

CENTRAL ELECTRICITY REGULATORY COMMISSION

Petition No. 151/MP/2021

Coram:

**Shri Jishnu Barua, Chairperson
Shri Arun Goyal, Member
Shri P. K. Singh, Member**

Date of Order: 15th May 2024

In the matter of:

Petition under Section 79(1)(c) & 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure as envisaged under the Central Electricity Regulatory Commission (Grant of Connectivity, long Term, Medium Term Open Access in Intra State and related matters) Regulations, 2009.

And in the matter of:

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

.....Petitioner

Versus

- 1) Northern Railway (NR),**
Northern Railway Head Quarter,
Baroda House, New Delhi – 110001
- 2) Railway Energy Management Co.Ltd. (REMCL),**
Plot-1, RITES Bhawan, Sector - 29,
Gurgaon, Haryana - 122001
- 3) SLDC Delhi Transco Ltd (SLDCDTL),**
SLDC Building Minto Road , New Delhi – 110002

.....Respondents

Parties Present: Shri M.G. Ramachandran, Sr. Advocate, NR
Shri Pradeep Dahiya, Advocate, JITPL
Shri Palak Srivastava, Advocate, JITPL
Shri Pulkit Agarwal, Advocate, NR
Ms. Kanupriya Sharma, REMCL
Ms. Sonali, SLDC, Delhi
Shri Pawan, SLDC, Delhi

ORDER

Jindal India Thermal Power Limited (hereinafter to be referred to as 'the Petitioner') has filed the instant Petition under Section 79(1)(c) & 79(1)(f) of the Electricity Act, 2003 read with Regulation 32 and the detailed procedure under the Central Electricity Regulatory Commission (Grant of Connectivity, Long Term, Medium Term Open Access in Intra State and related matters) Regulations, 2009 ('2009 Connectivity Regulations') for issuing direction to Northern Railways, to obtain NOC from SLDC under Short Term Open Access (STOA) and take power from the Petitioner as per the terms of the contract up to 30.11.2021 or else NR be made liable for payment of fixed charge till 30.11.2021.

2. The main issue raised in the present petition is" whether only an intra-state entity such as railways can procure NOC or whether a Generator (like the Petitioner) which enters into an agreement with an Intra State entity may also apply for such NOC".

3. The Petitioners have prayed as follows:

- (a) *"Direct Respondent No.1 to start off-taking the supply of power from the Petitioner immediately as the Petitioner is facing huge financial hardship in terms of blocking the contracted capacity till 30.11.2021;*
- (b) *Direct Respondent No.1 to obtain NOC from SLDC under STOA and take power from JITPL under STOA for remaining period of contract;*
- (c) *Direct Respondent No.1 to pay fixed charges for the month of Feb,2021, Mar-2021, April-2021 and thereafter on month to month basis till start of supply of power by Petitioner based upon NOC provided by Respondent No 1 or if not provided upto November 2021 along with the compensation/damages as per Clauses 4.2, 18.2 and 19.3.2 of the APP dated 13.04.2016;*
- (d) *Pass any such further order(s) as deemed fit and proper".*

Submissions of the Petitioner

4. The Petitioner has submitted as below:

- a) The Petitioner, Jindal India Thermal Power Limited (JITPL), is a company incorporated under the provisions of the Companies Act, 1956. JITPL is a generating company having their plant in the State of Orissa engaged in the business of generation and supply of power to various distribution companies within India.

- b) In September 2015, REMCL (Railway Energy Management Company Limited) initiated a bid process on behalf of various divisions of the Indian Railway. The purpose was to procure power through a Medium-Term Open Access (MTOA) arrangement for three years. This procurement was to be facilitated through a Public-Private Partnership (PPP) on a Finance, Own, and Operate (FOO) basis.
- c) During a pre-bid meeting on 07.01.2016, REMCL confirmed that the Indian Railways is considered a deemed distribution licensee according to Section 14(3) of the Electricity Act. This status was based on an Order dated 05.11.2015 by the Commission (Petition No. 197/MP/2015) and an Order dated 16.12.2015 by the Appellate Tribunal (I.A. No. 445 of 2015).
- d) The Petitioner entered into an APP (Agreement to Purchase Power) with Respondent No. 1 for 9 MW at a tariff of Rs. 3.62 per kWh, comprising a base fixed charge and a base variable charge. A Supplementary Agreement on 19.08.2020 extended the contract period with the same conditions, obligating the Petitioner to pay fixed charges regardless of power flow.
- e) The Petitioner gave a performance security of Rs. 90 lakhs (Rs. 10 lakhs per MW) as an irrevocable bank guarantee to Respondent No. 1 as per Article 9 of the APP. It has been extended and is valid until 15.11.2021.
- f) The Petitioner and Respondent No.1 were also required to fulfil certain conditions precedent to arrive at the appointed date in order to execute the APP. The appointed date as per the APP is the date on which , and every condition precedent is satisfied or waived, as the case may be in accordance with the provisions of the APP, and such date shall be the date of commencement of the contract period.
- g) The Petitioner needed to apply to the Central Transmission Utility (CTU) for transmission system access, following procedures outlined by Regulation 4 of 2009 Connectivity Regulations. This required submitting documents and obtaining a No Objection Certificate (NOC) from the State Load Dispatch Center (SLDC) in Delhi, as mandated in Format MTOA-3. Respondent No. 1, NR Delhi, is responsible for obtaining

this NOC from SLDC Delhi. Under clause 6.1.2 of the Agreement, Respondent No. 1, as an intra-state entity, is solely responsible for procuring the NOC from SLDC Delhi.

h) In view of the above-stated Regulation and MTOA 3 requirement, Respondent No.1 made an application to SLDC, Delhi, on 12.09.2017 for the issuance of an NOC for the supply of power from Petitioner under Medium Term Open Access for the period 01.02.2018 to 01.01.2021. The SLDC issued the NOC to Respondent No.1 vide letter dated 21.09.2017 for the period 01.02.2018 to 31.01.2021.

i) Respondent No.1 provided this NOC dated 21.9.2017 to the Petitioner and then Petitioner vide letter dated 29.09.2017 applied to Power Grid Corporation of India Ltd. ("PGCIL" in short) for grant of Medium Term Open Access ("MTOA"). PGCIL vide letter dated 10.11.2017 granted MTOA from 01.03.2018 to 31.01.2021, i.e. for a period of 35 months instead of 36 months as sought.

j) The scheduling of power from JITPL under MTOA started on 31.3.2018.

k) As per Clause 3.1.1 of the APP, at any time 3 (three) months prior to the expiry of the Contract period, the Parties may, with mutual agreement, extend the Contract Period for such further period as they may determine, but not exceeding the 25% (Twenty-Five per cent) of the initial contract period or one year, whichever is lower. Further, as per Clause 3.2 of the APP, in the event that an extension of the Contract period due to the supplier in accordance with the provisions of this Agreement is not granted by the Utility for any reason, the Utility shall, within 30 (thirty) days of the expiry of this Agreement, pay to the Supplier a lump sum amount computed in accordance with this Clause 3.2 in lieu of the Fixed Charge that would have been payable to the Supplier if the Contract Period shall have been extended in accordance with this Agreement.

l) On 14.08.2020, Respondent No. 1 sought an extension of the MTOA contract from Petitioner by nine months, from 1.3.2021 until 30.11.2021; citing clause 3.1.1 of the APP. The Petitioner consented on 18.08.2020 to the extension and requested a Supplementary Agreement. On 19.08.2020, a Supplementary Agreement extended the power procurement period between Petitioner and Respondent No. 1 to 30.11.2021. On 21.09.2020, Petitioner requested Respondent No.1 to obtain NOC from Delhi SLDC for the extended period to apply for MTOA to CTU. The Petitioner also apprised

Respondent No.1 that the present MTOA is valid till 31.01.2021 in accordance with the earlier NOC furnished by State SLDC. After that the Power will be required to be scheduled under STOA in the absence of MTOA. Accordingly, Respondent No.1 has to arrange the State SLDC NOC on a monthly basis or a day-ahead basis.

