

**TAMIL NADU ELECTRICITY REGULATORY COMMISSION**  
**(Constituted under section 82 (1) of the Electricity Act, 2003)**  
**(Central Act 36 of 2003)**

**PRESENT:**

**ThiruM.Chandrasekar**

**.... Chairman**

**and**

**Thiru.K.Venkatasamy**

**.... Member (Legal)**

**D.R.P. No.14 of 2015**

M/s. Birla Carbon India Pvt. Ltd.  
(Formerly known as M/s. SKI Carbon Black (India) Pvt. Ltd.)  
Unit: Hitech Carbon, Gummidipoondi  
K-16, Phase II, SIPCOT, P.O.  
Gummidipoondi  
District Thiruvallur – 601 201

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

Vs.

1. Tamil Nadu Generation and Distribution Corporation Limited (TANGEDCO)  
Represented by its Chairman and Managing Director,  
144, Anna Salai, Chennai – 600 002.
2. The Chief Financial Controller (Revenue)  
TANGEDCO,  
No.144, Anna Salai,  
Chennai – 600 002.
3. The Superintending Engineer,  
CEDC/North  
TANGEDCO  
144, Anna Salai  
Chennai – 600 002.
4. The Accounts Officer / Revenue  
CEDC/ North  
TANGEDCO  
Chennai – 600 002

... Respondents  
(Thiru. M. Gopinathan  
Standing Counsel for TANGEDCO)

**Dates of hearing** : 22-10-2019; 19-11-2019; 28-01-2020;  
25-02-2020; 06-10-2020; 03-11-2020;  
24-11-2020; 15-12-2020; 05-01-2021;  
03-02-2021; and 10-02-2021

**Date of Order** : 10-08-2021

The DRP No.14 of 2015 came up for final hearing on 10-02-2021. The Commission upon perusing the affidavit filed by the petitioner, counter affidavit filed by the respondent and all other connected records and after hearing both the parties passes the following:-

### **ORDER**

#### **1. Prayer of the Petitioner in D.R.P.No.14 of 2015:-**

The prayer of the petitioner in D.R.P. No. 14 of 2015 is to grant an interim direction to the 1<sup>st</sup> Respondent, the TANGEDCO, to release the outstanding payments owed to the Petitioner under the bills raised by the Petitioner in furtherance of the Tender bearing ref. No. Tender No. 05/TANGEDCO/2012, dated 27.11.2012 issued by the First Respondent, pertaining to the 10% of power supplied and billed over and above the contracted quantum as per the Power Purchase Agreement dated 7.8.2013, Addendum No.1 dated 22.7.2014, Addendum No. 2 dated 6.8.2014, Power Purchase Agreement dated 5.9.2014, and in accordance with the Clarification issued by the First Respondent bearing reference no. *CE/PPP/SE/PP/EE/(PP1)/F*. Tender No. 05/2012/D.720-1/2013 dated 25.10.2013 for the period from July, 2013 to September, 2014, amounting to a sum of Rs.1,10,05,638, along with interest due and payable to the Petitioner amounting to a sum of Rs.23,03,752 and to direct that TANGEDCO release the outstanding payments owed to the

Petitioner under the bills raised by the Petitioner in furtherance of the Tender bearing ref. No. Tender No. 05/TANGEDCO/2012, dated 27.11.2012 issued by the First Respondent, pertaining to the 10% of power supplied and billed over and above the contracted quantum as per the Power Purchase Agreement dated 7.8.2013, Addendum No.1 dated 22.7.2014, Addendum No. 2 dated 6.8.2014, Power Purchase Agreement dated 5.9.2014, and in accordance with the Clarification issued by the First Respondent bearing reference No. CE/PPP/SE/PP/EE/(PP1)/F.Tender No.05/2012/D.720-1/2013 dated 25.10.2013 for the period from July, 2013 to September, 2014, amounting to a sum of Rs.1,10,05,638, along with interest due and payable to the Petitioner amounting to a sum of Rs.23,03,752; and to pass such further or other orders as the Commission may deem fit and proper in the facts and circumstances of the case.

## **2. Facts of the Case:-**

The present petition has been filed to direct TANGEDCO to make payment of outstanding amounts under Short Term Open Access Bills raised by the Petitioner for the period from July 2013 to September 2014 raised under TANGEDCO's Tender No 5 representing 10% power supplied by the Petitioner over and above the contracted quantum and pass such further or other orders as the Commission may deem fit and proper in the facts and circumstances of the case and thus render justice.

## **3. Contention of the Petitioner:-**

3.1. The petitioner is a private company having a Carbon Black manufacturing facility at Gummidipoondi. Along with 33.7 MW Co-generation power plant. At the said

Caron Black manufacturing facility, substantial quantities of power are being sold to the First Respondent from the co-generation power plant since the Petitioner's inception in the year 1998.

3.2. TANGEDCO has been floating tenders for purchase of Round the Clock power from the Southern Region Generators and Traders. In accordance thereto, as per the Guidelines issued by the Ministry of Power, Government of India for short term procurement of power by TANGEDCO, the TANGEDCO initiated a competitive bidding process through issuance of Request for Proposal (RFP) *vide* Tender No.05/TANGEDCO/2012, dated 27.11.2012, (the "Tender") in order to select bidders for supply of 1000 MW of Round the Clock (RTC) Power for the period from June 2013 to May 2014.

3.3. Pursuant to the fulfillment of the terms and conditions contained in the RFP, the TANGEDCO identified, *inter alia*, the Petitioner with its Gummidipoondi unit as a 'Successful Bidder' under the Tender for supply of RTC Power and issued LOA Ref No. CE/PPP/SE/EE(PP)/F.Tender05 of 2012/LOA:570-13/13 dated 30.5.2013 for supply of RTC power to TANGEDCO from 1.6.2013 to 25.05.2014, which was then extended consistently until 30.9.2014. In this respect, the following agreements were entered into between the Petitioner and TANGEDCO for the supply of RTC power by the Petitioner to TANGEDCO:

- a. Power Purchase Agreement dated 7.08.2013, covering the period of supply from 1.6.2013 to 25.05.2014.
- b. Pursuant to a Power Purchase Agreement Addendum, dated 22.07.2014, the extended period of power supply until 31.07.2014 was given effect to.

