

TAMIL NADU ELECTRICITY REGULATORY COMMISSION

Order of the Commission dated this the 30th Day of May 2024

PRESENT:

Thiru M.Chandrasekar Chairman
Thiru K.Venkatesan Member
and
Thiru B.Mohan Member (Legal)

D.R.P. No. 10 of 2022

M/s. OPG Power Generation Private Limited
Represented by its Authorized Signatory
Thiru P. Venkatasubramanian
OPG Nagar, Periya Obalapuram Village
Nagaraja Kandigai
Madharapakkam Road
Gummidipoondi
Thiruvallur – 601 201.

... Petitioner
(Thiru Rahul Balaji
Advocate for the Petitioner)

Vs.

1. Tamil Nadu Generation and Distribution Corporation Ltd., (TANGEDCO),
Represented by its Chairman & Managing Director
10th Floor, 144, Anna Salai,
Chennai – 600 002.
2. The Chief Engineer / PPP,
TANGEDCO,
144, Anna Salai,
Chennai – 600 002.
3. Tamil Nadu Transmission Corporation Ltd.
TANTRANSCO
144, Anna Salai
Chennai – 600 002.

4. State Load Despatch Centre
C/o. TANTRANSCO
144, Anna Salai
Chennai- 600 002.

.... Respondents
(Thiru Richardson Wilson
Counsel for Respondents)

This petition coming up for final hearing in the presence of Thiru.Rahul Balaji, Advocate for the petitioner, Thiru Richardson Wilson, Advocate for the Respondents and upon hearing the arguments advanced on the either side and on perusal of all material records and the matter having stood up for consideration till this date, the Commission pass the following:

ORDER

1. Contentions of the Petitioner as per amended petition:-

1.1. The present petition is being filed in view of the Respondent TANGEDCO treating Petitioner's Declared Capacity ("DC") for the period 21.10.2021 to 31.10.2021, 01.11.2021 to 30.11.2021, 01.12.2021 to 31.12.2021 and 01.01.2022 to 31.01.2022 as 0 MW and consequently denying payments due and payable to Petitioner. Such an action is unmindful of the fact that Petitioner is legally entitled to not schedule any power to TANGEDCO until pending dues are cleared by Respondent TANGEDCO, in view of the terms of the Power Purchase Agreement dated 12.12.2013, contract law and various judicial pronouncements. The instant petition closely follows the heel of a writ petition filed by Petitioner, bearing W.P. No. 26052 of 2021, in and by which Petitioner sought for payment of a sum of Rs.93,64,47,378/-, being the amount due and payable to Petitioner

for the power supplied by it to the Respondent TANGEDCO and for further reliefs. The non-payment of dues of Petitioner is wholly arbitrary and violates the contractual and statutory rights apart from triggering the exercise of corresponding rights by the petitioner. The Hon'ble High Court while recognising the non-payment and issuing directions in that regard (which too remains not complied) had specifically allowed liberty to approach the Commission for determination of Regulatory issues.

1.2. Considering the settled legal position that in matters of this nature where there are reciprocal obligations, the generator cannot be forced to supply electricity when payments are not being cleared and the directives issued by the Ministry of Power, the petitioner is seeking to challenge the dispute notices dated 30.11.2021, 20.12.2021, 25.01.2022, and 18.02.2022 issued by the 2nd Respondent and set aside the same as being arbitrary, illegal and contrary to law and consequently direct the Respondent to consider the plant availability of Petitioner during the period of non-supply at 100% and direct TANGEDCO to pay the capacity charges and other charges to be paid in full till January 2022 along with the Late Payment surcharge till date of full payments towards outstanding invoices in compliance with the Long Term Power Purchase Agreement dated 12.12.2013 ("PPA") executed between the Petitioner and TANGEDCO, that till such time the outstanding dues under the PPA are cleared, the 3rd and 4th Respondents are not to schedule power from the Petitioner's plant and direct the Respondent TANGEDCO to act in compliance with the terms of the contract between parties which stand further strengthened by the directives issued by the Ministry of Power,

Government of India vide its Order dated 28.06.2019 in No.23/22/2019-R&R r/w Compliance directive dated 09.08.2019.

1.3. The Petitioner is a generating company as defined in Section 2 (28) of the Electricity Act, 2003. The Petitioner owns and operates a 414 MW coal fired power thermal plant at Gummudipoondi, Tamil Nadu ("OPGPG TPP"). One of the units of OPGPG TPP (74 MW) was duly commissioned on 05-06-2013 and has been generating and supplying the contracted capacity to the Respondent from 01.01.2014 in accordance with PPA, without any interruption.

1.4. The Respondent (TANGEDCO) is an electrical power generation and distribution public sector undertaking that is owned by the Government of Tamil Nadu. It was formed on 1st November 2010 under section 131 of the Electricity Act of 2003 and is the successor to the erstwhile Tamil Nadu Electricity Board and is in the business of distribution as well as generation.

1.5. TANGEDCO is a wholly owned undertaking of the Government of Tamil Nadu. That State Government of Tamil Nadu exercises full and complete control over functioning and affairs of TANGEDCO through Energy Department, Government of Tamil Nadu. Accordingly, it is stated that TANGEDCO is an alter ego of Government of Tamil Nadu.

1.6. The Petitioner states that on 27.09.2012, the Board of Directors of the 1st Respondent approved a proposal to procure 1000 MW + 20% each RTC power by

floating two tenders with two different delivery dates to meet the base load requirement throughout the year under Case-I bidding for a period of 15 years under the guidelines issued by the Ministry of Power, Government of India.

1.7. Thereafter, on 09.10.2012, Miscellaneous Petition No. 37 of 2012 was filed before the Commission for the approval of certain deviations from the standard bid documents for the procurement of 1000 MW + 20% RTC power. The Commission accorded its approval for certain deviations specified by it in its order dated 18.12.2012.

1.8. For the purposes of its distribution and retail supply activities, the Respondent on 21.12.2012 floated a tender in the form of a Request for Proposal bearing Ref No.03/PPLT/2012 for procurement of power on a long term basis under the Case - I bidding procedure for a period of fifteen years from 01.10.2013 to 30.09.2028 and subsequently entered into Power Purchase Agreements with various generators. The petitioner submitted its bid for supply of 74 MW RTC power, amongst other generators.

1.9. In the Non-Financial Bid Evaluation Committee meeting held on 18.04.2013, the committee recommended opening of financial bids for the twelve bidders who had met the qualification requirements and the same was opened on 07.05.2013. The levelled tariff was calculated for all bidders, including the Petitioner's bid by applying the escalation factor and discount factor notified by the Central Electricity Regulatory Commission (hereinafter referred to as "CERC"). Thereafter, the Petitioner was called by the Respondent for negotiations on rate matching to the lowest bidder's rate subject to

approval of the Board of Directors of the Respondent and the Commission. Accordingly, the Petitioner agreed to match the low revised levelled tariff of Rs.4.91/kWh.

1.10. On 30.10.2013, the Board of Directors of the Respondent approved the issuance of letters of intent to and the execution of power purchase agreements with the L4 through L11 bidders (which includes the Petitioner) for the purchase of 2122 MW RTC power through long term under Case - I for a period of 15 years from 2013 through 2028. During this meeting, it was also agreed that a petition would be filed before the Commission for the adoption of the revised levelled tariff of Rs.4.91/kWh.

1.11. The Respondent then issued the Letter of Intent dated 14.11.2013 in favour of the Petitioner and thereafter the parties entered into the said Power Purchase Agreement dated 12.12.2013 ("PPA dated 12.12.2013") for supply of a total contracted capacity of 74 MW from the generating station of the Petitioner. This is therefore a PPA that was executed under the provisions of S.63 of the Electricity Act, 2003. In pursuance thereof, the Petitioner has been providing uninterrupted supply of the contracted capacity to the Respondent from 01.01.2014 onwards.

1.12. While so, in 2014, the Respondent filed a petition bearing PPAP No.3 of 2014 before the Commission for the adoption of the levelled tariff of Rs.4.91/ kWh under the power purchase agreements signed between the Commission passed an order adopting the levelled tariff of Rs.4.91/- per kWh as contemplated under the PPA dated 12.12.2013.

1.13. In terms of Article 5.1.1 of the PPA dated 12.12.2013, the Petitioner is contractually obligated to offer for sale the contracted capacity of 74 MW to the Respondent at all times. Article 5.1.1 of the PPA dated 12.12.2013 reads as under -

“5.1 Obligation to Supply the Contracted Capacity

5.1.1 Notwithstanding any Scheduled Outage or Unscheduled Outage of the generating unit(s) and/or of the transmission system, the Seller shall offer for sale the Contracted Capacity to the Procurer at the Interconnection Point and arrange for transmission up to the Injection Point.”

1.14. Further, Article(s) 8.3.2 and 8.3.5 of the PPA dated 12.12.2013 deal with the mechanism of Late Payment Surcharge (hereinafter referred to as "LPSC") to be paid by the Respondent in case of delay in payment of monthly invoices raised by the Petitioner.

The Article(s) 8.3.2 and 8.3.5 read as under -

"8.3 Payment of Monthly Bills

8.3.2 All payments made by the Procurer shall be appropriated by the Seller in the following order of priority:

- (i) towards Late Payment Surcharge, if any;*
- (ii) towards the earlier unpaid Monthly Bill(s), if any; and*
- (iii) towards the then current Monthly Bill.*

8.3.5 In the event if delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate equal to SBIPLR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the seller through Supplementary Bill.”

1.15 The Respondent has never disputed the various letters issued and invoices/ bills raised by the Petitioner from February, 2021 until September, 2021. As per Article 8.6.1

of the PPA dated 12.12.2013, if any party does not dispute a bill raised by the other party by the due date, such bill shall be taken to be conclusive. Article 8.6.1 of the PPA dated 12.12.2013 reads as under -

"8.6 Disputed Bill

8.6.1 If a party does not dispute a Monthly Bill, Provisional Bill or a Supplementary Bill raised by the other Party by the Due Date, such Bill shall be taken as conclusive. "

Thus, admittedly, the bills raised by the Petitioner are conclusive, final and binding on the Respondents as per the PPA dated 12.12.2013 atleast until the month of September, 2021. It is pertinent to note that such bills are not disputed till date.

1.16. The following are invoices that stand undisputed and are not fully paid as on date, among other dues payable to Petitioner:

| Sl. No. | Month | Invoice Amount in Rs. |
|----------------------------------|----------------|-----------------------|
| 1 | July 2021 | 2,16,44,105 |
| 2 | August 2021 | 10,47,40,862 |
| 3 | September 2021 | 10,96,59,120 |
| Total undisputed invoices | | 23,60,44,087 |

The monthly invoices for supply made and capacity contracted during October, 2021, November, 2021, December, 2021, and January, 2022 have been partly disputed by the Respondent. Without admitting the disputed quantum, the details of invoices and undisputed quantum of such invoices are provided as below:-

| Month of Invoice | Amount of invoice submitted by OPGPG | Amount of invoice disputed by TANGEDCO |
|---|---|--|
| October 2021 | 12,99,68,347 | |
| November 2021 | 6,99,30,000 | |
| December 2021 | 7,22,61,000 | |
| January 2022 | 7,22,61,000 | |
| Outstanding late payment surcharge (as on 17-03-2022) | 79,28,312 | |
| Total | 35,23,48,659 | 20,21,43,866 |
| Undisputed outstanding dues as per TANGEDCO | 35,23,48,659 - 20,21,43,866 = 15,02,04,793 | |

1.17. The Respondent has paid ad-hoc amounts of Rs.94 Crores (approx.) in three tranches during the period December, 2021 to January, 2022. However, even after the receipt of the said amounts there are huge outstanding to be paid by the Respondent. Accordingly, the total outstanding amounts payable by TANGEDCO as on elate are as follows:

| TANGEDCO outstanding (as on 17-03-2022)/ | | | |
|--|------------|------------|---------------------|
| Month | Date | Due Date | Amount (in INR) |
| Late payment surcharge due on 17-03-2022 | | | 79,28,312 |
| July 2021 | 09-08-2021 | 08-09-2021 | 2,16,44,105 |
| August 2021 | 16-09-2021 | 16-10-2021 | 10,47,40,862 |
| September 2021 | 06-10-2021 | 05-11-2021 | 10,96,59,120 |
| October 2021 | 06-11-2021 | 06-12-2011 | 12,99,68,347 |
| November 2021 | 07-12-2021 | 06-01-2022 | 6,99,30,000 |
| December 2021 | 05-01-2022 | 04-02-2022 | 7,22,61,000 |
| January 2022 | 03-02-2022 | 05-03-2022 | 7,22,61,000 |
| Total | | | 58,83,92,746 |

1.18. In pursuance thereof, the Petitioner had continued to duly provide an uninterrupted power supply to the Respondent despite the hardship caused in power generation because of non-payment of the long pending outstanding dues under the PPA dated 12.12.2013 legally payable by the Respondent. After the continued default over 6 months when it became impossible to continue to generate and supply power without any payment as a result of the continued non-payment of outstanding dues by the Respondent, the Petitioner was constrained to raise demand letter dated 05.08.2021 in supersession of all previous communications between the parties with respect to payment of monthly outstanding dues by the Respondent for the period.

