

**IN THE APPELLATE TRIBUNAL FOR ELECTRICITY  
(Appellate Jurisdiction)**

**APL No. 438 OF 2019**

**Dated: 17.01.2025**

**Present: Hon'ble Mr. Justice Ramesh Ranganathan, Chairperson  
Hon'ble Smt. Seema Gupta, Technical Member (Electricity)**

**In the matter of:**

**1. UTTAR PRADESH POWER CORPORATION LIMITED**

*(Through its Chairman)*

7<sup>th</sup> Floor, Shakti Bhawan Extension,  
14, Ashok Marg, Lucknow,  
Uttar Pradesh - 226001

... Appellant No.1

**2. PASCHIMANCHAL VIDYUT VITRAN NIGAM LIMITED**

*(Through its Managing Director)*

Urja Bhawan, Victoria Park,  
Meerut- 250001, Uttar Pradesh

... Appellant No.2

**3. PURVANCHAL VIDYUT VITRAN NIGAM LIMITED**

*(Through its Managing Director)*

DLW, Bhikharipur,  
Varanasi - 221004  
Uttar Pradesh

... Appellant No.3

**4. MADHYANCHAL VIDYUT VITRAN NIGAM LIMITED**

*(Through its Managing Director)*

4-A, Gokhale Marg,  
Lucknow- 226001,  
Uttar Pradesh

... Appellant No.4

**5. DAKSHINANCHAL VIDYUT VITRAN NIGAM LIMITED**

*(Through its Managing Director)*

Urja Bhawan, NH-2, (Agra-Delhi Bypass Road),  
Sikandra, Agra - 282002  
Uttar Pradesh

... Appellant No.5

**VERSUS**

1. **CENTRAL ELECTRICITY REGULATORY COMMISSION**  
(Through its Secretary)  
3<sup>rd</sup> & 4<sup>th</sup> Floor, Chanderlok Building,  
36, Janpath, New Delhi - 110001 ...Respondent No.1
  
2. **MB POWER (MADHYA PRADESH) LIMITED**  
(Through its Director),  
239, Okhla Industrial Estate, Phase III,  
New Delhi - 110020 ...Respondent No.2
  
3. **PTC INDIA LIMITED**  
(Through its CMD)  
2<sup>nd</sup> Floor, NBCC Tower,  
15 Bhikaji Cama Place,  
New Delhi – 110066 ...Respondent No.3

Counsel on record for the Appellant(s) : Vishal Binod  
Divyanshu Bhatt  
Syed Jafar Alam  
Aryaman Saxena  
Arjun Agarwal  
Abhishek Kumar for App. 1  
Syed Jafar Alam  
Vishal Binod  
Divyanshu Bhatt  
Aryaman Saxena  
Arjun Agarwal  
Abhishek Kumar for App. 2  
Syed Jafar Alam  
Vishal Binod  
Divyanshu Bhatt  
Aryaman Saxena  
Arjun Agarwal  
Abhishek Kumar for App. 3  
Syed Jafar Alam  
Vishal Binod

Divyanshu Bhatt  
Aryaman Saxena  
Arjun Agarwal  
Abhishek Kumar for App. 4  
Syed Jafar Alam  
Vishal Binod  
Divyanshu Bhatt  
Aryaman Saxena  
Arjun Agarwal  
Abhishek Kumar for App. 5

Counsel on record for the Respondent(s) : for Res. 1

Amit Kapur  
Raghav Malhotra  
Akshat Jain for Res. 2

Ravi Kishore  
Niraj Singh  
Rajshree Chaudhary  
Perna Singh for Res. 3

## **JUDGMENT**

**(PER HON'BLE SMT. SEEMA GUPTA, TECHNICAL MEMBER (ELECTRICITY))**

1. The instant Appeal is filed by the Appellants - Uttar Pradesh Power Corporation Limited, Paschimanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited, Purvanchal Vidyut Vitran Nigam Limited, Madhyanchal Vidyut Vitran Nigam Limited, Dakshinanchal Vidyut Vitran Nigam Limited (**Appellants**) challenging the order dated 30.04.2019 passed by the Central Electricity Regulatory Commission (hereinafter referred to as "**Central Commission/ Respondent No.1/ CERC**) whereby the Central Commission has disposed of the Petition filed by the Respondent No.2 holding that the amount deducted by the Appellant No.1

towards the capacity and Transmission Charges ought to be refunded to Respondent No.2 along with the carrying cost/Late payment surcharge.

2. The Uttar Pradesh Power Corporation Limited, the **Appellant No. 1** is a body corporate authorized by the distribution companies in Uttar Pradesh; (i) Paschimanchal Vidyut Vitran Nigam Ltd. (**Appellant No. 2**), (ii) Purvanchal Vidyut Vitran Nigam Ltd. (**Appellant No. 3**), (iii) Madhyanchal Vidyut Vitran Nigam Ltd. (**Appellant No. 4**), (iv) Dakshinanchal Vidyut Vitran Nigam Ltd. (**Appellant No. 5**) (hereinafter collectively referred to as "**Appellants/UP Discoms**"). The Appellant Nos. 2 to 5 are distribution licensees in the State of Uttar Pradesh and are procuring 361 MW (net) power from Respondent No.2's Project through Respondent No. 3.

3. **Respondent No. 1** is the Central Electricity Regulatory Commission, which is a statutory body functioning under Section 76 of the Electricity Act 2003 ("**the Act**"). **Respondent No. 2**, M.B. Power (Madhya Pradesh) Limited ("**M.B. Power**") is a generating company and is currently operating a 1200 MW (2 X 600) domestic coal based thermal power project in District Anuppur of Madhya Pradesh ("**The Project**"). **Respondent No.3** PTC India Limited ("**PTC**") is a trading licensee as per the provisions of the Act and has been granted a trading license by the Central Commission.

The facts of the present appeal, in brief, are stated here-in-below:

4. Pursuant to the Request for Proposal (**RFP**) issued by the Appellant No.1 on 27.07.2012 for procurement of power for long term under Case-1

Bidding Procedure through tariff based competitive bidding process for supply of power to Appellant Nos. 2 to 5, the Respondent No.2 participated in the bidding process through Respondent No.3, and submitted its bid on 24.09.2012 for supply of 361 MW (net) power from the Project. On 11.12.2013, Appellant No.1 issued a Letter of Intent (**LoI**), informing that Respondent No.3's bid for supply of 361 MW (net) from the Respondent No.2's Project had been accepted. Thereafter, on 18.01.2014, the Respondent No. 3 and Appellant Nos. 2 to 5 executed Power Purchase Agreement (herein after referred as "**Procurers PPA**") for supply of 361 MW from Respondent No.2's Project. Subsequent thereto, on 20.01.2014, the Respondent No.2 and the Respondent No.3 executed back-to-back Power Purchase Agreement (herein after referred as "**PTC PPA**") for supply of 361 MW from the Project.

5. While executing the "PTC PPA", the Respondent No.2 had a Long-Term Open Access (**LTA**) of only 192 MW for Northern Region, immediately thereafter, on 11.02.2014, Respondent No.2 applied for the balance LTA of 169 MW to Power Grid Corporation of India Limited ("**POWERGRID/CTU**") and signed LTA Agreement with POWERGRID on 04.06.2015. Since the operationalization of this LTA of 169 MW by POWERGRID was taking time due to involvement of strengthening of downstream transmission system by POWERGRID, the Respondent No. 2, in order to supply 361 MW of power, secured Medium Term Open Access (**MTOA**) till 29.10.2016 from POWERGRID (through MTOA Agreement with POWERGRID dated 27.02.2015) as an interim arrangement till operationalization of the corresponding LTA of 169 MW by POWERGRID. On 12.03.2015, same was informed by Respondent No. 3

to Appellant No.1, giving reference to the Respondent No. 2's letter dated 11.03.2015, which stated that it had arranged MTOA of 169 MW and with this the entire transmission access of 361 MW for supply of power has been arranged. On 06.07.2015, Appellant No.1 conveyed its acceptance to Respondent No.3. Subsequently, the supply of power under "Procurers PPA" commenced from August 2015 onwards corresponding to the entire Contracted Capacity of 361 MW (192 MW through LTA + 169 MW through MTOA) to Appellant Nos. 2 to 5.

6. Since the ongoing MTOA of 169 MW granted to Respondent No. 2 by POWERGRID was till 29.10.2016, Respondent No. 2, on 12.10.2015, applied to POWERGRID in advance for MTOA of 169 MW for 3 years, which was granted by POWERGRID to Respondent No. 2 for a period of 3 years w.e.f. 30.10.2016 onwards and thereupon MTOA Agreement dated 16.12.2015 was entered into between Respondent No.2 and POWERGRID.

