

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

APPEAL NO. 254 OF 2021

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APPEAL NO. 207 OF 2022

Dated: 03.09.2025

**Present: Hon'ble Mr. Sandesh Kumar Sharma, Technical Member
Hon'ble Mr. Virender Bhat, Judicial Member**

APPEAL NO. 254 OF 2021

IN THE MATTER OF:

GRIDCO Limited,
Through Chairman and Managing Director,
Janpath, Bhubaneswar
Odisha- 751022.

...Appellant(s)

Versus

1. GMR Kamalanga Energy Limited (GKEL),
Through Authorised officer,
Skip House, 25/1, Museum Road,
Bangalore - 560 025.
2. SLDC, Odisha
Through Authorised officer,
SLDC Building, GRIDCO Colony,
P.O. Mancheswar Railway Colony,
Bhubaneswar-751017.
3. Central Electricity Regulatory Commission,
Through Secretary,
Chanderlok Building, Janpath,
New Delhi – 110001.

...Respondent(s)

Counsel for the Appellant(s) : Mr. Raj Kumar Mehta

Counsel for the Respondent(s) : Mr. Amit Kapur
Mr. Vishrov Mukerjee
Ms. Raveena Damija
Mr. Rohit Venkat V

Ms. Ameya Vikram Mishra
Mr. Pratyush Singh
Mr. Girik Bhalla for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva
Mr. Jai Dhanani for R-2

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Counsel for the Respondent(s) : Mr. Vishrov Mukerjee
Mr. Rohit Venkat V
Mr. Yashaswi Kant
Mr. Girik Bhalla
Mr. Damodar Solanki
Ms. Priyanka Vyas
Ms. Juhi Senguttam

Ms. Anamika Rana for R-1

Mr. Anand K. Ganesan
Ms. Swapna Seshadri
Ms. Ritu Apurva for R-2

JUDGEMENT

PER HON'BLE MR. SANDESH KUMAR SHARMA, TECHNICAL MEMBER

1. M/s. GRIDCO Limited has filed these Appeals, challenging the Impugned Order dated 04.02.2020 in Petition No. 115/MP/2019 and Impugned Order dated 04.04.2022 in Petition No. 498/MP/2020, passed by the Central Electricity Regulatory Commission (in short "CERC" or "Central Commission").

2. The Order dated 04.04.2022 was passed against the Petition filed by Respondent No. 1 seeking execution of the Order dated 04.02.2020 passed by CERC. Accordingly, both the captioned appeals challenge the identical issues and therefore are tagged together.

Description of the Parties

3. The Appellant, GRIDCO Limited, is a wholly owned Company of the Government of Odisha and is carrying on the function of Bulk Supply of Electricity to four Distribution Companies in the State of Odisha with effect from 01.04.2005.

4. Respondent No. 1, GMR Kamalanga Energy Limited (GKEL), is a subsidiary of GMR Energy Limited, part of the GMR Group that owns and operates a 1050 MW coal-based thermal power plant in Kamalanga village, Dhenkanal district, Odisha.

5. Respondent No. 2, State Load Dispatch Centre (in short “SLDC”), is a wholly-owned subsidiary of Odisha Power Transmission Corporation Ltd (in short “OPTCL”). SLDC's primary function is to ensure the reliable and efficient operation of the state's power grid.

6. Respondent No. 3 is the Central Electricity Regulatory Commission, established under section 76 of the Electricity Act, 2003, having been vested with the powers under section 79 of the Electricity Act, 2003 (in short “Act”) inter alia to resolve the dispute herein.

Factual Matrix (in Appeal No. 254 of 2021) (As submitted by the Appellant)

7. Government of Odisha signed a Memorandum of Understanding dated 09.06.2006 with GMR-Kamalanga Energy Limited (GKEL), Respondent No. 1 herein, for setting up a 1000 MW Thermal Power Plant in the State of Odisha. Subsequently, the capacity of the Project was increased to (4X350 MW) 1400 MW vide MOU dated 28.10.2010.

8. As per the principal MOU and Revised PPA 04.01.2011, the contracted capacity of power entitlement for the State of Odisha, to be supplied to the State Designated Entity, i.e., GRIDCO, was upto 25 % of the installed capacity of the Thermal Power Station and have the right to purchase on behalf of Government of Odisha upto 25% of the power sent out from the Thermal Power Station.

9. The details of the date of synchronisation and COD of each of the Units of GKEL having installed capacity of 3X350 MW are mentioned below:

S. No.	Unit No.	Date of synchronisation of Units	Date of Commercial Operation of Units (COD)
1.	#1(350MW)	27.01.2013	30.04.2013
2.	#2(350MW)	09.07.2013	12.11.2013
3.	#3(350MW)	08.03.2014	25.03.2014

10. GRIDCO has procured all Infirm Power from all three Units of GKEL as per the provision of the existing Power Purchase Agreement 04.01.2011 and Firm/Scheduled power from the date of Commercial Declaration of the Thermal Units as per the provision of PPA and final schedule of GKEL by SLDC.

11. During synchronisation and COD declaration, all three Units were connected with STU through LILO connectivity. Thereafter, all three Units were connected at CTU. Subsequently, after the construction of the Dedicated Transmission Line to STU, Unit #3(350 MW) was connected with STU at Meramundali through a 400 KV Single Circuit Transmission Line with effect from 18.03.2015.

