

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
Dr.T.PrabhakaraRao Member
and
ThiruK.Venkatasamy Member (Legal)

M.P. No.7of 2019

OPG Power Generation Pvt. Ltd.,
Represented by its Authorised Signatory,
Having its Registered office at
New No.6, Sardar Patel Road,
Guindy, Chennai – 600 032.

... Petitioner
(Thiru RahulBalaji
Advocate for the Petitioner)

Versus

1. Tamil Nadu Generation and Distribution
Corporation Ltd.,
Represented by its Chairman & Managing Director,
144, Anna Salai, Chennai –600 002.

2. The Chief Engineer / PPP,
TANGEDCO, NPKRR Maaligai, VI Floor,
144, Anna Salai, Chennai – 600 002.

... Respondents
(ThiruAbdul Saleem
Advocate for the Respondents)

Dates of hearing : 01-10-2019; 05-11-2019; 10-12-2019;
28-01-2020; 11-02-2020; 25-02-2020;
10-03-2020; 13-10-2020 and 17-11-2020

Date of Order : 15-12-2020

The M.P.No.7 of 2020 came up for final hearing on 17-11-2020. The Commission upon perusal of the petition and connected records and after hearing the submissions of the petitioner hereby makes the following:-

ORDER

1. Prayer of the Petitioner in M.P. No.7 of 2019:-

The prayer of the petitioner in the petition is to pass an order directing the Respondents to comply with the order of the Commission in P.P.A.P. No. 3 of 2014 dated 29.07.2016 and comply strictly with the P.P.A. dated 12.12.2013 in terms of the petitioner's communication of adherence to the approved PPA in its letter dated 22.05.2018 and consequently, prepare the MOD stack taking into account the approved terms of the PPA and issue schedules accordingly.

2. Facts of the case:-

The present petition is being filed before Commission seeking to set aside the instructions issued by the ^{1st} Respondent vide its letter dated 07.08.2018, directing that the power supplied by the Petitioner shall be continued to be at an energy charge of Rs.3.1170/- Kwh after availing a discount of Rs.1.20/- despite the cost being fixed at by an adoption order under section 63 of the Electricity Act, 2003 by the Commission and incorporated in the terms of the PPA being Rs.4.3170/- Kwh .

3. Contentions of the Petitioner:-

3.1. The Petitioner is engaged in the business of electricity generation and supplying to discoms within the state of Tamil Nadu. TANGEDCO had

proposed to purchase 3330 MW of power from nine private power generators and two power traders under Case I bidding at a levelised tariff of Rs.4.91 per kWhr by entering into PPAs with those generators for a period of fifteen years. The 1st Respondent herein filed a M.P. No. 37 of 2012 before the Commission on 09.10.2012 requesting approval for certain deviations from the Standard Bid Documents for procurement of 1000 MW \pm 20%RTC power for a period of 15 years from 2013 under long term. This Commission thereafter, vide order dated 18.12.2012 accorded approval to float tender for procurement of 1000 MW \pm 20% with the deviations stated therein. Thereafter, the 1st Respondent herein floated tender on 21.12.2012 to procure 1000 MW \pm 20% RTC power on long term under Case I bidding procedure for being the base load requirement of TANGEDCO for a period of fifteen years from 01.10.2013 to 30.09.2028. The Petitioner also submitted its bid for supply of 74 MW power amongst other companies.

3.2. The discount offered by the petitioner which was conditional, unilateral and voluntary had been withdrawn and all details in that regard are set out in the communication dated 24.08.2018 made by the Petitioner recording the withdrawal of the offer. The continued disregard by the Respondent, by not considering the withdrawal and not placing the petitioner accordingly in the MOD list, effectively amounts to a disobedience of such binding directive that would invite proceedings under S.142, in as much as, if the parties to an approved PPA and an affront to the regulatory mechanism carefully structured within the Act. Thereafter, in the Non-Financial Bid Evaluation Committee meeting held on 18.04.2013, the Committee recommended opening of financial bids for the

twelve bidders who had met the qualification requirements and the same was opened on 07.05.2013. The levelised tariff was calculated for all bidders, including the petitioner's bid by applying the Escalation Factor and discount factor notified by the CERC. Accordingly, the petitioner was ranked 11th in the process with an actual levelised tariff of Rs.7.502 per kWhr. Thereafter, in a meeting held on 18.05.2013, the Financial Bid Evaluation Committee recommended that the bidders have been evaluated correctly and the levelised tariff tabulated is found to be correct and the bid process and evaluation conform to the provisions of the RFP document dated 21.12.2012.

3.3. The 1st Respondent herein, procured 1208 MW of power at a revised levelised tariff of Rs.4.910 per kWhr from the first four successful bidders. The 1st Respondent, after considering the availability of power and power demand in the state of Tamil Nadu, proposed to procure the balance 2222 MW power from the total quantum of 3430 MW in Tender No. 03/PPLT/2012 after negotiating with the remaining bidders, including the Petitioner herein and requested them to match with the revised levelised tariff of Rs.4.910 per kWhr. In view of the above, negotiation for rate matching was called, subject to the approval of Board of TANGEDCO and the Commission. Accordingly, the 1st Respondent herein called for negotiation with the remaining bidders including the Petitioner herein and the bidders agreed to match to the revised levelised tariff of Rs.4.910 per kWhr and accepted to offer an additional rebate on payment against provisional bill raised.

3.4. As per clause 3.5.7 of RFP, any increase / decrease in the relinquished capacity exceeding 20% of the quantum could only be made with the approval

of the Commission. Therefore, the 1st Respondent herein filed M.P. No.27 of 2013 before this Commission on 30.08.2013 seeking approval for purchase of balance quantum of 2122 MW from other bidders. Thereafter, vide its order dated 18.10.2013, Commission approved the procurement of balance quantum of remaining bidders subject to deviations already approved in M.P. No.37 of 2012 dated 18.12.2012.

3.5. Thereafter, the Board TANGEDCO in its 41st meeting held on 30.10.2013 approved to issue Letter of Intent (hereinafter referred to as "LoI") to the Petitioner herein, who was successful bidder for purchase of 74 MW power through Long Term under Case-1 bidding for a period of 15 years from 2013 to 2028, authorised the Director to sign PPA on behalf of TANGEDCO and to file petition before Commission for adoption of tariff under Section 63 of the Electricity Act, 2003 (hereinafter referred to as the "Act") in line with the GOI guidelines vide clause No. 6.4 after issue of LOI and execution of PPA. The LoI was issued to the Petitioner on 14.11.2013 and was accepted unconditionally by the Petitioner. After this, a PPA dated 12.12.2013 was entered into between the Petitioner and the 1st Respondent herein for supply of 74 MW RTC Power through long term from the Petitioner's power plant situated at Gummdipoondi, Tamil Nadu for a period of 15 years. Thereafter, the Petitioner started supplying power from 01 .01 .2014 onwards as per the terms of PPA.