7. After the expiry of the earlier MTOA on 29.10.2016, there was delay in operationalisation of the fresh MTOA (**hereinafter referred as 2<sup>nd</sup> MTOA**) for 169 MW in terms of the MTOA Agreement dated 16.12.2015, and the fresh MTOA could be partially operationalised for 85 MW with effect from 10.11.2016. On 30.11.2016, the Appellant No.1 conveyed its consent to Respondent No.3 for scheduling of power by each distribution companies with immediate effect qua the 85 MW MTOA. On 02.01.2017, the Respondent No.2 informed the Respondent No.3 (**what about Appellants**) that the CTU would be operationalizing the MTOA for

supplying balance 84 MW of power to Appellant Nos. 2 to 5 in next few days.

8. On 14.03.2017, Respondent No.3 informed the Appellant No.1 that in the meeting of Respondent No.2 with POWERGRID/CTU on 28.02.2017, the LTA of 169 MW granted to Respondent No.2 from 765kV D/c Jabalpur-Orai transmission line has been upgraded to 800 kV Champa- Kuruskshetra HVDC transmission link. Therefore, the LTA of 169 MW would be operationalised immediately after commissioning of Champa- Kuruskshetra HVDC Bipole link which was expected to be operationalised shortly.

9. Subsequently, on 30.03.2017, Respondent No. 3/Respondent No 2 was ready to schedule the entire Aggregate Contracted Capacity of 361 MW under the "Procurers PPA" with immediate effect, and requested Appellant No.1 to ensure off-take/scheduling of entire Aggregated Contracted Capacity with immediate effect. However, it was on 15.05.2017, the Appellant No.1 conveyed its consent to Respondent No.3 for scheduling of entire 361 MW including scheduling of 169 MW under LTA. The dispute arose with regard to payment of Capacity charge and Transmission Charge for the 84 MW for the period from 01.04.2017 till 16.05.2017 by Appellants (which was not scheduled by the Appellants upon operationalisation of entire Aggregate Capacity of 361 MW through LTOA) as Capacity charges corresponding to this quantum of 84 MW was deducted by the Appellants from the invoice raised for the month of April 2017 and May 2017. Respondents requested Appellant No.1 to release the deducted amount of capacity charge of Rs. 10,63,43,328 (for the

month of April 2017) and Rs. 5,03,14723 (for the month of May 2017) as well as to reimburse LTA charges for the entire contracted quantum of 361 MW during this period, which would be sent separately to Appellant No.1. On 13.08.2018, Respondent No.3 requested Appellant No.1 to make payment of Rs. 15,66,58,051 towards Capacity Charges and Rs. 4,10,61,232/- towards transmission charges for the months of April and May 2017 corresponding to this 84 MW. Thereafter, the Respondent No.2 filed a Petition No. 289/MP/2018 against the Appellant No.1 under Section 79 (1) (b) and (f) of the Electricity Act, seeking payment of Capacity Charges and Transmission Charges as per the applicable provisions of the "Procurers PPA" read with "PTC PPA" dated 18.1.2014 and 20.1.2014 respectively. The Central Commission by its order dated 30.04.2019 disposed of the said Petition by holding that the amount deducted by the Appellant No.1 towards the capacity and Transmission Charges from the invoices of April and May 2017, ought to be refunded to the Respondent No. 2 along with the carrying cost/Late payment surcharge. Being aggrieved thereby. the Appellants have preferred the present appeal before this Tribunal.

### **Appellant Submissions**

10. Mr B.P. Patil, Learned senior counsel for the Appellants submitted that pursuant to Articles 3.1.1(b) and 3.1.1(c) of the "Procurers PPA", read with Clause III of Schedule 1 of the "PTC PPA" (referred as Generator PPA) , and Articles 4.2.1(c) and 4.2.1(d) of the Procurers-PPA, read with Clause IV of Schedule 1 of the "PTC PPA", Respondent No.2, MB Power was obligated to obtain LTOA for the entire quantum of 361 MW by 30.10.2016.



However, on 08.12.2014, the scheduled delivery date was revised to 01.03.2015, or the date of availability of open access to MB Power, whichever is later to enable early supply of electricity under the contracts as well as to accommodate Respondent No. 2, MB Power, since it failed to secure LTOA for entire 361 MW quantum by such time. The aforesaid indulgence or non-enforcement of compliance with the provisions relating to MB Power's obligation to secure LTOA shall not constitute a waiver of rights under Article 15.5 of the "Procurers PPA".

11. Further, it is contended that the entire quantum of 361 MW was supplied by MB Power from 26.08.2015 to 29.10.2016, wherein 192 MW quantum was supplied under LTOA, and 169 MW quantum was supplied under MTOA. However, from 30.10.2016, MB Power alleged the occurrence of a force majeure event due to delays in the operationalization of MTOA for the 169 MW quantum. The alleged force majeure affecting the supply of 169 MW from 30.10.2016 onwards was partially mitigated on 15.11.2016, with the operationalization of MTOA qua 85 MW quantum out of 169 MW quantum, leaving a balance of 84 MW and on 30.03.2017, MB Power abruptly informed that the entire 361 MW of electricity was available for supply through LTOA.

12. Learned senior counsel for the Appellants pointed out that in the Impugned Order, CERC observed that while the Respondent No.2, MB Power was capable of supplying the entire 361 MW through LTOA from 01.04.2017 onwards, the Appellants continued to off-take only 277 MW until 16.05.2017, for reasons known solely to them. The Impugned Order further held that the Appellants were obligated to ensure the availability of

interconnection facilities for the evacuation of electricity beyond the delivery point prior to the scheduled delivery date or the revised scheduled delivery date. Consequently, the Appellants were held liable to pay capacity charges for the 84 MW quantum for the period from 01.04.2017 to 16.05.2017; these findings under the Impugned Order are erroneous as MB Power failed to adhere to Article 4.1.2 of the "Procurers PPA", read with Clause IV of Schedule I of the "PTC PPA". As per Articles 3.1.1(b) and 3.1.1(c) of the "Procurers PPA", read with Clause III of Schedule I of the "PTC-PPA", and Articles 4.2.1(c) and 4.2.1(d) of the "Procurers PPA", read with Clause IV of Schedule I of the "PTC-PPA", MB Power, having fulfilled its obligation to arrange LTOA for the entire 361 MW quantum and intending to supply 361 MW under LTOA from 01.04.2017 onwards, was obligated to issue a mandatory 60-day advance preliminary written notice and a 30-day advance final written notice prior to such proposed commencement of power supply from 01.04.2017 onwards.

13. Learned senior counsel for the Appellants also emphasized on the principle laid down by this Tribunal in "***Talwandi Sabo Power Limited v. Punjab State Power Corporation Limited***", **2016 SCC OnLine APTEL 64**, stating that mandatory contractual terms requiring issuance of notices in a specified manner cannot be brushed aside. Accordingly, the Impugned Order is contrary to the settled legal position. This Tribunal, in its recent judgment dated 24.09.2024 in Appeal No. 172 of 2019, "***Arjun Green Power Private Limited v. Rajasthan Electricity Regulatory Commission & Ors***", (**Appeal No. 172 of 2019**), reiterated that contracts are sacrosanct and binding upon the parties. It was further held that timelines under contracts serve a specific purpose and cannot be treated

as mere procedural formalities; the parties cannot bypass mandatory provisions related to timelines under the contracts. Specifically, with regard to the requirement of giving preliminary and final written notices prior to commencement or synchronization, this Tribunal held that such notice requirements exist to enable distribution licensees to arrange for interconnection and transmission facilities for evacuation and to make necessary arrangements for receiving the contracted capacity of power.

14. Learned senior counsel for the Appellants asserted that in the present case, MB Power issued letters dated 02.01.2017 and 14.03.2017, indicating that the balance 84 MW would be supplied shortly upon the commissioning of the 1<sup>st</sup> pole of the Champa-Kurukshetra HVDC transmission link. Subsequently, Respondent NO. 3, issued a letter dated 27.03.2017, stating that the said transmission line had been commissioned but failed to specify any firm date for the commencement of power supply until its letter/notice dated 30.03.2017, wherein it was intimated for the commencement of the entire 361 MW power supply under LTOA with immediate effect. As such, Respondent, MB Power failed to comply with Article 4.1.2 of the "Procurers PPA", read with Clause IV of Schedule I of the "PTC PPA". Consequently, a period of 46 days (i.e., until 16.05.2017) was expended by UPPCL in arranging evacuation infrastructure necessary for off-taking the entire 361 MW under LTOA.