1.19. By way of the said letter dated 05.08.2021, the Respondent was duly notified of the total sum due upto July, 2021, on account of the then outstanding monthly bill payments, a sum of Rs.52,46,42,959/- (Rupees Fifty Two Crores Forty Six Lakhs Forty Two Thousand and Nine Hundred and Fifty Nine), legally due and payable to the Petitioner under terms of the PPA dated 12.12.2013. The Petitioner urged the Respondent to make immediate payment of the long pending dues under the PPA dated 12.12.2013. The Respondent was informed that the non-payment of outstanding dues has caused great financial stress to the Petitioner company. As a consequence of the non-payment, the entire working capital of the Petitioner was blocked, and the Petitioner incurred additional financing charges.

1.20. However, despite the best attempts of the Petitioner to seek payment of its outstanding dues the Respondent has failed to respond to the Petitioner's requests and

make payment of the outstanding amount making it impossible to supply the power. That due to huge outstanding payments of the Respondent, the petitioner notified the Respondent vide its letter dated 16.10.2021 that it shall stop supply of power from 21.10.2021 and accordingly, the supply of power was stopped from 01: 15 Hrs of 21.10.2021.

1.21. The Petitioner highlights that the monthly invoices raised by the Petitioner comprise of two components, namely - capacity charges and energy charges for each of the previous months. It is pertinent to state that capacity charges are required to be paid for capital investment made by the generator in setting up and maintaining the power plant while, the energy charges are required to be paid for fuel cost and running costs incurred during the generation of electricity. This is evident when seen in the context of Regulations 36 and 41- 43 of the TNERC (Terms and Conditions for Determination of Tariff) Regulations, 2005. The same principle has also been reiterated in Clause 4.2.1, 4.2.2 and 4.2.3 of the Schedule 4 of the Long Term PPA which is in adherence to this established principle.

1.22. The Petitioner had sent a letter to 2nd Respondent on 06.11.2021 submitting invoice for the supply month of October, 2021 consisting of capacity charges, energy charges and incentive charges as per clause 4.2 of the schedule 4 of the LTPPA. Similar letter was issued by the Petitioner to the 2nd Respondent on 07.12.2021 for the month pertaining to November, 2021, for capacity charges and incentive charges on the basis of 100% available declared capacity for an amount of Rs.6,99,30,000/-. Similar letter for

capacity charges and incentive charges pertaining to the month of December, 2021 was issued on 05.01.2022 and for the month of January, 2022 was issued on 03.02.2022 claiming an amount of Rs.7,22,61,000/- under each invoice.

1.23. Therefore, being left with no other alternative and facing continued financial hardship, the Petitioner company being aggrieved by the inaction of the Respondents, was constrained to approach the Hon'ble High Court of Madras under Article 226 of the Constitution of India, in W.P. No. 26052 of 2021 seeking for payment of Rs.93,64,47,378/- being the amount outstanding for supply of power to TANGEDCO on the date of filing said petition.

1.24. During the pendency of the said writ petition, on 02-12-2021, the Respondent TANGEDCO made an ad-hoc payment of Rs.50,00,00,000/-, to clear its outstanding dues. Even after payment of Rs.50,00,00,000/-, there remained a sum of Rs.62,42,91,867/- due and payable by TANGEDCO as on 03.12.2021. Thereafter, on 24.01.2022, W.P. No.26052 of 2021 was disposed by the Hon'ble High Court of Madras with specific directions to the Respondent TANGEDCO to clear the pending dues within four weeks. The relevant extract of the provision is as follows:

"4. The learned counsel for the petitioner submitted that the petitioner's company have no grievance if the Respondents pay the outstanding dues within a period of six weeks. However, this Court may, at its discretion, issue a direction to the Respondents not to insist the petitioner to provide electricity without remitting the dues.

.....

(9) The Respondents/TANGEDCO are directed to settle the admitted dues to the petitioner within a period of four weeks from the date of receipt of a copy of this order; "

1.25. Despite the above order dated 24.01.2022, the balance sum of Rs.58,83,92,746/- remain due and payable to Petitioner as on the date of filing this petition.

1.26. Further, it is relevant to note that, during the pendency of W.P. No. 26052 of 2021 and thereafter, the Respondent TANGEDCO issued three letters dated 20.12.2021, 25.01.2022 and 18.02.2022, which are allegedly in the nature of dispute notices, i.e., disputing the amount payable by TANGEDCO to Petitioner as provided under clause 8.6 of the PPA dated 12.12.2013. Such dispute notices have been issued only to take shelter under the contractual provisions to avoid payments. However, a holistic reading of the terms of the PPA make it evident that such dispute notices are on the face of it illegal and contrary to the contractual terms.

1.27. In these dispute notices dated 20-12-2021, 25-01-2022 and 18-02-2022, the Respondent TANGEDCO has unilaterally determined the Declared Capacity ("DC") of Petitioner to be 0 MW from 01: 15 Hrs of 21.10.2021 to 24:00 Hrs of 31.01.2022 and has further contended that in view of the same, Respondent TANGEDCO shall consider plant availability at 0% for such period and further Respondent TANGEDCO is not liable to make any payment to Petitioner for such period and rather is entitled to adjust incentives and penalties as per the revised annual availability.

1.28. Thereafter, Respondent TANGEDCO issued another dispute notice dated 18.02.2022, contending therein that there has arisen a dispute in the pending invoices on account of Petitioner suspending power supply until all pending arrears are cleared

by Respondent TANGEDCO. Relevant extract of the said dispute notice dated 18.02.2022 is as follows:

"Added to the above, as per clause 8.3.5 of the PPA, for the delayed payment of monthly bills, TANGEDCO is making Late Payment Surcharge applicable for the outstanding amounts calculated on a day to day basis. Hence, the statement of M/s OPG for suspension of power from 00.00 hours of 1.12.2021 to 24 Hrs of 31.12.2021 is incorrect and not acceptable by TANGEDCO. Due to the above reasons, TANGEDCO has made OPG DC claim as "0" MW from 00.00 Hrs of 01.01.2022 to 24.00 Hrs of 31.01.2022 and calculated capacity charges /Incentive charges accordingly.

Hence it is requested to resume supplying power immediately as per the provisions of PPA.

*.....
As per Clause 8.6.9 of PPA, TANGEDCO have made arrangements to deduct an amount of Rs.58,87,4401- towards monthly bill of January 2022 from the existing bills of OPG without prejudice to its right to dispute"*

1.29. The issuance of such dispute notices despite the direction of the Hon'ble High Court of Madras in its order dated 24.01.2022 in W.P. NO.26052 of 2021 in and by which Respondent TANGEDCO was directed to clear pending payment within 4 weeks, is illegal and unconscionable and amounts to a blatant violation of orders of Court.

1.30. A comprehensive response was issued on 04.03.2022 to the Respondent TANGEDCO, stating *inter alia*, that Petitioner was legally and contractually entitled to not effect power supply until all pending dues are cleared by Respondent TANGEDCO.

1.31. When a generator is disabled from supplying electricity since it is unable to generate due to non-payments by the procurer for an inordinately long time, not only can no penalty be imposed due to the breach of the reciprocal promise of prompt payment,

but the payments towards full capacity charges for the power plant that remains idle would be an appropriate consequence. This is in order for the generator which has kept a plant dedicated for the supply to be able to meet its fixed costs and the interest burden. Thus, the liability of the Respondent TANGEDCO to continue making payment of capacity charges when the plant of the Petitioner is not generating electricity for reasons attributable to the Respondent is an automatic consequence which is recognized by the Ministry of Power in its directives.

1.32. As stated hereinbefore, the Respondent TANGEDCO has failed to pay the outstanding dues of the Petitioner. As per clause 8.5.8 r/w 11.2.1(ii) of the Long Term PPA, TANGEDCO is liable for payment of Capacity Charges to the Petitioner during the TANGEDCO event of Default. The contractual position is set out in further detail in this petition. Due to indisputable event of default by TANGEDCO, by way of non-payment of outstanding dues, it is stated that the availability of the plant of the Petitioner should be treated as 100% and further, TANGEDCO should be directed to pay Capacity Charges to the Petitioner under the Long Term PPA during such period.

1.33. Further, the DISCOM shall continue to pay the Capacity Charges to the generating company and shall be restricted to procure power through exchanges and through Short Term Open Access (STOA). The relevant clause of the Order issued by the Ministry of Power, Government of India is reproduced herein below for ready reference:

"5.0 It is essential therefore that all the provisions mentioned above are implemented strictly. NLDC & RLDC are therefore directed as follows:

- i. In accordance with Section 28(3) (a), the NLDC & RLDC shall dispatch power only after it is intimated by the Generating Company and / Distribution Companies that a Letter of Credit for the desired quantum of power has been opened and copies made available to the concerned Generating Company.*
- ii. The intimation to NLDC and RLDC shall specify the period of supply.*
- iii. RLDC shall dispatch electricity only to the quantity equivalent of value of Letter of Credit.*
- iv. The dispatch shall stop once the quantum of electricity under LC is supplied.*
- v. The concerned generating company shall be entitled to encash the LC after expiry of grace period, i.e., 45 to 60 days as provided in the PPA.*
- vi. In the event of power is not dispatched for any reason given above, the Distribution Licensee shall continue to pay the Fixed Charge to the Generating Company.*

6.0. It shall also be ensured by the Load Dispatch Centre that the regulated entity, during the period of regulation, has no access to procure power from the Power Exchanges and they shall not be granted Short Term Open Access (STOA). "

1.34. Thereafter a further compliance Circular dated 09.08.2019 has also been issued, relevant portion is reproduced as follows:-

"This has reference to the Order dtd. 28.06.2019 issued by Ministry of Power on subject "Opening and maintaining of adequate Letter of Credit as Payment Security Mechanism under Power Purchase Agreements by Distribution Licensees" and its corrigendum dated 17.7.2019. A Procedure for scheduling of Power to Distribution Company in the event of Non-maintenance of Letter of Credit has been issued on 17.7.2019. A clarification has also been issued on 23rd July, 2019 to all stakeholders regarding applicability of Order dated 28.6.2019 and its Corrigendum dated 17.7.2019.

2. As per para (a) of the Scheduling procedure dtd. 17-07-2019, power will be scheduled for dispatch only after a written intimation is given to the appropriate Load Dispatch Center (LDC) i.e. NLDC / RLDC / SLDC / that Letter of Credit (LC) for the desired quantum of power w.r.t. the generating stations has been

opened. The intimation shall also specify the period of supply. The intimation of requisite LC having been opened will be given by the Distribution Company and will be confirmed by the generating company. Respective RLDC and SLDCs are required to implement the above procedure. "

1.35. In this regard, following Sections of Electricity Act, 2003 may be referred:

- i. Section 29 of the Electricity Act provides that the Regional Load Despatch Centre may give such directions and exercise such supervision and control as may be required for ensuring stability of grid operations and for achieving the maximum economy and efficiency in the operation of the power system in the region under its control.*
- ii. As per Section 29(3), all directions issued by the Regional Load Despatch Centres to any transmission licensee of State transmission lines or any other licensee of the State or generating company (other than those connected to inter State transmission system) or sub-station in the State shall be issued through the State Load Despatch Centre and the State Load Despatch Centres.*
- iii. RLDC shall dispatch electricity only up to the quantity equivalent of value of Letter of Credit.*
- iv. The dispatch shall stop once the quantum of electricity under LC is supplied.*
- v. The concerned generating company shall be entitled to encash the LC after expiry of grace period, i.e. 45 to 60 days as provided in the PPA.*
- vi. In the event power is not dispatched for any reason given above, the Distribution licensee shall continue to pay the Fixed Charge to the Generating Company.*

6.0 It shall also be ensured by the Load Despatch Centre that the regulated entity, during the period of regulation, has no access to procure power from the Power Exchanges and they shall not be granted Short Term Open Access (STOA).

7.0 In case scheduling and despatch of power produced by any generator is not done due to non-opening of Letter of Credit by the Distribution licensee, then the Distribution licensee would be liable to pay compensation to the generator as per the terms of Power Purchase Agreement or Power Sale Agreement, as the case may be, the distribution licensee has entered in with the generator

8.0 NLDC / RLDC / SLDC shall carry out such duty cast under Electricity Act, 2003 from 01.08.2019

9.0 This issues with the approval of Minister of State (I/C) for Power and NRE”

1.36. If electricity is to be dispatched the dues are to be cleared. It is stated that the Respondent TANGEDCO has never disputed the amounts demanded or the invoices/bills raised by the Petitioner from February, 2021 subject-matter of the pending dues, till the impugned dispute notices dated 30.11.2021, 20.12.2021, 25.01.2022 and 18.02.2022 came to be issued. All these dispute notices have been issued by the Respondent TANGEDCO after Petitioner filed W.P. No.26052 of 2021 in which the Commission directed the Respondent TANGEDCO to effect all pending payments to Petitioner within a period of 4 weeks.

1.37. Therefore, the dispute notices dated 30.11.2021, 20.12.2021; 25.01.2022 and 18.02.2022 have been issued as a mere afterthought and with a deliberate intent to deny payments that Petitioner is legally, factually and contractually entitled to.

1.38. Respondent No.1 has received the supply, distributed the same and recovered tariff from its consumers and unjustly enjoying the benefit of supplies effected by the Petitioner to the Respondent under the said PPA. In fact, it is to be noted that apart from other pending dues from TANGEDCO, the dues under the Long term PPA towards monthly energy supply made and late payment surcharge is Rs.58,83,92,746/- as on date of filing this petition.

