

CENTRAL ELECTRICITY REGULATORY COMMISSION

NEW DELHI

Petition No. 114/MP/2019
(On remand)

Coram:

Shri Jishnu Barua, Chairperson
Shri I. S. Jha, Member
Shri Arun Goyal, Member
Shri P. K. Singh, Member

Date of Order: 18.01.2024

In the matter of:

Petition under Section 79(1)(b) and (f) of the Electricity Act, 2003 for adjudication of disputes arising out of Power Purchase Agreement dated 27.11.2013 executed between the Petitioners and the Respondent.

And in the matter of:

1. GMR Energy Trading Limited,
Building No. 302, New Shakti Bhawan,
New Udaan Bhawan Complex,
Opp. IGI Airport, Terminal-3,
New Delhi-110037
2. GMR Warora Energy Limited,
Building No. 302, New Shakti Bhawan,
New Udaan Bhawan Complex,
Opp. IGI Airport, Terminal-3,
New Delhi-110037

.....Petitioner

Vs

Tamil Nadu Generation and Distribution Corporation Limited,
6th Floor, Eastern Wing,
144, Anna Salai,
Chennai-600002

....Respondent

For Petitioner: Shri Vishrov Mukherjee, Advocate, GMR
Shri Yashaswi Kant, Advocate, GMR
Ms Priyanka Vyas, Advocate, GMR



For Respondent: Ms. Anusha Nagarajan, Advocate, TANGEDCO
Ms. Aakanksha Bholra, Advocate, TANGEDCO
Shri Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, GMR Warora Energy Ltd. (GWEL), owns and operates a 600 (2x300) MW thermal power plant in Warora, Maharashtra. Unit 1 of the Project was commissioned on 19.3.2013, and Unit 2 was commissioned on 1.9.2013. GWEL presently supplies power generated from the Project to the states of Maharashtra, Gujarat and Tamil Nadu.

2. The instant petition was filed against the unilateral reduction of the contracted capacity and consequent non-payment of the capacity charges by TANGEDCO. The Petitioners have sought payment of capacity charges based on the contracted capacity at the normative/ declared availability, as per Schedule 4 of the Power Purchase Agreement (PPA) dated 27.11.2013.

3. The Petitioner had made the following prayers in the instant petition:

- “(a) Direct payment of the revised claims of the Petitioner No.1 for the period from November, 2015 to March, 2016, along with interest calculated in terms of Article 8.3.5 of the PPA;*
- (b) Declare that the Bill Dispute Notices issued by the Respondent, are illegal and not as per the terms of the PPA;”*

4. The Commission, vide order dated 4.2.2022 in Petition No. 114/MP/2019, held that TANGEDCO is liable to pay the capacity charges as per schedule 4 of the PPA corresponding to the contracted capacity of 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016, irrespective of grid constraint, and is also liable to pay a late payment surcharge for the unpaid amount in terms of Article 8.3.5 of the PPA. The relevant portions of the order dated 4.2.2022 are as follows:



“17. We, thus, note that the dispute that was raised by the Respondent vide bill dispute notice no.1/2016 related to calculation of incentive during the period of grid constraint, while vide bill dispute notice no. 2/2016 and bill dispute notice no.3/2016, the Respondent also contended that it was not liable to pay tariff for the period of grid constraint by relying on provisions of Article 9.7.1(c) read with Article 9.3.1 of PPA. Moreover, vide bill dispute notice no. 2/2016, the Respondent also raised disputes related to bills for the months of November 2015 and December 2015. While the Petitioner No. 1 had agreed to revise the bills vide its letter dated 10.03.2016 in response to bill dispute notice no.1/2016 (relating to calculation of incentives), it refused to revise the bills in response to bill dispute notice no. 2/2016 and bill dispute notice no. 3/2016 as those related to payment of tariff and not only calculation of incentives.

...

19. The Respondent has contended that it is not liable to pay tariff in case of grid constraint claiming the same to be a force majeure event. However, as we have noted in paragraph 18 above, as per Article 9.3.1 of PPA, no tariff is payable by the Respondent only for natural force majeure events and the definition of natural force majeure event does not include grid constraint.

...

21. We are of the considered view that when there is a specific provision in PPA that declares that grid constraint is a force majeure event, the contention of the Respondent that grid constraint is a natural force majeure event is not tenable...

