

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

**PRESENT:**

**Thiru. M. Chandrasekar**

**.... Chairman**

**and**

**Thiru K.Venkatasamy**

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

**D.R.P. No.2 of 2016**

M/s. DCW Limited  
Sahupuram, P.O. 628 229  
Thoothukudi.

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

Vs

1. M/s. PTC India Limited  
2<sup>nd</sup> Floor, NBCC Tower  
15, Bhikaji Cama Place  
New Delhi – 110 066.

2. Tamil Nadu Generation and  
Distribution Corporation Limited  
Represented by its Chairman and Managing Director  
NPKRR Maaligai  
144, Anna Salai  
Chennai – 600 002.

.... Respondents  
(Thiru. Ravi Kishore for R-1 &  
Thiru. M. Gopinathan,  
Standing Counsel for TANGEDCO (R-2)

**Dates of hearing :** **23-07-2019; 13-08-2019; 24-09-2019;  
22-10-2019; 26-11-2019; 11-02-2020;  
22-09-2020; 10-11-2020; 05-01-2021;  
03-02-2021; 16-02-2021; 02-03-2021;  
30-03-2021; 15-04-2021; 20-07-2021;  
10-08-2021; 31-08-2021; 14-09-2021;  
05-10-2021; 09-11-2021; and 07-12-2021;**

**Date of order : 08-02-2022**

The D.R.P.No.2 of 2016 came up for final hearing before the Commission on 07-12-2021 and the Commission upon perusing the petition and connected records and after hearing the submissions of both the Petitioner and Respondents passes the following:-

**ORDER**

**1. Prayer in D.R.P. No. 2 of 2016:-**

The prayer of the petitioner in this D.R.P.No.2 of 2016 is to direct the Respondent to-

(A) Declare the actions of the Respondents reflected in the position taken in Order No. PTC/MTFG/DCWL/3889 dated 03.07.2009 as arbitrary and illegal and quash the same and consequently direct the Respondents to jointly and severally pay the sum of Rs.48,02,128/- wrongfully debited from amounts due and payable by to the petitioner, along with interest at the rate of 12 % from the due date of payment until 29.02.2016 amounting to a total of Rs.83,95,172/- and further interest at 12 % until date of payment;

(B) Direct the respondents to refund the EMD amount of Rs.10,51,594 deducted from Invoice PTC/INV/10-11/14 dated 27.05.2010 along with interest at the rate of 12% from the due date of payment until 29.02.2016, amounting to a total of Rs.16,51,003 and further interest at 12 % until date of payment; and

(C) Direct the Respondents to pay the costs of the Claim including the sums paid towards court fee by the petitioner.

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

This petition has been filed to declare the actions of the Respondents reflected in the position taken in Order No. PTC/MTFG/DCWL/3889 dated 03.07.2009 as arbitrary and illegal and quash the same and consequently direct the Respondents to jointly and severally pay the sum of Rs.48,02,128/- wrongfully debited from amounts due and payable by to the petitioner and to refund the EMD amount of Rs.10,51,594 deducted from Invoice PTC/INV/10-11/14 dated 27.05.2010 along with interest at the rate of 12% from the due date of payment until 29.02.2016, amounting to a total of Rs.1,00,46,175 and further interest at 12% until date of payment.

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

3.1. The petitioner has stated that there has been a wide gap between requirement and supply of power in the State of Tamil Nadu for the year 2008-2009 the gap was 1232 MW and there were severe power shortage during the year 2008-2009 and 2009-2010.

3.2. The substantial demand-supply gap had resulted in serious disruption in power related activities in the State. Severe shortage of power resulted in the TNEB approaching the Commission for imposition of restriction and control measures. During the year 2008 to 2011 there has been substantial power cuts in Tamil Nadu and that was in force till 5<sup>th</sup> June 2015. The same situation is prevalent in the neighboring States as well. In view of the legal regime in respect of any purchase from a generator within the State of Tamil Nadu, the TNEB is mandatorily

required to follow the procedure set out under the Electricity Act,2003 and purchase power only after following the statutorily mandated procedure and obtaining approval from the Commission.

3.3. The 1<sup>st</sup> Respondent PTC being a trader had commenced negotiations with various generators having spare capacity within the State of Tamil Nadu in order to procure power and supply the same to TNEB. The tender bearing No.4-TNEB/2008-2009 dated 05.03.2009 was the notice inviting tender for procuring the surplus power from various power generators on a short term basis by the TNEB. Thereafter, rather than entering into a contract directly with the generators, the respondent TNEB instead chose to place an order for purchase of power upon PTC India Ltd for up to 150 MW round the clock firm power with immediate effect from 31.05.2009. For the purposes of the transaction, the 1st Respondent was understood not to be acting as a Merchant Trader i.e. it did not assume any of the financial and commercial risks involved with trading. The Central Electricity Regulatory Commission fixes the trading margin of the trading licensee which at the relevant time was between 4 paise to 7 paise per unit depending upon the price of the electricity. PTC Ltd. thus acted as an intermediary linking company which was entitled only for a trading margin as fixed by CERC Regulations.

3.4. The petitioner states that thereafter, the respondent PTC Ltd. had forwarded the power purchase agreement dated 24.04.2009, which is enclosed as Annexure 2, which clearly provides for sale of power only for the period between the date of signing of the Power Purchase Agreement (PPA) between the Petitioner and the

1st Respondent, i.e., from 09.04.2009 to 31.05.2009. The terms of the agreement required that round the clock supply of 28 MW power was made for the period from 09.04.2009 to 31.05.2009.

3.5. The Petitioner received further correspondence from the 1st Respondent vide Letter No PTC/ MTFG/DCWL/3275 dated 19.06.2009 and Letter No. PTC/MTFG/DCWL/3389 dated 3.7.2009 for the sale of power until 31.05.2010. In the letter dated 19.06.2009, the rate was specified and also the fact that other terms of supply would be as per the agreement dated 24.04.2009.

3.6. The TNEB (now TANGEDCO) had also at about the same time called for tenders for short term supply of power to an extent of 500 MW of power during June 2009-May 2010 for Round the Clock supply on firm basis. The tender floated by the 2<sup>nd</sup> Respondent dated 29.05.2009, which was circulated to the Petitioner by the 1<sup>st</sup> Respondent and the same specifically set out the terms and conditions for the supply of power. It is evident from an examination of the terms that the bids were called for the lowest single rate for the firm power without any escalation during the contract period. It was also required under the terms of the tender for the bidder to set out source of supply of power trading margin and purchase prices. Consequent upon the issuance of the said tender, the 1st Respondent submitted its bid. The 1st Respondent, in view of the tender terms, entered into negotiations with various generators within the State, including the petitioner and after obtaining commitment for supply of power in the event of it being awarded the tender, submitted its bid.

3.7. Upon examination of the various bids by the Respondent TNEB (Now TANGEDCO), the 1st Respondent was named the successful tenderer. The 2<sup>nd</sup> respondent TNEB thereafter issued a letter dated 03.07.2009 agreeing to purchase up to 650 MW round the clock power sourced from the 1<sup>st</sup> Respondent in Tamil Nadu and Andhra Pradesh with immediate effect. The said tender specifically sets out the period as 19.06.2009 to 31.05.2010. The quantum was fixed at 650 MW and the rate was fixed at Rs.5.90 per KWH. The said rate included the 1<sup>st</sup> Respondent's trading margin which was fixed at 4 paise per unit to be calculated at the delivery point.

3.8. At the time of issuance of the said order, no power purchase agreement was entered into between the 1<sup>st</sup> Respondent PTC and the TNEB. They had apparently entered into an agreement in October 2009. It is also pertinent to state that in view of the said position, the 1<sup>st</sup> Respondent had also entered into transactions only on the basis of Letters of Intent (LOI) with the various generators since a proper PPA could be entered into only after the PPA between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent was concluded and signed. In order to immediately commence power supplies the said LOI(s), *inter alia*, provided the validity and tenure as also the tariff payable.

3.9. The earlier arrangement was followed by a fresh order bearing Order No. PTC/MTFG/DCWL/3889 dated 03.07.2009 issued by PTC for scheduling of power from the Petitioner's project to TNEB through PTC till 31st May, 2010. The clauses

pertaining to scheduling, billing and payment, relevant to the dispute in question are duly extracted herein below:

**"5. Scheduling:**

*DCWL shall schedule this power in full except in case of transmission constraints as certified by the SLOC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by DCWL to PTC by 10.00 Hrs of 28th day of the preceding month for the following month (Starting from 0.00 Hrs of 1st to 24.00 Hrs of last day) as per the format annexed herewith.*

**6. Billing Cycle:**

*DCWL shall raise monthly bills for this transaction. Each monthly bill will be raised starting from 0.00 hrs of 27<sup>th</sup> day of month to 24.00 hrs. of 27<sup>th</sup> day of the next month respectively. Energy accounting shall be as per the JMR only. The relevant bills will be raised on the basis of JMR duly signed by representative of DCWL and TNEB for the concerned month. Payment shall be released for the energy indicated in JMR prepared by representative of TNEB and DCWL irrespective of the scheduling data. It is the responsibility of DCWL to get the initial meter reading prior to commencement of transaction certified by the respective office (s) of TNEB."*

**7. Payment:**

*The payment will be deposited by PTC in a designated account of DCWL within 10 days from the date of receipt of the bill by fax in the event of 10<sup>th</sup> day being a bank holiday in New Delhi, the next working day would be the due date for payment. In case of timely payment by PTC, adjustment for the admissible rebated as per Para 8 could be provisionally made while making payment against the monthly bill.*

**8. Rebate for Prompt Payment:**

*DCWL shall allow a rebate of 2.0% on the billed amount if PTC pays the amount to DCWL within due date of 10 (Ten) days of presentation of the bill by DCWL."*

3.10. Pursuant to the aforesaid agreement, the Petitioner duly commenced supply of power to TNEB through PTC with the JMRs duly signed by the representatives of the Petitioner and the TNEB recording the quantum of supply for the months of July 09, August 09 and September 09. The bills raised against the aforesaid supplies were duly raised and payments were effected against the same.

3.11. However, the Petitioner was shocked and surprised to find that an amount of Rs.48,02,128/-, was deducted from the payment against the invoices raised for November, 2009 and December 2009 alleging that there was an oversupply of power by the Petitioner during the months of August and September 2009 to TNEB. This was communicated to the Petitioner vide letter dated 19.11.2009. However, in the said letter the 1<sup>st</sup> Respondent had also made it clear that it was in continuous dialogue with the TANGEDCO and was taking steps to sort the issue.

3.12. Upon further enquiries, it became evident that the same was on account of the error on the part of the 1<sup>st</sup> Respondent / PTC in taking the billing period as the basis for calculation of shortfall/surplus as against the scheduling period as provided for in the agreement between the parties, more particularly, Clause 13 thereof, which reads as follows:-

*"13. Compensation for Default in Supply/Off take*

*DCWL will declare the monthly availability in energy terms at delivery point. It is obligatory for DCWL to schedule 80 % of the declared energy in a month as arrived by summing up the declared monthly availability falling in that particular month and it is obligatory for PTC to off take 80% of the declared energy in a month as arrived by summing up the declared monthly availability falling in that particular month.*

*If DCWL fails to schedule 80 % of declared energy in a month then compensation shall be paid by DCWL @ Rs.3.04/KWh to the extent of shortfall of 80% of monthly contracted energy. Similarly, if PTC fails to off take 80 % of the declared energy in a month then compensation shall be paid by PTC @ Rs.2.46/KWh to DCWL for the shortfall which falls short of 80% of energy. "*

3.13. The Petitioner has explained vide its letter dated 23.11.2009 that as per the terms and conditions in the Order No.PTC/MTFG/DCWL/3889 dated 03.07.2009,

compensation for default is to be determined on the basis of scheduled/declared energy for the month commencing from 1st of the said month until the last day of the month. As per the said order, contractual scheduling was from 00:00 hours of 1<sup>st</sup> August 2009 to 24:00 hours of 31<sup>st</sup> August 2009 and accordingly 80% of the contracted and scheduled quantum of 28 MW equivalent to 1,66,65,270 units has been only injected by the Petitioner during this period. As it transpired, the power sold billing quantum units in Aug 2009 (27.07.2009 to 27.08.2009) was claimed as excess supplied to TANGEDCO by TANGEDCO and the 1st Respondent PTC by their letter of 16.11.2009 filed along with the petition has taken a position contrary to the correct facts since the petitioner has matched power supply & dispatch from 00:00 hrs of 1<sup>st</sup> Aug to 24:00 hrs of 31<sup>st</sup> Aug 2009 with respect to the contracted quantum in terms of PTC's requirements and not from 27<sup>th</sup> July 2009 to 27<sup>th</sup> August 2009.