1.39. Pertinently, the value of Letter of Credit established by TANGEDCO (for the value of Rs.14.37 crores) as per the Order issued by the Ministry of Power. Article 8.4 of the PPA provides, "Adequate payment security shall be made available to the bidders. The payment security may constitute ... Stand by Letter of Credit (LC) / Bank guarantee."

Thus, Letter of Credit is merely a payment security mechanism and its recourse or non-recourse cannot in any manner be construed to have effect on contractual obligations of the Petitioner and TANGEDCO under the PPA. It is pertinent to note that TANGEDCO is a government owned DISCOM holding monopoly over the State of Tamil Nadu therefore, the petitioner is unable to encash the LC so as to maintain the long standing relationship with TANGEDCO under the present LTOA. Further, the Petitioner would not be treated fairly on participating in future procurement tenders by TANGEDCO, if it invokes the LC provided by TANGEDCO. More importantly, TANGEDCO officials have orally asked the Petitioner to not encash the LC and the Petitioner was constrained not to encash the LC so as to continue doing business with TANGEDCO. As such, the LC provided by TANGEDCO serves no practical purpose. Encashing the LC will affect the credit worthiness of TANGEDCO, thereby affecting its ability to continue to obtaining funds. It is therefore, detrimental to TANGEDCO and general consumers. Despite this, the Petitioner had initially been continuing to schedule power to the Respondent TANGEDCO on good faith, but since then the outstanding payment towards energy supplied had accrued to Rs.93.64 crores (on the date of filing W.P. No. 26052 of 2021 before Madras High Court) which is almost 7 times the LC established by the TANGEDCO.

1.40. Moreover, the Petitioner vide its letter dated 28.12.2021 informed TANGEDCO that due to regular delays in making the payment, the Petitioner was constrained to invoke Article 8.5 of the PPA, which provides that the Petitioner can offer 25% of the

contracted capacity for sale to a third party in case TANGEDCO fails to make payments to the Petitioner in terms of the PPA. However, the Petitioner states that no response was received for the same.

Article 8.5 reads:

"Third Party Sales on Default

8.5.1 Upon the occurrence of an event where the Procurer has not made payment by the Due Date of an Invoice through the Payment Mechanism provided in Article 8.4 of this Agreement, the Seller shall follow the steps as enumerated in Articles 8.5.2 and 8.5.5.

8.5.2 On the occurrence of the event mentioned in Article 8.5.1 and after giving a notice of at least seven (7) days to the Procurer, the Seller shall have the right to offer twenty five (25) per cent of the Contracted Capacity pertaining to Procurer "Default Electricity" for sale to third parties.

8.5.5 If the Standby Letter of Credit is not fully restored by the Procurer within thirty (30) days of the non-payment by the Procurer of an Invoice by its Due Date, the provisions of Article 8.5.2 shall apply with respect to one hundred per cent (100%) of the Contracted Capacity."

1.41. As mentioned hereinabove, the TANGEDCO has not even responded to the Petitioner's request for third party sale. The intention behind this Clause in the PPA is so that the losses to the Petitioner are mitigated. However, since the TANGEDCO has not permitted the Petitioner for third party sale, they have effectively prevented loss mitigation. Further the provisions require that in any event, irrespective of the exercise of such right, the loss caused is to be compensated and this would include the payment of capacity charges by TANGEDCO. As such, the TANGEDCO is liable to pay capacity charges to the Petitioner.

1.42. This very issue and while interpreting identical provisions as they emanate out of the same tender and PPA terms, has been affirmed by the Hon'ble CERC in its Order dated 15.08.2020, in Adhunik Power and Natural Resources Limited vs. TANGEDCO and Ors., in Petition No. 158/MP/2019 wherein the Petitioner therein was awarded capacity charges. It is pertinent to note that the PPA in the said case is identical to the Petitioner's PPA, since they arose from the same tender. However, in the said case, the sale was made through PTC. The relevant findings are extracted hereunder:

"38. Thus in terms of the above provisions, even in case of failure on the part of PTC to make payment to the Petitioner for supply of power, the PTC-PPA conceives joint efforts on the part of the Petitioner and PTC to sell power of TANGEDCO to third parties in terms of PTC-PPA and Procurer-PPA after giving a 7 days' notice to TANGEDCO. In such an event, either the Petitioner or PTC can sell 25% power to third parties. Further, if the Standby LC is not fully restored by PTC or TANGEDCO within 30 days of non-payment by PTC or TANGEDCO, then the Petitioner or PTC can sell 100% of capacity to third parties. During the period of sale to third parties, PTC shall have the liability to pay the capacity charges.

.....

46. In the foregoing paragraphs, we have already held that the Petitioner is entitled to refund of the capacity charges including the penalty withheld / deducted by the Respondents, the same being contrary to the provisions of the PTC-PPA and Procurer-PPA. Therefore, PTC is liable to pay such amount including the late payment surcharge in terms of Article 8.4.3 of the PTC-PPA. Further, PPAs being back to back in nature, PTC shall be entitled to the said amount from TANGEDCO in terms of Procurer-PPA and such payment shall be made by TANGEDCO to PTC with late payment surcharge in terms of provisions of the Procurer-PPA."

1.43. The continued non-payment of outstanding dues by the Respondent without furnishing a reason is arbitrary and amounts to gross-misuse of power. Further, due to non-payment of amounts which are payable by Respondents to the Petitioner under the

PPA dated 12.12.2013, which is binding on the parties, the Petitioner is suffering as the financial stress and liquidity crunch has gravely affected the capacity of the Petitioner to continue generation of power. It has led to an additional burden especially in view of the spiralling input costs and costs of financing charges with high interest rates, solely due to the lack of availability of a working capital on account of non-payment of legally payable admitted dues by the Respondent.

1.44. Further, as there is stress on working capital limits due to above reasons, the Petitioner is unable to negotiate and procure coal (which is the primary cost and raw material) at competitive rates. Despite the above, they have been supplying power consistently to TANGEDCO on good faith until 21.10.2021.

1.45. Thus the petitioner is forced to stop supplying electricity which may be taken note; of by the Commission. In view of the situation having been brought forth by TANGEDCO, the availability of the Petitioner's plant should be considered 100% during the stoppage period and, the capacity charges ought to be directed to be paid. It is pertinent to state that when the TANGEDCO has committed default by defaulting on payments, they cannot now claim penalty on the Petitioner for not scheduling power due to the default of TANGEDCO. It is well settled principle of law that the implementation of penalty clause would arise only when the party seeking to comply with the same is in full compliance of the terms of the agreement.

1.46. Subsequent to the filing of the present petition, the TANGEDCO has made the following payments and thus, the Applicant/Petitioner has adjusted the same as per PPA

terms towards the pending late payment surcharges and pending unpaid invoices for the months of July, 2021, August, 2021, September, 2021 and partly October, 2021:

| Sl. No. | Date | Amount paid by TANGEDCO (in Rs.) |
|--------------|------------|----------------------------------|
| 1 | 16-06-2022 | 8,02,00,000 |
| 2 | 17-06-2022 | 25,00,00,000 |
| 3 | 23-06-2022 | 25,17,00,000 |
| Total | | 58,19,00,000 |

1.47. The amounts due and payable by TANGEDCO as on date of filing the petition, i.e., 17.03.2022:

| TANGEDCO Outstanding (as on 17-03-2022) | | | |
|--|--------------|------------|---------------------|
| Month | Invoice Date | Due Date | Amount (in INR) |
| Late Payment Surcharge due on 17-03-2022 | | | 79,28,312 |
| July 2021 | 09-08-2021 | 08-09-2021 | 2,16,44,105 |
| August 2021 | 16-09-2021 | 16-10-2021 | 10,47,40,862 |
| September 2021 | 06-10-2021 | 05-11-2021 | 10,96,59,120 |
| October 2021 | 06-11-2021 | 06-12-2021 | 12,99,69,347 |
| November 2021 | 07-12-2021 | 06-01-2022 | 6,99,30,000 |
| December 2021 | 05-01-2022 | 04-02-2022 | 7,22,61,000 |
| January 2022 | 03-02-2022 | 05-03-2022 | 7,22,61,000 |
| Total | | | 58,83,92,746 |

1.48. The Respondent TANGEDCO has further raised dispute notices dated 30.03.2022, 23.04.2022, 19.05.2022 and 04.07.2022 for the months of February, 2022, March, 2022, April, 2022 and May, 2022 (for 2 days 01.05.2022 to 19.20 hrs of 02.05.2022) respectively, for which the Petitioner has responded vide letters dated 28.04.2022, 30.05.2022 and 03.06.2022 respectively.

1.49. Thus, the total disputed amount in terms of Capacity Charges for the period of 21.10.2021 to and 02.05.2022 due to non-supply of power are as below:

| Long term contract 74 MW capacity charges claimed by the Petitioner and admitted by TANGEDCO from 21-10-2021 to 02-05-2022 | | | |
|--|---------------|---------------------|----------------------|
| Sl. No. | Month | Claimed by OPG | Admitted by TANGEDCO |
| 1 | October 2021 | 12,99,68,347 | 12,49,60,827 |
| 2 | November 2021 | 6,99,30,000 | 4,68,99,011 |
| 3 | December 2021 | 7,22,61,000 | -1,63,69,917 |
| 4 | January 2022 | 7,22,61,000 | -58,87,440 |
| 5 | February 2022 | 6,52,68,000 | -1,19,34,720 |
| 6 | March 2022 | 7,22,61,000 | -1,32,13,440 |
| 7 | April 2022 | 6,99,30,000 | -1,27,87,200 |
| 8 | May 2022 | 7,01,96,400 | 6,94,13,273 |
| Total | | 62,20,75,747 | 18,10,80,394 |
| Balance | | 44,09,95,353 | |

1.50. Since the Respondent TANGEDCO vide its letter dated 30.04.2022, requested the Applicant/Petitioner to resume the supply of power under LT contract due to the prevailing grid emergency as per Section 11 of the Electricity Act, the Petitioner resumed supply on 02.05.2022. Further, the Respondent TANGEDCO vide its letter dated 16.06.2022, requested the Applicant/Petitioner to extend the power supply till 31.12.2022 on pass through basis as one time measure at the rate of ECR as notified by the Ministry of Power under Section 11 of the electricity Act in its directions dated 05.05.2022, 13.05.2022, 20.05.2022 and 27.05.2022. Thus, the Petitioner started supply to TANGEDCO under Section 11 intimation from them.

1.51. The Petitioner in its letters dated 27.09.2022 and 24.11.2022 requested TANGEDCO to withdraw the dispute notices raised for the months October, 2021 to

April, 2022 and pay the capacity charges for the disputed period. However, the Respondent TANGEDCO in its reply dated 12.12.2022, rejected the Applicant/Petitioner's claim for capacity charges for the disputed periods.

1.52. The Respondent TANGEDCO has unilaterally adjusted/ written off a "Covid discount" for an amount of Rs.3,44,71,165/- (Rupees Three Crores Forty Four Lakhs Seventy One Thousand One Hundred and Sixty Five Only) towards the outstanding dues even when such adjustment was never agreed to by the Petitioner and has been expressly objected to in multiple communications of the Petitioner. It is also pertinent to note that the Respondent TANGEDCO has never denied, disputed or refuted any of these objections sent by the Petitioner, thus agreeing with it. In any case, the Respondent cannot make unilateral decisions about discounts without the consent of the parties in the contract. Therefore, the petitioner submits that the amount of Rs.3,44,71,165/- (Rupees Three Crores Forty Four Lakhs Seventy One Thousand One Hundred and Sixty Five Only) unilaterally deducted by TANGEDCO ought to be refunded to the petitioner.

1.53. The petitioner is constrained to file the instant petition and is also legally entitled to the same. The actions of the Respondent are contrary to the binding judgments of the APTEL and this Hon'ble Commission. The petitioner submits that it ought to be awarded the costs of the petition including court fees and legal expenses incurred.

1.54. The 'amount in dispute' has reduced from Rs.58,83,92,746/- (Rupees Fifty Eight Crores Eighty Three Lakhs Ninety Two Thousand Seven Hundred and Forty Six Only) to

Rs.47,54,66,518/- (Rupees Forty Seven Crores Fifty Four Lakhs Sixty Six Thousand Five Hundred and Eighteen Only). The Petitioner has already paid a court fee of Rs.58,84,000/- (Rupees Fifty Eight Lakhs Eighty Four Thousand Only) and since the 'amount in dispute' is now RS.47,54,66,518/- (Rupees Forty Seven Crores Fifty Four Lakhs Sixty Six Thousand Five Hundred and Eighteen Only), the court fee payable is Rs.47,54,670/- (Rupees Forty Seven Lakhs Fifty Four Thousand Six Hundred and Seventy Only). Consequently, the Petitioner also prays for a refund of excess court fee of Rs.11,29,330/- (Rupees Eleven Lakhs Twenty Nine Thousand Three Hundred and Thirty Only) under Regulation 48 of the TNERC-Conduct of Business Regulations, 2004.

1.55. It is stated that the instant petition has been filed within the period of limitation. All claims relate to sums due which are well within the 3 year period from arising of the cause of action.