15. It is submitted that the Uttar Pradesh State Load Despatch Centre (UP SLDC), through its communication dated 13.04.2017, stated that the Available Transfer Capability (ATC) at the relevant point of time was 7200 MW, whereas the allocation from Central Sector Generation Stations

(CSGS), Inter-State Generation Stations (ISGS), and through Long-Term Open Access (LTOA) and Medium-Term Open Access (MTOA) was 8087 MW/7684 MW ex-bus. Additionally, UP SLDC indicated that certain additional generation capacity was due to be scheduled for the State of Uttar Pradesh under Case-1 competitive bidding. Out of total 969 MW capacity scheduled for commencement of supply, the balance 84 MW from MB Power was also referenced. UP SLDC further noted that the revised ATC and Total Transfer Capability (TTC) assessment was pending and stated that MB Power, having top priority, could be accommodated on the condition that UP DISCOMs and UPPCL schedule and draw power within the specified ATC limits.

16. By its order dated 09.11.2016 in Petition No. 84/MP/2016 and I.A. Nos. 53/2016 and 54/2016, the CERC permitted part operationalization of MTOA for MB Power, allowing a quantum of 85 MW out of 169 MW. However, MB Power's own submissions, as recorded in the said order, highlighted a lack of clarity regarding the operationalization of balance MTOA. The final order dated 02.11.2017 in Petition No. 84/MP/2016 and I.A. No. 30/2016 issued by the CERC corroborates the fact that while MB Power was obligated to arrange LTOA up to the delivery point under the "Procurers PPA" and "PTC PPA", MB Power itself was unaware of a firm date for commencement of entire 361 MW power supply under LTOA.

17. To cover up its failure to fulfil its obligation to arrange LTOA for the full quantum of 361 MW, MB Power made a claim for capacity charges for the 84 MW quantum during the period from 01.04.2017 to 16.05.2017. Notably, I.A. No. 30/2016 in Petition No. 84/MP/2016 was filed by MB

Power, seeking directions for the operationalization of MTOA for the balance 84 MW which was linked by CTUIL to commissioning of Champa-Kurukshetra HVDC Link, from the capacity blocked for Lanco Babandh generation project due to uncertainty in the commissioning of the said generation project as well as Champa-Kurukshetra HVDC Link. At the relevant point of time i.e. in February 2017, CTUIL, through an affidavit filed in the aforesaid petition, stated that the Champa-Kurukshetra HVDC Link would be progressively commissioned but provided no clarity as to when the balance 84 MW LTOA for MB Power would be operationalized. In light of the uncertainty in availability of open access for MB Power, 84 MW quantum was offered by MB Power abruptly from 30.03.2017 onwards without issuance of mandatory prior notice in terms of Article 4.1.2 of the Procurer -PPA and hence same could not be off-taken until 17.05.2017.

18. Learned senior counsel for the Appellants further contended that when all parties were unaware of firm date for commencement of entire 361 MW under LTOA, including 192 MW always supplied under LTOA, 85 MW initially supplied under MTOA and balance 84 MW supplied under LTOA (i.e., upon being upgraded to LTOA for full quantum), the Appellants should not be made liable for payment of capacity charges qua 84 MW from 01.04.2017 to 16.05.2017 due to no fault of their own. Particularly, as MB Power was contractually obligated to secure LTOA and was expressly required to issue a mandatory 60-day advance preliminary written notice and a 30-day advance final written notice, with full knowledge of its obligations.

19. Learned senior counsel for the Appellants further submitted that the Impugned Order erroneously concludes that the Appellants are liable to reimburse transmission charges if paid by MB Power solely on the basis that MB Power incurs the liability for the basic capacity booked, irrespective of actual usage. In this regard, the Impugned Order places erroneous reliance on the judgment of this Tribunal *dated 13.10.2015 in Appeal No. 6 of 2015, "GETCO v. GERC & Anr."*. The Impugned Order fails to consider that the Appellants' obligation to reimburse transmission charges under Article 4.3.1(b) of the "Procurers PPA" is subject to the other terms and conditions of the "Procurers PPA"; specifically, the definition of "Transmission Charges" expressly stipulates that reimbursement is subject to usage of intervening CTU network. These submissions are consistent with the judgment of the Hon'ble Supreme Court in "**Power Grid Corporation of India Ltd. v. Punjab State Power Corporation Ltd.**", (2016) 4 SCC 797, which interprets the definition of "Transmission Lines" under the Electricity Act, 2003.

20. The reliance placed in the Impugned Order on the judgment dated 13.10.2015 of this Tribunal in Appeal No 6 of 2015 (**GETCO v. GERC & Anr**) is misplaced, as the said judgment does not address the issue of reimbursement by beneficiaries. Instead, it pertains to the payment of transmission charges by customers of transmission services to transmission service providers. While relationship between MB Power and POWERGRID (Now CTUIL) may be governed by their *inter-se* commercial arrangement requiring payment basis capacity booked, it cannot impinge on the terms of the "Procurers PPA" which stipulates that reimbursement of transmission charges is subject to actual usage.

## **Respondent No. 2 Submissions**

21. Mr Amit Kapoor, learned counsel for the Respondent No. 2 submitted that the Appellant Discoms have introduced new grounds before this Tribunal which were neither raised before the CERC nor addressed in any past correspondence. In the present Appeal, the Appellants UP Discoms have, for the first time, contended that MB Power's claims for Capacity Charges and Transmission Charges are untenable on the ground that MB Power failed to issue a 60-day advance preliminary notice and a 30-day advance final notice, as required under Article 4.1.2 of the "Procurers PPA" read with the "PTC PPA".

22. It is a well-settled principle of law that a new ground cannot be raised for the first time in an appeal if the same was not advanced before the court in the original proceedings. In this regard, learned counsel for the Respondent No. 2 placed reliance on the following judgments:

- a. ***State of Maharashtra v. Hindustan Construction Company Ltd.*, (2010) 4 SCC 518**
- b. ***Karpagathachi & Ors. v. Nagarathinathachi*'**, AIR 1965 SC 1752

23. Learned counsel further submitted that the Appellants ought not to be permitted to raise new grounds for the first time in the present Appeal, particularly when such grounds were not raised before the CERC; Appellants-UP Discoms cannot assume that the CERC would consider grounds which are not specifically pleaded before it. Moreover, the Appellants-UP Discoms ought not expect CERC to formulate arguments and consider the averments of its own volition (which are not made by UP

Discoms) while passing the Impugned Order. In view of the categorical admission by the Appellants UP Discoms that these grounds have been raised for the first time in the present Appeal, it is submitted that the new grounds and contentions ought to be rejected by this Tribunal.

24. Learned counsel for the Respondent No. 2 contended that the Transmission Charges have been wrongfully withheld by the Appellants-UP Discoms; Rs. 10,63,43,328 and Rs. 5,03,14,723 from the bills of April 2017 & May 2017 respectively. In addition, UP Discoms has deducted Transmission Charges of Rs. 4,10,61,232/- for the months of April and May 2017 and during March 2018, UP Discoms deducted Capacity Charges of Rs. 5,06,85,262/- payable to MB Power for the months of January and February 2018, from the invoice of March 2018. Such unlawful deductions by the Appellants-UP Discoms are in contravention of Article 4.3.1(a), 4.3.1 (b), 4.4.1 of the "Procurers PPA".

25. Learned counsel for the Respondent No.2 submitted that Appellants-UP Discoms were obligated to ensure evacuation connectivity and establish adequate interconnection facilities for the evacuation of power from the Interconnection Point prior to the Revised Scheduled Delivery Date. Notably, Uttar Pradesh agencies, including Appellants-UP Discoms and UPSLDC, were duly notified that MB Power had declared the contracted capacity of 361 MW available for supply with effect from 01.04.2017. Despite being aware that MB Power was in a position to supply the contracted capacity from the said date, the Appellants-UP Discoms chose not to schedule power until 16.05.2017. Furthermore, upon operationalization of 169 MW LTA by POWERGRID with effect from 01.04.2017, POWERGRID raised invoices for Transmission Charges on



MB Power for the contracted capacity of 361 MW, which MB Power duly paid.

26. Learned counsel for the Respondent No. 2 referring this Tribunal's judgment in '**Gujarat Electricity Transmission Corporation Ltd. v. Gujarat Electricity Regulatory Commission & Anr.**', 2015 SCC Online **APTEL 21**, submitted that from the Article 4.3.1(b) and Article 4.4.1 of Schedule 4 of the "Procurers PPA", it is apparent that the Appellants-UPPCL/UP Discoms were liable to reimburse the Transmission Charges that were paid by MB Power on behalf of the Appellants-UPPCL/UP Discoms irrespective of whether Appellant No.1 has used the Transmission facilities or not.

