



नई दिल्ली
NEW DELHI

याचिका संख्या./ Petition No. 230/MP/2022

कोरम/ Coram:

श्री आई. एस. झा, सदस्य/ Shri I. S. Jha, Member
श्री अरुण गोयल, सदस्य/ Shri Arun Goyal, Member
श्री पी. के. सिंह, सदस्य / Shri P. K. Singh, Member

आदेश दिनांक/ Date of Order: 30th of October, 2023

IN THE MATTER OF:

Petition under Section 79 (1) (f) of the Electricity Act, 2003 in relation to non-payment of fixed charges by truing up annualized threshold PLF of 55% as per the tariff determined by the Hon'ble State Commission to M/s. EID Parry (India) Limited under Power Purchase Agreement.

AND IN THE MATTER OF:

M/s. E.I.D Parry (India) Limited,
Sankili Village, Regidi Amadalavalsa (M),
Srikakulam District — 532 440.

...Petitioner

VERSUS

1. Transmission Corporation of Andhra Pradesh Limited (APTRANSCO),
Vidyut Soudha, Gunadala, Eluru Road,
Vijayawada, Andhra Pradesh 520004

2. **Central Power Distribution Corporation of Andhra Pradesh Limited (APCPDCL),**
Beside Polytechnic College, ITI Road,
Vijayawada - 520 008,
Krishna District, Andhra Pradesh
3. **Southern Power Distribution Company of Andhra Pradesh Limited (APSPDCL),**
No. 19-13-65/A Srinivasapuram Tiruchanoor Road
Tirupati - 517 503 Chittoor District
4. **Northern Power Distribution Company of Andhra Pradesh Limited (APNPDCL),**
H. No: 2-5-31/2, Vidyut Bhavan, Nakkalagutta, Hanamkonda,
Warangal district, Telangana - 506 001
5. **Eastern Power Distribution Company of Andhra Pradesh Limited (APEPDCL),**
C/o 50-27-5/1, TPT Colony, Seethammadhara, Visakhapatnam,
Andhra Pradesh- 530013
6. **Transmission Corporation of Telangana Limited (TSTRANSCO),**
Vidyut Soudha, Khairatabad,
Hyderabad-500082
7. **Southern Power Distribution Company of Telangana Limited (TSSPDCL),**
No. 6-1-50, Mint compound,
Hyderabad – 500063
8. **Northern Power Distribution Company of Telangana Limited (TSNPDCL),**
H. No: 2-5-31/2, Vidyut Bhavan, Nakkalagutta,
Hanamkonda, Warangal district Telangana - 506 001

.....Respondents

Parties Present:

Mr. Manu Seshadri, Advocate, E.I.DPL
Mr. Aveak Ganguly, Advocate, E.I.DPL
Mr. Abhijit Lal, Advocate, E.I.D. PL
Ms. Pallavi Anand, Advocate, E.I.DPL
Mr. D. Abhinav Rao, Advocate, TCAPL
Mr. Sidhant Kumar, Advocate, AP Discoms
Ms. Manya Chandok, Advocate, AP Discoms
Mr. Gurpreet Singh Bagga, Advocate, AP Discoms
Mr. Shivankar Rao, Advocate, AP Discoms

आदेश/ ORDER

The Petitioner, E.I.D Parry (India) Ltd is a company engaged in the business of manufacture of sugar and allied products having one of its integrated sugar complex consisting of sugar, distillery and bagasse based 16 MW cogeneration plant located at Sankili Village, Regidi Ambudalavalasa Mandal in Andhra Pradesh. The integrated Sugar Complex with the co-gen unit earlier belonged to M/s. GMR Technologies & Industries Limited. The name of the Company was later changed to M/s GMR Industries Limited. and thereafter to M/s Parry Sugar Industries Limited. The project was demerged into M/s E.I.D.- Parry (India) Limited (the Petitioner) by virtue of the Order of the Hon'ble High Court of Karnataka dated 01.02.2013 and the Order of the Hon'ble High Court of Judicature, Madras dated 18.02.2013 w.e.f. 18.03.2013 after filing of the Court Order with the respective Registrar of Companies. The Petitioner is a captive consumer and is selling a part or surplus to the APTRANSCO. The Petitioner through the Association of bagasse-based co-generation power projects had participated in the proceedings before APERC and presently the petition is being preferred in its individual capacity being aggrieved by the action of the Respondents in withholding the amounts payable for the energy supplied as per the tariff determined by Andhra Pradesh Electricity Regulatory Commission (APERC). The Petitioner is seeking payment of fixed charges by truing up annualized threshold PLF of 55% as per the tariff determined by APERC under the Power Purchase Agreement (PPA) dated 14.08.2001.