Pleading so the petitioner prays for the following reliefs:

- a. Issue an Interim Injunction restraining the 3rd and 4th Respondents from scheduling power from the petitioner's plant till such time the petitioner's present outstanding dues (including capacity charges) for an amount of Rs.58,83,92,746/- (Rupees Fifty Eight Crores Eighty Three Lakhs Ninety Two Thousand Seven Hundred and Forty Six Only) are cleared along with mandated interest, applicable as per the Long Term Power Purchase Agreement dated 12.12.2013 executed between the petitioner and TANGEDCO;

- b. Issue and Interim Injunction restraining the Respondents from taking any coercive steps against the petitioner till such time for not supplying power due to non-payment of outstanding dues by the Respondent;
- c. Declare that 3rd and 4th Respondents are barred from scheduling power from the petitioner's plant till such time that petitioner's Invoice Dues are cleared along with mandated interest, applicable within such maximum period not exceeding 90 days under the Long Term Power Purchase agreement dated 12.12.2013 executed between the petitioner and TANGEDCO;
- d. Set aside the dispute notices dated 30.11.2022, 20.12.2021, 25.01.2022, 18.02.2022, 30.03.2022, 23.04.2022, 19.05.2022 and 04.07.2022 issued by the Respondent TANGEDCO and quash the same for being arbitrary, illegal and consequently direct the Respondent TANGEDCO to effect payment of a sum of Rs.44,09,95,353/- (Rupees Forty Four Crores Nine Lakhs Five Thousand Three Hundred and Fifty Three Only being the amount payable to petitioner as outstanding arrears, capacity charges, late payment surcharge and other charges under the PPA dated 12.12.2013 as on 02.05.2022) and Rs.3,44,71,165/- (Rupees Three Crores Forty Four Lakhs Seventy One Thousand One Hundred and Sixty Five Only) being the amount towards "Covid Discount" unilaterally deducted by TANGEDCO, totalling to Rs.47,54,66,518/- (Rupees Forty Seven Crores Fifty Four Lakhs Sixty Six Thousand Five Hundred and Eighteen Only) together with future interest thereon;

- e. Direct the 3rd and 4th Respondent to consider the availability of the petitioner's plant at 100% from the date of stoppage of supply due to non-payment of dues by TANGEDCO;
- f. Bear the costs of the instant petition including court fees and legal expenses and make payment of the said sum to the petitioner;
- g. Pass such further or other orders as this Hon'ble Commission may deem fit in the facts and circumstances of the case and this render justice.

2. Contentions of the Respondent (TANGEDCO) as set out in the counter affidavit dated 18-05-2022 and 03.07.2023:

2.1. The Respondent (TANGEDCO) had executed Power Purchase Agreement with the Petitioner (OPG Power Generation Pvt. Ltd), a generating company for supply of 74 MW RTC power for a period of fifteen years from 2013 under long term contract. The petitioner commenced supply of power to the Respondent (TANGEDCO) from 01.01.2014.

2.2. The provisions of the Power Purchase Agreement are as follows. The relevant Article of the PPA for adjudicating the issue involved in the present petition is,

"Article 8.3.5 of the PPA:

"In the event of delay in payment of a monthly bill by the procurer beyond its due date/ a late payment surcharge shall be payable by such procurer to the seller at the rate equal to SBIPLR per annum/ on the amount of outstanding payment, calculated on a date to date basis (and compounded with monthly rest), for each day of the delay. The late payment surcharge shall be claimed by the seller through the supplementary bill.

Article 8.4 of the PPA: Payment Mechanism

Adequate payment security shall be made available to the bidders. The payment security may constitute.

- 1. All payments payable to the Seller under invoice shall be paid through RTGS within Due Date.*
- 2. Stand by Letter of Credit (LC) / Bank Guarantee.*

Article 8.4.11.2 of the PPA:

The Procurer shall open a Stand by Letter of Credit through a scheduled bank at Chennai, India in favour of the Seller, to be made operative from a date prior to the Due Date of its first Monthly Bill under this agreement. The Stand by Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually; for an amount equal to:

- (i) For the first Contract Year, equal to one point one (1.1) times the estimated average monthly billing based on Normative Availability;*
- (ii) For each subsequent Contract Year, equal to the one point one (1.1) times the average of the monthly Tariff Payments of the previous Contract Year.*

The Procurer shall cause the scheduled bank issuing the Stand By Letter of Credit to intimate the Seller, in writing regarding establishing of such Stand by Letter of Credit.

Provided that the seller shall not draw upon such Stand by Letter of Credit prior to the Due Date of the relevant Monthly Bill and/or Supplementary Bill, and shall not make more than one drawal in a Month.

Provided further that if at any time/ such Stand by Letter of Credit amount falls short of the amount specified in Article 8.4.11.2 otherwise than by reason of drawal of such Stand By Letter of Credit by the Seller, the Procurer shall restore such shortfall within seven (7) days.

Article 8.4.11.3 of the PPA:

If the Stand By Letter of Credit is insufficient to pay the due payments to the Seller or is not replenished for the drawals made/ then within a period of seven (7) days from the date such shortfall in the Stand By Letter of Credit

Article 8.4.11.4 of the PPA:

If the Procurer fails to pay a Monthly Bill or Supplementary Bill or part thereof within and including the Due Date then, subject to Article 8.6.7, the seller may draw upon the Stand By Letter of Credit, and accordingly the bank shall pay without instructions from the procurer, an amount equal to such Monthly Bill and/or Supplementary Bill or part thereof plus Late Payment Surcharge, if applicable, in accordance with Article 8.4.3, by presenting to the scheduled bank issuing the Stand by Letter of Credit, the following documents:

- i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid by the Procurer beyond the Due Date:*
- ii) a certificate from the Seller to effect that the bill at item (i) above, or specified part thereof, is in accordance with the Agreement and has reminded unpaid beyond the Due Date; and*
- iii) Calculations of applicable Late Payment Surcharge, if any.*

Article 8.4.11.5 of the PPA:

The Procurer shall ensure that Stand by Letter of Credit shall be renewed not later than forty five (45) days prior to its expiry.

Article 8.4.11.7 of the PPA:

Where necessary, the Stand by Letter of Credit may also be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument as mutually agreed by the Procurer and the Seller.”

2.3. As per the Article 8.4.11.2 of PPA dated 12.12.2013, TANGEDCO had opened the standby Letter of Credit for an amount of Rs.14.37 Cr. Valid upto 17.08.2022 which is equal to one point one (1.1) times of the average of the monthly tariff payments of the previous contract year. The Petitioner has not invoked the Letter of Credit as per the provisions in the PPA on account of delay in payment due to the financial crunch faced by the TANGEDCO.

2.4. The availability statement of the petitioner for the year 2021-22 and April 22 are given below.

| Month | Contracted Energy in Kwh | Declared Availability in Kwh | REA Energy in Kwh | Availability in % | PLF in % |
|----------------------|--------------------------|------------------------------|-------------------|-------------------|--------------|
| April 2021 | 53,280,000 | 53,280,000 | 7,844,000 | 100.00% | 14.72% |
| May 2021 | 55,056,000 | 55,056,000 | 0 | 100.00% | 0.00% |
| June 2021 | 53,280,000 | 53,280,000 | 11,386,750 | 100.00% | 21.37% |
| July 2021 | 55,056,000 | 55,056,000 | 3,607,500 | 100.00% | 6.55% |
| August 2021 | 55,056,000 | 55,056,000 | 7,233,500 | 100.00% | 13.14% |
| September 2021 | 53,280,000 | 53,280,000 | 8,880,000 | 100.00% | 16.67% |
| October 2021 | 55,056,000 | 35,565,609 | 12,914,986 | 64.60% | 23.46% |
| November 2021 | 53,280,000 | 0 | 0 | 0.00% | 0.00% |
| December 2021 | 55,056,000 | 0 | 0 | 0.00% | 0.00% |
| January 2022 | 55,056,000 | 0 | 0 | 0.00% | 0.00% |
| February 2022 | 49,728,000 | 0 | 0 | 0.00% | 0.00% |
| March 2022 | 55,056,000 | 0 | 0 | 0.00% | 0.00% |
| 2021-22 Total | 543,456,000 | 360,573,609 | 51,866,736 | 55.62% | 8.00% |
| April 2022 | 53,280,000 | 0 | | 0.00% | 0.00% |

From the above, it is clearly seen that the availability and PLF of OPG for 2021-22 are 55.62% and 8.00% respectively. The availability and PLF for April 2022 is zero. The quantum of power suspended by the Petitioner from 21.10.21 to April 2022 is about 320 MU. Due to non-supply of power by the Petitioner, the Respondent TANGEDCO had purchased power through Power exchanges and Short Term Contract at a higher tariff of Rs.20 per unit and thereby suffered a huge expenditure till the issue of CERC Suo-moto order in 4/SM/2022 dated 01.04.22 where the ceiling limit for the Exchange price was limited to the maximum tariff of Rs.12 per unit in Day Ahead market and Real Time Market.

2.5. The petitioner had resorted to the practice of selling the power to the other customers at high tariff taking advantage of the prevailing power demand situations and prayed to the Commission to give direction not to schedule any power to the Respondent which is construed as breach of contract.

2.6. The Petitioner has sold 30,527,858 units, 16,858,993 units and 36,518,029 units of power through STOA/MTOA customers during February 2022, March 2022 and April 2022 respectively with huge profit without supplying power to the Respondent which is construed as breach of contract. Suspension of Supply of Power to the Respondent is wholly arbitrary and violates the contractual and statutory rights apart from triggering the exercise of corresponding rights by the Respondent.

2.7. In the Petition D.R.P.No.3 of 2022 filed by the Petitioner, OPG before TNERC praying "To declare the exorbitant increase in the price of imported coal along with the acute shortage and non-availability of domestic coal as a Force Majeure event and direct the suspension of transmission charges to be levied under the MTOA agreement until the Force Majeure event ceases and also direct the TANGEDCO not to levy OA charges for the period of Force Majeure continuation and from levying any other charges, costs whatsoever" furnished as below.

“8. The Petitioner submits that the abnormal and unexpected increase in price of Coal by over 300% within a span of 8 months/ had made the performance of their part of the contract commercially impracticable.

9The Petitioner submits that as such owing to the exorbitant increase in the price of Indonesian coal coupled with the acute shortage of Indian Coal the Performance of the contract has become impossible.

12 The exorbitant increase in the price of imported coal along with the acute shortage and non-availability of domestic coal is leading to stoppage of supply from the generator.”

2.8. In the Office Memorandum of MoP, Government of India, vide F.No.FU-3/2022-FSC (Vol-I) dated 13.04.2022 has stated that,

2.(i) Agenda 1.7980 MW capacity of Imported Coal Based Plants was not operational

2.9. In the CERC order dated 01.04.2022, for the petition No. 4/SM/2022 (Suo-Motu), has stated that

1. a..... 4323 MW of thermal capacity was on outage due to coal shortage itself.

2.10. From the above, it is clear that, only due to the increase in the price of Imported Coal, the Petitioner has suspended the supply and hence stating the reason as non-payment of outstanding amount is not acceptable. The outstanding payment due to the Petitioner is Rs.9.3 Cr. only as per the workings of TANGEDCO which is within the limit of Stand by Letter of Credit of Rs.14.37 Cr valid upto 17.08.2022.

2.11. The part payment was made during January 2022 for the energy bills upto the month of September 2021. In spite of it, the Petitioner did not resume the supply stopped from 21.10.21. Further based on the MoP directions No.F.No.FU-3/2022-FSC (Vol-I) dated 13.04.2022, letter was addressed to the petitioner on 30.04.22 to supply power on Pass Through basis for a period of one month or may be extended till December 2022, as one time measure by deviating the provisions of PPA. The petitioner had resumed the supply on 02.05.22 for a quantum of 60 MW against the contracted quantum of 74 MW.

2.12. The Undisputed outstanding payment due to the petitioner is only Rs.9,30,08,211/- (Rupees Nine Crores Thirty Lakhs Eight Thousand Two Hundred and Eleven only) as on the date and not Rs.58,83,92,746/- as mentioned by the Petitioner in the petition which is within the limit of the Stand by LC amount of Rs.14.37 Cr.

2.13. The provisions of the Power Purchase Agreement are as follows.

Article 4.1.3 of the PPA:

The Seller shall supply energy equivalent to the contracted quantum of power on first charge basis from the station Bus Bar when multiple generators are connected.

Article 4.4.2 of the PPA:

Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity up to the Contracted Capacity to the Procurer pursuant to Dispatch Instructions given by the Procurer.

Article 4.5.1 of the PPA:

Subject to provisions of this Agreement, the entire Aggregate Contracted Capacity shall be for the exclusive benefit of the Procurer and the Procurer shall have the exclusive right to purchase the entire Aggregate Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Contracted Capacity and/or Scheduled Energy.”

2.14. As per the Article 8.4.11.2 of PPA dated 12.12.2013, TANGEDCO had opened the standby Letter of Credit for an amount of Rs.14.37 Cr. valid upto 17.08.2022 which is equal to one point one (1.1) times of the average of the monthly tariff payments of the previous contract year. The Petitioner has not invoked the Letter of Credit as per the provisions in the PPA during the delay in payment. The Petitioner had filed

W.P.No.26052 of 2021 at Madras High Court for the Payment dues Rs.93,64,47,378/- for the month from February 2021 to September 2021. The Respondent has paid Rs.95,59,88,441/- (Rupees Ninety Five Crores Fifty Nine Lakhs Eighty Eight Thousand Four Hundred and Forty One Only) from 02.12.2021 to 31.01.2022 for the Energy Bills for the months from February 2021 to September 2021.

