

**Central Electricity Regulatory Commission  
New Delhi**

**Petition No. 7/RP/2024**

**Coram:**

**Shri Jishnu Barua, Chairperson  
Shri Ramesh Babu V., Member  
Shri Harish Dudani, Member**

**Date of Order: 20<sup>th</sup> January, 2025**

**In the matter of:**

Review Petition under Section 94 of the Electricity Act, 2003 read with Section 114 of the Code of Civil Procedure, 1908, and Regulation 52 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2023 seeking review of the order dated 18.1.2024 passed in Petition No.114/MP/2019.

**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.

**...Review Petitioners**

**Vs.**

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

**...Respondent**

**Parties Present** : Shri Vishrov Mukerjee, Advocate, GETL & GWEL  
Shri Yashaswi Kant, Advocate, GETL & GWEL  
Ms. Priyanka Vyas, Advocate, GETL & GWEL  
Ms. Anusha Nagarajan, Advocate, TANGEDCO  
Shri Rahul Ranjan, Advocate, TANGEDCO  
Ms. Aakaksha Bhola, Advocate, TANGEDCO



## ORDER

The Review Petitioners, GMR Energy Trading Limited (GETL) and GMR Warora Energy Limited (GWEL) have filed the instant Review Petition under Section 94 of the Electricity Act, 2003 (hereinafter referred to as “the Act”) read with Section 114 of the Code of Civil Procedure, 1908 (for short, hereinafter referred to as “the CPC”) and Regulation 52 of the Central Electricity Regulatory Commission (Conduct of Business) Regulations, 2023 (hereinafter referred to as “the 2023 CBR”) seeking review of the Commission’s order dated 18.1.2024 passed in Petition No.114/MP/2019 (hereinafter referred to as “the impugned order”).

2. The Review Petitioners have made the following prayers in the instant Review Petition:

*“(a) Allow the present Review Petition and review/modify Order dated 18.01.2024 passed in Petition No. 114/MP/2019 in terms of the submissions made in paragraphs 34 to 55 of the present Review Petition; and*

*(b) Compute the tariff payable by the Respondent, Tamil Nadu Generation and Distribution Corporation Ltd. to the Petitioners for the period of grid constraint i.e., November 2015 to March 2016, in terms of the Power Purchase Agreement dated 27.11.2013; and*

*(c) Pass such other orders as this Hon’ble Commission deems fit.”*

### **Background**

3. GETL and GWEL entered into a Power Sale Agreement to enable GETL to participate in the bid invited by the Respondent, Tamil Nadu Generation and Distribution Corporation Limited, TANGEDCO. GETL became a successful bidder and entered into a PPA dated 27.11.2013 for a period of 15 years for the supply of the 150 MW power.

4. Power supply from GWEL plant started from 22.10.2015. During November 2015, December 2015 and January 2016, curtailment of supply of power took place on various dates by RLDC due to system constraints.



5. GETL and GWEL, in their letter dated 16.3.2016, admitted the grid constraints as *Force Majeure* events but disagreed with TANGEDCO that grid constraints constituted natural *Force Majeure* events. The Review Petitioner's position was that only in the case of natural *Force Majeure* is TANGEDCO excused from the payment of full capacity charges. Since grid constraint is not a natural *Force Majeure* event, TANGEDCO is liable to pay the full capacity charges. TANGEDCO's position was that grid constraint is a natural *Force Majeure* event, and in terms of Article 9.7 (c) of the PPA, it is entitled to make payment of the capacity charges for the capacity not affected by *Force Majeure* only.

6. The GETL and GWEL/Review Petitioners filed Petition No. 114/MP/2019 against the Respondent, Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO), for the unilateral reduction of the contracted capacity and the consequent non-payment of the capacity charges by TANGEDCO. The Review Petitioners in the aforesaid Petition sought payment of the capacity charges from the Respondent based on the contracted capacity at the normative/declared availability, as per Schedule 4 of the Power Purchase Agreement ("the PPA") dated 27.11.2013.