22. In view of above, the contention of the Respondent that grid constraint is a natural force majeure event and that it is not liable to pay tariff for that period, is rejected. That being the case, relief contemplated in Article 9.7.1(c) of PPA is not available to the Respondent since such relief is only for natural force majeure events.

...

24. In view of the above discussion, we are inclined to set aside the bill dispute notices dated 31.03.2016 and 21.04.2016 issued by the Respondent and accordingly, both the bill dispute notices are hereby set aside. Consequently, we hold that the Respondent is liable to make payment for capacity charges as per schedule 4 of PPA corresponding to the contracted capacity of 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016 irrespective of grid constraint and is also liable to pay late payment surcharge for the unpaid amount in terms of Article 8.3.5 of PPA. The Respondent is directed to make the payment along with late payment surcharge within one month of issuing of the Supplementary Bill incorporating the late payment surcharge by the Petitioner.

25. Having decided the matter against the Respondent, we find that there is no need to deal with contention of the Petitioners that the Respondent's claims are also time-barred as the Respondent did not issue bill dispute notices within the stipulated period of 30 days as required under Article 8.6.2 of PPA.”

5. Aggrieved with the Commission's order dated 4.2.2022, TANGEDCO filed Appeal No. 333/2022 before the APTEL. APTEL, vide judgment dated 7.10.2022, has



set aside the order dated 4.2.2022 in Petition No.144/MP/2022 and remanded the matter to the Commission with a direction to consider the matter afresh and grant relief to TANGEDCO as per clause 9.3.1 read with clause 9.7.1 of the PPA. The relevant extracts of the APTEL's judgement dated 7.10.2022 are as follows:

“31. For the above reasons, it is opined that “grid constraint” can best be or only be placed under the “Natural Force Majeure Events” under the provisions of the PPA signed between the Appellant and GMR Trading.

32. Further, the word “liability” is one of the most and momentous word in the field of law, meaning thereby the legal responsibility for one’s acts or omissions. It is clear from the plain reading of clause 9 of the PPA that the provision “Any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission /grid constraint shall be treated as Force Majeure without any liability on either side” has been included with a very specific purpose and has a very wider scope, thereby exempting the procurer or the seller i.e. the Appellant and the GMR Trading from any form of contractual responsibility obligated upon them. It certainly includes financial liability also in the form of Tariff, and such a provision cannot be denied by other provision which is not in contradiction to it.

33. The clause 9.7.1 is an additional clause which provides that in case of occurrence of “Natural Force Majeure Event”, affecting the Procurer, shall exempt the procurer from making payment for the Tariff during the duration of such an event, however, clause 9.3.1 relieves the procurer as well as the seller from any contractual liability, in case of restrictions imposed by PGCIL/RLDC/SLDC in scheduling of power due to grid constraint irrespective of whether it affects either of the two.

34. In the above facts and circumstances, we find that the CERC, in the Impugned Order, has fallen in error by rejecting the contention of the Appellant that grid constraint is a Natural Force Majeure event and that it is not liable to pay tariff for that period, as such, we are unable to uphold the impugned decision.”

ORDER

For foregoing reasons as stated supra, we are of the considered view that the appeal filed by the Appellant i.e. TANGEDCO has merit and is allowed. The Impugned Order dated 04.02.2022 passed by Central Electricity Regulatory Commission (CERC) in Petition No. 114/MP/2019 is set aside.

The issue is remitted to the Central Commission with a direction to consider it afresh, in the light of the observations made in the foregoing paragraphs and consequential relief should be granted to the Appellant as per clause 9.3.1 read with clause 9.7.1.

6. The APTEL vide judgment dated 7.10.2022 observed that grid constraints under the PPA are natural force majeure events, and TANGEDCO is not liable to pay tariff for



the period of the grid constraint and directed the Commission to consider the matter afresh and grant relief to the Respondent as per clause 9.3.1 read with clause 9.7.1 of the PPA.

7. Accordingly, the matter was initially heard on 10.8.2023, and the order was reserved. However, on request from the Petitioners, the matter was relisted and again heard on 11.10.2023, and the order in the matter was reserved, and the parties were directed to make their submissions.