2.15. The statement of the Petitioner that the Respondent not complied the order of Madras High Court is not correct and baseless. In spite of payment of monthly energy Bills, the Petitioner has not resumed the power supply.

2.16. The directions issued by the Ministry of Power, Government of India vide its order dated 28.06.2019 in No.23/22/2019-R&R r/w Compliance directive dated 09.08.2019 for the Distribution Licensee whom have not opened the LC to the Generating Companies. Further the Capacity charge is payable to the Generating Companies for non-supply period only when LC is not made available. This direction of MoP is not applicable to the Petitioner and the Respondent has already opened the Stand by LC valid up to 17.08.2022. There is default on the part of the Petitioner in non-invoking the LC as and when required and the dispute notices served by the TANGEDCO to the Petitioner are holds good. In spite of having sufficient Payment Mechanism, Claiming of Capacity Charges and Plant Availability at 100% without Scheduling any power by the petitioner are being arbitrary, illegal and contrary with the provisions of PPA and against the directions of MoP, Government of India.

2.17. The Commission regarding the payment of the undisputed invoices for the month of July 2021, August 2021 and September 2021 are found to be incorrect and the details of the Payments made to the Petitioner are furnished as below.

| Month | Undisputed Invoice Amount stated by the Petitioner | Admitted by the TANGEDCO | Paid by TANGEDCO after deducting TDS 1% 8,81,74,886 | Date of Payment |
|----------------|--|--------------------------|--|-----------------|
| July 2021 | 2,16,44,105 | 8,82,63,149 | 8,81,74,886 | 28-01-2022 |
| August 2021 | 10,47,40,862 | 10,47,40,862 | 10,46,36,121 | 31-01-2022 |
| September 2021 | 10,96,59,120 | 10,96,59,120 | 10,95,49,461 | 31-01-2022 |

The outstanding payment submitted to the Commission by the Petitioner is also found incorrect. The outstanding payment to the Petitioner is Rs.9,30,08,211/- only and not Rs.58,83,92,746/- as claimed by the Petitioner.

2.18. The petitioner claiming capacity charges for non-supply period from 21.10.2021 to as on date even after receipt of Payments and having valid LC is being arbitrary, illegal and contrary to law and against the provisions of PPA and guidelines of MoP, Government of India.

2.19. The Petitioner has to supply power to the Respondent under first charge basis from the station bus bar. The provision in the PPA is,

“Article 4.1.3 of PPA: The Seller shall supply energy equivalent to the contracted quantum of power on first charge basis from the station Bus Bar when multiple generators are connected.

Article 4.4.2 of PPA: Unless otherwise instructed by the Procurer, the Seller shall sell all the Available Capacity up to the Contracted Capacity to the Procurer pursuant to Dispatch Instructions given by the Procurer.

Article 4.5.1 of PPA: Subject to provisions of this Agreement, the entire Aggregate Contracted Capacity shall be for the exclusive benefit of the Procurer and the Procurer shall have the exclusive right to purchase the entire Aggregate Contracted Capacity from the Seller. The Seller shall not grant to any third party or allow any third party to obtain any entitlement to the Contracted Capacity and/or Scheduled Energy.”

2.20. Despite receipt of Payment up to September 2021 from the Respondent, the Petitioner has suspended supply from 21.10.2021 to till date and claiming capacity charges for non-supply period from the month of October 2021 onwards is arbitrary and illegal and contrary to law and hence request the Commission to direct the petitioner to supply power to the Respondent as per PPA with immediate effect and suspend supply of power by the Petitioner to the STOA/MTOA customers at very high tariff during the present prevailing power demand in the State.

2.21. The Petitioner has filed W.P.No.26052 of 2021 at Madras High Court for the Payment dues Rs.93,64,47,378/- for the month from February 2021 to September 2021. The Hon'be Madras High Court vide order dated 24.01.2022, directed TANGEDCO to settle the admitted dues to the petitioner with in a period of four week from the date of receipt a copy of order. The Respondent has paid Rs.95,59,88,441/- (Rupees Ninety Five Crores Fifty Nine Lakhs Eighty Eight Thousand Four Hundred and Forty One only) during the period from 02.12.2021 to 31.01.2022 for the Energy Bills for the months from February 2021 to September 2021. The outstanding payment to the Petitioner is Rs.9,30,08,211/- only as on date.

2.22. The dispute notices dated 20.12.2021, 25.01.2022 and 18.02.2022 were issued to the Petitioner as per the Schedule 4.2.2.1 I) of PPA, ...no monthly Capacity Charges shall be paid for the Settlement Period during which the RLDC has not allowed the operation of the Power Station due to Sellers failure to operate it as per the provisions of Grid Code and such Settlement Period shall not be considered during calculations of Monthly Capacity Charge Payment.

2.23. In spite of payment of all the monthly Bills for the months from February 2021 to September 2021 made by TANGEDCO to the Petitioner with reference to the order of WP W.P.No.26052 of 2021, the Petitioner allegedly denying the receipt of payment of monthly Bills for July 2021, August 2021 and September 2021 on 28.01.2022 and 31.01.2022.

2.24. Despite receipt of payments upto September 2021 and having valid Stand by LC, the Petitioner has not resumed the supply till date. The petitioner without supplying power and claiming Capacity Charges to taking shelter under the contractual provisions to make further delay to supply power to the Respondent. However, a holistic reading of the terms of the PPA make it evident that such above actions of the Petitioner is on the face of illegal and contrary to the contractual terms.

2.25. There is no liability of the Respondent to continue making payment of capacity charges when the plant of the Petitioner is not generating electricity for reasons not attributable to the Respondent.

2.26. As per the direction of the Hon'ble Madras High Court to WP No. 26053 of 2021, all the Monthly Bills for the months from February 2021 to September 2021 amounting to Rs.93,59,88,441/- within the a period of 4 weeks. But even after receipt of the Payment dues latest by 31.01.2022, the Petitioner has not started supplying Power to TANGEDCO. All the Dispute Notices were issued as per the provisions of PPA as already mentioned. But the Petitioner denying receipt of Payments with a deliberate intent not to supply Power to TANGEDCO is being arbitrary, illegal, contrary to law and provisions in PPA.

2.27. As per the Article 8.4.11.2 of PPA dated 12.12.2013, TANGEDCO had opened the standby Letter of Credit for an amount of Rs.14.37 Cr. Valid upto 17.08.2022 which is equal to one point one (1.1) times of the average of the monthly tariff payments of the previous contract year. The Petitioner has not invoked the Letter of Credit as per the provisions in the PPA during the delay in payment. TANGEDCO would have renewed the Stand by Letter of Credit within the stipulated time when invoked by the Petitioner during the necessity as per the provisions in PPA. The statement of the Petitioner for non-invoking the stand by LC is incorrect, baseless and not acceptable by TANGEDCO.

2.28. All the payment dues for the monthly bills upto September 2021 is to 45 paid on or before 31.01.2022, there is no necessity to the petitioner to invoke Third party sales on default as per Article 8.5 of PPA. But the Petitioner without consent to the TANGEDCO has started selling power to STOA/MTOA customers. The Petitioner has sold 30,527,858 units, 16,858,993 units and 36,518,029 units of power through

STOA/MTOA customers during February 2022, March 2022 and April 2022 respectively through STOA/MTOA customers with very high price of selling power as compared to the Tariff with the Respondent by stopping the supply to the Respondent which is construed as breach of contract. Despite receipt of Payment upto September 2021 from the Respondent, the Petitioner is not ready to commence the supply till date but demanding capacity charges for non-supply period from the month of October 2021 onwards which is being arbitrary, illegal and contrary to law and direct the Petitioner to declare full contracted capacity to the Respondent with immediate effect and suspend supply of power by the Petitioner to the STOA/MTOA customers with very high price during the present prevailing power demand in the State.

2.29. As stated by the Petitioner, this Petition is not identical to the CERC Petition No. 158/MP/2019 filed by APNRL. In that case back to back PPAs have been signed by TANGEDCO & PTC and PTC & APNRL. Due to financial crunch, TANGEDCO had opened Stand by LC in favour of PTC with some delay. PTC has also opened Stand by LC in favour of APNRL with delay. Hence there is a default in Payment Mechanism. Hence the CREC case is not applicable to this case.

2.30. In the above facts and circumstances, the actions of the Petitioner without considering the power crisis in the State is on the face of illegal and contrary to the contractual terms which made the Respondent to incur huge additional Expenditure.

2.31. Thereafter, the Petitioner after adjusting payments made by TANGEDCO, had filed an application in 1A No. 1 of 2023 in DRP No. 10 of 2022 before the Commission to

amend the petition with the prayer to direct the Respondent TANGEDCO to effect payment of sum of Rs.44,09,95,353/- (Rupees Forty Four Crores Nine Lakhs Ninety Five Thousand Three Hundred and Fifty Three Only) being the amount payable to petitioner as outstanding arrears, capacity charges, late payment surcharges and other charges under the PPA as on 02.05.2022 along with "Covid Discount" together with future interest thereon.

2.32. The above DRP is liable to be dismissed in limine as there are no outstanding dues as alleged by the Petitioner and the petitioner is not entitled to any relief in this Dispute Resolution Petition on merits and also on an equitable consideration.

2.33. The petitioner had stated that TANGEDCO has not made any payments and that there is an outstanding amount to the tune of Rs.93,64,47,378/- for the period February 2021 till September 2021 and therefore they had stopped the supply of power till the outstanding dues are settled and had stopped the power supply from 21.10.2021 till 02.05.2022. The petitioner has claimed Rs.47,54,66,518/- for the period which he had not supplied power i.e., 21.10.2021 till 02.05.2022 which is against the provisions of PPA. The claim made by the petitioner is false and incorrect.

2.34. The petitioner had completely stopped its supply from 21.10.2021 and had resumed its supply only on 02.05.2022 which itself is a breach of its obligation. The invoices raised by the Petitioner for these periods are disputed by this Respondent and corresponding dispute notices are raised for the periods claimed in this petition.

2.35. TANGEDCO have been providing the necessary payment security mechanism and late payment surcharge, but the petitioner had stopped supply of power to TANGEDCO from 21.10.21 unilaterally stating the reason that they will supply power only on receipt of outstanding payment. As on that date, there are no outstanding dues pending to be paid by TANGEDCO. It is submitted that all the outstanding dues for the month of July, August and September which were not disputed by this Respondent were settled on various dates. Even after settlement of dues, the petitioner did not commence the supply of power. The payment details are as below:

| Month | Paid on | Amount |
|----------------|------------|---------------------------------------|
| July 2021 | 28-01-2022 | Rs.8,81,74,886; Cheque No.979816 |
| August 2021 | 31-01-2022 | Rs.10,46,36,121; Cheque No.979824 |
| September 2021 | 31-01-2022 | Rs.10,95,49,461; Cheque No. 979824 |

2.36. As per the Article 8.4.11.2 of PPA dated 12.12.2013, TANGEDCO had opened the standby Letter of Credit on 29.08.2020 for an amount of Rs.17.88 Crore valid upto 17.08.2021. which is equal to one point one (1.1) times of the average of the monthly tariff payments of the previous contract year. I state that the petitioner had not invoked the Letter of Credit as per the provisions of the PPA in the case of outstanding payment. The petitioner had not availed this LC which had later accumulated to an amount of Rs.93 Crore. Had the petitioner invoked the LC on monthly basis to clear their alleged outstanding dues, this Respondent would have reinstated the LC as and when there is a deficit in the credit so as to enable the petitioner to claim his outstanding dues through

this payment security mechanism. It is submitted that this Respondent had not made the payments directly because of the financial crunch faced by them and therefore it was neither wilful nor wanton.

2.37. The petitioner had wantonly not invoked this LC only to enjoy the Late Payment Surcharge (LPS) benefit available to him. The petitioner had been claiming the LPS with all interest benefits and had not invoked the LC. It is only because of the actions of the petitioner that such a huge amount accrued for the period from February 2021 till September 2021. Had it invoked the LC on a monthly basis, there wouldn't have been an accrual of dues and therefore there is no default on part of TANGEDCO. The stand by Letter of Credit would have been renewed within the stipulated time when invoked by the Petitioner during the necessity as per the provisions in PPA. The petitioner had failed to invoke this payment mechanism which was readily available to them, and is mandated by the PPA, but the petitioner had wantonly failed to encash the LC, only to escape the supply of power to this Respondent and instead supply power at huge cost to third parties.

2.38. TANGEDCO had further renewed the LC to a tune of Rs.14.37 Cr. on 20.07.2021 which is valid up to 17.08.2022 which is equal to one point one (1.1) times of the average of the monthly tariff payments of the previous contract year. The Petitioner has not invoked the Letter of Credit as per the provisions in the PPA during the delay in payment by this Respondent because of the financial crunch faced by this Respondent.