3.14. It was only after the receipt of the letter dated 16.11.2009 from the 1st Respondent in which it referred to agreements signed with the 2<sup>nd</sup> Respondent, it was intimated that compensation would be calculated as per the contracted quantum accepted by TNEB and it was irrespective of the monthly schedule submitted by the Petitioner and would be calculated as per the billing cycle of the respective EDC. After receipt of the letter the petitioner has been following billing cycle from 27<sup>th</sup> to 27<sup>th</sup> and matching the monthly scheduled contracted quantum. However PTC cannot seek to retrospectively apply its letter to the month of June 2009 and August 2009.

3.15. Though PTC Ltd. acts as an intermediary and the sale of power is effectively to TANGEDCO/TNEB, due to the structuring of the arrangements, all instructions with respect to scheduling etc. were required to be provided by PTC Ltd. to the petitioner. The petitioner was not aware of the exact arrangement with respect to the transactions and instructions exchanged between the Respondents. As such it acted bonafide in terms of what it believed to be correct on the basis of PTC Ltd.'s instruction which was its point of contact for the generation and transmission of electricity into the grid.

3.16. The Petitioner addressed a letter dated 24.12.2009 to the 1<sup>st</sup> Respondent highlighting how the time frame adopted by the 1<sup>st</sup> Respondent in computing shortfall/surplus in supply of power, being at variance to the contractual terms, was the cause of certain wrongful debits. The 1<sup>st</sup> Respondent was therefore requested to refund the amount of Rs.48,02,128/-. It was further pointed out that having come to know that TNEB was considering the billing cycle for calculating the contracted quantum of units instead of the scheduling period commencing from 00.00 hrs of 1<sup>st</sup> day to 24.00 hrs. of last day of the month, the petitioner had also started following the TNEB billing cycle for the purposes of computing the contracted scheduled quantum.

3.17. The Petitioner once again issued a letter dated 18.07.2011, noting that the amount as claimed under letter dated 23.11.2009 continued to remain unpaid despite continuous follow-up calling upon the 1st Respondent to make immediate payment of the substantial outstanding amount.

3.18. Thereafter, the Petitioner was constrained to issue several letters dated 27.12.2012, 18.07.2014, 20.03.2015, 06.05.2015, 13.05.2015, 22.10.2015, and on 19.11.2015, all calling upon the 1st Respondent to make payment of the aforesaid dues immediately failing which the Petitioner would have to initiate appropriate legal proceedings for recovery of the dues.

3.19. The Petitioner received a reply letter from the 1st Respondent vide letter dated 29.11.2013. In this, 1<sup>st</sup> Respondent has taken the stand that the issue of payment for the excess energy ought to be taken up with the 2nd Respondent, TANGEDCO. Until then, the Petitioner was under the bonafide belief that the 1<sup>st</sup> Respondent was taking steps to sort out the issue with TANGEDCO directly as had been indicated in its letter dated 19.11.2009, and moreover there has been no denial of the liability of payment by the 1st Respondent in its correspondence. On 6.11.2015, the 1st Respondent addressed another letter stating that it cannot make any payment in case of non-receipt from the 2<sup>nd</sup> Respondent. The Petitioner addressed a letter dated 18.07.2014 to the 2<sup>nd</sup> Respondent, requesting refund of the amount of Rs.48,02,128/ -. However, to the said correspondence, there was no reply and it was only on 29.09.2015 that a meeting was held, where the officials of the 2<sup>nd</sup> Respondent has also washed their hands of the issue and the Petitioner has been asked to sort out the issue with the 1<sup>st</sup> Respondent.

3.20. The Petitioner states that the refusal of payment by both the Respondents as well as the continued 'passing the buck' tactics indulged in by them have left the

Petitioner denied of its right to recover the amount, despite the fact that even by its letters dated 29.11.2013 and 14.07.2014, there has not been any denial by the 1<sup>st</sup>Respondent of the liability to pay the amount but it has taken the stand that it can only pay the Petitioner if the 2<sup>nd</sup>Respondent pays it.

3.21. The Petitioner states that it is entitled to a refund of the amount of Rs.48,02,128/- along with interest from the due date of payment, irrespective of whether the 1<sup>st</sup>Respondent is entitled to the amount or not. As has already been stated above, the Petitioner has supplied the power in accordance with the terms and conditions of the order and the letter dated 16.11.2009 cannot be given retrospective effect to.

3.22. In addition to the above, as against the Tender No.2/ 2010-2011 released by TANGEDCO dt.08.05.2010, the 1<sup>st</sup>Respondent had informed the petitioner to pay Earnest Money Deposit of Rs.10,51,594 and the said amount has been deducted by the 1<sup>st</sup>Respondent from the Invoice No.PTC/ INV//10-11/14 dated 27.05.2010. The petitioner sought for refund of this amount vide letter dt. 22.06.2011, after the tender was completed on 31.05.2011. In this regard, the Petitioner has also issued a series of reminder letters as no payment was forthcoming despite continued admission of the liability to make payment by the 1<sup>st</sup>Respondent. The various letters dated 07.03.2013,11.04.2013, 25.11.2013, 08.07.2014, 20.03.2015, 06.05.2015 are filed collectively along with the petition. Although PTC has promised to refund this EMD amount of Rs.10,51,594 vide their letters PTC/ MTFG/DCW/ 4192 dated 04.07.2011, 18112 dated 29.11.2013, 6219 dt.14.07.2014 &

2102dt.08.05.2015, filed collectively along with the petition until date this EMD amount has not been returned to the petitioner despite their repeated requests.

3.23. The Petitioner states that there has been an unequivocal admission of liability by the 1<sup>st</sup> Respondent to make the payment as recently as on 08.05.2015. However, the 1<sup>st</sup> Respondent has been consistently delaying effecting the payment on the pretext that there is an ongoing arbitration between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. However, at the meeting between the officials of TANGEDCO and the Petitioner on 29.09.2015, it was intimated to the Petitioner that the 2<sup>nd</sup> Respondent would be making a payment of Rs.220 lakh to the 1<sup>st</sup> Respondent.

3.24. In light of the continued inaction on the part of the 1<sup>st</sup> Respondent to act as per its contractual obligations, the Petitioner has been left with no other option but to directly initiate proceedings for recovery of the dues with interest. The petitioner states that while the payments are due from the 1<sup>st</sup> Respondent, in view of the peculiar stand taken by the 1<sup>st</sup> Respondent that the payments due to the petitioner are dependent upon the 2<sup>nd</sup> Respondent making the payment, it is necessary that the 2<sup>nd</sup> Respondent is also a party to the present recovery proceedings. Furthermore, the petitioner is entitled to the sums claimed and therefore in law and in equity the Respondents are jointly and severally liable to make payment in that regard. Therefore, it has requested the Commission to fix the liability and direct payment by the Respondent. In as much as the 1<sup>st</sup> Respondent has consistently taken the position that the repayment would depend upon the final outcome of the

inter-se claims between the Respondents and had not denied the claim of the Petitioner, the claims are well within time

#### **4. Contention of the First Respondent:-**

4.1. The Petitioner has claimed the following in its Petition

- (i) Payment of Rs.48,02,128 on account of deduction by PTC/TANGEDCO for oversupply during the months of August and September 2010.
- (ii) Refund of EMD of Rs.10,51,594/-

4.2. The issue No (i) above is not maintainable as the amount has been deducted as per terms of the PPA/Lol/ Agreement. As regards refund of EMD, the matter is quite old i.e. more than a decade, and the Respondent No.1 is checking whether the corresponding EMD has been refunded by TANGEDCO. On checking and verifying the records, if the EMD amount is payable same shall be paid by the answering Respondent.

4.3. The PTC had a back to back arrangement with various generators, including petitioner for supply of power from their units to Respondent No. 2 through Respondent No.1, under tenders / RFP floated by TANGEDCO.

4.4. The Respondent had entered into a Power Purchase Agreement with the Petitioner on 24.04.2009 for supply of power to TANGEDCO through PTC until 131.03.2010.

4.5. Subsequently this Respondent vide its letter dated 03.07.2009 informed the Petitioner that power from the project of the Petitioner shall be scheduled to TNEB through PTC till 31.05.2010 on the terms specified in the letter.

4.6. Some of the relevant clauses/provisions of the letter dated 03.07.2009 are as under:-

*“5. Scheduling*

*DCWL shall schedule this power in full except in case of transmission constraints as certified by the SLDC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by DCWL to PTC by 10:00 Hrs of 28<sup>th</sup> day of the preceding month for the following moths (Starting from 00:00 Hrs of 1st to 24:00 Hrs of last day) as per the format annexed herewith.*

*6. Billing Cycle*

*DCWL shall raise month bills for this transaction. Each monthly bill will be raised starting from 00:00 Hrs of 27<sup>th</sup> day of month to 24:00 hrs of 27<sup>th</sup> day of the next month respectively. Energy accounting shall be as per the JMR only. The relevant bills will be raised on the basis of JMR duly signed by representative of DCWL and TNEB for the concerned month. Payment shall be released for the energy indicated in JMR prepared by representative of TNEB and DCWL irrespective of the scheduling date. It is the responsibility of DCWL to get the initial meter reading prior to commencement of transaction certified by the respective office of TNEB.*

*11. Compensation for Default in Supply/Offtake*

*DCWL will declare the monthly availability in energy terms at delivery point. It is obligatory for DCWL to schedule 80% of the declared energy in a month as arrived to Cumming up the declared monthly availability falling in that particular month and it is obligatory to PTC to offtake 80% of the declared energy in the month as arrived by summing up the declared monthly availability falling in that particular month.”*

4.7. Thus the supply of power by the Petitioner to TANGEDCO through PTC was strictly in terms of the aforesaid letter dated 03.07.2009 only. Further the Petitioner had acted in terms of the letter and started supplying power to TANGEDCO through PTC.

4.8. In terms of the letter dated 03.07.2009, there was no provision for supply of additional quantum of power than the contracted quantum. Further, PTC/TANGEDCO had contractual authority to restrict the power to 80%.

4.9. Further, as regards compensation it has been clearly agreed between the parties that it was obligatory on PTC/TANGEDCO to offtake 80% of the declared energy in a month. Thus, the Respondent had a right to restrict the flow of power from the Petitioner to 80% and no compensation was payable on account of such restrictions upto 80% .

4.10. The petitioner started supply of power and submitted JMR from 27-07-2009 to 27-08-2009 and invoices. Similar JMR were submitted for subsequent months as well. The above was as per the billing cycle mentioned in the letter dated 03.07.2009.

4.11. On 23.07.2009 at 08:23 p.m., the Respondent No.1 received a fax from TANGEDCO (then TNEB) that with effect from 00:00 hrs on 24.07.2009 asking PTC to give necessary instructions to CPP generators to maintain 80% of the scheduled quantum until further intimation. Consequently, PTC on 24.07.2009 forwarded the above fax to all CPP for necessary action.

4.12. Thus, the TANGEDCO/PTC was well within its contractual and legal right to restrict the flow of power from the project of the Petitioner to 80%. Further, Petitioner have been become aware from such restrictions cannot supply power

beyond 80% to TANGEDCO through PTC as there was no such provision. The above facts have been reiterated by PTC in its various communications to the Petitioner.

4.13. The Respondent also informed the Petitioner that the issue has to be taken up by the petitioner directly with TANGEDCO as the supply of power was beyond the provisions of the Agreement with PTC. Accordingly, the petitioner approached TANGEDCO vide its letter dated 18.07.2014 requesting TANGEDCO to release the payment for excess quantum of power supplied by the Petitioner to the Respondent No.2.