7. The Commission, vide order dated 4.2.2022 in the said Petition, set aside the bill dispute notices issued by the Respondent, TANGEDCO, dated 31.3.2016 and 21.4.2016, and observed that TANGEDCO is liable to make the payment of the capacity charges as per Schedule 4 of the PPA dated 27.11.2013, corresponding to the contracted capacity of the 150 MW or declared capacity, whichever is lower, for the period from November 2015 to March 2016, irrespective of grid constraints. The Commission, in the said order, further observed that TANGEDCO is also liable to pay a late payment surcharge for the unpaid amount in terms of Article 8.3.5 of the PPA.



The Commission directed TANGEDCO to make the payment along with the late payment surcharge within a month of issuing the Supplementary Bill incorporating the late payment surcharge by the Review Petitioners.

8. Aggrieved with the Commission's aforesaid order dated 4.2.2022, TANGEDCO preferred Appeal No. 333/2022 before the Appellate Tribunal for Electricity (the APTEL). The APTEL, vide judgment dated 7.10.2022, set aside the Commission's aforesaid order dated 4.2.2022 in Petition No. 114/MP/2019 and remanded the matter back to the Commission with the following observations:

*"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."*

9. Pursuant to the APTEL's aforesaid judgment dated 7.10.2022, the Commission reheard the matter after affording the due opportunity to the parties. The Commission, in its order dated 18.1.2024 in Petition No. 114/MP/2019, taking note of the APTEL's judgment dated 7.10.2022 and analysing the provisions of Articles 9.3.1 and 9.7.1 (c) of the PPA dated 27.11.2013, executed between the Review Petitioners and TANGEDCO, came to the conclusion that the grid constraints during November 2015, December 2015, and January 2016 were natural *Force Majeure* events. Accordingly, TANGEDCO is not required to pay tariff for the part of the contracted capacity affected by these grid constraints. Therefore, the Review Petitioners were directed to raise revised bills on TANGEDCO only to the extent of the contracted capacity supplied to



TANGEDCO during the period affected by the grid constraints, in accordance with Article 9.7.1(c) of the PPA, within a month from the date of issue of this order. The parties were also directed to settle the amount due to each other, if any, as per the provisions of the PPA dated 27.11.2023.

10. Aggrieved with the Commission's aforesaid order dated 18.1.2024 in Petition No. 114/MP/2019 (hereinafter referred to as "the impugned order"), the Review Petitioners have filed the instant Review Petition on the grounds that there are errors apparent on the face of the record and /or there are 'sufficient reasons' for review of the impugned order as required under Order XLVII Rule 1 of the CPC.

11. The Review Petitioners have mainly made the following submissions in support of the Review Petition:

- i. The impugned order merely reiterates the APTEL's judgment dated 7.10.2022, holding that TANGEDCO is entitled to relief under Article 9.7 of the PPA. This is an error apparent as the limited issue before the Commission was to compute the tariff payable by TANGEDCO as per the PPA, taking into consideration the findings of the APTEL's judgment dated 7.10.2022.
- ii. The impugned order neither considered the computation of tariff filed by the Review Petitioners, which TANGEDCO did not dispute, nor did it perform any computation as directed by the APTEL in its judgment dated 7.10.2022.
- iii. As per Article 1.1 of the PPA, 'contracted capacity' is defined as the aggregate contracted capacity of 150 MW. This contracted capacity of the 150 MW mentioned in the PPA (agreed 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 on account of *Force Majeure* event or otherwise.

- iv. As per Clause 4.2.2 of Schedule 4 of the PPA, contracted capacity (sub-clause (h) of Clause 4.2.2.1 of Schedule 4 of the PPA) is a fixed component that cannot be altered or modified by the parties.
- v. The PPA tariff computation (under Schedule 4) adopts the ABT formulation and provides 2 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%. Notably, under both scenarios, the elements for determination of the capacity charges (prescribed in Clause 4.2.2 of Schedule 4 of the PPA) in both methodologies remain constant and cannot be modified.
- vi. Article 9 of the PPA does not contemplate amendment of the methodology of tariff computation provided in Schedule 4 of the PPA or the reduction of the contracted capacity, which is a fixed component regardless of the Force Majeure event.
- vii. The impugned order has erroneously permitted TANGEDCO to reduce the contracted capacity, contrary to the express provisions of the PPA and the computation methodology prescribed in the PPA, which is an error apparent on the record. TANGEDCO by misconstruing the terms of the PPA, has denied the Review Petitioners' capacity charges on the basis of availability of the Project.
- viii. TANGEDCO's methodology of unilaterally reducing the contracted capacity amounts to rewriting the contract, and the failure to consider this issue is an error apparent on the face of the record.