2.39. The outstanding payments for the month of February 2021 till September 2021 were paid on various dates such as 02.12.2021, 28.01.2021 and 31.01.2022 and that there were no further dues for the said claim period.

| Month and Year | Claimed Amount | Admitted and paid amount; cheque number | Payment made on |
|----------------|-------------------|---|-----------------|
| February 2021 | Rs.17,01,09,097/- | Rs.17,01,51,593/- Cheque No. 979694 | 02-12-2021 |
| March 2021 | Rs.16,65,69,695 | Rs.16,66,11,306 Cheque No.979694 | 02-12-2021 |
| April 2021 | Rs.10,44,60,889 | Rs.10,44,60,889 Cheque No.979694 | 02-12-2021 |
| May 2021 | Rs.7,23,33,261 | Rs.5,92,16,996 Cheque No. 979694 | 02-12-2021 |
| June 2021 | Rs.12,00,70,924 | Rs.12,00,70,924 Cheque No. 979816 | 28-01-2022 |
| July 2021 | Rs.8,82,63,149 | Rs.8,81,74,886 Cheque No.979816 | 28-01-2022 |
| August 2021 | Rs.10,47,40,862 | Rs.10,46,36,121 Cheque No. 979824 | 31-01-2022 |
| September 2021 | Rs.10,96,59,120 | Rs.10,95,49,461 Cheque No.979824 | 31-01-2022 |

2.40. The petitioner is attempting to claim capacity charges to which they are not entitled to when they had not supplied a single unit of power for the disputed period, that too in violation of the PPA and for no fault of TANGEDCO. The invoices raised by the petitioner for the period October 2021 to May 2022 are disputed by this Respondent on 30.11.2021, 20.12.2021, 25.01.2022, 18.02.2022, 30.03.2022, 23.04.2022, 19.05.2022, 04.07.2022.

2.41. Due to the non-supply of power, this Respondent was pushed to purchase power through power exchanges for the unexpected shortage they were facing and therefore

had entered into short term contracts at a higher tariff for which TANGEDCO is facing huge financial crisis.

2.42. As on 01.04.2022, the date of filing of this petition before the Commission, the outstanding amounts until September 2021 were cleared as early as on 31.01.2022 and the outstanding due to the petitioner was only Rs.9,30,08,211/- is well within the limits of the LC availed to the petitioner i.e., Rs.14.36 Cr. and that this outstanding due was also settled by TANGEDCO on 16.06.2022 itself. Therefore, as on date there are no outstanding dues pending to the petitioner for the period claimed and even as on filing of the IA 1 of 2023 i.e., 25.01.2023, all the admitted amount due to the petitioner has been settled to this petitioner. The payments made to the petitioner are as follows:

| Month and Year | Claimed Amount | Admitted and paid amount; cheque number | Payment made on |
|----------------|-----------------|---|-----------------|
| June 2021 | Rs.12,00,70,924 | Rs.12,00,70,924 Cheque No. 979816 | 28-01-2022 |
| July 2021 | Rs.8,82,63,149 | Rs.8,81,74,886 Cheque No.979816 | 28-01-2022 |
| August 2021 | Rs.10,47,40,862 | Rs.10,46,36,121 Cheque No. 979824 | 31-01-2022 |
| September 2021 | Rs.10,96,59,120 | Rs.10,95,49,461 Cheque No.979824 | 31-01-2022 |
| October 2021 | 12,99,68,347 | Rs.12,48,35,866 Cheque No. 56113 | 16-06-2022 |
| November 2021 | 6,99,30,000 | Rs.4,68,52,112 Cheque No. 56113 | 16-06-2022 |
| December 2021 | 7,22,61,000 | Rs.-1,63,69,917 | - |
| January 2022 | 7,22,61,000 | Rs.-58,87,440 | - |
| February 2022 | 6,52,68,000 | Rs.-1,19,34,720 | - |
| March 2022 | 7,22,61,000 | Rs.-1,32,13,440 | - |
| April 2022 | 6,99,30,000 | Rs.-1,27,87,200 | - |
| May 2022 | 7,01,96,400 | Rs.6,94,13,273 Cheque No. 56166 | 18-07-2022 |

2.43. The action of the petitioner in issuing the notice dated 16.10.2021 in stopping the supply of power is against the terms of the PPA wherein the petitioner is not entitled to stop the supply of electricity when there is an outstanding due to be made by TANGEDCO but they ought to invoke the Letter of Credit. It is pertinent to note that Article 8.4.11.4 provides that on default of making payment, the procurer should pay the outstanding due along with late payment surcharge and other applicable charges.

Therefore, the petitioner cannot stop the supply of power unilaterally and sell the power to third parties as per Article 8.4.11.4. The petitioner can only reduce the power supply rather than stopping the whole supply which had caused huge financial loss to this Respondent and had violated the terms of contract thereby had breached their obligations.

2.44. The petitioner herein cannot claim such a huge amount as outstanding when a Letter of Credit has been opened by this Respondent for realizing the admitted outstanding dues. That apart, the petitioner cannot claim capacity charges for the period where there was no power supplied by the petitioner to this Respondent as the supply was wantonly stopped by the petitioner. Therefore, the action of the petitioner is arbitrary, illegal and contrary to law and against the provisions of the PPA.

2.45. The admitted amounts were paid by TANGEDCO and only the disputed amount remains unpaid. It is pertinent to note that the petitioner had committed a breach of its obligation and since they had not supplied the contracted power that they are obliged to supply, they are liable to be levied with penalty as per clause 4.2.5 of the PPA. Since the

petitioner had stopped its supply on 21.10.2021, the energy charges for the previous period until 20.10.2022 has been paid by this Respondent and hence further till its non-supply till May 2022. The dispute raised by this Respondent for every month is elaborated below:

| Month | Claimed Amount | Dispute raised |
|---------------|-------------------|--|
| October 2021 | Rs.12,99,68,347/- | <p>OPG had suspended supply from 21.10.2021 stating the reason that non receipt of outstanding payment dues in spite of having payment security mechanism and payment of Late Payment Surcharge in the event of delay in payment beyond due date.</p> <p>OPG had raised the bill for the concurred energy by SLDC of TANGEDCO.</p> <p>Since OPG is a STU connected, the energy accounting is being carried out based on the CMRI reading.</p> <p>In the event of less scheduled energy than the concurred energy by SLDC of TANGEDCO, then the energy will be admitted for billing based on CMRI reading.</p> <p>OPG claimed declared energy from 21.10.2021 to 31.10.2021 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA.</p> <p>TANGDCO has not admitted the DC for non-adhering the scheduling instructions of SLDC and hence dispute raised.</p> |
| November 2021 | Rs.6,99,30,000/- | <p>OPG claimed capacity charges for DC from 01.11.2021 to 30.11.2021 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the DC for non-adhering the scheduling instructions of SLDC and hence dispute raised.</p> |

| | | |
|---------------|------------------|---|
| December 2021 | Rs.7,22,61,000/- | OPG claimed capacity charges for DC from 01.12.2021 to 31.12.2021 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the DC for non-adhering the scheduling instructions of SLDC and hence dispute raised. |
| January 2022 | Rs.7,22,61,000/- | OPG claimed capacity charges for DC from 01.01.2022 to 31.01.2022 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the DC for non-adhering the scheduling instructions of SLDC and hence dispute raised. |
| February 2022 | Rs.6,52,68,000/- | <p>OPG claimed capacity charges for DC from 01.02.2022 to 28.02.2022 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the DC for non-adhering the scheduling instructions of SLDC.</p> <p>As per Article 4.1.3 of PPA, OPG has to supply power on first charge basis to TANGEDCO.</p> <p>But OPG has sold 30,527,858 units of power through STOA consumers with huge profit by utilizing the prevailing power demand and hence dispute raised.</p> |
| March 2022 | Rs.7,22,61,000/- | OPG claimed capacity charges for DC from 01.03.2022 to 31.03.2022 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the DC for non-adhering the scheduling instructions of SLDC. As per Article 4.1.3 of PPA, OPG has to supply power on first charge basis to TANGEDCO. But OPG has sold 16,858,993 units of power through STOA consumers with huge profit by utilizing the prevailing power demand and hence dispute raised. |

| | | |
|------------|-------------------|--|
| April 2022 | Rs.6,99,30,000/- | OPG claimed capacity charges for DC from 01.04.2022 to 30.04.2022 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGDCO has not admitted the capacity charges for the OC for non-adhering the scheduling instructions of SLDC. As per Article 4.1.3 of PPA, OPG has to supply power on first charge basis to TANGEOCO. But OPG has sold 36,518,029 units of power through STOA consumers with huge profit by utilizing the prevailing power demand and hence dispute raised. |
| May 2022 | Rs.25,02,97,856/- | OPG claimed capacity charges for OC from 00.00 Hrs. of 01.05.2022 to 19.30 Hrs. of 02.05.2022 without adhering the scheduling instructions of SLDC which is arbitrary, illegal and contrary to the provisions of PPA. TANGOCO has not admitted the capacity charges for the OC for non-adhering the scheduling instructions of SLDC. From 19.30 Hrs of 02.05.22 to 16.00 Hrs. of 13.05.22, the OC of OPG is ranging from 40 MW to 60 MW but had claimed full contracted DC. From 25.05.22 to 30.05.22, in some blocks, the DC is restricted based on CMRI reading wherein OPG failed to schedule its full capacity as per its declaration and SLDC concurrence. Also, the units got tripped from 17.30 Hrs to 20.00 Hrs on 29.05.22. TANGEOCO has admitted the actual declared capacity by OPG instead of full contracted quantum. The capacity charges/Incentive Charges were calculated accordingly hence dispute raised. |

2.46. The petitioner had failed to note that clause 5 (vi) of the Order issued by the Ministry of Power dated 28.06.2019 will be given effect only if the LC has not been let open for the petitioner to avail it on 29.08.2020 which is valid for a term of one year till 17.08.2021 and the same would be renewed within the stipulated time when invoked by the petitioner during the necessity as per the provisions of PPA. Therefore, the petitioner is not entitled to claim capacity charges or fixed charges for the non-supply period. The petitioner plant is not supplying power exclusively to TANGEDCO. Therefore, the burden

to pay capacity charges for the period that power was not supplied to TANGEDCO due to the petitioner's breach of obligations, cannot be on TANGEDCO. Nowhere in the said circular there is a mention that the petitioner can suspend his supply of power if there is an outstanding due. It is also evident from the Order dated 28.06.2019 and circular dated 09.08.2019, that fixed charges should be paid only if the conditions mentioned in the order which includes non-opening of LC. In the present case, since there is an LC open to the petitioner, the petitioner cannot take a stand that LC was not made available to them and therefore fixed charges are liable to be paid.

2.47. The dispute notices were sent only from 30.11.2021 only because this petitioner had started to claim for the period of their wilful non- supply of power and therefore it was disputed by this Respondent through dispute notices. It is submitted that all the outstanding dues prior to October 2021 were cleared and only after the petitioner had arbitrarily and illegally stopped the supply of power and an invoice was raised for the same, this Respondent had raised their dispute notices with elaborate reasons for their dispute. That apart, this Respondent has been paying the admitted dues for the said period.

2.48. At no point had TANGEDCO told the petitioner not to avail the LC. The petitioner, in order to make up an excuse to not supply power to TANGEDCO but instead supply to third parties at higher profit, has attempted to project as if there was pending dues and without encashing the available standby LC, has unilaterally stopped supply of power. Therefore, the excuse that the petitioner had not supplied power because of the

outstanding dues is a cock and bull story whereas the real reason is that the petitioner had supplied power to third parties for a higher tariff. It is submitted that this petitioner in his own affidavit had admitted that there is an LC opened to the petitioner but had not availed it for the reasons best known to the petitioner. Assuming but not admitting to be true, even according to the story of this petitioner, the petitioner had not availed the LC that was made available to them on 20.07.2021 for the reason that they had to maintain a long term relationship with TANGEDCO and that it would be detrimental to TANGEDCO and that it would affect the creditworthiness of TANGEDCO but had filed a writ petition claiming for the outstanding dues in the year 2021 which are two total contradictory stands taken by this petitioner.

2.49. There was no such notice dated 28.12.2021 as stated by the petitioner has been received upon TANGEDCO. Needless to say that the petitioner had exported 230 KV to other third parties in the month of February, March and April 2022 as enumerated below:

| Month and Year | Total Units sold to third parties |
|----------------|-----------------------------------|
| February 2022 | 30527858 |
| March 2022 | 16588993 |
| April 2022 | 36518029 |

2.50. The provisions of the PPA in third party sales on Default enumerated in Clause 8.5 is different from that of the case referred by the petitioner herein as the clauses does not state that the seller is liable to pay the capacity charges.

2.51. The allegation that the petitioner had stopped its power supply only because there is an outstanding due is utter false and baseless when there is an LC opened and kept ready for the petitioner to avail and so it cannot be said that the petitioner had stopped its supply only because TANGEDCO had committed default in payments. Therefore, the petitioner is liable to be levied with penalty for non-supply of power under clause 4.2.5 for default by the petitioner and that the plant cannot be treated as 100% when there was not even a single supply of power from 21.20.2021 to 02.05.2022 and therefore the capacity charges would be considered as Zero only.

2.52. The ill-intention of the petitioner is again set out here where the petitioner had agreed to supply the power only after it is been intimated that power would be supplied through pass through basis at rate of ECR notified by Ministry of Power dated 05.05.2022 under Section 11 of the Electricity Act, 2003. It is submitted that if the stand of the petitioner was that only because of outstanding dues, the petitioner had not supplied power till May 2022, then what had provoked him in supplying power under pass through basis remains mysterious and it is clear that this petitioner had only stopped its supply only because of the hike in imported coal price and when it was intimated about the pass through basis, the petitioner had accepted to supply the same shows the malafide intention of the petitioner in not supplying the power.

2.53. The letters are disputed by this Respondent for the capacity charges claimed by the petitioner for the non-supply period and therefore the reply of the petitioner was

rejected. It is submitted that the claim made by the petitioner is arbitrary and illegal and had committed breach of the obligations thereby violating the provisions of the PPA.