3.6. Subsequently, the 1st Respondent herein filed P.P.A.P. No. 3 of 2014 praying to adopt the levelised tariff of Rs.4.91 per kWh for purchase of 74 MW

base load power from the Petitioner Company amongst different loads from different companies in terms of Section 63 of the Electricity Act, 2003. During the pendency of P.P.A.P. No. 3 of 2014 before the Commission, the Petitioner had vide its letter bearing reference OPGPG/TNEB/2355/2015-16 dated 03.02.2016 communicated to the 2nd Respondent herein, its willingness to offer a discount of Rs. 1.20 per kWhr on the monthly energy charge (MEPn) contained in the PPA for a period of five years. The petitioner also stated in the same communication, that the said discount was conditional and dependent upon the 2nd Respondent providing the Petitioner schedule of at least 85% of the contracted capacity of the PPA. Thus, the discount was conditional on getting minimum 85% schedule. The same was reported to the Commission on 23.02.2016 by the 1st Respondent herein for which the Commission directed the 1st Respondent to file written submissions to that effect. The 1st Respondent also proceeded to file written submission on 26.02.2016 wherein it has been recorded in paragraph 17 as follows:

“Though it is out of context to the issue of adoption of levelised tariff, which is the average tariff over the period of contract (15 years) duly escalated as per the escalation indices and discount factors issued by the CERC for the purpose of evaluation, the voluntary discounts offered by M/s. Coastal Energen, M/s. IL&FS and M/s. OPG Power are enclosed for information of the Commission.”

3.7. Thereafter, Commission in its order dated 29.07.2016 passed in P.P.A.P No.3 of 2014 while adopting the levelised tariff of Rs.4.91 kWhr, recorded as follows:

“7.6 TANGEDCO has stated that the levelised tariff of Rs. 4.91 per kWhr has been discovered in the tender through competitive bidding by following guidelines of MoP and the Evaluation Committee has also certified that Bid Evaluation has been done in a transparent manner and in conformity with the GOI guidelines. Therefore, in terms of section 63 of the Act, the Commission adopts the levelised tariff of Rs.4.91 per kWhr for procurement of 3330 MW Base Load Power as discovered under

Tender No.03/PPTL/2011.”

3.8. Though the 1st Respondent had filed written submissions recording the discount offered by the Petitioner herein, Commission had merely recorded the same and has in fact not approved any specific rate taking into account the discount offer or energy generation since that would evidently fall outside the scope of S.63 powers.

Accordingly, the following observations were made by the Commission:

“7.7. During the hearing of the above P.P.A.P. held on 23-02-2016, the TANGEDCO submitted interalia that M/s. Coastal Energen Private Ltd., M/s. IL&FS Tamil Nadu Power Company Ltd. and OPG Power Generation Pvt. Ltd, have offered some reduction in the rate discovered in the tender for specific periods. The Commission directed the TANGEDCO to file Written Statement to the above effect. Accordingly TANGEDCO filed Written Statement on 26-02-2016. In para 17 of the said Written Statement, TANGEDCO has stated as follows:-

“Though it is out of context to the issue of adoption of levelised tariff, which is the average tariff over the period of the contract (15 years) duly escalated as per the escalation indices and discount factors issued by CERC for the purpose of evaluation, the voluntary discounts offered by M/s. Coastal Energen, M/s. IL&FS and M/s. OPG Power are enclosed for the information of the Commission.”

The above statement of the TANGEDCO is recorded.

7.8. Regulation 75(1) of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2005 provides interalia that the Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch. Thus, the procurement of power in the above tender also shall be subject to the above Regulation. With the above order and observations, the P.P.A.P. No.3 of 2014 is disposed of.”

3.9. Despite offering discount and keeping the plant at 100% availability, the 1st Respondent had not given the agreed schedule to the Petitioner. However, without adherence to the conditional offer wherein the rate was dependent upon

the schedule, the 1st Respondent did not give the schedule but continued to pay on the basis that there was a discount. This step was completely untenable. Nevertheless, the petitioner continued to supply energy and raise invoices and proceeded to issue a letter bearing reference OPGPG/TNEB/693/2018-19 dated 22.05.2018 addressed to the 2nd Respondent which communicated that the discount offered by the Petitioner to the 1st Respondent herein would be specifically withdrawn on and from 01.06.2018, and that the Petitioner would be supplying power strictly as specified in PPA dated 12.12.2013. This letter was put on record to rest any controversy as to the adherence to the PPA. Since the conditional discount was one offered unilaterally by the petitioner, it could be withdrawn at any time. It is pertinent to state that no amendment to the PPA was either executed or approved by this Commission and therefore the PPA continues to be in force, To the above mentioned letter, the 2nd Respondent herein replied stating that the voluntary discount given has already been recorded in the Commission's Tariff adoption order. The 2nd Respondent also communicated to the Petitioner that vide Tariff Order dated 11.08.2017, Commission has placed OPG as an unapproved source. It was also informed to the Petitioner that since dispatch is based on MOD ranking, OPG could get such higher dispatch only if it finds place in MOD stack and thereby directed the Petitioner to withdraw the letter dated 22.05.2018.

3.10. Thereafter, the Petitioner in response to letter dated 29.05.2018 issued by the 2nd Respondent once again reiterated the fact, that despite the discount of Rs.1.20 per kWhr offered by the Petitioner in lieu of providing the Petitioner a schedule of at least 85% vide its letter dated 03.02.2016, the 1st Respondent

herein had not given the agreed schedule for the financial years 2016-17 and 2017-18. As such, there remains no basis for discount. The Petitioner also stated in this letter, that the Commission had merely gone on to record the discount offers, which were evidently placed as a matter of fact by the TANGEDCO as part of the Tariff fixation process but had, however, not approved any amendment to the PPA. Even while approving the tariff rate Commission had not considered the discount offered and has approved the levelised rate of Rs.4.91kWhr., that is the only rate which is approved and ought to be paid as the Electricity Act does not contemplate of rate outside the scope of what has been approved unless there is a specific prior approval by the State Electricity Regulatory Commission.

3.11. The Petitioner, thereafter, on 24.08.2018 issued a reply to letter dated 07.08.2018 in detail once again informing the 2nd Respondent that the discount of Rs.1.20 per kWhr was offered in order to get 85% of schedule vide letter dated 03.02.2016. However, the first Respondent had not given the agreed schedule of 85% even after the discount. The lower schedule has increased cost of generations and hence, the Petitioner had no option but to withdraw the discount offered. The Petitioner also informed the Respondents yet again that the Commission had in order dated 29.07.2016 passed in P.PAP No.3 of 2014 merely recorded the discount offers made by Petitioner and other companies and has not approved any specific rate taking into account of discount offer on energy generation.