S.No.	Unit No.	Point of Synchronisation	Evacuation of Power Through	Scheduling of Power By
1.	Unit #1,#2 & #3	Synchronised with LILO arrangement	LILO at 400 kV TSTPS - Angul PGCIL line, as an interim arrangement.	SLDC
2.	Unit #1,#2 & #3	Connected through 400 kV Dedicated Transmission Line with CTU in Dec-2014. For the period from 31.03.2014 to 17.03.2015, power supplied to GRIDCO at CTU by bearing transmission charges and losses.		ERLDC
3.	Unit #3	With effect from 18.03.2015, connected with STU through 400 kV Single Circuit GMR Meramundali transmission line and supplying power at STU. Unit #1 and #2 remain connected with CTU till date.		SLDC

12. Till the time the first tariff order was passed by CERC on 12.11.2015 in Petition No.77/GT/2013, GKEL was supplying power to GRIDCO at the provisional Tariff fixed by OERC in the Annual Revenue Requirement (ARR) orders of GRIDCO from time to time. The Energy Accounting was carried out based on the Minutes of Meeting (MoM) dated 05.04.2014 and 10.03.2015, signed by GKEL, SLDC, and GRIDCO, and during the disputed period MoM dated 10.03.2015 was effective.

13. Permission for Short Term Open Access was given by GRIDCO vide letter dated 29.05.2015. Subsequently, vide letter dated 04.07.2015, GKEL acknowledged the No Objection Certificate issued by GRIDCO for the sale of 150MW power in Open Access.

14. After the CERC Tariff order 12.11.2015, GKEL was raising the monthly Energy Bills on GRIDCO, claiming Fixed Charges and Energy Charges. However, the monthly Fixed Charges were claimed based on the PAFM (%) calculated by

GKEL on its own instead of being raised based on the SLDC-certified PAFM (%) for the period in compliance with the provision of PPA under Clause 5.3. The bills for arrear dues from the date of commencement of power supply were also calculated and raised on GRIDCO without considering the certified monthly Energy Accounting Statements of SLDC and without even approaching SLDC for issuance of the same. GKEL was requested by GRIDCO to raise the monthly Energy Bills as well as the arrears Bills as per CERC Tariff order dated 12.11.2015 on the basis of SLDC certified PAFM (%), but GKEL did not pay any attention to the request of GRIDCO.

15. To verify the arrear claims of GKEL, GRIDCO requested ERLDC and SLDC to issue necessary Energy Accounting Statements reflecting PAFM (%) for the period FY: 2013-14, 2014-15, 2015-16, and 2016-17, respectively. SLDC accordingly issued the Month-wise and Year-wise PAFM (%) Statement in respect of procurement of power by GRIDCO from GKEL on 20.02.2015, 11.04.2017, 21.06.2017, and 01.07.2017 based on the request of GRIDCO vide letters dated 08.09.2014, 20.01.2016, 17.12.2016, and 02.05.2017 respectively.

16. For the first time, GKEL raised a dispute regarding the PAFM (%) calculation of SLDC vide letter dated 06.05.2017. In order to resolve the dispute, a meeting was held at the GRIDCO office on 12.07.2017 between GRIDCO, GKEL, and SLDC. After exhaustive deliberation, Minutes of the Meeting were drawn up wherein, for the prospective period, it was decided to work out the PAFM (%) with respect to the availability of STU-connected Unit # 3, even though the Contracted Capacity as per the PPA dated 04.01.2011 has to be with respect to the availability of all three Units (i.e., both STU and CTU connected Units) of GKEL. In the said meeting, the following decisions were taken effective from 01.04.2017 onwards:

- i) SLDC will accept the entitlement/Declared Capacity in line with the entitlement mentioned in the Revised PPA dated 04.01.2011 with respect to the availability of STU connected Unit # 3;
- ii) Provisions of CERC Tariff Regulation for the determination of PAFM/PAFY can be complied with in their entirety while working out the monthly energy accounting;
- iii) Further, GRIDCO shall always have the first priority of availing its entitlement from Unit #3, after which any Open Access schedule may be considered;

17. In the said meeting, it was further decided that the issue of PAFM (%) in respect of the past period will be discussed separately.

18. While working out the PAFM (%) in respect of FY 2014-15 as well as the disputed period, SLDC has followed the mutual understanding reached between parties in Minutes of Meeting dated 10.03.2015 and the formula given in the CERC Tariff Regulations, 2014, except considering the average of Declared Capacity (DC) in the numerator of the formula. Instead, in the numerator, 25% Energy Sent Out (ESO) from the thermal plant has been considered by SLDC as per Clause 2.2(a) of the PPA in terms of Section 32 of the Electricity Act, 2003.

As per CERC Tariff Regulation, 2014:

“Plant Availability Factor for the Month (%):

= Average Declared Capacity for the Month X 100
Ex Bus Installed/Contracted Capacity.

(Note: - Day Ahead Declare Capacity means capacity in MW declared on 15 minutes basis by generator on day ahead basis to SLDC to supply to its long term beneficiaries based on availability of the machine limiting to ex-bus capacity)”

In view of Clause 2.2.(a) of the PPA, SLDC has worked out PAFM as follows:

Plant Availability Factor for the Month (%)

= Average of (25 % of Total Day Ahead Final Schedule from the Thermal Plant) X 100

Ex Bus Contracted Capacity

() SLDC has considered technical minimum and deemed generation (if any) during such period.*

19. The average of Declared Capacity was not considered by SLDC for the disputed period (FY 2015-16 and 2016-17) as it was based on the availability of STU connected Unit # 3 only, in deviation from the PPA provision, which provides for the availability of all three Units comprising the Thermal Power Plant and not Unit-specific. Also, SLDC followed the same principle of accepting 25% of energy sent out from the Thermal Power Plant as GRIDCO's entitlement, as adopted by GKEL during 2014-15.