- ix. In terms of Article 9.7.1 (c) of the PPA, TANGEDCO is liable to pay the capacity charges for the capacity unaffected by the Force Majeure event. Therefore, the only benefit available to 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. The Review Petitioners had admitted to grid constraints qualifying as a Force Majeure event. The relief for the same was accounted for as the corresponding tariff for the reduced available capacity was passed onto TANGEDCO in compliance with Article 9.7.1(c) of the PPA.
- x. Article 9.7 of the PPA 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' has been defined under Schedule 4 of the PPA. Therefore, Article 9.7 of the PPA is to be read harmoniously with Schedule 4. Schedule 4 of the PPA provides that the tariff is paid in two parts: (i) capacity charges and (ii) energy charges. Further, the formula for calculating monthly capacity charges consists of contracted capacity and availability. According to the formula mentioned in Schedule 4, contracted capacity has to be taken at 150 MW at all times and under all circumstances, including during Force Majeure events. In other words, the contracted capacity cannot be reduced/altered since it is a fixed component, i.e., 150 MW. In this regard, the Review Petitioners have placed reliance on certain judgments, namely, *Nabha Power Ltd. v. PSPCL* [(2018) 11 SCC 508 (Para 72)]; *Adani Power (Mundra) Ltd. v. GERC & Ors.* [(2019) 19 SCC 9 (Para 24, 30, 31)].
- xi. The acceptance of TANGEDCO's methodology in the impugned has resulted in the reduction (on account of grid constraints) being applied at two stages in



payment of tariff, i.e., (a) at the stage of determination of availability and then (b) at the stage of computation of capacity charges with the reduced contracted capacity. Accordingly, the Review Petitioners are being penalised twice for the same Force Majeure event, and TANGEDCO obtains a double benefit. This position is contrary to the express provisions in the PPA, and the same was never agreed upon among the parties. Accordingly, the impugned order gravely prejudices the Review Petitioners. It thus violates the settled principle of *actus curiae neminem gravabit*, whereby no act of a Court ought to prejudice either party.

12. TANGEDCO, in its reply, has mainly made the following submissions:
  - i. All the contentions raised by the Review Petitioners in the present Review Petition were previously raised in the remand proceedings in the Petitioners' affidavit dated 30.8.2023. The Review Petitioners claim that TANGEDCO had sought to unilaterally reduce the contracted capacity. This plea was duly recorded, considered, and rejected by the Commission in the impugned order on the basis that for the period when the supply of power was affected by grid constraints, which constitutes a 'Natural *Force Majeure* Event,' in terms of the express stipulation in Article 9.7.1(c) of the PPA, no tariff would be paid for the 'part of the contracted capacity' affected by the grid constraints.
  - ii. The Review Petitioners have, in effect, sought to convert the present review proceedings into appellate proceedings by attempting to change the Commission's view based on already overruled contentions. This is impermissible in review proceedings.
  - iii. The Commission, in the impugned order, arrived at the conclusion that no tariff is payable for the part of the contracted capacity affected by the grid





constraints. Therefore, the Review Petitioners' contention that a unilateral reduction in the contracted capacity is wholly misconceived and erroneous. Since in terms of Article 9.7.1(c) of the PPA, where the supply is affected by Natural *Force Majeure* Events such as the grid constraints, TANGEDCO is not liable to pay the capacity charges for the 'part of' the contracted capacity affected thereby. The interpretation put forth by the Review Petitioners will defeat the rationale of Article 9.7.1(c) of the PPA. The Commission applied the aforesaid provision under the PPA and held that no tariff was payable for such part of the contracted capacity. TANGEDCO has paid a tariff for the unaffected part of the contracted capacity – such payment, made in terms of the PPA, cannot be said to be a unilateral amendment of the contracted capacity. Thus, there arose no question of computation of the tariff payable to the Review Petitioners for the period of grid constraints by this Commission.