m) On 18.11.2020, the Petitioner again requested Respondent No.1 to provide the State SLDC NOC required for procuring supply of power under MTOA for balance period from 01.03.2021 to 30.11.2021 from PGCIL. The Petitioner further informed that now MTOA NOC from SLDC is required to obtain for the period from 1.5.2021 to 30.11.2021 and under STOA for the period from 1.2.21 to 30.4.2021.

n) Vide letter dated 20.11.2020, Respondent No.1 intimated to the petitioner that NR-Delhi, vide email dated 20.08.2020, requested SLDC to issue NOC for MTOA for the extended period. However, SLDC vide email dated 21.08.2020 rejected the request of NR mentioning that under MTOA, power procured should exceed one year but not exceed 03 years (as per DERC Open Access Regulation, 2005 amendment dated 04.10.2017). It was further stated that in this letter Respondent No.1 advised the Petitioner about the applicability of Article 3.2 of the APP and, consequently, the liability of NR to procure access to the transmission system for carrying the electricity from the power station to the Delivery point (clause 4.1.3 e) is of the JITPL and not NR.

o) Respondent No.1 asked for comments with regard to the implementation of SAPP for procurement of power under MTOA for an extended period and also a liability on either party if the contract was mutually terminated. Respondent No.1 deliberately and with malafide intentions did not pursue the matter with State SLDC earnestly seeking NOC, as the application was not even made in the proper format to State SLDC. Respondent No.1 made a hollow formality in making the request to State SLDC for NOC, as they did not actually want to procure power from the petitioner, however, at the same time entered into a supplementary agreement for an extension of nine months, just to avoid the fixed charges as per Clause 3.2 of the APP.

p) In a letter dated 24.11.2020, the Petitioner responded to Respondent No.1's letter of 20.11.2020, addressing the implementation of the Supplementary Agreement (SAPP) dated 19.08.2020 and liabilities in case of contract termination.

- (a) The Petitioner emphasized that the APP and SAPP were duly implemented, and requested NOC under STOA from 01.02.2021. They suggested Respondent No.1 to approach DERC with a petition for removal of difficulty in obtaining the NOC from Delhi-SLDC under MTOA.
- (b) The Petitioner argued against considering termination as mutual, stating they hadn't refused the power supply. They reminded that any deviations after contract execution attract legal liabilities, urging Respondent No.1 to provide the necessary NOC for power scheduling.
- q) Vide letter dated 11.01.2021, the Petitioner requested Respondent No.1 to provide NOC under STOA from Delhi State SLDC in advance or on a day-ahead basis to schedule power from 01.02.2021 onwards. They also informed that without the NOC, power could only be supplied under STOA from 01.02.2021. In another letter dated 27.01.2021, the Petitioner reiterated the urgent need for the NOC from SLDC Delhi for both MTOA and STOA for the remaining period of the original APP (from 01.02.2021 to 28.02.2021) and for the extended period (from 01.03.2021 to 30.11.2021). This was to ensure smooth power scheduling from 01.02.2021 and avoid unnecessary fixed charges liabilities.
- r) Vide dated 28.01.2021, Respondent No.1 wrongly interpreted Clause 5.1.5 of the agreement, shifting the responsibility of obtaining NOC from State SLDC onto the Petitioner. Additionally, Respondent No.1 absolved itself from the obligation to take power short-term under the agreement. In another letter dated 01.02.2021, Respondent No.1 baselessly alleged that the Petitioner failed to procure the NOC from Delhi SLDC, despite it being the responsibility of Respondent No.1 to obtain it. It was noted that initially, Respondent No.1 had obtained the NOC from Delhi State SLDC at the beginning of the APP.
- s) Vide letter dated 06.02.2021, the Petitioner once again requested Respondent No.1 to provide the STOA NOC from SLDC Delhi for February 2021 and onwards to avoid fixed charge liability without power scheduling. They emphasized continuous availability from 01.02.21. On 13.02.2021, the Petitioner extended the validity of the Bank Guarantee against the APP dated 13.04.2016 until 15.05.2021, with an extended claim period until 15.05.2022. In a letter dated 18.02.2021, the Petitioner asserted compliance with the APP terms regarding MTOA until 31.01.2021, based on the NOC provided by Respondent No.1. They reminded Respondent No.1 of the necessity to obtain NOC

from SLDC Delhi for power scheduling from 01.02.2021, as per the Supplementary Agreement dated 19.08.2020, to avoid fixed charge payment liability.

- t) Respondent No.1, in a letter dated 25.02.2021 (received on 09.03.2021), returned the extended bank guarantee, alleging Petitioner's failure to arrange the necessary NOC as per the agreement clauses. They stated that open access couldn't be operationalized from 01.02.2021, and no power was taken from the Petitioner, suggesting contract termination. This unilateral decision to terminate the contract is deemed unlawful, as Respondent No.1 initially entered into a Supplementary Agreement for extension but then failed to take power to avoid fixed charge payments. As per the legally executed APP, Respondent No.1 is liable for fixed charges and compensation/damages as per the contract terms.
- u) Vide email dated 01.03.2021, the Petitioner submitted an invoice for February 2021, claiming fixed charges. Respondent No.1 returned the invoice via email on 02.03.2021, citing the Petitioner's failure to arrange the required NOC as per the APP dated 13.04.2016, which hindered power scheduling. On 03.03.2021, the Petitioner sent a demand letter for payment of Rs. 76,59,792/- for February 2021 towards fixed costs to Respondent No.1, emphasizing their daily capacity declaration and the absence of schedule due to the lack of NOC, which was supposed to be provided by Respondent No.1. In response, on 11.03.2021, Respondent No.1 disputed liability to pay the fixed charges, based on their own interpretations of the APP dated 13.04.2016, and refused to make the payment.
- v) On 15.03.2021, the Petitioner clarified to Respondent No.1 that any unilateral departure from the terms of the APP without consent would be subject to the terms and conditions of the APP valid until 30.11.2021. On 14.05.2021, the Petitioner extended the validity of the Bank Guarantee against the APP dated 13.04.2016 until 15.11.2021, with an extended claim period until 15.11.2022. This extension was also communicated to Respondent No.1 via email on the same date.
- w) Thus, a dispute has arisen between the Petitioner and the Respondents for non-off-take of supply of power and for non-payment of fixed charges under the APP dated 13.04.2016 due to inappropriate and unjustified stand taken by Respondent No.1. Details of the impugned bills are - Feb-2021: MI2019201066 dated 01.03.2021 amounting Rs.76,59,792/-, Mar-2021: MI2019201079 dated 01.04.2021 amounting Rs. 84,80,484/, April-2021: MI2019201097 dated 01.05.2021 amounting Rs. 82,62,000/-

Hearing dated 17.09.2021

5. The Petitioner argued that NR was obligated to obtain the NOC from SLDC, Delhi, as it is an intra-state entity and only NR could procure the NOC from SLDC. The Petitioner also pointed out that under the terms of the APP (Article 3), NR was responsible for providing reasonable assistance to the Petitioner in obtaining necessary permits.
6. The Commission admitted the Petition and directed the Petitioner to submit the following:
 - a. *Copy of DERC (Terms and conditions of open access) Regulations, 2005 and DERC (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017.*
 - b. *Clarify whether power against contracted capacity was sold to buyer(s) other than Northern Railways as per clause 10.2.2 of the APP.*
 - c. *Clarify who is responsible to obtain NOC from State SLDC as per terms and conditions of APP and SAPP.*

Submission of Petitioner

7. The Petitioner on an affidavit dated 18.10.2021, has submitted as follows:
 - a) As per APP and SAPP, the procedure prescribed as per the MTOA, it is only the State Utility or intra-state entity which can apply for NOC from SLDC. In the initial stages, Northern Railways sought NOC as per the above-mentioned procedure and agreement.
 - b) As per the standing clearance certificate(s) issued by ERLDC from time to time, the maximum ceiling allowed to the Petitioner for injection is 1138 MW on RTC basis, against which JITPL has injected 946 MW (average) during the period Feb 2021 to Sept 2021 and hence has generated average 191 MW less than the said maximum allowable injection during the period from Feb 2021 to Sept 2021 since the Respondent/Indian Railways-Delhi division has not provided the NOC and has neither taken electricity from the Petitioner despite entering into the APP dated 13.4.2016 and supplementary agreement dated 19.08.2020.