20. Though separate Meetings were held between SLDC, GRIDCO, and GKEL in 2018 to resolve the issue of PAFM (%) calculation by SLDC for the past period, no consensus could be reached between the parties.

21. In a subsequent Meeting held on 24.11.2018, GRIDCO placed the difficulties regarding the revision of the past period PAFM (%) calculation. Vide letter dated 03.12.2018, GKEL submitted a proposal to GRIDCO offering to supply 50% of shortfall power at Special Forward E-Auction Coal for the resolution of the dispute pertaining to FY:2015-16 and 2016-17.

22. GKEL did not raise the issue of modifying Clause 2.2 (a) for the past period, even in their submissions in Case No. 63 of 2018 filed by GRIDCO before the State Commission for approval of the Power Purchase Agreements.

23. Vide letter dated 26/27.02.2019, GRIDCO agreed to the proposal of GMR in principle to supply Shortfall Power during FY: 2015-16 and 2016-17 at ECR based on Special Forward E-auction Coal, in case GMR agreed to supply 100% shortfall quantum of power during the period from March 2019 to February 2020.

24. On 26.02.2019, GKEL filed Petition No. 115/MP/2019 before CERC disputing the PAFM % calculation made by SLDC for the period F.Y. 2015-16 & 2016-17. In the said petition, GKEL claimed a sum of Rs. 56.00 Crore towards Differential Fixed Charge and Rs. 36.87 Crore towards DPS, and vide order dated 04.02.2020, CERC disposed of the petition.

25. Thus, being aggrieved by the Impugned Order dated 04.02.2020 passed by the CERC in Petition No. 115/MP/2019, the Appellant has preferred the present Appeal.

Our Observations and Analysis

26. The Appeal No. 254 of 2021 shall be the lead Appeal in this batch of Appeals.

27. The Appellant has prayed for the following relief before us (Appeal No. 254 of 2021):

“(i) set aside the impugned order dated 04.02.2020 passed by the Central Electricity Commission in Petition No. 115/MP/2019;

(ii) Pass such other Order/s as may be deemed just and proper in the facts and circumstances of the case.”

28. After hearing the Learned Counsel for the Appellant and the Learned Counsel for the Respondent at length and carefully considering their respective submissions, we have also examined the written pleadings and relevant material on record. Upon due consideration of the arguments advanced and the documents placed before us, the following issues arise for determination in this Appeal:

Issue No. 1: Whether the methodology for computation of Plant Availability Factor (Monthly) (PAFM) and payment of fixed/capacity charges for the period 01.04.2015 to 31.03.2017 ought to be governed by the provisions of the CERC Tariff Regulations, 2014 or by the Power Purchase Agreement (PPA)?

Issue No. 2: Whether CERC erred in relying upon the Minutes of Meetings governing the parties' conduct during the relevant period?

Issue No. 3: Whether CERC incorrectly held that SLDC did not compute the PAFM for the FY 2015-16 based on the original availability declaration by GKEL vis-à-vis the subsequent revision in the availability declaration by GKEL?

Issue No. 4: Whether GRIDCO can be made liable to pay fixed/ capacity charges (and Delayed Payment Surcharge) during 01.04.2015 to 31.03.2017?

29. The disputes pertain to the methodology for computation of the Plant Availability Factor (Monthly) (“PAFM”) and the consequent payment of fixed/ capacity charges for the period from 01.04.2015 to 31.03.2017 with respect to supply of electricity by GMR Kamalanga Energy Limited (Respondent No.1) to GRIDCO Limited (Appellant) under the Power Purchase Agreement dated 04.01.2011 (PPA).

30. The genesis of the controversy is the method adopted by the State Load Dispatch Centre, Odisha (SLDC- Odisha) (Respondent No. 2) for calculation of PAFM and the resultant fixed charges payable by GRIDCO to GKEL during the years 2015-16 and 2016-17 and whether such calculation was to be undertaken in accordance with the CERC Tariff Regulations, 2014 or the prevailing contractual terms and mutually agreed Minutes of Meetings.

Issue No. 1: Whether the methodology for computation of Plant Availability Factor (Monthly) (PAFM) and payment of fixed/ capacity charges for the period 01.04.2015 to 31.03.2017 ought to be governed by the provisions of the CERC Tariff Regulations, 2014 or by the Power Purchase Agreement (PPA)?

Issue No. 2: *Whether CERC erred in relying upon the Minutes of Meetings governing the parties' conduct during the relevant period?*

31. Issues No. 1 and No. 2 are taken together as they are interlinked.

32. GRIDCO contends that the computation of PAFM and payment of fixed/capacity charges for the disputed period must be in accordance with the provisions of the PPA dated 04.01.2011 and the Minutes of Meeting dated 10.03.2015 as mandated by Section 32 of the Electricity Act, 2003.

33. GRIDCO further submitted that during FY 2015-16 and FY 2016-17, SLDC computed the Plant Availability Factor based on 25% of power sent out from the generating station as outlined in Clause 2.2(a) of the PPA. This methodology was consistently applied, and GRIDCO made payments based on the final schedules issued by SLDC as agreed in the said MOM and as per the contract.

34. GRIDCO asserts that GKEL itself followed this methodology from the commencement of supply in April 2013 till January 2016, declaring availability based on plant availability and not solely on Unit #3. GRIDCO emphasizes that the conduct of the parties, exchanges of emails, the execution of Short Term Open Access agreements for the sale of surplus power, and reconciliation of energy statements for the disputed period all confirm unanimous adherence to the methodology described in the contract and operational arrangements.

