 to 5 i.e. Northern Railway, State of Haryana (NR Haryana); Northern Railway, State of Delhi (NR Delhi); West Central Railways, State of Rajasthan (WCR Rajasthan); and Western Central Railways, State of Madhya Pradesh (WCR MP), are deemed Distribution Licensees under the 3<sup>rd</sup> Proviso of Section 14 of the Act. In May, 2015, the Respondent No. 1, on behalf of Indian Railways, including the Respondents No. 2 to 5, had invited bids for procurement of electricity through Competitive Bidding Process. In February, 2016, the Respondent No. 1 had awarded a total of 220 MW power to the Petitioner for supplying it to the States of Uttar Pradesh, Rajasthan, Haryana, Punjab and Delhi, including 40 MW, 9 MW and 55 MW to the Respondents No. 2 to 4 respectively. Subsequently, in March, 2016, the Respondent No. 1 had awarded a total 205 MW to the Petitioner for supplying it to the States of Madhya Pradesh and Chhattisgarh, including 135 MW to Respondent No. 5. Accordingly, the Petitioner had entered into Agreement for Power Procurements (APPs) with Respondents No. 2 to 5.

4. The Petitioner, supplying power to various States, namely, Kerala, Bihar and Odisha under long term Power Purchase Agreement(s) and also signed medium term PPAs with different divisions of Railways. Thus, the generating station is a composite scheme of generation and within the jurisdiction of this Commission under Section 79 (1)(b) read with Section 79 (1)(f) of the Act.

5. In terms of APP, within one month of the signing of respective APPs, the Petitioner, at the rate of Rs.10,00,000 / MW, has submitted total Performance Securities of Rs. 23.90 crore (Rs. 4.00 crore– NR Haryana, Rs. 0.90 crore – NR Delhi, Rs. 5.50 crore – WCR

Rajasthan and Rs. 13.5 crore – WCR MP) to the respondents as bank guarantees, having a validity for a specified period. As the respondents had not released these Performance Securities, the Petitioner had extended the validity of these securities and incurred bank charges for the same.

### **Submissions of the Petitioner**

6. The Petitioner has mainly submitted as under:

(a) In May, 2015, the Respondent, REMCL, had invited proposals for Request for Qualification (RfQ) for procurement of 1010 MW power from generating stations. Subsequently, during the bidding, the quantum has been revised to 585 MW and it was clarified that period of contract shall be from the date of operationalization of Medium-Term Open Access (MTOA). On the basis of competitive bidding, in February, 2016, the Respondent No. 1, REMCL, had issued Letter of Intent (LoI) to the Petitioner for procurement of 40 MW, 9 MW and 55 MW power by NR Haryana, NR Delhi and WCR Rajasthan, respectively, for 3 years. On acceptance of this LoI by the Petitioner, the Respondent No. 1 has issued Letter of Award to the Petitioner, with the condition that the contract will be effective only after signing of APPs. Subsequently, in March, 2016, the Respondent No. 1 has issued LoI to the Petitioner for procurement of 135 MW power by WCR MP for 3 years. On acceptance of the subject LoI by the Petitioner, the Respondent No. 1 had issued Letter of Award (LoA) to the Petitioner, with the condition that the contract will be effective only after signing of APP. Accordingly, during March to April, 2016, the Petitioner and Respondents No. 2 to 5 have signed APPs for the quantum of power awarded through Letter of Award.

(b) In terms of APPs, during April to May, 2016, at the rate of Rs.10,00,000 / MW, the Petitioner has submitted a total Performance Securities in the form of Bank Guarantees of Rs. 23.90 crore to concerned railway entities (Rs. 4.00 crore – NR Haryana, Rs. 0.90 crore- NR Delhi, Rs. 5.50 crore – WCR Rajasthan and Rs. 13.5 crore-WCR MP). Subsequently, CTU (now 'CTUIL') has granted MTOAs w.e.f. the specified dates (April – November, 2017) to the Petitioner for supplying power from its plant to the concerned railway utilities and the same was operationalized from

the subject dates and these dates are to be considered as Appointed Dates under the respective APPs. In the meanwhile, the Petitioner has renewed the subject Bank Guarantees so as to keep the them alive.

(c) Subsequently, the Petitioner requested concerned utilities to furnish the Letter of Credits (LC) in terms of APP and in November, 2018, served the default notice to the Respondents for not providing Payment Security Mechanism and extended the BGs to keep these alive. In December, 2018, the Petitioner has requested for release of Performance Securities. In January, 2019, the Respondents NR Haryana and NR Delhi have communicated to the Petitioner that the matter for release of BG has been taken up with Respondent, REMCL. Further, during March to April, 2019, the Petitioner has again issued default notice to the concerned Respondents in accordance with Article 19.2.1 of the APP for breach of various terms and conditions of APP, including issuance of Letter of Credit. In May, 2019, the Petitioner again requested respondents to release the subject Performance Security.