3.12. The Commission had, in its order dated 29.07.2016, merely recorded

a finding that a discount offer was made to the 1st Respondent herein by the Petitioner and other companies. However, while approving tariff, this Commission has approved single levelised tariff of Rs.4.91 per unit and has not approved any specific tariff rate to the petitioner taking into account the discount offered. The discount offered by the petitioner was based on the 1st Respondent herein granting the Petitioner 85% of the Schedule. However, since the same was not agreed to by the 1st Respondent, the Petitioner is entitled to withdraw the discount offer based on the cost of generation as the same was conditional to the 1st Respondent providing 85% schedule to the Petitioner.

3.13. The Commission's approved MOD is based on the monthly energy cost. Further, Commission has stated in the tariff order that the MOD is subject to change on real time basis. To the effect, the Commission in the Tariff Order passed by it on 11.08.2017 made the following observation:

"4.15.5 As elaborated in Chapter 3, the Commission has subjected all sources of power purchase excluding the must run plants, to the merit order principle including TANGEDCO's own generating stations based on approved Energy Charges. The sources have been arranged based on their ranking, with the source having lowest variable cost being ranked first and despatched fully, and with the next ranked sources being despatched to the fullest/partly, till such time the approved Energy Requirement is matched. Further, it is clarified that even in cases where the sources have been considered as partial/zero despatch due to MOD constraints, the Fixed Costs have been considered fully, assuming that they will meet the availability norms as per the PPA/Regulations. The same will be subject to true-up based on actuals. The Commission reiterates that the whole objective of applying MOD principle is to optimize the power purchase cost, and it should be immaterial to TANGEDCO, whether the power is being procured from its own generation sources or other sources, as long

as the rate of power purchase is lower, as the fixed costs of TANGEDCO's generating stations are recovered based on their Availability rather than actual generation.

4.15.6 For FY 2016-17, the Commission has considered Energy Charge per unit and Fixed Charge based on actual data for 11 months. The same Energy Charge per unit have been considered for FY 2017-18 and FY 2018-19 without any annual escalation.

4.15.7 The Commission also observes that TANGEDCO does not appear to be availing the low cost short-term power available in the Power Exchanges. While the majority of power purchase should preferably be from long/medium-term sources, TANGEDCO should assess the opportunities available to meet around 10% of its power requirement from Power Exchanges in case the landed power purchase rates are lower than the variable cost of power available to TANGEDCO from other sources, with the view to minimise the power purchase cost. TANGEDCO should frequently review the prevailing rates in the Power Exchanges in order to optimise the power purchase cost.

4.15.8 TANGEDCO should take prior approval from the Commission for purchasing energy from unapproved sources and for power purchase beyond MoD. The Commission appreciates that the MoD is a dynamic activity, as TANGEDCO has to meet the MW requirement as well as MU requirement on a day-to-day basis and rates of power purchase from other sources are subject to revision. At the same time, TANGEDCO is duty-bound to ensure that the cheapest power (in terms of variable cost) available is procured, which is laid down by the broad MoD stack detailed above. Hence, TANGEDCO is directed to submit the MoD stack of actual power purchased from various sources during the month, on a monthly basis. Further, in case of any variations from the MoD stack approved by the Commission, TANGEDCO should file quarterly Petitions for ratification of such power purchase with proper justification, in the same manner as being done presently for purchase from IPPs outside the MoD stack.”

3.14. It is evident from the Tariff Order dated 11.08.2017 passed by the Commission that MOD is subject to change on real time basis and the 1st Respondent should prepare monthly MOD list taking into account the monthly variable costs. Hence, TANGEDCO should have prepared a monthly MOD list

considering the withdrawal of offered discount for preparation of MOD, should be strictly as per the approved PPA and in future also, the monthly MOD list is to be in accordance therewith.

4.Memo Filed on behalf of the petitioner:

4.1. An issuance of a Tariff Order and adherence thereto is purely and exclusively an exercise of Regulatory power. The preparation of MOD stack form is to be done strictly in accordance with the Tariff Orders issued from time to time.

4.2. As such, the entire relief is seeking for exercise of regulatory powers of this Commission and principally arises out of and under Section 63 read with Section 86(1)(a) and (b) of the Electricity Act, 2003. As such, the parties to an approved order under Section 63 cannot unilaterally change the terms thereof. The issue with respect to exercise of the regulatory powers and treating the petition in that regard as a miscellaneous petition has already been ordered by the Hon'ble APTEL in Appeal No.31 & 32 of 2017 by order dated 24.9.2019. In the said judgment the Hon'ble APTEL has already held that in matters relating to compliance and adherence to Tariff Orders etc., the petition is to be treated as a Miscellaneous Petition since it involves exercise of a Regulatory power, even if there is a monetary claim. In the present case, the need to treat it as an MP is all the more clear as no monetary claim is being made and only adherence to the Tariff approval already granted is sought.

4.3. The present petition had already been numbered as a Miscellaneous

Petition and as such the question of payment of any deficit court fee does not arise and at the hearing held on 01.10.2019, the Commission has ordered issuance of notice and filing of court fee. Therefore, there exists no ground for issuance of a communication by the Registry for any claim of alleged deficit court fee.

4.4 .It is stated by the Secretary, TNERC in his letter of 1.10.2019 that on a perusal of the petition it is noticed by it to be in the nature of a Dispute resolution and hence, fees payable as applicable to the DRPs should be paid by the petitioner and a further statement that claim should be quantified has been made and such a direction is wholly unwarranted. The averments clearly show that the entire issue is exclusively within the Regulatory sphere with the prayer seeking compliance with a Tariff already adopted by the Commission as also adherence to the drawing up of MOD stack which is also purely regulatory in nature. There is no quantification of the claim involved in the nature of the claim and therefore the Petitioner cannot be called upon by the Registry to draft a prayer in terms of its directions which is wholly impermissible. Furthermore, upon listing of the case for admission and issuance of notice thereof, the Registry/Secretary does not have any powers and such powers as is sought to be exercised are not provided under the TNERC (Conduct of Business) Regulations as available to the Secretary.

5. APPLICATION FOR INTERIM RELIEF AND DIRECTIONS ON BEHALF OF THE APPLICANT/PETITIONER

5.1. By its letter dated 07.08.2018, the Respondent No.1 had directed that the

power supplied by the Petitioner shall continue to be charged at a discounted rate of Rs.3.1170/- kWh after availing a discount of Rs.1.20/-, despite the cost being fixed at by an adoption order dated 29.07.2016 passed under Section 63 of the Electricity Act, 2003 by the Commission and incorporated in the terms of the PPA dated 12.12.2013 being Rs.4.3170/- kWh. The conditional discount offered by the Petitioner had been withdrawn and all details in that regard are set out in the communication dated 24.08.2018 addressed to the Petitioner recording the withdrawal of the offer and requesting for the payment of Tariff accordingly as per the terms of the PPA dated 12.12.2013.

