

**In the Appellate Tribunal for Electricity,  
New Delhi  
(Appellate Jurisdiction)**

**Appeal no. 118 of 2015**

**Dated: 29<sup>th</sup> August, 2016**

**Present: Hon'ble Mrs. Justice Ranjana P. Desai, Chairperson  
Hon'ble Mr. I.J. Kapoor, Technical Member**

**In the matter of**

**M/s. TCP Limited  
04, TCP Sapthagiri Bhavan  
Karpagambal Nagar, Mylapore  
Chennai 600 004  
Tamilnadu**

**... Appellant**

**Versus**

- 1. Tamil Nadu Generation and Distribution Corporation Limited  
144, Anna Salai  
Chennai 600 002  
Tamil Nadu** **...Respondent No.1**
- 2. Chief Engineer , Planning and ERC,  
Tamil Nadu Generation and Distribution Corporation Limited  
5<sup>th</sup> Floor, NPKKR Maligai,  
144, Anna Salai,  
Chennai 600 002  
Tamil Nadu** **...Respondent No.2**
- 3. Tamil Nadu Electricity Regulatory Commission  
TIDCO Office Building  
No 19A, Rukmani Lakshmipathy Salai,  
Marshalls Road, Egmore,  
Chennai 600008 Tamil Nadu** **...Respondent No 3**

**Counsel for the Appellant(s):** Mr. Rahul Balaji  
Mr. Govind Manoharan  
Mr Senthil Jagadeesan  
Ms Shruti Iyer  
Ms Suchitra Kumbhat

**Counsel for the Respondent(s):** Mr. G. Umapathy  
Mr. S. Vallinayagam for R-1 and R-2

### JUDGMENT

#### PER HON'BLE MR. I. J. KAPOOR, TECHNICAL MEMBER

1. The present Appeal is being filed by M/s. TCP Limited (hereinafter referred to as the “**Appellant**”) under Section 111 of the Electricity Act, 2003 against the Impugned Order dated 13.02.2015 passed by the Tamil Nadu State Electricity Regulatory Commission (hereinafter referred to as the “**State Commission**”) in petition No D.R.P. No. 5 of 2013 filed by the Appellant in relation to Payment dispute with Tamilnadu Generation and Distribution Corporation Limited (hereinafter referred to as the “**Respondent No.1**”) for the energy supplied in the year 2010-11.
2. The Appellant is a Generating Company registered under Companies Act 1956 and is a Captive Power Generator in the State of Tamil Nadu.
3. The Respondent No 1 is Tamil Nadu Generation and Distribution Corporation Limited (“**TANGEDCO**”) and the Respondent No 2 is the Chief Engineer, Tamil Nadu Generation and Distribution Corporation

Limited. TANGEDCO is the Distribution Licensee in the State of Tamilnadu. The Respondent No 3 is the Electricity Regulatory Commission for the State of Tamil Nadu exercising jurisdiction and discharging functions in terms of the Electricity Act, 2003.

4. Aggrieved by the Impugned Order dated 13.02.2015 passed by the State Commission, the Appellant has preferred the present appeal on following grounds:
- a) The State Commission while passing the Impugned Order has committed an error in interpreting the provisions of the PPA, in particular Clauses 3.8 and 3.9 which specifically carve out an exception to the period of planned and forced shut down.
  - b) The State Commission has erred in failing to consider that Clause 3.10 specifically sets out that if the shutdown is either forced or planned, the minimum and maximum energy in units to be sold to the Board for that billing period/periods are to be arrived at in the manner set forth in clause 3.10 (c).
  - c) The State Commission had failed to give due weightage to the fact that the reasons for shortfall in the supply of power were solely due to reasons beyond the control of the Appellant and that the Appellant has also taken appropriate and speedy steps in that regard for repairing the equipment and putting the plant back into operation. The rate payable for the admitted power supplied could not therefore be at the infirm rate as held by the State Commission.
  - d) The State Commission has failed to consider that the shortfall percentage of power set out in clause 3.14 of the PPA would be applicable only under normal conditions and not due to conditions of forced outage or due to any force majeure conditions and further the

period when the infirm power rate was paid also related to periods when the commitment could not be met for reasons that were attributable to the plant failure and not due to any reason attributable to the Appellant.

- e) The State Commission has erred in holding that the revision of the annual power commitment from 450 MU to 300 MU is not supported by any provision in the PPA, and has ignored the provisions set out in Clause 3.8 and 3.9 of the PPA which have carved out an exception during periods of planned and forced outage as also failed to read the PPA as a whole. Clause 3.10 also sets out the method to be applied for billing in case of a shutdown, and the applicability of these provisions to the dispute at hand has been ignored.
- f) The State Commission has erroneously held that concessional treatment was extended by the Respondent to the Appellant during the period of outage between 3.8.2010 to 11.11.2010 and payments were made as per the provisions of Clause 3.10.
- g) The impugned order does not make a whisper about the intent of the Parties in having provided for the specific exception carved out in Clauses 3.8 and 3.9 regarding the period of planned or forced shutdown or the billing method prescribed in Clause 3.10 (c).
- h) The impugned order effectively penalizes the Appellant and holds it to the commitment to supply the 1/12<sup>th</sup> quantum of annual power committed when such could not be the interpretation upon reading the PPA as a whole.