8. The gist of the submissions made by the Petitioners are as follows:

i) Schedule 4 of the PPA deals with the method of tariff payment for the supply of power at any given time during the term of the PPA. It provides that the tariff quoted in the bill has to be paid in two parts comprising (i) capacity charges and (ii) Energy charges. The capacity charges are recovered for fixed costs incurred towards building assets and are independent of the varied scheduling of power. In terms of Schedule 4 of the PPA, capacity charges are provisioned to be recovered in a phased manner without subjecting the same to the variable component of the supply system. Accordingly, the tariff to be paid by TANGEDCO has to be in accordance with Articles 4 and 5, read with Schedule 4 of the PPA.

ii) As per Article 1.1 of the PPA, 'capacity charges' are defined as the aggregate capacity charges, which is 150 MW. This capacity charge of 150 MW mentioned in the PPA (agreed upon and executed by both parties) is not a derived quantum but the agreed quantum undertaken to be supplied by GWEL under the PPA, which cannot be altered. The computation of monthly capacity charges is to be undertaken as per the methodology agreed between the parties and prescribed in Clause 4.2.2 of Schedule 4 of the PPA. Therefore, there can be no modification of



the capacity charges on account of *force majeure* or otherwise. Any methodology which modifies the capacity charges will be contrary to the express language of the PPA and cannot be permitted by this Commission.

iii) In terms of Article 1.1 of PPA, it is established that “capacity charges” is a fixed quantum of 150 MW and remains unchanged for the entire term of the PPA.

iv) In terms of Article 4.4 of the PPA, the Petitioners are under an obligation to supply the capacity charges to TANGEDCO and TANGEDCO is obligated to pay tariff for all of the available capacity up to the contracted capacity and corresponding Scheduled Energy.

v) Tariff is mandated to be calculated as per Schedule 4 of the PPA, and in terms of the said formula, capacity charges have to be taken at 150 MW at all times and under all circumstances, including during *force majeure* events.

vi) As per Clause 4.2.2 of Schedule 4 of the PPA, capacity charges (sub-clause (h) of Clause 4.2.2.1 of Schedule 4 of the PPA) are a fixed component which cannot be altered or modified by the parties.

vii) Article 9 of the PPA does not contemplate the reduction of the contracted capacity, which is a fixed component regardless of the *force majeure* event.

viii) Accordingly, in terms of the PPA, TANGEDCO has to pay tariff for the available capacity up to the capacity charges. The Petitioners are, therefore, entitled to recover tariff in the form of capacity charges from TANGEDCO and raised monthly bills (November 2015 to March 2016), which have been computed as per Schedule 4.2.2 of the PPA.

ix) The TANGEDCO’s submission that the Petitioners themselves reduced the ‘capacity charges’ is misplaced, as the Petitioners calculated contracted capacity only to the extent of the open access operationalized, which is as follows:



Date	Open Access Granted	Open Access operationalized	Cumulative operationalization
22.10.2015	150	56	56
1.12.2015	150	65	121
16.12.2015	150	29	150

x) Accordingly, it is evident that as per the PPA provisions, the operationalized open access is fixed at 150 MW, and the Petitioners can declare the full availability of 150 MW as per the Grid Code and 2014 Tariff Regulations.

xi) It was in good faith that the Petitioners gave the benefit of the reduced declared capacity to TANGEDCO on account of the partial operationalization of open access and limited its entitlement to tariff payment to the extent of the available open access quantum. Had the Petitioners considered the operationalization of 150 MW throughout, i.e., since October 2015, then the total claim of the Petitioners would have increased by approximately ₹5 crore. Therefore, the benefit of an additional ₹5 crore has already been passed on to the TANGEDCO. This is in addition to the benefit of reduced availability, which has already been passed on to TANGEDCO.

xii) The TANGEDCO's reliance on the Judgment of the Hon'ble Supreme Court in *Godhra Electricity Co. Ltd. & Ors. Vs. State of Gujarat & Ors.* (1975) 1 SCC 199 ("Godhra Judgment") is incorrect. The Petitioners only gave a benefit to TANGEDCO on account of the partial operationalisation of open access. This was only a benefit which was extended to the TANGEDCO in good faith and did not amount to the remaking of the PPA. Pertinently, post-operationalisation of the entire open access, the operationalized power has been fixed at 150 MW and considered accordingly by both TANGEDCO and the Petitioners.