2.54. TANGEDCO has made its refund of Rs.3,44,71,165/- on 10.05.2023 vide Cheque No. 56969 and therefore, there is no dispute with the covid discount deducted from OPG at present.

2.55. The actions of the Petitioner by claiming capacity charges for the DC without scheduling power as per the concurrence of SLDC to TANGEDCO in the prevailing load demand by stopping the plant with incorrect statements and enjoyed 300% more profit by selling power to STOA customers on the face of illegal and contrary to the contractual terms which made the Respondent to incur additional Expenditure of about 380 Crores.

2.56. The claim of the petitioner amounts to unjust enrichment at the expense of TANGEDCO. When the petitioner has supplied power at a higher cost to a third party, burdening the TANGEDCO to bear the capacity charges is unjust and this Hon'ble Commission must not perpetuate an illegality.

3. The Petitioner filed Rejoinder on 31-08-2023 followed by written submission on 05-10-2023 and additional written submission on 03-11-2023. The Respondent similarly filed a written submission on 20-10-2023 followed by a counter affidavit on 19-12-2023. All the points raised in the above are in the form of legal submissions and do not introduce any new facts. They are solely intended to elaborately emphasize the points

already put forth by both the parties to seek the Commission's attention for consideration that they deserve for a complete and just resolution of the matter.

4. Submissions made by both the parties and contentions raised by the Counsel for the Petitioner and the Respondents considered in the back drop of the respective pleadings. Legal precedents pressed into service on either side traversed.

5. The points for determination that arise in the instant petition are as follows:

- 1) Whether the disputed notices dated 30.11.2022, 20.12.2021, 25.01.2022, 18.02.2022, 30.03.2022, 23.04.2022, 19.05.2022 and 04.07.2022 issued by the Respondent TANGEDCO are liable to be set aside for being arbitrary and illegal as contented by the Petitioner?
- 2) Whether the Petitioner is entitled for payment of a sum of Rs.44,09,95,353/- by TANGEDCO as outstanding arrears, capacity charges, late payment surcharges and other charges as per PPA dated 12.12.2013 as on 02.05.2022 and a sum of Rs.3,44,71,165/- towards "Covid Discount" unilaterally deducted by TANGEDCO?
- 3) To what reliefs, if any the petitioner is entitled?

6. Findings of the Commission

6.1. The issue for consideration in the present case is whether TANGEDCO is liable to pay the Petitioner a sum of Rs.44,09,95,353/- along with interest being the amount claimed by the Petitioner towards outstanding arrears, capacity charges, late payment surcharge and other charges under the Long Term Power Purchase Agreement dated

12.12.2013 executed between the Petitioner and TANGEDCO. The other reliefs claimed by the petitioner are consequential in nature being dependent upon the liability of the respondent towards the petitioner.

6.2. The petitioner and the respondent have entered into a Power Purchase Agreement dated 12.12.2013 for supply of a total contracted capacity of 74 MW from the generating station of the Petitioner. As per Article 5.1.1 of the PPA dated 12.12.2013 entered into between the parties, the Petitioner is contractually obliged to offer for sale the contracted capacity of 74 MW to the Respondent at all times. The relevant Articles of the PPA which are necessary and germane for deciding the issue involved in the case are enumerated as hereunder:

Article 5.1.1 of the PPA:

"5.1 Obligation to Supply the Contracted Capacity

5.1.1 Notwithstanding any Scheduled Outage or Unscheduled Outage of the generating unit(s) and/or of the transmission system, the Seller shall offer for sale the Contracted Capacity to the Procurer at the Interconnection Point and arrange for transmission up to the Injection Point."

6.3. The payment obligations of TANGEDCO are found in Article 8. Article 8.3 provides for the method of payment of Monthly Bills and reads as follows:

"8.3 Payment of Monthly Bills

8.3.2 All payments made by the Procurer shall be appropriated by the Seller in the following order of priority:

- (i) towards Late Payment Surcharge, if any;*
- (ii) towards the earlier unpaid Monthly Bill(s), if any; and*

(iii) towards the then current Monthly Bill.

8.3.5 In the event if delay in payment of a Monthly Bill by the Procurer beyond its Due Date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate equal to SBIPLR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly rest), for each day of the delay. The Late Payment Surcharge shall be claimed by the seller through Supplementary Bill.”

6.4. In the event of delayed payments, Article 8.3.5 provides as under:

Article 8.3.5 of the PPA:

"In the event of delay in payment of a monthly bill by the procurer beyond its due date/ a late payment surcharge shall be payable by such procurer to the seller at the rate equal to SBIPLR per annum/ on the amount of outstanding payment, calculated on a date to date basis (and compounded with monthly rest), for each day of the delay. The late payment surcharge shall be claimed by the seller through the supplementary bill."

6.5. The Payment Mechanism provided under Article 8.4 is as hereunder:

Article 8.4 of the PPA:

"Payment Mechanism

Adequate payment security shall be made available to the bidders. The payment security may constitute.

1. *All payments payable to the Seller under invoice shall be paid through RTGS within Due Date.*
2. *Stand by Letter of Credit (LC) / Bank Guarantee."*

6.6. Article 8.4.11.2 of the PPA is as hereunder:

"The Procurer shall open a Stand by Letter of Credit through a scheduled bank at Chennai, India in favour of the Seller, to be made operative from a date prior to the Due Date of its first Monthly Bill under this agreement. The Stand by Letter of Credit shall have a term of twelve (12) Months and shall be renewed annually; for an amount equal to:

- (i) For the first Contract Year, equal to one point one (1.1) times the estimated average monthly billing based on Normative Availability;
- (ii) For each subsequent Contract Year, equal to the one point one (1.1) times the average of the monthly Tariff Payments of the previous Contract Year.

The Procurer shall cause the scheduled bank issuing the Stand By Letter of Credit to intimate the Seller, in writing regarding establishing of such Stand by Letter of Credit.

Provided that the seller shall not draw upon such Stand by Letter of Credit prior to the Due Date of the relevant Monthly Bill and/or Supplementary Bill, and shall not make more than one drawal in a Month.

Provided further that if at any time/ such Stand by Letter of Credit amount falls short of the amount specified in Article 8.4.11.2 otherwise than by reason of drawal of such Stand By Letter of Credit by the Seller, the Procurer shall restore such shortfall within seven (7) days.”

6.7. Article 8.4.11.3 of the PPA:

“If the Stand By Letter of Credit is insufficient to pay the due payments to the Seller or is not replenished for the drawals made/ then within a period of seven (7) days from the date such shortfall in the Stand By Letter of Credit.”

6.8. Article 8.4.11.4 of the PPA:

“If the Procurer fails to pay a Monthly Bill or Supplementary Bill or part thereof within and including the Due Date then, subject to Article 8.6.7, the seller may draw upon the Stand By Letter of Credit, and accordingly the bank shall pay without instructions from the procurer, an amount equal to such Monthly Bill and/or Supplementary Bill or part thereof plus Late Payment Surcharge, if applicable, in accordance with Article 8.4.3, by presenting to the scheduled bank issuing the Stand by Letter of Credit, the following documents:

- i) a copy of the Monthly Bill or Supplementary Bill which has remained unpaid by the Procurer beyond the Due Date:
- ii) a certificate from the Seller to effect that the bill at item (I) above, or specified part thereof, is in accordance with the Agreement and has reminded unpaid beyond the Due Date; and

iii) *Calculations of applicable Late Payment Surcharge, if any.*“

6.9. Article 8.4.11.5 of the PPA:

“The Procurer shall ensure that Stand by Letter of Credit shall be renewed not later than forty five (45) days prior to its expiry.”

Article 8.4.11.7 of the PPA:

“Where necessary, the Stand by Letter of Credit may also be substituted by an unconditional and irrevocable bank guarantee or an equivalent instrument as mutually agreed by the Procurer and the Seller.”

6.10. The PPA also provides for a mechanism for the Seller to follow in the event of a payment default by TANGEDCO. The relevant Articles are as follows:

“8.5 Third Party Sales on Default

8.5.1 Upon the occurrence of an event where the Procurer has not made payment by the Due Date of an Invoice through the Payment Mechanism provided in Article 8.4 of this Agreement, the Seller shall follow the steps as enumerated in Articles 8. 5.2 and 8.5.5.

8.5.2 On the occurrence of the event mentioned in Article 8.5.1 and after giving a notice of at least seven (7) days to the Procurer, the Seller shall have the right to offer twenty five (25) per cent of the Contracted Capacity pertaining to Procurer (“Default Electricity”) for sale to third parties.

8.5.5. If the Standby Letter of Credit is not fully restored by the Procurer within thirty (30) days of the non-payment by the Procurer of an Invoice by its Due Date, the provisions of Article 8.5.2 shall apply with respect to one hundred per cent (100%,) of the Contracted Capacity.”

“8.5.8 The liability of the Procurer towards making Capacity Charge payments to the Seller even for Default Electricity sold to third parties or remaining unsold during such periods will remain unaffected.

Provided such Capacity Charge payment liability shall cease on the date which occurs on the expiry of a period of Six(6) months form the date of occurrence of a Procurer Event of Default under Article 11.2.1(i), provided if prior to such date,

such Procurer Event of Default has not ceased and regular supply of power for a period of at least ninety (90) continuous days has not occurred.

8.5.9 Sales to any person or Party, under Article 8.5, shall cease and regular supply of power to the Procurer in accordance with the provisions of this Agreement shall commence and be restored on the later of the two following dates or any date before this date at the option of Seller;

- a) the day on which the Procurer pays the amount due to the Seller and renews the Standby Letter of Credit or*
- b) the date being 'x' days from the date on which the Procurer pays the amount due to the Seller, where 'x' days shall be calculated in accordance with Schedule 2."*

6.11. When a party disputes a Monthly Bill, the procedure to be adopted is prescribed in Article 8.6. In the present case, according to the Petitioner, the Respondent did not make payments for the months of June 2020, Feb 2021 to May 2021 and hence, the Petitioner addressed a letter to the Respondent dated 05.08.2021 requesting outstanding payment to the tune of Rs.52,46,42,959/- According to the Petitioner, thereafter, payments were not made so the Petitioner issued another letter dated 05.10.2021 claiming a sum of Rs.72,20,47,396/- as on July 2021 and in the said letter, the Petitioner had threatened that if payments is not made, it would restrict scheduling of power to TANGEDCO and claim capacity charges. Thereafter, by another letter dated 16.10.2021, the Petitioner addressed the Respondent and intimated that owing to the non-payment of outstanding arrears, it will suspend the supply of electricity from 00.00 hrs of 21.10.2021. Accordingly from 21.10.2021, the Petitioner did not schedule power and stopped supply of power unilaterally from 00.00 hrs on 21.10.2021 onwards.

6.12. After the stoppage of supply of power, the Petitioner had sent a letter to the 2nd Respondent dated 06.11.2021 along with an invoice for the month of October, 2021 consisting of capacity charges, energy charges and incentive charges. Similar invoices were raised by the Petitioner for the months of November and December, 2021 claiming capacity charges even though power was not scheduled by the Petitioner. In fact, the Respondent had raised a dispute on the Monthly Bill for October 2021 vide its letter dated 30.11.2021. In its dispute letter, TANGEDCO had specifically objected to the unilateral suspension of electricity supply by the Petitioner from 21.10.2021 onwards. TANGEDCO had claimed that the declared capacity should be "0" from 21.10.2021 till 31.10.2021. TANGEDCO had also raised similar dispute notices for the bills of the following months and the main dispute is that the Petitioner ought not to have unilaterally suspended supply of power as per the PPA terms even for non-payment of dues.

6.13. In the meanwhile, the Petitioner had approached the Hon'ble Madras High Court vide Writ Petition No.26052 of 2021 seeking a direction to TANGEDCO to pay a sum of Rs.93,64,47,378/- which it claimed was outstanding as on 30.09.2021. During the pendency of the Writ Petition, TANGEDCO paid a sum of Rs.50,00,00,000/- to the Petitioner on 02.12.2021. Recording the said payment, the Hon'ble Madras High Court disposed of Writ Petition No. 26052 of 2021 with the following directions:

“ ...

6. Considering the fact that the respondents have already paid a sum of Rs.50,00,00,000/- to the petitioner on 02.12.2021 and the respondents have agreed to pay the balance amount within a period of six weeks and therefore, this Court passes the following order:

(a) The respondents/TANGEDCO are directed to settle the admitted dues to the petitioner within a period of four weeks from the date of receipt of a copy of this order; and

(b) The petitioner is directed to approach the competent authorities with regard to the electricity supply to the respondent, if any.

7. With the above observations, this writ petition is disposed of. No costs. Consequently, connected miscellaneous petitions are closed.”

6.14. It is in the above background that the present petition has come to be filed. The main question that is to be answered while deciding this petition is whether the Petitioner is justified in unilaterally suspending the supply of power to TANGEDCO under the terms of the PPA on account of outstanding dues. As discussed above, the PPA has provided for remedies for the Petitioner in case of default of payment by TANGEDCO. The steps that the Petitioner must follow as per the PPA are as follows:

- (i) Under Article 8.4.11.4, whenever TANGEDCO fails to pay a Monthly Bill or Supplementary Bill within the Due Date, the Petitioner may draw upon the Letter of Credit given by TANGEDCO the amount of the such Monthly Bill or Supplementary Bill along with Late Payment Surcharge if applicable.
- (ii) When the Letter of Credit is drawn upon by the Petitioner, it becomes the duty of TANGEDCO to replenish the Letter of Credit.
- (iii) If TANGEDCO fails to replenish the Letter of Credit and if dues are still outstanding, the Petitioner must have recourse to clause 8.5.1 which states that the procedure contemplated in Articles 8.5.2 and 8.5.5 are to be followed.