(d) As per Article 9.3 and Article 9.4 of the APP, the Performance Security was for a limited period of 6 months from the appointed Date i.e. commencement of power supply through MTOA and a Deemed Performance Guarantee is to be created. In the present case, the subject six months from the appointed dates are already over for all APPs of the respondents. Thus, the Respondents are obligated under the Contract to return the said Performance Security in terms of Article 9.3 of the APP, however, the Respondents are in illegal possession of the Performance Security in the form of Bank Guarantee deposited by the Petitioner. On account of continuance of the Performance Security, the Petitioner has incurred substantial bank charges, which were unnecessarily paid by the Petitioner as the subject bank guarantees were not returned.

(e) In regards to non-issuance of Letter of Credit (LC) / Letter of Assurance (LoA) by the Respondents, the Petitioner has submitted that in terms of the Article 13.2 of the APP, the Respondents No. 2 to 5 are mandated / obligated to furnish a LC / LoA to secure Payment Security Obligation of the Petitioner. Perusal of Article 13.1.3 read with Article 13.2, the Respondents No. 2 to 5 are obligated to provide L

C / LoA equivalent to 20% of the Annual Capacity Charges and the same was required to be provided 30 days prior to the appointed date and was required to come into effect from the appointed date. In the present case, even though the appointed date has been achieved in all APPs on 1.4.2017, 20.4.2017, 1.10.2017 and 1.3.2018, however, the LC / LoA has not been provided so far. Thus, the Respondents have violated Article 13.2. of the APP.

### **Hearing Dated 13.7.2019**

7. The case was heard on 13.7.2019 and notice was issued to the parties to file their replies and rejoinders. The Respondents were directed not to take any coercive measure against the Petitioner and the Petitioner was directed to keep alive the Bank Guarantee.

### **Replies and Rejoinders:**

8. The Respondents have filed combined reply dated 26.9.2019 and have mainly submitted as under:

(a) In terms of the provisions of Article 3.10 of the PPA executed between the parties, the conditions for commencement of the rights and obligations of the parties under the PPA is the date of getting the Medium-Term Open Access. Article 3.1.1 of the PPA is as follows:

#### ***“3.1 The Procurement Contract***

*3.1.1 Subject to and in accordance with the provisions of this Agreement, Applicable Laws and the Applicable Permits, the Utility hereby awards to the Supplier the procurement contract set forth herein for supply thereof to the Utility (the “Procurement Contract”) for a period of 3 (Three) years commencing from the date of getting the Medium Term Open Access, and the Supplier hereby accepts the Procurement Contract and agrees to implement the same subject to and in accordance with the terms and conditions set forth herein.*

*The Utility at its discretion may take the power on short term duration on the same terms and conditions of this APP subject to ensuring the reliability of power supply during such period till grant of the Medium-Term Open Access. The period of contract will be reckoned from the date of getting the Medium-Term Open Access and subject to other terms and conditions of this APP.*

*Provided that at any time 3 (three) months, prior to the expiry of the Contract Period specified hereinabove, the Parties may with mutual agreement extend the Contract Period for such further period as they may determine,*

*but not exceeding the lower of 25% (twenty-five per cent) of initial contract period or one year whichever is lower.”*

(b) Article 9 of PPAs deals with the Performance Security and the Article 9 of the PPAs (monetary values of PPA dated 01.10.2017 executed for the State of Haryana) read as under:

**“ARTICLE 9: PERFORMANCE SECURITY**

**9.1 Performance Security**

*9.1.1 The Supplier shall, for the performance of its obligations hereunder, provide to the utility no later than 30 (thirty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Schedule Bank for a sum equivalent to Rs. 4 crore (Rupees Four Crore) in the form set forth in Schedule-B (the “Performance Security”) for a period of 6 (six) months.*

*Explanation: The Performance Security submitted by the Supplier (M/s JITPL) will be for a period of 6 months as per Clause 9.1.1 of APP. The Utility may release the Performance Security after expiry of 6 months as per clause 9.3 of APP and may substitute with deemed performance security either in form as prescribed in Clause 9.1.1 of APP or by making a deduction from the amount due and payable by it to the supplier in accordance with clause 9.4 of APP. However, initially the Performance Guarantee, “will be for a period of two years from the date of its issue or until it is released earlier by the Utility pursuant to the provisions of the Agreement” as per Clause 11 of Schedule-B of APP.*

*9.1.2 Until such time the Performance Security is provided by the Supplier pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the performance Security pursuant hereto, the Utility shall advise REMCL to release the Bid Security to the Supplier.*

*9.1.3 Notwithstanding anything to the contrary contained in the Agreement, in the event Performance Security is not provided by the Supplier within a period of 30 (thirty) days from the date of the Agreement, the Utility may encash the Bid Security and appropriate the proceeds thereof as Damages, and the upon all rights, privileges, claims and entitlements of the Supplier under or arising out of this Agreement shall be deemed to have been waived by, and this Agreement, shall be deemed to have been terminated with the consent of the Supplier.*

**9.2 Appropriation of Performance Security**

*Upon occurrence of a Supplier Default or failure to meet any condition precedent, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate from the Performance Security the amounts due to it for and in respect of such Supplier Default or for failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Supplier*

*shall, within 15 (fifteen) days thereof, replenish, incase of partial appropriation, to the original level of the Performance Security, and in case of appropriation of the entire Performance Security provided a fresh Performance Security, as the case may be, failing which the Utility shall be entitled to terminate the Agreement in accordance with Article 19. Upon such replenishment or furnishing of a fresh Performance Security, as the case may be, the Supplier shall be entitled to an additional Cure Period of 120 (one hundred and twenty) days for remedying the Supplier Default or to meet any Condition Precedent, and in the event of the Supplier not curing its default or meeting such Condition Precedent within sue Cure Period, the Utility shall be entitled to encase and appropriate Performance Security as Damages, and terminate this Agreement in accordance with Article 19.*

....”