- c. *Vide a Power Purchase Agreement Addendum No. 2 dated 6.8.2014, the period was further extended until 31.08.2014.*
- d. *A further Power Purchase Agreement dated 5.9.2014 for the period from 1.09.2014 to 30.09.2014.*

The quantum of power to be supplied was specifically stipulated for each period and the purchase rate for the power was fixed at Rs.5.50 per kwh.

3.4. Clause 3 of Tender specifically states that *'successful bidders are allowed to supply 10% over and above the approved contracted quantum.* Therefore, it is beyond doubt that the Petitioner, as well as other Successful Bidders, are permitted to supply up to 110% of the contracted quantum of power and the TANGEDCO's liability to that extent is indisputable under the Tender.

3.5. Power Purchase Agreements, dated 7.8.2013 and 5.9.2014, both specifically provide that there can be no denial of ability for supply of power up to 110% of the contracted quantum. Clause 5 of the PPAs, which are agreed to form an integral part of the Addendum agreements as well, specifically state *"there is no liability for payment on TANGEDCO to pay for any excess energy injected beyond 110% of approved scheduled energy or contracted energy by the generators on its accord".*

3.6. In light of the aforementioned provisions in the Tender as well as the specific PPAs executed as regards the Petitioner, it is clear that supply of power up to 110% of the contracted quantum will be fully compensated by the TANGEDCO without any limitation of liability.

3.7. Crucially, in order to ward off any confusion that may arise in this regard, the Chief Engineer (PPP) of the TANGE000 unambiguously clarified by letter bearing reference No.CE/PPP/SE/PP/EE/(PP1)/F.Tender No.05/2012/D.720-1/2013 dated 25.10.2013, with reference to illustrations and calculations that "*supplying and billing over and above 100% up to 110% is permissible*" ("Clarification"). Therefore, any bills corresponding to the supply of power over and above 100% up to a maximum of 110% will have to be provided for by the TANGEDCO.

3.8. Despite the clear provisions and the subsequent clarification from Chief Engineer, for all the bills furnished by the Petitioner for the period from July 2013 till September 2014, only short payment was made by the TANGEDCO. It is clear that the shortfall in the payments corresponded to the 10% over and above the contracted quantum of 15 MW under the Tender.

3.9. The Petitioner made a representation through a letter dated 21.01.2015 issued to the Chief Engineer (PPP), who himself had issued the Clarification, setting out the situation wherein the TANGEDCO has outstandings then amounting to a sum of Rs.99,15,208, and seeking payment of the same on the basis of the specific provisions of the Tender and the PPAs. However, the representation with the request to release the withheld payments was of no avail.

3.10. A further letter was sent by the Petitioner to the Chairman and Managing Director, raising the issue of pending payments for the 10% supply over and above the contracted quantum up till the month of September 2014, and &

further citing all the efforts undertaken by the Petitioner to follow-up with the relevant officer of the TANGEDCO, viz., the Superintending Engineer (North), TANGEDCO (SE-North) for the payments, thereby seeking intervention of the TNEB and resolution of the issue of short payment. The overall outstanding due amount asset out in the said letter of the Petitioner amounted to Rs.1,10,05,638, and the interest due and payable to the Petitioner amounts to Rs.23,03,752.

3.11. Another letter was sent by the Petitioner to the TANGEDCO, again reiterating the liability of the TANGEDCO for the supplied power, raised validly under the Tender and the PPAs. Despite such repeated attempts to recover the pending dues owed to the Petitioner by the TANGEDCO, the Respondent has not been forthcoming to settle the dues.

3.12. It is important at this juncture to note that by virtue of G.O NO 10 dated 27.2.2009 issued by the Government of Tamil Nadu under section 11 of the Electricity Act,2003, the generators are perforce required to supply power only within the State of Tamil Nadu. Therefore, pending dues, especially when pertain to power already supplied and cost already incurred, seriously harm the stability of the Petitioner's generating unit.

3.13. The Petitioner entered the bid process pursuant to the express clauses and provisions contained in the Tender. It therefore has a legitimate expectation that the TANGEDCO would act in accordance with the terms of the Tender, one such term being that the successful bidders are allowed to supply 10% over and above the contracted quantum.

3.14. It is a fundamental principle in bid processes that the prescribed terms

and conditions in the tender document shall not be modified after the bidders have acted in pursuance of the bid process, incurred a change in their position and entered the process. In such a situation, the authority inviting the tenders is estopped from changing the conditions originally prescribed and is required to act in accordance with the original terms as stipulated.

3.15. The TANGEDCO is estopped from denying any liability towards the dues validly claimed by the Petitioner, more so, when the basis of such a claim is the very document issued by the TANGEDCO inviting the Petitioner to supply power to it i.e. the Tender.

3.16. The PPA dated 7.8.2013 contains an express acknowledgement of liability of the TANGEDCO as regards quantum of power supplied up to 110% of the contracted quantum. Furthermore, even a subsequent PPA, executed later on 5.9.2014, continues to contain such a clause. Therefore, the TANGEDCO is precluded from denying the liability which has always existed and remained with the power purchaser to pay for the purchased power.

3.17. The Petitioner was shocked when the TANGEDCO declined payments power supplied to it and invoiced to it validly under the applicable provisions by the Petitioner.

3.18. The petitioner is also entitled to interest on the delayed payments under Clause 7(l) of both the Power Purchase Agreement dated 7.08.2013, and the Power Purchase Agreement dated 5.9.2014

which provide that if payment is outstanding beyond the due date by TANGEDCO, then the surcharge as applicable on a daily basis @ SBI's PLR or mutually agreed rate but not exceeding 1.5% per month which will be payable. The interest thus payable by the TANGEDCO to the Petitioner in the instant case calculated at the SBI's PLR of 1.22% amounts to Rs.23.03,752.