xiii) In the Godhra Judgment, the Hon'ble Supreme Court has recognised that the process of applying practical interpretation of contracts does not result in the



remaking of the contract. Further, the Hon'ble Supreme Court categorically held that extrinsic evidence in the shape of an interpreting statement in which both parties have concurred may be admissible only if there is any latent ambiguity. In the present case, there is neither any latent ambiguity in the terms of the PPA nor is there any interpreting statement on the issue of reduction of operationalized, which has been concurred by both parties. Accordingly, TANGEDCO's reliance on the Godhra Judgment is erroneous and ought to be rejected.

xiv) In terms of the APTEL's Judgment dated 7.10.2022, the Grid-Constraint has been held to be a Natural *Force Majeure* Event, in terms of which the TANGEDCO should be exempted from any liability, including financial liability. However, the APTEL neither made any observations on the computation of contracted capacity nor on TANGEDCO's methodology of reducing the contracted capacity itself for the period of grid constraint for computing capacity charges. The admitted unilateral reduction of contracted capacity by TANGEDCO is, therefore, an overreach of APTEL's judgment dated 7.10.2022.

xv) Article 9 of the PPA does not contemplate the reduction of the contracted capacity, which is a fixed component regardless of the *force majeure* event. In terms of Article 9.7.1(c), TANGEDCO is liable to pay capacity charges for the capacity that was not affected by the *force majeure* event. Therefore, the only benefit available to the TANGEDCO has been provided in the formula in Schedule 4 of the PPA, in terms of which only the cumulative or declared availability can be reduced.

xvi) The Petitioners have admitted that the grid constraints affecting the available capacity constitute *force majeure* events and have already accounted for the grid constraints in the invoices for November 2015 and December 2015. Thus, the



corresponding tariff for the reduced available capacity was passed onto TANGEDCO in compliance with Article 9.7.1(c) of the PPA.

xvii) Therefore, the reduced cumulative/declared availability (on account of grid constraint being a *force majeure* event) and capacity charges were determined in accordance with the PPA. The PPA tariff computation (under Schedule 4) adopts the ABT formulation and provides two different computation methodologies depending upon the cumulative availability, viz one when it is equal to or above 85% and another when it is below 85%. Under both scenarios, the elements for determination of capacity charges (prescribed in Clause 4.2.2 of Schedule 4 of the PPA in both methodologies remain constant and cannot be modified.

xviii) TANGEDCO's contention that relief under Article 9.7.1(c) of the PPA permits modification of 'contracted capacity' is incorrect. It is reiterated that Article 9.7 provides that TANGEDCO is not liable to pay a "tariff" for part of the contracted capacity affected by a natural *force majeure* event. Further, the tariff is defined to mean tariff under Schedule 4 of the PPA. Therefore, Article 9.7 is to be read harmoniously with Schedule 4. In terms of Schedule 4 of the PPA, the tariff is paid in two parts. comprising capacity charges and Energy charges. Further, the formula for the computation of monthly capacity charges consists of both contracted capacity and availability. The contracted capacity cannot be reduced/altered since it is a fixed component, i.e., 150 MW. However, the TANGEDCO is reducing both contracted capacity and availability in the same formula and thus taking double benefit of the *force majeure* event, as is clearly evident from the comparative statement furnished by the Petitioners along with the affidavit dated 30.8.2023 filed as per the Commission's directions in the Record of Proceedings dated 10.8.2023. Accordingly, TANGEDCO's admitted unilateral



reduction of contracted capacity is incorrect and ought to be rejected by the Commission.

xix) The TANGEDCO, contrary to the terms of the PPA, is computing the contracted capacity by deducting from it the capacity qua the backing down instructions issued by RLDC (in real time) as follows:

Period	Contracted capacity considered by GMR= Initial OA approval granted (A)		Backing Down/OA Schedule curtailment in Real time by RLDC (B)	Contracted Capacity considered by TANGEDCO (C=A-B)	
	kwh	MW	kwh	(kwh)	MW
October 2015	13,440,000	56	-	13,440,000	56
November 2015	40,320,000	56	509,500	39,810,500	55
December 2015	101,160,000	136	4,051,125	97,108,875	131
January 2016	111,600,000	150	23,188,750	88,411,250	119
February 2016	104,400,000	150	-	104,400,000	150
March 2016	111,600,000	150	-	111,600,000	150
Total	482,520,000		27,749,375	454,770,625	

xx) Such an interpretation adopted by TANGEDCO is contrary to the provisions of the PPA, 2014 Tariff Regulations and the Grid Code. The TANGEDCO, by misconstruing the terms of the PPA, is denying the Petitioner Capacity Charges on the basis of the availability of the Project. Such an interpretation by TANGEDCO is impermissible since contracted capacity, which is a fixed component envisaged in the formula under the PPA, cannot be altered or modified by either of the parties, including TANGEDCO.

xxi) The TANGEDCO's approach (by reducing the contracted capacity itself on account of force majeure) results in an amendment to Schedule 4 of the PPA, which is de hors the scheme of the PPA and cannot be countenanced by this Commission. It is settled law that parties to a contract cannot re-write a contract,



and the Commissions/ Tribunals cannot make a new bargain for the parties. [*Haryana Power Purchase Centre v. Sasan Power Ltd. & Ors.* [2023 SCC OnLine SC 577 (Para 90-92, 95, 96)] Therefore, the TANGEDCO cannot be permitted to make such unilateral reductions in the contracted capacity while computing the capacity charges.

xxii) The TANGEDCO's approach/methodology, if accepted, would result in the reduction (on account of grid constraints) being applied at two stages in the payment of tariffs, i.e. (i) at the stage of determination of availability and then (ii) at the stage of computation of capacity charges with the reduced contracted capacity. This will result in the Petitioners being penalised twice for the same *force majeure* event. This position is contrary to the express provisions in the PPA and was never agreed upon between the parties. This is also contrary to the principle of business efficacy as laid down by the Hon'ble Supreme Court.

xxiii) Based on the requisition made by the TANGEDCO, vide Bill Dispute Notices dated 31.3.2016 and 21.4.2016, the Petitioners, vide reply to the notices dated 13.5.2016, revised the cumulative availability (on account of grid constraints) without revising its contracted capacity for the period from November 2015 to January 2016. On the basis of the revision in availability, the Petitioners are entitled to receive the corresponding capacity charges computed as per Schedule 4 of the PPA since there can be no reduction of the contracted capacity.

xxiv) The GMRETL, in response to the alleged Bill dispute raised by the TANGEDCO, vide communications dated 2.5.2016 and 13.5.2016, objected to the TANGEDCO's action in unilaterally reducing (i) the contracted capacity contemplated under the PPA and (ii) the capacity charges, which were payable on the normative availability.



xxv) Even in terms of judgment dated 7.10.2022, the APTEL has only held that grid constraint is a natural *force majeure* event under Article 9.3.1 of the PPA and the TANGEDCO is entitled to relief under Article 9.7.1 in terms of which capacity charges are to be computed as per the principles under ABT and Schedule 4 of the PPA.

xxvi) Moreover, the Petitioners have admitted that the grid constraints affecting the available capacity constitute *force majeure* events and have already accounted for the grid constraints in the invoices for November 2015 and December 2015.

xxvii) Therefore, the approach/methodology of TANGEDCO by unilaterally reducing the contracted capacity and consequent reduction in the capacity charges from the bills of GMRETL, on the misconstrued interpretation of the Force majeure provisions of the PPA, is liable to be set aside by this Commission. Accordingly, the Petitioners are entitled to the balance tariff payment of ₹6,51,75,681/- in terms of Schedule 4 of the PPA.