Submissions of Respondents

8. Respondent, Northern Railways, vide affidavit dated 19.01.2022, has submitted as follows:

- a) As per Article 4.1.3(a) of PPA, which mentions prerequisites to be satisfied by the Petitioner, the obligation to procure Open Access to the transmission system for carrying the electricity up to the Delivery Point is of the Petitioner and not the Respondents. It is the duty of the Petitioner to procure access to the transmission system for delivering power to the traction substations of the Respondent No.2 as a precondition and thereafter to maintain/renew permission for the transmission access for the entire duration of the PPA or its extension for the purposes of supplying electricity to the Respondent No.2 in terms of the PPA.
- b) The Respondent No.1 in terms of its obligation under Article 6 (Obligations of Utility) vide application dated 12.09.2017, applied to State Load Despatch Centre, Delhi, for issuance of 'No Objection Certificate' for the supply of power from the Petitioner to Respondent No.2 under MTOA, pursuant to which NOC dated 21.09.2017 was issued by SLDC Delhi for the period from 01.02.2018 to 31.01.2021.
- c) Since the MTOA was made available from 01.03.2018, the appointed date was achieved and the PPA came into force for a period of 3 years, i.e., from 01.03.2018 to 28.02.2021.
- d) It was the obligation of the Supplier, i.e., the Petitioner, to supply electricity to the Utility, i.e., the Respondent No.1 at its traction substations under MTOA. The Petitioner was always aware of the fact that the MTOA that has been granted by the CTU was applicable only till 31.01.2021.
- e) Further, in terms of clause 3.1.1 of the APP, a Supplementary Agreement for Procurement of Power (hereinafter referred to as 'Supplementary PPA') was executed between the parties, wherein the PPA dated 13.04.2016 was extended for a period of 9 months, i.e., up to 30.11.2021.
- f) Accordingly, Respondent No.2 on 20.08.2020 applied to SLDC Delhi for NOC for a period of 10 months commencing from 01.02.2021 to 30.11.2021, i.e., for a total of 10 months (nine months for the extended period and one month for the balance initial contract period). However, on 21.08.2020, the said application was rejected by SLDC

Delhi on the ground that in terms of DERC Open Access Regulations 2005 as amended by DERC Open Access Amendment Regulations 2017, MTOA was available only for a period exceeding one year but not exceeding 3 years.

g) Respondent No.1, vide its letter dated 31.08.2020, made a representation to the Delhi Electricity Regulatory Commission for considering the case of Indian Railways issuing directions to SLDC Delhi to grant MTOA in terms of CERC Open Access Regulations 2009 wherein MTOA is made available for a period exceeding 3 months but not 3 years. However, vide letter 20.10.2020, the Delhi Electricity Regulatory Commission refused to entertain the request of Respondent No.1.

h) Respondent No.1, vide its letter dated 20.11.2020, informed the Petitioner of the status of NOC for MTOA and also sought its comments regarding the mutual termination of the Agreement. It is submitted that in terms of Articles 5.1.5(a) and 6.1.2(a), i.e., in the event non-grant of MTOA or STOA, the parties can mutually decide the course of action.

i) In terms of the above, there is no obligation of the Respondents in regard to Open Access except to provide reasonable support and assistance to the Petitioner in procuring necessary approval. Such a thing expected from the Respondents is not a legal obligation to be fulfilled with any claim for compensation that can be claimed by the Petitioner against the Respondents. In fact, it was the Petitioner's obligation to procure access to the transmission network for the purposes of supply to Respondent No.1. As mentioned above, Respondent No.1, in terms of its obligations under the PPA had approached the Delhi Electricity Regulatory Commission to obtain the necessary directions to the SLDC Delhi for the grant of NOC.

Rejoinder of Petitioner

9. The Petitioner vide affidavit dated 02.02.2022 has reiterated its submissions as in the main Petition.

Hearing dated 29.11.2022

10. The Commission directed the Petitioner to implead Delhi SLDC as a party to the petition. Additionally, Delhi SLDC was instructed to file its reply. Furthermore, the Commission directed the Petitioner to provide on affidavit, the Regulations mentioned in their affidavit dated 20.05.2021. Lastly, Delhi SLDC was directed to provide

clarification on whether only an intra-State entity like Railways can procure NOC or if the generator which enters into an agreement with an intra-State entity can also apply for such NOC.

Hearing dated 10.01.2023

11. The Petitioner informed the Commission that SLDC, Delhi, had been impleaded as per the Commission's directions dated 29.11. 2022, and a revised "Memo of Parties" had been filed accordingly. However, SLDC, Delhi, had not submitted its reply in the matter nor responded to the queries raised by the Commission. The Commission expressed its intention to hear from SLDC, Delhi before making any decision on the issues raised by the Petitioner and thus directed SLDC, Delhi, to file its reply. Additionally, the Commission instructed both the Petitioner and Northern Railways to submit their rejoinders or written submissions. Commission directed the Petitioner to clarify whether the 9 MW power contracted for the period from February 1, 2021, to November 30, 2021, was sold to buyers other than Northern Railways.

Submission of Petitioner

12. The Petitioner vide affidavit dated 13.03.2023 submitted that Petitioner did not sell 9 MW power during the period 01.02.2021 to 30.11.2021, and the said capacity remained idle except for 2 (two) days, when part of the capacity was sold to the buyer. The details are as hereunder:

| Date | UOM | NR-Delhi @ Ex-bus | Sold to Buyer @ Ex-bus | Idle Capacity @ Ex-bus | Idle Capacity @ TSS NR-Delhi |
|-------------|------------|--------------------------|-------------------------------|-------------------------------|-------------------------------------|
| 10.04.2021 | MW | 9.46 | 3.20 | 6.26 | 5.95 |
| 11.04.2021 | | 9.46 | 1.45 | 8.01 | 7.62 |

Submission of Respondent

13. The Respondent, Northern Railways, vide Written Submissions dated 19.04.2023, has submitted as follows:

- a) It was the responsibility of the Petitioner to procure access to the transmission system required for carrying electricity from the power station to the Delivery Point and the same has to be satisfied by the Petitioner. There is no obligation upon the Indian Railways in regard to Open Access except to provide reasonable support and assistance in procuring necessary approval.

- b) Article 3.2 of the PPA provides for the compensation to be paid to the Supplier, i.e., the Petitioner, in case the extension of contract due to the Supplier (such as extension in terms of Article 17.6.2 and 18.3 of the PPA), is not given to the supplier. The said Article itself carves out an exception for the cases covered under Article 3.1.1 of the PPA. The extension of the Contract Period under Article 3.1.1 is not a right per se of the Petitioner but something which is to be mutually decided.
- c) The salient aspect is that the obligation to procure Open Access to the transmission system for carrying the electricity up to the Delivery Point is of the JITPL and not of the Indian Railways (Art. 4.1.3, Art. 5.1.2, Art. 5.1.3, Art. 5.5 to 5.7 and Art. 5.11). Reference may be made to Order dated 07.12.2022 in Petition Nos. 278/MP/2018, 303/MP/2018, 304/MP/2018, and 339/MP/2018 passed by this Commission.
- d) The Petitioner has contended that the Respondent ought to have off taken the power under Supplementary PPA under STOA in case the MTOA was not being made available. In this regard, the intention of the parties at the time when the contract was entered into was clear, namely, that the power shall be supplied by the Supplier under the PPA if and only if the MTOA is available or on STOA till the time MTOA is made available. It is the Petitioner who failed to comply with its obligations under the PPA as it failed to procure MTOA for the period covered under the Supplementary PPA. However, considering that the MTOA was not be made available to the parties in view of the Regulations framed by the Delhi Electricity Regulatory Commission, which came into force after the signing of the PPA and also after procuring MTOA for the initial period, the Respondent in terms of Article 5.1.5(a) and 6.1.2(a) of the PPA called upon the Petitioner to mutually terminate the PPA and the Supplementary PPA.
- e) Without prejudice, taking power under the STOA would have subjected the Respondent to great difficulties in the scheduling of required power by the Respondent and also would have subjected it to unintentional deviation charges as compared to power being procured under Medium Term Open Access.
- f) No breach of any legal obligation has been made by the Respondent with regard to procurement of Open Access for which any claim for compensation can be made by the Petitioner against the Respondent. In fact, it is the Petitioner who is in default of not complying with its obligation to procure access to the transmission system in terms of the PPA.

g) Article 4.2 of the PPA provides for the payment of compensation by the Respondent to the Petitioner only in the event specified therein. There is no provision in the PPA either under Article 4.2 or otherwise for any damages or compensation payable by the Respondents to the Petitioner on non-grant of MTOA for carrying power.

h) The Liquidated Damages payable by the Respondent as provided under Article 19.3 of the PPA do not cover within its scope the payment of any compensation by the Respondent to the Petitioner for non-availability of MTOA. Article 19.3 deals with the event of termination of the contract by the Petitioner for default on the part of the Respondent as specified in Article 19.2. In the facts and circumstances mentioned herein above, the present petition filed by the Petitioner is liable to be dismissed.