2. The Respondent No. 1, Transmission Corporation of Andhra Pradesh Limited (APTRANSCO), is the electric power transmission company of Andhra Pradesh and is the State Transmission Utility (STU).
3. The Respondents No. 2 to 5 are the distribution companies in the State of Andhra Pradesh engaged in the business of distribution of electricity.
4. The Respondent No. 6, i.e. Transmission Corporation of Telangana Limited (TSTRANSCO) is the electricity transmission company of Telangana. Now, it has ceased to do power trading and is now controlling system operations of power transmission in the State.

5. The Respondents No. 7 and 8 are the distribution companies in the State of Telangana engaged in the business of distribution of electricity.
6. The Petitioner has made the following prayers:
 - a) *Direct the Respondents to pay an amount of Rs. 4,28,23,048/- towards fixed cost as claimed by the Petitioner in the monthly tariff bills furnished by it to the 1st Respondent for the period 01.04.2004 to 14.08.2010 by truing up annualized threshold PLF of 55%;*
 - b) *Declare that the Petitioner Company is entitled to be paid interest of Rs.2,95,94,157/- for delay in payment of fixed charges as claimed by the Petitioner in the monthly tariff bills furnished by it to the 1st Respondent for the period 01.04.2004 to 14.08.2010 as per the attached statement; and consequently, direct the Respondents to pay the same;*
 - c) *Declare that the Petitioner Company is entitled to be paid interest on the amount payable as on the date of filing of this petition till realization and consequently direct the Respondents to pay the same; and*
 - d) *Pass such other order or orders as this Hon'ble Commission may deem fit and proper in the interest of justice.*

Factual Matrix

7. The Petitioner is a captive consumer and owns 16MW bagasse-based power plant at Sankil, Srikakulam District, Andhra Pradesh which was commissioned on 15.08.2001. APTRANSCO, being the holding company of distribution companies of Andhra Pradesh, purchased bulk power from the generating companies and allotted the same to its subsidiary distribution companies.
8. On 14.08.2001, the Petitioner entered into a PPA with APTRANSCO for the surplus power generated.
9. Pursuant to the transfer of Bulk Supply Undertaking and power purchase agreements of APTRANSCO to APDISCOMS under the third transfer scheme in 2005, the Project was allocated exclusively to Andhra Pradesh Eastern Power Distribution Company Limited (APEPDCL) by virtue of its geographical location.
10. On 20.06.2001, APERC passed an Order in O.P. 1075 of 2000 wherein it had directed that the existing incentives under G.O.M No. 93, dated 18.11.1997 stand extended; all generators of non-conventional energy shall supply power to APTRANSCO alone; that power generated by non-conventional energy developers is not permitted for sale to third parties, that the price

applicable for purchase by the supply licensee should be Rs 2.25 per unit with 5% escalation per annum with 1994-95 as the base year and that a suo motu review of the incentives to take effect from 01.04.2004 will be undertaken by APERC after discussion with the concerned parties.