**5. Facts of the present Appeal:**

- i. The Appellant had originally set up a captive power plant of 63.5 capacity MW at Gummidipoondi, Tiruvallore District, Tamil Nadu.

- ii. The Appellant had entered into a Power Purchase Agreement (PPA) with the then Tamil Nadu Electricity Board (TNEB) on 29.1.1999 for sale of power to Respondent No.1 after its own captive use.
- iii. The PPA was for 15 years (i.e. upto 2014). The scheme of the PPA provides for supply of power to the then TNEB and payment to be governed by the terms contained therein.
- iv. The rate of firm power for the year 1998-99 was Rs 2.25 per unit with a provision for 5% increase every year for nine years (upto 2007-08) and then the State Commission fixed the tariff for the years 2008-09 to 2013-14, with 5% increase every year on the tariff for the year 2007-08.
- v. An addendum to the PPA was entered into on 24.4.2009 in respect of the rates applicable for firm power for the years beginning from 2008-09 to 2013-14. The other clauses of PPA remained unaltered and accepted by Appellant and Respondent No. 1 and 2.
- vi. In line with clause 3.7 of PPA, the Appellant vide letter dated 17.02.2010 communicated a firm committed power supply of 450 million units for the period from 01.04.2010 to 31.03.2011 from its 63.5 MW captive power plant at Gummidipoondi. The same was accepted by the TNEB vide letter dated 17.03.2010.
- vii. The Appellant observed some technical problems in the generator rotor in the Plant during April 2010, due to which Appellant ran the plant at reduced capacity until end of July 2010. The Appellant anticipated a major breakdown of the unit and subsequent shut down of unit for repairs. As such, the Appellant vide letter dated 03.07.2010 notified to the Respondent No.1 and 2 that due to unforeseen force majeure problems that had occurred in the running unit which is

beyond the Appellant's control and as such requested that it may be exempted from the monthly commitment of firm supply of power during the period of unit shut down for repair. The Appellant also intimated that the plant is expected to be under Shut down for about 100 days and requested the Respondent No.1 and 2 to treat 300 million units as firm committed power for the year 2010-11 as against 450 million units already intimated.

- viii. The Appellant informed Respondent No. 1 and 2 that due to the technical problem, the plant had tripped at 01:00 hour on 03.08.2010 with one of the technical reasons being excessive vibration of the generator. Further, Appellant on 10.08.2010 informed Respondent No.1 and 2 about faulty Generator Rotor being transported to Alstom Projects India Ltd, Vadadora, for necessary rectification and return and it would take about 90 days for carrying out the repairs exclusive of the transportation, re-erection and commissioning.
- ix. The Respondent No. 1 and 2 vide communication dated 27.08.2010 informed the Appellant that the Appellant's request dated 03.07.2010 for revised commitment of power is not in line with the provisions of the PPA and that the payment for supply of power to Respondent would be regulated in terms of the provisions of PPA for the already approved quantum i.e. 450 MUs.
- x. The Appellant vide its letter dated 13.09.2010 to Respondent No. 1 and 2 requested to treat the period of non-operation of the plant as a "forced outage".
- xi. The Appellant, issued a further detailed letter dated 23.10.2010 to Respondent No.1 and 2 detailing out the developments and intimating that as per their anticipation, they would be in a position to re-start

- the plant by end of November 2010 and that the sudden failure of the rotor was unforeseen “force majeure” condition and the commitment to supply power had to be accordingly modified.
- xii. The Respondent No. 2 on 18.11.2010 asked the Appellant to specify the provisions of the PPA under which the Appellant was requesting approval for revised commitment of power.
- xiii. The Appellant on 22.11.2010 stated that the unit has been put back into operation from 11.11.2010 and again reiterated their request for revision of committed power for 2010-11 as 300 MUs against earlier committed power of 450 MUs and requested to consider shutdown period from 03.08.2010 to 11.11.2010 be treated as force majeure condition and settle the bills on firm power rate for the power supplied during the shut down period.
- xiv. The Respondent No. 2 on 10.02.2011 informed the Appellant that the request of the Appellant has been examined in detail and found to be outside the purview of the PPA and unacceptable. The payment to the energy supplied will be regulated as per provisions of the PPA.
- xv. The Appellant approached the State Commission vide its petition dated 28.12.2012 seeking to set aside the action of the Respondent No. 1 and 2 and to direct the Respondent No. 1 and 2 to effect payments for energy supplied in 2010-2011. As per Appellant, a payment of Rs 9,19,24,107/- together with interest at 14% per annum was due and payable by the Respondents to the Appellant as on the date of filing of the petition before the State Commission towards the shortfall in payments made by the Respondents on the basis of incorrect calculation along with interest.