In terms of the above, the Petitioner is entitled to receive subject Performance Bank Guarantee after a period of six months from the appointed date, subject to it being substituted by the Deemed Performance Security. Further, in terms of explanation to Article 9.1, the Deemed Performance Security may be created in either (i) in form as prescribed in Clause 9.1.1, i.e. an irrevocable and unconditional guarantee from a Schedule Bank for a sum equivalent to Rs. 4 crore; or (ii) by making a deduction from the amount due and payable by it to the supplier in accordance with clause 9.4, i.e. by deducting an amount equivalent to the Bank Guarantee from the monthly bill raised by the Petitioner for the electricity supplied in the previous month and making the balance payment and then for the subsequent months make the payment of the monthly bills as raised by the Petitioner. However, in case, any amount is encashed or appropriated by the Respondents No. 2 to 5 on account of any default of the Petitioner, the Respondents shall be entitled to replenish the said amount by deducting the amounts from the next monthly bill.

(c) In order to resolve the issue, various meetings were held between the parties. However, till date, as the Petitioner has not offered to provide substitution to the subject Performance Security. Further, it was conveyed to the Petitioner that the Respondents No. 2 to 5 are willing to consider the release of Performance Security if the same is substituted by the Petitioner by Deemed Performance Security as provided for in the explanation to Article 9.1.1.



(d) Further, at the time when the Petitioner had executed the PPA, the intention of the parties was clear that the Performance Security shall be released to the Petitioner only after creation of the Deemed Performance Security in terms of the Article 9.1.1 and the Petitioner was in knowledge that the Performance Security may be released by Respondents No. 2 to 5 on creation of the Deemed Performance Security as provided for in Article 9.1.1. The Petitioner vide its letters dated 27.12.2018 (for the State of Delhi, Rajasthan and Madhya Pradesh) and dated 28.12.2018 (for the State of Haryana) requested respective Respondents to release the subject Performance Security, for the first time, which was much beyond the period of six months from the appointed date. These letters are contrary to the terms and conditions of the PPA. It is the Petitioner who is in default for not providing for the Deemed Performance Security which was to substitute the Performance Security. Thus, the Petitioner is not entitled to release of performance security unless the same is substituted by the Deemed Performance Security in the manner prescribed for under the PPA. Consequently, the Petitioner is not entitled to any amount incurred by it on account of keeping the bank guaranteed alive.

(e) In regard to providing the Letter of Credit or Letter of Assurance in favour of the Petitioner, the Respondents, have already initiated the process for creation of payment security mechanism and Letter of Mandate issued by the Reserve Bank of India in favour of the Petitioner was already provided by NR Haryana and NR Delhi as a payment security mechanism and the same will be issued by WCR Rajasthan and WCR MP to the Petitioner, shortly. However, in the meanwhile, the States of Rajasthan and Madhya Pradesh have been providing advance payment to the Petitioner to protect its interest.

### **Rejoinder to the reply of the Respondents**

9. The Petitioner, vide affidavit dated 11.11.2019, has filed rejoinder to the reply of respondents and has mainly submitted as under:

(a) The contention of the Respondents i.e. the Petitioner has failed to issue the Deemed Performance Security in accordance Article 9.4 of the APP and therefore the Petitioner is not entitled to the release of Performance Security, is incorrect.

Considering the Article 9.3 and Article 9.4 of the APP, the Performance Security was for a limited period of 6 months from the Appointed Date and Article 9.4 categorically mentions that the Deemed Performance Security will be created only after the release of the original Performance security that has been submitted in the form of Bank Guarantees.

(b) Deemed performance security is an artificial legal fiction created, wherein, the Respondent would have a lien and charge over the receivables of the Petitioner up to a particular amount. Further, Article 9.5 of the APP provides that *'Upon occurrence of a Supplier Default, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate relevant amounts from the Deemed Performance Security as Damages for Supplier Default. For the avoidance of doubt, the parties expressly agree that upon the Deemed Performance Security being appropriated, in whole or in part, it shall be deemed to be replenished to the extent of such appropriation.'*

(c) Considering the Article 9.4 and Article 9.5 of APP, it is noted that (i) After return of Performance Security, a Deemed Performance Security is created (ii) This security is an artificial fiction and it enables the Utility to have a charge equivalent to the performance security on the receivables of the supplier (iii) The Deemed Performance Security cannot be earmarked in any way from the Letter of Credit / Assurance created in favour of the Supplier but only be reduced from the amounts due and payable to Petitioner (iv) On Supplier default the Utility can exercise its Charge and withhold payment equivalent to the Deemed Performance Security from the payables to the Petitioner. Thus, the APP in clear terms mandates deduction of payables to be done post occurrence of default and not at the time when the Deemed Performance Security is created.