3.19. The petitioner has made out a prima facie case and the balance of convenience is also in its favour in the grant of Orders as prayed for. No prejudice, loss or hardship would be caused to the Respondents if the Petition is allowed. On the contrary, grave prejudice, irreparable loss and hardship would be caused to the Petitioner if the present Petition is not allowed.

#### **4. I.A. filed by the Petitioner:-**

4.1 The petitioner has reiterated all the submissions made in the petition for the purpose of this IA. Apart from the same, sought an interim direction which is as follows:-

To grant an interim direction to the 1<sup>st</sup> Respondent, the TANGEDCO, to release the outstanding payments owed to the Petitioner under the bills raised by the Petitioner in furtherance of the Tender bearing ref. No. Tender No. 05/TANGEDCO/2012, dated 27.11.2012 issued by the First Respondent, pertaining to the 10% of power supplied and billed over and above the contracted quantum as per the Power Purchase Agreement dated 7.8.2013, Addendum No.1 dated 22.7.2014, Addendum No. 2 dated 6.8.2014, Power Purchase Agreement dated 5.9.2014, and in accordance with the Clarification issued by the First Respondent bearing reference No.

CE/PPP/SE/PP/EE/(PP1)/F.TenderNo.05/2012/D.720-1/2013 dated 25.10.2013 for the period from July, 2013 to September, 2014, amounting to a sum of Rs.1,10,05,638, along with interest due and payable to the Petitioner amounting to a sum of Rs.23,03,752”.

## **5. Contentions of the Respondent:-**

5.1. The Petitioner with its Gummudipoondi Unit was selected as "successful Bidder" against the tender floated by TANGEDCO for the purchase of 1000 MW Round The Clock (RTC) power for the period from 01.06.2013 to 25.05.2014 and issued Letter Of Acceptance (LOA) vide reference No. CE/PPP/SE/EE(PP)/F.TENDER 05 OF 2012/LOA:570-13/13 dated 30.05.2013. Based on the Guidelines issued by the Ministry of Power and Government of India as short term procurement of Power by entering through Power Purchase Agreement dated 07.08.2013. And then the period was extended upto 30.09.2014 at three occasions by entering through Power Purchase Agreement Addendums 1,2& 3 on 22.07.2014 for extension upto 31.07.2014, on 06.08.2014 for extension upto 31.08.2014 and on 05.09.2014 for extension upto 30.09.2014 respectively.

5.2. The Dispute resolution petition is neither maintainable in law nor on facts, among other things, on the following grounds.

5.3. In the Power Purchase Agreement under the head of "Terms and Conditions" & in sub-head 2.(quantum) at last paragraph it has been clearly mentioned about the 10% excess over & above the contracted quantum. The extract is reproduced below for perusal.

*"TANGEDCO will accept energy over and above the contracted energy (energy corresponding to the contracted quantum of power) and payment made accordingly. For avoidance of doubt, plus 10% and tolerance is only for Energy Accounting but the maximum scheduling should not exceed contracted quantum."*

The above said condition undoubtedly states that the 10 % excess injection can be accepted for energy accounting only and not for payment.

5.4. In the same Power Purchase Agreement under the main head of "Billing and Payments" & in sub-clause (g) as 7<sup>th</sup> point it has also been clearly mentioned about the payment for exceeding beyond the 100% contracted quantum & the extract is reproduced below for perusal.

*"Any scheduling done beyond 100% of the open access approved quantum or beyond 100% of the contracted quantum will not be accepted and in case of such excess injection, no payment shall be made by TANGEDCO."*

5.5. In the same Power Purchase Agreement under the main head of "Applicability of the Acts, Rules, Regulations and in sub-clause (d)", it has also been clearly mentioned about the payment for exceeding beyond the 100% contracted quantum. The extract is reproduced below for perusal.

*"No scheduling done beyond 100% of the open access approved quantum or beyond 100% of the contracted quantum. In case of excess injection, no payment will be made by TANGEDCO. This will be without prejudice to taking action by the SLDC / Hon'ble TNERC for violation of Grid Code and Act".*

5.6. The quantum of Power to be supplied by the petitioner to TANGEDCO was specifically stipulated in the Power Purchase Agreement for each period and the purchase rate was also fixed as 5.50 per kwh. for the power supplied

upto the level of contracted quantum.

5.7. Based on the stipulated conditions available in the Power Purchase Agreement and also in the Terms & Conditions, the bills submitted by the petitioner was calculated by deducting the excessively billed for excess injection of power over and above the contracted Quantum of 100% as detailed below in the tabular column.

| Month                    | Actual contracted Quantum in MW | Actual contracted Quantum in Units | Quantum submitted by Petitioner in MW | Quantum submitted by Petitioner in Units | Excess quantum over and above 100% contracted quantum to be deducted in Units | Amount claimed by Petitioner | Payment advice issued for 100% contracted quantum | Excess claim deducted |
|--------------------------|---------------------------------|------------------------------------|---------------------------------------|--|---|------------------------------|---|-----------------------|
| 07/2013                  | 8.5 MW                          | 6324000                            | 8.5MW                                 | 5506616                                  | 325722  | 30286388                     | 28218960  | 2067428               |
| 03/2014                  | 15 MW                           | 9330269                            | 15 MW                                 | 9597684                                  | 267415  | 52787262                     | 51083173  | 1704089               |
| 05/2014                  | 15 MW                           | 9806038                            | 15 MW                                 | 10064878                                 | 258840  | 55356829                     | 53871208  | 1485621               |
| 06/2014                  | 15 MW                           | 8959552                            | 15 MW                                 | 9155772                                  | 196220  | 50356746                     | 49217539  | 1139207               |
| 07/2014                  | 15 MW                           | 9881929                            | 15 MW                                 | 10189455                                 | 307526  | 56042003                     | 54288610  | 1753393               |
| 08/2014                  | 15 MW                           | 10221893                           | 15 MW                                 | 10598529                                 | 376636  | 58291910                     | 56158412  | 2133498               |
| 09/2014                  | 15 MW                           | 9504119                            | 15 MW                                 | 9702379                                  | 198260  | 53363085                     | 52212655  | 1150430               |
|                          | Total                           | 64027800                           |                                       | 64815313                                 | 1930619   | 356484223                    | 345050557   | 11433666              |
| Less- Scheduling Charges |                                 |                                    |                                       |  |   |                              |   | 430000                |
| Balance deducted         |                                 |                                    |                                       |  |   |                              |   | 11005637              |

5.8. The petitioner has no prima facie case to further pursue the above Dispute Resolution petition. Therefore, the petitioner is not entitled to any relief as prayed for in the above petition. The balance of convenience is clearly in favour of the respondents herein. Hence, considering all the above, the petition is liable to be dismissed. By dismissing the same, no prejudice will be caused to the petitioner as the impugned order has been passed in accordance with law and in the manner known law.