11. On 20.03.2004, in Petition R.P. No. 84 of 2003 (Tariff Order dated 20.03.2004), APERC initiated suo-motu proceedings for determination of tariff applicable to Non-Conventional Energy Projects (NCE Projects) in Andhra Pradesh effective from 01.04.2004. Vide Tariff Order dated 20.03.2004, APERC adopted a 'Cost plus' approach and allowed a fair amount of return instead of the adhoc price earlier fixed in OP No 1075 of 2000 based on the guidelines of Ministry of Non-Conventional Energy Sources (MNES). APERC considered that beyond the threshold level of generation, the developers should get only variable cost (if any) and incentives and not the fixed charges. Accordingly, APERC determined a two-tier tariff on the basis of the Plant Load Factor (PLF) at which the plants are operating:
 - (i) For plants operating upto, and at 55% PLF i.e. the level at which fixed cost is expected to be recovered; and
 - (ii) For plants operating above 55% PLF, APERC fixed the tariff applicable to Non-Conventional Energy developers w.e.f. 01.04.2004.APERC further held that only variable cost will be paid alongwith incentive of 21.5 paise/ unit for plants operating above 55% PLF as fixed by Central Electricity Regulatory Commission in its tariff notification dated 20.12.2000 for conventional generation projects.
12. Aggrieved by the Tariff Order dated 20.03.2004, the Petitioner, through its association, filed W.P. No. 6207 of 2004 before the Hon'ble High Court of Andhra Pradesh. The Hon'ble High Court of Andhra Pradesh disposed the writ petition granting permission to file a review before APERC.
13. The association filed a review petition, R.P. No.8 of 2004 before APERC which was dismissed on 10.07.2007. However, APERC vide its Order dated 10.07.2007 modified its earlier Order dated 20.03.2004 making some re-determination of the incentive and modifying the tariff on that basis.
14. Aggrieved by Order dated 10.07.2007, the association again filed W.P. No. 12898 of 2004 before the Hon'ble High Court of Andhra Pradesh.
15. The Petitioner also instituted an Original Petition O.P. No. 1 of 2005 before APERC disputing the alleged calculation of PLF on monthly basis, instead of annual basis by APTRANSCO.

However, in view of the pending WP No. 12898 of 2004, APERC on 26.04.2005 adjourned O.P. No. 1 of 2005 petition *sine die*, awaiting outcome of the Writ Petition.

16. Meanwhile, APTRANSCO also preferred a Review Petition bearing R.P. No. 84 of 2004 against the Tariff Order dated 20.03.2004, seeking reduction in the tariff and incentive determined by the APERC. APERC dismissed R.P. No. 84 of 2004 on 11.08.2004. However, APERC, in its Order dated 11.08.2004, clarified that the PLF shall be computed on annual basis and not on monthly basis.
17. Upon constitution of the Appellate Tribunal for Electricity (APTEL), the Hon'ble High Court of Andhra Pradesh, disposed writ petition WP No. 12898 of 2004 vide its Order dated 15.06.2005 directing the Petitioner's association to move an appeal before APTEL.
18. Consequently, the Petitioner instituted Appeal No. 20 of 2005 against Tariff Order dated 20.03.2004 before APTEL. The Petitioner also instituted Appeal No. 198 of 2005 against the Order dated 26.04.2005 passed by APERC.
19. On 02.06.2006, APTEL allowed Appeal No. 20 of 2005, *inter alia*, holding that APERC had no power to revise the tariff which has been fixed under the Power Purchase Agreement (PPA). Further, APERC being a quasijudicial authority cannot lay down the policies of the State.
20. Also, in view of the Order dated 02.06.2006 in Appeal No. 20 of 2005, APTEL also disposed of Appeal No. 198 of 2005 on 05.07.2006.
21. APTRANSCO preferred Civil Appeal No. 2926 of 2006 and Civil Appeal No. 3910 of 2006 before the Hon'ble Supreme Court. The Apex Court disposed of the appeals vide its Order dated 08.07.2010 by setting aside the Order of APTEL dated 02.06.2006 in Appeal No. 20 of 2005 and remanded the matters to APERC with a direction that it shall hear the NCE generators afresh and fix/determine the tariff for purchase of electricity in accordance with law. Apex Court also made it clear that the Order dated 20.06.2001 passed by the APERC has attained finality.
22. Vide Order dated 12.09.2011, APERC re-determined the tariff (Tariff Order dated 12.09.2011).
23. Aggrieved by the decision, the Petitioner's association again filed Appeal No. 168 of 2011 before APTEL.
24. Vide judgment dated 20.12.2012, APTEL, allowed the Appeal and directed APERC to re-compute the tariff on the basis of specific parameters.
25. The Petitioner filed Review Petition bearing R.P. No. 5 of 2013 against the judgment dated 20.12.2012 on the limited grounds concerning computation of PLF, control period etc. which were not dealt with, in the said judgment dated 20.12.2012. The R.P. No. 5 of 2013 was

disposed of by Order dated 30.04.2013 by APTEL granting liberty to the Petitioner to raise the issue of method of computation of PLF before APERC.