xvi. The State Commission passed the Impugned Order on 13.02.2015 and dismissed the petition filed by the Appellant holding that:

"the plant was shut down during 03.08.10 to 11.11.10 and during this period, taking cognizance of this shut down condition of the plant, the quantum of 1/12<sup>th</sup> supply was calculated as per Clause 3.10 and accordingly payments were made. Therefore, concessional treatment for shut down period was properly given by TANGEDCO as contemplated in the PPA. But, the claim of the petitioner for revising the annual committed power itself from 450 MU to 300 MU is not supported by any provision in the PPA. If this reduction in annual committed power supply from 450 MU to 300 MU is allowed then higher rate i.e. firm power rate will become payable even for those months which were outside the shut down period during which power supply was less than 1/12<sup>th</sup> of committed annual supply. This is not a correct proposition and will end up in undue enrichment to the petitioner. The contention of the petitioner for revising the annual committed power from 450 MU to 300 MU for force majeure due to forced shut down is not tenable and therefore, it is dismissed. Consequently, the claim of interest will not survive".

xvii. Aggrieved by the Impugned Order, Appellant has preferred the present Appeal.

## **6. QUESTIONS OF LAW**

As per Appellant, following questions of law arise in the present Appeal:

**a) Whether the State Commission is correct in holding that the claim of the Appellant for revising the annual committed**

- power itself from 450 MU to 300 MU is not supported by any provision in the PPA?**
- b) Whether the State Commission has correctly interpreted the terms of the PPA?**
  - c) Whether the State Commission has erred in failing to take note that Clause 3.8 and Clause 3.9 of the PPA carve out an exception to the period of planned and forced shut down?**
  - d) Whether the State Commission is correct in holding that the revision of the annual commitment would result in an unjust enrichment to the Appellant?**
  - e) Whether the State Commission has interpreted the relevant provisions of the PPA, in particular, Clauses 1.5, 1.7, 1.8, 2, 3.7 to 3.10, 3.14 and 3.15, in a correct manner?**
7. We have heard at length the learned counsel for the Appellant and learned counsel for Respondent No. 1 and 2 and considered the arguments put forth by the rival parties and their respective written submissions on various issues identified in the present Appeal. Gist of the same is brought out hereunder.
8. On the specific issues raised in the present Appeal, the learned counsel for the Appellant has made the following submissions for our consideration
- a) The State Commission has misinterpreted the provisions of the Clauses 3.8 and 3.9 of PPA, which specifically carve out an exception to the period of planned and forced shut down. The Clause 3.10 specifies that if the shutdown is either forced or planned, the minimum and maximum energy in units to be sold to the Board for that billing

- period/periods are to be arrived at in the manner set forth in clause 3.10 (c) of PPA.
- b) The State Commission had failed to give due weightage to the fact that the reasons for shortfall in the supply of power were solely due to reasons beyond the control of the Appellant and that the Appellant has also taken appropriate and speedy steps in that regard for getting the equipment repaired and putting the plant back into operation. The rate payable for the admitted power supplied could not therefore be at the infirm rate as held by the State Commission.
  - c) The State Commission has failed to consider that the shortfall percentage of power set out in clause 3.14 of the PPA would be applicable only under normal conditions and not due to conditions of forced outage or due to any force majeure conditions and further the period when the infirm power rate was paid also related to periods when the commitment could not be met for reasons that were attributable to the plant failure and not due to any reason attributable to the Appellant.
  - d) The State Commission has erred in holding that the revision of the annual power commitment from 450 MU to 300 MU is not supported by any provision in the PPA, and has ignored the provisions set out in Clause 3.8 and 3.9 of the PPA which have carved out an exception during periods of planned and forced outage as also failed to read the PPA as a whole. Clause 3.10 also sets out the method to be applied for billing in case of a shutdown, and the applicability of these provisions to the dispute at hand have been ignored.
  - e) The State Commission has erroneously held that concessional treatment was extended by the Respondent to the Appellant during the

period of outage between 3.8.2010 to 11.11.2010 and payments were made as per the provisions of Clause 3.10.

- f) The Impugned Order does not make a whisper about the intent of the parties in having provided for the specific exception carved out in Clauses 3.8 and 3.9 regarding the period of planned or forced shutdown or the billing method prescribed in Clause 3.10 (c).
- g) The Impugned Order effectively penalizes the Appellant and holds it to the commitment to supply the 1/12<sup>th</sup> quantum of annual power committed when such could not be the interpretation upon reading the PPA as a whole.
- h) The sum and substance of the contentions of the Respondents is that the occurrence of force majeure and the inability to generate power during the existence of such force majeure condition would have no impact upon the annual committed quantity of supply of power. It would suffice to state that such a stand is wholly illogical and contrary to settled principles of law, as it would be wholly impossible to expect the performance by the affected party to comply with the original commitment even after accepting the inability of the affected party to perform its obligations due to occurrence of a force majeure event.
- i) In the event of occurrence of force majeure for a prolonged period, it would not be impossible to supply the original committed quantity and as such, both in fact and in law, there ought to be a pro-rata reduction in the annual committed quantity to the extent of the period of force majeure and existence of the disability. In the event of adoption of any other interpretation, it would result in a situation where despite occurrence of force majeure and acceptance of the event of force majeure, the contractual adjustment occurring out of such force

majeure would not be provided. A party cannot be penalized for causes beyond its control and that is the entire purpose of the terms of the contract.