(d) The word "Deemed" is an artificial fiction which is generally used to impose for the purposes of a statute an artificial construction of a word or a phrase, which does not actually exist intending that i.e. the courts shall presume that such a fact exists as real. Thus, once the Performance Security is deemed to have been created, nothing else was required to be done by the Petitioner and Respondents

shall return the Performance Security and thereon have a lien limited to the amount equivalent to the receivables of the Petitioner.

(e) Section 171 of the Indian Contract Act, 1872 specifically provides that a legal charge can be created over receivables of or goods of the company as per the Terms and Conditions of the Contract. In terms of Article 9.1 and Article 9.4, there is no physical guarantee required to be given by the Petitioner, but a deemed guarantee ought to have been created in favour of the Respondents pursuant to the release of original performance Security. Further, as on date, in addition to the earlier mentioned Rs. 93 lakh, another Rs. 14.39 lakh have been incurred by the Petitioner to keep the Performance Securities alive i.e. total bank charges already incurred are of Rs. 1.073 crore, which has financially prejudiced the Petitioner.

(f) In regard to issuance of LC / LoA, Letters of Mandate dated 31.7.2019 and 30.10.2019 have been issued by the Respondents as a Payment Security Mechanism, however, these were issued only after the Ministry of Power, Government of India's O M dated 28.06.2019 directing NLDC / RLDC / SLDC to further direct DISCOMs to open and maintain Payment Security Mechanism mainly in the form of LC in favour of the Generating Companies. In terms of Article 13.1.3 and 13.2 of APP, the respondents shall provide LC / LoA equivalent to 20% of the Annual Capacity Charges, 30 days prior to the appointed date. However, the LMs submitted by the Petitioner were delayed for number of days ranging from 547 to 972 days. Therefore, Respondents have violated Article 13.2 of the APP and have throughout been ignorant towards fulfilling its obligations under the PPA.

(g) It was out of the fear that the respective Bank Guarantees may be encashed by the Railways as demonstrated by WCR-MP vide its letter dated 7.2.2019 and in hope that at least an LC / LoA will be issued by the Respondents, the Petitioner extended the Bank Guarantee. Further, no request was made by the Respondents for creation of Deemed Performance Security and in fact, Respondents till February 2019 sought the extension of BGs, including a threat by WCR - MP that in case Bank Guarantee is not extended, the same will be encashed. The contention that the interest of the Petitioner is being protected by making advance payments is

false and vehemently denied and other averments made by the Respondents that various meetings were held between the parties are bald and unsubstantiated.

### **Hearing dated 22.3.2022**

10. The case was called for virtual hearing on 22.3.2022. During the course of hearing, the learned counsels for the parties argued at length and reiterated the submissions made in the pleadings. Based on the request, the Petitioner and the Respondents were directed to file their respective written submissions, including their views regarding relevance of term “deemed” as prefixed to Performance Security under Article 9.4 of the Agreement and the reserved the order in the Petition.

### **Written submissions by the Petitioner**

11. The Petitioner vide written submissions and brief note thereof dated 18.4.2022 has mainly submitted as under:

(a) The APPs expired in the year 2021 (NR Haryana – 30.6.2021; NR Delhi – 30.11.2021; WCR Rajasthan – 19.10.2021 and WCR MP – 31.12.2020) and on 14.2.2022, NR Haryana and NR Delhi have returned their respective BGs and communicated to the Petitioner that as the APPs have expired, extension of BGs is not required. However, these BGs were returned incomplete as the Respondents have not returned some of the original documents, which are required for cancellation of BGs. In regards to APP with WCR – Rajasthan and WCR – MP, their APPs have expired on 19.1.2021 and 31.12.2020, however, the BGs have not been returned. Thus, the Petitioner is incurring bank charges to keep such BGs alive. As on 22.03.2022 (date of order reserved), the bank charges incurred by the Petitioner for keeping the BGs alive and interest thereof has increased to Rs. 3.98 crore.

(b) Article 9.4 and Article 9.5 of APP mention only for ‘Charge’ to be created in favour of utility and Deemed Performance Guarantee is to be created means that there shall be first right of the utility on the amount to be paid against energy bill, equivalent to amount of Performance Security. It was also submitted that after return of the Performance Security only, the Deemed Performance Security is to be

created. This security is a legal fiction, and it enables the utility to have a charge equivalent to the Performance Security on the receivables of the supplier and it cannot be earmarked in any way from the LC / LoA to be created in favour of the Petitioner. Further, in terms of Section 171 of the Indian Contract Act, 1872, a legal charge can be created over the receivables or goods of the company as per the terms and conditions of the Contract. Accordingly, it can only be reduced from the amounts due and payable to the Petitioner and upon occurrence of default, the utility can exercise its charge and withhold payment equivalent to Deemed Performance Security from the payables. Moreover, Deemed Performance Security was not to be created by the Petitioner but supposed to be a “deemed automatic creation” and further, deeming provision is an admission of the non-existence of the fact. The word "Deemed" is a legal fiction which is generally used to impose for the purposes of a statute, an artificial construction of a word or a phrase which may not actually exist.