Hearing dated 27.09.2023

14. The Petitioner submitted that the Commission, in its RoP dated 29.11.2022, directed SLDC, Delhi, to furnish information as to whether only an intra-State entity such as Railways can procure a NOC or whether the Generator that enters into an Agreement with an intra-State entity can apply for such a NOC. SLDC, in its reply filed before the Commission, vide affidavit dated 14.9.2023, did not respond to this query.

15. Northern Railways (NR) submitted that it is the responsibility of the Generator to obtain the NOC as held by the Commission in the Order dated 7.12.2022 in Petition No. 278/MP/2018, Petition No. 303/MP/2018, Petition No. 304/MP/2018 and Petition No. 339/MP/2018.

16. SLDC, Delhi, submitted that there is no provision for extension of MTOA for 9 months as per the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017. For an MTOA of 9 months, a fresh application has to be filed by the generator. Further, SLDC, Delhi, through an e-mail to Northern Railway, replied that, as per Regulation 7.5 of the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017, after the expiry of the term, Medium Term and Short Term Open Access customers may apply for fresh open access, and the same shall be treated as a new applicant.

17. The Commission directed the SLDC, Delhi, to clarify whether only an intra-State entity such as Railways can procure an NOC or whether the generator which enters into a PPA with an intra-State entity can apply for a NOC and Open Access for the intra-State System of Delhi State for the supply of power at the delivery point to Northern Railways, as per its regulations.

Submission of SLDC, Delhi

18. The SLDC, Delhi, vide affidavit dated 14.09.2023 and 20.10.2023, has submitted as follows:

a) Delhi Electricity Regulatory Commission (DERC) vide Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) Regulation, 2005, dated 03.01.2006, introduced Long Term Open Access (LTOA) and Short Term Open Access (STOA) in Delhi. Subsequently, Medium Term Open Access (MTOA) was introduced vide Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017 dated 04.10.2017.

b) Respondent, NR-Delhi, in its letter dated 20.11.2020 to the Petitioner, had submitted that SLDC Delhi, vide email dated 21.08.2020, rejected the request of the Respondent for MTOA for an extended period of 9 months. The above-mentioned email dated 21.08.2020 was made by SLDC Delhi in response to the email dated 20.08.2020 of the Respondent, wherein Respondent NR-Delhi requested certain details such as application charges and account details for processing of MTOA application for an extended period of 9 months. The relevant part of the above-mentioned email of Northern Railway-Delhi dated 20.08.2020 is reiterated as under –

“As you are aware that Northern Railway - Delhi as deemed Distribution licensee is already procuring power from JITPL under medium term open access. NOC granted by SLDC (Delhi) for procurement of power through MTOA will be expired on 31.01.2021. Therefore, this NOC of MTOA will be required to be extended for further 9 months. To expedite the process you are requested to provide the following details:

- a) Amount of concurrence fees to be paid including GST.*
- b) Account details of SLDC Delhi for making RTGS/NEFT against the concurrence fee.”*

However, no such MTOA application for extended period of 9 months was submitted to SLDC Delhi vide the aforesaid email.

c) SLDC vide aforementioned email had replied that “under MTOA, power procured should be exceeding by 01 year but not be exceeding by 03 year as per DERC Open Access Regulation, 2005 and its amendment dated 04.10.2017”. Also, it was suggested that Northern Railway “tends to avail power through Open Access (OA) for a period less than one year, so it should be procured through STOA”. However, contrary to the claim made by the Petitioner, no such rejection was made by SLDC Delhi over the email in question dated 21.08.2020.

d) Regarding the query of this Commission to clarify whether only an intra-state entity such as Railways can procure an NOC or whether the generator which enters into a PPA with an intra-State entity can apply for an NOC and Open Access for the intra-State System of Delhi State, for the supply of power at the delivery point to Northern Railways, as per its regulations, Delhi SLDC has submitted as follows:

- i. The DERC vide its order dated 01.06.2017 regarding “*In the Matter of: Determination of Open Access Charges and related matters*” issued guidelines for operationalization and implementation of Open Access in Delhi. The guidelines/procedure for implementation of STOA and LTOA are codified as Annexure-A & Annexure-B of the aforementioned order, respectively. Further, with respect to MTOA, DERC vide its aforementioned amendment of DERC (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017 dated 04.10.2017, clarified that the procedure and timelines for grant of MTOA shall be the same as applicable to LTOA.
- ii. For availing of a STOA, the application for Short Term Open Access shall be submitted to the office of the Manager (System Operation – Energy Accounting) State Load Dispatch Centre for further processing. Further, vide clause 2.1 of Annexure-A of the above order, DERC has clarified that consumer/buyer or generating station/sellers seeking Short Term Open Access shall be connected to the Transmission/Distribution System of STU /Distribution Licensees. The relevant part of Annexure-A of the aforementioned DERC order is reproduced herewith –

“2. Connectivity:

The consumer/buyer or generating station/sellers seeking Short Term Open Access shall be connected to Transmission/Distribution System of STU / Distribution Licensees at 11KV or above.”

Hence, for short-term open access, the consumer/buyer or generating station/seller shall be connected to the Transmission/Distribution system of STU/Distribution Licensee. The above clarification is not available in Annexure B of the DERC order dated 01.06.2017, which is applicable for processing of LTOA application (also applicable for MTOA application as per 1st Amendment of DERC (Terms and Conditions for Open Access) Regulation dated 04.10.2017). Further, as per DERC (Terms and Conditions for Open Access) Regulations 2005 dated 03.01.2006, SLDC is responsible for processing STOA applications, and for LTOA and MTOA applications are processed by STU. The application for Long term & Medium-Term Open Access shall be made with State Transmission Utility (STU).

Rejoinder of Petitioner

19. The Petitioner vide affidavit dated 03.11.2023 has submitted that the Petitioner being a CTU-connected entity, the Petitioner cannot apply to SLDC, Delhi to obtain NOC. Respondent No. 1, being an intra-state entity under the instant Regulations and procedure, can only apply and seek NOC from SLDC. Respondent No. 1 had already obtained NOC from SLDC for the period 01.02.2018 to 01.01.2021, and Regulation 4 of CERC (Open Access) Regulations, 2009 stipulates that a generating station which is not connected to the State grid cannot apply for long-term open access or medium-term open access without applying for connectivity.