- j) While the Respondents and the State Commission accept the position that there was force majeure, they are effectively seeking compliance of obligations even during such an event of force majeure, though there is no such requirement under the contract between the parties.
9. The learned counsel for the Respondents has made following submissions on the issues raised in the Appeal for our consideration
- a) The Appellant committed to supply 450 MU for the period from 01.04.2010 to 31.03,2011 vide letter dated 17.02.2010 as per the provisions of clause 3.7 of the PPA. The same was accepted by the Respondent and approval was communicated vide letter dated 17.03.2010. As per this clause the commitment of power is voluntary. Respondent 1 & 2 had no role to play in the declaration of the quantum of committed power made by the Appellant. The rate for purchase of power during the above period was Rs 4.04 per Kwhr for firm power and Rs 3.03 per KWhr for infirm power. The infirm power rate is 75% of firm power rate.
- b) As per the Clause 3.8 of the PPA, the Appellant during the billing period (i.e. in a month) has to supply minimum energy of 5% of the firm power committed by the Appellant for the billing year except for the periods of planned and forced shut down. As the Appellant had committed 450 MU during the year 2010-2011, the Appellant had to supply minimum of 22.5 MU every month.
- c) Further as per Clause 3.11 of the PPA, the Appellant can be paid only at infirm power rate in a billing month (i.e. from April to February) when

the quantum of power in units sold for the billing month is below one twelfth of the annual power committed. This means if the Appellant supplies less than one twelfth of 450 MU i.e. less than 37.5 MU in a month, such supplies can be paid only at infirm power rate, which is 75% of the firm power rate. When the Appellant supplies one twelfth of annual committed power in a billing month i.e. equal to 37.5 MU, as per clause 3.12 of the PPA, the Appellant is paid at firm power rate, upto a maximum permitted supply of 52.47 MU as per the provision of Clause 3.9 of the PPA i.e. 11.66% of annual Committed Power.

- d) The Appellant has supplied less than  $1/12^{\text{th}}$  of the committed power during the period from April 2010 to July 2010 and hence payment was settled at Rs 3.03 i.e. infirm power rate ( $\text{Rs.}4.04 \times 0.75$ ) clearly as per the provisions of Clause 3.11 of the PPA. The Appellant has accepted the same without any dispute.
- e) The Appellant, had supplied 40,24,800 Units during the month of August 2010 which was more than the  $1/12^{\text{th}}$  of the committed power of 36,29,032 units. The Appellant was paid for August 2010 bill at firm power rate as per the clause 3.10 of the PPA .
- f) During September 2010 and October 2010 there was nil supply from the Appellant.
- g) The Appellant supplied 2,11,00,800 units during the month of November 2010 which was less than the  $1/12^{\text{th}}$  of the committed power units. Hence the payment was made at infirm power rate.
- h) The Appellant vide letter dated 22.11.2010 stated that, sudden failure of the rotor was unforeseen and it is a force majeure condition as per Article 2 of Power Purchase Agreement and requested to treat the

shutdown period as due to force majeure condition and requested to accept revised commitment of power to 300 M.U.

- i) The request of the Appellant was once again examined in detail taking into account of various provisions of PPA. The subject was placed before the Board of the Respondent No.1 & 2 and the Board examined the issue and concluded that there was no provision available in the PPA to accede to the request of the Appellant for revision of committed power. Hence the Respondent No. 2 in the letter dated 10.02.2011 to the Appellant informed that the request made by the Appellant was outside the purview of the PPA, and as such it was unacceptable. The Appellant was also informed that payment for the energy supplied will be regulated as per the provisions of PPA.
- j) There is no due payable to the Appellant for the financial year of 2010-11. The Respondent No. 1 and 2 had settled the dues to the Appellant strictly as per PPA.
- k) In the case of Appellant, the annual committed power for the year 2010 to 2011 accepted by the Respondent No. 1 and 2 was 450 MU. The Appellant had to supply at least 37.5 MU every month in order to get payment at firm power rates. The firm power rate for the year 2010-11 was Rs 4.04/- Per Kwhr and the infirm power rate was 75% of Rs 4.04, which was Rs.3.03/- Per Kwhr. Energy supplied less than 37.5 MU was eligible for payment only at infirm power rate every month. It can be seen that the Appellant had not even supplied the 1/12<sup>th</sup> of Annual Committed Power of 450 MU i.e. 37.5 MU per month as per PPA provisions for making payment at firm power rate of Rs 4.04/- even before the Break down of the Generator i.e. during the month from April to July 2010. Hence during such periods the

Appellant had been paid infirm power rate (i.e 75% of the firm power rate) for the supplied energy as per the PPA provisions.