**6. Rejoinder filed on behalf of the petitioner:**

6.1. It is trite law that the terms of the tender are overarching and are strictly binding between the parties. Any subsequent agreement between the parties must be interpreted in light of the terms of the tender, which sets the tenor of any subsequent agreement the parties enter into.

6.2. The Tender clearly states as follows:

*"2, Quantum:*

*However, the successful bidders are allowed to supply 10% over and above the approved contracted quantum".*

6.3. Further, the first Power Purchase Agreement dated 07.08.2013 between the parties herein also allows the Petitioner company to supply 10% above the contracted sum, in light of the technical modalities involved. The relevant extract is as follows:

*"Since generators expressed hardship in maintaining the plant capacity round the clock at specific load as the generation will always hover around, TANGEDCO will accept energy upto 10% over and above the contracted energy (energy corresponding to the contracted quantum of power) and payment will be made accordingly. For avoidance of doubt, plus 10% tolerance is only for energy accounting but the maximum scheduling should not exceed the contracted quantum."*

6.4. It is clear that the Petitioner is allowed to inject 10% above the contracted quantum in energy terms and the same is to be paid for. However, while energy accounting allows for such power injection and payment, the generators are not allowed to schedule power for a quantum above whatever has been contracted. The present case is not a case of scheduling above the contracted quantum and the

Respondent is clearly seeking to wrongly deny payment.

6.5. It would be relevant to state that the details of the Power injected for the period with the calculations in that regard clearly demonstrate the entitlement of the petitioner to payment in the tabular column below:

| Month  | Tender contracted Quantum (MW) | Energy/Month corresponding to the Contracted Quantum (Units) | 110% of Energy/Month corresponding to the Contracted Quantum (Units) | Actual Energy injected & invoiced by Birla Carbon Under Tender No.5 (Units) | % Actual Energy injected by Birla Carbon against the Energy corresponding to the Tender No.5 contracted quantum |
|--------|--------------------------------|--|--|---|---|
| Jul-13 | 8.5 MW                         | 6324000  | 6956400  | 5506616   | 87.07   |
| Mar-14 | 15 MW                          | 11160000   | 12276000   | 9597684   | 86.00   |
| May-14 | 15 MW                          | 11160000   | 12276000   | 10064874  | 90.19   |
| Jun-14 | 15 MW                          | 10296000   | 11325600   | 9155772   | 88.93   |
| Jul-14 | 15 MW                          | 11160000   | 12276000   | 10189455  | 91.30   |
| Aug-14 | 15 MW                          | 11160000   | 12276000   | 10598529  | 94.97   |
| Sep-14 | 15 MW                          | 10800000   | 11880000   | 9702379   | 89.84   |

6.6. The above tabular column clearly shows that power injected under Tender No.5 in any particular month is never in excess of the Tender contracted quantum. Thus, the contracted quantum which is provided for each month has never been exceeded. Thus, the terms of the understanding that provides that — *'Since generators expressed hardship in maintaining the plant capacity round the clock at a specific load as the generation will always hover around, TANGEDCO will accept energy upto 10% over and above the contracted energy (energy corresponding to the contracted quantum of power) and payment will be made accordingly'* will clearly apply to the facts of the case and payment cannot be denied. The power injected for which payment was denied is due to the generation variation in various days and in fact was the cause for the specific acceptance by CE/PPP in letter dated

25.10.2013 where they have clearly mentioned that energy upto 10% over and above the contracted energy is admissible for payment and the question of scheduling does not arise.

6.7. The instant petition is maintainable in law and in facts. Further, a bare statement of the instant petition not being maintainable without providing any cogent reasons for the same is insufficient and the Respondents are put to strict proof of the same.

6.8. That the interpretation of the Respondent of sub heading 2 of the Power Purchase Agreement dated 07.08.2013 is grossly erroneous and the Respondents are put to strict proof of the same. The said clause only stipulates that the Petitioner is not allowed to schedule power' over and above the contracted quantum, meaning thereby the demand quota remains fixed at 15MW. However, the Petitioner is entitled to supply 10% extra energy depending on the technical modalities, for which due payment will be made after energy accounting. Such an interpretation also complements the terms contained in the Tender dated 27.11.2012. In fact, the very same clause 2 of the Power Purchase Agreement dated 07.08.2013 has been interpreted in favour of the Petitioner, by the Chief Engineer in the clarification circular dated 25.10.2013

6.9. Even the subsequent agreement between the parties, which has been entered into following the principal Tender dated 27.11.2012 ought to be interpreted in light of the overarching terms contained therein. Any other contrary interpretation would mutilate the very object of the contract and the intention of the parties. The Petitioner is allowed to supply 10% above the contracted energy in

light of the fact that it is near impossible to maintain the plant at a specific load round the clock. Clause 3 of the Tender dated 27.11.2012 and clause 2 of the principal Power Purchase Agreement dated 07.08.2013 provide for such supply as agreed between parties. Therefore, clause (g) of the Addendum Power Purchase Agreement dated 05.09.2014 ought to be interpreted in light of the above. Should the Respondent's straitjacket interpretation be taken to be correct, the same would run contrary to the express terms of the Tender which overrides the terms of the Addendum Power Purchase Agreement.