35. GRIDCO argues that GKEL cannot now claim a retrospective change in methodology based on the Minutes of Meeting dated 12.07.2017, which was adopted prospectively with effect from 01.04.2017.

36. GRIDCO also contends that the CERC erred in the impugned order by directing payment of fixed/ capacity charges based on GKEL's original availability declarations without reference to the plant-wide methodology accepted up to 31.03.2017. GRIDCO highlights that, as per Clause 5.3 and 7.1.1 of the PPA, the energy accounting statements issued by SLDC are binding on both parties for the purposes of billing and payment, and that any declaration of capacity must be bona fide and conform to both the contract and the prevailing grid code.

37. Further submitted that CERC's reliance solely on the Tariff Regulations, 2014, to the exclusion of the PPA and mutually accepted MOM undermines the contractual basis for payment and ignores the actual conduct of the parties during the relevant period.

38. GRIDCO maintains that computation of PAFM and payment of fixed charges for power not scheduled or supplied cannot be sustained and that the practice agreed to and followed by SLDC, GRIDCO, and GKEL during the disputed years represents the true intention and agreement of the parties.

39. On the contrary, GKEL submits that under the CERC Tariff Regulations, 2014, the computation of PAFM and payment of fixed/ capacity charges must be based on the declared availability of the generating station and not on actual energy schedules or power sent out. GKEL relies on the formula for calculation of PAFM provided in Regulation 30 of the CERC Tariff Regulations, 2014, and argues that neither the PPA nor the MOM can override the statutory regulatory framework as affirmed by the Hon'ble Supreme Court in ***PTC India Ltd. v. CERC (2010) 4 SCC 603***.

40. GKEL also submitted that the levy of fixed charges and the levy of energy charges are different, and so is the objective thereof, stating that the

understanding of this concept would result in anchoring the dispute in the correct perspective.

41. Unarguably, the tariff for power is governed based on the Availability Based Tariff Regime (**ABT Regime**). Under this regime, tariff is bifurcated into two components, namely:-

- (a) Fixed Charges or Capacity Charges; and
- (b) Variable Charges or Energy Charges.

42. Also submitted that the Fixed Charges correspond to capacity, whereas the Energy Charge corresponds to the power actually sent out. This distinction is the fundamental bedrock under the ABT Regime - the concept of the regime being that an entity should be able to recover (a) the cost of setting up the asset/ infrastructure (FC) and (b) the cost of operating the asset/ infrastructure (EC).

43. Also invited our attention to the Indian Electricity Grid Code (IEGC), contending that under the ABT Regime, capacity charges which depend on availability declared by a generator do not have a bearing on the scheduling of power. This is also consistent with the provisions of the IEGC as under:-

"Annexure-1

(Refer section 6.1 (d))

Complementary Commercial Mechanisms

1. The beneficiaries shall pay to the respective ISGS Capacity charges corresponding to plant availability and/or Energy charges for the scheduled dispatch, in accordance with the relevant contracts /orders of CERC. The bills for these charges shall be issued by the respective ISGS to each beneficiary on monthly basis."

44. Reliance was placed on this Tribunal's judgment dated 22.04.2015, passed in Appeal No. 261 of 2013 titled ***Maharashtra State Electricity Distribution Co. Ltd v. CERC & Ors. (Para 14)***, wherein it is held that Distribution Licensees are under the obligation to pay Capacity Charges as long as the Generating Company declares capacity, irrespective of whether the Distribution Licensee schedules the capacity offered by the generating station or not.

45. GKEL submits that Clause 2.2(a) of the PPA specifies capacity charges in respect of capacity requisitioned and allocated (i.e., 25% of installed capacity) and that capacity charges are payable irrespective of whether GRIDCO actually schedules its full entitlement. GKEL points out that while the practice until 31.03.2017 was to compute PAFM on the basis of scheduled energy, both GRIDCO and SLDC admitted that this was inconsistent with the Tariff Regulations and agreed by Minutes of Meeting dated 12.07.2017 to revise the methodology from 01.04.2017 onwards. GKEL's position is that the same regulatory methodology should be applied to the past period as well, if the same is contrary to the relevant laws.

46. GKEL further submits that the payment of fixed/ capacity charges is a function of making capacity available and that under the ABT regime, the purchaser must pay capacity charges irrespective of actual drawal. GKEL contends that GRIDCO's opposition to retrospective application of the correct methodology is untenable, especially since the parties recognized and admitted the error and reached subsequent agreement on the proper approach towards this issue.

47. GKEL also disputes GRIDCO's contention that the Joint Reconciliation Statement and Short Term Open Access arrangements indicated acceptance of

the prior methodology, arguing that these only concerned energy schedules and not the determination of capacity charges under applicable regulations.

48. It is important to note the relevant Clause 2.2(a) of the PPA stipulating that:

“2.2 Entitlement of power for GRIDCO:

(a) The capacity allocated to GRIDCO shall be up to 25 (Twenty Five) percent of the installed capacity of the thermal power station as requisitioned by GRIDCO once in each 5 (Five) year block period. GRIDCO shall at all times have the right to purchase on behalf of Government of Orissa up to 25% (Twenty five percent) of the power sent out from the Thermal Power Station excluding the quantum of power in excess of 80% Plant Load Factor and Infirm Power with variable cost. GRIDCO shall requisition the capacity up to (Twenty Five) percent six months prior to the commencement of each 5 year block period.”