- l) As per the Article 2 of the PPA, Explosions, Accidents, Breakage of facilities, plant or equipment, Structural collapse etc amounts to 'Force Majeure Conditions': However the Clause 3.10 of PPA states how billing to be made during such shutdown of the plant during billing period's i.e every month and Clause 3.14 of PPA describes how billing should be made for the period of March of any year when the total power units sold is below the annual firm power committed. From the above it could be seen that there is no provision in the PPA for revising the quantum of power already committed by the Appellant. The above provisions of the PPA take care of the shortfall due to Force Majeure Condition also on monthly basis i.e. for every billing period.
- m) Appropriate consideration of Force majeure clause and Force majeure period of about 100 days as per the PPA provisions was not denied to the Appellant by the Respondents. The amount payable during such Force majeure period as envisaged in the PPA had been paid. The claim of the Appellant is citing a Force majeure period of about 100 days for revising the bench mark downward, and apply the down sized bench mark for the entire year. If the annual committed power is revised to 300 MU then 1/12th of annual committed power would be 25 MU. By this the Appellant tries to circumvent the provisions of PPA to get firm power rates for the energy supplied by the Appellant below the monthly benchmark of 37.5 MU as a result of which the Respondents will suffer monetary loss .The Appellant is trying to get additional benefit of Rs 15.67 Crores for which it is not entitled as per PPA.

- n) The Appellant is aware of the fact that PPA was in operation from 29.01.1999. The commitment was never sought to be revised by the Appellant till 2010. The operation and maintenance of the generator is the responsibility of the Appellant. The PPA was extended pursuant to the orders of the State Commission for the years 2008-09 to 2013-14. There is no provision in the PPA which envisages that in the event of reduction in generation, the Appellant could seek for revision of yearly quantum committed by it.
- o) The terms of PPA do not mandate payment by treating the entire power supplied as firm power without any deduction as claimed by the Appellant, contrary to what is agreed to and approved by the State Commission under the PPA.
- p) The clause 3.7 of the PPA clearly mandates that the Appellant had to commit firm power before commencement of the billing year and the Appellant also acknowledged the same and hence there is no dispute on furnishing commitment of power by the Appellant. However it is not necessary for the Respondents to mandatorily purchase such commitment of power under clause 3.22, since the PPA enables the Respondents not to accept such power. Hence approval and acceptance of the Respondent is required for the purchase of power committed by the Appellant, and mere intimation by the Appellant for the power proposed to be sold cannot be taken as acceptance of commitment of power unless specifically accepted by the Respondents. In this case, the revision of commitment of power has not been accepted by the Respondents, therefore, the original commitment of power of 450 MU only survive.

- q) The Appellant apart from sale of power to the Respondents also wheel energy for its Captive use to a High Tension service (HT SC.NO. 31 in Sivaganga EDC) every month ie billing period. The meter readings of generation are taken at Sub-station end at Gummidipoondi 110 KV SS at Thiruvallur District where the connectivity has been granted. Hence in a billing period whenever the Appellant wheel power to the HT service, such quantum of power along with wheeling charge is deducted from the total recorded energy at SS end and the quantum of power available for sale to Respondents is calculated and bills are settled for such quantum taking into applicable Clauses of the PPA. Hence all the bills were made as per the provisions of the PPA and the entire claim of the Appellant is misleading and not correct.
- r) The Clause 3.14 of the PPA gives the methodology for making payment when there is short fall on supply of committed power in a year. This clause does not state that it is not applicable to a force majeure situation. This clause specifically states the procedure for billing period of March of any year when the total units sold to the Respondents for the billing year April to March is below the annual firm power commitment.
- s) The Appellant is not agitating the billing/payment made during the periods of shutdown of plant i.e. from August to October 2010.
- t) There was no total breakage of equipment due to factors mentioned in the force majeure clause which lead to a situation in which the Appellant was rendered incapable of supplying power completely in future. The defect in the rotor was noticed on 09.04.2010 itself and the consultant of the Appellant company had recommended

to run the plant at reduced capacity. Four months thereafter the generator had tripped, and it was declared defective. The failure of rotor was not sudden event or force majeure. During routine maintenance itself, the defects could have been detected and the Appellant could have taken adequate precautions or anticipated any break down. The Appellant could have arranged for supply of spares well in advance anticipating shutdown.