Submissions of TANGEDCO

9. TANGEDCO has made the following submissions:

- i) TANGEDCO and Petitioner No.1, GETL entered into a PPA on 27.11.2013 for a period of 15 years for the purchase of 150 MW of contracted capacity of power. This power is supplied from the plant of GWEL, Petitioner No. 2, which has an Agreement of Sale of Power with the GETL.
- ii) Between November 2015 and January 2016, there were certain grid constraints, which reduced the cumulative availability of power under the PPA from the Petitioners. The details of these grid constraints were recorded by this



Commission in para 4(i) of the order dated 4.2.2022 originally passed in the present petition.

iii) By way of a letter dated 10.3.2016, the Petitioners admitted that grid constraints constitute *force majeure* events and also agreed to a revised calculation of incentive under the PPA.

iv) However, the Petitioners disagreed with the TANGEDCO that grid constraints were natural *force majeure* events. When the TANGEDCO, by way of dispute notices dated 31.3.2016 and 21.4.2016, disputed the bills on the ground that capacity charges payable under the PPA have to be re-computed by taking into account the reduced power resulting from grid constraints, the Petitioners in their letter dated 2.5.2016, took the position that under the PPA, the TANGEDCO is excused from payment of full capacity charges only under Article 9.7.1(c) of the PPA, that is, in case of a natural *force majeure* event or any other *force majeure* event, the TANGEDCO is liable to pay full capacity charges.

v) Article 9.7.1(c) of the PPA reads as follows:

“9.7.1 Subject to this Article 9:

...

(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 Developer, for the duration of such Natural Force Majeure Event affecting the Developer. 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 Developer, 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;”

vi) The Petitioners filed the present petition seeking recovery of capacity charges up to the contracted capacity for the period when power was not supplied on account of grid constraints. The Commission, vide order dated 4.2.2022, allowed the Petition on the basis that grid constraints do not constitute



a natural *force majeure* event, and thus the relief under Article 9.7.1(c) was not available to the TANGEDCO.

vii) Therefore, as per the Petitioners and the Commission's order dated 4.2.2022, it is undisputed that if grid constraints are considered as natural *force majeure* events, no tariff, including capacity charges for the capacity affected by grid constraints, is payable.

viii) The TANGEDCO's contention before APTEL in Appeal No. 333 of 2022 was limited, being whether or not, in principle, the TANGEDCO is entitled to relief from payment of tariffs where supply is affected by grid constraints.

ix) The APTEL, vide judgement dated 7.10.2022, while allowing TANGEDCO's appeal, unequivocally held that grid constraints under the PPA are natural *force majeure* events and that TANGEDCO is not liable to pay tariff for the period of grid constraints. In terms of these findings, the APTEL remitted the issue to this Commission to consider it afresh in light of its observations in the judgment dated 7.10.2022. The APTEL's judgment has not been challenged by the Petitioners and has thus attained finality.

x) The Petitioners' case in their affidavit dated 30.8.2023 is that despite the APTEL holding that grid constraints are natural *force majeure* events, TANGEDCO is liable to pay tariff up to the normative availability in terms of Schedule 4 of the PPA and failure to do so amounts to alteration of the contracted capacity under the PPA. This contention of the Petitioners is wholly incorrect and undermines the express scheme of the PPA.



xi) From the facts of the present case and the Petitioners' submissions, it is undisputed that (i) grid constraints are natural *force majeure* events under the PPA, (ii) because of grid constraints capacity under the PPA was affected, details of which have also been provided by the Petitioners in their affidavit dated 30.8.2023, and (iii) the TANGEDCO has paid capacity charges for the capacity which have not affected by grid constraints.

xii) Article 9.7.1(c) of the PPA expressly provides that in the event of natural *force majeure* events, no tariff will be payable for that part of the contracted capacity which is affected by the event. As per Schedule 4.1(i) of the PPA, it is clear that the tariff has two components: capacity charges and energy charges. Article 9.7.1(c) of the PPA does not make a distinction between the kind of tariff, the payment of which is excused in the event of a natural *force majeure* event; therefore, it follows that on the occurrence of a natural *force majeure* event, for the capacity affected, neither energy charges nor capacity charges are payable.

xiii) The PPA specifically provides for situations where capacity charges up to normative availability in the event of *force majeure*: under Article 9.7.1(e) of the PPA, the procurer is liable to pay capacity charges to the seller on availability deemed to be normative availability if the daily average availability is reduced below normative availability for over two consecutive months or for over four non-consecutive months due to a non-natural *force majeure* event attributable to the procurer. Thus, in a scenario where the procurer is to be made liable to pay capacity charges despite the lower capacity available because of *force majeure*, the PPA specifically contains a deeming provision to such effect. Such mandate of payment of capacity charges up to the normative availability is not provided for in the case of natural *force majeure* events.