4.14. From the above correspondence, it is evident that the Petitioner has acknowledged the fact that the issue of release of the payment is to be resolved between Petitioner and Respondent No.2 as Respondent No.2 did not have any liability towards the same.

4.15. As regards the Arbitration proceedings between Respondent No.1 and Respondent No.2, this is to confirm that the arbitral proceedings was initiated in respect of supplies which were made by various generators to TANGEDCO through PTC strictly under NITs/LOIs and Agreements, and the present supply was not covered under the said arbitral proceedings.

4.16. In view of the facts and circumstances, 1<sup>st</sup> Respondent sought to dismiss the prayer of the Petitioner for payment of Rs.48,02,128/- as not maintainable.

## 5. Contention of the Second Respondent:-

5.1. TANGEDCO (Formerly known as TNEB), the second Respondent has entered into agreement with M/s. PTC India Ltd (PTC) on 21.10.2009 for procuring the Round the Clock (RTC) power in the range of 325 MW to 433 MW for the period from 19.06.2009 to 31.05.2010. Again the second Respondent entered into an agreement with first Respondent on 25.01.2011 for procuring RTC power in the range of 469 MW to 571 MW for the period from 26.08.2010 to 31.05.2011.

5.2. The first Respondent had entered into separate agreement with various generators with different set of terms and conditions. The Petitioner is also one such generator entering into agreement with M/s. PTC, the first Respondent herein. The above agreement is a bipartite agreement executed between the Petitioner and first Respondent and not a tripartite agreement.

5.3. The 2<sup>nd</sup> Respondent referred the case in DRP No.8 of 2013 wherein the Commission has given direction for similar issues in para 6.3, which is reproduced below:

*"It may be seen from the above/ that the provisions of the contract between PTC and TANGEDCO and the provisions of the contract between PTC and the Petitioners contain different provisions. In order to term a contract as Back to Back contract; the provisions between the contracting parties should contain identical provisions. In view of the different provisions in the above two contract. it cannot be termed as Back to Back contract. As such the contract between PTC and TANGEDCO and PTC and the Petitioner are to be interpreted separately.*

*There is no privity of contract between the Petitioner and the first Respondent TANGEDCO as the agreements entered into between TANGEDCO and PTC is a bi-partite agreement. Similarly, the 2<sup>nd</sup> Respondent PTC's agreement with the Petitioner, OPG Power Generation Pvt Ltd is also a bi-partite agreement. As the petitioner's power*

*plant is connected with TANGEDCO's Grid, TANGEDCO's representative signs the Joint Meter Reading as Data Recorder for the sole purpose of energy accounting and no dispute can be attributed to the "Data Recorder".*

*Hence, in the given situation/ TANGEDCO cannot be a party to this present petition. ... "*

5.4. There is no contractual agreement between the Petitioner and the second Respondent and it is the duty of the Petitioner and the first Respondent to sort out the issues arose in the contract between the Petitioner and the first respondent.

5.5. There is no privity of contract between Petitioner & 2<sup>nd</sup> Respondent. The reliefs sought in the above petition arise out of the agreements dated 03.07.2009 entered into between the Petitioner in DRP 2 of 2016 and the first Respondent PTC Ltd. The second Respondent are not signatory or party to the said agreements. The breach of contractual obligation alleged by the petitioner which gives rise to the petitions arise out of the agreement dt 03.07.2009 and necessarily relate to breach purportedly committed by the first Respondent. As the second Respondent is not party to the said agreement, no breach of any contractual obligation can be levelled against the said Respondent. It is well settled by a catena of decisions that no claim can be made against a stranger to the contract (AIR 1970 Supreme Court 504-para 9). The breach, if any of the contractual obligations was by the first Respondent and no relief can be granted against second Respondent.

5.6. This Respondent has been unnecessarily impleaded to the above proceedings as second Respondent with an intention by the petitioner to harass and attain unlawful gains.

5.7. The petition filed by the Petitioner has no relevance to the second Respondent and there is no privity of contract between the Petitioner and the second Respondent and hence the second Respondent may be discharged from the above Dispute Resolution Petition.

5.8. If the above petition against this Respondent is entertained, this second Respondent would be put to severe unnecessary strain, hardship and consequential loss.

## **6. Written Submissions of the Petitioner:-**

6.1. The present petition was filed to declare the actions of the Respondents reflected in the position taken in order No. PTC/MTFG/DCWLI3889 dated 03.07.2009 as arbitrary and illegal and quash the same and consequently direct the Respondents to jointly and severally pay the sum of Rs.48,02,128/- wrongfully debited from amounts due and payable to the petitioner and to refund the EMD amount of Rs.10,51,594/- deducted from Invoice PTCIINV/10-11 14 dated 27.05.2010 along with interest at the rate of 12% from the due date of payment until 29.02.2016, amounting to a total of Rs.1,00,46,175/- and further interest at 12% till date of payment.

6.2. An argument was sought to be raised during oral submissions that the Commission has no jurisdiction, either because the terms of the Agreement between the petitioner & PTC provide for jurisdiction in Delhi or that it has to be referred to arbitration.

6.3. This submission is entirely without merit for two reasons

(i) First, since in matters involving electricity, the Electricity Act, 2003 having overriding effect, it is only the Regulatory Commission which would have jurisdiction. Even with regard to an agreement which has an arbitration clause, it is for the concerned commission to either decide for itself or refer the matter to arbitration. This issue has been long settled by the binding judgment of the Hon'ble Supreme Court in the Gujarat UrjaVikas Nigam Ltd. VsEssar Power Ltd (2008) 4 SCC 755.

(ii) Second, the claim that dispute has to be decided in Delhi or by the CERC is also entirely without merit since the Hon'ble Supreme Court has settled the issue in its judgment dated 11.4.2017 in the Energy Watchdog Case (2017) 14 SCC 80 wherein it held that

*"22. The scheme that emerges from these Sections is that whenever there is inter-State generation or supply of electricity, it is the Central Government that is involved, and whenever there is intra-State generation or supply of electricity, the State Government or the State Commission is involved. This is the precise scheme of the entire Act, including Sections 79 and 86. It will be seen that Section 79(1) itself in subsections (c), (d) and (e) speaks of inter-State transmission and inter-State operations. Order in Petition No. 61/MP/2021 Page 12. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression "within the State" in sub-clauses (a), (b), and (d), and "intra-state" in sub-clause(c). This being the case, it is clear that the PPA, which deals with generation and supply of electricity, will either have to be governed by the State Commission or the Central Commission. The State Commission's jurisdiction is only where generation and supply takes place within the State. On the other hand, the moment generation and sale takes place in more than one State, the Central Commission becomes the appropriate Commission under the Act. What is important to remember is that if we were to accept the argument on behalf of the appellant, and we were to hold in the Adani case that there is no composite scheme for generation and sale, as argued by the appellant, it would be clear that neither Commission would have jurisdiction, something which would lead to absurdity. Since generation and sale of electricity is in more than one State obviously Section 86 does not get attracted. This being*

*the case, we are constrained to observe that the expression "composite scheme" does not mean anything more than a scheme for generation and sale of electricity in more than one State."*

(iii) In the present case it is an intra-state generation and supply where the TANGEDCO has procured the power generated by the petitioner from the petitioner's bus-bar. It is therefore only the TNERC which has jurisdiction. The PTC is also a licensee under the Act and is subject to the jurisdiction of the Commission.

(iv) It is also pertinent to state that several judgments have already been passed by the Commission where PTC and TANGEDCO were held liable in respect of transactions arising from agreements under the same set of tenders.

(v) It was also stated that the TANGEDCO has no privity of contract with the petitioner. However, it is pertinent to state that the entire supply was pursuant to tenders for supply to TANGEDCO which tenders were awarded in favour of PTC and PTC in turn procured the power and supplied to TANGEDCO. Thus as the beneficiary of the electricity the TANGEDCO is also jointly and severally liable depending upon the decision of the Commission. Therefore, this stand of TANGEDCO is entirely without merit. Further TANGEDCO is both a proper and necessary party to the dispute since the power was procured and used by it and further it is clear from correspondence that even PTC was claiming that upon settlement of its issues with TANGEDCO on such power supply the amount will be settled. Furthermore the very issue is with regard to alleged instructions of TANGEDCO to PTC. And it is the stand of the petitioner that such alleged instruction was never communicated to the petitioner and all electricity generated and supplied were in accordance with the agreement with PTC. Therefore the

presence as well as determination of liability upon PTC or TANGEDCO or both will have to be made by the Commission on the basis of the pleadings and records.

6.4. The 1<sup>st</sup> Respondent PTC being a trader had commenced negotiations with various generators having spare capacity within the State of TamilNadu in order to procure power and supply the same to TNEB. Accordingly, the letter dated 05-03-2009 was the notice inviting tender for procuring the surplus power from various power generators on a short term basis by the TNEB. Thereafter, rather than entering into a contract directly with the generators, the respondent TANGEDCO instead chose to place an order for purchase of power upon PTC India Ltd for up to 150 MW round the clock firm power with immediate effect from 31.05.2009. For the purposes of the transaction, the 151 Respondent was understood not to be acting as a Merchant Trader i.e., it did not assume any of the financial and commercial risks involved with trading. The Central Electricity Regulatory Commission fixes the trading margin of the trading licensee which at the relevant time was between 4 paise to 7 paise per unit depending upon the price of the electricity. A perusal of the contract which was subsequently filed by TNEB/TANGEDCO reveals that PTC bore equal risk and was also independently acting. It is for this reason that PTC would be liable for the electricity supplied as such supply was in accordance with the contract. Any inter se claims or settlements between PTC and TNEB are not relevant for the purposes of the petitioner since the petitioner has to be paid for its supplies made, which were in terms of PTC's contract and which electricity was factually taken benefit of by TANGEDCO as well. It cannot be the case that the petitioner acted in terms of the contract and that both

PTC and TNEB by claiming that the other is liable, not compensate the petitioner. The PTC would be liable under contract and if the Commission finds upon pleadings of the Respondents that TNEB/TANGEDCO is also liable that liability would arise under general law as the beneficiary having to compensate the entity from whom it received the benefit and to whom compensation is due.

6.5. The petitioner states that they entered into a PPA with PTC on 24.04.2009 which required round the clock supply of 28 MW power for the period 09.04.2009 to 31.05.2009. Thereafter, the Petitioner received correspondences from PTC dated 19.06.2009 and 03.07.2009 extending sale of power till 31.05.2010 and further stating that the rate and other terms of supply would be as per the PPA dated 24.04.2009. This arrangement was followed by a fresh order dated 03.07.2009 issued by PTC for scheduling of power from the Petitioner's project to TANGEDCO through PTC till 31.05.2010. The clauses pertaining to scheduling, billing and payment, relevant to the present petition, is extracted hereunder:

*"5. Scheduling:*

*DCWL shall schedule this power in full except in case of transmission constraints as certified by the SLOC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by DCWL to PTC by 10.00 Hrs. of 28<sup>th</sup> day of the preceding month for the following month (starting from 0.00 hrs of 1<sup>st</sup> to 24.00 hrs of last day).*

*6. Billing Cycle:*

*DCWL shall raise monthly bills for this transaction. Each monthly bill will be raised starting from 0.00 Hrs of 2<sup>th</sup> day of month to 24.00 Hrs of 27<sup>th</sup> day of the next month respectively. Energy accounting shall be as per the JMR only. The relevant bills will be raised on the basis of JMR duly signed by representative of DCWL and TNEB for the concerned month. Payment shall be released for the energy indicated in JMR prepared by representative of TNEB and DCWL irrespective of the scheduling data. It is the responsibility*

*of DCWL to get the initial meter reading prior to commencement of transaction certified by the respective office (s) of TNEB. "*

*7. Payment:*

*The payment will be deposited by PTC in a designated account of DCWL within 10 days from the date of receipt of the bill by fax in the event of 10th day being a bank holiday in New Delhi, the next working day would be the due date for payment. In case of timely payment by PTC, adjustment for the admissible rebated as per Para 8 could be provisionally made while making payment against the monthly bill.*

*8. Rebate for Prompt Payment:*

*DCWL shall allow a rebate of 2.0% on the billed amount if PTC pays the amount to DCWL within due date of 10 (Ten) days of presentation of the bill by DCWL."*

6.6. It duly commenced supply of power to TANGEDCO through PTC recording quantum of supply for the months of July, August and September 2009. Pertinently, the bills raised in regard to the aforesaid supplies were duly raised and payments were also effected against the same. Therefore, it is evident that the billing cycle for the purpose of compensation was as per the terms of the PPA, i.e., 0.00 hrs 1<sup>st</sup>August, 2009 to 24.00 hrs 31<sup>st</sup>August 2009 and payments were effected based on the same.