49. The parties uniformly followed a methodology under which SLDC issued schedules and determined paid capacity charges on the basis of actual power sent out during the disputed period. The Minutes of Meeting dated 10.03.2015 and their subsequent correspondence confirm this operational arrangement. GRIDCO's conduct, sale of surplus power by GKEL under Short Term Open Access, and reconciliation of energy statements also reflect adherence to this plant-wide approach.

50. GKEL also countered the submission of GRIDCO, stating that GKEL itself had accepted the MoM dated 10.03.2015 and thus, no reliance can be placed on the Minutes of Meeting dated 12.07.2017.

51. As placed before us, from the MoM dated 10.03.2015, it is clear that the same pertains to the scheduling of power and is not connected with the consideration of availability declared by GKEL to compute PAFM for the determination of fixed charges/capacity charges.

52. However, as noted earlier, the Minutes of Meeting dated 12.07.2017, GKEL, GRIDCO, and SLDC had agreed and adopted a methodology for PAFM%/ PAFY% which was in line with the regulations framed by the Central Electricity Regulatory Commission. In fact, GRIDCO and SLDC had accepted that the earlier methodology for computing PAFM was incorrect. Pertinently, GRIDCO has subsequently gotten the Minutes of Meeting dated 12.07.2017 approved by OERC vide Order dated 09.04.2019 in Case No. 63 of 2018. Accordingly, once GRIDCO and SLDC have admitted that the earlier methodology was inconsistent with the applicable regulations, the same cannot be ignored simply on the basis that another MoM was governing that period.

53. It is also to be noted that once GRIDCO/SLDC agreed that the methodology being followed till 31.03.2017 was incorrect and inconsistent with the CERC Tariff Regulations 2014, GRIDCO cannot be permitted to rely on any other agreement/minutes only on the basis that the same was inter-se agreed between the parties. It is a trite law that parties cannot agree contrary to the law. Thus, even for the Disputed Period, i.e., FY 2015-2016 and FY 2016-2017, PAFM for GKEL's Project will be calculated basis the availability declared by GKEL and not on the power sent out from the Project.

54. However, Regulation 30 of the CERC Tariff Regulations, 2014 prescribes that PAFM is to be calculated on the basis of the **“average declared capacity...for the ith day”** as certified by the load dispatch centre. The

regulation draws a distinction between declared capacity (availability) and scheduled energy (utilisation) and forms the regulatory basis for the determination of fixed/ capacity charges. The Hon'ble Supreme Court in ***PTC India Ltd. v. CERC (2010) 4 SCC 603*** has clarified that regulations override the terms of the PPA which are inconsistent with the regulations; therefore, the regulations made by the CERC have an overriding effect over inconsistent provisions in contracts between regulated entities.

55. It is evident that both parties recognized the inconsistency between their initial practice and the regulations. Importantly, in the Minutes of Meeting dated 12.07.2017, GKEL, GRIDCO, and SLDC expressly agreed that computation of PAFM would be aligned with the regulatory method prescribed in the CERC Tariff Regulations from 01.04.2017 onwards. The Board of Directors of GRIDCO also approved this change. While GRIDCO argues that such revision was intended to apply prospectively, GKEL seeks adoption of the same principle for the disputed past period.

56. Undisputedly, anything done or to be done contrary to law needs to be rejected, and the legal provisions shall prevail even if such inconsistency is noticed at a later date.

57. It cannot be denied that the Availability declaration is within the sole purview of the generating station, and the generating station is required to demonstrate the DC as and when asked by RLDC/SLDC. No document/averment has been to the effect that GKEL has failed to comply with instructions to increase generation, if any. Further, the Fixed Charges are to be computed on an annual basis in proportion to the Declared Capacity, and therefore linking Fixed Charges to the energy sent as opposed to the capacity available and declared is contrary to the 2014 Tariff Regulations and IEGC.

58. The CERC in the impugned order directed computation and payment of capacity charges based on declared availability, not actual scheduled drawal. The Commission also recorded that the reconciliation of energy statements and short-term open access permissions pertained only to energy schedules and not to the calculation of capacity charges.

59. We also find that where regulations made under statutory authority conflict with a contract, the regulations must prevail. The Tariff Regulations, 2014, clearly require computation of PAFM and payment of fixed/ capacity charges on the basis of declared availability, irrespective of actual energy scheduled or withdrawal. The ABT regime is founded on incentivizing the availability and reliability of supply, not mere consumption.

60. It is relevant that the parties admit both (i) the regulatory requirement and (ii) that the prior practice was inconsistent with the statutory norm. Social and economic justice, as embedded in the regulatory framework, requires regulated entities to align their conduct and financial arrangements with the statutory directives issued. Given that the error in methodology was mutually recognized and corrected from 01.04.2017, equity demands that the same correction be applied to the disputed period, unless compelling contractual or legal constraints dictate otherwise.

61. GRIDCO's arguments based on historical conduct and operational arrangements cannot outweigh the overriding nature of the statutory regulations. The PPA and related MOMs are subordinate to and must yield to the CERC Tariff Regulations, 2014, especially on regulatory matters governing tariff calculation.

62. Accordingly, we hold that the correct methodology for computation of PAFM and payment of fixed/ capacity charges for the period 01.04.2015 to 31.03.2017 is that prescribed by the CERC Tariff Regulations, 2014, i.e., on the basis of declared capacity made available by the generator to the beneficiary, irrespective of actual schedule or drawal.

63. Even if we were to accept GRIDCO and SLDC's contention that the PPA requires capacity charges to be based on 25% of the power sent out, such a provision cannot be accepted as it is contrary to the CERC Tariff Regulations 2014. Also, the power sent out cannot be equated to capacity allocated, and that CERC was correct in relying on the CERC Tariff Regulations 2014, given that the Tariff Regulations explicitly require declared capacity to be considered for the calculation of availability and not power sent out.