xiv) In the event of a natural *force majeure*, TANGEDCO is exempted from payment of tariffs for the capacity affected, which includes capacity charges and energy charges – therefore, TANGEDCO cannot be called upon to make payment of capacity charges up to the normative availability.

xv) The Petitioner's contention that TANGEDCO has altered the contracted capacity and it amounts to a unilateral amendment of the PPA is wholly untenable and misleading.

xvi) In the event of natural *force majeure* events, no tariff (which includes capacity charges and energy charges) is payable for the capacity affected. Therefore, TANGEDCO is only liable to make payment of capacity charges up to the capacity that was not affected by *force majeure* - such a reduction in the contracted capacity, strictly as per the PPA for the purposes of payment of capacity charges during periods of grid constraints, is not a unilateral amendment of the PPA.

xvii) In any event, the Petitioners' case before the Commission was that because grid constraints are not natural *force majeure* events on the occurrence of which no tariff is payable, the TANGEDCO cannot proportionately reduce the contracted quantum for the purposes of computation of amount payable during this period. Therefore, Petitioners agree that had a natural *force majeure* event occurred, TANGEDCO's calculation would have been correct.

xviii) Therefore, TANGEDCO only made a corresponding reduction in the contracted capacity to better reflect the accurate position for the duration of the grid constraint, which is a natural *force majeure* event. This is in line with Article 9.7.1(c) of the PPA. It is pertinent that the reduction of the contracted quantum



for the purposes of calculation is an established practice under the PPA, which even the Petitioners have undertaken from time to time. For instance, in their reply dated 10.3.2016 to TANGEDCO's bill dispute notice, the Petitioners themselves communicated that they have considered the contracted quantum to be 121 MW on account of grid constraints. This position is cemented by their affidavit dated 30.8.2023, wherein it is stated that they have calculated contracted capacity only to the extent the open access was operationalised. This further suggests that to reflect the true position, both parties have, from time to time, taken the contracted capacity to be less than 150 MW. It is settled law that the application of the contract by the parties must be given great weight while interpreting the same and, in this regard, placed reliance on *Godhra Electricity Co. Ltd. & Ors. v. State of Gujarat & Ors.*, (1975) 1 SCC 199.

xiv) In light of the above submissions, the TANGEDCO prayed that the Petitioners' contentions raised in the affidavit dated 30. 8.2023, along with its prayers in the present petition, must be rejected in light of the findings of the APTEL in its judgment dated 7.10.2022 in Appeal No. 333 of 2022.

Analysis and Decision

10. We have considered the submissions of the Petitioner and TANGEDCO.

11. GETL, Petitioner No.1, raised bills towards the capacity charges and incentive on TANGEDCO for November 2015 and March 2016, and TANGEDCO contested these bills on the ground that it is not liable to pay tariff on account of grid constraints, which is a natural *force majeure* event. However, the Commission, in an order dated 4.2.2022, observed that as per Article 9.3.1 of the PPA, no tariff is liable to be paid by TANGEDCO only in the case of natural *force majeure* events, and the definition of natural *force majeure* does not include the grid constraint. The Commission held that grid constraint



is only a *force majeure* event as per the PPA, and therefore, TANGEDCO is liable to pay the capacity charges as per schedule 4 of the PPA corresponding to the contracted capacity of 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016, irrespective of grid constraint. The Commission also held that TANGEDCO is liable to pay a late payment surcharge for the unpaid amount in terms of Article 8.3.5 of the PPA.

12. In the Appeal No.333 of 2022 filed by TANGEDCO against the Commission's order dated 4.2.2022, the APTEL has held that grid constraints are natural *force majeure* event and has set aside the Commission's order dated 4.2.2022 and remitted the matter to the Commission with a direction to consider it afresh in the light of the observations made in its judgement dated 7.10.2022.

13. Accordingly, the matter was heard again, and the parties were directed to file their submissions. In response, the Petitioners made their submission, vide affidavit dated 30.8.2023, and a reply to the same was filed by TANGEDCO vide affidavit dated 26.9.2023. Besides this, the Petitioners have also filed their written submissions dated 16.10.2023.