6.7. The Petitioner states that they received a letter for the first time dated 19.11.2009 wherein it was intimated that an amount of Rs.48,02,128/- will be deducted from the payment against invoices raised for November and December, 2009. However, it is pertinent to note that PTC had categorically stated that it was in continuous dialogue with TANGEDCO and was taking steps to sort this issue.

6.8. Upon further enquiries, it became evident that the same was on account of an evident fault on the part of the 1<sup>st</sup> Respondent/PTC in taking the billing period as the basis for calculation of shortfall/surplus as against the scheduling period as provided for in the agreement between the parties, more particularly, Clause 13 thereof, which reads as follows:

*"13. Compensation for Default in Supply/Off take*

*DCWL will declare the monthly availability in energy terms at delivery point. It is obligatory for DCWL to schedule 80 % of the declared energy in a month as arrived by summing up the declared monthly availability falling in that particular month and it is obligatory for PTC to off take 80% of the declared energy in a month as arrived by summing up the declared monthly availability falling in that particular month.*

*If DCWL fails to schedule 80% of declared energy in a month then compensation shall be paid by DCWL @ Rs.3.04/KWh to the extent of shortfall of 80% of monthly contracted energy. Similarly, if PTC fails to off take 80% of the declared energy in a month then compensation shall be paid by PTC @ Rs.2.46/KWh to DCWL for the shortfall which falls short of 80% of energy. "*

6.9. The Petitioner has explained vide its letter dated 23.11.2009 that as per the terms and conditions in the order dated 03.07.2009, compensation for default is to be determined on the basis of scheduled/declared energy for the month commencing from 1<sup>st</sup> of the said month until the last day of the month. As per the said order, contractual scheduling was from 00:00 hours of 1<sup>st</sup> August 2009 to 24:00 hours of 31st August 2009 and accordingly 80% of the contracted and scheduled quantum of 28 MW equivalent to 1,66,65,270 units have been only injected by the Petitioner during this period.

6.10. The power sold billing quantum units in Aug 2009 (27.07.2009 to 27.08.2009) was claimed as excess supplied to TANGEDCO by TANGEDCO, and

the 1<sup>st</sup> Respondent PTC by their letter of 16.11.2009 had taken a position contrary to the terms of the PPA and Order dated 03.07.2009 since the petitioner has matched power supply & dispatch from 00:00 hrs of 1<sup>st</sup> Aug to 24:00 hrs of 31<sup>st</sup> Aug 2009 with respect to the contracted quantum in terms of PTC's requirements and not from 27<sup>th</sup> July 2009 to 27<sup>th</sup> August 2009.

6.11. It was only after the receipt of the letter dated 16.11.2009 from the 1<sup>st</sup> Respondent in which it referred to agreements signed with the 2<sup>nd</sup> Respondent, it was intimated that compensation would be calculated as per the contracted quantum accepted by TANGEDCO and it was irrespective of the monthly schedule submitted by the Petitioner and would be calculated as per the billing cycle of the respective EDC. After receipt of the letter the petitioner has been following billing cycle from 27<sup>th</sup> to 27<sup>th</sup> and matching the monthly scheduled contracted quantum. However, PTC cannot seek to retrospectively apply its letter to the month of June and August, 2009.

6.12. A perusal of its counter affidavit clearly discloses that the PTC has never denied the belated issuance of this information which is the petitioner's specific stand. In fact even in the counter while PTC states that such intimation was given, it has not provided any proof of the same or the date and has merely filed a copy of the fax from TANGEDCO. Absolutely no proof has been given to controvert the stand of the petitioner of the belated instruction/information.

6.13. That the fact that PTC has been directed by TANGEDCO to reduce its power supply to 80% does not translate into/ have any material bearing on the contract of Petitioner with PTC. There is no clause in the order dated 03.07.2009 which mandates that changes in the agreement between PTC and TANGEDCO will be incorporated in the agreement with the Petitioner. Even assuming that such a direction from TANGEDCO has a bearing, PTC ought to have communicated it to the petitioner. Such communication can be given effect only after receiving such communication and PTC cannot seek to enforce the same retrospectively.

6.14. The 1<sup>st</sup> Respondent PTC has stated that they have informed the petitioner, however, have conveniently omitted to mention the date of such communication in their counter. PTC has not provided any date of communication nor any letter to show that the change in billing cycle was informed to the petitioner prior to August 2009.

6.15. It is not the stand of the petitioner that they were never informed of such a change. They were informed of such a change for the first time only vide letter dated 16-11-2009, much after the period during which the petitioner purportedly oversupplied power. In fact, the same was categorically communicated to the 1<sup>st</sup> Respondent PTC contemporaneously vide its letter dated 13-05-2015.

6.16. Though PTC Ltd. acts as an intermediary and the sale of power is effectively to TANGEDCO/TNEB, due to the structuring of the arrangements, all instructions with respect to scheduling etc. were required to be provided by PTC Ltd. to the

petitioner. The petitioner was not aware of the exact arrangement with respect to the transactions and instructions exchanged between the Respondents. As such it acted bonafide in terms of what it believed to be correct on the basis of PTC Ltd.'s instruction which was its point of contact for the generation and transmission of electricity into the grid.

6.17. It was the duty of the 1<sup>st</sup> Respondent PTC to intimate the Petitioner of any change in the terms of the PPA or Order dated 03.07.2009 and the petitioner cannot be put at a loss for the failure of the 1<sup>st</sup> Respondent to communicate any change.

6.18. The fact that the 1<sup>st</sup> Respondent is not a mere intermediary and is a trader has been categorically held by the Commission in its Order dated 02.03.2021 in DRP No. 8 of 2016, wherein PTC was the 2<sup>nd</sup> Respondent. Relevant portions of the Order are extracted hereinbelow for quick reference:-

*"6.15. We have arrived at the conclusion purely based on the conduct of the parties. The second respondent being an intermediary as contended by it ought to have forwarded the request of the petitioner to the first respondent with either 1<sup>st</sup> June 2010 as the effective date or 10<sup>th</sup> June as the effective or even could have left the decision to the first respondent instead of deciding on its own resulting devolving of liability on it. We do not agree in principle with the contention that the second respondent is a mere intermediary. The second respondent being a trader, having back to back contracts and deriving trade margin cannot contend that no liability can be fastened on it and would only enjoy the benefits. In any case, even assuming that the second respondent is a mere conduit or intermediary, still the unilateral fixing of 04-06-2010 as the effective date has no rationale and in fact it has indicated that the second respondent had abdicated the role of intermediary and assumed a more active role. Hence, the inherent risks associated with playing an active role will have to be necessarily borne by the second respondent. However, the power injected into the grid had been utilized by the first respondent. Therefore, both the first respondent and the second*

*respondent are jointly and severally liable to pay the cost of the power injected by the petitioner during the period in question. "*

6.19. A bare perusal of the counter filed by the respondents demonstrates that they are simply shifting the blame on each other. While PTC contends that the power was supplied to TANGEDCO and therefore, TANGEDCO must pay the petitioner, the TANGEDCO contends that there is no privity of contract since the PPA is executed between the petitioner and PTC, TANGEDCO is not liable. It is imperative to note that while the PPA is between PTC and the petitioner, the same is consequent to the PPA between TANGEDCO and PTC and thus, neither TANGEDCO nor PTC can claim that they are not liable. In fact, PTC in its letter dated 19.11.2009 had stated that it was in continuous dialogue with TANGEDCO and was taking steps to sort this issue. The 1<sup>st</sup> Respondent during the exchange of communication, has not denied its liability and in its letter dated 06.11.2015, as categorically stated that it cannot make payment in case of non-receipt from the 2<sup>nd</sup> Respondent.

6.20. The refusal of payment by both the Respondents as well as the continued 'passing the buck' tactics indulged in by them have left the Petitioner denied of its right to recover the amount, despite the fact that even by its letters dated 29.11.2013 and 14.07.2014, there has not been any denial by the 1st Respondent of the liability to pay the amount but it has taken the stand that it can only pay the Petitioner if the 2<sup>nd</sup> Respondent pays it.

6.21. The delay in refund of EMD is even more objectionable and shows the clearly unconscionable attitude of the PTC in dealing with the generators. For more than a decade it has held on to the petitioner's money while always claiming it would refund the same. It is wholly unbelievable that the PTC would not have a record of the EMD that is to be refunded. Further, not only have the dues not been paid, the PTC has also illegally withheld the EMD. This is thus a fit case to order exemplary costs upon the Respondent PTC and also interest at 18% p.a. Even after admitting to liability for EMD in the pleadings before the Commission, EMD has till date not been returned which alone would suffice to demonstrate the attitude of PTC.

6.22. The petitioner sent various letters to the 1<sup>st</sup> Respondent requesting for a refund of the EMD, however, despite continued admission of liability both in PTC's letters dated 04-07-2011, 29-11-2013, 14-07-2014 and 08-05-2015 and their counter, no payments have been forthcoming in this regard. There has been an unequivocal admission of liability by the 1<sup>st</sup> respondent to make the payment as recently as on 08.05.2015, less than a year before filing the present petition. However, the 1<sup>st</sup> Respondent has been consistently delaying effecting the payment on the pretext that there is an ongoing arbitration between the 1<sup>st</sup> and 2<sup>nd</sup> Respondents. However, at the meeting between the officials of TANGEDCO and the Petitioner on 29.09.2015, it was intimated to the Petitioner that the 2<sup>nd</sup> Respondent would be making a payment of Rs.220 lakh to the 1<sup>st</sup> Respondent.

6.23. The 1<sup>st</sup> Respondent has in its counter taken a stand that the arbitration proceedings between the 1<sup>st</sup> and 2<sup>nd</sup> Respondent is not relevant to the present claim of EMD and as such, there is no valid reason to hold the refund of the Earnest Money Deposit of Rs.10,51,5941- to the petitioner, especially in light of the fact of admission of liability by the 1<sup>st</sup> Respondent.

## **7. Written Submission of the Respondent No.1– PTC India Ltd.:-**

7.1. The Petitioner has claimed the following in its Petition:-

- (i) Payment of Rs.48,02,128 on account of deduction by PTC/TANGEDCO for oversupply during the months of August and September 2009.
- (ii) Refund of EMD of Rs.10,51,594/-

7.2. The issue no (i) above is not maintainable as the amount has been deducted as per terms of the PPA/Lol/Agreement for the reasons set out in succeeding paragraphs.

7.3. As regards issue No.(ii) refund of EMD, the Petitioner herein has not provided any documentary evidence as regards payments of EMD. It is humbly submitted that the Petitioner had not paid any EMD while submitting its bid. On the contrary an amount of Rs.3,30,0001- was deducted from the invoice of the Petitioner being No.DCWIP/TC/INV/II0-11114 for the billing period 01.05.2010 to 27.05.2010.

7.4. From the above document it is clearly established that the amount of EMD was actually deducted from the bill of DCW amounting to Rs.3,30,000/- and not Rs.10,51,594/- as claimed by the Petitioner. The representative of the Petitioner had a meeting with the official of the Respondent No.1 in the past, wherein, the Petitioner was requested to submit the documentary evidence towards payment of EMD as claimed. However, the Petitioner did not submit any documentary evidence for the same.