(c) Accordingly, the Petitioner has prayed to (i) direct Indian Railways to return the Original Performance Security / Bank Guarantees along with all amendments issued extending the original BGs till date as submitted by JITPL, and (ii) direct Respondents No. 2 to 5 to pay Bank Charges totalling to Rs. 3.98 crore incurred by JITPL for keeping the BGs alive beyond the stipulated period of 6 months under Article 9.3 of the APPs along with interest/carrying cost as prayed in the original Petition.

### **Written submissions by the Respondents**

12. The Respondents, vide written submissions and brief note thereof dated 22.4.2022, have mainly submitted as under:

(a) The Respondents have already furnished Letter of Mandate as a payment security mechanism, however, the same has taken some time for the Respondents. In terms of Article 3.1.1, the contract period is for three years from the commencement of MTOA and further it also provides for extension of contract period, on mutual agreement, but not exceeding 25 % of initial contract period i.e. 9 months. Accordingly, all four APPs were extended, however, in view of the Open

Access Regulation of DERC, the contract with NR Delhi was came to end on 31.1.2021. In this regard, the Petitioner has filed a Petition being Petition No. 151/MP/2021 before this Commission and the same is pending for adjudication. However, the Petitioner has claimed that it has come to end on 30.11.2021. In terms of Article 9.3, performance bank guarantee is required to be released after a period of six months of the appointed date, subject to it is being substituted by the deemed Performance Security and the Performance Security shall be released upon the Deemed Performance Security coming into effect i.e. till deemed p Performance Security is created, the Performance Security shall not be returned.

(b) In terms of Article 9.2 of APP, on occurrence of any default by the Petitioner constituting 'supplier default' during the entire contract period, the Respondents are entitled to without prejudice to any other right or remedy under the PPAs to encash the same and the Petitioner is liable to replenish the same. Further, Article 9.4 provides that there has to be a 'substituted Performance Security' for a like amount for the Performance Security to be released. The deeming fiction is under Article 9.4 means that the security created under Article 9.4 shall be deemed to be 'Performance Security' under Article 9.1, however, it does not mean that there is no requirement for the security to be given by the supplier. Further, the explanation to Article 9.1 clearly stipulates the manner in which the 'Deemed Performance Security' is to be created. The contract has to be read as a whole. In terms of Section 50 of the Indian Contract Act, 1872, if the contract provides for something to be done in a particular manner, then the same can be done only in that manner and in no other manner.

(c) With regard to the Petitioner's claim that there is a fictional security in the hands of respondents in the nature of amounts payable by them for the previous month and the same can be considered as an effective Deemed Performance Security in terms of Article 9.4, the same shall be irrelevant in case the amount payable for the previous month is already paid by the Respondent to avail the benefit of rebate. In case supplier default occurs, after the payment of invoice for the previous month, there will be no security in the hands of the Railways to exercise its right under Article 9.2 and / or Article 9.5. Accordingly, for the purposes of encashment or appropriation of a security on occurrence of supplier default, there

has to be a physical security available with the Respondents. Further, Article 9.4 only stipulates that no amount can be 'earmarked', 'frozen' or 'withheld' in LoA / LC. The Petitioner vide its letters dated 27.12.2018 and 28.12.2018 for the first-time sought release of Performance Security, which was much beyond the period of six months from the appointed date had expired and these letters are contrary to the terms and conditions of the PPA. Thus, the Petitioner has failed to comply with obligations of APP. Accordingly, Respondents neither have any obligation to release Performance Security in absence of any 'Deemed Performance Security' nor have any liability to pay any charges for the keeping the Performance Security alive.

(d) The PPAs for the respective States have already expired and the Respondents have already initiated the process for release of all four Performance Securities. In regards to NR Haryana and NR Delhi, certain documents pertaining to Bank Guarantees have already been returned, however, inadvertently these were incomplete documents and process has been initiated for release of all the documents pertaining to Performance Security and the same is expected to be completed shortly. In regard to WCR Rajasthan and WCR Madhya Pradesh, the Performance Securities have been released. Only deeming fiction in Article 9.4 of the PPAs is that the substituted Performance Security shall be deemed to be a 'Performance Security' as provided for in Article 9.1. The judgments cited by the Petitioner in the written submissions are not applicable in the present case.

### **Analysis and Decision**

13. We have considered the submissions of the Petitioner and the Respondents and perused documents available on record. The following issues arise for our consideration:

**(a) Issue No.1: Whether the Respondents are liable to return the Original Performance Security / Bank Guarantees? and**

**(b) Issue No.2: Whether the Respondents No.2 to 5 are liable to furnish Letter of Credit/ Letter of Assurance in terms of Article 13.2 of the APP?**