5.2. During pendency of the tariff adoption petition filed by the Respondents, being PPAP No.3 of 2014, the Petitioner had, by its letter bearing reference OPGPG/TNEB/2355/2015-16 dated 03.02.2016, communicated its willingness to offer a conditional discount of Rs. 1.20 per kWh on the monthly energy charge (MEPn) stipulated in the PPA dated 12.12.2013 for a period of five years. The said discount was conditional and dependent upon the Respondents providing the Petitioner a monthly schedule of at least 85% of the contracted capacity of the PPA. The same was reported to the Commission on 23.02.2016 by the Respondents for which the Commission was pleased to direct the Respondents to file written submissions to that effect. The Respondents accordingly filed written submissions on 26.02.2016 wherein it has been recorded in paragraph 17 as follows:

"Though it is out of context to the issue of adoption of levellised tariff, which is the average tariff over the period of contract (15 years) duly escalated as per the escalation indices and discount factors issued by the CERC for the purpose of evaluation, the voluntary discounts offered by MIs. Coastal Energen, MIs IL&FS and MIs. OPG Power are enclosed for information of the Commission."

5.3. The Commission, in its order dated 29.07.2016 passed in PPAP No.3 of 2014

while adopting the levelled tariff of Rs.4.91 kWh, recorded as follows:

"7.6 TANGEDCO has stated that the levelled tariff of Rs.4.91 per kWh has been discovered in the tender through competitive bidding by following guidelines of MoP and the Evaluation Committee has also certified that Bid Evaluation has been done in a transparent manner and in conformity with the GOI guidelines. Therefore, in terms of section 63 of the Act, the Commission adopts the levelled tariff of Rs.4.91 per kWh for procurement of 3330 MW Base Load Power as discovered under Tender No. 03/PPTL/2011."

5.4. Though the Respondents had filed written submissions recording the discount offer by the Petitioner, Commission had merely recorded the same and has in fact not approved any specific rate taking into account the discount offer or energy generation evidencing that the discount was conditional and would only be applicable as per the terms offered by the Petitioner.

5.5. The following observations were made by this Commission:

"7.7. During the hearing of the above P.P.A.P. held on 23-02-2016, the TANGEDCO submitted inter alia that M/s. Coastal Energen Private Ltd., M/s. IL&FS Tamil Nadu Power Company Ltd. and OPG Power Generation Pvt. Ltd. have offered some reduction in the rate discovered in the tender for specific periods. The Commission directed the TANGEDCO to file Written Statement to the above effect. Accordingly TANGEDCO filed Written Statement on 26-02-2016 In para 17 of the said Written Statement, TANGEDCO has stated as follows. -

"Though it is out of context to the issue of adoption of levelled tariff, which is the average tariff over the period of the contract (15 years) duly escalated as per the escalation indices and discount factors issued by CERC for the purpose of evaluation, the voluntary discounts offered by M/s. Coastal Energen, M/s. IL&FS and M/s. OPG Power are enclosed for the information

of the Commission. "

The above statement of the TANGEDCO is recorded.

7.8 Regulation 75 (1) of the Tamil Nadu Electricity Regulatory Commission (Terms and Conditions for Determination of Tariff) Regulation, 2005 provides inter alia that the Distribution Licensee shall procure power on least cost basis and strictly on Merit Order Despatch. Thus, the procurement of power in the above tender also shall be subject to the above Regulation. With the above order and observations, the P.P.A.P.No.3 of 2014 is disposed of."

5.6. Despite offering discount and keeping the plant at 100% availability, the Respondents have not made available the agreed schedule to the Petitioner. However, without adherence to the conditional offer wherein the rate was dependent upon the schedule, the Respondent continued to pay the Petitioner on the basis that there was a discount, which was wholly untenable and not acceptable to the Petitioner.

5.7. The Petitioner continued to supply energy and raise Invoices and proceeded to issue a letter bearing reference OPGPG/TNEB/693/2018-19 dated 22.05.2018 addressed to the Respondent No.2 communicated that the discount offered by the Petitioner would be specifically withdrawn from 01.06.2018, and that the Petitioner would be supplying power as per the rate specified in PPA dated 12.12.2013. This letter was put on record to rest any controversy as to the applicable rates and put it beyond doubt. Since the conditional discount was one offered by the Petitioner, it could be withdrawn at any time.

5.8. The Respondents replied stating that the voluntary discount given has

already been recorded in the Commission's Tariff adoption order. The Respondents also communicated to the Petitioner that by Tariff Order dated 11-08-2017, the Commission has placed the petitioner as an unapproved source. It was also informed to the Petitioner that since dispatch is based on MOD ranking, the Petitioner could get such higher dispatch only if it finds place in MOD stack and thereby directed the Petitioner to withdraw the letter dated 22.05.2018.

5.9. In response to the letter dated 29.05.2018, the Petitioner reiterated the fact that despite the discount of Rs.1.20 per kWh offered by the Petitioner in lieu of providing the Petitioner a schedule of at least 85% vide its letter dated 03.02.2016, the Respondents had not given the agreed schedule for the financial years 2016-17 and 2017-18. As such, there remained no basis for the discount. The Petitioner also states that even while approving the tariff rate, the Commission had not considered the discount offered and has approved the levelled rate of Rs.4.91/kWh. which is the only rate which is approved and ought to be paid, as the Electricity Act does not contemplate of rates outside the scope of what has been approved unless there is a specific prior approval by the State Regulatory Commission.

5.10. The lower schedule has increased cost of generation and hence, the Petitioner had no option but to withdraw the discount offered. Be that as it may the present position is that there is no electricity being purchased by the Respondent despite the Petitioner's maintaining 100% availability to supply in terms of the PPA. Consequently, the Petitioner is suffering huge losses and the Petitioner

Company's finances are heavily stressed. Continued exclusion from the MOD stack is *adversely* affecting the rights of the Petitioner, if the interim relief sought *for in the present* Application is not granted to the Petitioner, the petitioner Company shall suffer from irreparable loss and injury as a result of mounting losses, which cannot be later compensated. Despite maintaining the power plant at 100% availability, the Respondents have not procured any electricity from the Petitioner and the instant relief has been sought in an effort to best mitigate the precarious financial position of the Petitioner Company during pendency of the present petition.

5.11. In the event, the Petitioner is placed on the MOD stack after taking into account the withdrawal of discount as per the adopted levelled tariff rate of Rs.4.910 per kWh in terms of the Commission's order dated 29.07.2016, no injury, loss or prejudice will be caused to the Respondents. On the contrary, the balance of convenience is wholly in favour of the Petitioner being placed on the MOD stack. The Commission may pass appropriate orders directing the Respondent No.1 to place the petitioner on the MOD stack without applying discount, pending disposal of the petition and pass such further or other orders as it may deem fit. Respondents may be directed to prepare the Merit Order Dispatch ("MOD") stack taking into account the approved tariff rate as per the order dated 29.07.2016 of the Commission in PPAP No.3 of 2014 without discount and issue schedules accordingly.