Hearing dated 18.12.2023

20. The Petitioner submitted as follows:

a) In terms of the directions of the Commission in RoP dated 27.9.2023 to SLDC, SLDC in its reply did not answer manifestly the specific query of the Commission whether an intra-State entity such as Railways can procure NOC or the generator which enters into a PPA with intra-State entity can apply for such NOC and Open Access for the intra-State System of Delhi State, for the supply of power at the delivery point to Northern Railways, as per its Regulations.

b) The Petitioner supplied power to NR under the Agreement for Procurement of Power (APP) dated 13.4.2016 for a period of three years, i.e., from 1.2.2018 to 31.3.2021 through Medium Term Open Access (MTOA) on NOC being provided by the NR from the SLDC, Delhi, for getting connected to the intra-State system for this duration. The

Petitioner submitted the said NOC to CTUIL, and CTUIL, in turn, granted MTOA for the above duration.

c) The Petitioner and NR entered into Supplementary Agreement for Procurement of Power (SAPP) dated 19.8.2020 for extending the contract of supply of power for a further period of 9 months from 1.3.2021 to 30.11.2021, for which NR sought NOC from SLDC, Delhi for this extended duration. However, SLDC rejected the request of NR for a grant of NOC for MTOA on the premise that MTOA is meant for a period of more than one year and less than three years, and as such, NR should apply for the same under STOA.

d) NR is connected with SLDC, Delhi, and it, being the intra-State entity, can only procure NOC from SLDC, Delhi. However, NR failed to procure NOC from SLDC, Delhi.

e) Under these circumstances, since the SAPP dated 19.8.2020, is a part of APP dated 13.4.2016, and if the NR terminates the Power Purchase Agreement unilaterally, the Petitioner is entitled to fixed charges and compensation as agreed under the PPA.

21. SLDC, Delhi, submitted that there is no provision for extension of an MTOA for 9 months as per the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017. For a period of 9 months, a fresh application has to be made under STOA. NR applied for an MTOA of 9 months, but the same was not granted to it as it was not in the proper format of STOA. It is not mentioned in the Regulations anywhere as to who can apply for LTOA and MTOA, i.e., intra-State entity or the generator who enters into the PPA with intra-State entity.

22. NR submitted that APP and SAPP came to an end if MTOA was not available to NR. APP and SAPP were intended for MTOA. SLDC has communicated to NR that NOC for MTOA cannot be granted and the same was duly informed to the Petitioner. In view of this, NR is not levying any penalty or charges on the Petitioner. It was also submitted that NR could not function on a short-term basis as the quantum of power required fluctuates regularly. It was further submitted that while deciding similar issues between Jindal India Thermal Power Limited and Indian Railways and Anr. involving identical Power Purchase Agreements (PPAs), the Commission vide common order dated 7.12.2022 in Petition No. 278/MP/2018 and batch matters did not agree with the Jindal India Thermal Power Limited's argument that the Indian Railway being the intra-

State entity could only have obtained NOC from SLDC. He submitted that the NOC should have been obtained by the Petitioner as per the Regulations and it was required to do so as per PPA, which the Petitioner failed to do. The Petitioner submitted that the said case is different from the present one, and the Petitioner has appealed against the said order.

23. Accordingly, the Commission reserved the matter for Order.

Submissions of Petitioner

24. The Petitioner vide Written Submissions dated 14.01.2024 has submitted as follows:

- a) The Petitioner, being a CTU-connected entity, cannot apply for NOC with Delhi State SLDC for open access power supply. This NOC is specifically for State Embedded entities, like the Respondent Northern Railway (NR), which had previously obtained such NOC on 12.09.2017. The responsibility for fulfilling prerequisites like metering, dues settlement, etc., lies with NR, as it is an Intra-state entity connected to Delhi State Transmission Utility (STU). The CERC Regulations also emphasize that only State Embedded entities or Intra-state utilities, such as NR in this case, can apply for NOC. The Petitioner, JITPL, lacks the necessary connection and cannot fulfil the requirements on behalf of NR, as evidenced by NR's previous successful application for NOC.
- b) NR purposely entered into the SAPP dated 19.08.2020 with JITPL in order to escape its liability under Clause 3.2 of Article 3 of the APP, which clearly provided that:

“Notwithstanding anything to the contrary contained in this Agreement, save and except the extension of contract period specified in the Proviso of Clause 3.1.1, in the event that extension of the contract period due to the Supplier in accordance with the provisions of this Agreement is not granted by the Utility FOR ANY REASON, the utility shall, within 30 days of the expiry of this agreement, pay to the supplier a lump sum amount computed in accordance with this clause 3.2 in lieu of the fixed charge that would have been payable to the supplier if the contract period shall have been extended in accordance with this agreement”.

Clause 3.2 then provides the methodology of computation of the aforesaid lump sum amount payable by the utility to the supplier.

- c) The Petitioner is entitled to compensation and damages under clauses 4.2, 18.2, and 19.3.2 of the APP due to delays caused by NR in obtaining NOC from SLDC, NR's material breach or default of the agreement, and unilateral termination of the SAPP by NR. The SAPP explicitly states that all terms and conditions of the previous agreement remain binding. NR had options like STOA for power procurement but deliberately chose not to pursue them, indicating an intention to avoid liabilities under the agreement.

d) The present case is different from Petitions Nos. 278/MP/2018, 303/MP/2018, 304/MP/2018, and 339/MP/2018 as APP was entered into between the Petitioner and NR-Delhi on providing of NOC by NR-Delhi, and there has been a consistent supply of power in the present case for 3 years, and there was no supply in case of those cases. Further, the supplementary agreement was also executed between the Petitioner and NR-Delhi as per the terms of APP, and then NR-Delhi could not provide NOC to Petitioner and unilaterally terminated the APP and therefore only question, which is required to be determined in the present case, is whether such termination was legal and what compensation the Petitioner is entitled to in terms of wrongful termination of APP by NR-Delhi. The Petitioner has already explained that the unilateral termination of APP was illegal, and the Petitioner is entitled to compensation and damages under Clauses 4.2, 18.2, and 19.3.2 of the APP.

Submissions of Respondent, NR-Delhi

25. The Respondent vide Written Submissions dated 12.01.2024 have submitted as follows:

a) The PPA and Supplementary PPA were premised on the availability of Medium-Term Open Access which enables Railways to vary the scheduling by increasing or decreasing the quantum considering the Railways' distinct requirements. Non availability of MTOA led to the termination of the PPA. Further, under the Supplementary PPA read with the PPA, it was the responsibility of JITPL to procure access to the transmission system required for carrying electricity from the power station to the Delivery Point and the same has to be satisfied by the JITPL. JITPL is wrong in construing Article 3.1.1, read with Article 3.2, as imposing a binding obligation on Railways to extend the purchase of power by nine months on the expiry of the initial term of the PPA.

b) In similar matters inter se between JITPL and Railways, this Commission, in its order dated 07.12.2022 in Petition Nos. 278/MP/2018, 303/MP/2018, 304/MP/2018, and 339/MP/2018 have considered and decided on the issue as raised in the instant case. The Commission, in the said Order, had held that nowhere the Regulations debar JITPL from obtaining NOC for an intra-state entity with whom it has entered into a PPA and is willing to avail MTOA for such transaction. It is the buyer, seller, and trading licensee (if

any) who decides as to who shall obtain open access and NOC as per their mutual Agreement.

c) Further, in the above order, considering the provisions of the PPA therein (which are identical to the provisions of the PPA in the present case), this Commission has held that the PPA clearly places the obligation of obtaining open access till the Delivery Point (TSS connected to State network) on JITPL. The PPA nowhere provides the responsibility to obtain NOC from the State on the Railways.

d) Railways entered into a Power Purchase Agreement (PPA) with JITPL for a period of 3 years from March 1, 2018, to February 28, 2021. However, they exercised their right to extend the contract by 25% or one year, whichever is lower, as per Article 3.1.1 of the contract. Consequently, the contract was extended for 9 months, until November 30, 2021.

e) In August 2020, Railways sought permission from SLDC Delhi to procure power under Medium-Term Open Access (MTOA) for an extended period, as per Article 6 of the contract. However, SLDC Delhi cited Regulations stating that MTOA is only available for periods exceeding one year but not exceeding three years. Railways made representations to DERC, seeking special consideration, but their request was denied. As a result, Railways informed JITPL about the status of the NOC for MTOA and also sought comments on mutual termination of the agreement, as per Article 5.1.5(a) and 6.1.2(a) of the PPA. Although JITPL was supposed to supply power until February 28, 2021, the MTOA was granted only until January 31, 2021, resulting in power supply by JITPL until that date.

f) Railways informed JITPL about their efforts with Delhi SLDC and DERC prior to the expiry of the initial PPA, indicating proactive communication.

g) It was never an obligation on either the JITPL or Railways to enter into Supplementary PPA for an extension of the contract period. The parties can extend it by mutual agreement. It cannot be unilaterally extended by one party to the PPA, or there is an automatic extension of the PPA. In view of the above, Railways had no obligation to extend the supply/procurement by nine months. It could have proceeded on the basis that the contract period need not be extended as a matter of right. In such circumstances, the allegation made by JITPL that Railways had schemed for

termination of the PPA by not getting the Open Access is totally misconceived and blatantly wrong. Thus, it is wrong and denied that the Railways, in order to absolve itself from the liability of fixed charges in terms of Article 3.2, had sought to extend the contract under Article 3.1.1.