6.10. The Respondents are adopting a very narrow and pedantic approach while interpreting the terms of the various power purchase agreements between the parties herein, without fully appreciating the nuances contained therein. Clause (d) as relied on by the Respondents reads as follows:

*"No scheduling done beyond 100% of the open access approved quantum or beyond 100% of the contracted quantum. In case of excess injection, no payment will be made by TANGEDCO. This will be without prejudice to taking action by the SLDC/Hon'ble TNERC for violation of Grid Code and the Act."*

6.11. The Respondents have failed to understand that the said clause only prohibits the Petitioner from scheduling power' over and above the contracted quantum since such scheduling will violate grid discipline. However, both the Tender and the power purchase agreements give the Petitioner the freedom to inject excess energy upto 10%, depending on whether the Petitioner is able to maintain the plant at the specific load throughout the day, since the agreement is for RTC power. Therefore, an injection of 10% excess energy was contemplated and allowed in the Tender and the principal Power Purchase Agreement. Consequently, the grid has the ability to absorb such

power, thereby ensuring stability of the grid. Any other interpretation is wrong especially since there was not a single issue relating to scheduling during the term of the contract.

6.12. The Respondents have conveniently not addressed the Clarification circular issued by the Chief Engineer dated 25.10.2013 in their counter affidavit. The said circular specifically instructs all Superintending Engineers, including the 3rd Respondent herein, to allow energy injection of 10% in the light of clause 2 of the power purchase agreement.

6.13. The Petitioner places on record that the Petitioner is entitled to the payment of interest on the sums due and payable to it pursuant to the terms of the Tender and the power purchase agreement which stipulates that, “.... *If any payment is outstanding beyond the due date by TANGEDCO, then surcharge as applicable on daily basis @SBI'sPLR, but not exceeding 1.25% per month will be payable.*’

**7. Written submission on behalf of the Petitioner:**

7.1. The key dates and events and essential clauses of the PPA in respect of the present dispute are set out herein below:

**List of Dates &Events:**

| S. No | Dates      | Events  |
|-------|------------|---|
| 1.    | 27.02.2009 | G.O.Ms. No. 10 issued by the Govt. of Tamil Nadu under section 11 of the Electricity Act mandating allelectricity generators to sell power to TANGEDCO  |
| 2.    | 27.11.2012 | Tender No.5/TANGEDCO/2012 floated by the Respondent for procurement of 1000MW RTC power   |
| 3.    | 30.05.2013 | LOA issued in favour of the Petitioner in Ref No. CE/PPP/SE/EE(PP)/F.Tender 05 of 2012 /LOA570-13/13 in which the Petitioner was permitted to export 15MW RTC power forthe period 01.06.2013 - 25.05.2014 |
| 4.    | 07.08.2013 | PPA for the period 01.06.2013 - 25.05.2014  |
| 5.    | 25.10.2013 | Clarification bearing CE/PPP/SE/PP/EE/(PP)/F Tender No. 05/ 2012/D.720/2013 issued by the   |

|     |            |   |
|-----|------------|---|
|     |            | ChiefEngineer (PPP) - <i>'supplying and billing over and above 100% up to10% is permissible'</i>  |
| 6.  | 22.07.2014 | Addendum PPA power export extended till 31.07.2014  |
| 7.  | 06.08.2014 | Addendum PPA powerexportextended till 31.08.2014.   |
| 8.  | 05.09.2014 | Addendum PPApower export extended till 30.09.2014   |
| 9.  |            | Bills furnished by the Petitioner for the period July2013 - September, 2014   |
| 10. | 21.01.2015 | Letter issued by the Petitioner seeking reasons as to why a shortfall of Rs.99,15,208/- has been withheld from the Petitioner and also seeking payment for the same in view of specific conditions in the Tender document and the PPAs. |

## 7.2. Essential clauses in the Tender and PPAs:

### 1. Clause 2 of the Tender document dated

27,11.2012: "2. *Quantum:*

*.....However, the successful bidder are allowed to supply 10% over and above the approved contracted quantum".*

### 2. Last paragraph in Sub Head 2. (quantum) of the Power Purchase Agreement dated 07.08.2013:

*"Since generators expressed hardship in maintaining the plant capacity round the clock at a specific load as the generation will always hover around, TANGEDCO will accept energy upto 10% over and above the contracted energy (energy corresponding to the contracted Quantum of power) and payment will be made accordingly. For avoidance of doubt, plus 10% tolerance is only for energy accounting but the maximum scheduling should not exceed the contracted quantum."*

7.3. All the addendum PPAs executed also bear the clause extracted above. Therefore, the TANGEDCO's stand that sale of power up to 110% is billable has been consistent.

### 7.4. Internal Clarification issued by TANGEDCO dated 25.10.2013:

*'supplying and billing over and above 100% upto 10% is permissible'*

7.5. Clause 7(g) of the PPA:

*'Any scheduling done beyond 100% of the open access approved quantum orbeyond 100% of the contracted quantum will not be accepted and in case of such excessinjection, no payment shall be made by TANGEDCO'.*

7.6. Clause 7(l) of the Power Purchase Agreements permit the levy of interest on delayed payments at SBI's PLR or at a mutually agreed rate not exceeding 1.5%.

7.7. Submissions on merit

(1) That the Petitioner is permitted to export power up to 110% in view of the specific clauses contained in the Tender and the subsequent PPAs.

- a. TANGEDCO cannot be permitted to rescind from express provisions of both the Tender and PPA which are binding contracts.
- b. The Petitioner is allowed to supply 10% above the contracted energy in light of the fact that it is near impossible to maintain the plant at a specific load round the clock.

(2) *That it was common knowledge that there exists a difference between 'scheduling of power' and the actual export of power and this was envisaged in the PPA.*

- a. In the PPA dated 07.08.2013, TANGEDCO has categorically agreed to compensate for power export up to 110%, fully aware that such deviation ought to be permitted due to technical modalities.
- b. The Tender document dated 27.11.2012 as extracted hereinabove, would further evince that 10% supply over and above the contracted quantum is permitted.