6. COUNTER AFFIDAVIT FILED ON BEHALF OF THE RESPONDENTS

IN TERMS OF THE ORDER DATED 28.01.2020

6.1. The petition is not maintainable and it is devoid of merits on both the factual and legal aspects. The present Miscellaneous Petition in M.P. No. 7 of 2019 has been filed under Section 86(1) (a) & (b) read with Section 63 of the Electricity Act, 2003 read with Regulation 16(1) of TNERC Conduct of Business Regulations, 2004 for the relief stated above. The relevant provisions are extracted hereunder:

“Section 86. (Functions of State Commission):

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

(a) determine the tariff for generation, supply, transmission and wheeling of electricity, wholesale, bulk or retail, as the case may be, within the State: Provided that where open access has been permitted to a category of consumers under section 42, the State Commission shall determine only the wheeling charges and surcharge thereon, if any, for the said category of consumers;

(b) regulate electricity purchase and procurement process of distribution licensees including the price at which electricity shall be procured from the generating companies or licensees or from other sources through agreements for purchase of power for distribution and supply within the State;

Section 63. (Determination of tariff by bidding process):

Notwithstanding anything contained in section 62, the Appropriate Commission shall adopt the tariff if such tariff has been determined through transparent process of bidding in accordance with the guidelines issued by the Central Government.”

6.2. Section 86 of the Electricity Act deals with the function of the Commission in determination of tariff and Section 63 deals with the determination of tariff by bidding process, but neither deals with the prayer sought for in the present Miscellaneous Petition, hence this Petition is not maintainable.

6.3. The averments in the present Miscellaneous Petition clearly establishes the existence of dispute between the Petitioner and the Respondents i.e. between the Generator and the Licensee, which is indirectly a claim petition and hence the Petitioner ought to have filed it as a Dispute Resolution Petition (DRP) and not as Miscellaneous Petition.

6.4. Instead of filing a Dispute Resolution Petition, the petitioner has filed its Miscellaneous Petition only to avoid Court Fee and hence this Petition is not maintainable and the same is liable to be dismissed at the threshold.

6.5. The answering Respondent had initiated the tender for procurement of power under Long Term basis for a period of 15 years. The Petitioner also submitted bid for supply of 74MW RTC power and became one of the successful bidders with a levelized tariff Rs.4.91 per unit.

6.6. The Power Purchase Agreement was entered into between the Petitioner and the Respondent on 12.12.2013 for procuring 74 MW power for a period of 15 years and the Petitioner commenced its supply from 01.01.2014. The tariff at the time of commencement was Rs.5.4497 and gradually increased to Rs 5.7477 during January 2016.

6.7. As per the Power Purchase Agreement, the Respondents being the procurers have to get an approval and order of the Commission under

Section 63 of the Electricity Act, 2003 for adoption of tariff. Pursuant to which, this Respondent had approached the Commission in P.P.A.P. No. 3 of 2014 for the approval.

6.8. In the meantime and during the pendency of the above P.P.A.P. No. 3 of 2014 before the Commission, by a letter dated 27.01.2016 the petitioner offered a discount of Rs.1.15 Per kWh in Energy Charge for the period from 28.01.2016 to 31.05.2016. Then, by a letter dated 01.02.2016, the Petitioner informed that the discount offered shall be read as 1.20 per unit in Energy Charges instead of Rs.1.15 per kWh indicated inadvertently. Subsequently, by a letter dated 03.02.2016 the Petitioner offered an unconditional discount of Rs.1.20 per kWh for a period of five years, the relevant portion of which is as follows:-

“We humbly offer a discount Rs. 1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA. This discount is for a period of 5 years and the same can be extended as required.

We hope that our request is considered favorably and we request you to consider, if possible, a schedule of 85% of the contracted capacity”.

6.9. It is apparent from the above that the discount offered by the Petitioner is unconditional. Further, it is crystal clear from the above statement of the petitioner that there is no obligation on the part of the Respondent to schedule 85% of the contracted capacity and it is the sole discretion of Respondent. Hence, the claim of the Petitioner is improper and contrary to its own statement of admission.

6.10. On 23.02.2016 when the above matter was taken up for hearing by the Commission, the above voluntary discount rates offered by the Petitioner and also by the other generators were brought to the notice of the Commission and this Respondent was directed to file a written statement on the same. Subsequently, on 26-02-2016, this respondent filed its written statement before the Commission as directed and the same was also recorded.

6.11 The Commission in its order dated 29.07.2016 in P.P.A.P No. 3 of 2014 has clearly recorded the above, as follows:-

“7.7. During the hearing of the above P.P.A.P held on 23.02.2016, the TANGEDCO submitted inter alia that M/s. Coastal Energen Private Ltd., M/s. IL&FS Tamil Nadu Power Company Ltd. And OPG Power Generation Pvt. Ltd. have offered some deduction in the rate discovered in the tender for specific periods. The Commission directed the TANGEDCO to file Written Statement to the above effect. Accordingly TANGEDCO filed Written Statement on 26.02.2016 In para 17 of the said Written Statement, TANGEDCO has stated as follows:-

*“Though it is out of context to the issue of adoption of levelized tariff, which is the average tariff over the period of contract (15 years) duly escalated as per the escalation indices and discount factors issued by CERC for the purpose of evaluation, the voluntary discounts offered by M/s. Coastal Energen, M/s. IL&FS and M/s. OPG Power are enclosed for the information of the Commission”.
The above statement of the TANGEDCO is recorded.”*

6.12. The Commission in its Tariff Order dated 11.08.2017, has considered the variable cost of the Petitioner's source after taking into account the

discount offered and prepared the Merit Order and also approved the Annual Revenue Requirement. In fact the Commission did not approve power purchase from the Petitioner even after taking into account the discount offered for the year 2017-18 and allowed only fixed charge. The Commission has approved power purchase from the Petitioner's source only for the year 2018 - 19. As per Clause 1.8.1 of the Tariff Order, the Order will come into effect from August 11, 2017 and this Order will be valid until issue of the next Order.

6.13. The Petitioner by its letter dated 22.05.2019 informed that the discount offered on monthly energy charges on the basis that upon availing the discount, the Respondent will provide us schedule of at least 85% of the contracted capacity. As the schedule for the year 2016 – 17 and 2017 – 18 was 27% and 40% respectively, the Petitioner proposed to withdraw the discount offered from 01.06.2018 onwards.

6.14. The respondent by its letter dated 29.05.2018 informed that voluntary discount offered has been recorded in Commission's Tariff adoption order. In the Tariff Order dated 11.08.2017, the Commission has placed the Petitioner as unapproved source and directed the Respondent to get prior approval for purchase of energy from unapproved source. Since dispatch is based on Merit Order Dispatch (MOD) ranking, the Petitioner can get a higher dispatch only if it finds place in MOD stack.

6.15. The petitioner by its letter dated 30.05.2019 informed that the Commission has approved power purchase cost only from 2016-17 to 2018-19 in its Tariff Order dated 11.08.2017 and requested to consider withdrawal of discount with effect from 01.04.2019.