- u) When the Appellant can anticipate the problem which is of technical nature and continue to run the plant means the Appellant wants to enjoy the existing facilities and derive profits without incurring any expenditure till something happens. Hence the defect or anticipated shutdown can't be treated as force majeure and beyond the control of the Appellant and ultimately nothing survives on the Appellant's claim for revision of commitment of power due to absence of such provisions in the PPA. The PPA has taken adequate precautions to prevent undue enrichment by the Appellant, and at the same time has given adequate safe guard to get reasonable payment when such forced or planned shutdown takes place.
  - v) The PPA does not provide for compensation to be paid by either party in the event of force majeure condition and hence the Respondents can't be burdened with additional payment which will lead to compensating the Appellant for its failure to maintain supply of required committed power during the financial year 2010-2011.
- 10.** After having a careful examination of all the issues brought before us for our consideration, our observations are as follows:-

- a) Reliance has been made by the parties on the various provisions of PPA. The relevant clauses of the PPA required for deciding the present appeal are as under:

**Clause 1.4- 'Billing Period'** means the period between the time of taking monthly meter reading of a particular month to that of succeeding month.

**Clause 1.5 - Billing Year** means the period between the time of taking monthly meter reading of the month of March to the same time and date of March of the succeeding year i.e Billing period of April to that of March is the billing year.

**Clause 1.7 - Firm Power** means the quantity of power in units committed by the Company for sale for the billing year.

**Clause 1.8 - Infirm Power** means the percentage of power equal to the percentage of shortfall in commitment of power supplied to the Board and the power supplied without any commitment.

**Clause 2: "Force Majeure"** any event or circumstance, including

- (a) Explosions, accidents, breakage of facilities, plant or equipment, structural collapse, chemical or radioactive contamination (other than resulting from an act of war, terrorism or sabotage) caused by a person not being the affected Party or one of its contractors or sub contractors of any of their respective employees or agents, and not being due to inherent defects of the affected facility or the failure properly to operate the affected facility.
- (b) Lightning, earthquake, tempest, cyclone, hurricane, whirlwind, storm, flood
- (c) Epidemic or plague
- (d) Act of God

**Clause 3.7** - The Firm Power committed by the company for each billing year shall be intimated one month in advance before commencement of the billing year.

**Clause 3.8** - Minimum energy in units to be sold to the Board during the billing period is to be 5% of firm power committed by the company for the billing year, except for the periods of planned and forced shut down.

**Clause 3.9:** Maximum energy in units to be sold to the Board during the billing period is to be 11.66% of Firm power committed by the Company for the billing year, except for the periods of planned and forced shut down.

**Clause 3.10:** If the shutdown of the CPP (either forced or planned) is for a part of a billing period, the minimum and maximum energy in units to be sold to the Board for that billing period are to be arrived at as follows:

(a) Minimum energy to be sold is to be  
 = Minimum units as per condition 3.8 X (No. of Hrs. the CPP is in Parallel with the grid during the Billing period) / (No. of Hrs. of billing period)

(b) Maximum energy to be sold is to be  
 = Maximum units as per condition 3.9 X (No. of Hrs. the CPP is in Parallel with the grid during the Billing period) / (No. of Hrs of billing period)

(c) Total units sold to the Board are to be arrived at as follows for billing period :

Total billable units for the billing period ( For CPPs Where meter is installed at Board's Sub Station end and with wheeling)=

(Total recorded units for the billing period) - (Total units wheeled including the wheeling charges)

**Clause 3.11** - Monthly billing for the period of April to February of any year (When the quantity of power in units sold for the billing month is below one twelfth of the annual committed) will be as below.

Total cost of the power sold to the Board for the billing period =  
 (Total units sold during that period) x (firm power rate) x 0.75

**Clause 3.12** - Monthly billing for the period of April to February of any year (When the total units of power sold to the Board for the billing month is one twelfth of the annual committed or more) will be as below.

Total cost of the power sold to the Board for the billing period =  
 (Total units sold during that period) x (firm power rate)

**Clause 3.13** – Billing for the billing period of March of any year (When the total power in units sold to the Board for the billing year April to March is equal to or more than the annual commitment of power) will be as below:

The cost of the power billed during the billing period of March of any year = ((Total units sold during the billing year) x (firm power rate)) - (already paid amount from April to February of that year).

**Clause 3.14:** Billing for the billing period of March of any year (when the total units sold to the Board for the billing year April to March is below the annual firm power committed) will be as below:

The shortfall percentage of power sold against the commitment is to be billed under the infirm power rate and the balance out of sold power is to be billed under firm power rate.

**Clause 3.15: Payment**

- a) The cost of the power sold to the Board for each billing period is to be paid by cheque by the Board to the Company within 8 working days from the date of taking monthly meter reading for that billing period.
- b) If payment is not made within the above period, an interest at 14 percent per annum will be calculated in proportionate to the number of days delayed and paid in the bill for the next month.

**Clause 3.22** - In case the Board is not able to purchase the committed firm power either a part (or) whole from the CPP of company due to reasons other than force majeure, then the company is allowed to sell the non-purchased quantity of committed firm power alone to third parties by wheeling through the Board's grid with a wheeling charge of 15%. The company has to specify such third parties and intimate to Board and the Board has to give approval immediately for the above and the rate for the third party sale should not be less than the TNEB's H.T Industrial tariff rate.