26. The Petitioner filed O.P. No. 15 of 2014 before APERC.
27. During the pendency of this Petition, the State of Andhra Pradesh was bifurcated into Telangana and Andhra Pradesh. This led to a dispute regarding the jurisdiction of APERC to adjudicate upon the disputes involving both Telangana and Andhra Pradesh. Hon'ble Supreme Court by Order dated 04.02.2020 in Civil Appeal No. 3788-3790 of 2019, in the matter of *Eastern Power Distribution Company of Andhra Pradesh Ltd. and Anr. v. GMR Vemagiri Power Generation Ltd. and Ors.*, upheld this Commission's jurisdiction to adjudicate upon and decide disputes concerning generating companies and distribution licensing of the State of Andhra Pradesh and Telangana.

Submissions of the Petitioner:

28. Briefly, the Petitioner has submitted as follows:
- a) The Respondents have been computing fixed charges on net exportable capacity rather than on installed capacity contrary to the terms of the PPA. The Respondents have been computing PLF on monthly basis rather than on annual basis contrary to the terms of the PPA, directions of APERC and their own admissions before APERC and the Appellate Tribunal for Electricity. No documents were produced by the Respondents showing payment of fixed cost subject to overall annualized threshold PLF of 55%.
 - b) The Petitioner addressed the letters dated 08.08.2012, 14.10.2012 and 27.11.2012 regarding disbursement of Rs. 4,28,23,048/- (Arrear Amount) towards the annual truing up of the fixed cost and also sent the details for the same several times to Andhra Pradesh Power Co-ordination Committee, which have not been replied so far. The Respondents have made a categorical statement that they are paying fixed cost subject to overall annualized threshold PLF of 55%. In so far as the Petitioner is concerned, the Respondents have not settled the bills on the said basis. The Respondents have done truing up of the fixed cost only for the year 2010-2011 and for rest of the years from 2004-05, they have neglected to do so.
 - c) The Petitioner on 07.05.2013 addressed a letter to APTRANSCO to settle the amount alongwith interest for delay in payment by truing up, for which there is no response so far.
 - d) As per the terms of the PPA, Respondents are liable to pay interest at the rate of 10% per annum as per the existing nationalized bank rate to the Petitioner for any payment

made beyond the due date for payment. So, the Petitioner is entitled for late charges.

- e) APERC in its Order dated 11.08.2004 clarified that it was not the intention of the Commission that PLF and incentives should be worked on monthly basis and therefore the PLF is to be computed on annual basis instead of monthly basis.
- f) The Petitioner is entitled to Rs.4,28,23,048/- (Arrear amount) on account of truing up of fixed cost for the said years 2004-05, 2005-06, 2006-07 and 2009-10, along with interest of Rs.2,95,94,157 for the period between 01.04.2004 to 14.08.2010 as well as pendente lite and future interest.

Hearing dated 13.10.2022

29. The petition was listed for hearing on 13.10.2022 wherein after hearing the submissions of the Petitioner, the matter was admitted . Further, during the course of hearing dated 17.01.2023, the Petitioner prayed for disbursement of Rs. 4.28 crore towards annual truing up of fixed cost by the Respondent Andhra Pradesh Discoms. The Petitioner further submitted that the Respondents have been computing PLF on monthly basis, instead of annual basis, contrary to the terms of PPA and Respondent's own submission before APERC and APTEL. Telangana Discoms submitted that they are not the necessary party to the case. After hearing the submissions of the parties, the Commission permitted the parties to file their respective submissions and reserved the matters for orders.