27. Learned counsel for the Respondent No. 2 further asserted that MB Power was in a position to supply the Contracted Capacity to the Appellants-UP Discoms effective 01.04.2017, and is entitled to claim Capacity Charges for the power declared from the Project. Under Article 4.4.1 of the "Procurers PPA", MB Power is obligated to sell the Contracted Capacity to the Appellant No.1, and Appellant No.1 is correspondingly obligated to pay the Tariff for the entire Available Capacity up to the Contracted Capacity and the corresponding Scheduled Energy. Additionally, in accordance with Article 4.1(ii) of Schedule 4 of the "Procurers PPA", the Tariff shall be paid in two parts: comprising of Capacity Charge and Energy Charge.

28. Learned counsel for the Respondent 2 contended that the Appellant No.1 is obligated to pay Capacity Charges for the capacity declared by Respondent No.2, as the latter was in a position to generate electricity, irrespective of the Appellant's decision not to schedule the quantum of the

declared capacity. In this context, learned counsel placed reliance on the following judgments:

- a. ***Maharashtra State Electricity Distribution Company Ltd. v. CERC, 2015 SCC Online APTEL 1***
- b. ***Maharashtra State Electricity Distribution Company Ltd. v. Ratnagiri Gas and Power Pvt. Ltd., (2024) 1 SCC 333***
- c. ***Talwandi Sabo Power Ltd. v. Union of India, CWP No. 7519 of 2020***

29. It is contended that the Appellants-UP Discoms failed to schedule 84 MW of power for a period of 46 days, from 01.04.2017 to 16.05.2017 and have further compounded the problem by withholding an amount of ₹5,06,85,262/- from the Capacity Charges payable to Respondent No.2 for the months of January and February 2018, as deducted from the invoices for March 2018. This deduction is based on an erroneous computation of the cumulative availability declared during FY 2017-18, wherein the Appellants-UP Discoms failed to account for the unscheduled capacity of 84 MW duly declared available by Respondent No.2.

30. Learned counsel for the Respondent No. 2 submitted that the Appellants have placed reliance on Article 4.1.2 of the "Procurers PPA", stated that Respondent No. 2 was required to give the Appellant No.1, 60 days advance preliminary written notice and 30 days advance final written notice, of the date on which it intends to commence supply of power; however, as per the referred Article, Respondent No.2 was obligated to issue the required notices to notify the date of commencement of power supply under the PPA for the first time and not required to reissue the 60-day advance preliminary notice and 30-day advance final notice every time

there is a disruption in power supply under the PPA. Further, disruptions in power supply may arise due to various reasons, including line tripping or delays in the operationalization of Open Access; it is neither the scheme nor the intent of the PPAs to impose a cumulative 90-day notice period before such power can be scheduled by the Appellant following each disruption in power supply.

31. It is also submitted that Respondent No.2 has fully complied with Article 4.1.2 of the Procurer's PPA as even though the Scheduled Delivery Date (SDD) was 30.10.2016, on 08.12.2014, the Appellant No.1 had categorically agreed for commencement of power supply from the later date of either 01.03.2015, or the actual date of availability of Open Access. Notably, UPPCL's letter dated 08.12.2014 does not distinguish between MTOA and LTOA for the purpose of determining the commencement of power supply under the PPAs. In view of the foregoing, it is submitted that Respondent No.2 commenced supply of the entire Contracted Capacity of 361 MW on 26.08.2015, which was 20 months prior to the disputed period and was duly scheduled and availed by the Appellants. Therefore, the date of commencement of power supply under the PPAs is 26.08.2015. It is further submitted that the obligation under Article 4.1.2 of the Procurer's PPA was exhausted on 26.08.2015, the date of which supply of the entire Contracted Capacity of 361 MW under the PPA had commenced.

32. Learned counsel for the Respondent No. 2 submitted that the Appellant reliance on the judgment in "**Arjun Green Power Pvt. Ltd. v. RERC & Ors.**" and '**Talwandi Sabo Power Ltd. v. PSPCL & Ors., 2016 SCC Online APTEL 43** to assert that MB Power was obligated to mandatorily provide a 60-day advance preliminary notice and a 30-day

advance final notice of the date on which it intends to commence power supply before imminent operationalization of the LTA, in erroneous. The said judgments are not applicable to the facts of the present Appeal and are clearly distinguishable as in the present case, MB Power had already commenced power supply under the PPAs on 26.08.2015.

33. It is further asserted that in accordance with Article 3.1.1 of the “Procurer PPA”, Respondent No.2 was required to obtain the necessary permissions for LTA for the transmission system from the Injection Point to the Delivery Point. Notably, the Appellants by its letter dated 06.07.2015, had conveyed to Respondent No.2/ Respondent No.3, its acceptance of the fulfilment of conditions subsequent under Article 3.1.1 of the Procurer’s PPA, thereby, granting its acceptance to the fact that Respondent No.2 had received the requisite Open Access to supply power under the PPAs. Accordingly, the Appellants had already accepted that Respondent No.2 had obtained the required Open Access to commence power supply under the PPA. It is, therefore, not open for the Appellant to contend that MB Power did not have the required LTA to supply power under the PPAs but had commenced power supply under MTOA.

34. Learned counsel for the Respondent No.2 submitted that the Reduction of power supply from 361 MW to 277 MW was due to transmission constraints which was a Force Majeure event. In this regard, learned counsel submitted that

- On 09.12.2016, Respondent No.2 issued a Force Majeure Notice to Respondent No.3 regarding the delay in the operationalization of 169 MW MTOA by POWERGRID.

- On 13.12.2016, Respondent No.3 informed the Appellants of the Force Majeure event and the Appellants did not dispute Respondent No.2's Force Majeure claim, which rendered Respondent No.2 unable to supply a portion of the contracted capacity of 361 MW to the Appellants during the period from 30.10.2016 to 31.03.2017.
- On March 30, 2017, POWERGRID operationalized the 169 MW LTA, which was informed by Respondent No.2 to Respondent No.3 of its readiness to supply the contracted capacity of 361 MW to the Appellants and requested Respondent No.3 to coordinate with UPPCL, UPSLDC, UPSTU, and other relevant entities to commence scheduling power from 01.04.2017.
- On 31.03.2017, Respondent No 2 served a Notice for cessation of Force Majeure on Respondent No 3 with copy to UP Discoms and UPPCL.

35. Learned Counsel further submitted that on 21.12.2016, Respondent No.2, vide its communication addressed to Respondent No.3 and copied to Appellants, granted a one-time waiver of Capacity Charges for the period from 15.11.2016, being the date when the Appellants-UP Discoms could have commenced the off-take of power under the 85 MW Medium Term Open Access (MTOA), until 02.12.2016, being the date of actual scheduling and off-take of power; this waiver was however subject to the certain conditions like reimbursement of Transmission /open access charges, Availability of the project to be treated as 100 % for the this period, UP Discom shall promptly schedule and off take balance 84 MW MTOA upon operationalisation etc:

36. Learned counsel for the Respondent No. 2 submitted that the Appellants cannot seek a waiver of Capacity Charges for the disputed period arising from their inability to off-take the entire Contracted Capacity. From the foregoing, it is evident that the contention of the Appellants, asserting that Respondents letter dated 31.03.2017 was a belated intimation of the date on which MB Power intended to commence power supply, is baseless. On the contrary, Respondent No 2 was affected on account of delay in operationalization of 169 MW MTOA by POWERGRID –procuring the evacuation facility being the contractual obligation of the Appellants-UP Discoms.

37. Learned counsel for the Respondent No. 2 asserted that the Appellants have stated that it did not receive any intimation about the operationalization of the 169 MW LTA well in advance is wrong and erroneous. Learned Counsel submitted that Respondent No 2/ Respondent No 3 through various communications dated 21.12.2016, 02.01.2017, 14.03.2017, 27.03.2017, 30.03.2017 and 31.03.2017 informed the Appellants-UP Discoms of imminent operationalization of the balance 84 MW LTOA/ 169 MW LTA and had requested Appellants-UP Discoms to ensure readiness for the off-take of the Contracted Capacity. Despite this, the Appellants-UP Discoms scheduled only 277 MW of power from MB Power's Project, leaving the remaining 84 MW of the total Contracted Capacity unscheduled without any justification.