The above issues have been dealt with in succeeding paragraphs

**Issue No.1: Whether the Respondents are liable to return the Original Performance Security / Bank Guarantees?**

14. Considering the information furnished by the parties, the important milestones of the APPs are as under:

S. No.	Utility	Quantum (MW)	BG Amount (Rs. Cr)	Quarterly Extension Charges (Rs.)	Date of signing APP	Date of BG	Appointed Date	Date of request made for release	Expiry of APP
1	NR - Haryana	40	4.00	8,76,150	12.04.2016	26.05.2016	01.10.2017	28.12.2018	30.06.2021
2	NR - Delhi	9	0.90	3,56,950	13.04.2016	26.05.2016	01.03.2018	27.12.2018	31.01.2021 / 30.11.2021
3	WCR - Rajasthan	55	5.50	58,410	15.03.2016	05.04.2016	20.04.2017	27.12.2018	19.01.2021
4	WCR - MP	135	13.50	2,59,600	11.04.2016	24.05.2016	01.04.2017	27.12.2018	31.12.2020

15. Prior to advertng to the dispute between the parties, we may refer to the relevant Article of one of APPs (Petitioner and NR Haryana) as signed between the parties, which reads as under:

**“ARTICLE 9: PERFORMANCE SECURITY**

**9.1 Performance Security**

*9.1.1 The Supplier shall, for the performance of its obligations hereunder, provide to the utility no later than 30 (thirty) days from the date of this Agreement, an irrevocable and unconditional guarantee from a Schedule Bank for a sum equivalent to Rs. 4 crore (Rupees Four Crore) in the form set forth in Schedule-B (the “Performance Security”) for a period of 6 (six) months.*

*Explanation: The Performance Security submitted by the Supplier (M/s JITPL) will be for a period of 6 months as per Clause 9.1.1 of APP. The Utility may release the Performance Security after expiry of 6 months as per clause 9.3 of APP and may substitute with deemed performance security either in form as prescribed in Clause 9.1.1 of APP or by making a deduction from the amount due and payable by it to the supplier in accordance with clause 9.4 of APP. However, initially the Performance Guarantee, “will be for a period of two years from the date of its issue or until it is released earlier by the Utility pursuant to the provisions of the Agreement” as per Clause 11 of Schedule-B of APP.*

*9.1.2 Until such time the Performance Security is provided by the Supplier pursuant hereto and the same comes into effect, the Bid Security shall remain in force and effect, and upon such provision of the performance Security pursuant hereto, the Utility shall advise REMCL to release the Bid Security to the Supplier.*

*9.1.3 Notwithstanding anything to the contrary contained in the Agreement, in the event Performance Security is not provided by the Supplier within a period of 30*



*(thirty) days from the date of the Agreement, the Utility may encash the Bid Security and appropriate the proceeds thereof as Damages, and the upon all rights, privileges, claims and entitlements of the Supplier under or arising out of this Agreement shall be deemed to have been waived by, and this Agreement, shall be deemed to have been terminated with the consent of the Supplier.*

## **9.2 Appropriation of Performance Security**

*Upon occurrence of a Supplier Default or failure to meet any condition precedent, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to encash and appropriate from the Performance Security the amounts due to it for and in respect of such Supplier Default or for failure to meet any Condition Precedent. Upon such encashment and appropriation from the Performance Security, the Supplier shall, within 15 (fifteen) days thereof, replenish, in case of partial appropriation, to the original level of the Performance Security, and in case of appropriation of the entire Performance Security provided a fresh Performance Security, as the case may be, failing which the Utility shall be entitled to terminate the Agreement in accordance with Article 19. Upon such replenishment or furnishing of a fresh Performance Security, as the case may be, the Supplier shall be entitled to an additional Cure Period of 120 (one hundred and twenty) days for remedying the Supplier Default or to meet any Condition Precedent, and in the event of the Supplier not curing its default or meeting such Condition Precedent within sue Cure Period, the Utility shall be entitled to encase and appropriate Performance Security as Damages, and terminate this Agreement in accordance with Article 19.*

## **9.3 Release of Performance Security**

*The Performance Security shall remain in force and effect until expiry of 6 (six) months after the Appointed Date, and shall be released upon the Deemed Performance Security taking effect in accordance with the provisions of Clause 9.4.*

## **9.4 Deemed Performance Security**

*The Parties expressly agree that upon release of Performance Security in accordance with the provision of Clause 9.3, a substitute Performance Security for a like amount shall be deemed to be created under this clause 9.4, as if it is a Performance Security under clause 9.1 for and in respect of the entire Contract Period (the "Deemed Performance Security"). The Deemed Performance Security shall be unconditional and irrevocable, and shall constitute the first and exclusive charge on all amounts due and payable by the Utility to the Supplier, and the Utility shall be entitled to enforce the Deemed Performance Security by making a deduction from the amounts due and payable by it to the Supplier in accordance with provisions of Clause 9.5. For the avoidance of doubt, the Parties agree that no amounts shall be earmarked, frozen or withheld in the Letter of Assurance from Reserve Bank of India or Letter of Credit as the case may be for securing payment of any potential Damages that may fall due at a subsequent date, and only the amounts which shall have become due an payable by the supplier upon occurrence of Supplier Default shall be liable to appropriation hereunder.*

## **9.5 Appropriation of Deemed Performance Security**

*Upon occurrence of a Supplier Default, the Utility shall, without prejudice to its other rights and remedies hereunder or in law, be entitled to appropriate relevant amounts from the Deemed Performance Security as Damages for Supplier Default. For the avoidance of doubt, the parties expressly agree that upon the Deemed Performance Security being appropriated, in whole or in part, it shall be deemed to be replenished to the extent of such appropriation.*