14. The Petitioner has submitted that as per Article 1.1 of the PPA, the contracted capacity is 150 MW and remains unchanged for the entire term of the PPA, and as per Article 4.4 of the PPA, the Petitioners are under an obligation to supply the contracted capacity to TANGEDCO, and TANGEDCO is obligated to pay tariffs for all of the available capacity up to the contracted capacity and corresponding scheduled energy. The contracted capacity is 150 MW under all circumstances, including the period under *force majeure* events, and it cannot be altered or modified by the parties. Article 9 of the PPA does not contemplate the reduction of the contracted capacity, which is a fixed component regardless of the *force majeure* event. Accordingly, TANGEDCO has to pay



the tariff for the available capacity up to the contracted capacity, and the Petitioners are entitled to recover the tariff in the form of capacity charges from TANGEDCO. The Petitioners have raised monthly bills (November 2015 to March 2016), computed as per Schedule 4.2.2 of the PPA. However, contrary to the provisions of the PPA, TANGEDCO is computing the contracted capacity by deducting the capacity qua the backing down instructions issued by RLCDC (in real time) and is therefore denying the capacity charges on the basis of the availability of the project. Therefore, the Petitioner is being penalized twice (on account of grid constraints/ *force majeure* event), first at the stage of determination of availability and secondly at the stage of computation of capacity charges with the reduced contracted capacity. Thus, the basic contention of the Petitioners is that TANGEDCO is required to pay the tariff for 150 MW of contracted capacity under all circumstances, including *force majeure* events, as per the provisions of the PPA.

15. In response, TANGEDCO has submitted that Article 9.7.1(c) of the PPA expressly provides that in the event of natural *force majeure* events, no tariff is payable for that part of the contracted capacity which is affected by the *force majeure* events, and TANGEDCO is exempt from payment of tariffs for the capacity affected, which includes capacity charges and energy charges.

16. We have gone through the submissions of the Petitioners as well as the TANGEDCO and the material available on record. As stated earlier in this order, the APTEL has already held that the grid constraints in November 2015 to January 2016 in the instant case were a natural *force majeure* event and has set aside the order dated 4.2.2022 and remanded the matter to the Commission with a direction to consider it afresh and grant consequential relief to TANGEDCO as per Article 9.3.1 read with Article 9.7.1 of the PPA. Thus, the Commission's role in remand is limited, as APTEL



has already held that the grid constraints are a natural force majeure and directed the Commission to grant consequential relief. As per Article 9.3 of the PPA, restrictions in the schedule of power due to breakdown of transmission and grid constraints shall be treated as a *force majeure* event without any liability on the seller or the procurer. Further, as per Article 9.7.1(c) of the PPA, no tariff will be paid by the procurer for the part of the contracted capacity affected by a natural *force majeure* event for the duration of such an event. Article 9.3.1 and Article 9.7.1(c) of the PPA dated 27.11.2023 provide as follows:

Article 9.3 of the PPA defines *force majeure* as follows:

“9.3 Force Majeure

9.3.1A '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:

Any restriction imposed by PGCIL/RLDC/SLDC in scheduling of power due to breakdown of transmission /grid constraint shall be treated as Force Majeure without any liability on either side (Non-availability of open access is treated as Force Majeure)”

Article 9.7.1(c) of the PPA provides as follows:

“9.7.1 Subject to this Article 9:

...

(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 Developer, for the duration of such Natural Force Majeure Event affecting the Developer. 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 Developer, 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;”

17. As per the APTEL’s judgement dated 7.10.2022, and the above-referred provisions of the PPA dated 27.11.2023 between the Petitioner and TANGEDCO, the grid constraints during November 2015, December 2015, and January 2016 were a



natural *force majeure* event. Accordingly, TANGEDCO is not required to pay any tariff for the part of the contracted capacity affected by the grid constraints. Therefore, the Petitioners are directed to raise revised bills on TANGEDCO only to the extent of the contracted capacity supplied to TANGEDCO during the period affected by grid constraints, in accordance with Article 9.7.1(c) of the PPA, within one month from the date of issue of this order, and the parties are directed to settle the amount due to each other, if any, as per the provisions of the PPA dated 27.11.2023.

18. Petition No. 114/MP/2019 is disposed of in terms of the above discussions and findings.

sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I. S. Jha)
Member

sd/-
(Jishnu Barua)
Chairperson