- h) Under the PPA executed between the parties, JTL has an obligation to procure access to the transmission system. i) The PPA obligates Railways only to provide reasonable support and assistance on the best endeavour basis. Besides the PPA, the Regulations applicable also provide for a generating company to apply for Open Access.
- i) Guidelines/Procedure for Implementation of Long-Term Open Access notified by DERC (also applicable for MTOA as per Regulation 10(4) of DERC Open Access Regulation as amended on 10.04.2017. Thus, for the purposes of availing MTOA and LTOA, there is no such requirement for the applicant to be connected to the STU/Distribution Network of the State.
- j) JITPL has contended that the Railways ought to have taken the power under Supplementary PPA under Short Term Open Access in case the Medium-Term Open Access was not being made available, as the PPA under Article 3.1.1 provides for taking power under STOA.
- k) The intention of the parties at the time when the contract was entered into was clear, namely, that the power shall be supplied by the Supplier under the PPA if and only if the MTOA is available. Article 3.1.1 clearly provides that “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”. Article 3.1.1 further provides that Railways, at its discretion, may take 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 the grant of the Medium-Term Open Access. Further, the period of the contract will be reckoned from the date of getting the Medium-Term Open Access. In view of the above, firstly, it is the discretion of the Railways to take power on STOA and not a right of JITPL to supply power under STOA. Secondly, power under STOA can be availed by Railways only till such MTOA is made available. The PPA does not contemplate a situation where the power flow could commence on STOA even when MTOA shall never be made available. In the present case, from the facts stated hereinabove, in view of the DERC Open Access Regulation, MTOA shall not be made available at all. Thus, the power flow cannot commence, and as such, the parties were

to discuss the same in terms of Articles 5.1.1 and 6.1. Considering the legal and factual position as regards the availability of MTOA, Railways suggested mutual termination since it was believed that neither party could be held responsible for this situation. It is pursuant to this that the Railways returned the extended Bank Guarantee furnished by JITPL vide its letter dated 25.02.2021.

l) Under STOA, Regulations only provide for a reduction in the schedule and that also after a period of two days. Whereas if the power is procured under MTOA the drawing entity is entitled to increase or reduce its schedule as per its requirement and that also on an immediate basis subject to the provisions of the applicable Regulations. It is submitted that Railways have a fluctuating load pattern, which is dependent on the running of trains. In some time blocks, the requirement is low and in some, it is high. Under STOA, Railways shall not be able to manage its load requirement, therefore subjecting it to unintentional deviation charges.

m) The Liquidated Damages payable by the Railways as provided under Article 19.3 of the PPA do not cover, within its scope, the payment of any compensation by the Railways to the JITPL for the non-availability of Medium-Term Open Access.

Analysis and Decision

26. We have considered the submissions of the parties and perused the documents available on record.

27. Petitioner has submitted that they were supplying power to NR under an APP dated April 13, 2016, for a three-year period from February 1, 2018, to March 31, 2021, under MTOA with NOC from State Load Dispatch Centre (SLDC) in Delhi. Later, the Petitioner and NR extended their contract through a Supplementary Agreement for Procurement of Power (SAPP) dated August 19, 2020, for an additional 9-month period from March 1, 2021, to November 30, 2021. NR applied for NOC from SLDC Delhi for MTOA during this extension, but SLDC rejected the request, stating that MTOA is for periods longer than one year but less than three years. NR is connected with SLDC, Delhi, and it, being the intra-State entity, can only procure NOC from SLDC, Delhi. However, NR failed to procure NOC from SLDC, Delhi. Under these circumstances, since the SAPP dated 19.8.2020 is a part of APP dated 13.4.2016, and if the NR terminates the Power Purchase Agreement unilaterally, the Petitioner is entitled to fixed charges and compensation as agreed under the PPA.

28. Respondent NR has submitted that under the PPA executed between the parties, the obligation to procure access to the transmission system is of JITPL, and the PPA obligates Railways only to provide reasonable support and assistance on the best endeavour basis. Besides the PPA, the Regulations applicable also provide for a generating company to apply for Open Access. Respondent NR has referred to an Order dated 7.12.2022 involving Jindal India Thermal Power Limited and Indian Railways in batch matter 278/MP/2018 and others. In this order it was held that the Petitioner has failed to comply with this requirement of obtaining the NOC and subsequent open access, similar to the circumstances outlined in the instant case. Under STOA, Railways shall not be able to manage its load requirement, therefore subjecting it to unintentional deviation charges.

29. Respondent No. 3, SLDC Delhi, has submitted that there is no provision for extension of an MTOA for 9 months as per the Delhi Electricity Regulatory Commission (Terms and Conditions for Open Access) (First Amendment) Regulations, 2017. For a period of 9 months, a fresh application has to be made under STOA. NR applied for an MTOA of 9 months, but the same was not granted to it as it was not in the proper format of STOA. It is not mentioned in the Regulations anywhere as to who can apply for LTOA and MTOA, i.e., intra-State entity or the generator who enters into the PPA with intra-State entity.

30. We have considered the rival submissions of the parties. We observe that the Petition was filed in 2021 when the contract period between Petitioner and Respondent NR was subsisting till 30.11.2021. Since the contract period has expired already, Prayer No.1 and Prayer No.2 of the Petitioner do not survive. However following issues arise for our consideration:

Issue No1: Whose responsibility was it to obtain NOC from SLDC/STU to enable the grant of open access under the agreements entered into between parties?

Issue No.2: Whether any directions are required to be issued to Respondent No. 1 to pay fixed charges for the period from Feb-2021 up to November 2021 along with the compensation/damages as per APP dated 13.04.2016;

31. Now, we proceed to analyse the above issues.

Issue No. 1: Whose responsibility was it to obtain NOC from SLDC/STU to enable the grant of open access (MTOA/STOA) under the agreements entered into between parties?

32. We observe that power flow from the generating plant of the Petitioner to the Delivery Point of Respondent No.1 (TSS point in this case) involves two different Transmission networks. Petitioner's Generating Station is connected to CTU (Central Transmission Utility), and the Delivery Point of Respondent No.1 is connected to the STU network of Delhi. Power will flow from the Generating Station at Orissa through the CTU network to the CTU periphery and then to the STU interconnection periphery of the State of Delhi and then will flow through the STU transmission network of Delhi till TSS points of Respondent No.1.

33. The Petitioner has submitted that it was required to apply to the Central Transmission Utility (CTU) for transmission system access, following the procedure outlined by Regulation 4 of Connectivity Regulations, 2009. This requires submitting documents and obtaining a No Objection Certificate (NOC) from the State Load Dispatch Center (SLDC) in Delhi, as mandated in Format MTOA-3.

34. We have perused the APP between Petitioner and Respondent NR. The relevant clauses are quoted as follows:

A) Article 4.1.3(e) :

"4.1.3 The Conditions, Precedent required to be satisfied by the Supplier within a period of 90 (ninety) days from the date of this Agreement shall be deemed to have been fulfilled when the Supplier shall have:

.....

(e) *procured access to the transmission system for carrying electricity from the Power Station to the Delivery Point. ** (to be satisfied by the supplier within a period of 180 days from the date of this Agreement.*

....."

As per the above, the responsibility to obtain transmission open access was that of the petitioner till the delivery point.

B) Delivery Point as defined in the PPA:

"Delivery Point" means any point in the inter-state/intra-state Grid where the electricity supplied under this Agreement is received by the Utility."