#### **9.6 References to Performance Security**

*References to Performance Security occurring in this Agreement for and in respect of any period prior to the delivery of the Performance Security by the Supplier to the Utility, or in respect of any period subsequent to the expiry or release thereof, as the case may be, shall be construed solely for the purposes of calculating the amount of Damages payable by the Supplier, and the amount so determined shall be appropriated from the Bid Security or Deemed Performance Security, as the case may be.”*

As per Article 9.1.1, the supplier, the Petitioner herein, for performance of its obligation, was required to provide the Utility, NR Haryana within 30 days from the date of the agreement, an irrevocable and unconditional guarantee as a Performance Security (PS) for a sum equivalent to Rs. 4 crore for a period of 6 months. Article 9.2 provides for the Appropriation of the Performance Security by the Utility upon the occurrence of supplier Default or its failure to meet any condition precedent. Whereas, Article 9.3 provides that the Performance Security shall remain in force and effect until expiry of 6 months after the appointed date and shall be released upon the Deemed Performance Security taking effect in accordance with the provisions of the Article 9.4. The term appointed date has been defined under Article 26 to mean the date on which all the condition precedents are achieved, satisfied or waived as the case may be and such date shall be the date of commencement of the contract period. Admittedly, there is no dispute between the parties as to the appointed date of the respective APPs as noted above which being the dates from which the supply of power commenced under the MTOA under the respective APPs.

16. Article 9.4 defines the expression Deemed Performance Security and further provides that parties agree that upon the release of Performance Security in accordance with Article 9.3, a substitute Performance Security for a likewise amount shall be deemed to be created under the said Article as if a Performance Security under Article 9.1 for and in respect of the entire contract period. It also specifies that the Deemed Performance Security shall be unconditional and irrevocable and shall constitute the first and exclusive charge on all amounts due and payable by the Utility to the supplier and the supplier shall be entitled to enforce the Deemed Performance Security by making a deduction from the amount due and payable by it to the supplier in accordance with the provisions of Article 9.5. Article 9.5 provides that the Utility shall be entitled to appropriate the relevant amounts from the Deemed Performance Security as Damages upon the occurrence of a supplier default and in the event of the Deemed Performance Security having been appropriated, it shall be deemed to be replenished to the extent of such appropriation.

17. In the context of the above provisions, dispute has been arisen between the parties as to the release of the Performance Security and the form/manner of the Deemed Performance Security. As per the Petitioner, the Performance Security was for a limited period of 6 months from the appointed date i.e. commencement of supply under MTOA and thereafter the Respondents were required to return the same upon creation of the Deemed Performance Security in terms of Article 9.4 of the APP which is nothing but an artificial fiction enabling the Utility/Respondents to have charge equivalent to the Performance Security on the receivable of the supplier/Petitioner and that no physical security in any form was required to be given by the Petitioner. The Petitioner has also submitted that Article 9.4 also clarifies that the Deemed Performance Security cannot be earmarked in any way from the LC/LoA created in favour of the Petitioner and can only be reduced from the amounts due and payable to the Petitioner.

18. *Per contra*, the Respondents have submitted that the Petitioner was entitled to get his Performance Security released after a period of six months after the appointed date subject to it having been substituted by the Deemed Performance Security. The Respondents have further relied upon explanation to Article 9.1.1 and have submitted that as per the said explanation, the Deemed Performance Security had to be created either in form as prescribed in Article 9.1.1 for the Performance Security or by making a deduction from the amount due and payable by it to the supplier in accordance with Article 9.4 i.e. by deducting the amount equivalent to Performance Security from the invoices raised by the Supplier/Petitioner. As per the Respondents, Article 9.4 clearly provides that there has to be a Substitute Performance Security for a like amount for the Performance Security to be released and the deeming fiction thereunder is that the security created under Article 9.4 is deemed to be a Performance Security under Article 9.1 and it does not mean that there is no requirement for the security to be given by the supplier.

19. We have considered the submissions made by the parties including their purported interpretation of the above quoted provisions of the APP. Upon perusal of the above provisions, we do find some discord between the explanation contained in Article 9.1.1 and the provisions of Article 9.3 and Article 9.4 of the APP. For instance, explanation provides that the Utility “*may*” release the Performance Security after expiry of 6 months as per Article 9.3 and may substitute with Deemed Performance Security either in form as prescribed in Article 9.1.1 or by making a deduction from the amount due and payable by it to the supplier in accordance with Article 9.4 of the APP. Whereas the Article 9.3 specifically provides that the Performance Security “*shall*” be released upon the Deemed Performance Security “*taking effect*” in accordance with the provisions of Article 9.4. The provisions of the Article 9.4, as already noted above also, categorically provides that upon release of Performance Security under Article 9.3, a substitute Performance Security for

a likewise amount “*shall*” be “*deemed to be created*” under this Article as if it is a Performance Security for the entire contract period. The said article also goes to provide that Utility shall be entitled to enforce the Deemed Performance Security by making a deduction from the amounts due and payable by it to the supplier as per Article 9.5.