- (iv) As a first step, the Petitioner must offer 25% of its Contracted Capacity to sale for third parties after giving TANGEDCO atleast seven days' notice as per Article 8.5.2.
- (v) If the standby Letter of Credit is not fully restored by TANGEDCO and dues are still outstanding for thirty days, the Petitioner is duty bound under Article 8.5.5 to offer 100% of its Contracted Capacity to third party sales.
- (vi) If such a procedure is followed, TANGEDCO shall be liable to pay capacity charges only for a period of six months from the date on which the first default occurred as per Article 8.5.8 proviso.

6.15. The PPA has set out the above referred well thought out mechanism in order to balance the interests of both parties and ensure that the Petitioner generator mitigates its losses in the event of default by TANGEDCO. If the PPA's payment mechanism and default mechanism is scrupulously followed, the generator will not be put to much loss and hardship and neither will the Procurer. Applying the PPA mechanism to the present case, when the first default occurred in February 2021, the Petitioner ought to have resorted to the payment mechanism set out in Article 8.4.11.4. It is pertinent to note that TANGEDCO had maintained a valid standby Letter of Credit for an amount of Rs.14.37 Crores valid upto 17.08.2022. If the Petitioner had invoked the Letter of Credit of Rs.14.37 Crores in February 2021 at the first instance when a Monthly Bill was not honoured, as per the terms of the PPA, then TANGEDCO would have had to replenish the Letter of Credit, or in the alternative, the Petitioner could have offered its Contracted

Capacity for sale to third parties. Instead, the Petitioner continued to add Late Payment Surcharge to its invoices and waited till October 2021 whereupon it unilaterally stopped the supply of electricity.

6.16. Thiru Rahul Balaji, Id. Counsel for the Petitioner vehemently contended that it is not mandatory for the Petitioner to invoke the Letter of Credit and that the payment mechanism is only optional. We are unable to agree with this contention owing to the express language of Article 8.5.1 which has employed the term “shall”. The PPA unequivocally states and contemplates in Article 8.5.1 that when a payment default occurs, the Seller *shall* follow the steps enumerated in Articles 8.5.2 and 8.5.5 viz. sales to third party. In the case of *Sarala vs. Kishen* 2009 7 SCC 658, the Hon'ble Supreme Court has held that the word “may” shall be read as “shall” depending upon the intention of the legislature even when interpreting the provisions of a statute. In paragraph 29, the Hon'ble Supreme Court held that taking into consideration the object of the Act and the intention of the legislature, the word “may” may be construed as mandatory and not directory. In this connection, it is observed that clause 8.5.1 employs the word “shall”. We are of the view that the word “may” appearing in clause 8.4.11.4 cannot be read in isolation and it has to be read as conjunction with clause 8.5.1 which means the payment mechanism cannot be taken to be directory in nature. There are good enough reasons for this.

6.17. The PPA, as is known, is a contract for sale of energy and the rights of parties are governed by the PPA. But when a dispute arises as to the interpretation of any of its

clause, the provisions of Contract Act, 1872, can be pressed into service. Apart from this, the PPA has to be read as a whole and not selectively or in isolation. Viewed in such context, we are of the view that when the claim for capacity charges falls within the realm of breach of contract, for the purpose of granting the relief, the incidental question of mitigative factors which requires examination in such breach cannot be overlooked. A holistic reading of the PPA makes it clear that it has a few clauses making it incumbent upon the seller to mitigate the losses and it may be seen in clauses 8.5.1, 8.5.2 and 8.5.5.

6.18. The reason that the PPA has made it mandatory to offer sales to third party is to mitigate losses and avoid burdening the Procurer with indefinite Late Payment Surcharge like the Petitioner has done in this case is obvious. If the Procurer has committed default in payment, the seller has to suffer the consequences but the consequences have to be as per the terms of the contract agreed by the parties. The Petitioner cannot unilaterally modify the agreed terms of the PPA and make out a case for compensation. In the present case, the Petitioner ought to have invoked the Letter of Credit in the very first month immediately after the payment fell due viz. February 2021, in which case TANGEDCO would have had to replenish the Letter of Credit in the subsequent month and if TANGEDCO had failed to replenish the Letter of Credit, the Petitioner had the right to offer its power to sale to third parties as per clauses 8.5.2 and 8.5.5. By this course of action, the Petitioner could have also avoided its losses and mitigated the liability on the procurer.

6.19. Apart from this, it is observed that the Petitioner has recourse to the payment mechanism under the PPA and the sale to third parties mechanism. The PPA provides that the Respondent shall be liable to bear Capacity Charges only for the first 6 months of such sale. In the present case, we find that the Petitioner has unilaterally re-written the terms of the contract and instead of adhering to the payment mechanism stipulated in clauses 8.5.1 to 8.5.9, the petitioner has refused to supply electricity thereby adding liability towards late payment surcharge for eight months. For these reasons, the actions of the Petitioner cannot be countenanced in law.

6.20. Further, it is pointed out by the Respondent that the Petitioner had sold power to third parties through STOA/MTOA during the months of February, March and April 2022. The Petitioner had sold 30,527,858 units, 16,858,993 units and 65,684,570 units of power during February'2022, March' 2022 and April' 2022 respectively at 300% higher price when compared to the Tariff under the PPA which has not been disputed by the petitioner. Even if the benefit of doubt is given to the Petitioner that it stopped supply of power only in view of pending payments from TANGEDCO, at least after receipt of the outstanding sums on 02.12.2021, 28.01.2022 and 31.01.2022, the Petitioner ought to have resumed its supply to TANGEDCO. Instead, even as late as April, 2022, the Petitioner had not resumed supply. Thus, the conduct of the Petitioner is not above board and the intention of the Petitioner does not appear to be to adhere to the terms of the PPA.

6.21. Yet another factor which negates the claim of the petitioner for capacity charges is that even as per the terms of the PPA, Capacity Charges is payable only when the Petitioner makes power available. Capacity Charges is defined under clause 1.1 as the “charges referred to in Schedule 4 of the Agreement”. In clause 4.1 (iv) of Schedule 4, the PPA states that Capacity Charges shall be payable on the basis of Contracted Capacity at Normative Availability. Normative Availability is defined under clause 1.1 as 85% availability of the Aggregate Contracted Capacity at the interconnection point on contract year basis. The Aggregate Contracted Capacity in the present case is 74 MW. Therefore, as per clause 4.1 (iv) of Schedule 4, Capacity Charges are payable only when 85% of 74 MW i.e. 62.9 MW is made available for scheduling by the Petitioner. In case of availability being lower than 62.9 MW, clause 4.1 (iv) states that the Capacity Charges is payable on proportionate basis in addition to penalty being paid by the petitioner. The formula to calculate the monthly Capacity Charges is found in Clause 4.2.2 as below:

If $CAA \geq NA$,

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

Else:

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

Thus, cumulative availability (CAA) is required wherein AA is the availability for the relevant settlement period. Thus, if the availability of power (AA) is zero, as per the aforesaid formula, the capacity charges payable will be zero.

6.22. That apart, clause 4.2.5 of schedule 4 further provides that if availability is less than 80%, the Petitioner shall pay a penalty @ 20% of simple average capacity charge for all months in the contract year applied on the energy (in kWh) corresponding to the difference between 80% and availability during such contract year. Thus, it is clear from a plain reading of Schedule 4 that when the availability of power is zero, on applying the prescribed formula, the Capacity Charges to be paid for that relevant month will be zero. When it is admitted by the Petitioner that he has unilaterally not made power available to be scheduled from 21.10.2021, there can be no case at all for claiming capacity charges as per the terms of the PPA since capacity charges can only be claimed when power is made available for scheduling. The logic behind payment of capacity charges is that when the Petitioner keeps ready its plant, machinery and staff to schedule power as per the PPA, a charge must be paid by the Respondent for such action of the Petitioner. There is simply no provision in the PPA for claiming Capacity Charges, when the Petitioner itself unilaterally makes power unavailable to the Respondent.

6.23. The learned counsel for the Petitioner placed heavy reliance on the judgment of the Hon'ble APTEL in the case of *Ragurama Renewable Energy vs. TANGEDCO*, Appeal No.181 of 2013 dated 11.07.2013 in support of his contentions. However, a reading of the facts of the case in *Ragurama Renewable Energy* shows that the said

judgement does not apply to the facts of this case. In *Ragurama Renewable Energy*, the Appellant therein had entered into an energy purchase agreement on 14.10.2011 for supply of 10MW with TANGEDCO. The Appellant therein could not use the fuel that was stored at the Appellant's plants between the months of October-December 2011 due to torrential rains and the Appellants had also offered to make good the shortfall in supply of power from excess supply of power from other power plants of its group companies. Having rejected such an offer, TANGEDCO had levied compensation for short supply which the Court found was not justifiable in view of the force majeure event. Further, TANGEDCO had also imposed penalty for short supply despite non-payment of dues by it. In the present case, TANGEDCO has not imposed any penalties on the petitioner though otherwise, it is entitled to impose penalties for non-availability of power. Thus, the ratio laid down in the *Ragurama case* has no bearing on the issue in the present case since the facts are completely different.

6.24. The Id. Counsel for the Respondent had also cited case laws to support the proposition that there is always a duty in law on any party to a contract suffering breach to mitigate its losses. In fact the proposition stems from explanation to section 73 of the Indian Contract Act, 1872 which reads as follows:

"73. Compensation for loss or damage caused by breach of contract.—When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it. Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract.—When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation.—In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.”

6.25. The above said principle has also found acceptance in a catena of judgements rendered by the Hon'ble Apex Court. In the case of *Muralidhar Chirajee Lal Vs. Harish Chandra Dwarkadoss*, 1962 1 SCR 653, the Hon'ble Supreme Court of India has held that one of the fundamental principles of law of damages is that there is a duty on the plaintiff to take all reasonable steps to mitigate the loss and the plaintiff cannot claim any part of damage which had occurred due to his neglect to take such steps to mitigate the losses. Similarly, in the case of *Jugat Mal vs.State of Madhya Pradesh*, AIR 1963 MP 242, the Hon'ble Madhya Pradesh High Court has held that the rule is that damages are compensatory and not penal and that one who has suffered loss from breach of contract must take every reasonable step to ensure that the extent of damages is mitigated. The Plaintiff cannot claim to be compensated by the party in default for loss which is due to his failure to behave reasonably after the breach.

6.26. If the above referred settled principles of law are applied to the facts of the present case it would be manifest that a duty is cast on part of the Petitioner to mitigate its losses and invoke the Letter of Credit on the very first month of default and in case of

failure of TANGEDCO to replenish the Letter of Credit, offer its contracted capacity for sale to third parties. Instead, the course adopted by the Petitioner in continuing to add late payment surcharge and unilaterally suspending supply of power and not resuming supply even after clearing the outstanding dues by the respondent TANGEDCO is totally in breach of the express terms and conditions set out in the PPA dated 12.12.2013. The overarching obligation under Article 5.1.1 is that the Petitioner has a duty to offer its Contracted Capacity for sale to the Respondent. At this juncture, it is useful to also refer to Article 14.4.1 of the PPA which provides that parties shall continue to perform its obligations even if a dispute arises between them. It is clear from a holistic reading of these clauses that the Petitioner has miserably failed in adhering to the terms of the PPA when faced with a default event. The Petitioner has re-written the terms of the PPA and devised its own payment mechanism, which cannot be approved by this Commission. If parties are allowed to throw the agreed terms of a contract to the winds and act as per their whims and fancies, then there is no sanctity to a legally concluded contract, particularly a PPA approved by this Commission by exercising its statutory powers conferred under the Electricity Act, 2003.

6.27. Thus, for all the above reasons, this Commission find that the unilateral suspension of supply of power by the Petitioner is in violation of the terms of the PPA, more particularly the payment mechanism terms. Consequently, this Commission decides that the dispute raised by TANGEDCO vide the impugned dispute notices dated

30.11.2021, 20.12.2021, 25.01.2022, 18.02.2022, 30.03.2022, 23.04.2022, 19.05.2022 and 04.07.2022 are perfectly valid under law.

6.28. Based on the preceding discussions and aforementioned findings, this Commission has to arrive at the inevitable conclusion that the petitioners claim for payment of a sum of Rs.44,09,95,353/- by the respondent TANGEDCO towards outstanding arrears, capacity charges, late payment surcharges and other charges under the PPA dated 12.12.2013 as on 02.05.2022 and the Covid Discount amount of Rs.3,44,71,165/- allegedly unilaterally deducted by TANGEDCO has no legal foundation and as such not sustainable under law. The entitlement of the petitioner to the other reliefs claimed in the petition very much depend upon the success of the petitioner in having the disputed notices set out in the petition set aside. As this Commission has rendered a finding that the impugned notices are valid under law, it is imperative that the petitioner is not entitled to any of the reliefs claimed in the petition.

Accordingly all the issues are decided against the Petitioner.

In the result, the Petition is dismissed. Both the parties are directed to bear their respective costs.

(Sd.....)
Member (Legal)

(Sd.....)
Member

(Sd.....)
Chairman

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission