



TELANGANA STATE ELECTRICITY REGULATORY COMMISSION
5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 59 of 2022
&
I. A. No. 49 of 2022

Dated 18.12.2023

Present

Sri. T. Sriranga Rao, Chairman
Sri. M. D. Manohar Raju, Member (Technical)
Sri. Bandaru Krishnaiah, Member (Finance)

Between:

M/s. Achampet Solar Private Limited,
4th Floor, Rectangle One,
D-4 District Centre, Saket,
New Delhi 110 017.

... Petitioner.

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office, H. No.6-1-50, Mint Compound,
Hyderabad 500 063.
2. Transmission Corporation of Telangana Limited,
A-Block, Room No.451, Vidyut Soudha,
Khairatabad, Hyderabad 500 063.
3. Telangana Power Coordination Committee (TPCC),
Vidyut Soudha, Hyderabad 500 082. ... Respondents.

(Respondent No. 2 & 3 deleted from the array of the petition by the Commission)

The petition came up for hearing on 25.08.2022, 05.09.2022, 30.09.2022, 31.10.2022, 21.11.2022, 12.01.2023 and 24.04.2023. Sri. Amit Kapur, Advocate along with Sri. Sai Sanjay Suraneni, Advocate representing M/s. J. Sagar Associates for petitioner is present on 25.08.2022, 30.09.2022, 12.01.2023, Sri. Sai Sanjay Surareni, Advocate representing M/s. J. Sagar Associates for petitioner is present on

05.09.2022, Sri. Amit Kapur, Advocate along with Sri. T. G. Rajesh, Advocate representing M/s. J. Sagar Associates for petitioner is present on 31.10.2022, 12.01.2023 and 24.04.2023 and Sri. T. G. Rajesh Kumar, counsel for petitioner is present on 21.11.2022. Sri. Mohammad Bande Ali, Law Attaché for respondent is present on 25.08.2022, 05.09.2022, 30.09.2022, 31.10.2022, 21.11.2022, 12.01.2023 and 24.04.2023. The matter having been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s. Achampet Solar Private Limited (petitioner or ASPL) has filed a petition under Section 86 (1) (f) of the Electricity Act, 2003 (Act, 2003) read with the terms of the power purchase agreement (PPA) seeking release of payments due to the petitioner by the respondent No. 1 and consequently payment of all future bills in a timely manner in accordance with PPA. The averments of the petition are extracted below:

- a. It is stated that the petitioner owns and operates a solar power generation facility near Achampet, Mahabubnagar District, State of Telangana. The respondent No.1, Southern Power Distribution Company of Telangana Limited (TSSPDCL), is a distribution licensee in the State of Telangana, to whom ASPL supplies power under the PPA dated 29.02.2016. The respondent No.2, Transmission Corporation of Telangana Limited (TSTRANSCO) is the electricity transmission company of the Government of Telangana (GoTS). The respondent No.3, Telangana State Power Coordination Committee (TSPCC) is an entity created to ensure coordination between the distribution companies in the State of Telangana. The functions of TSPCC inter-alia include examination of all commercial issues related to bulk supply and all legal issues related to renewable power developers and other generators and advise distribution companies in the State of Telangana suitably. Further, all invoices are submitted before and processed by TSPCC. The respondent Nos.2 and 3 are performam respondents as letters regarding opening of letter of credit (LoC) and invoices have been addressed to the respondent Nos.2 and 3 respectively. Hence, ASPL has impleaded respondent Nos.2 and 3 for completion.
- b. It is stated that on 18.03.2015, Government of Telangana directed Transmission Corporation of Telangana Limited (TSTRANSCO) and

Telangana State Power Coordination Committee (TSPCC) to issue a tender on behalf of Telangana State Electricity Distribution Companies (TSDISCOMs) for purchase of 2000 MW solar power.

- c. It is stated that on 01.04.2015, TSSPDCL issued Request for Selection (RfS) for selection of solar power developers for procuring 2000 MW solar power project.
- d. It is stated that on 19.01.2015, M/s Solarpack Corporation Technolgica S.L.U. (now known as, Solarpack Corporation Tecnologica S.A.U.) (SPCT) was selected as the successful bidder and accordingly a letter of intent (LoI) was issued in favour of SPCT by TSSPDCL for purchase of 10 MW solar power at tariff of Rs.5.7249 per kWh for a period of 25 years.
- e. It is stated that thereafter, SPCT incorporated ASPL as a Special Purchase Vehicle for the implementation of the project.
- f. It is stated that on 29.02.2016, ASPL executed a PPA with TSSPDCL for the supply of 10 MW power from the project. The project achieved COD on 31.08.2017.
- g. It is stated that ASPL has raised the following invoices for the period from January, 2021 to January, 2022 on TSPCC:

Invoice No.	Invoice Submission Date	Month	Amount (Rs.)
ACM/TSPCC/20-21/12	01.02.2021	Jan 2021	76,19,541
ACM/TSPCC/20-21/13	02.03.2021	Feb 2021	81,60,663
ACM/TSPCC/20-21/14	01.04.2021	Mar 2021	80,07,980
ACM/TSPCC/21-22/01	02.05.2021	Apr 2021	90,95,648
ACM/TSPCC/21-22/02	03.06.2021	May 2021	94,86,190
ACM/TSPCC/21-22/03	05.07.2021	Jun 2021	92,10,505
ACM/TSPCC/21-22/04	05.08.2021	Jul 2021	72,76,920
ACM/TSPCC/21-22/05	06.09.2021	Aug 2021	80,69,819
ACM/TSPCC/21-22/06	06.10.2021	Sept 2021	75,29,102
ACM/TSPCC/21-22/07	12.11.2021	Oct 2021	83,38,889
ACM/TSPCC/21-22/08	03.12.2021	Nov 2021	67,85,151
ACM/TSPCC/21-22/09	06.01.2022	Dec 2021	82,02,637
ACM/TSPCC/21-22/10	14.02.2022	Jan 2022	94,46,944

- h. It is stated that ASPL wrote to TSPCC regarding payment of LPS in terms of the following:

Date of Letter	Month	Amount (Rs.)
18.06.2018	September 2017	1,02,625
18.06.2018	October 2017	1,19,794
18.06.2018	November 2017	1,35,428

Date of Letter	Month	Amount (Rs.)
18.06.2018	December 2017	1,15,521
18.06.2018	January 2018	2,24,396
30.06.2018	February 2018	1,99,285
21.08.2018	March 2018	2,42,360
06.11.2018	April 2018	3,98,900
14.12.2018	May 2018	4,17,463
16.04.2019	Jun 2018	5,88,852
21.06.2019	Jul 2018	5,16,612
31.07.2019	Aug 2018	5,53,315
30.08.2019	Sept 2018	7,13,474
14.10.2019	Oct 2018	7,80,085
14.10.2019	Nov 2018	7,27,907
05.11.2019	Dec 2018	5,57,250
04.12.2019	Jan 2019	7,35,514
10.01.2020	Feb 2019	6,88,691
10.02.2020	Mar 2019	6,63,728
03.03.2020	Apr 2019	7,27,604
07.04.2020	May 2019	5,97,223
07.05.2020	Jun 2019	6,33,818
05.06.2020	Jul 2019	5,09,902
07.07.2020	Aug 2019	4,17,381
27.07.2020	Sept 2019	3,87,444
27.07.2020	Oct 2019	3,25,192
27.07.2020	Nov 2019	3,46,802
27.07.2020	Dec 2019	2,79,470
28.08.2020	Jan 2020	3,27,542
28.08.2020	Feb 2020	3,19,686
11.12.2020	Mar 2020	4,55,732
31.04.2021	Apr 2020	7,64,985.37
31.04.2021	May 2020	6,02,506.01
31.04.2021	June 2020	4,90,341.36
31.04.2021	July 2020	3,90,075.25
02.06.2021	Aug 2020	3,28,848
25.08.2021	Sep 2020	3,02,993
03.11.2021	Oct 2020	3,40,447
02.11.2021	Nov 2020	4,47,774

- i. It is stated that additionally, the ASPL is claiming LPS from December 2020 to December 2021 on account of delay in payment of monthly bills which is as under:

Month	Amount (Rs.)
Dec 2020	5,77,447
Jan 2021	5,89,429
Feb 2021	5,79,653
Mar 2021	5,16,504
Apr 2021	5,34,675
May 2021	4,84,056
Jun 2021	4,22,989
Jul 2021	2,91,117
Aug 2021	2,70,129

Month	Amount (Rs.)
Sept 2021	2,05,926
Oct 2021	1,61,694
Nov 2021	1,01,099
Dec 2021	66,969

j. It is stated that on 01.02.2018, 18.01.2019, 16.09.2019, 05.09.2020, 21.06.2021 and 17.01.2022, the ASPL wrote to TSSPDCL and TSTRANSCO seeking issuance of irrevocable revolving Letter of Credit in favour of ASPL in accordance with Article 5.4 of the PPA. In terms of the letters, the ASPL inter-alia stated as under:

- (a) ASPL has synchronized and commissioned the Project on 31.08.2017 and is supplying power to the grid.
- (b) In terms of Article 5.4 of the PPA, ASPL requested to open irrevocable revolving Letter of Credit for one month's billing value at the earliest since the same needs to be submitted to the Lenders (Bank).
- (c) ASPL referred to Ministry of Power, Government of India's order No.23/22/2019-R&R dated 28.06.2019 read with Corrigendum No.23/22/219-R&R in terms of which distribution licensees are to open and maintain adequate LoC as payment security mechanism under the PPA.

k. It is stated that in in terms of the PPA:

- (a) TSSPDCL shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the due date of payment.
- (b) For payments made beyond the due date, TSSPDCL shall be liable to pay interest at the prevailing base prime lending rate of the State Bank of India.
- (c) Meter reading date means 25th day of each calendar month.
- (d) Due date for the invoices shall be 30 days from the meter reading date provided that the bill is received by TSSPDCL within 5 working days from the meter reading date.
- (e) ASPL shall furnish a bill to TSSPDCL for the billing month (25th of the calendar month and ending on the 24th of the next calendar month) on or before the 5th working day following the meter reading date.
- (f) TSSPDCL is required to pay the bills raised by ASPL promptly. In case of dispute, TSSPDCL shall notify ASPL in respect of any disallowed amount on account of any dispute as to all or any portion of the bill.

l. It is stated that the relevant Articles of the PPA are reproduced below:

“Article-1

Definitions

- 1.8 *“Billing Date” means the fifth (5th) Working day after the Meter Reading Date.*
- 1.9 *“Billing Month” means the period commencing from 25th of the calendar month and ending on the 24th of the next calendar month.*

.....
1.14 "Conciliation Period" means the period of sixty (60) days or such other longer period as the parties may agree, commencing from the date of issuance of a Solar Power Developer Preliminary Default Notice or DISCOM Preliminary Default Notice as provided in Article 10 of this Agreement, for conciliation between the parties to mitigate the consequence of the relevant event having regard to all the circumstances.

.....
1.19 "Due Date of Payment" means the date on which the amount payable by the DISCOM to the solar power developer hereunder for Delivered Energy, if any, supplied during a billing month becomes due for payment, which date shall be thirty (30) days from the meter reading date provided the bill is received by DISCOM within 5 working days from meter reading date, and in the case of any supplemental or other bill or claim, if any, the due date of payment shall be thirty (30) days from the date of the presentation of such bill or claim to the designated officer of the DISCOM. If the last date of payment falls on a statutory holiday, the next working day shall be considered as last date.

.....
1.35 "Meter Reading Date" means the 25th (twenty fifth) day of each calendar month, at 12:00 hours, at the Interconnection Point.

.....
1.43 "Scheduled Commercial Operation Date (SCOD) or Scheduled date of Commercial Operations" means the date whereupon the SPD is required to start injecting power from the power project to the Delivery Point i.e., and shall mean twelve (12) months from the Effective Date for projects connecting at 33 kV level and shall mean fifteen (15) months from the Effective Date for projects connecting at 132 kV or 220 kV level.

.....
1.53 "Tariff" shall have the same meaning as ascribed in Clause 2.2 of this Agreement.

.....
1.56 "TSTRANSCO" means Transmission Corporation of Telangana Limited, incorporated under the Companies Act, 2013."

"Article-2

Purchase of Delivered Energy and Tariff

2.1 Entire Delivered Energy, as mentioned in Schedule 1, at the Interconnection Point for sale to the DISCOM shall be purchased at the Tariff as provided in Clause limited to the contracted capacity of the Project after the Date of Commercial Operation. Title to the Delivered Energy purchased shall pass from the Solar Power Developer to the DISCOM at the Interconnection Point.

Provided that the units of energy delivered by the SPD prior to the COD of the Project shall be purchased by the DISCOM at tariff as provided in clause 2.2.

2.2 The DISCOM shall pay Tariff of Rs.5.7249 per unit to the Solar Power Developer as per the tariff agreed by the Solar Power Developer vide letter dated: 23.12.2015 and shall be inserted as schedule 5 of this PPA. This Tariff shall be the Tariff for the entire term of the Agreement.

- 2.3 The tariff payable by the DISCOM shall be inclusive of all taxes, duties and levies or any other statutory liability, as applicable from time to time.
- 2.4 The solar power developer, at any time during the validity of this Agreement, shall not add any extra solar modules or equipment that shall alter the contracted capacity.
- 2.5 For Delivered Energy corresponding to less than or equal to 25% CUF, the applicable tariff shall be as per Article 2.2 of this Agreement. For Delivered Energy beyond 25% CUF, the applicable tariff shall be equal to the 50% of the Tariff specified for that Tariff Year. The calculation of CUF shall be done on a yearly basis i.e., over the Tariff Year.”

[...]

“4.10 On the meter reading date of each month, the meter readings shall be taken and an acknowledgement thereof signed by the authorized representatives of both the parties.”

[...]

“Article-5

Billing and Payment

- 5.1 For the Delivered Energy, the solar power developer shall furnish a bill to the DISCOM calculated at the tariff provided for in Article 2, in such form as, may be mutually agreed upon between the DISCOM and the solar power developer; for the billing month on or before the 5th working day following the Meter Reading Date.
- 5.2 The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, the DISCOM shall pay simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is increased/reduced, such an increased/reduced rate is applicable from the date of such notification.
- 5.3 Billing and payment: The solar power developer shall open a bank account at Yes Bank Limited, D12, South Extension Part II, Delhi, (the "solar power developer's designated account") for all payments to be made by the DISCOMs to the solar power developer and notify the details of such account atleast thirty (30) days before the dispatch of the first monthly bill. Instructions to change the Solar Power Developer's Designated Account may be accepted by DISCOM only if they are accompanied with a duly authorized written consent of the Lender and/or Lenders Representative consenting to such change.
All payments shall be made by either cheques, National Electronic Fund Transfer (NEFT) or Real Time Gross settlement (RTGS) payments into solar power developer's designated account.
- 5.4 Letter of Credit: Before 30 days prior to the due date of first monthly bill of the generating unit, the DISCOM shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of the solar power developer by a scheduled bank (the "Letter of Credit") for one month's billing value. Provided that any increase in the delivered energy on account of commissioning of additional capacity after the first month's billing or in subsequent billing months, the DISCOM shall revise the revolving letter of credit in favour of the solar power developer covering the latest previous month billing upto achieving of COD.

- a. *Provided further that the Letter of Credit shall not be invoked for any disputed or objected bill amount.*
- b. *Provided further that the Letter of Credit can be invoked only when DISCOM fails to pay the current month bill amount by the due date.*
- 5.5 *Payment of bills raised The solar developer shall submit bills for the energy delivered during the billing period as per the provision of this Agreement and there upon the DISCOM shall make payment of for the undisputed amount of the bill by the due date of payment.*
- 5.6 *Billing disputes The DISCOM shall pay the bills of solar power developer promptly subject to the Clauses 5.1 and 5.2. The DISCOM shall notify the solar power developer in respect of any disallowed amount on account of any dispute as to all or any portion of the bill. The solar power developer shall immediately take up issue with the relevant and complete information with the DISCOM which shall be rectified by the DISCOM, if found satisfactory. Otherwise notify its (DISCOM's) rejection of the disputed claim within reasonable time with reasons, therefore. The dispute may also be resolved by the mutual agreement. If the resolution of any dispute requires the DISCOM to reimburse the solar power developer, the amount to be reimbursed shall bear simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is reduced/increased, such a reduced/increased rate is applicable from the date of reduction/increase from the date of disallowance to the date of reimbursement.*
- 5.8 *Notwithstanding anything contained in this Agreement, the dispute of correctness or otherwise of the applicable tariff, shall not be considered as a billing dispute.*
- 5.9 *Where the DISCOM finds at any time, that amount is due from solar power developer either under this agreement the DISCOM is entitled to recover the said due amount by adjusting from the bill amount payable to the solar power developer.”*

[...]

“Article-11

Dispute Resolution

- 11.1 *Each party shall designate in writing to the other party a representative who is authorized to resolve any dispute arising under this Agreement in an equitable manner.*
- 11.2 *Following the notice by one party to the other setting out the particulars of the dispute, if the designated representatives are unable to resolve a dispute under this Agreement within 15 days, such a dispute shall be referred by such representatives to a senior officer designated by the Solar Power Developer and a senior officer designated by the DISCOM, respectively, who shall attempt to resolve the dispute within a further period of 15 days.*
- 11.3 *The parties hereto agree to use their best efforts to attempt to resolve all disputes arising hereunder promptly, equitably and in good faith and further agree to provide each other with reasonable access during normal business hours to any and all non-privileged records, information and data pertaining to any such dispute.*

- 11.4 *Failure to resolve the dispute in terms of clauses 11.1 to 11.3 or even otherwise, any party may approach the TSERC to resolve the dispute under Section 86 (1) (f) of Electricity Act, 2003.*
- 11.5 *In the event of any conflict of interpretation in terms and conditions between the RFS document and the PPA, the provisions of PPA shall prevail.”*

[...]

“Article-13

Additional Provisions Relaxing the Existing Clauses in this PPA

... ..

13.2 *Discom Event of Default – Further Provision*

Notwithstanding anything contained in clause 10.2.1 of this Agreement, where DISCOM fails to make the payment to SPD for a period of 90 days after due date of payment and the developer is unable to recover the amount outstanding through Letter of Credit (LC) or in any other manner, then, it is considered to be an event of default by DISCOM, following which SPD can opt for conciliation and after expiry of 2 months and 7 days from the date of opting for conciliation, the SPD is free to sell the contracted capacity to any third party by giving a notice to DISCOM in writing and can terminate the PPA with DISCOM after expiry of 3 months from the date of selling of power to any third party.”

- m. It is stated that the issue in the present petition pertains to adjudication of disputes that have arisen between the parties due to non-payment/delayed payment of bills and consequent LPS in terms of the PPA. The Project is setup within the State of Telangana and the entire contracted capacity i.e., 10 MW generated by ASPL is tied up with TSSPDCL. It is submitted that there is no inter-state transaction and accordingly, this Commission has the jurisdiction to adjudicate on the present dispute in terms of Section 86(1)(f) of the Act. In this regard, reliance is placed on the judgement of the Hon'ble Supreme Court in *Energy Watchdog v. CERC & Ors. (2017) 14 SCC 80* (“Energy Watchdog”), wherein it was held as under:

“24. *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 clauses (c), (d) and (e) speaks of inter-State transmission and inter-State operations. This is to be contrasted with Section 86 which deals with functions of the State Commission which uses the expression “within the State” in clauses (a), (b) and (d), and “intra-State” in 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.”

It is stated that in light of the judgement of the Hon'ble Supreme Court in Energy Watchdog, the Commission has the jurisdiction to entertain the present Petition since ASPL supplies power to TSSPDCL in the State of Telangana.

- n. It is stated that the PPA executed between TSSPDCL and ASPL for the supply of power from the project sets out the obligations of the parties with the objective of sale and purchase of power on a long-term basis.
- o. It is stated that it is a settled position of law that power purchase agreements are complex, technical documents which are entered into by the parties being fully aware of the terms and conditions, and the express terms of these agreements ought to be given effect to. In this regard, reliance is placed on the following judgments of the Hon'ble Supreme Court:
 - (a) Nabha Power Limited v. PSPCL reported as (2018) 11 SCC 508:
“72. We may, however, in the end, extend a word of caution. It should certainly not be an endeavour of commercial courts to look to implied terms of contract. In the current day and age, making of contracts is a matter of high technical expertise with legal brains from all sides involved in the process of drafting a contract. It is even preceded by opportunities of seeking clarifications and doubts so that the parties know what they are getting into. Thus, normally a contract should be read as it reads, as per its express terms. The implied terms are a concept, which is necessitated only when the Penta test referred to aforesaid comes into play. There has to be a strict necessity for it. In the present case, we have really only read the contract in the manner it reads. We have not really read into it any “implied term” but from the collection of clauses, come to a conclusion as to what the contract says. The formula for energy charges, to our mind, was quite clear. We have only expounded it in accordance to its natural grammatical contour, keeping in mind the nature of the contract.”
 - (b) Transmission Corporation of Andhra Pradesh v. GMR Vemagiri reported as (2018) 3 SCC 716:

“18. A wrong question will inevitably lead to a wrong answer. The question for consideration presently is not if RLNG is a form of natural gas, but whether the parties intended to exclude any form of gaseous fuel from the ambit of the contract except for natural gas in its natural form from the domestic market, keeping the price of gas in mind, which would ultimately set the price per unit of electricity for the consumer. The PPA is a technical commercial document. It has been drafted by persons conversant with the business. RLNG and natural gas as used in the agreement are not synonymous or interchangeable. The principle of business efficacy will also have to be kept in mind for interpreting the contract. The terms of the agreement have to be read first to understand the true scope and meaning of the same with regard to the nature of the agreement that the parties had in mind. It will not be safe to exclude any word in the same.”

p. It is stated that the Hon'ble Tribunal in Gujarat Urja Vikas Nigam Limited v. Gujarat Electricity Regulatory Commission reported as 2014 SCC OnLine APTEL 168 has held that a power purchase agreement is a binding contract and rights and liabilities under it cannot be escaped by the parties. Relevant paras reproduced below:

- “123. The rights and liabilities arising from a binding contract cannot be escaped on the basis of some presumption in relation to same facts leading to the execution of the Agreement between the parties.
124. Furthermore, as pointed out by the respondents, the PPAs do not contain any provisions empowering the state Commission to undertake re-visiting or re-determination of the tariff.
125. The State Commission in view of the fact that there was a possibility of considerable reduction in capital cost in future, prescribed the control period of only two years. There is no provision for revision of the tariff prior to two years in the event of deviation in the normative parameters.
126. This Tribunal as quoted above, has already held that the PPA can be re-opened only for the purpose of giving thrust to the non-conventional energy projects and not for curtailing the incentives. The above ratio has been decided in the decision in Ritwik Energy Systems v. Transmission Corporation of Andhra Pradesh Case in Appeal No.90 and 91 batch of 2006. The relevant portion of the observations is as follows:
Therefore, it is the bounden duty of the Commission to incentivise the generation of energy through renewable sources of energy. PPAs can be reopened only for the purpose of giving thrust to non-conventional energy projects and not for curtailing the incentives.”

q. It is stated that further, the Hon'ble Tribunal in Essar Power Ltd. v. Uttar Pradesh Electricity Regulatory Commission, Appeal No.82 of 2011 (Judgment

dated 16.12.2011) held that power procurement done pursuant to the Act is statutory in nature and have a legal sanctity. Relevant paras reproduced below:

“135. On going through these decisions cited by both, we are of the view that this proposition projected by the Noida Power is not tenable in view of the fact that the power procurement pursuant to the statutory framework constitutes a statutory contract in terms of the pre approved and finalized PPA governed by the provisions of the Act as well as the guidelines. There are specific clauses which require certain acts have to be performed mandatorily making the contract statutory.”

- r. It is stated that ASPL and TSSPDCL have executed the PPA for the sale and purchase of power with the intention to create binding legal obligations. Accordingly, in view of the same and the foregoing judgements, it is stated that PPA is binding on ASPL and TSSPDCL. Thus, the provisions regarding payment of invoices for power supplied and levy of LPS on delayed payments are also binding on TSSPDCL.
- s. It is stated that TSSPDCL is obligated to pay the monthly bills by the due date under the PPA. However, despite reminders and requests, monthly bills along with LPS remain unpaid till date.
- t. It is stated that ASPL has been validly raising bills in accordance with the provisions of the PPA and TSSPDCL is under a legal and contractual obligation to pay tariff in terms of the PPA. It is noteworthy that TSSPDCL has not challenged any of the bills raised by ASPL nor has it denied its liability to pay the same. Article 5.6 of the PPA states that TSSPDCL shall pay the bills promptly i.e., within the due date of payment (30 days from the date of presentation of the bill). Further, TSSPDCL is under an obligation to notify ASPL about any dispute as to all or any portion of the monthly bill. Further, it is noteworthy that TSSPDCL has made part payments towards the monthly bills raised by ASPL. Therefore, in spite of having the opportunity to dispute the bills, TSSPDCL has failed to do so. It is stated that such conduct is indicative that TSSPDCL has accepted its liability in terms of the bills and that TSSPDCL continues to withhold amounts in contravention of the PPA.
- u. It is stated that ASPL has held several meetings with TSSPDCL regarding payment of pending bills as well as LPS. It is pertinent to mention that TSSPDCL has never disputed the payments due under the said bills, which is a deemed admission of the amount due on behalf of TSSPDCL. It is submitted

that the invoices are sent physically and TSSPDCL accepts them and acknowledges the receipt of these invoices by way of a dated stamp. Accordingly, TSSPDCL cannot deny the acceptance and receipt of the said invoices.

- v. It is stated that the Central Electricity Regulatory Commission (CERC) by way of order dated 28.06.2021 in IA.No.64 of 2020 in Petition No.614/MP/2020 titled Adani Power (Mundra) Ltd. v. Gujarat Urja Vikas Nigam Ltd reiterated that parties are bound by the power purchase agreement and till the time the generating company (Adani) is supplying power and raising the bill in accordance with the PPA, the procurer (GUVNL) is bound to make payment. It was further held that if GUVNL purports to dispute a bill, it may be done so as per the terms of the PPA, as under:

“21. *In terms of Article 11.6.2, either party may dispute the amount payable under monthly or supplementary bills. Article 11.6.9 provides that till the time the dispute is resolved, the procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date.*

22. *Admittedly, despite deductions being made by GUVNL, the power is being supplied by APMuL as per the provisions of the Bid-01 PPA and SPPA.*

23. *As power is being procured by GUVNL and is being supplied by APMuL as per the provisions of the Bid-01 PPA and SPPA, we are of the view that the parties are bound by terms of the Bid-01 PPA and SPPA and, therefore, raising of bill or any dispute thereon has to be in accordance with the terms and conditions as provided in the Bid-01 PPA and SPPA.*

[...]

25. *We are of the view that whatever the reasons of dispute may be, the provisions of Article 11.6.9 of the Bid-01 PPA are clear in this regard that provides that “Till the time a dispute is resolved as per Article 11.6 or Article 17, the Procurer shall be liable to pay 100% of the undisputed amount plus 85% of the disputed amount within the due date.*

[...]

27. *GUVNL is directed to pay 100% of the undisputed amount and 85% of the amount as disputed for all the invoices raised since signing of the SPPA till the pendency of the main Petition No.614/MP/2020. Payment must be made within thirty days of this order.”*

- w. It is stated that the bills raised by ASPL are admitted, conclusive and binding on TSSPDCL in the absence of any dispute raised by it. For the period starting from January 2021 to January 2022, the undisputed amount to be paid to ASPL is Rs.10,72,29,989/-.

- x. It is stated that further, the Hon'ble Supreme Court in Tamil Nadu Generation and Distribution Corporation Limited v. PPN Power Generating Company Private Limited (PPN Judgement), reported as (2014) 11 SCC 53 has held that unilateral deductions from monthly bills without adjudication are illegal. Relevant paragraphs are reproduced hereunder:

- “71. *The real dispute between the parties seems to be on the question whether the appellant was entitled to avail 2.5% rebate on part-payment of the monthly invoices within 5 business days. We have noticed earlier that it was a precondition under Article 10 that the payment of the monthly invoice had to be made in full. In addressing the issue of rebate, Aptel has come to the conclusion that merely because substantial payment had been made in relation to monthly invoices would not entitle the appellant to claim the rebate of 2.5% on the invoice amount. We see no reason to interfere with the findings recorded by Aptel. Under Article 10.2(b)(i), the payments have to be made in full for every invoice by due date. Under Article 10.2(e), the payment had to be made in full when due even if the entire portion or a portion of the invoice is disputed. Under Articles 10.3(a) to (c) of the PPA, letter of credit is to be established covering three months estimated billing, one month prior to commercial operation date. Under Article 10.3(d) of the PPA, an escrow account is to be established by the appellant in favour of the power company into which collections from designated circles are to flow in and be available as collateral security. Under Article 10.4, the Government of Tamil Nadu has guaranteed all of the financial obligations of the appellant. Under Article 10.2(e) of the PPA agreement, the right to dispute any invoice by the appellant is limited to one year from due date of such invoice. Thus it would be evident that even if the amount of invoice is disputed, the appellant is obliged to make full payments of the invoice when due and then raise the dispute. Undoubtedly, early payment is encouraged by offering rebate of 2.5% if paid within 5 days of the date of the invoice. Similarly, 1% rebate would be available if the payment of the entire invoice is made within 30 days. The rebate is in the form of incentive and is an exception to the general rule requiring payment in full on due date. Therefore, in our opinion, the appellant had no legal right to claim rebate at the rate of 2.5% not having paid the entire invoice amount within 5 days. Similarly, the appellant would be entitled to 1% rebate if payment is made within 30 days of the invoice. We are of the opinion that the findings of Aptel on this issue do not call for any interference.*
72. *In fact, in our opinion, the appellant has illegally arrogated to itself the right to adjudicate by unilaterally assuming the jurisdiction not available to it. It was required to comply with Article 10 of the PPA which provides for compensation payment and billing. We are also not able to accept the submission of Mr Nariman that invoices could not be paid in full as they were only estimated invoices. It is true that reconciliation is to be done annually but the payment is to be made on monthly basis. This cannot even be disputed by the appellant in the face of its claim for rebate at the rate of 2.5% for having made part-payment of the invoice amount within 5 days. We also do not find any merit in the submission*

that any prejudice has been caused to the appellant by the delayed submission of annual invoice by PSPCLs. Pursuant to the directions issued by the State Commission, the monthly invoice and annual invoice for the respective years have been redrawn as on 30th September each year. Therefore, the benefit of interest has been given on such annual invoices.”

- y. It is stated that in terms of the above, TSSPDCL is under an obligation to make payments, within the due date on a monthly basis. In the present case, TSSPDCL has failed to raise any dispute, nor has it made any payments. Accordingly, TSSPDCL is in clear breach of the terms of the PPA. In the PPN Judgement, it has been held that unilateral deductions are not permissible and that such deductions can only be allowed after adjudication. In such a scenario, where even disputed amounts cannot be deducted by parties to a PPA, the actions of TSSPDCL in failing to make payments to ASPL is clearly in violation of the PPA.
- z. It is stated that the non-payment of bills by TSSPDCL is illegal and contrary to the terms of the PPA and ASPL is constrained to approach the Commission seeking recovery of the aforementioned amounts. The said amounts could not have been withheld without raising a substantive dispute within the time and procedure prescribed under the PPA. Accordingly, and TSSPDCL should be directed to pay the same forthwith.
- aa. It is stated that under the PPA, TSSPDCL is liable to pay monthly bills within 30 days from the meter reading. However, if the payment of monthly bills is not made within the due date, ASPL is entitled to claim LPS on the unpaid bills at the prevailing base prime lending rate of the State Bank of India. The relevant Articles of the PPA are as under:

*“Article-1
Definitions*

- 1.8 *“Billing Date” means the fifth (5th) Working day after the Meter Reading Date.*
- 1.19 *“Due Date of Payment” means the date on which the amount payable by the DISCOM to the solar power developer hereunder for Delivered Energy, if any, supplied during a billing month becomes due for payment, which date shall be thirty (30) days from the meter reading date provided the bill is received by DISCOM within 5 working days from meter reading date, and in the case of any supplemental or other bill or claim, if any, the due date of payment shall be thirty (30) days from the date of the presentation of such bill or claim to the designated officer of the*

DISCOM. If the last date of payment falls on a statutory holiday, the next working day shall be considered as last date.

- 1.35 “Meter Reading Date” means the 25th (twenty fifth) day of each calendar month, at 12:00 hours, at the Interconnection Point.

“Article-5

Billing and Payment

- 5.1 For the Delivered Energy, the solar power developer shall furnish a bill to the DISCOM calculated at the tariff provided for in Article 2, in such form as, may be mutually agreed upon between the DISCOM and the solar power developer; for the billing month on or before the 5th working day following the Meter Reading Date.
- 5.2 The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, the DISCOM shall pay simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is increased/reduced, such an increased/reduced rate is applicable from the date of such notification.
- 5.3 Billing and payment: The solar power developer shall open a bank account at Yes Bank Limited, D-12, South Extension Part II, Delhi (the "solar power developer's designated account") for all payments to be made by the DISCOMs to the solar power developer and notify the details of such account atleast thirty (30) days before the dispatch of the first monthly bill. Instructions to change the Solar Power Developer's Designated Account may be accepted by DISCOM only if they are accompanied with a duly authorized written consent of the Lender and/or Lenders Representative consenting to such change. All payments shall be made by either cheques, National Electronic Fund Transfer (NEFT) or Real Time Gross settlement (RTGS) payments into solar power developer's designated account.
- 5.5 Payment of bills raised: The solar developer shall submit bills for the energy delivered during the billing period as per the provision of this Agreement and there upon the DISCOM shall make payment of for the undisputed amount of the bill by the due date of payment.
- 5.6 Billing disputes The DISCOM shall pay the bills of solar power developer promptly subject to the Clauses 5.1 and 5.2. The DISCOM shall notify the solar power developer in respect of any disallowed amount on account of any dispute as to all or any portion of the bill. The solar power developer shall immediately take up issue with the relevant and complete information with the DISCOM which shall be rectified by the DISCOM, if found satisfactory. Otherwise notify its (DISCOM's) rejection of the disputed claim within reasonable time with reasons, therefore. The dispute may also be resolved by the mutual agreement. If the resolution of any dispute requires the DISCOM to reimburse the solar power developer, the amount to be reimbursed shall bear simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is reduced/increased, such a reduced/increased rate is applicable from the date of reduction/increase from the date of disallowance to the date of reimbursement.”

- ab. It is stated that TSSPDCL has failed to make payments towards bills generated for the supply of power by ASPL by the due date and accordingly, TSSPDCL is liable to pay LPS on the outstanding amounts for the period of September 2017 to December 2021 as under:

Meter Reading Date	Invoice Submission Date	Amount (Rs.)	Delay days	LPS (Rs.)
25.09.2017	13.12.2017	72,97,530	59	1,02,625
25.10.2017	13.12.2017	85,18,365	59	1,19,794
25.11.2017	13.12.2017	1,01,45,954	63	1,35,428
25.12.2017	03.01.2018	1,00,97,006	48	1,15,521
25.01.2018	06.02.2018	1,09,46,868	86	2,24,396
25.02.2018	06.03.2018	1,12,98,376	74	1,99,285
25.03.2018	02.04.2018	1,01,67,995	100	2,42,360
25.04.2018	02.05.2018	1,11,56,971	150	3,98,900
25.05.2018	31.05.2018	1,04,44,794	163	4,17,463
25.06.2018	04.07.2018	95,76,326	248	5,88,852
25.07.2018	30.07.2018	72,85,221	286	72,85,221
25.08.2018	24.08.2018	74,63,552	299	5,53,315
25.09.2018	01.10.2018	97,87,575	294	7,13,474
25.10.2018	31.10.2018	1,03,15,411	313	7,80,085
25.11.2018	01.12.2018	1,07,14,437	274	7,27,907
25.12.2018	02.01.2019	83,54,919	269	5,57,250
25.01.2019	04.02.2019	1,12,76,621	266	7,35,514
25.02.2019	02.03.2019	1,10,17,856	270	6,88,691
25.03.2019	01.04.2019	1,05,40,400	272	6,63,728
25.04.2020	03.05.2019	1,16,83,662	269	7,27,604
25.05.2019	03.06.2019	98,33,374	272	5,97,223
25.06.2019	02.07.2019	1,04,35,920	272	6,33,818
25.07.2019	02.08.2019	85,20,941	268	5,09,902
25.08.2019	04.09.2019	77,39,492	266	4,17,381
25.09.2019	09.10.2019	76,44,173	250	3,87,444
25.10.2019	13.11.2019	74,60,403	215	3,25,192
25.11.2019	30.11.2019	84,26,480	203	3,46,802
25.12.2019	03.01.2020	84,05,298	164	2,79,470
25.01.2020	31.01.2020	90,25,591	179	3,27,542
25.02.2020	03.03.2020	1,07,26,745	147	3,19,686
25.03.2020	03.04.2020	1,05,04,047	214	4,55,732
25.04.2020	05.05.2020	1,14,34,057	300	7,64,985
25.05.2020	05.05.2020	1,03,90,980	256	6,02,506
25.06.2020	18.06.2020	91,61,271	286	4,90,341
25.07.2020	10.07.2020	82,57,596	264	3,90,075
25.08.2020	10.08.2020	76,51,043	233	3,28,848
25.09.2020	07.10.2020	62,48,156	236	3,02,993
25.10.2020	10.11.2020	58,32,033	286	3,40,447
25.11.2020	05.12.2020	73,37,092	299	4,47,774
25.12.2020	06.01.2021	71,98,732	393	5,77,447
25.01.2021	05.02.2021	76,19,541	379	5,89,429
25.02.2021	08.03.2021	81,60,663	348	5,79,653
25.03.2021	09.04.2021	80,07,980	316	5,16,504

Meter Reading Date	Invoice Submission Date	Amount (Rs.)	Delay days	LPS (Rs.)
25.04.2021	07.05.2021	90,95,648	288	5,34,675
25.05.2021	14.06.2021	94,86,190	250	4,84,056
25.06.2021	09.07.2021	92,10,505	228	4,22,989
25.07.2021	07.08.2021	72,76,920	196	2,91,117
25.08.2021	08.09.2021	80,69,819	164	2,70,129
25.09.2021	08.10.2021	75,29,102	134	2,05,926
25.10.2021	16.11.2021	83,38,889	103	1,61,694
25.11.2021	08.12.2021	67,85,151	73	1,01,099
25.12.2021	10.01.2022	82,02,637	43	66,969

ac. It is stated that LPS is a provision for interest to compensate for delayed payments. Further, LPS is also meant to act as a disincentive for delayed payments. The compensatory nature of LPS has been held by various decisions namely:

- (a) Judgment of the Hon'ble Supreme Court in Adoni Ginning Factory vs. Secretary, Andhra Pradesh Electricity Board & Ors., reported as AIR 1979 SC 1511 (Para 4); and
- (b) Judgment of the Hon'ble Kolkata High Court in Tapan Kumar Sinha vs. West Bengal State Electricity Board, reported as 1997 SCC Online Cal 13.

ad. It is stated that payment of LPS has been held to be mandatory. In this regard, reliance is placed on this Hon'ble Commission's Order dated 08.01.2020 in Petition 22/MP/2019 titled D.B Power Ltd. vs. TANGEDCO Ltd. wherein this Commission held as under:

- “10. In view of the above discussion, it is evident that Respondent is under 'default of payment' towards Late Payment Surcharge in terms of the PPA. The extract of Article 8.8 of the PPA in regard to payment of Supplementary bills is as under:
[...]
11. Accordingly, Respondent is directed to pay the remaining amount under Late Payment Surcharge claimed by the Petitioner within three months from the date of issue of this order, after reconciliation of bills with the Petitioner. However, with regard to Petitioner's prayer for directing the Respondent to pay the Late Payment Surcharge along with interest @18%, it is held that interest on non-paid Late Payment Surcharge is covered by the provisions of PPA as quoted above which takes care of compounding on monthly basis at the rate of SBI-PLR as quoted in PPA. Further, on repeated default of payment by the Respondent, Petitioner has the option to regulate the power of the Respondent in terms of CERC (Regulation of Power Supply) Regulations, 2010.”

ae. It is stated that the Hon'ble Tribunal in its judgement dated 04.02.2021 in Appeal No.56 of 2020 titled D.B. Power Limited vs CERC and Ors. took serious note of non-payment of LPS by the distribution licensee of Tamil Nadu and summoned the concerned official for an explanation on the payment defaults.

Dismissing the reason of financial difficulty, the Hon'ble Tribunal held as under:

“5. ... We are not impressed with the only plea of financial crunch or the request for TANGEDCO to be given some time to raise loan for paying up to the Appellant. Given the huge arrears that have accumulated and the delay which has occurred causing distress, in turn, to the Appellant as well, we direct the Respondent TANGEDCO shall presently pay 50% of the above mentioned liability towards late payment surcharge in two equal parts, first part to be paid within a week of today and the second part to be paid within the week following that.

[...]

We would expect our order to be scrupulously abided by the Respondent TANGEDCO with no provision for coming up for any modification of the timelines. ...”

af. It is stated that with regard to payment of LPS, the High-Level Empowered Committee (HLEC) headed by the Cabinet Secretary in its report dated 12.11.2018 has acknowledged an existing trend whereby the State DISCOMs are delaying the payment of Monthly Bills and are not paying LPS on delayed payment, despite PPAs providing for the same. Accordingly, HLEC recommended that LPS should be mandatorily paid in the event of delay in payment by the DISCOMs. Recommendation 3.1 of the HLEC report provides as under:

“3.1 Mandatory payment of Late Payment Surcharge (LPS)

It has been observed that due to delay in payment by the DISCOMs, the viability of the generators get hurt severely. As one of the roles of the regulator is to ensure sustainable operation of the power sector, the Committee recommends that Ministry of Power may advise the Regulators to monitor payments by DISCOMs and frame appropriate regulations. It has also been pointed out that frequently the DISCOMs insist that generators should forgo the LPS on the delayed payments, despite its mention in the signed PPA. This again adversely affects the viability of generators and their ability to meet its obligation to service the debt and other operating expenses. Therefore, the Committee recommends that Ministry of Power may engage with the Regulators to ensure that LPS is mandatorily paid in the event of delay in payment by the DISCOMs.”

ag. It is stated that thereafter, the Central Government recommended the constitution of a Group of Ministers (GOM) headed by the Finance Minister,

Road Transport Minister, Minister of Commerce, Minister of Oil, Minister of Railways and the Minister of Power to examine the specific recommendations of HLEC which was constituted to address the issue of stressed power projects and forward their comments for consideration by the Cabinet. The GOM thereafter submitted its recommendation to the Cabinet Committee on Economic Affairs (CCEA) on 07.03.2019. The CCEA on 07.03.2019 approved recommendations of the GOM to make payment of LPS as mandatory.

- ah. It is stated that on 08.03.2019, Ministry of Power (MoP) vide its office memorandum has approved the recommendations of GOM qua mandatory payment of LPS, as under:

“3.4 Approval with regards to mandatory payment of Late Payment Surcharge (LPS): Ministry of Power may engage with the Regulators to ensure that LPS is paid in case of delay in payment by DISCOMs as per the provisions of the PPA. Appropriate Regulatory Commission may ensure compliance.”

- ai. It is stated that in view of the above, the conduct of TSSPDCL in non-payment of outstanding dues and consequent LPS on the delayed payments is in violation of the terms of the PPA dated 29.02.2016 and the express directions of the CCEA and the MOP. Therefore, the Commission ought to direct TSSPDCL to pay the applicable LPS to ASPL at the earliest.

- aj. It is stated that the TSSPDCL being a licensee under the Act, 2003 is bound by the provisions thereof. Sections 61(b) and (c) of the Act states as follows:

“61. Tariff regulations- The Appropriate Commission shall, subject to the provisions of this Act, specify terms and conditions for the determination of tariff, and in doing so, shall be guided by the following, namely:

- (a) ...*
- (b) the generation, transmission, distribution and supply of electricity are conducted on commercial principles;*
- (c) factors which would encourage competition, efficiency, economical use of the resources, good performance and optimum investments;”*

- ak. It is stated that despite the express mandate of Section 61, TSSPDCL has continually refused to meet its legal and statutory obligation to pay bills in accordance with the PPA. The actions of TSSPDCL are a clear case of abuse of power and dereliction of statutory duties.

- al. It is stated that in the present case, TSSPDCL is misusing their dominant and coercive position since ASPL has dedicated 100% of its capacity to TSSPDCL, and it is arbitrarily and without basis withholding payments legally due to ASPL.

am. It is stated that the PPA prescribes a mandatory payment security mechanism to be set up by TSSPDCL under Article 5.4 of the PPA. The intent behind the same is to secure payment of bills and to enable ASPL to recover amounts due in the event of non-payment. However, it is submitted TSSPDCL has not put the payment security mechanism in place and as a consequence, ASPL is unable to recover accepted and admitted claims. In this connection ASPL has sent multiple reminders to TSSPDCL and TSTRANSCO to set up payment security mechanism in terms of PPA.

an. It is stated that setting up of payment security mechanism is a material obligation under the PPA. The violation of this material obligation is immensely detrimental to the financial health of ASPL.

ao. It is stated that clause 6.2(2) of the National Tariff Policy, 2016 requires the DISCOMs to ensure availability of adequate and bankable payment security arrangement with regards to payment of agreed tariff under the PPA. Clause 6.2(2) of the Tariff Policy is reproduced as below:

“6.2 Tariff structuring and associated issues

(2) Power Purchase Agreement should ensure adequate and bankable payment security arrangements to the Generating companies. In case of persisting default on payment of agreed tariff as per PPA in spite of the available payment security mechanisms like letter of credit, escrow of cash flows etc. the generating companies may sell such power to other buyers.”

ap. It is stated that The PPA between ASPL and TSSPDCL has been entered pursuant to the Competitive Bidding Guidelines (CBG). Clause 4.1 of the CBG provides that Tariff for power procured under the CBG shall be paid and settled for each payment period (not exceeding one month). Further, in terms of Clause 4.10, the DISCOMs have been mandated to provide adequate payment security mechanism by way of LoC and in case of default in payment of monthly tariff by the DISCOMs the seller that is ASPL is permitted to take recourse to the payment security mechanism by encashing the LoC. The relevant provisions of the CBG are reproduced as below:

“4. Tariff Structure

4.1 For procurement of electricity under these guidelines, tariff shall be paid and settled for each payment period (not exceeding one month). A multi-part tariff structure featuring separate capacity and energy components of tariff shall ordinarily form the basis for bidding.

[..]

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

(i) Letter of Credit (LC)

(ii) Letter of Credit (LC) backed by credible escrow mechanism.

In the case the seller does not realize full payment from the procurer by the due date as per payment cycle, the seller may after 7 days, take recourse to payment security mechanism by encashing the LC to the extent of short fall or take recourse to escrow mechanism. The procurer shall restore the payment security mechanism prior to the next date of payment. Failure to realize payment even through payment security mechanism shall constitute an event of payment default.”

aq. It is stated that despite the same, TSSPDCL has failed to provide payment security as mandated under the PPA. Further, most DISCOMs have not provided payment security mechanisms envisaged under PPAs, and taking note of the same, the Ministry of Power issued a notification dated 28.06.2019, making the following observations:

(a) Despite provisions in the PPAs for adequate payment security mechanisms like Letters of Credit, the DISCOMs have failed to provide the same and there are huge outstanding amounts on account of unpaid bills.

(b) NLDC/RLDC have been directed to despatch power only after it is intimated that a Letter of Credit, for the particular period and quantum of power to be supplied, is in place.

(c) Once the quantity equivalent to value of Letter of Credit is supplied, the despatch will be stopped.

(d) Concerned generating company is entitled to encash the Letter of Credit after expiry of grace period.

(e) In the event the power is not dispatched for any reason given above, the distribution licensee shall continue to pay the fixed charge to the generating company.

ar. It is stated that on 23.07.2019, MoP issued notification clarifying that LoC has to be opened against power purchases made from 01.08.2019 onwards.

as. It is stated that for renewable energy companies like ASPL, MoP issued a clarification on 31.07.2019, indicating that, instead of capacity charges, they will receive full payment of tariff when power is not dispatched as a result of failure to open and maintain a LoC, as under:

“3. *It is hereby clarified that Fixed Charge as referred to in paragraph 2 above, in cases of Solar, Wind and Small Hydro Power, would constitute the following:*

“For the purpose of Clause 5 (vi) of the Ministry of Power’s order no.23/22/2019-R&R dated 28 June 2019, the Fixed Charge in the cases of Solar, wind and Small Hydro Power will be the tariff on which the power is being purchased by the distribution licensee

as it reflects the cost of installation, operation and maintenance of the power plant. The energy generated during the non-dispatch period, as stated in Clause 5(vi) of the order referred above, shall be calculated on the basis of Capacity Utilization Factor as declared by the Generators in Power Purchase Agreements (PPAs), and for projects having more than one year operation, the power not-dispatched shall be calculated on the basis of pro-rated actual energy generated in the last twelve months.”

- at. It is stated that in view of the above, TSSPDCL has failed to fulfil its contractual and statutory obligation to open and maintain LoC in favour of ASPL.
- au. It is stated that as per the Commission’s order on tariff for retail sale of electricity during FY 2018-19 dated 27.03.2018 (Tariff Order 2018), as extended by Order dated 27.03.2021 in I.A.No.4 of 2021 in O.P.Nos.21 and 22 of 2017, the TSDISCOMs, including TSSPDCL have allowed cost recovery of purchase of power from renewable sources. This Commission has allowed recovery of costs corresponding to 3634.21 MU and total requirement from non-conventional energy sources of Rs.2021.51 crores as against 4223.47 MU and Rs.2478.27 crores claimed by the TSDISCOMs
- av. It is stated that as is evident from above, the TSDISCOMs including TSSPDCL are recovering from consumers of the State of Telangana, the cost of procurement of power supplied by solar generators like ASPL. It is submitted that the cost of procurement of power from ASPL has most likely been accounted for in the tariff being charged by the DISCOMs from its consumers. TSSPDCL is put to strict proof to prove otherwise.
- aw. It is stated that despite recovering these amounts, payments to ASPL are being withheld. This not only amounts to unjust enrichment of TSSPDCL but is also contrary to the TSSPDCL’s legal obligation to remit such monies to the ASPL. It is stated that this is not only a fraud on the consumers bearing the burden of this cost, but is also illegal, unfair and arbitrary.
- ax. It is stated that the Commission ought to direct TSSPDCL for payment of outstanding dues along with LPS. It is stated that such a direction would be consistent with the findings of the Hon’ble Tribunal in its judgment dated 27.04.2021 in Appeal No.77 of 2018 titled Maharashtra State Electricity Distribution Co. Ltd. vs. MERC & Ors. wherein the Hon’ble Tribunal held as under:

“32. We agree that the extant practice of decision-making primarily on principles of law concerning claims is not helping in securing timely relief for the parties. It unnecessarily drags them into fresh round of proceedings before the Commission where, as experience shows – ready illustration would be Appeal no. 97 of 2020 decided by us on 05.10.2020 (supra), the party resisting the claim (unjustly) puts forward new arguments so as to distract and dilate, taking it forward by another round of appeal making it a never-ending process. This - and there can be no dispute in such regard - is neither conducive for the financial health of the sector nor in public interest in as much as the burden when it comes will, more often than not, bring along baggage in the form of carrying cost, an element that will unfortunately be met by the consumer at the end of the supply chain.

[...]

34. There is a need for all concerned to do a re-think on the propriety of the procedure adopted under the existing legal framework. Speaking only of a dispute involving claim for recovery of money, there is nothing stopping the party approaching the regulatory commission to not only quantify its claim but also support it not only by the principle on which it is founded but also by furnishing all necessary details and evidence so that the correctness is tested in the same adjudicatory process. If detailed averments are made in the petition, the law on pleadings would compel the opposite party to respond not only on justification but also, should the claim be found justified, on the arithmetic involved. It is natural that from such pleadings issues of fact would arise for determination. The Regulatory Commissions would be obliged in law, in such a scenario, to answer all issues, not only on principle of law but also the claim on facts which are established. An effective assistance from the learned counsel for the parties would keep the Commission informed of its duty (reference to the spirit of Rule 2 of Order XIV of Code of Civil Procedure, 1908) to adjudicate on all issues in one go, rather than only on questions of law. Insistence on a comprehensive adjudicatory process before the Commissions will ensure its views on the quantification of the claim (which was rejected on principle of law) are available when denial of relief is challenged by appeal before this tribunal. Needless to add, if the appellant in such situation were to succeed on issue of law, the findings on facts can also be subjected to simultaneous appellate scrutiny by this tribunal so that the decision rendered in appeal is comprehensive and ready for execution subject, of course, to remedy of second statutory appeal before the Supreme Court. There would, in such sequence, hardly be scope for indulgence in multiplicity of proceedings respecting same dispute.

35. In present case, we do find that the issue involved in the dispute was of rate at which LPS is payable. There has been no denial at any stage by the appellant that it had committed series of defaults in timely payments. This indisputably rendered it liable to pay LPS. In the name of having the determination of rate, it statedly has not paid LPS even at the rate its pleadings would admit it to be liable for. The initial orders on this appeal would show that it engaged the respondent suppliers in negotiations. It is not explained as to what was the result of, or stalemate in, such

negotiations. Be that as it may, the failure of the appellant to account for its liability under LPS clause is something that does not behove its status as a licensee operating in the State. The least that we would expect it to do now is to pay the liability on account of LPS to the contesting respondents forthwith, not later than four weeks from the date of this judgment. We order accordingly”

ay. It is stated that the Judgment dated 27.04.2021 of the Hon’ble Tribunal in Appeal No.77 of 2018 was confirmed by the Hon’ble Supreme Court in terms of Judgment dated 08.10.2021 in Civil Appeal No.1843 of 2021 titled Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors., wherein the Hon’ble Supreme Court further added that steps ought to be taken to finally put an end to litigation.

az. It is stated that further, the Hon’ble Tribunal in the Judgement dated 04.02.2022 in Appeal No.184 of 2019 titled CLP Wind Farms (India) Pvt. Ltd. vs. M.P. Power Management Company Limited & Ars., observed that the State Commission is under an obligation to not only adjudicate disputes but also to enforce its decisions to maintain judicial discipline among entities in the State. However, effective adjudication is missing in claims arising out of default in payments. Relevant para reproduced below:

“11. *In our view, the approach of the regulator has been hesitant. A State Commission is empowered under the Electricity Act not only to adjudicate upon such disputes but also to enforce its decision to maintain judicial discipline amongst entities within its State. It has, however, been noticed by this tribunal, almost as a pattern, that in most of such claims arising out of default in payments, effective adjudication of dispute is missing. There is a perceptible reluctance on the part of Commissions to prescribe a definite timeline for payment or to take recourse to jurisdiction under Section 142 read with Section 146 of the Electricity Act.”*

ba. It is stated that in view of the foregoing:

- (a) There has been a delay in payment of tariff for the bills raised by ASPL for the power supplied, purchased and further distributed by TSSPDCL;
- (b) Payment of LPS is mandatory;
- (c) This Commission has the power to issue directions for immediate payment.

It is stated that accordingly, TSSPDCL be directed to pay Rs.12,95,08,641/- as amounts due towards outstanding bills including LPS to ASPL.

bb. It is stated that, in terms of Sections 61(h) and 86(1)(e) of the Act, 2003 there is a statutory obligation on this Commission to ensure promotion of generation

of electricity from renewable sources. This view has been endorsed by the Hon'ble Tribunal in the following decisions:

- (a) *M.P. Biomass Energy Developers Association v. MERC and Anr, 2017 ELR (APTEL) 0377.*
- (b) *Judgment dated 28.04.2016 in Appeal No.16 of 2015 titled Green Energy Association vs. Madhya Pradesh Electricity Regulatory Commission and Ors.*

- bc. It is further stated that the National Electricity Policy and the Tariff Policy formulated and notified by the Central Government in exercise of powers under Section 3 of the Act also lays emphasis on promotion of renewable energy. The Hon'ble Supreme Court in Energy Watchdog (Para 18, 57) has held that the Tariff Policy has statutory force and hence is binding on all.
- bd. It is stated that, under the Act, 2003 as well as the National Electricity Policy, there is an express mandate on the State Government to promote renewable energy and to gradually progress to satisfying the energy demands by way of renewable energy sources. This position has also been affirmed by the Hon'ble Supreme Court in the case of Gujarat Urja Vikas Nigam Ltd v. Solar Semiconductor Power Co. (India) Pvt. Ltd. reported as (2017) 16 SCC 498. (Para 31). However, on the contrary, TSSPDCL is denying payments to ASPL despite being mandated and obligated to ensure promotion of and generation from renewable sources.
- be. It is stated that further, ASPL has been incorporated as a special purpose vehicle by SPCT for the implementation of the project and ASPL has dedicated 100% of its capacity to TSSPDCL. It is stated that TSSPDCL has been consistently failed to make timely payments of bills under the PPA which has impacted ASPL's Project and its ability to continue to generate power. Given that power generated by ASPL is supplied by TSSPDCL to consumers in the State of Telangana, it is in public interest that necessary directions be issued to TSSPDCL, directing TSSPDCL to abide by the terms of the PPA. In this regard, reliance is placed on the Judgement dated 02.12.2021 passed by the Hon'ble High Court of Karnataka in Writ Petition No.5703 of 2020 titled ReNew Power Private Limited vs. State of Karnataka & Ors. (and batch matters). The writ petitions were filed by renewable energy generating companies against respective Electricity Supply Companies (statutory distribution licensees under the Act) seeking payment of pending dues and directions for timely future

payments. Considering both, public interest and interest of all generating companies, Hon'ble High Court of Karnataka has held as under:

“8.

Re: Point No.4

(i) *The last question that arises for consideration is with regard to the relief's sought for by the petitioners and the orders to be passed/directions to be issued in the petitions. As stated supra, petitioners seek directions to the Respondent No.2-ESCOMs to pay the outstanding dues covered under the subject bills/invoices to the petitioners as well as continue to pay all the amounts in respect of the bills/invoices raised by the petitioners in future also as per the PPAs in addition to directions to be issued to open irrevocable and revolving letters of credit in favour of the petitioners towards the payments/dues payable by the ESCOMs. In this context, learned Senior Counsel for the petitioners submitted that in the interest of all power generating companies as well as the public at large, it is essential that general guidelines and suitable/appropriate directions are issued to all the ESCOMs in the State of Karnataka to honour, discharge and fulfil their obligations and duties under the PPAs.*

[...]

(vi) *In view of the aforesaid facts and circumstances, I am of the considered opinion that the petitioners are entitled to the relief's sought for by them in the petitions and consequently, Respondent No.2-ESCOMs are to be directed to honour and discharge all their obligations and liabilities under the PPAs including making payment of the outstanding dues to the petitioners and to continue to make timely and prompt payments henceforth in the future also in; so also, the ESCOMs are to be directed to open/renew irrevocable and revolving monthly letters of credit in favour of the petitioners so as to ensure prompt, timely and regular payments being made to the petitioners. Further, general guidelines are also to be issued to all the ESCOMs in the State of Karnataka to honour and discharge all their obligations and liabilities under the PPAs entered into with anyone including making payments, opening/renewing letters of credit etc., in favour of all the power generators.*

Accordingly, Point No.4 is answered in favour of the petitioners by holding that the petitioners are entitled to the relief's sought for in the petitions and necessary directions and guidelines are to be issued to the ESCOMs.”

- bf. It is stated that ASPL has been requesting release of pending dues from TSSPDCL however, TSSPDCL has failed to make to payments towards the same.
- bg. It is stated that ASPL is facing severe financial constraint on account of the said delays/non-payment of outstanding dues beyond due date by the TSSPDCL

which has further impacted ASPL's operational expenditure and ensuring supply of uninterrupted power under the PPA.

- bh. It is stated that non-payment/delay in payment of outstanding dues and consequent LPS has had a cascading effect on all suppliers/stakeholders such as ASPL's O&M contractors, vendors etc.
- bi. It is stated that the Hon'ble Tribunal in its order dated 05.12.2018 in the case of TANGEDCO v Central Electricity Regulatory Commission (I.A.No.1428 of 2018 in Appeal No.289 of 2018), directed TANGEDCO to pay 80% of its dues and held as under:

"4.12 So far as who will suffer irreparable loss or hardship, admittedly, the issues are answered in favour of the second Respondent not only by the Commission, but also by this Tribunal in earlier judgments dated 14.08.2018. It is the generators who are facing financial stress on account of various issues including delay in payment of amounts due to them. The Appellant has long term agreement with the second Respondent. If the amounts due are not paid, the Respondent would suffer irreparable injury and therefore justice requires rejection of stay application and direction in favour of second Respondent. Hence, the Appellant is directed to immediately pay 80% of Rs.70.17 crores which is calculated up to July 2018. They shall continue to pay 80% of claims under different Heads in future also as and when bills are raised so far as the above-mentioned claims which are already allowed by the Commission. In case the issues are answered in favour of Appellant on merits in the appeal, the same can be adjusted towards monthly tariff charges to be paid to the second Respondent since Appellant has long term PPA with second Respondent."

- bj. It is stated that similarly, even CERC has passed similar orders directing distribution licensees to make payment of outstanding dues in accordance with the terms of the PPA. In this regard, reliance is placed on Ld. CERC's Order dated 26.11.2018 in the case of GMR Warora Energy Limited v MSEDCL (I.A.No.77 of 2018 in Petition No.284/MP/2018) (Para 8), wherein CERC directed MSEDCL to pay the outstanding dues in view of the fact that GMR Warora Energy Limited had been supplying power regularly and was facing financial difficulties in arranging for working capital.
- bk. It is stated that in light of the foregoing submissions and the admitted status of the monthly bills and pending amounts, it is evident that the balance of convenience lies in favour of the petitioner, ASPL. It is stated that TSSPDCL has never alleged any contravention of the provisions of the PPA by ASPL. Further, TSSPDCL has not disputed its liability to make payment towards

pending bills along with LPS. It is submitted that if the admitted liability is not paid to ASPL and the reliefs sought herein are not granted, irreparable loss shall be caused to ASPL. In view of such facts and circumstances, this Commission may be pleased to direct TSSPDCL to pay the pending amounts expeditiously.

Claim of unpaid bills and LPS as under PPA dated 029.02.2016	Amount (Rs.)
Total amount due towards unpaid bills for the period January 2021 to January 2022	10,72,29,989
Total LPS for the period September 2017 to December 2021	2,22,78,652
Total	12,95,08,641

2. The petitioner has sought the following prayer in the petition.
 - “(a) to direct the respondent No.1 to pay Rs.10,72,29,989/- towards pending bills due forthwith to ASPL;
 - (b) to direct the respondent No.1 to pay Rs.2,22,78,652/- towards LPS on delayed payment of outstanding bills;
 - (c) to direct the respondent No.1 to set up letter of credit as a payment security mechanism under the PPA;
 - (d) to direct respondents No.1 to 3 to pay future bills and accrued LPS in a timely manner in accordance with the power purchase agreement.”

3. The petitioner has also filed an Interlocutory Application (I.A.No.49 of 2022) for interim orders and sought the following prayer.

“to direct the respondent No.1 to pay 80% of the pending amounts to ASPL within one week, pending final adjudication.”

4. The respondent No.1 has not filed its counter affidavit to the petition despite giving ample opportunity, but the respondent No.1 has filed an affidavit, wherein it has been stated the following:
 - a. It is stated that on 30.09.2022 during the course of hearing on submission made on behalf of respondents stating that respondent N. 1 has made arrangement for payment of amount due, in 12 to 48 instalments through Power Finance Corporation Limited (PFC) and Rural Electrification Corporation Limited (REC) and that the respondent has passed on required information of all the petitioners including the petitioner herein who filed similar petitions that outstanding dues along with bank details to PFC and REC for arranging payment of agreed amount as per PPA directly to the petitioners.

- b. It is stated that respondent No.1/TSDISCOMs have entered into loan agreement with REC Limited and PFC limited facilitating financial assistance for clearance of dues.
- c. It is stated that the Commission directed this respondent to file specific affidavit indicating the amount that is to be paid by the said corporations on behalf of respondents as per the agreement.
- d. It is stated that payments are being arranged to the petitioners in 12 equal instalments and out of which 3 instalments have already been paid. Balance 9 instalments will be paid on 5th of every month.
- e. It is stated that the late payment surcharge is under reconciliation and the same is in process. The details of monthly bills covered in the financial assistance scheme extended by PFC and REC is submitted below:

Name of the petitioner (s)	Amount covered under REC/PFC payments to be made in 12 instalments (Rs)	Installments already paid (Amount in Rs./Date of Payment)		
		22.09.2022	23.09.2022	06.10.2022
M/s Achampet Solar Private Limited	12,18,74,878	10156240	10156240	10156240"

5. The petitioner has filed an additional affidavit in support of the petition for proper adjudication and the contents of it are as below:
 - a. It is stated that the petitioner has filed the present petition under Section 86(1)(f) of the Electricity Act, 2003 read with PPA dated 29.02.2016, seeking recovery of Rs.12,95,08,641/- for supply of power to the respondent No.1 along with directions to pay all future bills in a timely manner in accordance with the PPA executed between the parties.
 - b. It is stated that the respondent No.1 had filed its reply affidavit to the present petition before this Commission stating that the respondent No.1 shall make payments to the petitioner in 12 equal instalments amounting to Rs.12,18,74,878/- while claiming to have already made three instalments of Rs.1,01,56,240/- each. It is stated that the respondent No.1 did not provide any explanation in support of the amounts paid/deduction of amounts mentioned in its reply affidavit dated 21.10.2022.
 - c. It is stated that the Commission by way of its order dated 21.11.2022 passed for the last hearing had, inter-alia, directed as under:

“The Commission is concerned about the inaction on the part of the licensee and observed that what all the petitioner required them to do is to identify and intimate the amount that will be paid towards principal and late payment surcharge, which has not been done by the licensee. As such, there is no case for granting further time, however, keeping in view the magnanimity of the issue, the Commission is inclined to grant time for filing the required information. At this juncture, the counsel for petitioner stated that the required information may be filed at the earliest within a period of fifteen days and thereafter give time for corroborating the same.

The Commission considering the submissions has fixed the time period for filing the information as sought by it to be filed on or before 15.12.2022 with a copy to the counsel for petitioner and thereafter, the Commission will hear the parties on the next date of hearing. It is made clear that if no information is filed, the Commission will proceed to hear the matter on merits. The time is being granted solely to enable effective resolution of the issue. It is emphasized that the licensee shall at least furnish information in the case without fail as stipulated above. Keeping in view the above situation, the matter is adjourned.”

- d. It is stated that pursuant thereto, the respondent No.1 has still not furnished/ filed any information in support of its claim despite this Commission’s directions in the order dated 21.11.2022. This is yet another attempt by the respondent No.1 to delay the adjudication of the present Petition to the detriment of the petitioner which is suffering losses on day-to-day basis due to the unlawful actions of the respondent No.1.
- e. It is stated that the petitioner has been raising bills in terms of the PPA on a monthly basis, however, the respondent No.1 has failed to make payments within the due dates. The petitioner is entitled to LPS for payments made beyond the due date under Article 5.2 of the PPA. A summary of the amounts legally due to the petitioner as on the date of filing of the Petition is set out below:

Sl. No.	Particulars	Period	Amount due and payable (Rs.)
(a)	Undisputed Monthly Bills	January 2021 to January 2022	10,72,29,989/-
(b)	LPS	November 2017 to December 2021	2,22,78,652/-
Total			12,95,08,641/-

- f. It is stated that as per Article 5.2 of the PPA, the respondent No.1 is liable to pay interest at the rate of prevailing base prime lending rate of the State Bank of India to the petitioner for delayed payment. It is stated that the respondent

No.1 did not calculate and include the said interest amount to the amounts due mentioned in its reply affidavit and therefore, there is a difference of Rs.76,33,763/- in the amounts being claimed by the petitioner over and above what has been admitted by the respondent No.1 in its affidavit. Though the respondent No.1 has stated in its reply affidavit that the payments of the said interest amount is under reconciliation, there has been no effort by the respondent No.1 till date to reconcile the same.

- g. It is stated that since the respondent No.1 has failed to provide the necessary information as directed by this Commission in the order dated 21.11.2022, the petitioner is submitting herewith a detailed tabulated statement showing the present status of total amounts due and payable to the petitioner by the respondent No.1 along with interest.
- h. It is stated that no further time ought to be granted to the respondent No.1 and the Petition be allowed by this Commission with directions to the respondent No.1 to release payments to the petitioner forthwith.

6. The respondent No.1 has filed a additional submissions in support of its defence, which is extracted below:

- a. It is stated that the petitioner, in the subject Petition (Petition filed under the Section 86(1)(f) of the Electricity Act 2003) has prayed the Commission to issue directions to the respondents for payment of outstanding sums to it under the bills raised by it along with Late Payment Surcharge (LPS) for the period April 2016 to March 2022 in terms of the provisions of the PPA subsisting with it.
- b. It is stated that as per the law settled by the Hon'ble Supreme Court in several Electricity matters, the rights and obligations of the Parties shall have to be read together with the statutory provisions and the claims of the petitioner have to be examined in accordance with statutory provisions/law settled also.
- c. It is stated that the Case law, (2016) 3 SCC 468 (APPCC Vs LANCO Kondapalli Power Ltd., Hon'ble Supreme Court's judgment dated 16th October 2015 in Civil Appeal No.6036 of 2012 & batch), wherein it was held, as extracted below:

“

30. *We hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the Civil Court.*

... .. *We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect its*

judicial power under clause (f) of subsection (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions, which may be administrative or regulatory.

-“
- d. It is stated that in terms of the aforesaid case law, the principles of Limitation Act, 1963 shall apply to the claims sought to be adjudicated by this Commission under Section 86(1)(f) of the Electricity Act,2003.
 - e. It is further stated that the Article 55 of the first Schedule of the Limitation Act 1963 has stipulated that in case of breach of Contract, the limitation period for filing a Suit is 3 years from the date of cause of action.
 - f. It is stated that since the petitioner's claims are pertaining to the period from (September 2017) to (March 2022) and the petition was filed before the Commission on as per list enclosed, therefore the outstanding claims beyond 3 years prior to the date of filing of the Petition ought to be rejected since these were barred by time in terms of the law settled by the Hon'ble Apex Court.
 - g. It is also stated that the Hon'ble Apex Court also held in a catena of the judgments that “*exchange of Communications do not extend the period of limitation provided by law*”.
 - h. It is further stated that the Commission is requested to examine clauses on delayed payment surcharge in different PPA's which is conflicting with the present method of interest rates. The attention of the Commission is drawn to the fact that from 2016 all the banks have switched over to MCLR i.e. Marginal Cost of Fund Based Lending Rate.

In certain PPA's clause 5.2 Clause - “The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, DISCOM shall pay interest at prevailing SBI bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction”.

In certain PPA's 5.2 Clause – “The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of payment, the DISCOM shall pay simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is increased/reduced, such an increased/reduced rate is applicable from the date of such notification.”

And in certain PPA's 5.3 Clause - “For default in payment beyond 30 days from the date of billing, a surcharge at the rate of nationalized bank rate (Prime Lending Rate) per month or part thereof shall be levied on the billed amount.”

The application of the different rates to different generators is totally ambiguous and contrary to the present system of applying interest rates by the lenders (MCLR).

- i. It is stated that the “change in law” means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India (GoI), Government of Telangana (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.
- j. It is stated that the change in method of lending is subservient to the change in law article, therefore the Commission is requested to examine and give standard rate of interest i.e., MCLR to be applied to all the generators. Therefore, there will be uniformity and aligned to the present method of lending.
- k. It is stated that in light of the above, the Commission is prayed to examine the claims of the petitioner duly taking into account the law settled by the Hon’ble Supreme Court in the interest of justice in respect of time barred debts.
- l. It is requested to examine the application of uniform delayed payment surcharge i.e., MCLR to all the solar generators aligning with the present method of interest application envisaged by RBI w.e.f. 01.04.2016.
Hence it is prayed that the Hon’ble Commission may be pleased to pass appropriate orders.”

7. The petitioner has filed additional affidavit to the additional submissions filed by the respondent, which are extracted below:

- a. It is stated that the present petitions were listed before the Commission on 12.01.2023 wherein the Commission had reserved the petitions for orders. Thereafter, by way of the Commission’s letters received on 31.03.2023, it was intimated that the Southern Power Distribution Company of Telangana Limited and Northern Power Distribution Company of Telangana Limited (respondents) have filed additional submissions on 28.01.2023 and in view thereof, the petitions have been listed for hearing on 24.04.2023.
- b. It is stated that in their submissions dated 28.01.2023, the respondents have broadly contended that:
 - (i) Since the petitioner’s claims are pertaining to period from September 2017 to March 2022 and the petition was filed in April 2022, the outstanding claims beyond 3 years are to be rejected in terms of

Limitation Act in terms of APPCC v. Lanco Kondapalli Power Ltd. (2016) 3 SCC 468.

- (ii) The Commission is requested to examine the clauses on delayed payment surcharge in different PPAs which are conflicting with the present method of interest rates because from 2016, all banks have switched over to Marginal Cost of Fund Based Lending Rate (MCLR).

- c. It is stated that the petitioners have filed the present petitions seeking recovery of amounts for supply of power to the respondents along with directions to pay all future bills in a timely manner in accordance with the PPAs executed between the parties. The brief details of the amounts are provided below:

Sl. No.	Petition no.	Petitioner	Respondent/ Discom	Date of PPA	COD	Amounts due as per petition
1.	OP No.59/2022	Achampet Solar Private Limited (ASPL) [Plant capacity – 10 MW]	TSSPDCL	29.02.2016	31.08.2017	12,95,08,641/-
2.	OP No.60/2022	Padmajiwadi Solar Private Limited (PSPL) [Plant capacity – 10 MW]	TSNPDCCL	01.03.2016	23.08.2017	14,34,10,155/-
3.	OP No.61/2022	Ghanpur Solar Private Limited (GHSPL) [Plant capacity – 15 MW]	TSSPDCL	29.02.2016	29.10.2017	20,65,70,648/-
4.	OP No.62/2022	Thukkapur Solar Private Limited (TSPL) [Plant capacity – 15 MW]	TSSPDCL	29.02.2016	27.10.2017	20,97,12,814/-
5.	OP No.63/2022	Renjal Solar Private Limited (RSPL) [Plant capacity – 15 MW]	TSNPDCCL	01.03.2016	03.02.2018	20,42,16,943/-
6.	OP No.64/2022	Gummadidala Solar Private Limited GSPL) [Plant capacity – 15 MW]	TSSPDCL	29.02.2016	23.11.2017	19,25,30,005/-

- d. It is stated that the respondent No.1 had filed its reply affidavit to the present Petition on 21.10.2022 before this Hon'ble Commission unilaterally admitting lesser amounts for payment to the petitioner and stated that such unilaterally determined amounts shall be paid to the petitioner in 12 equal instalments:

Sl. No.	Petitioner	Amounts due as per petition	Amount admitted in the affidavit	Each instalment amount	Amount payable over and above what is admitted in the affidavit
1.	ASPL [Plant capacity – 10 MW]	12,95,08,641/-	12,18,74,878/-	1,01,56,240/-	76,33,763/-

Sl. No.	Petitioner	Amounts due as per petition	Amount admitted in the affidavit	Each instalment amount	Amount payable over and above what is admitted in the affidavit
2.	PSPL [Plant capacity – 10 MW]	14,34,10,155/-	13,30,59,171/-	1,10,88,264/-	1,03,50,984/-
3.	GHSP [Plant capacity – 15 MW]	20,65,70,648/-	18,92,45,450/-	1,57,70,454/-	1,73,25,198/-
4.	TSPL [Plant capacity – 15 MW]	20,97,12,814/-	19,29,05,675/-	1,60,75,473/-	1,68,07,139/-
5.	RSPL [Plant capacity – 15 MW]	20,42,16,943/-	19,50,85,138/-	1,62,57,095/-	91,31,805/-
6.	GSPL [Plant capacity – 15 MW]	19,25,30,005/-	17,51,46,938/-	1,45,95,578/-	1,73,83,067/-

- e. It is stated that thereafter, the respondents have paid 9 instalments to the petitioners for the six separate SPVs.
- f. It is stated that pursuant thereto, the respondents have still not filed any basis of calculations in support of its claim. This is yet another attempt by the respondents to delay the adjudication of the present Petitions to the detriment of the petitioners which are suffering losses on day-to-day basis due to such unlawful actions.
- g. It is stated that the petitioners have been raising bills in terms of the PPA on a monthly basis, however, the respondents have failed to make payments within the due dates. The petitioner is entitled to late payment surcharge (LPS) for payments made beyond the due date under Article 5.2 of the PPA.
- h. It is stated that as per Article 5.2 of the PPA, the respondents are liable to pay interest at the rate of prevailing base prime lending rate of the State Bank of India to the petitioners for delayed payment. It is stated that the respondents have not calculated and included the said interest amount to the amounts due mentioned in its reply affidavits.
- i. It is stated that since the petitioners are submitting herewith a detailed tabulated statement showing the present status of total amounts due and payable to the petitioners by the respondents along with interest computed from March 2021 to February 2023 along with the LPS as per the prevailing base prime lending rate of the State Bank of India.
- j. It is stated that the payment of interest/delayed payment surcharge ought to necessarily be governed in terms of the PPAs executed between the parties. As such, the respondent's averments in its submissions dated 28.01.2023 that

there should be uniformity in the rate of interest and it should be based on MCLR merits no consideration.

- k. It is stated that the respondents' averments that the petitioners' claims are barred by limitation are also misplaced. The petitioners have been seeking payments of the amounts due from the respondents (both principal and interest) continuously since the time they became due. As such, the petitioners' claims are premised on continuous cause of action and provisions of the limitation act as interpreted in APPCC v. Lanco Kondapalli Power Ltd. (2016) 3 SCC 468 will not apply in the present case. In this regard, reliance is placed on Power Company of Karnataka Ltd. v. Udupi Power corporation Ltd. [2020 SCC OnLine APTEL 94] (paras 180 to 186, 191, 192, 203 to 209). Even otherwise, this Commission exercises wide regulatory supervision over the PPAs executed between the petitioners and the respondents to pass the necessary orders.
- l. It is stated further, the respondents are precluded from now taking a stand that the claims are barred by limitation since in terms of the respondents' own Affidavits dated 21.10.2022, the respondents have admitted the petitioner's claims as payable (with the interest rate being the issue to be resolved). Therefore, the respondents ought not to be allowed to take a divergent stand pursuant to the affidavit dated 21.10.2022 and after having paid 9 out of 12 instalments to the petitioners.
- m. In view of the above, it is prayed that the petitions be allowed by the Commission with directions to the respondents to release payments to the petitioners forthwith along with the interest as per the respective PPAs.

8. The Commission has heard the parties to the present petition from time to time and it was ultimately reserved for orders on 12.01.2023. Subsequent to reserving the matter for orders by the Commission, the respondent has filed common additional submissions in this matter as well as in other similar matters on 28.01.2023 raising several contentions, which required an examination by the Commission and also the submission of the petitioner on the same for ascertainment and for a detailed hearing. Even though the respondent did not seek reopening the matter, but due to various averments made in the common additional submissions by the respondent, the Commission opined that the matter required for reopening for fresh consideration and accordingly the Commission de-reserved the matter and posted it for hearing on

24.04.2023. The Commission has heard the parties and also considered the material available to it. Record of proceedings on various dates including that of 24.04.2023 are extracted for ready reference.

Record of proceedings dated 25.08.2022:

“... .. The counsel for petitioner stated that the petition is filed for recovering the amounts due towards power generation supplied to the respondent. Also, the petitioner has filed an interlocutory application for payment of part amount pending disposal of the original petition. The representative of the respondent stated that the matter is coming up for the first time and he needs further time for filing counter affidavit. The Commission upon insistence of the counsel for petitioner for interim directions or disposal of the petition itself on the same lines as has been decided by the Commission in similar cases, had observed that the Commission is inclined to pass orders, however, an opportunity is being given to the respondent for filing counter affidavit. The Commission having noticed that the matter is coming up today for the first time for filing counter affidavit, while making it clear that the licensee shall file the counter affidavit expeditiously and the petitioner is at liberty to file rejoinder, if any upon filing counter affidavit by the respondent, adjourned the matter.”

Record of proceedings dated 05.09.2022:

“... .. The counsel for petitioner stated that no counter affidavit is filed so far despite granting time for the said purpose. Again time is being sought inspite of the fact that the Commission had already considered similar matters and disposed them. The representative of the respondent stated that the Commission may consider granting further time for filing counter affidavit while conceding the fact that sufficient time has already been given. The Commission expressed its distress that the licensee is placing the Commission in a peculiar situation of not disposing of the matter despite it being the similar to earlier batch of cases. However, in view of the request of the representative of the respondent, the matter is adjourned.”

Record of proceedings dated 30.09.2022:

“... .. The counsel for petitioner stated that the petition is filed for recovering the amounts due towards power generation supplied to the respondent. Even till today, no counter affidavit is filed nor any commitment is given as regards payment to be made or not before this Commission. The representative of the respondent stated that the respondent has made arrangements for payment of amount due in 12 to 48 instalments through Power Finance Corporation Limited and Rural Electrification Corporation Limited. The respondent has passed on the information required to them and they will directly arrange payment of the amount as agreed between the respondent and the said corporations. In support of his submissions, he has sought to file the agreement entered by them for payment of the amount due to the petitioner. Therefore, he sought further time to report in the matter. The counsel for petitioner stated that the petitioner is in dark about the same. Unless the respondent comes up with an affidavit to that effect, the petitioner will not be in a secured position. He has required the Commission to direct the respondent to file an affidavit detailing

the amounts indicated to the said corporations in respect of each of the cases by filing separate affidavits as the petitioner is entitled to the original amount as also the late payment surcharge.

The Commission, considering the submissions made by the parties, has directed the respondent to file specific affidavit in respect of the each of the petitions indicating the amount that is to be paid by the respondent including LPS and to be facilitated by the said corporations under the agreement before the Commission. Such an affidavit shall be filed on or before 22.10.2022 with a copy to the petitioner's counsel. The Commission will consider the matter on the next date of hearing depending the developments in the matter. Accordingly, the matter is adjourned."

Record of proceedings dated 31.10.2022:

"... .. The counsel for petitioner stated that the petition is coming up for counter and hearing. The Commission had earlier required the respondent to file an affidavit indicating the amounts that are being paid through the financial agencies as also the quantum of instalment for the benefit of the petitioner. Though the Commission directed that such an affidavit be filed by 22.10.2022, the respondent has filed the same only the other day when it has been served on the petitioner. Even now, the respondent did not mention the LPS amount that is being considered for reimbursement alongwith the principal amount and no details are mentioned in the affidavit despite the fact that in the earlier round of cases, the Commission had specifically pointed out that LPS amount is liable to be paid to the petitioner and directed accordingly while passing orders in the said batch of cases. According to the PPA, the respondent has to clearly identify and pay the LPS amount the moment the payment of principal amount has been delayed upon submission of invoice for the purpose by the petitioner beyond the stipulated time. While explaining the provisions in the PPA with regard to billing and payment, it is stated that the DISCOM is entitled to rebate only when it has made payment of the original amount within the stipulated time, but, is liable to pay the LPS amount on delaying the payment of original amount beyond the period stipulated in the PPA. Contrary to the said provision, it is noticed that in some cases, the respondent has indicated a lessor amount of the total payment due inspite of the figures mentioned by the petitioner in its petition. This amounted to reduction of the net payment and claiming rebate at a higher percentage than that is accepted in favour of DISCOM for early payment. To rebut the figures of the respondent, the petitioner, on its side, is filing the details of calculations as also the amount due to it to enable the Commission to direct specifically the amounts to be paid by the licensee.

The representative of the respondent stated that they have filed the affidavit clearly indicating the amount that is proposed to be disbursed through the arrangement made with the financial institutions. The payment is particularly with reference to the principal amount. He has no instructions on the aspect of LPS amount, which is the bone of contention of the petitioner apart from the principal amount. He needs time to seek instructions as also clarification from the management on the aspect of LPS payment to the generators apart from the principal amount committed in the affidavit.

The Commission expressed its dismay that the respondent filed affidavit without giving the complete picture of the payments sought to be made and which are not sought to be made. It is also noticed by the Commission that there is no

clarity on the aspect of payment of LPS from the respondent. Therefore, it desired that the licensee shall place before the Commission the relevant particulars with regard to the principal amount as also LPS in respect of each of the generators. The Commission also enquired about undertaking any conciliation process before initiating the proceedings. The counsel for petitioner replied emphatically that no steps as provided in the PPA were initiated nor any communication was received from the respondent. Since the statement made by the licensee is insufficient and inadequate, the Commission desired the licensee to place proper information with regard to all the payments due including the subsequent period and the petitioner to corroborate by way of reply as to the details if any are missing in the statement of the licensee. In the circumstances, the matter is adjourned for further hearing including required corroboration of the figures by either side.”

Record of proceedings dated 21.11.2022:

“... .. The counsel for petitioner stated that the Commission had specifically recorded in the proceedings on the earlier date of hearing that the action required to be taken by the respondent in the matter on payment of amounts duly identifying the same. However, no action including the filing of any information has come forth from the respondent, even after lapse of 21 days. In fact, the Commission had already considered the issues and disposed of several similar cases and what remains to be examined, is with reference to the amounts due on different heads. The representative of the respondent stated that though Commission required furnishing of details of the payments as contemplated in the matter, however, the issue is not merely of the petitioner alone, but there are about 200 generators in whose cases, the exercise has to be undertaken. As such, the matter has been entrusted to a group of auditors, who have been tasked to calculate the amounts in respect of all the generators and it will take a period of one month. This work is entrusted to the auditors as the company staff are not able to concentrate on the matter and they are also busy with several topics including the litigation before the Hon'ble Supreme Court on their service issues. He needs atleast one month to complete the exercise and report the same to the Commission. He also emphasized that the payment of amounts relates to not only one or two months, but the period to be considered is about 5 years in many cases.

The counsel for petitioner vehemently opposed the proposal made by the representative of the respondent and stated that the Commission may consider reserving the matter and give liberty to the respondent to file the required information before it within a period of one week or ten days as may be appropriately considered. The Commission is concerned about the inaction on the part of the licensee and observed that what all the petitioner required them to do is to identify and intimate the amount that will be paid towards principal and late payment surcharge, which has not been done by the licensee. As such, there is no case for granting further time, however, keeping in view the magnanimity of the issue, the Commission is inclined to grant time for filing the required information. At this juncture, the counsel for petitioner stated that the required information may be filed at the earliest within a period of fifteen days and thereafter give time for corroborating the same.

The Commission considering the submissions has fixed the time period for filing the information as sought by it to be filed on or before 15.12.2022 with a copy

to the counsel for petitioner and thereafter, the Commission will hear the parties on the next date of hearing. It is made clear that if no information is filed, the Commission will proceed to hear the matter on merits. The time is being granted solely to enable effective resolution of the issue. It is emphasized that the licensee shall atleast furnish information in the case without fail as stipulated above. Keeping in view the above situation, the matter is adjourned.”

Record of proceedings dated 12.01.2023:

“... .. The counsel for petitioner stated that the Commission had specifically recorded in the proceedings on the earlier date of hearing that the action required to be taken by the respondent in the matter on payment of amounts duly identifying the same. However, no action including the filing of any information has come forth from the respondent even after lapse of the period till the date of hearing. In fact, the Commission had already considered the issues and disposed of several similar cases and what remains to be examined, is with reference to the amounts due on different heads. The issue of LPS is not adverted to anywhere nor any information is coming forth from the respondent. It is appropriate that the respondent places the information both in respect of LPS as well as principal amount, though the principal amount is being reimbursed in terms of the mechanism stated earlier. The petitioner is also in receipt of current payments, but the issue of LPS as also opening of letter of credit has not taken place. Insofar as LPS is concerned, the provisions of PPA require that the amount should be calculated and paid for as and when the amount became due and not paid in time. The counsel highlighted the provisions in the PPA with regard to the same. The licensee is attempting to calculate the LPS, though not intimated, from the date when it had issued notice of undertaking payments without indicating the actual amounts due as also the period when the amounts have accrued for the first time. In support of his case, he has filed an affidavit extracting the order of the Commission along with the details of the amount due and the calculations to be arrived at in terms of the provisions of the PPA for undertaking proper adjudication in the matter.

The representative of the respondent stated that in terms of the directions of the Commission, arrangements have been made for payment of the amount due. The arrangements have already been made for payment of the arrears, but there is no issue of LPS in these cases and no quantification is required to be made. The petitioner is at liberty to approach the respondent for payment of LPS in terms of the PPA. The respondent having considered and made arrangement for payment of arrears as well as current liability is not required to make any other payment. The licensee is ready to comply with the provisions of the PPA, however, the Commission may consider the unreasonable argument with reference to payment of LPS despite the fact that the payment is being effected in a timely manner.

The Commission noticed that the provisions in the PPA as explained by the petitioner would call for payment of LPS as also incentive. However, as the licensee has failed to comply with the directions as also did not place any information on the amounts due, no further time can be considered in the matter. Accordingly, the matter is reserved for orders.

Record of proceedings dated 24.04.2023:

“... .. The counsel for petitioner stated that the main issue in this petition is with regard to payment of arrears due alongwith interest and late payment surcharge. The details were earlier not forthcoming from the respondent. Moreover, the petitioner has claimed the bills towards power supply and the same have not been honoured as such interest is liable to be paid for the same and further as the amount is paid belatedly, as per the provisions of the PPA the respondent is liable to pay late payment surcharge also. One contention that has been raised by the respondent is that the claims are beyond the period of limitation, which cannot be accepted as it is a continuous process as and when the payment gets delayed, it will attract such consequence as are provided in the PPA. Therefore, the respondent cannot contend that the limitation has expired.

The counsel for petitioner stated that even if the contention is to be accepted insofar as limitation is concerned the claims would survive for the reason that the Hon'ble Supreme Court in suo motu proceedings in W. P. No.3 of 2020 had extended the limitation period for the issues where the limitation had expired between 15.03.2020 to 28.02.2022 by its orders from time to time. It is also made clear there that the limitation would start running from 01.03.2022 and would be expiring after 90 days. It is also submitted that the Hon'ble Supreme Court had occasion to consider the issue of limitation in the matters of A. P. Power Coordination Committee Vs. Lanco Kondapalli Limited reported in 2016 (3) SCC 468, which is not applicable to the facts of the case. Reliance is also placed by the respondent in the matter of Power Company of Karnataka Limited Vs. Udupi Power Corporation Limited reported in 2020 SCC On Line APTEL 94, which is of no help to the respondent. In fact, the said appeal would support the contents of the petitioner that the respondent is bound to pay the LPS. The Commission has extensive power on regulation in respect of PPAs executed and it can pass such necessary orders.

The counsel for petitioner stated that the respondent has committed itself to release the payments in 9 or 12 instalments upto 36 instalments of the amounts due through an affidavit filed by the respondent. They now cannot contend different aspects contrary to their own submissions that arrangements have been made for liquidating the arrears of amounts due. The Commission may consider the approbating and reprobating of submissions made by the respondent. The Commission may not consider the arguments raised now in the additional submissions in view of the specific affidavit submitted by the respondent earlier.

The representative of the respondent stated that the aspect of LPS cannot be agitated as there was no issue on the same. Therefore, the respondent has specifically adverted to in the additional submissions pointing out the provisions in the PPA alongwith the relevant law. In the contentions raised by the petitioner, the amounts have been quantified only for a specific period and nothing is made out for a period prior to the period mentioned in the PPA or the petition. In any case as the respondent has made arrangement for payment of the principal amount, payment of interest or late payment surcharge would not arise. One specific issue that requires consideration is that of change of applicability of interest rate which was mentioned as prime lending rate, which has been changed by the banking regulator for consideration of interest as marginal cost lending rate (MCLR), which needs to be examined, as it stands

contrary to the provisions of PPA. Therefore, the Commission may consider refusing the said prayer.

The counsel for petitioner stated that the amounts due is a continuous exercise and every month when the amount is becoming due it will attract not only interest but also late payment surcharge unless the respondent has disputed the bill and communicated the same before the due date. Inasmuch as, the Government of India had notified the late payment surcharge rules. Such rules have been held to be part of the agreement on and from the date of their notification. Therefore, the respondent could not have raised the contention with regard to applicability of the late payment surcharge and as also question of limitation attracting it. The counsel for petitioner referred to several provisions and judgements rendered by the Hon'ble ATE as also the Hon'ble Supreme Court on the question of limitation, continuity of liability and treatment of modifications made by the government policies as change in law. The contention that the calculation of interest based on prime lending rate has been changed to MCLR do constitute a change in law and the licensee should have taken steps to amend the agreement.

The counsel for petitioner stated that the Commission may not consider any of the submissions made by the licensee as the law is settled against them. Also, the Commission had already disposed of a batch of cases on the similar subject. Therefore, there is nothing further to be considered for deviation from the earlier decision of the Commission.

The Commission felt it appropriate that the parties to the petition may consider undertaking conciliation of the matter towards LPS amount amicably. In view of the submissions made by the parties, the matter is reserved for orders.”

9. The petitioner vide letter dated 27.06.2023 have informed that in spite of their efforts and communication in pursuant to the orders passed by the Commission for the hearing held on 24.04.2023, the respondent No.1 has not come forward for conciliation of the matter towards LPS amount. Therefore, prayed the Commission to pass the final orders directing respondent No.1 to release payments of arrears along with interest and LPS as per the data placed on record by the petitioner before the Commission.

10. The Commission considers that the Transmission Corporation of Telangana Limited (TSTRANSCO, the other Respondent) is the STU and is concerned with only transmission lines business. It is neither authorized nor has authority to procure power nor to do retail sale of such procured power. Therefore, it is unnecessary to have it as party to this proceeding. Also, the Telangana State Power Coordination Committee (TSPCC, another respondent) is not a statutory body and is not recognized under the Act, 2003. The said Committee has been created by G.O. referred by the petitioner only to co-ordinate the power procurement and allied activities to have a single window to favour generators. Therefore, the TSPCC cannot be a party to the proceedings,

even though it is created by the Government. It is also relevant that just because correspondence is being done by TSPCC, it has no authority to contest or defend for the lapses or omissions committed by TSDISCOM. Thus, the Commission consider to drop both the respondents from the array of the respondents. Thus, the distribution licensee is sole respondent in this case.

11. Though the Commission was considerate and magnanimous in granting time for filing the counter affidavit, the respondent has failed to respond to the petition through a proper counter affidavit. However, it had filed an affidavit setting out certain details as to the action taken by it towards arranging payment for the amounts due in the petition. Further, the Commission has specifically posted the matter for hearing and after hearing the parties on the basis of additional submissions made by the respondent, required the parties to undertake conciliation of the LPS amount. However, the respondent did not initiate any action in the matter and no information has been placed by the parties in this regard. The Commission has no other option but to decide the matter on the prayer of the petitioner in this context.

12. From the pleadings it is noticed that the petitioner is having a long-term Power Purchase Agreement with the respondent vide NCE Solar PPA No.2000 MW/30/2016 dated 29.02.2016 (PPA) for setting up of the Solar Power Project of 10 MW capacity at Achampet, Mahabubnagar District connected to at 33 kV side of 132/33 kV Achampet substation, for sale of Solar Power to the respondent for a period of 25 years from the Date of Commercial Operation. The terms & conditions of the PPA stipulates that –

- 5.1 *For the Delivered Energy, the Solar Power Developer (petitioner) shall furnish a bill to the DISCOM (respondent) for the billing month on or before the 5th working day following the Meter Reading Date;*
- 5.2 *Any payment made beyond the Due Date of Payment, the respondent shall pay simple interest at prevailing base Prime Lending Rate of State Bank of India; [Late Payment Surcharge (LPS)]*
- 5.3 *All payments shall be made into petitioner's designated account;*
- 5.4 *The respondent shall cause to put in place an irrevocable revolving Letter of Credit issued in favour of the petitioner by a Scheduled Bank for one month's billing value;*
- 5.5 *The respondent shall make payment of for the undisputed amount of the bill by the due date of payment;*
- 5.6 *The respondent shall pay the bills of petitioner promptly;*

....

11.4 any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003;

13. Prima facie, the prayer in this petition is with regard to action of the respondent in not making the payment in accordance with the provisions of the PPA. The petitioner has identified the outstanding amount due against monthly delivered energy bills for the period Jan'21 to Jan'22, which includes LPS amount for the period Sep'17 to Dec'21, the details which are shown in the petition as Rs.12,95,08,641/-. The petitioner further contended that the respondent is yet to open the Letter of Credit as provided in clause 5.4 of Article 5 of the PPA, as such, it is unable to recover the outstanding due or any part thereof. Therefore, in the prayer it is sought not only for release of payments due along with interest thereon for late payment (late payment surcharge, LPS) but also for directions to the respondent for opening of irrevocable revolving Letter of Credit in favour of petitioner and for making all future payments in a timely manner, though there is no mention of the amount for subsequent period.

14. The Commission is of the view that in the absence of any contest made by the respondent as to the veracity of the claims made by the petitioner, there is no dispute on the amounts payable by the respondent to the petitioners. However, as per the provisions of the PPA, when the petitioner has complied with its part to the PPA by delivering the electricity energy to the respondent, the respondent is bound to make payment without any demur. Further, in terms of the PPA such occurrence and continuation of event of non-payment of dues by the respondent to the petitioner and when the petitioner is unable to recover the outstanding amount, shall constitute "*DISCOM (respondent) Event of Default*". Further, as the PPA provides for payment of interest, it is bounden duty of respondent to pay the interest in terms of the PPA. Since the respondent did not pay the amounts towards delivered energy bills raised by the petitioner, it is liable to pay interest as claimed by the petitioner to that extent as also further LPS for the amounts which are not paid till date.

15. The petitioner sought to rely on the minutes of GoM as also the directions thereof by the GoI with regard to payments of due as well as LPS. Inasmuch as the PPA as also the subsequent rules notified in the year 2022 on the subject matter are binding on the respondent and as such, it cannot escape from the liability.

16. The petitioner sought to rely on Judgments of the Hon'ble Supreme Court,

Hon'ble APTEL and Hon'ble High Courts referred in the pleadings of the petitioner with regard to payment of amounts due by the respondent. Without reiterating the relevant observations of those Judgements, which are already extracted in the pleadings, the Commission is in complete agreement with the submission of the petitioner. Moreover, the decisions referred thereof are binding on this Commission. Therefore, it cannot extricate itself from the findings thereof and is accordingly, inclined to accept the submissions of the petitioner. Further the references made to orders of the other Commissions are of persuasive value and are not binding on this Commission.

17. The petitioner also relied on the Judgments of the Hon'ble Supreme Court in the matter of unjust enrichment and public authority must act fairly. Even in the case of these judgments as referred by the petitioner, since the respondent did not comply with the provisions of the PPA and did not make timely payment of the invoices, the natural understanding would be that the respondent has unjustly enriched itself by withholding the amounts due to the petitioner and its actions are not in consonance with the principles of public authority must act in fair manner. From the pleadings, there appears to be a certain extent force in the contention of the petitioner insofar as the above two aspects are concerned, but the Commission views that such application is subject to reasonable benefit of regulatory oversight in favour of the petitioner.

18. The respondent relied on the Judgment of the Hon'ble Supreme Court in respect of the observations made in the matter of M/s A.P.Power Coordination Committee on the aspect of limitation. Contra argument is also placed by the petitioner on the same aspect by placing reliance on the judgment of the Hon'ble APTEL in the matter of Power Company of Karnataka Vs. Udupi Power Corporation Limited. While it is not denied that the observations of the Hon'ble Supreme Court qua limitation are binding on the Commission as the petition is filed under Section 86(1)(f) of the Act, 2003, at the same time, the decision of the Hon'ble APTEL places importance on the aspect of 'continuous breach'. This case squarely falls within the aspect of continuous breach. Therefore, the contention of the respondent regarding limitation aspect or delayed filing of the petition cannot be accepted.

19. The respondent contended that since the method of calculation of interest is proposed to be changed, it amounts to 'Change in Law'. The contention of the respondent appears to be based on misunderstanding. The method of calculation of

interest cannot be deviated upon as provided in the PPA. At the same time, if the competent authority under the financial laws had changed the method of calculation of interest, nothing precluded respondent to initiate appropriate proceedings before the Commission for amendment of the provisions in the PPAs in line with such modifications in financial laws. Having not done so, it cannot now take defence that the same is change in law. For this reason, the contention of the respondent fails and is rejected.

20. The Commission had occasion to consider a judgment rendered by the Hon'ble APTEL in the matter of Bangalore Electricity Supply Company Ltd. Vs. Devangere Sugar Company Limited in Appeal No.176 of 2009. The observations made by the Hon'ble APTEL are extracted below:

- “23. Besides this, there is one more breach. Under Clause 6.6, the Corporation (Appellant) shall establish and maintain transferable, sustainable and irrevocable revolving Letter of Credit (LOC) in favour of the company. (Respondent)*
- 25. In the instant case, admittedly, neither the amount due were paid in time, nor the penal interest was paid as per clause 6.3 of the contract, nor the LOC was established within the stipulated time as per Clause 6.6 of the Contract.*
- 26. In every Power Purchase Agreement (PPA), the opening of a LOC is a vital part of the contract. It is fundamental financial obligation cast upon the Appellant by the contract to honour the same. In other words, to open an LOC forms an integral part of the contract. It is, therefore, clear that there is a failure on the part of the Appellant to honour its obligation under the contract.”*

21. Thus, it is seen that the present case also provides for Letter of Credit and the same is not complied with according to the pleadings. In the absence of any statement from the respondent as to the reasons or compliance of providing Letter of Credit in terms of the PPA, the Commission has no other option to infer that the respondent did not provide Letter of Credit to the petitioner, which it is required to comply with. The Commission opines that the respondent complying with the said provision in order to safeguard the interest of the petitioner, is appropriate in the interest of justice.

22. The Commission also considers it appropriate to observe that the respondent shall comply with the terms of the PPA without any demur and also honour all the payments in future towards the invoices to be raised by the petitioner, though it had made arrangement for payment of the earlier invoices and LPS as the case may be.

23. In view of the above, the petition is allowed and the respondent shall comply with this order within a period of four (4) weeks from the date of receipt of the order. While complying with the order, the respondent would ensure that the amounts are settled completely and shall endeavour to make payment of the undisputed amount of the bills raised by the petitioner promptly in accordance with the provisions of the PPA.

24. The original petition is disposed in terms of the observations made supra, without any costs. Since the original petition is itself being disposed of, the Interlocutory Applications would not survive and accordingly stand closed.

This Order is corrected and signed on this the 18th day of December, 2023.

Sd/-	Sd/-	Sd/-
(BANDARU KRISHNAIAH)	(M. D. MANOHAR RAJU)	(T. SRIRANGA RAO)
MEMBER	MEMBER	CHAIRMAN

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