20. In view of the categorical provisions of Article 9.3 and Article 9.4 of the APP, the contention of the Respondents that the Petitioner was entitled to get its Performance Security released only upon furnishing the substitute Performance Security/Deemed Performance Security, which the Petitioner did not offer and as a result the Respondents withheld the Performance Security, in our view, deserves to be rejected. Article 9.3 of the APP mandates the release of that Performance Security, upon the Deemed Performance Security taking effect in accordance with Article 9.4 of the APP. Noticeably, the expression employed herein is “*taking effect*” and not upon the Petitioner furnishing or providing such Deemed Performance Security. Moreover, the deeming provision employed in the Article 9.4 is also very clear in as much as it categorically provides that a substitute Performance Security for a like amount shall be deemed to be created under this Article. It nowhere requires the Petitioner to provide a substitute Payment Security as physical security in any form as sought to be contended by the Respondents. As rightly pointed out by the Petitioner, it is well settled position of law that a deeming provision is a legal fiction. In the present case, the Deemed Performance Security under Article 9.4 is merely a legal fiction created by deeming provisions and did not require furnishing of an actual Performance Security. Had it been so, then there would not have been any need to specify that Utility shall be entitled to enforce the Deemed Performance Security by making deduction from the amount due and payable by it to the supplier in accordance with Article 9.5 of the APP. The above reasoning also gets support from the provisions of Article 9.5 and Article 11.9.4 of the APP. Article 9.5 provides that upon appropriation of the Deemed Performance

Security by the Utility upon the occurrence of a supplier default, it shall be “deemed” to be replenished to the extent of appropriate. Thus, the said article envisages the replenishment of Deemed Performance Security also on deemed basis and not on actual basis as it would have been had the Deemed Performance Security would have been on actual basis. Further, the Article 11.9.4 of the APP also provides that all damages and any other amount due and payable by the supplier in accordance with the provisions of the agreement may be deducted from the tariff due and payable to the supplier and in the event of deduction exceeding the tariff for a particular month, the balance remaining to be deducted from the tariff due and payable to the Supplier for the immediately following month.

21. Thus, taking into the account the scheme of APP as whole, in our view the creation of Deemed Performance Security under Article 9.4 is nothing but a legal fiction enabling the Respondents to have charge equivalent to the Performance Security on the receivables of the Petitioner and as such did not require furnishing of any separate physical security in any form. Even assuming that the language employed in explanation under Article 9.1.1 of the APP gives rise to certain ambiguity with regard to form/manner of Deemed Performance Security - aiding the contentions of the Respondents, it has to bear in mind that Article 9.3, Article 9.4 and Article 9.5 are the specific provisions relating to the release of Performance Security and Deemed Performance Security and as per the well settled position in law, in case of conflict between a specific provision and a general provisions, the specific provision prevails over the general provision. Therefore, any ambiguity arising out of the explanation to Article 9.1.1 has to be thwarted in view of the clear and specific provisions of Article 9.3 and Article 9.4 as discussed above.

22. In view of the above, we find that non-release of the Performance Security, as furnished under Article 9.1 of the APPs by the Respondents after the expiry of the six months from the appointed date and Deemed Performance Security taking into the effect

was against the provisions of the APPs and the Petitioner cannot be made liable to suffer on account of such action of the Respondents. Accordingly, we hold that the Respondents are liable to return the original Performance Security to the Petitioner, if not already done so far. Further, the Petitioner will be entitled to additional expenditure incurred by it towards bank charges for keeping the Performance Security alive beyond what had been required under the APPs i.e. six months from the appointed date along with the rate of interest as provided in the APPs. The Petitioner shall furnish the statement of such charges including interest thereon supported by the auditor certificate to the Respondents, who shall pay such amount within a month from the receipt thereof.

**Issue No. 2: Whether the Respondents No.2 to 5 are liable to furnish Letter of Credit/ Letter of Assurance in terms of Article 13.2 of the APP?**

23. As regard the non-issuance of LC / LoA by the Respondents, considering the provisions of APP and submissions of the parties, it is noticed that the Respondents were to provide LC / LoA, equivalent to 20% of the annual capacity charges, 30 days prior to the appointed date as a Payment Security Mechanism and were required to come into effect from the appointed dates (April, 2017 to March, 2018). However, as the Respondents did not submit the same, the Petitioner sought the direction of the Commission to the above extent. In this context, it is noted that subsequent to filing of the instant Petition, the Respondents have submitted the Letter of Mandates i.e. from July, 2019 to October, 2019, albeit with a delay of almost two years, and the same is acknowledged by the both parties. It is further noted that during the hearing held in March, 2022 and subsequent submissions made thereof, the Petitioner has restricted relief w.r.t. release of Payment Securities and recovery of bank charges but not for deposition of LC by the Respondents. In any case, the APPs having already elapsed by efflux of time, the prayer seeking direction to furnish the LC/ LoA in terms thereof has become infructuous. Accordingly, we do not find a need to issue any direction in this regard.

24. The Petition No. 183/MP/2019 is disposed of in terms of above.

Sd/-  
**(P.K. Singh)**  
Member

sd/-  
**(Arun Goyal)**  
Member

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