- iv. The Review Petitioners have incorrectly claimed in the Review Petition that TANGEDCO did not dispute the computation furnished by them for the tariff payable. TANGEDCO's express stance was that no tariff is payable at all. Thus, there was no occasion for TANGEDCO to dispute elements of the said computation, which had no basis in the PPA at all. Thus, the Review Petitioner's contention that the computation furnished by them during the remand proceedings was not considered, is frivolous and baseless.
- v. The APTEL, in its judgment dated 7.10.2022, had directed the Commission to consider Petition No. 114/MP/2019 in light of the APTEL's observations and provide consequential relief to the Appellant/TANGEDCO. The Commission, relying on the observations of the APTEL that grid constraints are natural *Force*



*Majeure* events, held that no tariff is payable for the part of the contracted capacity that was affected by the grid constraints.

- vi. The interpretation of the PPA proposed by the Review Petitioners contradicts the directions given by the APTEL and goes beyond the scope of the remand. If the Review Petitioners were dissatisfied with the finding that grid constraints are classified as Natural *Force Majeure* Events, it was their responsibility to challenge the APTEL judgment dated 7.10.2022. Since they did not do so, the provisions in the PPA regarding Natural *Force Majeure* Events apply fully and without any modification. The Review Petitioners cannot attempt to reverse the effect of the APTEL judgment through the current Review Petition, as that judgment is final. Therefore, this Review Petition constitutes a serious misuse of the legal process and should be dismissed with costs.
- vii. The Review Petitioners plea that TANGEDCO's methodology for computation of the capacity charges amounts to a reduction in the tariff at two stages, i.e. (i) at the stage of calculation of availability and (ii) at the stage of computation of the capacity charges has been considered by the Commission in para 8 of the impugned order.
- viii. The issue is squarely covered by the Commission's observation that 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 *Force Majeure* event. Accordingly, the Review Petitioners have been directed to revise the bills such that TANGEDCO is only called upon to pay the capacity charges to the extent of the contracted capacity supplied to TANGEDCO.
- ix. The Review Petitioners are seeking to alter the methodology for computation of tariff under the PPA for the period affected by a Natural *Force Majeure* Event



and are insisting that the full contracted capacity has to be taken into consideration. The interpretation put forth by the Review Petitioner amounts to reading the words “part of the contracted capacity affected” as “part of the availability affected.”

- x. 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. As detailed above, this is in line with Article 9.7.1(c) of the PPA. It is pertinent that the reduction of the contracted quantum for calculation is an established practice under the PPA, which even the Review Petitioners have undertaken from time to time; for instance, in their reply dated 10.3.2016 to TANGEDCO’s bill dispute notice, the Review Petitioners themselves communicated that they have considered contracted quantum to be 121 MW on account of the grid constraints. This position is further affirmed by para 28 of their affidavit dated 30.8.2023, wherein it is stated that they have calculated contracted capacity only to the extent the open access was operationalized. This further suggests that to reflect the actual position, both parties have, from time to time, taken the contracted capacity to be less than 150 MW.
  - xi. The Review Petitioners have not shown any error apparent in the impugned order and have attempted to re-argue their case in the absence of a newly discovered fact. The Review Petitioners have also not shown any other sufficient reason of like nature, which must be analogous to a mistake apparent on the face of the record or discovery of a new fact.
13. In response, the Review Petitioners have refuted TANGEDCO's averments and reiterated the submissions made in the Review Petition.



14. We heard the parties at length on 12.11.2024 and, thereafter, reserved the order on the Review Petition.

### **Analysis and Decision**

15. We have considered the submissions of the Review Petitioners, TANGEDCO, and have also gone through the record.

16. Under Order XLVII Rule 1 of CPC, a person aggrieved by the order of a Court can file a review on the following grounds:

*“1. **Application for review of judgment.** (1) Any person considering himself aggrieved—*

*(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred,*

*(b) .....*

*(c) .....*

*and who, from the discovery of new and important matter or evidence which, after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or order made, or on account of some mistake or error apparent on the face of the record or for any other sufficient reason, desires to obtain a review of the decree passed or order made against him, may apply for a review of judgment to the Court which passed the decree or made the order.”*

17. We also note that Section 94(1)(f) of the Act provides that the Commission has the same power as that of a civil court to review its decisions, directions, or orders.