(3) Any term in the subsequent PPAs/Addendums contrary to terms in the

Tender document dated 27.11.2012 must be interpreted in such a way so as to give effect to intention of both parties.

- a. The subsequent PPAs entered into following the principal Tender dated 27.11.2012 ought to be interpreted in light of the overarching terms contained in the Tender itself. Any other contrary interpretation would mutilate the very object of the contract and the intention of the parties.
- b. Clause 3 of the Tender dated 27.11.2012 and Clause 2 of the principal power purchase Agreement dated 07.08.2013 provide for such deviance of 10%. Therefore, clause (g) of the Addendum Power Purchase Agreement dated 05.09.2014 ought to be interpreted in light of the above. Should the Respondent's straitjacket interpretation be taken to be correct, the same would run contrary to the express terms of the Tender which override the terms of the Addendum Power Purchase Agreement.

7.8. That the TANGEDCO has issued a clarification in this regard dated 25.10.2013 which runs directly contrary to the stand taken by them in this petition. They cannot be allowed to approbate and reprobate on the same issue in a manner that suits their convenience.

7.9. Payment of interest is contractually provided for at clause 7(1) and fortified by the judgment of the SC in *PPN Power v TANGEDCO and Hon'ble Aptel in Chairman, TNEB & Another V. Indian Wind Power Association and Others*.

7.10. The Hon'ble Appellate Tribunal for Electricity has upheld the rationale behind incorporating interest/ surcharge clauses in power purchase agreements in the case of *Chairman, TNEB & Another V. Indian Wind Power Association and Others* in Appeal No.11 of 2012 dated 17.04.2012. The relevant paragraphs are extracted hereunder:

*'13. It is settled law, when a certain time limit has been prescribed within which payments have to be made, it would mean that any payments made after the said time period would be subject to payment of interest as indicated above.*

*17. In any power project, one of the important aspects is the promptitude in payment since the delays would seriously affect the viability of the project. All these projects are substantially funded through finances obtained from various funding organizations require regular repayment of principal loan amount with interest by the generators. Only if regular payments are made for the power generated and supplied the loans can be serviced along with the promised return of investment”.*

7.11. In the case of *TANGEDCO vs PPN Power Generation Co Ltd* Civil Appeal No.4126 of 2013, the Hon'ble Supreme Court of India has enunciated the rationale behind incorporating interest clauses in agreements in the following manner:-

*"We are also not able to accept the submission of Mr. Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part payment of the invoice amount within 5 days. We also do not find any merit in the submission that any prejudice has been caused to the appellant by the delayed submission of annual invoice by the respondents. Pursuant to the directions issued by the*

*State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India vs. Ravindra&Ors. In this judgment it has been held as follows.*

*“.....The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd. All ER at p. 472 is that it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation; the money due to the creditor was not paid, or, in other words, was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation whether the compensation was liquidated under an agreement or statute. A Division Bench of the High Court of Punjab 2002 (1) SCC 367 speaking through Tek Chand, J. in CIT v. Dr Sham LalNarula thus 'articulated the concept of interest the words 'interest' and 'compensation' are sometimes used interchangeably and on other occasions they have distinct connotation. 'Interest' in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, 'interest' is understood to mean the amount which one has contracted to pay for use of borrowed money.....In whatever category 'interest' in a particular case may be put, it is a consideration paid either for the use of money or for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable”.*

**8. Written submission filed by TANGEDCO:**

The respondents have filed a written submission which is almost

identical to the counter affidavit filed by them and hence it is not necessary to set out the contention in the written submission of the Respondent.

## 9. Findings of the Commission:-

9.1. This petition has been filed to direct the respondent to release the outstanding payments owed to the petitioner for the bills raised by the petitioner in furtherance of the Tender No. 05/TANGEDCO/2012 dated 27-11-2012, issued by the respondent. The petitioner has sought to claim the cost of 10% of power supplied over and above the contractual quantum amounting to Rs.1,10,05,638/- together with interest. PPA in this case has been executed on 07-08-2013 to which two addendums dated 27-04-2014 and 06-08-2014 have also been executed. The said PPA is for the supply of power to the respondent from the cogeneration power plant of the petitioner. Originally the supply was intended for the period from 01-06-2013 to 25-05-2014 which was subsequently extended upto 30-09-2014. The quantum of power to be supplied was specifically stipulated for each period and the purchase rate for the power was fixed at Rs.5.50 per kwh.

9.2. In Letter No. CE/PPP/SE/EE/F.Tender 05/dated 05-06-2012/LOA:570-1/13, dated 30-05-2013 issued by Chief Engineer (PPP) of the respondent issued Letter of Acceptance for procurement of power from the petitioner for the following quantities:-

| Sl. No. | Source   | Period                    |                            | Quantity (MW) | Rate per kwh | Delivery Point                              |
|---------|--|---------------------------|----------------------------|---------------|--------------|---|
|         |  | From 00.00 hrs            | To 24.00 hrs.              |               |              |   |
| 1       | Hi Tech Carbon Cogen Power Plant, Gummidipoondi, Tamil Nadu (S.R.) | 1 <sup>st</sup> June 2013 | 30 <sup>th</sup> June 2013 | 15            | 5.50         | Interconnection point of seller with TN STU |
|         |  | 1 <sup>st</sup> July 2013 | 31 <sup>st</sup> July 2013 | 8.5           |              |   |
|         |  | 1 <sup>st</sup> August    | 25 <sup>th</sup> May 2014  | 15            |              |   |

|  |  |      |  |  |  |  |
|--|--|------|--|--|--|--|
|  |  | 2013 |  |  |  |  |
|--|--|------|--|--|--|--|

9.3. Pursuant to the above, the Power Purchase Agreement has been entered between the petitioner and the respondent on 07-08-2013. The quantum of power to be supplied by the petitioner is indicated in clause 2 of the said PPA which is in line with the LOA issued by the respondent as specified in para 2 above. But the said clause 2 of the PPA also contains the following provision, namely:-