64. The GRIDCO's reliance on Clause 6.4(9) of the IEGC is also misplaced. It is stated that the contracts executed by ISGS have to be considered, Clause 6.4(9) of the IEGC 2010 provides as under:-

"6.4(9) The ISGS, other generating stations and sellers shall be responsible for power generation/power injection generally according to the daily schedules advised to them by RLDC/SLDC on the basis of the contracts/requisitions received from SLDCs/Buyers/Power Exchanges."

65. Clause 6.4(9) divulges that the provisions require generating companies to be responsible for injecting power as per the schedule given by RLDC/SLDC for grid security, and the schedule will be determined by RLDC/SLDC basis the contracts of the generating station and requisition received from buyers/power exchange.

66. In light of the above, the methodology for computation of Plant Availability Factor (Monthly) (PAFM) and payment of fixed/ capacity charges for the period 01.04.2015 to 31.03.2017 ought to be governed by the provisions of the CERC Tariff Regulations, 2014 and not by the contractual arrangements under the PPA or Minutes of Meetings during the relevant period inconsistent with the said regulations.

67. It is a settled principle of law that the terms and conditions of sale and purchase of electricity under the Electricity Act shall be executed only with the approval of the Appropriate Commission, inter alia, in line with the regulatory principles.

68. Therefore, Energy reconciliation and short-term open access arrangements during the disputed period do not supersede the regulatory mandate for payment of capacity charges under declared availability criteria.

69. Fixed/ capacity charges must be paid by GRIDCO to GKEL for the capacity made available as declared by the generator in accordance with the regulatory formula and not limited to the quantum of power actually scheduled or supplied.

Issue No. 3: *Whether CERC incorrectly held that SLDC did not compute the PAFM for the FY 2015-16 based on the original availability declaration by GKEL vis-à-vis the subsequent revision in the availability declaration by GKEL?*

70. GRIDCO and SLDC have contended that SLDC correctly computed PAFM for FY 2015-2016 basis the availability declaration made by GKEL (after considering the subsequent modifications made by GKEL).

71. We find it appropriate to note the Order dated 04.02.2020 passed by CERC, the same is quoted as under:

*"51. Accordingly, we direct Respondent No. 2 to correct the PAFM for the project for the disputed period i.e. from 01.04.2015 to 31.03.2017 based on the **original availability declarations made by GKEL. The Respondent No.1 shall pay the capacity charges (along with late payment surcharge)** to the petitioner based on the corrected PAFM as calculated by the Respondent No. 2 in terms of 2014 Tariff Regulations, **within a month from the date of issue of this order.**"*

72. The CERC passed the above Order after considering various documents/facts placed before it:

- a. Submission that SLDC used to make verbal instructions to GKEL to reduce availability to correspond with the schedule for GRIDCO.
- b. Presentation dated 13.11.2019 by SLDC wherein SLDC admitted that Scheduling of the Project during 2015-16 to 2016-17 was based on the GRIDCO PPA. The PAFM%/PAFY% for the said period was worked out based on the final schedule of SLDC.

- c. Minutes of Meeting dated 12.07.2017 whereby SLDC admitted that the methodology for computing PAFM was not consistent with the regulations and was being done basis of Article 2.2(a), i.e., entitlement of GRIDCO for 25% of the power sent out.

73. GKEL, during the hearing, reiterated that SLDC used to issue verbal/oral instructions to GKEL to lower its declared capacity to match the schedule for GRIDCO. Admittedly, GKEL used to comply with this request till 03.12.2015. However, GKEL has submitted that when it became apparent that SLDC was reducing the plant availability to power actually scheduled, GKEL refused to revise the availability declaration. As a result, between 04.12.2015 to 31.03.2017, GKEL refused to revise the availability declarations in the evening based on such verbal instructions by SLDC on behalf of GRIDCO.

74. GKEL, further, referred to the Minutes of Meeting dated 11.07.2013, which has been signed by all parties, including GRIDCO and SLDC, clearly recording that verbal instructions were issued by SLDC to GKEL. In response, GRIDCO has contended that Minutes dated 11.07.2013 do not pertain to FY 2015-2016 and FY 2016-2017. We are unable to accept the contention advanced by GRIDCO. It is clear that the MoM dated 11.07.2013 establishes that SLDC had been issuing verbal instructions to GKEL to revise the Availability.

75. Furthermore, we have considered the factual background in the surrounding circumstances wherein, admittedly, SLDC was computing PAFM based on availability by restricting the same to 25% of the power sent out by GKEL. GRIDCO and SLDC have admitted to this practice by stating that the same was in accordance with Article 2.2(a) of the PPA and MoM dated 10.03.2015. We have

already held that this methodology adopted by SLDC is incorrect and contrary to the applicable regulations. Further, we have also held that no reliance can be placed on the MoM dated 10.03.2015, as it is concerned with the scheduling of power and not on the computation of PAFM.

76. We agree with the contentions of the GKEL that, apart from verbal instructions by SLDC, there is no evidence to show that GKEL had any other reason to revise declared availability. GRIDCO and SLDC's contention to state that the revision was based on technical reasons does not hold merit, given that:-

- (a) As a practice, the revisions due to technical constraints/ reasons are duly recorded in the e-mail sent to SLDCs.
- (b) GKEL had sufficient coal stock for operating the Project. GKEL has placed on record Form-15 showing coal stock availability for the primary and the secondary fuel for FY 2015-16. This submission has also been recorded in Para 14 of the Order dated 04.04.2022.
- (c) SLDC never issued any communication enquiring from GKEL as to why availability declarations were revised consistently. Whereas, in terms of the IEGC 2010, SLDC was mandated to do so.
- (d) GKEL's emails dated 04.11.2015, 05.11.2015, and so on, issued to SLDC categorically record that the revised dispatch schedule is as per GRIDCO's requirement.