38. Learned counsel for the Respondent No. 2 further pointed out that based on the NoC dated 12.12.2014 issued by the UPSLDC, Respondent No. 2 secured MTOA of 169 MW from POWERGRID with a validity till 29.10.2016 and commenced the supply of Contracted Capacity of 361 MW

to the Appellants-UP Discoms with effect from 26.08.2015. However, in the Appeal, the Appellant No.1 asserted that grid security concerns were raised by UPSLDC through its letter dated 13.04.2017, however It is pertinent to note that the said letter is an internal communication between UPSLDC and the Appellant No.1, to which Respondent No.2 was not privy. The CERC has categorically held that reliance on UPSLDC's letter dated 13.04.2017, to justify the under-scheduling of the contracted capacity by the Appellants, is untenable, as the communication is purely internal between UPSLDC and the Appellants. It is submitted that the UPSLDC's NoC dated 26.09.2015, clearly indicates that the Appellant-UPSLDC had granted its consent for the scheduling of 169 MW by the Appellants-UP Discoms for the period from 30.10.2016 to 29.12.2019. Respondent No.2 secured the necessary approvals through the aforesaid NoC and Open Access for the supply of the contracted capacity from 30.10.2016, well within the required timeline. Consequently, the Appellants-UP Discoms were cognizant of the same with effect from 26.09.2015.

39. Learned counsel for the Respondent No. 2 submitted that the Appellants have alleged wrongful declaration of capacity charges (a) Declaration of Capacity Charges is not towards 169 MW quantum of LTA Agreement; and (b) With the operationalization of 169 MW LTA w.e.f. 30.03.2017, the corresponding 169 MW MTOA stands cancelled. In this context, it is submitted that these are extraneous issues which are not germane for the present dispute. As per the terms of the "Procurer PPA", Respondent No. 2 is obligated to declare the day-wise availability of the Contracted Capacity and secure Open Access for the transmission of the

aggregated Contracted Capacity from the Injection Point to the Delivery Point. Pursuant to Article 4.2.1(d) of the "Procurer PPA", the Appellants are obligated to ensure the availability of Interconnection Facilities and the evacuation of power from the Delivery Point (CTU-UP STU Interfaces) prior to the Scheduled Delivery Date (SDD) or the Revised SDD (i.e., 26.08.2015). Under Article 4.3.1(b) of the "Procurer PPA", the Appellants are responsible for payment of Transmission Charges and applicable RLDC/SLDC charges, limited to the Contracted Capacity.

40. Learned counsel of Respondent No. 2 submitted that during the period from 01.04.2017 to 16.05.2017, Respondent No 2 duly declared the availability of the entire Contracted Capacity and arranged for Open Access for transmission up to the Delivery Point (CTU-STU Interfaces); POWERGRID issued invoices for Transmission Charges based on the Contracted Capacity of 361 MW, rather than the 277 MW scheduled, for the said period; and the Appellants-UP Discoms, despite these arrangements, failed to schedule the full 361 MW of Contracted Capacity, and scheduled only 277 MW. Appellants are liable to pay Respondent No.2 the Capacity Charges and Transmission Charges for the unscheduled 84 MW during the period from 01.04.2017 to 16.05.2017, as Respondent No 2 had incurred these costs by declaring the entire Contracted Capacity as available.

41. Learned counsel for the Respondent No. 2 also contended that it is a well-established principle of law that when payment is deferred or delayed, LPS is payable along with the deferred amount. The purpose of LPS is to enforce and encourage timely payment of charges by the procurer. This principle aligns with the directions of the CERC, holding that



the Appellants are liable to pay LPS to Respondent No.2 on the deducted amount from the date of deduction until the date of payment of the entire deducted amount, at the rate prescribed in Articles 8.3.5 of the “Procurer PPA”. It is submitted that the LPS being claimed is legitimate and the principles governing LPS are well settled by the Hon’ble Supreme Court, being a method to compensate the affected party for the time value of the money. Accordingly, the present Appeal filed by the Appellants lacks merit and ought to be dismissed.

### **DISCUSSION AND ANALYSIS**

42. Heard Mr B.P. Patil, learned senior counsel for the Appellants and Mr Amit Kapoor, learned counsel for the Respondent No 2. The main dispute is with regard to applicability of capacity charges and other related charges for the period from 01.04.2017 to 16.05.2017 when entire contracted capacity of 361 MW could be operationalised through LTOA, however, the Appellants scheduled only 277 MW, and whether Respondent No2/Respondent No 3 was obligated to give 60 days’ preliminary notice, plus additional 30 days final notice, prior to such operationalisation through LTOA, having supplied contracted capacity of 361 MW through a combination of LTA and MTOA from 26.08.2015. These issues are discussed under different heads.

### **Commencement date for Entire Contracted Capacity**

43. Learned senior counsel for the Appellants has contended that in terms of Article 3.1.1 (b) & 3.1.1(c) and Articles 4.2.1 (c) & 4.2.1 (d) of “Procurer PPA” read along with “PTC PPA”, the Respondent No 2 i.e

M.B.Power was obligated to obtain Long Term Open Access ( LTOA) qua entire 361 MW by 18.01.2015 i.e. 12 months from effective date, and by exercising its right under Article 3.3 of the “Procurer PPA”, the scheduled delivery date was revised to 01.03.2015 or availability of open access to M.B.Power whichever is later and this indulgence or non-enforcement of compliance with the provisions relating to MB Power’s obligation to secure LTOA shall not constitute a waiver of rights under Article 15.5 of the “Procurers PPA”. Learned senior counsel for the Appellants has contended that CERC has erred in holding that the Appellants were liable to pay for the Capacity charges for unscheduled 84 MW quantity between 01.04.2017 to 16.05.2017, while M.B.Power has failed to comply with Article 4.1.2 of the “Procurer PPA” read along with Clause IV of Schedule I of “PTC PPA” which provides for 60 days of advance Preliminary written notice and at least 30 days advance final written notice of the date on which it intends to commence supply of power.

44. On the other hand, learned counsel for Respondent No 2 has contended that supply of the entire contracted capacity has commenced since 26.08.2015, through 192 MW LTOA and 169 MW MTOA, as agreed by the Appellants, and there is no requirement to give notice while operationalising the entire contracted capacity through LTOA since 01.04.2017.

45. There is no dispute that M.B.Power commenced supply of 361 MW on 26.08.2015 and the details of electricity supplied by M.B.Power from time to time from 26.08.2015 onwards are as follows:

Period	Capacity offered by MB Power	Open access mode	Capacity scheduled by UP DISCOMs
26.08.2015 To 29.10.2016	361 MW	192 MW – LTOA 169 MW – MTOA	361 MW
30.10.2016 To 01.12.2016	192 MW	192 MW – LTOA	192 MW
02.12.2016 To 31.03.2017	277 MW	192 MW – LTOA 85 MW – MTOA	277 MW
<b><u>01.04.2017</u></b> <b>To</b> <b><u>16.05.2017</u></b>	<b>361 MW</b>	<b>361 MW – LTOA</b>	<b>277 MW</b>
17.05.2017 onwards	361 MW	361 MW – LTOA	361 MW

46. As per the “Procurer PPA”, the “*Delivery date*” shall mean the date on which the seller commences supply of the Aggregate Contracted Capacity to the procurers. Let’s look at the other relevant clauses of “Procurer PPA” signed between the Appellants 2 to 5 and Respondent No.3 (PTC) dated 18.01.2014 for supply of 361 MW power from Respondent No. 2 Project , as reproduced below:

**“ARTICLE 3: CONDITIONS SUBSEQUENT TO BE SATISFIED BY SELLER/ PROCURER(S)**

**3.1 Satisfaction of conditions subsequent by the Seller**

*3.1.1 The Seller agrees and undertakes to duly perform and complete the following activities at the Seller's own cost and risk within twelve (12) months from the Effective Date, unless such completion is affected by any Force Majeure event or due to the Procurers' failure*

*to comply with their obligations under Article 3.2.1 of this Agreement, or if any of the activities is specifically waived in writing by the "Procurers jointly":*

*b) In case the Power Station is located outside the state of the Procurers, the Seller shall have obtained all the necessary permission for the long term open access for the intrastate transmission system from the Power Station bus bar to the Injection Point (except in case of dedicated transmission lines) and shall have executed all necessary agreements for such transmission access and provided a copy of the same to the Procurers;*

*c) The Seller shall have obtained the necessary permission for long term open access for the transmission system from the Injection Point up to the Delivery Point and have executed the Transmission Service Agreement with the transmission licensee for transmission of power from the Injection Point up to the Delivery Point and provided a copy of the same to the Procurers;"*

### ***"3.3 Joint responsibilities of the Procurers and the Seller***

*3.3.1 The Lead Procurer and the Seller shall have jointly agreed on the specific date(s) for **commencement of supply of power** and quantum of the Contracted Capacity to be supplied to Procurers from each such date. Such mutually agreed date(s) shall not be later than the Scheduled Delivery Date, and the total quantum of power shall be equal to the Aggregate Contracted Capacity."*

### ***"4.2 Seller's Obligations***

*4.2.1 Subject to the terms and conditions of this Agreement, the Seller undertakes to be responsible, at Seller's own cost and risk, for:*