*"Since generators expressed hardship in maintaining the plant capacity round the clock at a specific load as the generation will always hover around, TANGEDCO will accept energy upto 10% over and above the contracted energy (energy corresponding to the contracted quantum of power) and payment will be made accordingly. For avoidance of doubt, plus 10% tolerance is only for energy accounting but the maximum scheduling should not exceed the contracted quantum."*

9.4. Further, clause 7 of the said PPA relating to Billing and Payment *inter alia* provides as follows:-

- 7. Billing and Payment:-
  - (a) x xx
  - (b) x xx
  - (g) *Any scheduling done beyond 100% of the open access approved quantum or beyond 100% of the contracted quantum will not be accepted and in case of such excess injection, no payment shall be made by TANGEDCO.*  
x xx "

9.5. Subsequent to the execution of the said PPA dated 07-08-2013, Two addendums dated 22-07-2014 and 06-08-2014 have been entered into by the parties and they relate to the extension of period of supply of power by the petitioner to the respondent as mentioned below and they donot have any relevancy to the point at issue in this Dispute Resolution Petition.

| Period  | Quantum in MW | Rate in Rs./Kwh |
|---|---------------|-----------------|
| 00.00 hrs. on 26-05-2014 to 24 hrs. on 31-05-2014 | 15 MW         | Rs.5.50         |
| 00.00 hrs. on 01-06-2014 to 24 hrs. on 07-01-2014 | 12 MW         | Rs.5.50         |
| 00.00 hrs. on 08-06-2014 to 24 hrs. on 30-06-2014 | 15 MW         | Rs.5.50         |
| 00.00 hrs. on 01-07-2014 to 24 hrs. on 31-07-2014 | 15 MW         | Rs.5.50         |

| Period  | Quantum in MW | Rate in Rs./Kwh |
|---|---------------|-----------------|
| 00.00 Hrs on 01 <sup>st</sup> August 2014 To 24.00 Hrs. on 31 <sup>st</sup> August 2014 | 15 MW         | Rs.5.50         |

9.6. Another PPA containing identical provisions as that of the PPA dated 07-08-2013 has also been entered by the parties on 05-09-2014 for supply of power 15 MW RTC Power for the period from 01-09-2014 to 30-09-2014. The period of supply, contracted quantum of supply, excess quantum supplied etc. as admitted by both parties are as follows:-

| Month                    | Actual contracted Quantum in MW | Actual contracted Quantum in Units | Quantum submitted by Petitioner in MW | Quantum submitted by Petitioner in Units | Excess quantum over and above 100% contracted quantum to be deducted in Units | Amount claimed by Petitioner | Payment advice issued for 100% contracted quantum | Excess claim deducted |
|--------------------------|---------------------------------|------------------------------------|---------------------------------------|--|---|------------------------------|---|-----------------------|
| 07/2013                  | 8.5 MW                          | 6324000                            | 8.5MW                                 | 5506616                                  | 325722  | 30286388                     | 28218960  | 2067428               |
| 03/2014                  | 15 MW                           | 9330269                            | 15 MW                                 | 9597684                                  | 267415  | 52787262                     | 51083173  | 1704089               |
| 05/2014                  | 15 MW                           | 9806038                            | 15 MW                                 | 10064878                                 | 258840  | 55356829                     | 53871208  | 1485621               |
| 06/2014                  | 15 MW                           | 8959552                            | 15 MW                                 | 9155772                                  | 196220  | 50356746                     | 49217539  | 1139207               |
| 07/2014                  | 15 MW                           | 9881929                            | 15 MW                                 | 10189455                                 | 307526  | 56042003                     | 54288610  | 1753393               |
| 08/2014                  | 15 MW                           | 10221893                           | 15 MW                                 | 10598529                                 | 376636  | 58291910                     | 56158412  | 2133498               |
| 09/2014                  | 15 MW                           | 9504119                            | 15 MW                                 | 9702379                                  | 198260  | 53363085                     | 52212655  | 1150430               |
|                          | Total                           | 64027800                           |                                       | 64815313                                 | 1930619   | 356484223                    | 345050557   | 11433666              |
| Less- Scheduling Charges |                                 |                                    |                                       |  |   |                              |   | 430000                |
| Balance deducted         |                                 |                                    |                                       |  |   |                              |   | 11005637              |

9.7. The only question to be decided in this case is whether the petitioner is entitled for payment for supply of power beyond 100% of the contracted energy. In this connection, the relevant provisions of the PPA have to be looked into. The clause 7 of the PPA dated 07-08-2013 categorically states that any scheduling done beyond 100% of the contracted quantum will not be accepted and in case of such injection, no payment shall be made. However, the petitioner vehemently opposed this stand and contended that TANGEDCO cannot be permitted to rescind from the express provisions of both the Tender and PPA which allowed 10% above the contracted energy. It is to be noted that to corroborate its contention, the petitioner has not specifically mentioned any provisions of the PPA which entitle it for payment beyond 100% of the supply. Presumably, the petitioner is referring clause 2 of the PPA to back its claim for payment for the supply beyond 100% of the contracted quantity which provides as follows:-

*"Since generators expressed hardship in maintaining the plant capacity round the clock at a specific load as the generation will always hover around, TANGEDCO will accept energy upto 10% over and above the contracted energy (energy corresponding to the contracted quantum of power) and payment will be made accordingly. For avoidance of doubt, plus 10% tolerance is only for energy accounting but the maximum scheduling should not exceed the contracted quantum."*

9.8. While clarifying the above provision, the Chief Engineer (PPP) of the respondent has informed on 25-10-2013 to all the S.Es. as follows:-

| Sl. No. | Generator | Contracted quantum in MW | Energy / day corresponding to contracted quantum in units | % of column (4) in units | Energy actually supplied / day in units | Energy admissible / day in units |
|---------|-----------|--------------------------|---|--------------------------|---|----------------------------------|
| (1)     | (2)       | (3)                      | (4)   | (5)                      | (6)                                     | (7)                              |
| 1       | x1        | 10                       | 2,40,000  | 2,42,400                 | 2,40,000                                | 2,40,000                         |
| 2       | x2        | 10                       | 2,40,000  | 2,42,400                 | 2,42,400                                | 2,42,400                         |
| 3       | x3        | 10                       | 2,40,000  | 2,42,400                 | 2,50,400                                | 2,42,400                         |

Cumulative of column (7) for the whole month is to be computed to arrive at the energy supplied and admissible for the corresponding month.