77. Accordingly, we find no infirmity in the Order dated 04.02.2020 wherein CERC had directed that the original availability declaration be considered by SLDC. In fact, while SLDC computed the PAFM for FY 2016-2017 based on the original availability declaration, for FY 2015-2016, SLDC considered subsequent revisions made by

GKEL in its availability declaration. We hold that by adopting this method for FY 2015-2016, SLDC has effectively negated the Order dated 04.02.2020, which was passed for this very dispute that PAFM ought to be based on the original availability declaration.

78. Accordingly, we hold that SLDC has not computed the PAFM for FY 2015-2016 correctly and ought to have considered the original availability declaration made by GKEL.

Issue No. 4: *Whether GRIDCO can be made liable to pay fixed/ capacity charges (and Delayed Payment Surcharge) during 01.04.2015 to 31.03.2017?*

79. GRIDCO submits that it cannot be held liable for payment of fixed/ capacity charges or Delayed Payment Surcharge (DPS) for power which it neither scheduled nor availed during the disputed period 01.04.2015 to 31.03.2017. GRIDCO argues that it has made payments for the actual quantum of power duly scheduled by SLDC following Clause 2.2 (a) of the PPA and applicable regulatory provisions.

80. GRIDCO stresses that under the existing PPA and operational practice during that period, capacity charges were linked to 25% of power sent out from the generating station (plant availability basis), and the day-ahead declared capacity was submitted accordingly. It points out that GKEL itself followed this principle of declaration until January 2016 and availed Open Access for the sale of surplus power (up to 150 MW) from Unit #3, which implies that GKEL could not have

supplied full contracted capacity from that unit alone. Thus, GRIDCO argues GKEL cannot now claim capacity charges for power that was not supplied or scheduled.

81. GRIDCO further submits that the Joint Reconciliation Statements signed by the parties on 30.05.2018, which captured the quantum of power supplied and accepted during FY 2013-14 to FY 2016-17 based on SLDC's methodology, had not raised any objections from GKEL on the quantum of power supplied. This conduct is seen as an estoppel against subsequent claims for power not supplied.

82. Regarding DPS, GRIDCO contends that GKEL never raised billing claims supported by certified PAFM statements issued by SLDC during the disputed period as mandated under Clause 5.3 and Clause 7.1.1 of the PPA. Despite this, GRIDCO continued to make provisional payments without default. Therefore, GRIDCO submits that it is not liable to pay DPS for delayed bills that were not formally raised with proper certification. GRIDCO also urges that interim payments already made should be refunded by GKEL with applicable interest.

83. GRIDCO argues that the impugned order by CERC is contrary to the contractual and regulatory framework that the methodology adopted by SLDC for PAFM calculation during the disputed period was prudent and in consonance with the PPA and the Electricity Act, and that GRIDCO should not be held liable for capacity charges in excess of the actual power scheduled or availed.

84. GKEL submits that under the Availability Based Tariff (ABT) regime and CERC Tariff Regulations, 2014, capacity charges are payable based on declared availability of capacity made available to the beneficiary, regardless of whether the beneficiary actually schedules or draws the full capacity. GKEL contends that

capacity charges compensate the generator for having capacity ready and available, and recovery is not linked to actual energy scheduled or consumed.

85. GKEL emphasizes that the PPA, Tariff Regulations, and the Indian Electricity Grid Code (IEGC) mandate payment of fixed/ capacity charges based on declared availability or Plant Availability Factor (PAF) and not on energy scheduled by the beneficiary. It submits that GRIDCO's contention that payment liability is limited to scheduled or availed power is misplaced and contrary to the regulatory regime.

86. GKEL further submits that SLDC and GRIDCO admitted that the earlier methodology calculating PAFM based on scheduled energy was erroneous and agreed in the Minutes of Meeting dated 12.07.2017 to adopt the regulatory methodology based on declared availability from 01.04.2017 onward. GKEL insists that the same principle must apply retrospectively for the disputed period as well.

87. The regulatory regime underlying the ABT system provides that generators are to be paid fixed/ capacity charges for the capacity they make available, independent of the energy actually scheduled and consumed. This principle is integral to incentivizing capacity adequacy and availability as distinct from energy charges pertaining to actual consumption.

88. Article 2.2(f)(A)(i) of the PPA is as follows:

“(f) The tariff payable by GRIDCO to GKEL will be determined by the OERC and shall comprise the following:

A. IN THE CASE OF 25% POWER,

(i) Capacity (Fixed) Charges: The capacity charges shall be determined by OERC as per the terms and conditions of tariff issued from time to time and shall be related to target availability. Recovery of capacity charges below the level of target availability shall be on pro rata basis.

Further, it is to be calculated proportionate to the capacity requisitioned and allocated to GRIDCO.”

89. From the above, it is clear that capacity charges correspond to the allocated capacity which GRIDCO has requisitioned, and recovery is based on availability rather than actual energy drawn. The Commission's order fixed annual fixed charges for 262.5 MW capacity, explicitly acknowledging GRIDCO's contracted share of installed capacity.