18. With regard to review jurisdiction, we would like to refer here to the judgment of the Hon’ble Supreme Court in the matter of **BCCI v. Netaji Cricket Club & Ors.**

[(2005) 4 SCC 741], wherein the following was observed :

*“89. Order 47, Rule 1 of the Code provides for filing an application for review. Such an application for review would be maintainable not only upon discovery of a new and important piece of evidence or when there exists an error apparent on the face of the record but also if the same is necessitated on account of some mistake or for any other sufficient reason.*

*90. Thus, a mistake on the part of the court which would include a mistake in the nature of the undertaking may also call for a review of the order. An*



*application for review would also be maintainable if there exists sufficient reason therefor. What would constitute sufficient reason would depend on the facts and circumstances of the case. The words 'sufficient reason' in Order 47, Rule 1 of the Code is wide enough to include a misconception of fact or law by a court or even an Advocate. An application for review may be necessitated by way of invoking the doctrine "actus curiae neminem gravabit".'*

19. In the light of the above, we now proceed to consider whether the instant case for review has been made out by the Review Petitioners in terms of Order XLVII Rule I of the CPC read with Section 94 of the Act and Regulation 52 of the 2023 CBR.

20. The Review Petitioners have contended that as per Article 1.1 of the PPA, contracted capacity is defined as the aggregate contracted capacity of 150 MW. This is not a derived quantum but an agreed-upon quantum undertaken to be supplied by GWEL under the PPA, which cannot be altered. The Review Petitioners have further contended that as per Clause 4.2.2 of Schedule 4 of the PPA, contracted capacity (Clause 4.2.2.1(h) of Schedule 4) is a fixed component, which cannot be altered or modified by the parties on account of *Force Majeure* events or otherwise. It is contended that the PPA tariff computation (under Schedule 4) adopts the ABT formulation and provides for 2 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, elements for the determination of the capacity charges remain constant and cannot be modified. It is further contended that Article 9 of the PPA neither contemplates amendment of tariff computation methodology provided in Schedule 4 of the PPA nor reduction of contracted capacity, which is a fixed component regardless of *Force Majeure*. Therefore, the impugned order erroneously permits TANGEDCO to reduce the contracted capacity, contrary to the PPA and the APTEL's judgment dated 7.10.2022, which is an error apparent on the record.



21. The Review Petitioners have contended that Article 9.7 of the PPA provides that TANGEDCO is not liable to pay a tariff for part of the contracted capacity affected by a Natural *Force Majeure* event. According to the Review Petitioners, tariff is defined to mean tariff under Schedule 4 of the PPA. Therefore, Article 9.7 of the PPA is to be read harmoniously with Schedule 4 of the PPA. The Review Petitioners have also contended that as per Schedule 4 of the PPA, the tariff is paid in two parts, i.e., capacity charges and energy charges. The formula for the computation of monthly capacity charges consists of both 'contracted capacity' (CC) and availability (AA). The PPA does not permit the reduction/alteration of CC, which is fixed at 150 MW. It is contended by the Review Petitioners that the impugned order results in TANGEDCO obtaining double benefit for the same *Force Majeure* event and penalises them twice, inasmuch as the reduction (on account of grid constraints) is being applied at two stages in payment of tariff, i.e. (i) determination of availability, and (ii) computation of the capacity charges with reduced contracted capacity and the same is evident from the Review Petitioners affidavit dated 30.8.2023 filed before the Commission in Petition No. 114/MP/2019.

22. The Review Petitioners have submitted that the relief to which TANGEDCO is entitled under Article 9.7 of the PPA has already been included in the invoices raised by the Review Petitioners. Accordingly, the Review Petitioners are seeking payment of a differential amount of ₹6.51 crore as sought in Petition No. 114/MP/2019 post remand, which ought to be allowed in the present Review Petition.

23. *Per contra*, the Respondent, TANGEDCO has contended that all the contentions raised by the Review Petitioners in this Review Petition were already raised in the remand proceedings vide affidavit dated 30.8.2023, including that



TANGEDCO had sought to unilaterally reduce the contracted capacity, which was duly recorded, considered, and rejected by the Commission observing that for the period when the supply of power was affected by grid constraints, which constitutes a 'Natural Force Majeure Events', as per Article 9.7.1(c) of the PPA, no tariff would be paid for the part of the contracted capacity affected by the grid constraints. TANGEDCO has contended that it has paid a tariff for the unaffected part of the contracted capacity – such payment, made in terms of the PPA, cannot be said to be a unilateral amendment of the contracted capacity. Therefore, there was no question of computation of the tariff payable to the Review Petitioners for the period of grid constraints by the Commission. The Review Petitioners have not challenged the APTEL's judgment dated 7.10.2022, and as such, it has attained finality.