- b) the commencement of supply of power, up to the Aggregated Contracted Capacity, to the Procurers no later than the Scheduled Delivery Date or the Revised Scheduled Delivery Date(s), as the case may be, such that as much of the Contracted Capacity as can be made available through the use of Prudent Utility Practices will be made available reliably to meet the Procurers' scheduling and dispatch requirements throughout the Term of this Agreement;*
- c) obtaining all the necessary permissions for the long term open access for the intrastate transmission system for evacuation of power from the Power Station bus bar to the Injection Point (except in case of dedicated transmission lines) and execute all necessary agreements for such transmission access and provide a copy of the same to the Procurers;*
- d) obtaining open access for transmission of Aggregated Contracted Capacity of power from the Injection Point to the Delivery Point;”*

#### **“4.3 Procurers' Obligations**

*4.3.1 Subject to the terms and conditions of this Agreement, the Procurers shall:*

- a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be;*
- b) be responsible for payment of the Transmission Charges (from the Injection Point onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurers. The Procurers shall reimburse any of the above charges, if paid by the Seller,*
- c) -Not Used-*
- d) -Not Used-*


*e) make all reasonable arrangements for the evacuation of the Infirm Power from the Power Station; subject to the availability of transmission capacity, and*

*f) fulfil all obligations undertaken by the Procurers under this Agreement.”*

47. We note that at the time of signing of “Procurer PPA” dated 18.01.2014, LTOA was available only for 192 MW and only subsequent to signing of “Procurer PPA”, on 11.02.2014, Respondent No. 2 applied for balance LTOA/LTA of 169 MW to POWERGRID/CTU, which was granted vide letter dated 07.05.2015 associated with commissioning of Indore –Chittorgarh 765 kV D/c line, (which was subsequently changed to Champa – Kurushetra HVDC Bipole Link) and signed LTA agreement with POWERGRID/CTU on 04.06.2015. The Appellants vide its letter dated 06.07.2015 accepted the fulfilment of Condition subsequent by the seller in accordance with Clause 3.1.1 of the “Procurer PPA” as noted below, which puts an obligation on Seller to obtain all the necessary permission for the long term open access for the intra-state transmission system from the Power Station bus bar to the Injection Point and execute all necessary agreements in this regard:

272

**ANNEXURE A-8**



**उत्तर प्रदेश पावर कारपोरेशन लिमिटेड**  
(उत्तर प्रदेश सरकार का उपक्रम)  
**U.P. POWER CORPORATION LIMITED**  
(Govt. of Uttar Pradesh Undertaking)  
CIN No. U32201UP1999SG024928

नियोजन पकच  
चुतीय तल, शक्ति भवन विस्तार,  
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No 1166 -Plg/UMPP/6000MW/Vol-20      Dated: 06 July, 2015

**Registered Post/Fax/e-mail**

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15 Bhikaji Cama Place,  
New Delhi-110 066

Phone no. 011- 4165 9506, 4165 9600  
Fax no. 011-4165 9142  
Email: da@ptcindia.com

**Kind Attn: Mr. Harish Saran, Executive Director**

**Sub: Confirmation regarding Fulfillment of conditions subsequent to be complied by the Seller as per the provisions of Procurer-PPA dated 18<sup>th</sup> Jan, 2014.**

Dear Sir,

Based on submissions made vide M/s PTC India Ltd's letter no. C/PTC/M&TFG/UPPCL/4198 dated 05-06-2015 with regards to fulfillment of conditions subsequent of PPA dated 18<sup>th</sup> January, 2014, UPPCL as authorized representative of procurers, hereby conveys acceptance w.r.t. satisfaction of conditions subsequent by the Seller, as per article Clause 3.1.1 of PPA.

Thanking you,

Yours faithfully,  
  
(A.H. Khan)  
Chief Engineer (Planning)

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...Lishakuma

48. It has been brought to our notice that the Appellants vide its letter dated 08.12.2014, though acknowledging that as per the "Procurer PPA", the scheduled delivery date for the commencement of aggregated Contracted Capacity is 30.10.2016, citing Article 3.3 and Article 4.1.1 of "Procurer PPA", conveyed a revised date for commencement of Supply for 361 MW as later date of 01.03.2015 or the actual date of availability of open access, considering NOC dated 29.09.2014 issued by UPSLDC, as extracted here-in-under :

*'In accordance with provisions of Clause 1.3.1 of RFP with regards to Scheduled Delivery Date, read along with Clause 3.3 & Clause 4.1.1 of the above PPA and the No Objection Certificate of UP State Load Dispatch Centre issued on Sept. 29, 2014, the Procurer(s) agree for commencement of supply of power of 361 MW from 1 March, 2015 or actual date of availability of Open Access to the Seller, whichever is later.'*

49. We find force in the submission of learned counsel for the Respondent No.2 that the Appellant's letter dated 08.12.2014, was not linking the commencement of supply upon operationalisation of entire aggregated contracted capacity through LTA alone. The NOC dated 29.09.2014 issued by UPSLDC, referred in the Appellants letter dated 08.12.2014, was valid for a limited duration; with maximum ceiling allowed for drawl as 161 MW from 01.12.2014 to 31.12.2014 and 361 MW from 01.01.2015 to 30.09.2016 for the UP Discoms and appears to be for the purpose of availing MTOA.

50. There is no dispute, that since operationalisation of balance 169 MW of LTA was contingent upon Commissioning of a new transmission line, which could have taken some time; Respondent No. 2 secured Medium Term open Access (MTOA) till 29.10.2016 from POWERGRID/CTU and MTOA agreement was signed on 27.02.2015, and we take note that UPSLDC had issued another NOC dated 12.12.2014 with validity from 01.03.2015 to 29.10.2016 with drawl ceiling as 361 MW. Respondent No 2 vide letter dated 11.03.2015, informed Respondent No 3 about the



availability of transmission access of entire PPA quantum of 361 MW, which was in turn informed by Respondent No. 3 to the Appellant No. 1 vide its letter dated 12.03.2015 and commencement of supply for entire contracted capacity of 361 MW took place from 26.08.2015, which is in line with the Appellants agreement of commencement of supply from a revised date conveyed vide their letter dated 08.12.2014

51. We also take note that since first MTOA granted was valid only until 29.10.2016, and there was no timeline indicated for operationalisation of balance 169 MW of LTA (linked with Champa –Kurushatra HVDC bipole link), Respondent No.2 applied for another MTOA (2<sup>nd</sup> MTOA) for a period of three years from 30.10.2016 in order to provide uninterrupted power supply to the Appellants, for which NOC dated 26.09.2015 was issued by UPSLDC for supply to UP Discoms, which indicates that 192 MW LTA was approved by CTU and the balance 169 MW MTOA was under consideration through this NOC. The said NOC also notes that “*UPPCL authorities has accorded consent for this MTOA from 30 Oct 2016 to 29<sup>th</sup> Oct 2019 by chief engineer (Planning) UPPCL vide letter no 1112-Plg/UMPP/6000 MW dated 30 June 2015*”. The MTOA for the period 30.10.2016 to 29.10.2019 was granted by POWERGRID/CTU and MTOA agreement was signed by Respondent No 2 with POWERGRID/CTU on 16.12.2015. However, there was some delay in operationalisation of MTOA from 30.10.2016 and only 85 MW out of this 169 MW MTOA could be made effective from 10.11.2016 as informed by POWERGRID/CTU and the Appellants provided their consent for operationalisation of 85 MW of MTOA from 30.11.2016. In fact, the Appellants vide their letter dated 14.12.2016, requested for non-levy of capacity charges by Respondent No 2 from the date of

operationalisation of MTOA by CTU till actual commencement of off take by UP Discoms, subsequent to their consent to operationalise 85 MW MTOA vide letter dated 30.11.2016 in view of Long term Relationship between the parties. Respondent No 2, vide its letter dated 21.12.2016 addressed to Respondent No. 3, with a copy to the UP Discoms, acceded to the request of the Appellants for non-levy of capacity charges for 85 MW of MTOA from 15.11.2016 (date since when UP Discoms could have off taken this amount) till 01.12.2016 (actual scheduling of power by UP Discoms), subject to the following Conditions:

- *The transmission/ Open Access charges (if any, as raised by PGCIL) for the period between operationalization of such MTOA of 85 MW by CTU till actual commencement of scheduling and off-take of power by UP under this MTOA shall be duly reimbursed to us.*
- *Our plant availability during such waiver period from 15.11.2016 till 01.12.2016 shall be deemed as 100% for the purpose of calculating Availability for FY 2016-17.*
- *Post operationalization of the remaining MTOA quantum of 84 MW by CTU, UP shall promptly commence the scheduling and off-take of power under such remaining MTOA quantum.*
- *This is a one-time gesture and should not be used as a precedent for claiming any waiver(s) of Capacity Charges in the future. Further, this indulgence should not be construed as an acceptance of any variation or the relinquishment of any right of MB Power (Madhya Pradesh) Limited under the PPA(s) dated 18.01.2014 and 20.01.2014, which shall remain in full force and effect. “*