90. It is clear that during the disputed period, GKEL declared availability corresponding to 25% of the installed capacity based on fuel and operational constraints. Despite GRIDCO not drawing or scheduling the full contracted share, this did not absolve it of its obligation to pay capacity charges on availability, consistent with the regulatory regime. The conduct of the parties submitting to reconciliation statements for power actually supplied does not negate the regulatory and contractual entitlement of GKEL to recover capacity charges for available capacity.

91. Regarding the Delayed Payment Surcharge, the record indicates that GKEL raised provisional bills for capacity charges and supplementary bills based on PAFM calculations as per the 2014 Tariff Regulations post-November 2015. GRIDCO defaulted on payment of the full assessed capacity charges, resulting in

the accumulation of dues and delayed payment penalties. The Commission holding GRIDCO liable for DPS aligns with the contract and regulatory norms since the delay is attributable to GRIDCO's non-payment of due amounts.

92. GKEL also submitted that the following supports their contention and also the Order dated 04.02.2020:-

- a) GKEL had raised invoices for PAFM claims between 31.12.2015 to 11.04.2017. These invoices were placed on record at Annexure P-36 in Petition 115/MP/2019 before CERC.
- b) In Paragraphs 50-51 of the Order dated 04.02.2020, CERC upholds the invoices raised by GKEL.
- c) GRIDCO has admitted that it has made payment of Rs. 515.46 Crores to GKEL towards fixed charges against the disputed period, which is about 86.66% of the Revised Fixed Charges (approx. Rs. 595 Crores) payable.
- d) In its Written Submissions and Rejoinder Submissions, GRIDCO has admitted that for FY 2015-2016 and FY 2016-2017, GKEL was raising invoices that were based on the availability declared by GKEL rather than the PAFM certified by SLDC.
- e) GRIDCO had restricted payment to GKEL by considering the PAFM as certified by SLDC and not basis availability declaration of GKEL.

93. From the Order dated 04.02.2020, it is clear that the invoices for the period FY 2015-2016 and FY 2016-2017 were considered by CERC in proceedings pertaining to Petition No. 115/MP/2019. Further, GRIDCO has also admitted to invoices being raised based upon the availability declaration of GKEL and not the PAFM certified by SLDC.

94. We have already observed that the PAFM, as certified by SLDC, is incorrect given that PAFM is to be computed basis the availability declaration by GKEL in light of CERC Tariff Regulations 2014 and Article 2.2 of the PPA. Therefore, we note that there is no requirement for GKEL to raise fresh invoices on GRIDCO. The only change was that the PAFM certified by SLDC had to be in accordance with the availability declaration by GKEL, which latter incorporated in the invoices already raised by GKEL.

95. It is also important to note Clause 7.2 of the PPA, which is as follows:

“7.2 Rebate and Late Payment Surcharge:

Two percent (2%) rebate shall be allowed on payment of bills through Letter of Credit (LC) or directly from GRIDCO on the amount paid within 7 (seven) days of presentation of the bills. If payment is made after 7 (seven) days then one percent (1%) rebate shall be allowed if payment is made within thirty (30) days of presentation of the bills.

A surcharge calculated at the rate of one point two five percent (1.25%) per month on the amount of the bill remaining unpaid shall be payable for the actual period of delay beyond the due date of payment i.e. sixty (60) days after presentation of bill.

The rate / percentage of rebate and late payment surcharge shall be in line with the CERC guideline as amended from time to time.”

96. The argument that GRIDCO is not liable for capacity charges on unscheduled power because such power was neither availed nor supplied overlooks the fundamental regulatory mandate and the distinct nature of capacity

charges under ABT. The declaration of availability binds GRIDCO to pay irrespective of utilization, subject to the terms in the PPA and prevailing regulations.

97. GRIDCO's reliance on prior conduct and agreements cannot negate statutory and regulatory obligations. The PPA provisions are subject to the overriding effect of regulations framed by the Commission, as affirmed by the Hon'ble Supreme Court's ruling in ***PTC India Ltd. v. CERC***. Thus, GRIDCO cannot avoid liability for fixed charges on the pretext of non-utilization or partial scheduling, nor escape DPS on delayed payments of undisputed amounts.

98. **Accordingly, we hold that GRIDCO is liable to pay fixed/ capacity charges to GKEL for the declared capacity made available during the period 01.04.2015 to 31.03.2017, irrespective of the quantum actually scheduled or drawn. Further, GRIDCO is liable to pay DPS for delayed payments of such capacity charges as provided under Clause 7.2 of the PPA and applicable Tariff Regulations.**

ORDER

For the foregoing reasons as stated above, we are of the considered view that the captioned Appeal Nos 254 of 2021 and 207 of 2022 do not have merit and are dismissed.

The Orders passed by the CERC in Petition No. 115/MP/2019 dated 04.02.2020 and in Petition No. 498/MP/2020 dated 04.04.2022 are upheld.

GRIDCO Limited is directed to pay to GMR Kamalanga Energy Limited the fixed/ capacity charges calculated in accordance with the declared capacity basis as provided under the CERC Tariff Regulations, 2014, for the disputed period 01.04.2015 to 31.03.2017. GRIDCO Limited shall also be liable to pay any applicable delayed payment surcharge in consonance with the terms of the Power Purchase Agreement.

The Captioned Appeal and pending IAs, if any, are disposed of in the above terms.

PRONOUNCED IN THE OPEN COURT ON THIS 3rd DAY OF SEPTEMBER, 2025.

(Virender Bhat)
Judicial Member

(Sandesh Kumar Sharma)
Technical Member

REPORTABLE / NON-REPORTABLE
pr/mkj/kks