24. According to TANGEDCO, as per the judgment of APTEL dated 7.10.2022, only the part of the contracted capacity that was unaffected by grid constraints is to be considered for payment of tariff for the relevant period, and the formula under the PPA for tariff computation has to be applied, considering only such part of the contracted capacity unaffected by the grid constraints. The Review Petitioners are seeking to alter the methodology for computation of tariff under the PPA for the period affected by a Natural Force Majeure Event by insisting that the full contracted capacity has to be taken into consideration.

25. On consideration of the rival contentions of the parties, we think it is necessary for us to refer to the provisions of Articles 1.1, 9.3.1, and 9.7.1 of the PPA and Schedule 4 of the PPA for disposal of the present Review Petition. Accordingly, we refer to the provisions of Articles 1.1, 9.3, and Schedule 4 of the PPA, which are as under:



## **“ARTICLE 1: DEFINITIONS AND INTERPRETATION**

### **1.1 Definitions**

*The terms used in this Agreement, unless as defined below or repugnant to the context, shall have the same meaning as assigned to them by the Electricity Act, 2003 and the rules or regulations framed there under including those issued/ framed by Appropriate Commission (as defined hereunder), as amended or re-enacted from time to time*

*"Contracted Capacity" shall mean the Aggregate Contracted Capacity; 150 MW*

### **9.3 Force Majeure**

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

*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).*

#### **i. Natural Force Majeure Events**

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

#### **ii. Non-Natural Force Majeure Events**

##### **1. Direct Non-Natural Force Majeure Events attributable to the Procurer**

*a) Nationalization or compulsory acquisition by any Indian Governmental Instrumentality (under the State Government(s) of the Procurer or the Central Government of India) of any material assets or rights of the Seller; or*

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

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

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

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





- b) the unlawful, unreasonable or discriminatory revocation of, or refusal to renew, any Consents, Clearances and Permits required by Seller to perform its obligations under the RFP Documents or any unlawful, unreasonable or discriminatory refusal to grant any Consents, Clearances and Permits required for the development/ operation of the Power Station, provided that a Competent Court of Law declares the revocation or refusal to be unlawful, unreasonable and discriminatory and strikes the same down.
- c) any other unlawful, unreasonable or discriminatory action on the part of an Indian Government Instrumentality (other than those under the State Government(s) of the Procurer or the Central Government of India) which is directed against the supply of power by the Seller to the Procurer, provided that a Competent Court of Law declares the action to be unlawful, unreasonable and discriminatory and strikes the same down.

### 3. Indirect Non-Natural Force Majeure Events

- a) any act of war (whether declared or undeclared), invasion, armed conflict or act of foreign enemy, blockade, embargo, revolution, riot, insurrection, terrorist or military action; or
- b) radioactive contamination or ionising radiation originating from a source in India or resulting from another Indirect Non Natural Force Majeure Event mentioned above excluding circumstances where the source or cause of contamination or radiation is brought or has been brought into or near the Power Station by the Affected Party or those employed or engaged by the Affected Party.
- c) Industry wide strikes and labour disturbances having a nationwide impact in India.

### 9.4 Force Majeure Exclusions

#### 9.4.1 Force Majeure shall not include

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

#### 9.7.1 Subject to this Article 9:

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



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

(c) For the avoidance of doubt, it is clarified that no Tariff shall be paid by the Procurer for the part of Contracted Capacity or part thereof affected by a Natural Force Majeure Event affecting the 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;

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

-----

(e) If the average Availability of the Power Station is reduced below Normative Availability for over two (2) consecutive months or for any non-consecutive period of four (4) months both within any continuous period of 12 months, as a result of a Direct Non Natural Force Majeure Event attributable to the Procurer, then, with effect from the end of such two (2) consecutive months or four (4) non-consecutive months and for so long as the daily average Availability of the Power Station of the Developer continues to be reduced below Normative Availability as a result of a Direct Non Natural Force Majeure Event attributable to the Procurer, the Seller may elect through a written notice to the Procurer, to deem the Availability to be equal to Normative Availability from the end of such two (2) consecutive months or four (4) non-consecutive months, regardless of its actual - Available Capacity. In such a case, the Procurer shall be liable to make payment of Capacity Charges calculated on such deemed Normative Availability, after the cessation of the effects of Direct Non Natural Direct Force Majeure Event attributable to the Procurer in the form of an increase in Capacity Charge.”