52. Vide aforementioned letter, Respondent No 2 also informed about likelihood of operationalisation of balance 84 MW MTOA within the next few days as 800 KV Champa -Kurushetra HVDC Bipole link is likely to be commissioned shortly and requested the concerned Discoms to make necessary arrangement to schedule the same; it was also promptly intimated by Respondent No. 3 to the Appellants vide its letter dated 21.12.2016. The Respondent No 2 vide its letter dated 14.03.2017 to Respondent No 3, with a copy to Appellant No. 1 & UPSLDC informed of the impending operationalisation of entire remaining 169 MW through LTA (including the 85 MW already operationalised through MTOA) as updated by CTU in its meeting on 28.02.2017, enclosing the Minutes of the said meeting and requested UP Discoms for making adequate arrangement for scheduling the same. Subsequently, Respondent No 2 vide its letter dated 30.03.2017 addressed to Respondent No 3, with a copy to Appellant No. 1 and UPSLDC expressed their ability to supply entire Aggregated Contracted capacity of 361 MW (192 MW+169 MW) through LTA to UP Discoms and requested UP Discoms to ensure scheduling of entire Aggregate Contracted Capacity with immediate effect. The LTA for Balance 169 MW (including the 85 MW already operationalised as MTOA) was fully operationalised by POWERGRID/CTU w.e.f 01.04.2017.

53. From the above sequence of events, noting and deliberations, we are of the view that:

- A) There was no prerequisite for availability of LTA for the entire Aggregate Contracted Capacity of 361 MW prior to participation in bidding and signing of PPA as Respondent No 2/ Respondent No 3 had LTA for 192 MW only while signing the PPA.

- B) The Appellants themselves have conveyed fulfilment of condition subsequent as per Article 3.1.1 of “Procurer PPA” vide their letter 06.07.2015, upon grant of LTA for balance 169 MW by POWERGRID/CTU to Respondent No 2. Thus, we fail to understand that Appellants, having acknowledged/ accepted w.r.t satisfaction of the condition subsequent, which includes obtaining necessary permission for Long term Open Access, as per Article 3.1.1 of “Procurer PPA”, are now contending otherwise.
- C) The Appellants, vide their letter dated 08.12.2014, have agreed for revised scheduled delivery date of 01.03.2015 or upon receipt of requisite open access, whichever is later, basis NOC dated 29.09.2014 issued by UPSLDC which had validity period from 01.12.2014 to 30.09.2016. The letter dated 08.12.2014 is unconditional letter for commencement of Supply. Thus, the Appellants themselves had given clearance for commencement of supply under Article 4.1 of “Procurer PPA” from an earlier date making no distinction whether such supply should only be through LTA alone as UPSLDC NOC appears to have been issued for the purpose of availing MTOA.
- D) The Respondents cannot be faulted on account of not indicating exact commencement date of balance 84 MW ( 85 MW out of 169 MW already operationalised through MTOA) for UP Discoms, as it is not under the control of Respondents to know what was the exact date of operationalisation of MTOA/LTA, linked to commissioning of an element being implemented by POWERGRID, and in fact, no firm date of commissioning was indicated in LTA intimation, which has been accepted by the Appellants, and on that basis, the Appellants

have also accepted fulfilment of condition subsequent. In fact, the exact date of commencement of LTA supply was not mentioned in the LTA intimation letter of CTUIL as well as in the affidavit filed by CTUIL before CERC in February 2017 exact date of commissioning of Champa – Kurushetra HVDC Bipole link and the commencement LTA/MTOA could not be indicated, it is not justified to put the onus on the Respondent to intimate the exact date of commencement of LTA. It is noted that the Respondent No. 2 / Respondent No 3, upon receipt of information from POWERGRID/CTU, promptly made the Appellants aware about impending operationalisation of entire Aggregate Contracted Capacity through MTOA/LTA via various communications dated 20.12.2016, 14.03.2017, 30.03.2017 and 31.03.2017.

- E) In the NOC of UPSLDC dated 26.09.2015, with validity period from 30.10.2016 to 29.10.2019, basing on which MTOA of 169 MW was obtained by Respondent No2, consent of Appellant No.1 (UPPCL) to avail entire balance 169 MW through MTOA is expressly stated. Thus, in our view, both the Appellants and UPSLDC were aware that entire contracted capacity of 361 MW shall continue to be scheduled from 30.10.2016 to 29.10.2019, subject to grant of 169 MW MTOA by CTU and were in agreement to receive the same for entire duration of 30.10.2016 to 29.10.2019, as no constraint within the UP system were expressed. From technical point of view, there is no difference whether power is received under MTOA or LTA except for the priority in the grid operation, like LTA users have the highest priority for scheduling and the least likelihood of curtailment in case

of congestion while on the other hand in case of Congestion, if curtailment of scheduling is required in the grid, MTOA users have higher priority than short-term access users but lower than LTA users.

F) Thus, having agreed and given consent to receive entire contracted capacity (192 MW LTA and 169 MW MTOA), even for the period under dispute, the Appellants are not justified to argue that in the absence of exact date of commencement of 169 MW LTA, which includes 84 MW, which was not operationalised under 2<sup>nd</sup> MTOA, period from 01.04.2017 to 16.05.2017 was spent by them in arranging the off-take for this balance 84 MW to be operationalised through LTA.

G) We also do not find any error in CERC's order holding that Appellants reliance on UPSLDC's letter dated 13.04.2017, to justify the under-scheduling of the contracted capacity, is untenable, as the communication is purely internal between UPSLDC and the Appellants. As such, from technical point of view, the value of ATC relied upon in the referred UPSLDC letter dated 13.04.2017, on which reliance has been placed by Appellants for justifying the delay in off taking the 84 MW capacity for the period from 01.04.2017 to 16.05.2017, is dynamic in nature and depends on Grid operating conditions from time to time and curtailment / operation of various types of Open Access takes place as per their priority in Grid operation.

- H) As per Article 4.3.1 of the “Procurer PPA” it is the Procurer’s obligation to ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date. The Appellants having agreed for the Revised Scheduled Delivery Date, and for supply of entire contracted capacity of 361 MW to be commenced from such revised scheduled date of 26.08.2015, without any dispute, procurer were under obligation to ensure availability of interconnection facilities and evacuation of power from the delivery point since then.
- I) The Appellants are aware about their liability to pay for the capacity charges upon operationalisation of a quantum under Open Access whether the same is scheduled or not by them, is clear from the fact that when 85 MW under 2<sup>nd</sup> MTOA was operationalised from 15.11.2016 but they could schedule the same only from 02.12.2016, the Appellants requested for non-levy of capacity charges for 85 MW for the period from 14.11.2016 to 01.12.2016, which was agreed by Respondent No 2 as one time waiver, subject to certain conditions not disputed by the Appellants.

54. In view of above observations and deliberations, we are of the view that while granting approval for commencement of supply (prior to scheduled date indicated in the PPA) the Appellants were fully aware that such commencement of supply would be by availing MTOA and their consent is expressly stated in the NOC issued by UPSLDC and thus the requisite provisions of PPA gets fulfilled. In fact, in their letters

dated 07.07.2015 & 08.12.2014, the Appellants have conveyed the fulfilment of condition subsequent and agreed for revised scheduled date for commencement of supply. We, therefore, hold that commencement of supply condition has been fulfilled when supply of entire contracted capacity commenced from 26.08.2015 and the Appellants are liable to ensure availability of interconnection facilities and evacuation of power from the delivery point since then. We do not find any merit in the contention of the Appellants that due to no prior intimation of exact date of LTA commencement for the remaining power, they could not schedule/off take the balance 84 MW (other than 85 MW already under operation through MTOA) from 01.04.2017 and needed time to make arrangements and this issue is decided against the Appellants.