7.5. The petitioner in its petition has clearly contended that the Respondent No.1 was not acting as a Merchant Trader which states as under:-

*“For the purposes of the transactions, the 1<sup>st</sup> Respondent was understood not to be acting as a Merchant Trader i. e. it did not assume any of the financial and commercial risks involved with trading. The Central Electricity Regulatory Commission fixes the trading margin of the trading licensee which at the relevant time was between 4 paise to 7 paise per unit depending upon the price of the electricity. PTC Ltd. thus acted as an intermediary linking company which was entitled only for a trading margin as fixed by CERC Regulations. ”*

7.6. The Petitioner has unequivocally accepted the fact that the Respondent No.1 has acted as a trader only and not as a Merchant Trader, in the above transaction and that being so the transaction being on a back to back basis, the Petitioner cannot seek any relief against the Respondent No.1. Hon'ble APTEL and High Courts in various judicial pronouncements had clearly stated that in case where the trader acts, not as a merchant trader, it acts only as a conduit/facilitator in the transactions without taking any financial and/or commercial risks. This legal proposition has been dealt in the succeeding paragraphs.

7.7. The Respondent No.1 had entered into a Power Purchase Agreement with the Petitioner on 24.04.2009 for supply of power to TANGEDCO through PTC until 31.03.2010, with the full knowledge of the Petitioner.

7.8. That subsequently the Respondent No.1 vide its letter dated 03.07.2009 informed the Petitioner that power from the project of the Petitioner shall be scheduled to TNEB through PTC till 31.05.2010 on the terms specified in the letter.

7.9. Some of the relevant clauses/provisions of the letter dated 03.07.2009 are as under:-

*"5. Scheduling*

*DCWL shall schedule this power in full except in case of transmission constraints as certified by the SLDC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by DCWL to PTC by 10:00 Hrs of 28th day of the preceding month for the following moths (Starting from 00:00 Hrs of 1<sup>st</sup> to 24:00 Hrs of last day) as per the format annexed herewith.*

*6. Billing Cycle*

*DCWL shall raise month bills for this transaction. Each monthly bill will be raised starting from 00:00 Hrs of 27th day of month to 24:00 hrs of 27th day of the next month respectively. Energy accounting shall be as per the JMR only. The relevant bills will be raised on the basis of JMR duly signed by representative of DCWL and TNEB for the concerned moth. Payment shall be released for the energy indicated in JMR prepared by representative of TNEB and DCWL irrespective of the scheduling date. It is the responsibility of DCWL to get the initial meter reading prior to commencement of transaction certified by the respective offices) of TNEB. "*

7.10. Thus, the supply of power by the petitioner to TANGEDCO through PTC was strictly in terms of the aforesaid letter dated 31-07-2009 only. Further, the

petitioner had acted in terms of the letter and started supplying power to TANGEDCO through PTC.

7.11. In terms of the letter dated 03.07.2009, there was no provision for supply of additional quantum of power than the contracted quantum. Further PTC/TANGEDCO had contractual and legal authority to restrict the power to 80% which reads as under:-

*"11. Compensation for Default in Supply/Offtake*

*DCWL will declare the monthly availability in energy terms at delivery point. It is obligatory for DCWL to schedule 80% of the declared energy in a month as arrived to Cumming up the declared monthly availability falling in that particular month and it is obligatory to PTC to off take 80% of the declared energy in the month as arrived by summing up the declared monthly availability falling in that particular month. "*

7.12. Further, as regards compensation it has been clearly agreed between the parties that it was obligatory on PTC/TANGEDCO to offtake upto 80% of the declared energy in a month. Thus, the Respondents had a right to restrict the flow of power from the Petitioner to 80% and no compensation was payable on account of such restrictions upto 80%.

7.13. The Petitioner started supply of power and submitted JMR from 27.07.2009 to 27.08.2009 and invoices. Similar JMR were submitted for subsequent months as well. The above was as per the billing cycle mentioned in the letter dated 03.07.2009. The JMR was signed by the Petitioner and representatives of the Respondent No.2, and the Respondent No.1 was not a signatory to the JMR.

7.14. On 23.07.2009 at 08:23 p.m., the Respondent No.1 received a fax from TANGEDCO (then TNEB) that with effect from 00:00 hrs on 24.07.2009 and asking PTC to give necessary instructions to CPP generators to maintain 80% of the scheduled quantum until further intimation. Consequently, PTC on 24.07.2009 forwarded the above fax to all CPP for necessary action.

7.15. Thus, the TANGEDCO/Respondent No.1 was well within its contractual and legal right to restrict the flow of power from the project of the Petitioner to 80%. Further, petitioner has been become aware from such restrictions that it cannot supply power beyond 80% to TANGEDCO through Respondent No.1.

7.16. The fact that the Respondent No.1 had sent the fax to all the CPPs including the Petitioner herein has never been denied by the Petitioner. This fact of fax having been sent by Respondent No.1 to all CPPs was clearly stated in the counter filed by the Respondent No.1 and despite seeking time on several occasions to file rejoinder, the Petitioner chose not to file any rejoinder to the counter filed by the Respondent No.1. Thus, by conduct the Petitioner has accepted it has received the facts dated 24.07.2009, as the same was never specifically denied by the Petitioner.

7.17. Further the Petitioner's contention that it came to know about the compensation only in November 2009 is also not tenable as the Petitioner has sought refund of compensation amount, which was legally claimed by

Respondents, only for the months of July and August 2019 and not thereafter. Thus the Petitioner has become aware of the same facts earlier than November 2009.

7.18. The Respondent No.1 also informed the Petitioner that the issue has to be taken up by the Petitioner directly with TANGEDCO vide its letters dated 14.07.2014 and 29.11.2014 as the supply of power was beyond the provisions of the Agreement between Petitioner and the Respondent No.1.

7.19. Consequently, the Petitioner approached TANGEDCO directly vide its letter dated 18.07.2014 requesting TANGEDCO to release the payment for excess quantum of power supplied by the Petitioner to the Respondent No.2. This clearly establishes the fact that Petitioner has acknowledged that it was the responsibility of Respondent No.2 to make the payment. From the above correspondence it is evident that the Petitioner has acknowledged the fact that the issue of release of the payment is to be resolved between Petitioner and Respondent No.2 as Respondent No.1 did not have any legal and/or contractual liability towards the same.

7.20. The section 2 (71) of the Electricity Act, 2003 defines trading as

*“trading” means purchase of electricity for resale thereof and the expression “trade” shall be construed accordingly”.*

7.21. Section 12 of the Electricity Act, 2003 contemplates that no person shall undertake trading in electricity unless he is authorized to do so by a license issued u/s 14.

7.22. Section 14 of the Electricity Act, 2003 therefore stipulates that the appropriate Commission may on an application made to it u/s 15 grant a license to undertake trading in electricity as an electricity trader. The Respondent No-1 was granted a license to trade in electricity u/s 14 of the Electricity Act by the Hon'ble Central Electricity Regulatory Commission (CERC).

7.23. Accordingly, the Respondent No.1 is a licensed trader under the Electricity Act, 2003 to undertake the activity of purchase of electricity for re-sale thereof.

7.24. To undertake this activity of trading, generally the Respondent No.1 enters into an agreement with the DISCOM for sale of electricity and enters into a back to back agreement with the generating company for purchase of electricity. Sometime the agreements are entered vice-versa.

7.25. The role of the Respondent No.1 is that of a conduit/facilitator in the entire transaction and the same has also been held in a catena of judgments.

- i. *PTC India Limited v. Jaiprakash Power Ventures, 2012 (130) DRJ 351 (S.Muralidhar, J) Delhi High Court*

61. .... .

*So, the combined reading of the above provisions brings out the scheme of the Act. A trader is treated as an intermediary. When the trader deals with the distribution company for re-sale of electricity, he is doing so as a conduit between generating company and distribution licensee. When the trader is not functioning as merchant trader, i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the Purchaser under re-sale, then there is clearly a link between the ultimate distribution company and the generator with trader acting as only an intermediary linking company.*

61. It cannot be debated that the whole scheme of the Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumer is one interconnected transaction and is regulated at each level by the statutory commission in a manner so that the objective of the Act is fulfilled; the electricity industry is rationalized and also the interest of the consumer is protected. This whole scheme will be broken if the important link in the whole chain i. e. the sale from generator to trading licensee is kept outside the regulatory purview of the Act. If such a plea of the Appellant is accepted, the same would result in the Act being completely ineffective and completely failing to serve the objective for which it was created."

62. In other words, while interpreting the provisions of the Act, the entire Act will have to be looked into totality as one integral whole and not in an isolated manner. That is why, the Act itself does not seek to look at the electricity industry and the consumer interest on a segmented or fragmented basis but as a cohesive whole. It is for this reason that the Act has been given in Section 174 overriding effect over all other legislations which are inconsistent with the provisions of the Act.

- ii. *PTC India Limited v. Uttarakhand Electricity Regulatory Commission & Ors.*, (2011) ELR (APTEL) 81 (Mr. Rakesh Nath; P.S. Datta, J)

52. "A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case the generating company proposes to sell power of a trading licensee which has back-to-back agreement for resale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power procured from the trading licensee with power procured from other sources and supply the same to its consumers. Thus, the power is ultimately going to be consumed by the consumers outside the State. This is in accordance with scheme of things and provisions of the Act."

- iii. *PTC India Ltd. v. Uttarakhand Electricity Regulatory Commission and Ors.*, (2016) ELR (APTEL) 1176 (Ranjana Desai, J; Mr. I.J. Kapoor)

8. ....PTC is a trading licensee which has been given a license for inter-state trading of electricity by the Central Commission. PTC has signed back-to-back PSA with PSEB for re-sale of the entire power under which it has a legal obligation to supply power. A trading licensee is only a facilitator for supply of electricity by a generator to a licensee or a consumer. In this case, the generating company proposes to sell power to a trading licensee which has back-to-back arrangement for re-sale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the

*power purchased from the trading licensee with power purchased from other sources and supply the same to the consumers. Thus, the power is ultimately going to be consumed by the consumers outside the State.*

*18. .... This Tribunal clarified that a trader (PTC) is treated as an intermediary and when the trader deals with the distribution company for resale of electricity he does so as a conduit between generating company and the distribution licensee. This Tribunal further noted that when the trader is not functioning as merchant trader i.e. without taking upon itself the financial and commercial risks but passing on the all the risks to the purchaser under resale, there is clearly a link between the ultimate distribution company and the generator with trader acting as an intermediary linking company .*

*"20 ....*

*27 ..... Trader is only a facilitator for supply of electricity by a generator to a licensee or consumer. In this case the hydro power generating company has proposed to sell power to an inter-state trading licensee which has a back to back agreement for resale of power to a distribution licensee outside the State of Uttarakhand. The distribution licensee is going to pool the power procured from the trading licensee with power purchased from other sources and supply the same to its consumers. Thus the power is ultimately going to be the consumer outside the State of Uttarakhand. This is in accordance with the scheme of things and provisions of the Electricity Act, 2003".*

7.26. From the provision of the Electricity Act 2003 and the legal pronouncements it clearly emerges that

- Respondent No-1 being a licensed trader under the Electricity Act, 2003 purchases electricity for resale thereof and acts as a facilitator/conduit between the generating company and the distribution company.
- The whole scheme of the Electricity Act is that from the very generation of electricity to the ultimate consumption of electricity by the consumer is one interconnected transaction and is regulated at each level by the statutory commission in a manner so that the objective of the Act is fulfilled
- This whole scheme, under the Electricity Act, will be broken if the important link in the whole chain i.e. the sale from generator to trading

licensee is kept outside the regulatory purview of the Act as the same would result in the Electricity Act being completely ineffective and completely failing to serve the objective for which it was created.

7.27. Thus in view of the above legal pronouncements and the clear averment by the Petitioner that the Respondent No.1 was not acting as a Merchant Trader, it is well established beyond any doubt that the Respondent No.1 herein was acting merely as a facilitator/intermediary in the whole transaction.

7.28. Accordingly Respondent No.1 herein is not liable to make any payment to the Petitioner. This is more so on account of the fact that the supply was outside the purview of agreement entered between the Petitioner and Respondent No.1, the Petitioner has acknowledged the fact the Respondent No.2 was liable to make payment and had directly taken up with the Respondent No.2 and the power has been consumed by the Respondent No.2.