#### **Schedule 4- Tariff-**

##### **4.1 General-**

i) The method of determination of Tariff Payments for any Contract Year during the Term of Agreement shall be in accordance with this Schedule.

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

iii) For the purpose of payments, the Tariff will be Quoted Tariff as specified in Schedule 8, duly escalated as provided in Schedule 6 for the applicable Contract Year.

iv) The full Capacity Charges shall be payable based on the Contracted Capacity at Normative Availability and Incentive shall be provided for Availability beyond (85%) as provided in this Schedule. In case of Availability being lower than the Normative Availability, the Capacity Charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in this Schedule. “



## **“4.2 Monthly Tariff Payment**

4.2.1 Components of Monthly Tariff Payment the Monthly Bill for any Month in a Contract Year shall consist of the following:

- i) Monthly Capacity Charge payment in accordance with Clause 4.2.2 of Schedule 4;
- ii) Monthly Energy Charge for Scheduled Energy in accordance with Clause 4.2.3 of Schedule 4; iii) Incentive determined in accordance with Clause 4.2.4 of Schedule 4 (applicable on a cumulative basis and included in each Monthly Bill);
- iv) Penalty determined in accordance with Clause 4.2.5 of Schedule 4 (applicable on a cumulative basis and included in each Monthly Bill);

### 4.2.2 Monthly Capacity Charge Payment

4.2.2.1 The Monthly Capacity Charge payment for any Month *m* in a Contract Year *n* shall be calculated as below:

If  $CAA \geq NA$ ,

$$FC_m = \sum_j (NA * AFC_{Cyn} * CC * L * N_{contract}/24) - \sum c(m-1)$$

Else:

$$FC_m = \sum_j (AFC_{Cyn} * AA * CC * L * N_{contract}/24) - \sum c(m-1)$$

Where:

- a)  $FC_m$  is the Capacity Charge payment for the Month *m* (in Rupees)
- b)  $\sum_j$  is the summation of all the relevant values separately for each Settlement Period from the start of the Contract Year "*n*" in which Month "*m*" occurs up to and including Month "*m*"
- c)  $AFC_{Cyn}$  is the Capacity Charge and is sum of-a) Payable Escalable Capacity Charges  $AEFC_{Cyn}$  and b) Payable Non Escalable Capacity Charges  $ANEF_{Cyn}$  for the Month "*m*" in the Contract Year "*n*" (in Rs/ kWh) in which such month "*m*" occurs and computed as mentioned hereunder;
- d)  $AEFC_{Cyn}$  is the Payable Escalable Capacity Charges for Month "*m*" in the Contract Year "*n*", expressed in Rs/ kWh and is equal to the Quoted Escalable Capacity Charges as provided in Schedule 8 for the first Contract Year and for subsequent Contract Years duly escalated by the following formula:

$$AEFC_{Cyn} = QAEFC_{Cyn} * p/q$$

where,

- i.  $QAEFC_{Cyn}$  is the Quoted Escalable Capacity Charges (in Rs/ kWh) shall be taken as at the end of the previous Contract Year (*n-1*);
- ii. *p* is the Escalation Index as per Schedule 6 at the beginning of the Month "*m*" (expressed as a number);
- iii. *q* is the Escalation Index as per Schedule 6 (expressed as a number);
- e)  $ANEF_{Cyn}$  is the Payable Non Escalable Capacity Charges for the Month "*m*", expressed in Rupees/kWh and is equal to the Quoted Non Escalable Capacity Charges for the Contract Year in which such Month "*m*" occurs, as provided in Schedule 8;



f) CAA is the cumulative Availability, as per REA, from the first day of the Contract Year "n" in which Month "m" occurs up to and including Month "m" (expressed in percentage);

g) AA is the Availability, as per REA, in the relevant Settlement Period (expressed as a percentage of Contracted Capacity in such Settlement Period), expressed as a percentage;

h) CC is the Contracted Capacity in the relevant Settlement Period (expressed in kW);

i) L is the number of minutes in relevant Settlement Period, as divided by total number of minutes in one hour, (expressed as hours);

j) N contract is the number of hours of power supply in a day, contracted as per the PPA (24 in the case of base load and seasonal load requirement);

k) NA is Normative Availability; and

l)  $\sum c(m-1)$  is the cumulative Capacity Charge payable from the first day of the Contract Year "n" in which Month "m" occurs up to and including Month "m-1" but not including Month "m", (in Rupees).