6.16. The contention of the Petitioner that discount of Rs.1.20 per unit was offered on the understanding that it would get schedule for 85% from TANGEDCO is wrong. All the generators are aware of the fact that a generator has to qualify under the MOD for dispatch/ scheduling. The Petitioner gave the voluntary discount only to get into the MOD stack. It is wrong to seek scheduling of 85% of its generation in violation of MOD Regulations as the Respondent had never promised that it would dispatch 85% of the contracted power.

7. REJOINDER FILED BY THE PETITIONER ON 25-02-2020:

7.1. The contents of paras 1 to 5 of the counter affidavit filed by the respondents are matters of record and anything contrary to the record are denied and the respondents are put to strict proof of the same.

7.2. As regards the contents of para 6 of the counter affidavit filed by the respondents, the present issue clearly deals with the enforcement of a Tariff adoption order under Section 63 and procurement price including the price that has been determined and the tariff fixed in accordance with Section 63 of the Act and therefore squarely falls within the provisions of the Act and the provisions cited. The attempt of the Respondent to characterize a pure

Regulatory power as an exercise of a dispute adjudicatory power is clearly with an ulterior motive. The Respondent has now unfortunately sought to adopt a strategy of making claims of a dispute when there are none raised by the petitioner with the sole objective of preventing exercise of a Regulatory power. This is therefore a clear abuse of process and ought to be deprecated. The strategy appears to be calculated to prevent justice being rendered to the affected parties.

7.3. The contents of para 7 of the counter affidavit filed by the Respondents, are denied. It appears to be an attempt, once again, on the part of the respondents to claim that there is dispute when there is none. The present petition only seeks to enforce Section 63 of the Electricity Act, 2003. It is the specific stand of both the parties that there was voluntary discount that was offered by the petitioner. The petitioner herein has withdrawn such discount. The respondents' own statement filed before the Commission and the orders passed thereon demonstrates that the discount given was unilateral and was never *part of the PPA*. *It is, therefore, incomprehensible that something that is not part of PPA or incorporated as a clause in the agreement can be a dispute under the PPA. There is no provision in the PPA* executed between the parties or as approved by this Commission for a discount and therefore the discount being admittedly unilateral and outside the scope of the PPA and one having been withdrawn cannot be said to be part of PPA or a dispute under it. The claim of the Respondent is therefore wholly untenable.

7.4. The contents of para 8 of the counter affidavit filed by the respondents, are denied. The present petition is clearly a Miscellaneous Petition since in its terms and in substance, it seeks exercise of regulatory powers of the Commission and APTEL had held, in clear and unequivocal terms that matters involving regulatory powers ought to be in the nature of Miscellaneous Petition. The petitioner has not sought for adjudication of any dispute or recovery of money. It is only when any recovery of *money is sought for, there would be an amount involved requiring payment of a court fee thereon. Therefore, the question of avoidance of court fee does not arise at all as there is no 'amount in dispute' which the petitioner is seeking as payment in the present petition. A relief that is exclusively in the nature of seeking for regulatory intervention cannot be characterised as a dispute.*

7.5. The contents of paras 9 to 13 of the counter affidavit filed by the respondents are matters of record and merit no comments.

7.6. The contents of paras 14 and 15 of the counter affidavit filed by the respondents, are vehemently denied, The Respondents are seeking to selectively read a portion of the letter thereby adopting a misleading position. When the exchange of correspondence between the parties and the stand of the Respondent in the relevant proceedings and orders passed by this Commission are examined, it would be clear that discount can never be taken to be binding or form part of an agreement inasmuch as even the respondent's own stand before the Commission was that it was not a part

of any agreement and the Commission had also not approved such discount and directed the incorporation of the same in any binding agreement between the parties. Further, it is submitted that although levelized tariff is determined through bidding and finally determined by the Commission by adoption of the same, the said tariff is not final but is subject to escalations and pass through, even as per the tariff order itself. Therefore, it is completely wrong to contend that the levelized tariff is final and binding.

7.7. The contents of paras 16 and 17 of the counter affidavit filed by the respondents is self-evident and indeed supports the stand of the petitioner which itself clearly records in its written statement that the issue of discount is outside the context of adoption of tariff and the discount offered was only for information of the Commission. Thus, the respondents' own stand supports the position of the petitioner.

7.8. The contents of paras 18, of the respondent Reply is denied. It relates to a tariff order wherein merit order has been prepared on the basis of information given to the Commission. That would, in no manner, change the position that where discount provided unilaterally and of the petitioner's intention to achieve greater despatch and also prompt payments from the respondent, wherein the Petitioner does not achieve the purpose of providing the discount, the same can be withdrawn. Further the averments by the respondent that this commission has not approved the Power Purchase agreement of the Petitioner for the year 20 17-18 is totally

wrong and misleading.

7.9. The contents of para 19 are matters of record and hence require no rebuttal.

7.10. The contents of paras 20 and 21 are denied and the contents of the petitioner's letter dated 13.5.2019 are clear and the question of request for considering the withdrawal of discount does not arise since it is an unilateral offer of discount and which can be withdrawn at any time by the petitioner.

7.11. As regards the contents of para 22 of the counter affidavit filed by the respondents, the petitioner's *communications in regard to unilateral discount are clear. The discount had originally been offered only in recognition of prompt payment and higher despatch. From the particulars unfolded, both the aspects i.e prompt payment and higher despatch were not forthcoming. Therefore, there would be no purpose in continuation of the discount.*

8. REJOINDER FILED BY THE PETITIONER ON 10-03-2020:-

8.1. As regards the contents of para 6 of the counter affidavit filed by the respondents, the present issue clearly deals with the enforcement of a Tariff adoption order under Section 63 and procurement price including the price that has been determined and the tariff fixed in accordance with Section 63 of the Act and therefore squarely falls within the provisions of the Act and the provisions cited. The attempt of the

Respondent to characterize a pure Regulatory power as an exercise of a dispute adjudicatory power is clearly with an ulterior motive. The TANGEDCO has now unfortunately sought to adopt a strategy of making claims of a dispute when there are none raised by the petitioner, with the sole objective of preventing the exercise of a Regulatory power. This is, therefore, a clear abuse of process and ought to be deprecated. The strategy appears to be calculated to prevent justice from being rendered to the affected parties.

8.2. As regards the contents of para 7 of the counter affidavit filed by the respondents, the same is denied. It appears to be an attempt, once again, on the part of the respondents to claim that there is a dispute when there is none. The present petition only seeks to enforce Section 63 order. It is the specific stand of both the parties that there was a voluntary discount that was offered by the petitioner. The petitioner herein has withdrawn such a discount. The respondents' own statement filed before this Commission and the orders passed thereon demonstrates that the discount given was unilateral and was never part of the PPA. It is, therefore, incomprehensible that something that is not part of PPA or incorporated as a clause in the agreement can be a dispute under the PPA. There is no provision in the PPA executed between the parties or as approved by the Commission for a discount and therefore the discount being admittedly unilateral and outside the scope of the PPA and one having been withdrawn cannot be said to be part of PPA or a dispute under it. The claim of the Respondent is therefore wholly untenable.