As per the RFQ submitted by the Petitioner, the Delivery point in the instant case is the Railway Traction substation connected with respective STUs. The relevant clause of RFQ is quoted as follows:

“1.3 Delivery Point/Points of Delivery

“Railway Traction Sub-Stations as per detailed enclosed at Annexure=1 connected with respective State transmission Utilities (STUs) Grid sub-station points in the states of Madhya Pradesh and Chattisgarh at which power would be consumed”

C) Article 5.1.5:

“

5.1.5 The Supplier shall, at its own cost and expense, In addition to and not in derogation of its obligations elsewhere set out in this Agreement:

- (a) *Make, or cause to be made, necessary applications to the relevant Government Instrumentalities with such particulars as may be required for obtaining Applicable Permits, and obtain and keep in force and affect such Applicable Permits in conformity with Applicable Laws; Non-grant of Short & Medium term open access shall be mutually decided by The Utility and Supplier;*

.....”

As per the above, the Petitioner is under obligation to make an application to the relevant government instrumentalities for obtaining applicable permits. It was also agreed between the parties that the non-grant of STOA and MTOA shall be mutually decided by the parties.

D) Article 3.1.1:

“

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 as 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.”

As per the above, the Procurement contract was supposed to commence from the date of getting Medium-term open access. It was the discretion of the Utility to take power for a short-term duration. Also, prior to the expiry of the Contract Period, the Parties may by mutual agreement, extend the Contract Period for such further period as they may determine.

35. From a perusal of the above-quoted clauses, we observe the following:
- a. Procurement contract was supposed to commence from the date of getting Medium-term Open Access, thereby implying that Medium-term open access was the primary requirement of the contract;
 - b. Responsibility to obtain open access till delivery point, i.e., till Traction substation point at STU periphery, was that of the Petitioner;
 - c. It was the discretion of the Utility to take power for a short-term duration.
36. The entire case of the Petitioner is that it could have not obtained the NOC from STU since it is not an intra-state entity and that it was the responsibility of Respondent No.1 to obtain the NOC from STU. Let us peruse the Delhi SLDC's submissions in this regard.
37. Delhi SLDC has submitted that for short-term open access, the consumer/buyer or generating station/seller shall be connected to the Transmission/Distribution system of STU/Distribution Licensee, implying that an intra-state entity can obtain NOC for short-term open access. Delhi SLDC also submitted that this is not a requirement for the processing of LTOA and MTOA applications and that SLDC is responsible for processing STOA applications, and STU is responsible for LTOA and MTOA applications. Further, during the Hearing held on 18.12.2023, Delhi SLDC submitted that it is not mentioned in the Regulations anywhere as to who can apply for LTOA and MTOA, i.e., intra-State entity or the generator who enters into the PPA with the intra-State entity.
38. We have perused the submissions of Delhi SLDC and observe that as per Delhi SLDC, a generator or an intra-state entity, anyone can obtain NOC for STU system for LTOA or MTOA, but NOC for STOA can only be obtained by an intra-state entity. Accordingly, it is concluded that the Petitioner could have obtained NOC for the STU system for LTOA or MTOA but not for STOA.

39. After concluding the above, it is to be decided whether it was mandatory for Respondent to extend the contract under STOA and whether Respondent No.1 was mandated to obtain NOC for such STOA as per terms of PPA.

40. We observe that the entire issue has arisen due to Supplementary PPA (SAPP) dated 19.8.2020. SAPP dated 19.8.2020 provides as follows:

“WHEREAS, NR and JITPL had executed the Agreement for procurement of power in Delhi (hereinafter referred to as “Agreement”) dated 13.04.2016 with the procurement contracted for a period of 3 (three) years from the date of getting the Medium Term Open Access, which is completing on 28.02.2021.

NOW IT IS HEREBY AGREED by both the parties, i.e. NR and JITPL to extend the said Agreement mutually under clause 3.1.1 of the Agreement as under:-

1. *The parties agree to the following facts:*
 - a) *NR has entered into Agreement dated 13.04.2016 with JITPL for procurement of power through Medium Term Open Access by NR for Delhi state.*
 - b) *NR has submitted the letter no. 230/Elect/TRD/21/10/Power trading/Delhi dated 18.08.2020 communicating that under clause 3.1.1 under article 3 of the APP, the contract period may be extended upto a period of 9 months and JITPL may give its consent for the extension of the contract period by 9 months i.e. from 01.03.2021 to 30.11.2021.*
 - c) *JITPL vide its letter No. JITPL/NR-Delhi/EB/FY21/180820 dated 18.08.2020 communicating that under clause 3.1.1 under article 3 of the APP for the state of Delhi. JITPL give its consent for the extension of the contract upto a period of 9 months i.e. from 01.03.2021 to 30.11.2021.”*

As per the above, both parties mutually agreed to extend the contract for a period of 9 months, i.e., from 01.03.2021 to 30.11.2021, on the same terms and conditions as per the Agreement (APP) dated 13.04.2016.

41. The issue arose in the instant Petition since MTOA was not available for an extension of the contract by 9 months. and Respondent No.1 did not wish to avail of such power under STOA.

42. We have perused the Responsibility of Respondent No.1 under the PPA where Clause 6.1.2 of the Agreement provides as follows:

“6.1.2 The Utility agrees to provide support to the Supplier and undertakes to observe, comply with and perform, subject to and in accordance with the provisions of this Agreement and Applicable Laws, the following:

- (a) *Upon written request from the Supplier, and subject to the Supplier complying with Applicable Laws. Provide reasonable support and assistance to the Supplier*

in procuring the Applicable Permits required from any Government Instrumentality for operation of the Project; Non grant of Short & Medium term open access shall be mutually decided by the Utility and Supplier...”

As per the above, Respondent No.1 was to provide reasonable support to the supplier, and that Non-grant of Short & Medium Term Open Access shall be mutually decided by the Utility and Supplier. We observe that there is nothing in the PPA that puts the onus of obtaining NOC on Respondent No.1. The issue of MTOA and STOA was to be mutually decided.

43. We observe that for the extended contract of 9 months, MTOA was not an option under the DERC Regulations which was allowed only for more than one year. Respondent No.1 submitted that it provided reasonable support to the Petitioner in the instant case by approaching Delhi SLDC and DERC requesting to allow MTOA for the extended contract since Respondent No.1 cannot take power under STOA. Respondent No.1 has further submitted that Railways have a fluctuating load pattern that is dependent on the running of trains; in some time blocks, the requirement is low, and in some, it is high, and under STOA Railways shall not be able to manage its load requirement, thereby subjecting it to unintentional deviation charges.

44. We observe that Respondent No.1 did not wish to take power under STOA and it provided reasonable support to Petitioner by approaching Delhi SLDC and DERC for obtaining NOC under MTOA.

45. In the light of the factual and legal position posed above, we observe that the PPA is for providing power under MTOA, and taking power under short term is entirely the discretion of Respondent No.1. Further, it was the responsibility of Petitioner to obtain open access including NOC till delivery point, as per NOC for the STU system. The PPA nowhere places the responsibility on Respondent No. 1 to obtain NOC from STU/SLDC. Even if it is assumed that Respondent No. 1 would have agreed to take power under STOA from Petitioner and made an application of STOA to SLDC, it does not make it a responsibility of Respondent No.1 under PPA. The express responsibility to obtain open access to the delivery point is that of the Petitioner, and for any failure to achieve such open access, the Petitioner is liable. Further, the Petitioner cannot coerce Respondent No.1 to take power under STOA in terms of PPA.

46. The issue is decided accordingly.

Issue No.2: Whether any directions are required to be issued to Respondent No. to pay fixed charges for the period from Feb-2021 up to November 2021 along with the compensation/damages as per APP dated 13.04.2016;

47. Petitioner has claimed fixed charges from Respondent NR for the period from 1.2.2021 till November 2021 under Clauses 4.2, 18.2, and 19.3.2 of the APP dated 13.04.2016.

48. We observe that the period from 1.02.2021 to the end of February 2021 is covered under the APP dated 13.04.2016 and the period from 1.3.2021 onwards is covered under Supplementary PPA dated 19.08.2020.