*Provided, no Monthly Capacity Charges shall be paid for the Settlement Period during which the RLDC has not allowed the operation of the Power Station due to Developer's failure to operate it as per the provisions of Grid Code and such Settlement Period shall not be considered during calculation of Monthly Capacity Charge payment."*

26. On consideration of the record, we find that the APTEL, in its judgment dated 7.10.2022, considered whether grid constraint is covered under any of the enumerated categories of Force Majeure, namely, natural Force Majeure, non-natural Force Majeure, Force Majeure exclusion and has thereafter concluded that grid constraint is covered under natural Force Majeure. The matter was remanded back to the Commission to consider the matter afresh in the light of the observations made in the APTEL's judgment dated 7.10.2022 and grant consequential relief to TANGEDCO as per clause 9.3.1 read with clause 9.7.1 of the PPA.

27. The Commission, in the impugned order dated 18.1.2024, observed as follows:

*"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 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.”*

28. The Review Petitioners are seeking a review of the impugned order dated 18.1.2024 whereby the Commission directed that TANGEDCO is not required to pay any tariff for the part of the contracted capacity affected by any of the grid constraints, in accordance with Article 9.7.1 (c) of the PPA. The Commission, in the impugned order, directed GETL and GWEL 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.

29. We find merit in the contentions of the Review Petitioners that TANGEDCO's methodology for computation of the capacity charges amounts to a reduction in the tariff at two stages, i.e. (i) at the stage of calculation of availability, and (ii) at the stage of computation of the capacity charges and the same escaped the attention of the Commission while passing the impugned order. Accordingly, there is an error apparent on record which is required to be modified.

30. On perusal of the language applied in Article 1.1 of the PPA, as quoted above, we are of the view that the words 'Contracted Capacity' mean the aggregate contracted capacity of 150 MW. We further note that Article 9.3.1 of the PPA covers restrictions imposed by PGCIL/RLDC/SLDC in the scheduling of power due to breakdown of transmission /grid constraint on account of grid constraints shall be treated as *force majeure* without any liability on either side. In other words, the liability should arise on account of non-supply of power owing to the grid constraints.



31. Further, on perusal of Schedule 4 of the PPA, we are of the view that the full capacity charges are payable based on the contracted capacity at normative availability (80%), and an incentive is payable for the availability of more than 85%. In case availability is lower than the normative availability, the capacity charge shall be payable on a proportionate basis. In addition, a penalty @20% of the simple average capacity charge for all months in the contract year applied on the energy corresponding to the difference between 80% and availability is payable by the seller. Therefore, the term 'without any liability on either side' means that TANGEDCO's liability will be limited to paying the capacity charges and energy charges for the power that is available and supplied at the drawl point. Any part of the availability (i.e., the difference between the injection point and the drawl point) that is affected by transmission or grid constraints will not be payable by TANGEDCO. However, the contracted capacity of the 150 MW shall remain unchanged for the purpose of calculating capacity charges. Accordingly, the Review Petitioners, in terms of Schedule 4 of the PPA, shall not be liable to pay a penalty for non-supply of power if the availability at the drawl point falls below 80% due to transmission or grid constraints, provided the availability at the injection point is above 80%.

32. In view of the foregoing discussions, we allow the Review Petition and accordingly, the impugned order dated 18.1.2024 is modified to the extent indicated above. As regards the computation of tariff is concerned, the parties are directed to reconcile the same with each other, within one month from the date of issue of this order, strictly in accordance with the provisions of the PPA dated 27.11.2013.



33. This order disposes of Petition No. 7/RP/2024 in terms of the above discussions and findings.

**sd/-**  
**(Harish Dudani)**  
**Member**

**sd/-**  
**(Ramesh Babu V.)**  
**Member**

**sd/-**  
**(Jishnu Barua)**  
**Chairperson**