8.3. The contents of para 8 of the counter affidavit filed by the respondents are denied. The present petition is clearly a Miscellaneous Petition since in its terms and in

substance, it seeks exercise of regulatory powers of the Commission and APTEL had held, in clear and unequivocal terms that matters involving regulatory powers ought to be in the nature of Miscellaneous Petition. The petitioner has not sought for adjudication of any dispute or recovery of money. It is only when any recovery of money is sought for, there would be an amount involving payment of a court fee thereon. Therefore, the question of avoidance of court fee does not arise at all as there is no 'amount in dispute' which the petitioner is seeking as payment of in the present petition. A relief that is exclusively in the nature of seeking regulatory intervention cannot be characterized as a dispute.

8.4. The contents of paras 9 to 13 of the counter affidavit filed by the respondents are matters of record and merit no comments.

8.5. The contents of paras 14 and 15 of the counter affidavit filed by the respondents, are vehemently denied. The Respondents are seeking to selectively read a portion of the letter thereby adopting a misleading position. When the exchange of correspondence between the parties and the stand of the Respondent in the relevant proceedings and orders passed by this Commission are examined, it would be clear that discount can never be taken to be binding or form part of an agreement inasmuch as even the respondent's own stand before this Commission was that it was not a part of any agreement and the Commission has just recorded such discount and has not directed the incorporation of the same in any binding agreement between the parties.

8.6. The contents of paras 16 and 17 of the counter affidavit filed by the

respondents are self-evident and indeed supports the stand of the petitioner which itself clearly records in its written statement that the issue of discount is outside the context of adoption of tariff and the discount offered was only for information of the Commission. Thus, the respondents' own stand supports the position of the petitioner.

8.7. The contents of Para 18, of the counter affidavit filed by the respondent, are denied. The same relates to a tariff order wherein merit order has been prepared on the basis of information given to the Commission. That would, in no manner, change the position that where the discount provided unilaterally and arose out of the petitioner's intention to achieve greater despatch and also prompt payments from the respondent, when the Petitioner does not achieve the purpose of providing the discount, the same can be withdrawn. Further, the averments by the respondent that the Commission has not approved the Power Purchase agreement of the Petitioner for the year 2017-18 is erroneous and misleading. The approval for the purchase of power by the respondent was given in PPAP No.3 of 2014, which in no way is changed by the Tariff Order and cannot be changed under the statutory scheme. This is a fact which the Respondent is fully aware and is now making misleading statements. The Respondent is well aware that the tariff order only provides the methodology the Respondents must follow when scheduling power between the approved sources. It cannot and does not approve or disapprove any generation or any particular tariff. The tariff to be paid to any generator under section 63 of the Act can only be the tariff for that period as mentioned in the PPA approved by the Commission which in this case, PPAP No 3 of 2014. Further, the Tariff order only gives the methodology for MOD preparation and does not freeze any static MOD for

any period. The MOD is to be prepared every month by the Respondent keeping in mind various factors mentioned in the tariff order including demand and supply situation, the lowest variable cost for that month etc. This, of course, varies from month to month, a fact the Respondent is well aware of. Moreover, the final Tariff which is taken for preparation of monthly MOD, is the respective PPA tariff for each generator for that month. It is not the tariff mentioned in the MOD stack of the tariff order which is considered for preparation of monthly MOD, which, at most times, will only provide the levelised tariff under the respective PPA's, but is, in fact, the actual variable tariff payable as per the PPA for that month. The claims of the Respondent are therefore erroneous.

8.8. The contents of para 19 are matters of record and hence require no rebuttal.

8.9. The contents of paras 20 and 21 are denied and the contents of the petitioner's letter dated 13.5.2019 are clear and the question of request for considering withdrawal of discount does not arise since it is an unilateral offer of discount and which can be withdrawn at any time by the petitioner.

8.10. As regards the contents of para 22 of the counter affidavit filed by the respondents, the petitioner's communications in regard to unilateral discounts are clear. Further, the discount had originally been offered only in recognition of prompt payment and higher despatch. As would be evident even from the particulars unfolded, both the aspects i.e prompt payment and higher despatch were not forthcoming. Therefore, there would be no purpose in the

continuation of the discount.

8.11. The Rejoinder filed by the petitioner on 25th February, 2020 be permitted to be withdrawn and the present rejoinder taken on record and the present petition may be allowed as prayed for by this Commission.

9. Findings of the Commission:-

9.1. This petition has been filed with a prayer to direct the respondents to comply with the order of the Commission in P.P.A.P. No. 3 of 2014 dated 29.07.2016 and comply strictly with the P.P.A. dated 12.12.2013 in terms of the petitioner's communication of adherence to the PPA in its letter dated 22.05.2018 and consequently, prepare the MOD stack taking into account the approved terms of the PPA and issue schedules accordingly. In other words, the petitioner seeks to set aside the instructions issued by the ^{1st} Respondent vide its letter dated 07.08.2018, directing that the power supplied by the Petitioner shall be continued to be at an energy charge of Rs.3.1170/- Kwh after availing a discount of Rs.1.20/- per unit despite the cost being fixed at by an adoption order under section 63 of the Electricity Act, 2003 by the Commission and incorporated in the terms of the PPA.

9.2. The brief facts leading to the filing of the case are as follows:-

In M.P. No. 37 of 2012, the Commission has approved to float a tender for procurement of 1000 MW \pm 20% with certain deviations. Thereafter first respondent floated tender on 21-12-2012 to procure 1000 MW \pm 20% RTC

Power of long term under Case-I bidding procedure being base load requirement of TANGEDCO over a period of 15 years from 01-10-2013 to 30-09-2028. The petitioner has also submitted its bid for supply of 74 MW power amongst other companies. The petitioner was ranked 11th in the process with a actual levelised tariff of Rs.7.502 per kwhr. Thereafter, the first respondent has procured 1208 MW of power at a revised levelised tariff of Rs.4.910 per kwhr from first four successive bidders.

9.3. The first respondent after considering the availability of power and power demand in the State of Tamil Nadu proposed to procure a balance of 2222 MW power from the total quantum of 3430 MW in Tender No.03/PFLT/2012 after negotiating with the remaining bidders including the petitioner herein and requested them to match with the revised levelised tariff of Rs.4.910 per kwhr. The petitioner is one among to bidders who agreed to match the revised levelised tariff of Rs.4.910 kwhr and accepted to offer an additional rebate on payment against provisional bill raised. The Lol was issued to the petitioner on 14-11-213 and was accepted unconditionally by the petitioner. Thereafter, a PPA was entered between the petitioner and the first respondent on 12-12-2013 for supply of 74 MW RTC power on long term from the petitioner's power plant at Gummilipoondi, Tamil Nadu from 01-01-2014 as per terms of the PPA.