7.29. The PPA and PSA were on back to back basis. In fact, this also has been the petitioner's own understanding of the arrangement between the parties. Clearly therefore, the whole transaction must be construed in a manner so as to give effect to this intention and understanding of the parties.

7.30. That the arrangement between the parties could be given no other interpretation in view of the fact that the Respondent No.1 herein is playing only the role of a trader without assuming any of the risks. Therefore, if the Respondent is made liable it will not only be contrary to language of the agreements and the understanding of the parties, but also contrary to business common sense.

7.31. It is well settled that in addition to the words in a commercial instrument, the Court must also consider the commercial purpose of the instrument, and in considering that purpose must rely upon its own experience of contracts of similar nature. In case of *Satya Jain v. Anis Ahmed Rushdie*, (2013) 8 SCC 131 Hon'ble Supreme Court has held that

*"The principle of business efficacy is normally invoked to read a term in an agreement or contract so as to achieve the result or the consequence intended by the parties acting as prudent businessmen. Business efficacy means the power to produce intended results. The classic test of business efficacy was proposed by Bowen, L.J in Moorcock (1889) LR 14 PD 64 (CA)). This test requires that a term can only be implied if it is necessary to give business efficacy to the contract to avoid such a failure of consideration that the parties cannot as reasonable businessmen have intended. But only the most limited term should then be implied - the bare minimum to achieve this goal. If the contract makes business sense without the term, the courts will not imply the same. The following passage from the opinion of Bowen, L.J in Moorcock (1889) LR 14 PD 64 (CA)] sums up the position: (PD p. 68)*

*"..... In business transactions such as this, what the law desires to effect by the implication is to give such business efficacy to the transaction as must have been intended at all events by both parties who are businessmen; not to impose on one side all the perils of the transaction, or to emancipate one side from all the chances of failure, but to make each party promise in law as much, at all events, as it must have been in the contemplation of both parties that he should be responsible for in respect of those perils or chances. "*

7.32. The Appellant being a trader, as already submitted herein above the contracts i.e. the PPA and PSA has to be construed in such a way that it lend to business efficacy only.

7.33. The Respondent No.1 being a trader of Electricity, is not a consumer of Electricity. The Hon'ble Supreme Court in case of *State of AP Vs. National Thermal Power Corporation* (2002) 5 SCC 203 has held the sale of electricity is on

consumption. Thus, as the power has been supplied to Respondent No.2 by the petitioner, outside the agreement between the petitioner and Respondent No.1, Respondent No.1 can't be held liable for payment.

7.34. Without prejudice to the above contentions, it is submitted that in case of any dispute which is purely between the Petitioner (being a generator) and the Respondent No. 1 (being a trader), the Commission doesn't have jurisdiction to adjudicate such dispute(s) between the Petitioner and Respondent No.1. This Commission has jurisdiction for adjudication of dispute under Section 86 (f) of the Electricity Act, 2003 which reads as under:

*“(f)adjudicate upon the dispute between the licensees, and generating companies and to refer any dispute for arbitration”.*

7.35. Thus under the provisions of Electricity Act 2003, the Commission has jurisdiction to adjudicate upon disputes between the licensees, and generating companies only. In the present case the Respondent No-I is not a licensee of the Commission as the Respondent No.1, being a Inter-Sate Trader, licensee was granted license by the Hon'ble Central Electricity Regulatory Commission.

7.36. Further, that as per the Agreement entered between the Petitioner and Respondent No.1 provides for arbitration as a dispute settlement mechanism.

Clause 21 and 22 of the Agreement reads as under:-

*"21. Settlement of Disputes and arbitration*

*a. Any and all disputes between the parties arising out of or in connection with this Agreement or its performance shall, so far as is possible, be settled amicably between the parties within 30 days after receipt of notice thereof from the party raising the disputes. In the event the parties fail to reach an*

*amicable settlement within 30 days as aforesaid, such dispute or difference shall be finally settled under the Indian Arbitration and Conciliation Act, 1996 and any statutory modification thereof or any enactment replacing the said act in accordance with the rules of arbitration of the India Council of Arbitration, New Delhi.*

*b. During the period of submission to mediation and thereafter until the dispute is settled, the parties shall except in the event of termination, continue to perform all their obligations under this agreement without prejudice to a final adjustment in accordance with such award.*

## **22. Governing Laws and Jurisdiction**

*This Agreement shall be governed and interpreted by and construed in accordance with the laws of India and the Courts/tribunals of Delhi/New Delhi shall have exclusive jurisdiction in all matters under this Agreement. "*

7.37. Under provisions of the Electricity Act, 2003 and the specific agreement between the petitioner and the Respondent No.1, in case any dispute is purely between the Petitioner and Respondent No.1, the same needs to be adjudicated under Arbitration only and the Commission will not have the jurisdiction to adjudicate such disputes.

7.38. In view of the above facts and legal proposition it is most humbly submitted that the claim of the Petitioner is not legally tenable both under facts and law and no relief can be granted against the Respondent No.1.

## **8. Written Submission filed by the Respondent No.2:-**

8.1. The main contention raised on behalf of the Respondent, is that, though the relief of payment has been prayed for in the Petition that, the petitioner sought the action of the Respondents as illegal arbitrary, and to quash the same, especially the rejection of the claim by the 1<sup>st</sup> Respondent under its letter dated 03.07.2009 as

arbitrary, it was contended that it is contrary to law and is erroneous. Further, from the reliefs prayed for in the Petition, refers only to the order passed by the 1<sup>st</sup>Respondent dated 03.07.2009, which makes it very clear that, no relief has been asked for against this Respondent, and that, no relief can be asked for from this Respondent. Even from the averments made in the Petition, it is clear that, grievance has been made only against the 1<sup>st</sup>Respondent, namely M/s.PTC, because the agreement was only between the petitioner and M/s.PTC. Notwithstanding the above, it is strange that, the Petitioner has chosen to implead this Respondent as a party Respondent, and had made claims against this Respondent, as well, especially when there is no privity of contract, between this Respondent and the Petitioner.

8.2. It was submitted that, it clearly shows that, there is an agreement, only between the petitioner and the 1<sup>st</sup>Respondent, and that there is no privity of contract, between this Respondent and the Petitioner.

8.3. In addition to the above, it was further pointed out that, as per the agreement entered into between the Petitioner, and the 1<sup>st</sup>Respondent, Clause 21 & 22 provides, only for an Arbitration that to, to be held at New Delhi, and the clause reads as follows:-

*21. Settlement of Disputes and Arbitration*

*a. Any and all disputes between the parties arising out of or in connection with this Agreement on its performance shall, so far as if possible, be settled amicably between the parties within 30 days after receipt of notice thereof from the party raising the disputes. In the event of parties fail to reach an amicable settlement within 30 days as aforesaid, such dispute or difference shall be finally settled under the Indian Arbitration and Conciliation Act, 1996*

*and any statutory modification thereof or any enactment replacing the said act, accordance with the rules of Arbitration of the Indian Council of Arbitration New Delhi.*

*b. During the period of submission to mediation and thereafter until the dispute is settled the Parties, shall except in the event of termination, continue to perform all their obligations under this Agreement without prejudice to a final adjustment in accordance with such award.*

## **22. Governing Laws and Jurisdiction**

*This Agreement shall be governed and interpreted by and construed in accordance with the laws of India and the court/ tribunals of Delhi/ New Delhi shall have exclusive jurisdiction in all matters under this Agreement.*

8.4. Based on the above Contractual Conditions entered into between the Petitioner and the 1<sup>st</sup> Respondent, it was contended that, there is no privity of Contract, between the Petitioner and this Respondent, and that this Respondent, is not a proper or a necessary party, to the above Petition. This Submission was made, without prejudice to the contention raised that, the Petition filed by the Petitioner, is not maintainable against the Respondent, and that, the Commission may hold, namely that, the above petition is not maintainable before the Commission.

## **9. Findings of the Commission:-**

9.1. The present petition has been filed by the petitioner on the two issues viz., (i) to pay the sum of Rs.48,02,128/- towards the power supplied during the period 27.07.2009 to 27.08.2009, alongwith interest @ 12%, (ii) to refund the EMD amount of Rs.10,51,594 deducted from the Invoice PTC/INV/10-11/14 dated 27.05.2010 alongwith interest @ 12%.

9.2. The petitioner, M/s.DCW Limited, has executed the Power Purchase Agreement with the PTC India Limited on 24.04.2009 for the supply of 28 MW power (00.00 Hrs to 24.00 Hours for the period from 09.04.2009 to 31.05.2009. Subsequently, on 03.07.2009 both the parties agreed to supply 28 MW power @ Rs.5.90 / Unit for the period from July 2009 to May 2010 with the agreed terms and conditions.

9.3. The 1<sup>st</sup> Respondent M/s.PTC India Limited executed an Agreement with the 2<sup>nd</sup> Respondent Tamil Nadu Electricity Board for selling of RTC power within the range of 325 MW to 433 MW during the period from 19<sup>th</sup> June 2009 to 31<sup>st</sup> May 2010. The arrangement have been made by the PTC India Limited to supply the power from various 28 sources of generators situated in Tamil Nadu and Andhra Pradesh under the agreed terms and conditions between the parties.

9.4. In this petition, M/s.DCW Limited has stated that a sum of Rs.48,02,128 had been wrongfully debited from the invoice payable to the petitioner. It is the prayer of the petitioner that the above sum is jointly and severally payable by M/s.PTC Limited and the TNEB to the petitioner.

9.5. The 1<sup>st</sup> Respondent has stated that, on 23.07.2009 a fax message was received from the 2<sup>nd</sup> Respondent to give necessary instructions and maintain 80% of the scheduled quantum until further intimation; and the same is forwarded to all CPPs for necessary action. Having informed the above restriction, the petitioner cannot supply power beyond 80% to TANGEDCO through PTC. Therefore the

1<sup>st</sup> Respondent's contention is that the issue should be taken by the petitioner directly with TANGEDCO as the supply was beyond the provisions of the Agreement with 1<sup>st</sup> Respondent; and the issue of release of the payment is to be resolved between Petitioner and 2<sup>nd</sup> Respondent. It is further the contention of the first respondent that the role of 1<sup>st</sup> Respondent is that of a conduit/facilitator in the entire transaction as trader. To undertake this activity of trading, generally the 1<sup>st</sup> Respondent entered into an Agreement with the Discom for sale of electricity and enters into a back to back agreement with the generating company for purchase of electricity.

9.6. The 1<sup>st</sup> Respondent has further stated that the dispute between the Petitioner and the 1<sup>st</sup> Respondent is in the nature of dispute between a generator and Inter-State trader; and hence the Commission does not have jurisdiction to adjudicate the issue on hand. As per PPA, the Dispute resolution mechanism is provided under arbitration clause 21 and 22, hence the Commission has no jurisdiction to hear the present issue under Section 86(1)(f) of the Electricity Act 2003.

9.7. From the disputes raised by the petitioner and the objections of the 1<sup>st</sup> Respondent, the following questions arise for consideration:-

**(i) Whether the Commission has its jurisdiction to hear the dispute?**

9.7.1. On this issue, it is necessary to refer to Judgment dated 4.11.2011 of the Hon'ble Appellate Tribunal for Electricity in Appeal Nos. 15 & 52 of 2011 in the matter of Lanco Power Ltd Vs Haryana Electricity Regulatory Commission, wherein

the question of jurisdiction of a State Commission has been settled with reference to the nexus of the generating company to the place of consumption. The following portions of the said judgment would be relevant:

13. *“ At the outset, it shall be stated that, it cannot be debated that when there is no nexus and privity between the PPA and PSA, jurisdiction of the State Commission cannot be invoked. Therefore, in order to decide about the issue of jurisdiction, we have to first find out as to whether there is any nexus or privity in respect of the PPA entered into between the Appellant Lanco Power Limited and PTC (R-3) and PSA entered into between the PTC (R-3) and Haryana Power (R-2).*

14. *While dealing with this question, it would be proper to analyse the legal position with reference to the functions of the State Commission. Section 86 (1) (f) of the Electricity Act, 2003 (the Act) provides as under:-*

**(86) “Functions of State Commission**

(1) *The State Commission shall discharge the following functions, namely:-*

.....