For the purpose of compensation, the summation of daily admissible energy so calculated above shall be considered for the whole month and if the summation of energy for the month falls below 85% of contracted quantum, (summation of column 4) then compensation is to be collected from the generator.

xxxxxx  
xxxxxx”

9.9. The petitioner has not challenged the above clarification nor has submitted anything to contend that the calculations arrived by the respondent as stated is not in accordance with the clarification issued by the respondent on 25-10-2013.

9.10. However, this would not in any way preclude us from dealing with the issue as the said communication is the single point of focus on the part of the petitioner for staking the claim. It is not in dispute that the tender document provides for supply of power upto 110% of the contracted quantity. It is also not in dispute that the clause 2 of the PPA dated 07-08-2003 has incorporated a provision to the effect that the respondent shall accept the energy upto 10% over and above the contracted quantum and payment would be made accordingly in view of the difficulties and hardship expressed by the generators in maintaining the plant capacity at a specific load. The clause 7 (g) of PPA, however, has a totally contrary provision to clause 2 and it makes it abundantly clear that any scheduling beyond 100% of open access quantum or beyond 100% of contracted quantum will not be accepted and in case of such injection, no payment will be made by TANGEDCO.

9.11. While clause 7 (g) is relied upon by TANGEDCO, the petitioner relies on clause 2 of the PPA and the provision in the tender for acceptance of power beyond contracted quantum. The focus, is also on the letter dated 25-10-2013 of the SE, PP of TANGEDCO who has issued a clarification to the effect that such injection over and above the contracted quantum is permissible upto 10% and proceeded to lay down a new guideline that such allowance given @ 10% over and above the quantum can be allowed on daily basis.

9.12. We are at a loss to understand as to how, in the first place, such quantum of injection over and above the contracted quantum @ 10% was allowed to be incorporated in the PPA without the approval of the Commission. We are further at a loss to understand as to how the SE (PP), on his own, laid down a new guideline permitting the injection of energy @ 10% over and above the contracted quantum. We are not going into the question as to whether such injection was necessitated in view of the practical difficulties experienced by the generators as we are not in possession of sufficient material records except for a statement made by the generators which was agreed upon by TANGEDCO.

9.13. It is to be noted that any injection beyond the contracted quantum on regular basis would result in instability of the grid and the Hon'ble APTEL in the case of Indo-Rama has held categorically held any excess injection without the approval of the licensee need not be paid for. Since the licensee has consented to such excess injection in the present case, the injection @ 110% cannot be termed as unauthorised. But the moot point which arises for consideration is as to how such a

far reaching decision could have been taken by the SE (PP) on his own without filing a petition before the Commission. We are constrained to observe that the SE has usurped the jurisdiction of the Commission.

9.14. We are further constrained to observe that the clause 13 of the PPA dated 05-09-2019 which provides for referral of disputes to the Commission only in regard to tariff related issues and settlement of other disputes in regard to other issues to Arbitration is directly inconsistent with the ratio laid down in Gujarat Urja case. As per the said ratio laid down in Gujarat Urja case, all disputes between generating companies and the licensee shall be adjudicated or referred to arbitration by the Commission and only in regard to other issues, the provision of the Arbitration and Conciliation Act, 1996 would apply. The clause 13 which restricts the power of the Commission only to tariff related issues is patently illegal and liable to be struck down. It is not known why the petitioner too has not raised objection to the said clause at the time of signing.

9.15. Here, there are two provision, namely, clause 2 of the PPA and clause 7 (g) of the PPA which are directly in contrast with each other leaving no scope for harmonious reconciliation. While the clause 2 provides for payment of money in such cases of injection beyond contracted quantum, the clause 7 (g) expressly deprives payment in such cases. We find that the clause 2 is couched in general terms and clause 7 (g) in specific terms leading to an unassailable and inescapable conclusion that clause 2 has to give way to clause 7 (g). Moreso, when clause 7 (g) has strict negative connotation and convey the meaning more explicitly than what clause 2 does.

9.16. Above all, the claim of the petitioner rests on a general permission given to inject energy in case of difficulty and this can be construed only as an one-time event or as an when there is inevitability or where there is no alternative out. This can be no way construed as an omnibus approval for injection at all times over and above the contracted quantum.

9.17. Lastly, in the absence of disputing the clarification of the respondent dated 25-10-2013 and in the absence of any specific provision in the PPA to support the claim of the petitioner, the petition has to fail, moreso, when there is a specific provision in the PPA restricting the payment for supply of energy beyond the contracted quantum. The purpose of allowing 10% over and above the contracted quantum is mentioned in the provision itself i.e. to avoid hardship in maintaining the plant capacity round the clock at a specific load as the generation will always hover around and 10% tolerance is only for energy accounting but the maximum schedule should not exceed the contracted quantum. Therefore, we hold that the claim of the petitioner for payment of energy injected over and above 100% of the contracted capacity cannot be allowed.

9.18. Having held so, the other claims namely, interest on amount withheld by the respondent for the energy injected over and above 100% of the contracted capacity would not arise. The petitioner in its Written Submission has also relied on the Hon'ble Supreme Court in PPN Power Vs TANGEDCO and the decision of Hon'ble APTEL in Chairman, TNEB & Another Vs. Indian Wind Power Association and others to stake its claim for interest. Inasmuch as the principal claim of

payment for the supply of power beyond contracted quantum itself fails for the reason stated in para 9 above, it also follows the payment of interest has to necessarily fail.

In the result, the petition is dismissed.

(Sd.....)  
**(K.Venkatasamy)**  
**Member (Legal)**

(Sd.....)  
**(M.Chandrasekar)**  
**Chairman**

/True Copy /

**Secretary**  
**Tamil Nadu Electricity**  
**Regulatory Commission**