49. We now have to deal with each period separately under the following paragraphs.

Period from 1.02.2021- 28.02.2021

50. Vide email dated 01.03.2021, the Petitioner submitted an invoice for February 2021, claiming fixed charges. Respondent No.1 returned the invoice via email on 02.03.2021, citing the Petitioner's failure to arrange the required NOC as per the APP dated 13.04.2016, which hindered power scheduling. On 03.03.2021, the Petitioner sent a demand letter for payment of Rs. 76,59,792/- for February 2021 fixed costs to Respondent No.1, emphasizing their daily capacity declaration and the absence of schedule due to the lack of NOC, which was supposed to be provided by Respondent No.1.

51. We observe that the Petitioner's main argument hinges on the issue of the responsibility of arranging a NOC. We also observed that MTOA expired on 31.1.2021, and there was no open access available from 1.02.2021. We also observe that vide letter dated 11.01.2021; the Petitioner requested Respondent No.1 to provide a NOC under STOA from Delhi State SLDC in advance or on a day-ahead basis to schedule power from 01.02.2021 onwards.

52. Petitioner has relied on Clauses 4.2, 18.2, and 19.3.2 of the PPA while seeking fixed charges from Respondent. We have perused the referred clauses quoted as follows:

"4.2 Damages for delay by the Utility

In the event that (i) the Utility does not procure fulfilment or waiver of any or all of the Conditions Precedent set forth in clause 4.1.2 within the period specified in respect thereof, and (ii) the delay has not occurred as a result of breach of this Agreement by the Supplier or due to Force Majeure, the Utility shall pay to the Supplier Damages in

an amount calculated at the rate of 0.1% (zero point one per cent) of the Performance Security for each day's delay until the fulfilment of such Conditions Precedent, subject to a maximum of 20% (twenty per cent) of the Performance Security."

"18.2 Compensation for default by the Utility

In the event of the Utility being in material breach or default of this agreement at any time after the Appointed Date, it shall, upon receipt of the demand supported by necessary particulars thereof, pay to the Supplier by way of compensation, all direct costs suffered or incurred by the Supplier as a consequence of such material breach or default; provided into no such compensation shall be payable for any material breach or default in respect of which Damages have been expressly specified in this agreement. For the avoidance of doubt, compensation payable may include interest payments on debt, O&M Expenses and all other costs directly attributable to such material breach or default but shall not include loss on account of Tariff revenue from sale of electricity to other Distribution Licensees and Buyers and other revenues, debt repayment obligations or any consequential losses."

"19.3.2 Upon Termination on account of a Utility Default, the Utility shall pay to the Supplier, by way of Termination Payment, an amount equal to the Fixed Charge that would have been due and payable for Normative Availability for a period of [3 (three) months] as if the Contracted Capacity was Available for such [3 (three)] months from the dated of Termination."

"

53. We observe that the above clauses provide treatment for an event of default by a Utility or a breach of contract by a Utility. The Petitioner has claimed the non-availability of NOC under STOA as a breach of contract by the Respondent. We have already concluded in Issue No.1 that the arrangement of open access, including NOC, was the responsibility of the Petitioner and that off-taking power under short term was solely at the discretion of Utility.

54. In light of the discussion above, we do not find merit in the Petitioner's prayer seeking fixed charges from the Respondent for February 2021.

Period from 1.03.2021- November 2021

55. The Petitioner has stated that the Supplementary Agreement dated 19.08.2020 was executed between NR-Delhi and JITPL. This agreement, mandated that NR-Delhi off-take power from JITPL for an extended period of 9 months in continuation of the earlier period of thirty-six months, keeping all other conditions of the APP dated 13.04.2016 the same. Therefore, NR-Delhi is liable to make payment of fixed charges irrespective of the flow of power.

56. Respondent Northern Railways, has submitted that Article 3.1.1 of the PPA stipulated that the parties may agree to extend the Contract Period for up to 25% of the initial

term (i.e. nine months for a thirty-six months initial period). However, it is pertinent to note that this extension is contingent upon mutual consent and not as a right of the Petitioner per se.

57. Taking into consideration submissions of both parties, we observe Articles 3.1 and 3.2 of the APP as reproduced below-

“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

3.2 Extension of Contract Period

Notwithstanding anything to the contrary contained in this Agreement, save and except the extension of Contract Period specified in the Proviso of Clause 3.1.1, in the event that extension of the Contract Period due to the Supplier in accordance with the provisions of this Agreement is not granted by the Utility for any reason, the Utility shall, within 30 (thirty) days of the expiry of this Agreement, pay to the Supplier a lump sum amount computed in accordance with this Clause 3.2 in lieu of the Fixed Charge that would have been payable to the Supplier if the Contract Period shall have been extended in accordance with this Agreement. For computation of the aforesaid lump sum amount payable hereunder, the Fixed Charge due and payable for and in respect of the last month of the Contract Period shall be deemed as the base and the amount so determined shall be reduced by 10% (ten per cent) for the following month and the same computation shall be repeated for every subsequent month for the purposes hereof. For the avoidance of doubt and by way of illustration, if the Fixed Charge for the last month of the Contract Period is Rs. 1 crore (Rupees one crore) and the period of foregone extension is 2 (two) months, the amount payable for and in respect of the first and second months shall be a sum of Rs. 90 lakh (Rupees ninety lakh) and Rs. 81 lakh (Rupees eighty one lakh) respectively. It is further clarified that payment for a part month shall be computed on a proportionate basis. The Parties further agree that the payment of such amount shall be deemed to form part of the Secured Obligations and may be recovered by the Supplier under and in accordance with Article 13.”

58. From a cohesive reading of Article 3.1.1, we observe that for an extension of the contract period, the parties must mutually agree. This extension can be for a maximum period of up to 25% of the initial term (i.e., nine months for a thirty-six-month initial period). However, it is pertinent to note that this extension is subject to mutual consent

of both parties, that is, the Supplier as well as the Utility. Further, as per Clause 3.2, we observe that in the event that an extension of the Contract Period is not granted by the Utility for any reason, the Utility shall, within 30 (thirty) days of the expiry of this Agreement, pay to the Supplier a lump sum amount in lieu of the Fixed Charges.

59. We also note that both parties mutually agreed to extend the contract for a period of 9 months, i.e., from 01.03.2021 to 30.11.2021, on the same terms and conditions as per the Agreement (APP) dated 13.04.2016.

60. The Petitioner has submitted that Respondent No. 1 extended the contract to save itself from liability of fixed charges but failed to obtain the NOC for the supply of power under the contract.

61. Respondent No.1, in this context, has submitted that it was never an obligation on either the JITPL or Railways to enter into Supplementary PPA for an extension of the contract period; the parties can extend it by mutual agreement. Respondent No.1 has also submitted that it cannot be unilaterally extended by one party to the PPA or that there is an automatic extension of the PPA, and accordingly, Railways had no obligation to extend the supply/procurement by nine months and that in such circumstances, the allegation made by JITPL that Railways had schemed for termination of the PPA by not getting the Open Access is totally misconceived and wrong.

62. We observe that the contract was to be extended on a mutual agreement basis under Clause 3.1.1 of the PPA, and it was not mandatory to extend the contract. In the instant case, Petitioner and Respondent No.1 extended the contract for nine months. Post extension of the contract for scheduling of power, open access is required, which was the responsibility of the Petitioner under the PPA as concluded at Issue No.1. Further, it has also been concluded at Issue No.1 that Petitioner could not coerce Respondent No.1 to take power under STOA and it was the discretion of Respondent No.1 to take power under STOA or not.

63. We observe that the prayer of the Petitioner seeking fixed charges from Respondent No.1 under Clause 3.2 of the PPA does not survive in light of the extension of the contract signed by Respondent No.1 dated 19.8.2020. We do not agree with the

contention of the Petitioner that Respondent No.1 extended the contract to save itself from payment of fixed charges under Clause 3.2 of the PPA. We observe that Respondent No.1, in accordance with the agreements, has made all efforts to ensure the availability of NOC under MTOA. Further, it is important to note that STOA was at the discretion of Respondent No.1 and not an obligation on the part of Respondent No.1.

64. Accordingly, the Petitioner's prayer seeking fixed charges from Respondent No.1 under Clause 3.2 of the PPA is devoid of merit and is rejected.

65. The Petition No. 151/MP/2021 is disposed of in terms of the above.

sd/-
(P. K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(Jishnu Barua)
Chairperson