- b) On the first issue for our consideration i.e. **Whether the State Commission is correct in holding that the claim of the Appellant for revising the annual committed power itself from 450 MU to 300 MU is not supported by any provision in the PPA?, we observe as follows:**

- i. As per Clause 3.7 of the PPA, the Appellant had to intimate the firm power commitment for each billing year one month in advance before the commencement of the billing year. The Appellant had committed to supply 450 M.U. for the period from 01-04-2010 to 31-03-2011 vide letter dated 17-02-2010 and

that the same was accepted by the Respondent and approval was communicated vide letter dated 17-03-2010. The rate for purchase of power during the above period was Rs 4.04 per Kwhr for firm power and Rs 3.03 per Kwhr for infirm power.

- ii. Clause 3.8 and Clause 3.9 of the PPA specify the minimum and maximum quantum of energy to be sold to the TANGEDCO during the billing periods except for the periods of planned and forced shutdown, with reference to the firm power committed to the Respondent No. 1 for the billing year. In case of planned/forced shutdown , the maximum and minimum energy shall be calculated as per provisions of Clause 3.10 of the PPA.
- iii. There is a specific formulation about the rate of power supplied in any billing month to TANGEDCO which has been linked with the 1/12<sup>th</sup> of the annual committed power.
- iv. Hence the quantum of annual committed power plays a key role with respect to performance of the Appellant and its revenue from the sale of power to the TANGEDCO.
- v. There is a Force majeure cause in the PPA under clause 2.0 but there is no specific mention of treatment of Force Majeure condition as far as annual committed power from the Appellant is concerned.
- vi. The provisions of clause 3.10 of the PPA set out the basic principle of treatment of shortfall in supply due to planned/forced outage as pro-rata reduction of the minimum or maximum energy supplied as specified under clause 3.8 and 3.9 of the PPA.
- vii. Clause 3.14 of the PPA is about the annual reconciliation of the total energy supplied to the TANGEDCO with respect to the

- annual committed quantity of power and treatment of shortfall, if any.
- viii. Hence considering the combined reading of various provisions of PPA, it is observed that the annual committed quantity, once communicated by the Appellant as per clause 3.7 cannot be revised for any billing year, since there is no provision in PPA with respect to revision of annual committed quantity. There are only provisions with respect to the computation of the minimum and maximum energy in case of shut down in a part of the billing period. Month to month adjustments of the quantum and rate of power shall be done as per clause 3.10, 3.11 and 3.12 of PPA and the annual adjustment shall be done as per Clause 3.14 of PPA.
  - ix. Considering above, we are in agreement with the findings of the State Commission that the claim of the Appellant for revising the annual committed power from 450 MU to 300 MU is not supported by any provision in the PPA.
  - x. Hence this issue is decided against the Appellant.
- c) On the second issue for our consideration i.e. Whether the State Commission has correctly interpreted the terms of the PPA?, we observe as follows;
- i. After going through the findings of the State Commission in the Impugned Order, we found that the State Commission has gone through various relevant provisions of the PPA as discussed above to decide the issue in dispute including clause 3.7, 3.8, 3.10 & 3.14 and ordered accordingly.

- ii. We do not find any infirmity in the observations of the State Commission.
  - iii. Hence this issue is also decided against the Appellant.
- d) On the third issue for our consideration i.e. **Whether the State Commission has erred in failing to take note that Clause 3.8 and Clause 3.9 of the PPA carve out an exception to the period of planned and forced shut down?**, we observe as follows:

- i. The State Commission in the Impugned Order has observed as follows:

“5.4.1 As per clause 3.7 of the PPA, the petitioner has to intimate the firm power commitment for each billing year, one month in advance before the commencement of the billing year. This commitment is voluntarily made by the petitioner. The petitioner in their letter dated 17.2.2010, had committed to supply 450 MU for the period from 1.4.2010 to 31.3.2011 and the same was accepted by the respondent and it was communicated in their letter dt. 17.3.2010 to the petitioner and thus it has reached the finality.

5.4.2. As per clause 3.8 of the PPA, minimum energy in units to be sold to the Board during the billing period is to be 5% of firm power committed by the company for the billing year, except for the periods of planned and forced shut down. As the Petitioner had committed 450 MU during the year 2010-2011, the company had to supply minimum of 22.5 MU every month (Billing period).

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5.4.7. The plant was shut down during 3.8.2010 to 11.11.2010 and during this period, taking cognizance of this shut down condition of the plant, the quantum of 1/12th supply was calculated as per clause 3.10 and accordingly payments were made. Therefore, concessional treatment for shut down period was properly given by TANGEDCO as contemplated in the PPA. But, the claim of the petitioner for revising the annual committed power itself from 450 MU to 300 MU is not supported by any provision in the PPA. If this reduction in annual committed power supply from 450 MU to 300 MU is allowed then higher rate i.e. firm power rate will become payable even for those months which were outside the shutdown period during which power supply was less than 1/12th of committed annual supply. This is not a correct proposition and will end up in undue enrichment to the petitioner. The contention of the petitioner for revising the annual committed power from 450 MU to 300 MU for force majeure due to forced shut down is not tenable and therefore it is dismissed. Consequently, the claim of interest will not survive.”