9.4. Subsequently the first respondent filed P.P.A.P. No. 3 of 2014 prayed to adopt the levelised tariff of Rs.4.91 per kwhr for purchase of 74 MW base load power from the petitioner's company amongst different loads from different companies in terms of section 63 of the Electricity Act, 2003. During the

pendency of the P.P.A.P. No. 3 of 2014, the petitioner has offered a discount of Rs.1.20 per unit and the said discount was reported to the Commission by TANGEDCO (Respondent) and the Commission has recorded the submission of the TANGEDCO.

9.5. The relevant orders of the Commission dated 29-07-2016 in the said P.P.A.P. No. 3 of 2014 is as follows:-

“7.7. During the hearing of the above P.P.A.P. held on 23-02-2016, the TANGEDCO submitted interalia that M/s. Coastal Energen Private Ltd., M/s.IL&FS Tamil Nadu Power Company Ltd. and OPG Power Generation Pvt. Ltd. have offered some reduction in the rate discovered in the tender for specific periods. The Commission directed the TANGEDCO to file Written Statement to the above effect. Accordingly TANGEDCO filed Written Statement on 26-02-2016 Inpara 17 of the said Written Statement, TANGEDCO has stated as follows. -

"Though it is out of context to the issue of adoption of levelised tariff, which is the average tariff over the period of the contract (15 years) duly escalated as per the escalation indices and discount factors issued by CERC for the purpose of evaluation, the voluntary discounts offered by MIs. Coastal Energen, M/sIL&FS and M/s. OPG Power are enclosed for the information of the Commission. "

The above statement of the TANGEDCO is recorded.

9.6. During the hearing of this D.R.P. on 17-11-2020, the learned counsel for the respondent raised a preliminary objection that the petition should be numbered only as a DRP and not as a M.P. The Registry of the Commission has also issued a separate notice to the petitioner directing them to pay the applicable fee for the D.R.P. petition.

It is the submission of the learned counsel for the respondent that the discount offered by the petitioner is unconditional. According to the petitioner, it is conditional one and as such a dispute exists between the parties for adjudication under section 86 (1) (f) of the Act. Therefore, the petition should be classified as a DRP only.

9.7. Per contra, the learned counsel appearing for the petitioner would submit that the petition has been filed with a prayer to the Commission to exercise its regulatory power to direct the respondent to implement the PPA entered between the parties. Before going into the merits of the case, this preliminary issue has to be settled. The learned counsel for the petitioner has submitted that under section 86 (1) (f) of the Electricity Act, 2003, the Commission has got powers to regulate the purchase of electricity including the price at which electricity shall be procured from the generating companies and the petitioner is also seeking to enforce the payment of tariff agreed in the PPA and approved by the Commission and therefore this petition is only a Miscellaneous Petition. The learned counsel for the respondent replied that section 86 (1) (b) comes into picture when both the parties agree for the price at which the electricity should be procured but in this case both the parties differed on the nature of the discount offered by the petitioner. Therefore, it should be classified as D.R.P. After examining the submission of both parties, the Commission is of the view that inasmuch as the main issue involved in this case is with reference to the payment of tariff to the electricity supplied by the petitioner as per the PPA entered into the parties and the prayer of the petitioner involves the implementation of the PPA which has been approved by the Commission, the

petition has to be numbered as a Miscellaneous Petition only. Accordingly, the preliminary issue raised by the respondent is answered in favour of the petitioner.

9.8. Coming to the main issue involved in the prayer of the petitioner, the question to be decided is whether the discount offered by the petitioner is unconditional and it ought to be enforced or whether the discount offered by the petitioner is conditional and the petitioner is entitled to withdraw the same due to non-fulfilment of the condition attached to such discount.

9.9. In order to decide this issue, we have to look into the original letter given by the petitioner to the Chief Engineer. In its letter dated 27-01-2016 addressed to the Chief Engineer, PPP, Chennai – 600 002 copy marked to the CMD, TANGEDCO has stated as follows:-

“As you are aware, Tamil Nadu suffered from severe flooding causing widespread damage and financial stress to the State and the EB systems. As our humble contribution in the flood relief and restoration of electrical infrastructure, we are pleased to offer a discount on the Monthly Energy Charge in Rs./kWh (“MEPn” as defined in the PPA) contained in the PPA. This discount is for the period from 28-01-2016 upto 31-05-2016.

We humbly offer a discount of Rs.1.15 per kWh (One Rupee Fifteen PaisePer Kwh) on the MEPn for the period from 28-01-2016 till 31-05-2016.

In the event of any outage at our plant during the relevant period (i.e.28-01-2016 to 31-05-2016) and our available capacity is less than 85% we confirm that the above level of discount will apply on the actual power scheduled. We further confirm that the amount forgone by us by the above mentioned discount will not be claimed by us subsequently.”

9.10. Further, the petitioner in its letter dated 01-02-2016 to the respondent by referring their letter dated 27-01-2016 has stated as follows:-

“The discount referred in the above letter shall be read as Rs.1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA, instead of Rs.1.15 per kWh indicated inadvertently.”

9.11. Further, the petitioner in its letter dated 03-02-2016, by superseding his earlier letters dated 27-01-2016 and 01-02-2016 has stated as follows:-

“We humbly offer a discount of Rs.1.20 per kWh on the monthly energy charge (MEPn) contained in the PPA. This discount is for a period of 5 years and the same can be extended as required.

We hope that our request is considered favourably and we request you to consider, if possible, a schedule of 85% of the contracted capacity.”

9.12. From the above three letters, it is seen that in the first letter dated 27-01-2016 (though superseded later) the period of 4 months during which the petitioner had offered discount to mitigate the financial stress caused to the State and EB systems caused due to severe flooding that occurred during that period is already over. In the letter dated 03-02-2016, the petitioner has only requested the respondent to consider a schedule of 85% of the contracted capacity. Therefore, the intention underlying the discount offer is evident that the petitioner is offering discount in order to get 85% schedule of the contractual capacity.

9.13. Further, we have to determine the issue within the contours of the provisions of the PPA. It is noticed that the PPA has not been amended to give effect to the discounts offered by the petitioner. Nor the Commission has passed any specific orders on the discount made by the petitioner. The Commission has only recorded the submission made by the TANGEDCO regarding the discount offered by the petitioner. Now, it appears that the condition of the petitioner is not fulfilled by respondent and in such circumstance, the person making such

conditional offer can withdraw it as it has no binding effect. The discount offered by the petitioner is not legally enforceable when it decides to withdraw it. Therefore, we hold that the petitioner is entitled to withdraw its discount offer and the respondent is liable to pay the tariff to the power supplied by it to the respondent at the tariff approved in the PPA dated 12-12-2013 and this order taken effect from the date of filing of this petition i.e. on 16-04-2019.

With the above orders, this petition is finally disposed of.

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

(Sd.....)
(Dr.T.PrabhakaraRao)
Member

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

/True Copy /

Secretary
Tamil Nadu Electricity
Regulatory Commission