*(f) adjudicate upon the disputes between the licensees, and generating companies and to refer any dispute for arbitration;*

15. *This provision deals with the adjudication of the dispute between (a) Generating Company and Licensee or (b) between Licensees. Thus section 86 (1)(f) dealing with adjudication of dispute is not upon any agreement between a generating Company and the Licensee. In other words, the existence of a contractual relationship between a generating company and the licensee is not a pre-condition for exercise of the jurisdiction of adjudication provided under Section 86(1)(f). The dispute between the generating Company and the licensee where such power is generated and sold by the generating company to the licensee is intended for maintaining supply to the consumers at large is covered under section 86(1)(f) of the Act. The Statutory adjudicating power by the Appropriate Commission which*

*regulates the tariff of the consumers, has been specifically provided for under Section 86(1)(f) of Act.*

*The State Commission regulating the tariff of the consumers of the State will be in a better position to adjudicate on such dispute taking into consideration the interest of the consumers of the State.*

*16. If a generating Company enters into an agreement for sale of power generated by it, knowing the place where the power generated is going to be consumed, the generating company acts with the nexus to such consumers. This nexus leads to the fact that the State Regulatory Commission of the place where the electricity is to be consumed is the Appropriate Commission to exercise jurisdiction. If the sale and purchase of power has a nexus to the State, the concerned State Commission will have jurisdiction notwithstanding the fact that there is no direct contractual arrangement between the generating company and the distribution licensee. In this context, it would be worthwhile to refer to Section 64 (5) of the Electricity Act, 2003 which is as under:*

*“(5) Notwithstanding anything contained in Part X, the tariff for any inter-state supply, transmission or wheeling of electricity, as the case may be, involving the territories of two States may, upon application made to it by the parties intending to undertake such supply, transmission or wheeling, be determined under this section by the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity and make payment therefor”.*

*17. This provision thus clarifies that the State Commission having jurisdiction in respect of the licensee who intends to distribute electricity shall be the Appropriate Commission. In the present case, it is not disputed that the electricity generated in the state of Chhattisgarh is intended to be transmitted through the inter-State transmission system to the State of Haryana for distribution to the consumers of the State of Haryana by the distribution licensees of the Haryana. Thus, the present case squarely falls within the provision of Section 64 (5) of the Act.”*

9.7.2. The aforesaid ratio laid down by APTEL squarely applies to the case on hand. Here is a case where the petitioners, who are the generators, have entered into agreement for sale of power generated by them knowing that the power would be consumed in the State of Tamil Nadu and the petitioners have acted in nexus to such consumers. Such nexus lead to the position that this Commission has jurisdiction to decide the issue on hand. Therefore, we have no hesitation in holding that this Commission has jurisdiction to decide the present issue.

**(ii) Whether the PPA between the petitioner and 1<sup>st</sup> Respondent, and the Agreement between the 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent are back to back agreements and whether there exists any privity of contract to the 2<sup>nd</sup> Respondent (TNEB) in the Agreement held with PPA between the petitioner and 1<sup>st</sup> Respondent?**

9.7.3. In order to resolve the issue, it is necessary to refer to the order dated 05-10-2021 of the Commission in D.R.P. No. 15 of 2011 to see whether the PPAs and PSA in the instant case are back to back contracts and whether the said agreements satisfy the requirements laid down by the Hon'ble Tribunal. The following are the observations of the Commission therein:-

*“The said issue is no longer res integra and has been well settled by the Hon'ble Appellate Tribunal for Electricity in Appeal Nos. 15 & 52 of 2011. In order to appreciate the facts of the case better it is necessary to re-produce the following portions of the judgment of the APTEL in the said case also.*

“38. In this context, it would be proper to refer to the relevant clauses of the recitals of the PPA dated 19.10.2005 which go to show that PPA is linked to the PSA. Those clauses are reproduced herein:

“(C) The Company has requested PTC to purchase the Contracted Capacity and Power Output from the Project (273 MW net power) at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project and PTC has agreed to purchase such power at the Delivery Point for a period of twenty five (25) years from the Commercial Operation Date of the Project **for onward sale by PTC.**

(E) PTC will enter into a Sale Agreement (PSA) with one or more Purchasers, **for sale of such power from the Project.**

(F) **A Petition for approval of tariff for sale of the above power shall be filed before the Appropriate Commission** and the tariff as approved by such Appropriate Commission will be applicable for purchase and sale of the above power by PTC based on the CERC norms, subject to the ceilings as agreed upon by the Parties in this Agreement”. {emphasis added}

39. These factors would categorically indicate that both the PSA and PPA are back to back agreements as the PPA between the Appellant and PTC(R-3) got firmed up with the execution of PSA entered into between R-2 Haryana Power and PTC(R-3).

40. As indicated above, the purchaser in the present case namely the Haryana Power (R-2) has been specifically identified before the execution of the final PSA and the said information was conveyed to the Appellant by PTC (R-3) through its letter dated 28.7.2006. It was only thereafter, that an amended PPA was executed between the PTC (R-3) and the Appellant on 18.9.2006 whereby a new article bearing No.16.6.5 was added. Under this amendment, the PTC may assign its right and transfer its obligations under the PPA to the Purchaser namely Haryana Power (R-2)

It may be seen from the observations of the Tribunal, the basic criteria for terming two independent contracts into back to back contracts are that a) the distribution licensee should be the ultimately recipient and b) the PPA should form an integral part of PSA. The mere identification of the buyer is not sufficient but the PPA should be an integral part of PSA. The Trader has to

*assign the rights and obligations arising out its agreement with the generators to the distribution licensee. Though references have been made to TANGEDCO in the PPA and TANGEDCO is the ultimate recipient, rights and obligations arising out the PPA have not assigned by PTC to the distribution licensee. Hence, the fourth respondent herein cannot seek to pass on the liability alone to TANGEDCO without corresponding rights accruing under the PPA.*

*In other words, the simple test in determining back to back nature of contracts was whether there was any mention in the PPA as to the PSA and whether the performance of the terms and conditions of PPA are dependent on performance of terms and conditions of the PSA.*

*In the case decided by the Tribunal referred herein, there were clear recitals in the PPA and PSA to the effect that PPA and PSA are back to back contracts and based on the same the distribution licensee was seeking to enforce the same.*

*However, the facts in the present case are different. A bare reading of the PPA and the PSA does not lend any credence to the contention that both agreements are back to back in nature. We do not see even any slightest reference in the PPA as to the likelihood of execution of a back to back agreement in the form of PSA leave alone make them integral part of the other. The PTC has not passed on the rights and liabilities arising out of its agreement with generators to the TANGEDCO in the PSA and there is no explicit mention about the same in the PSA.*

*Though it cannot be disputed that the ultimate recipient of power is the distribution licensee, TANGEDCO, the intention of the parties to make the agreements back to back has to be ascertained only with reference to the express intention prevailing at the time of execution of the agreements and not thereafter.*

*In order to satisfy the requirements of back to back contracts, the basic requirement as may be seen from the judgment of the Tribunal, is the fundamental document on which the PSA ought to have been approved should have been the PPA or vice versa i.e, the PPA should have been the integral part of PPA or the rights and liabilities of the parties arising out of the PPA should have been made an integral part of PSA and the performance under the PSA should have been made subject to the performance of the parties under the PPA.. There does not seem to be any such back to back clauses in the PSA.*

*The fact that the distribution licensee is the ultimate recipient of power cannot be pleaded at this stage when there was no express intention to make the distribution licensee a party to the agreement. Except for the fact that there is clauses to the effect that a) PTC has been established with the objective of carrying on business of purpose of all electrical power from*

*IPPs, CPPs and other Generating companies, SEBs etc for sale to SEBs, Power distribution companies , other organisation and bulk consumers and abroad and that tariff shall be as agreed and finalised between PTC and TNEB in consultation with SASL, there is no other clause which is explicit enough to make the TANGEDCO liable in respect of the clauses under the PPA. Therefore, there is nothing on record to suggest even remotely that the PPA and PSAs are interconnected and inextricably linked so as to invoke the doctrine of privity of contract.*

*The PPA between the individual generators and the PSA between TANGEDCO and PTC cannot be said to be back-back-contracts going by the recitals of the agreements. Therefore, in the absence of any material evidence as to the passing of the risk to TANGEDCO in this regard, we are to unable to agree to the contention that the contract between the petitioners and the PTC on the one hand and the contract between the PTC and the TANGEDCO are back to back contracts.*

9.7.4 Now coming to the present case, the 1<sup>st</sup> Respondent PTC Limited has stated that it had back to back arrangement with various generators including petitioner for supply of power from their Units to the 2<sup>nd</sup> Respondent through 1<sup>st</sup> Respondent under tenders / RfP floated by the TNEB. The 1<sup>st</sup> Respondent entered into a PPA with the petitioner on 24.04.2009 for supply of 28 MW power to TNEB until 31.03.2010. And it further extended vide PTC Limited's letter dated 03.07.2009 to schedule the power to TNEB till 31.05.2010 as per the terms stipulated thereon.

9.7.5. It is to be seen the extent to which both the agreements are identical with each other to decide whether the 1<sup>st</sup> and 2<sup>nd</sup> respondents are jointly and severally liable or whether only one of them is liable. It would be relevant compare the following clauses of the Agreement held between the (i) Petitioner and 1<sup>st</sup> Respondent and (ii) 1<sup>st</sup> Respondent and 2<sup>nd</sup> Respondent.

<b>PPA terms between the DCW Limited and PTC India Limited</b>	<b>Agreement terms between the PTC India Limited and TNEB</b>
<p><u>5. Scheduling :</u></p> <p>DCW Limited shall schedule this power in full except in case of transmission constraints as certified by the SLDC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by DCWL to PTC by 10.00 hrs of 28<sup>th</sup> day of the preceding month for the following month (Starting from 00.00 Hrs of 1<sup>st</sup> to 24.00 Hrs of last day) as per the format annexed herewith.</p>	<p><u>5. Scheduling :</u></p> <p>TNEB shall schedule this power in full except in case of transmission constraint as certified by the SLDC of TNEB or under Force Majeure conditions. Copy of monthly generation schedule shall be forwarded by PTC to TNEB by 08.00 hrs of 1<sup>st</sup> of the every month as per the format.</p>
<p><u>6. Billing cycle :</u></p> <p>DCWL shall raise monthly bills for this transaction. Each monthly bill will be raised starting from 00.00 Hrs of 27<sup>th</sup> day of month to 24.00 Hrs of 27<sup>th</sup> day of the net month respectively. Energy accounting shall be as per the JMR only. The relevant bills will be raised on the basis of JMR duly signed by representative of DCWL and TNEB for the concerned month. Payment shall be released for the energy indicated in JMR prepared by representative of TNEB and DCWL irrespective of the scheduling data.</p>	<p><u>6. Billing :</u></p> <p>For the supply of power during the month, PTC will be raising monthly bill. Each monthly bill will be raised depends on the billing cycle of the respective circles. Energy accounting shall be as per the Joint Meter Reading only. The relevant bills will be raised on the basis of Joint meter reading signed by representative of Generator and TNEB for the concerned month. Payment shall be released for the energy indicated in Joint Meter Reading prepared by representative of TNEB and Generator.</p>
<p><u>8. Rebate for prompt payment:</u></p> <p>DCWL shall allow a rebate of 2% on the billed amount if PTC pays the amount to</p>	<p><u>9. Rebate for prompt payment:</u></p> <p>PTC would allow 2% rebate only on the</p>

DCWL within due date of 10 (Ten) days of presentation of the bill by DCWL	purchase price of PTC (i.e., excluding PTC margin) if TNEB deposits the full payment to PTC Bank account within 7 (seven) days of presentation of the bill through fax by PTC as per Para 7 above.
<u>11. Compensation for Default in Supply / Offtake:</u> If DCW fails to schedule 80% of declared energy in a month then compensation shall be paid by DCW @ Rs.2.00 / kWh for the shortfall which falls short of 80% of energy. Similarly if PTC fails to offtake 80% of the declared energy in a month then compensation shall be paid by PTC @ Rs.1.96/kWh to DCW for the shortfall which falls short of 80% of energy	<u>11. Compensation for Default in Supply / Offtake:</u> If PTC fails to schedule 80% of contracted energy in a month then PTC shall pay the compensation to TNEB at the rate of Rs.1.75 / kwh to the extent of shortfall of 80% of monthly contracted energy. Similarly, if TNEB fails to offtake 80% of the contracted energy in a month then compensation shall be paid by TNEB @ Re.1.00 / kWh to PtC for the shortfall which falls short of 80% of contracted energy.