- ii. We find that the State Commission has rightly considered the various provisions of PPA including that under Clause 3.8 with respect to minimum energy and Clause 3.9 with respect to maximum energy to be supplied during any billing month except in case of planned and forced shutdown.
- iii. Hence this issue is also decided against the Appellant.

- e) On the fourth issue i.e. **Whether the State Commission is correct in holding that the revision of the annual commitment would result in an unjust enrichment to the Appellant?, we observe as follows;**
- i. Considering our observations on issue no 1, we found that if annual committed quantity is allowed to be revised by the Appellant during the billing year, it will have impact on the tariff rate to be paid by the TANGEDCO to the Appellant. This will cause additional financial stress to the TANGEDCO. The clauses of PPA have clearly defined the framework to deal with the situations of planned/forced shutdown and adjustment of maximum/ minimum monthly energy supplied and applicable rates for the same.
  - ii. Hence we are in agreement with the findings of the State Commission.
  - iii. Hence this issue is also decided against the Appellant.
- f) On the last issue i.e. **Whether the State Commission has interpreted the relevant provisions of the PPA, in particular, Clauses 1.5, 1.7, 1.8, 2, 3.7 to 3.10, 3.14 and 3.15, in a correct manner?, we observe as follows;**
- i. Clause 1.5 of PPA is definition of the “Billing Year” which is the period between the time of taking monthly meter reading of the month of March to the same time and date of March of the succeeding year i.e Billing period of April to that of March is the billing year. The Firm power is defined in Clause 1.7 of PPA as the quantity of power in units committed by the Company for sale for the billing year. Clause 1.8 of PPA is definition of Infirm Power which is percentage of shortfall in commitment of power and the

power supplied without any commitment. Clause 2.0 of PPA is regarding the Force Majeure conditions which have been discussed above. All these have been taken care of while computing the power supplied during the period under dispute and further discussed hereunder.

- ii. As per provisions of Clause 3.7 of PPA, the Firm Power committed by the company for each billing year shall be intimated one month in advance before commencement of the billing year. Clause 3.8 and 3.9 of PPA detail out the quantum of minimum energy and maximum energy in units to be sold to the Respondent No. 1 during the billing period except for the periods of planned and forced shut down. The minimum and maximum energy in units to be sold, if the shutdown of the CPP (either forced or planned) is for a part of a billing period, has been detailed out in Clause 3.10 of PPA. Annual reconciliation of the power supplied against the committed quantum is deliberated in Clause 3.14 of PPA. Mode of payment and interest on delayed payment has been considered in clause 3.15 of PPA.
- iii. As per Appellant, the shortfall percentage of power set out in clause 3.14 of PPA would be applicable only under normal conditions and not due to conditions of forced outage or due to any force majeure conditions.
- iv. Clauses 3.8 and 3.9 of a PPA clearly fix the quantum of minimum and maximum energy that has to be supplied by the Appellant, every month. The exceptions provided in these clauses for the periods of planned and forced shutdown are applicable for the particular month only (billing period). In the normal course in

order to get firm power rate, the Appellant has to satisfy clauses 3.8, 3.9 read with clause 3.12 of the PPA. As per these clauses, the Appellant had to supply 1/12th of annual committed power to get paid at firm power rate. The Appellant was to be paid only at infirm power rate, in case of annual committed power below the 1/12<sup>th</sup> of the committed quantum as per clause 3.11 or for the short fall in quantum and even for the power supplied without any commitment as per clause 1.8 of the PPA. As per the Article 2 of the PPA, explosions, accidents, breakage of facilities, plant or equipment, structural collapse etc. amounts to "Force Majeure Conditions". However, clause 3.10 of PPA states how billing is to be made during such shutdown of the plant during billing periods i.e. every month and clause 3.14 of the PPA describes how billing should be made for the period of March of any year when the total units sold for the billing year is below the annual firm power committed. From the above, it could be seen that there is no provision in the PPA for revising the quantum of power already committed by the Appellant. The above provisions of the PPA take care of the shortfall due to force majeure condition also on monthly basis i.e. for every billing period.

- v. Hence we do not find any infirmity in the findings of the State Commission.
- vi. This issue is also decided against the Appellant.

**ORDER**

We are of the considered opinion that the issues raised in the present Appeal have no merits and Appeal deserves to be dismissed.

The Impugned Order dated 13.02.2015 passed by the State Commission is hereby upheld.

No order as to costs.

Pronounced in the Open Court on this **29<sup>th</sup> day of August, 2016.**

**(I.J. Kapoor)**  
**Technical Member**

**(Mrs. Justice Ranjana P. Desai)**  
**Chairperson**

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**REPORTABLE/~~NON-REPORTABLE~~**  
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