**Compliance of condition for preliminary written notice and final notice as per Article 4.1 by Respondent No 2/Respondent No 3 for commencement of balance 169 MW (out of total contracted capacity of 361 MW) through LTOA since 01.04.2017.**

55. Learned senior counsel for the Appellants have contended that as per Article 4.1.2 of the Procurer PPA, Respondents are obligated to give advance preliminary notice of 60 days and final notice of at least 30 days of the date on which it intends to commence supply of power. Article 4.1.2 of the "Procurer PPA" is reproduced below:

***"4 ARTICLE 4: SUPPLY OF POWER***

***4.1 Commencement of Supply of Power to Procurers***



*4.1.2 The Seller shall give the Procurers and the concerned RLDC at least sixty (60) days advance preliminary written notice and at least thirty (30) days advance final written notice, of the date on which it intends to commence supply of power.”*

56. With regard to notice period for commencement of supply as per Article 4.1.2, the Appellants, vide their letter dated 08.12.2014, have agreed the date as 01.03.2015 or availability of Open Access for commencement of supply quoting Article 4.1.2 of Procurer PPA, whichever is later. The supply of entire contracted capacity of 361 MW commenced from 26.08.2015, through LTA of 192 MW and MTOA of 169 MW. In fact, upon expiry of 1<sup>st</sup> MTOA of 169 MW (on 29.10.2016), as stated above, only 85 MW could be operationalised from 14.11.2016 (though scheduled only from 02.12.2016) under 2<sup>nd</sup> MTOA of 169 MW (30.10.2016 to 29.10.2019), Respondents have issued Force Majeure notice dated 09.12.2016 to the Appellants, citing reasons beyond their control for a period from 30.10.2016 to 14.11.2016 wholly and beyond 15.11.2016 partially. No dispute has been raised by the Appellants on this account. From a bare reading of Article 4.1.2, the requirement of preliminary notice of 60 days and final notice of 30 days is contemplated only for commencement of supply and it cannot be interpreted now that whenever there is disruption in supply or change in type of open access, fresh commencement of supply shall be considered and requirement of 60 days preliminary notice and 30 days of final notice shall be there. Article 4.1.2 as well as Appellants letter dated 08.12.2014 does not specify that commencement of supply is linked only through operationalisation of LTOA. As stated in previous

paragraphs, UPSLDC has given NOC dated 26.09.2015 in which express consent of the Appellants is also recorded to receive 169 MW under MTOA in addition to 192 MW operationalised through LTOA, for the entire period from 30.10.2016 to 29.10.2019 and technically there is no difference whether power is availed through LTOA or MTOA, except the priority in grid operation.

57. In our view, having agreed for commencement of supply either from 01.03.2015 or upon receipt of open access whichever is later, and as the supply was already commenced on 26.08.2015, thus, fulfilling condition of "Procurer PPA" and keeping in view the said article 4.1.2 does not contemplate issuance of notice again when entire contracted capacity is supplied through LTA instead of combination of LTA and MTOA, there is no requirement of fresh notice period of 90 days upon operationalisation of 169 MW under LTA since 01.04.2017, while MTOA for the said amount, as also concurred by the Appellants in NOC granted by UPSLDC for the purpose, was already available since 30.10.2016 till 29.10.2019. The Reliance placed by the Appellants on the Judgements in "***Talwandi Sabo Power Limited v. Punjab State Power Corporation Limited***", 2016 SCC OnLine APTEL 64 and "***Arjun Green Power Private Limited v. Rajasthan Electricity Regulatory Commission & Ors***" (Appeal No. 172 of 2019) is of no avail as the Appellants themselves have communicated fulfilment of condition subsequent as well as commencement of supply referring to the provisions of "Procurers PPA". Thus, the Appellants are liable to pay capacity charges for the quantum (84 MW) which was not scheduled by them during the duration 01.04.2017 to 16.05.2017,

though the Respondents were in a position to schedule entire quantum of 361 MW through LTOA since 01.04.2017 (***Maharashtra State Electricity Distribution Company Ltd. v. CERC, 2015 SCC Online APTEL 1; Maharashtra State Electricity Distribution Company Ltd. v. Ratnagiri Gas and Power Pvt. Ltd., (2024) 1 SCC 333*** and ***Talwandi Sabo Power Ltd. v. Union of India, CWP No. 7519 of 2020***). Since we have already held above that there is no requirement to give notice (preliminary notice of 60 days and final notice of 30 days) while commencing entire contracted capacity through LTA, we do not find it necessary to deliberate on the issue whether or not such a contention can be raised for the first time at the appellate stage as contended by Respondents.

**Reimbursement of Transmission Charges between 01.04.2017 to 16.05.2017**

58. Learned senior counsel for the Appellants has contested the liability fixed on the Appellants for reimbursement of transmission charges to M.B.Power for the period from 01.04.2017 to 16.05.2017 on the basis of capacity booked instead of actual usage, as per the Impugned Order, citing that reimbursement of Transmission Charges as per Article 4.3.1 (b) of the procurer PPA, is subject to other Terms and Conditions and the definition of Transmission Charges clearly stipulates that the reimbursement of Transmission Charges is subject to usage of intervening CTU network.

59. For ease of reference, Definition of transmission charges and Article 4.3.1 (b) of the "Procurer PPA" are reproduced as under:

*“wheeling Charges or Transmission Charges” shall mean the charges to be paid by the Seller and reimbursed by the Procurers as transmission tariff for usage of intervening CTU networks for the transmission of power from the Injection Point up to the Delivery Point, as approved by the Appropriate Commission (excluding the charges for the STU network or charges of STU system operation or SLDC Charges, if any);*

*“4.3.1 Subject to the terms and conditions of this Agreement, the Procurers shall:*

*b) be responsible for payment of the Transmission Charges (from the Injection Point onwards) and applicable RLDC/SLDC charges, limited to the charges applicable to the Contracted Capacity of Procurers. The Procurers shall reimburse any of the above charges, if paid by the Seller,”*

60. In the previous paragraphs, it has been contested by the Appellants that Terms and Conditions with regard to fulfilment of Condition subsequent as well as commencement of supply has not been fulfilled by the Respondents and accordingly contested that their liability for Reimbursement of Transmission Charges as per Article 4.3.1(b) shall accrue upon fulfilment of Terms and Conditions of Procurer PPA. It has already been held above that referred Terms and Conditions of the “Procurer PPA” have been fulfilled as also acknowledged by the Appellants vide their letter dated 07.07.2015, 08.12.2014 regarding fulfilment of Condition subsequent and with regard to commencement of supply.

61. The Article 4.3.1(b), casts liability on the Procurer i.e. the Appellants for reimbursement of transmission charges for the Contracted Capacity of Procurer. Regarding the contention of the Appellants that reimbursement of Transmission Charges is linked to the usage, we take note that during

the period from 15.11.2015 to 02.12.2015, when 85 MW MTOA was operationalised, Appellants could off take the same only from 02.12.2016, waiver of capacity charge for the said period was granted by the Respondents subject to the condition that the transmission/ Open Access charges (if any, as raised by POWERGRID/CTU) for the period between operationalization of such MTOA of 85 MW by CTU till actual commencement of scheduling and off-take of power by UP under this MTOA shall be duly reimbursed by the Appellants. No dispute regarding the liability of reimbursement of Transmission Charges for the period (14.11.2015-01.12.2015) when the Appellants did not schedule MTOA, leading to non-usage of Transmission System, has been raised before this Tribunal. Thus, in our view, the Appellants were aware about their liability for reimbursement of transmission charges upon operationalisation of Open Access. Going by the contention put forth by the Appellants now that reimbursement of Transmission Charges is subject to usage based on the definition of Transmission Charges is erroneous because it would mean that though the Open Access is availed by the Respondents to supply power to Appellants and for any reason Appellants are unable to utilise the Open access, they would not be liable to reimburse the transmission charges. We understand that once a Long Term Open Access is granted and operationalised for an applicant, such capacity is booked for that applicant and is liable to pay charges for the same whether it is utilised or not (***this Tribunal's Judgment dated 13.10.2015 in Appeal No. 6 of 2015, "GETCO v. GERC & Anr."***). In the present case, the liability of reimbursement of Transmission Charges so paid by the Respondents is on the Appellants in terms of the "Procurer PPA". In the judgment of the Supreme Court in "***Power Grid Corporation of India Ltd. v. Punjab State***

**Power Corporation Ltd.”, (2016)4 SCC 797** (reliance of which has been placed by the Appellant), it has been held that the beneficiaries were not liable to pay the tariff before the Transmission line was operational. The facts of the case are different as in the present case, the LTA has been operationalised and the liability of payment of Transmission Charges has accrued subsequent to the commissioning of the associated transmission line i.e., Champa- Kuruskshetra HVDC transmission link on which the LTA was granted.

62. We do not find any error in the Impugned Order regarding the liability of the Appellants for payment of capacity charges and reimbursement of Transmission charges for the period under consideration.

63. In view of the above discussion and deliberation, we do not find any infirmity in the order of the Central Commission dated 30.04.2019 impugned in this Appeal, and the same is hereby upheld. The Appeal is, accordingly, dismissed and all associated IAs are also disposed of.

**Pronounced in open court on this 17<sup>th</sup> Day of January, 2025**

**(Seema Gupta)**  
**Technical Member (Electricity)**

**(Justice Ramesh Ranganathan)**  
**Chairperson**

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

*ts/ag*