9.7.6. Common arrangement in both the agreements is supply of 28 MW to TNEB, other than this most of the conditions viz., Scheduling, Billing procedure, Compensation, Rate of Tariff, etc., differs between the PPA and PSA. Though the 1<sup>st</sup> Respondent has stipulated to supply the power the TNEB, in its status of trader, there is no binding conditions on the 2<sup>nd</sup> Respondent to the Petitioner. No such provision incorporated in the PPA which makes the 2<sup>nd</sup> Respondent to pay for the fault of its action to the Petitioner. Moreover, all the above conditions tabulated above are completely differs in the two Agreements. Hence, these Agreements cannot be considered as back to back.

9.7.7 Moreover, the issue in our hand is similar to the issue discussed in D.R.P. No.8 of 2013, wherein the Commission held that :-

*"It may be seen from the above, that the provisions of the contract between PTC and TANGEDCO and the provisions of the contract between PTC and the Petitioners contain different provisions. In order to term a contract as Back to Back contract, the provisions between the contracting parties should contain identical provisions. In view of the different provisions in the above two contract, it cannot be termed as Back to Back contract. As such the contract between PTC and TANGEDCO and PTC and the Petitioner are to be interpreted separately.*

*There is no privity of contract between the Petitioner and the first Respondent TANGEDCO as the agreements entered into between TANGEDCO and PTC is a bi-partite agreement. Similarly, the 2<sup>nd</sup> Respondent PTC'S agreement with the Petitioner, OPG Power Generation Pvt. Ltd is also a bi-partite agreement. As the petitioner's power plant is connected with TANGEDCO's Grid, TANGEDCO's representative signs the Joint Meter Reading as Data Recorder for the sole purpose of energy accounting and no dispute can be attributed to the "Data Recorder".*

*Hence, in the given situation, TANGEDCO cannot be a party to this present petition..."*

9.7.8 As held above, the agreements contains different provisions and thus, it is the settled position of law that, no privity of contract between the petitioner and 2<sup>nd</sup> Respondent TNEB, and in view of this, the petitioner and 1<sup>st</sup> Respondent cannot make the 2<sup>nd</sup> Respondent liable for any lapse over the agreed terms between the parties viz., the petitioner and 1<sup>st</sup> Respondent.

**(iii) Whether the petitioner's claim for the period from 27.07.2009 to 27.08.2009 is tenable under the terms specified in PTC's Order dated 03-07-2009 subject to change in method intimated vide letter dated 16-11-2009?**

9.7.9. The Power Purchase Agreement executed between the petitioner (DCW Limited) and 1<sup>st</sup> Respondent (PTC India Limited) on 24.04.2009 for the supply of RTC power of 28 MW for the period from 09.04.2009 to 31.5.2009. Based on the correspondences held between the parties vide Letter No.PTC / MTFG / DCWL / 3275 dated 19.06.2009 and Letter No. PTC/MTFG / DCWL / 3389 dated 03.07.2009, the DCW Limited has to supply 28 MW RTC power till 31.05.2009 at the tariff of Rs.5.90 / kWh with no change in all other terms specified in the Agreement dated 24.04.2009.

9.7.10The invoice for the period from 27.07.2009 to 27.08.2009 was allowed shortly by Rs.48,02,128/- (8,13,920 units x Rs.5.90) treating such 8,13,920 units as energy supplied excess over the scheduled quantum.

9.7.11 It is the argument of the petitioner that as per the terms and conditions of the order dated 03-07-2009, Compensation for default is to be determined on the basis of scheduled/declared energy for the month commencing from 1<sup>st</sup> of the said month until the last day of the month.

*"5. Scheduling :*

*DCW Limited shall schedule this power in full except in case of transmission constraints as certified by the SLDC of TNEB or Force Majeure. Copy of monthly generation schedule shall be forwarded by*

*DCWL to PTC by 10.00 hrs of 28<sup>th</sup> day of the preceding month for the following month (Starting from 00.00 Hrs of 1<sup>st</sup> to 24.00 Hrs of last day) as per the format annexed herewith.”*

9.7.12. In adherence to the above condition, the petitioner has scheduled 28 MW power equivalent to 1,66,65,270 units during the period from 00.00 Hrs of 1<sup>st</sup> August 2009 to 31<sup>st</sup> August 2009. There was no excess supply over the scheduled quantum during the said period.

9.7.13. The petitioner has stated that only in the letter dated 16.11.2009, the PTC India Limited intimated that compensation would be calculated as per the contracted quantum accepted by TNEB and it was irrespective of the monthly schedule submitted by the Petitioner and would be calculated as per the billing cycle of the respective EDC. After this letter from PTC India Limited, the petitioner has been following billing cycle from 00.00 Hrs of 27<sup>th</sup> of the month to 24.00 Hrs of 27<sup>th</sup> of next month and matching the monthly scheduled contracted quantum. It is the allegation of the petitioner that the PTC cannot seek to retrospectively apply this arrangement to the month of June and August 2009.

*“PTC India Limited’s Letter dated 16-11-2009*

*To  
DCW Limited,  
Sahapuram,  
Thoothukudi.*

*Dear sir,*

*With reference to the recently signed agreements between CPPs & PTC and PTC & TNEB it is to intimate you that the following points are to be considered in respect of generation of power and compensation calculation.*

- A. Compensation will be calculated as per the contracted quantum accepted by TNEB which is enclosed herewith. This compensation calculation is irrespective of the monthly schedule submitted by the CPP on 28<sup>th</sup> of every month for the next month. Compensation will be calculated as per the billing cycle of the respective circle. Any shortfall from the 80% of contracted quantum will be billed as per the rate specified in the agreement.*
- B. The monthly schedule is only for the operational convenience and has no commercial significance. This schedule is required by TNEB to match the daily demand with the available power.*
- C. Any over generation beyond contracted quantity beyond contracted quantity and the requirement given by TNEB would require prior approval from TNEB for admitting the excess quantum.*

xxxx

xxxx

xxxx”

9.7.14 It cannot be denied that, in fact, the scheduling of 80% quantum is clearly specified in the PTC's letter dated 03.07.2009, as 00.00 Hrs of 1<sup>st</sup> day to 24.00 Hrs of 31<sup>st</sup> day. The billing is to be done for the relevant period as followed in respective circle. The 1<sup>st</sup> Respondent has ever not stated that the petitioner has supplied the excess energy during this Scheduling period from 1<sup>st</sup> to 31<sup>st</sup> of August 2009.

9.7.15 It is clear from the PTC's letter that only on 16-11-2009, the 1<sup>st</sup> Respondent has stated that the compensation calculation is irrespective of the monthly schedule

submitted by the CPP on 28<sup>th</sup> of every month for the next month. Compensation will be calculated as per the billing cycle of the respective circle. The petitioner has followed the revised method from November 2009 onwards without any deviation. But until this communication, the petitioner has adopted the scheduling method as stipulated under clause 5 of the terms & conditions letter dated 03.07.2009. Therefore, in this case the balance of convenience is fully in favour of the petitioner. Hence we observe that any change in scheduling/compensation provision communicated by the PTC India limited vide 16-11-2009 cannot have retrospective effect. The 80% of scheduled energy maintained throughout the period from 1<sup>st</sup> August to 31<sup>st</sup> August is to be taken into account for calculation, and so if any of the energy scheduled during the 1<sup>st</sup> to 31<sup>st</sup> of any month is not exceeded the 80% of the scheduled quantum, irrespective of the quantum of energy billed as per the Billing cycle shall have to be paid by the 1<sup>st</sup> Respondent until the procedure revised vide letter dated 16.11.2009.

9.7.16. The 1<sup>st</sup> Respondent also states that the role of the PTC Limited is merely a facilitator / intermediary in the whole transaction. Accordingly the 1<sup>st</sup> Respondent is not liable to make any payment to the Petitioner. The Petitioner has acknowledged the fact that 2<sup>nd</sup> Respondent was liable to make payment and had directly taken up with it. In this connection, the 2<sup>nd</sup> Respondent TANGEDCO Limited's (former TNEB) contention was that the relief sought by the petitioner arises out of the breach of agreement dated 03.07.2009; the 2<sup>nd</sup> Respondent is not a party in that agreement. It is the breach of contractual obligation between the Petitioner and the

1<sup>st</sup> Respondent, and no claim can be made against a stranger to the contract. There is no privity of contract between the Petitioner and 2<sup>nd</sup> Respondent.

9.7.17 We have clearly observed from the contention of the petitioner and 1<sup>st</sup> Respondent that the cause of action begins from the crucial communication dated 16.11.2009 which has transformed the scheduling discipline adopted by the petitioner during the Billing cycle, but it is not seen that it prejudiced to the Clause 5 "Scheduling" of PTC's terms & conditions communicated on 03.07.2009. Such an arrangement which aligns the Scheduling and Billing shall have to be carried out by way of an amendment to the Agreement between the Petitioner and 1<sup>st</sup> Respondent; but they didn't done so. However, the petitioner has accepted the change in method of scheduling as stated in PTC's letter dated 16.11.2009, but the petitioner is only against the retrospective effect of this PTC's letter. Hence, the scheduling method stipulated in 16.11.2009 will not be applicable prior to 16.11.2009.

**(iv) Whether the petitioner is eligible for refund of EMD amount Rs.10,51,594 along with interest @ 12%?**

9.7.18 The petitioner has argued that the EMD amount of Rs.10,51,594 is deducted from the Invoice PTC / INV / 10-11 / 14 dated 27.05.2010, but no documentary evidence was produced by the petitioner for recovery of Rs.10,51,594 as EMD. Further no calculation was furnished by the petitioner for calculation the above sum as EMD.

9.7.19 However, the 1<sup>st</sup> Respondent has furnished the copy of invoice No.DCW / PTC/INV/10-11/14 dated 27.5.2010 in which it has deducted a sum of Rs.3,30,000 towards EMD.

Net Amount Payable	- Rs.9,33,64,845.00
Less: June'09 adjustment for 0.12480 MU	
@ Rs.5.90 after rebate	- Rs. 7,21,594.00
Less: EMD	- Rs. 3,30,000.00
Balance	- Rs. 9,23,13,251.00

9.7.20 It is evident from the above that the PTC India Limited has deducted only Rs.3,30,000 as EMD in 5/2010 bill. We observe that only such amount can be claimed towards refund of EMD. Moreover, there is no stipulation in the Agreement executed between the parties that the refund of EMD is conditional and subject to the refund of EMD by the 2<sup>nd</sup> Respondent.

9.8. In view of the above findings, we direct that –

- (i) the petitioner is eligible for payment of Rs.48,02,128/- since the petitioner has not breached the scheduling of 80% of the contracted quantum during the “Scheduling period” as defined under Clause 5 of the PTC’s Order dated 03.07.2009. Any revised procedure stated by the PTC in its letter dated 16.11.2009 which amounts to amendment to the Agreement will take effect only from the date of receipt by the petitioner, and it cannot be given effect retrospectively. And thus the claim is to be settled by the 1<sup>st</sup> Respondent alongwith the interest @ 12% per annum.

- (ii) The petitioner has not provided documents for recovery of EMD amount of Rs.10,51,594/-, but the 1<sup>st</sup> Respondent has provided a documentary evidence for deduction of Rs.3,30,000 from the 27.5.2010 invoice. Hence we direct for refund of Rs.3,30,000 to the petitioner along with the interest @ 12% per annum.

Ordered accordingly.

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

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

/True Copy /

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