Submissions of Respondents 6 to 8:

30. Briefly, the Respondents vide their reply dated 23.01.2023, have submitted as under:
- a) Power generated by the Petitioner is supplied only to APEPDCL and therefore the payment liability, if any, solely rests on APEPDCL. The entity which reaped the benefits out of the PPA shall have to bear the liability arising out of the same. The Respondents are not a necessary and proper party for the adjudication of the present dispute.
 - b) The interpretation of Sec 53(1) of the Andhra Pradesh Reorganization Act, 2014 clearly establishes that the liability, if any, for the plant of the Petitioner is on the entities in the State of Andhra Pradesh. The power generated from this plant is being exclusively utilized in the districts which are under the jurisdiction of APEPDCL and is never shared with Telangana DISCOMS either by virtue of geographical location of the plant or by virtue of third transfer scheme and State Reorganization Act, 2014. Since the plant

is located in Andhra Pradesh under the jurisdiction of APEPDCL, the withheld amounts if any shall be recovered from APEPDCL alone. Therefore, liability if any is identifiable with APEPDCL belonging to the residual State of Andhra Pradesh.

Submissions of Respondents No. 1 to 5:

31. The Respondents vide their reply dated 03.05.2023 have submitted that the present petition is not maintainable and liable to be dismissed for the following reasons:

Re. Reliefs sought are beyond the scope of the liberty granted by APTEL vide Review Order dated 30.04.2013

- a) The Petitioner seeks recovery of Rs. 4.28 Crore towards annual truing up of fixed cost by the Respondents. This is on account of erroneous computation of PLF on monthly basis, instead of annual basis. The Petitioner avers that this is violation of the Original Tariff Order for the FY 2004-2009, which contemplates computation of PLF on annual basis.
- b) The Original Tariff Order came to be set aside in appellate proceedings. Consequently, the tariff for the FY 2004-2009 was redetermined by APERC vide Revised Tariff Order dated 12.09.2011. This Revised Tariff Order was assailed by the Petitioner in Appeal No. 168 of 2011 before APTEL.
- c) By judgment dated 20.12.2012, APTEL set aside the Revised Tariff Order and laid down specific norms along with permitted quantum for re-determination of tariff by APERC. Notably, APTEL held that there was no dispute between the parties on the quantum of the threshold PLF. The said parameter was therefore retained at 55% as per the Original and Revised Tariff Orders. This finding has not been challenged till date and has attained finality.
- d) The Petitioner preferred a Review assailing this judgment before APTEL, raising the limited issue of method computation of the PLF *i.e.* whether it has to be computed monthly or annually.
- e) By Review Order dated 30.04.2013, APTEL granted the Petitioner liberty to raise the limited issue of method of computing the PLF before APERC. The liberty granted did not include liberty to institute recovery proceedings against the Respondents.
- f) However, the reliefs sought in O.P. No. 15 of 2014 before APERC, and now the present petition, concern recovery of charges towards PLF computed annually for the period 01.04.2004 to 14.08.2010 along with interest. This is *ex-facie* beyond the scope of

liberty granted by APTEL which is limited to the issue of method of computation of PLF.

- g) In any event, admittedly the method of computation has already been decided by APERC *vide* Review Order dated 11.08.2004, which has attained finality. Therefore, in view of the Order dated 11.08.2004, the present petition is misconceived, and in any event, is rendered otiose.

Re. Reliefs sought are beyond the scope of the proceedings in R.P. No. 5 of 2013, pursuant to which the Order granting liberty, was passed

- h) The Review Order dated 30.04.2013 granting liberty to the Petitioner, came to be passed by APTEL in review proceedings. These proceedings sought review of the judgment dated 20.12.2012 passed by APTEL in Appeal No. 168 of 2011 assailing the Revised Tariff Order of the APERC.
- i) The appellate proceedings, and consequently the review proceedings, pending before APTEL were limited to challenging the determination made under the Revised Tariff Order. APTEL, being a creature of the statute, was therefore strictly confined to the powers vested by the Act under Sections 111 and 120(1)(f). These powers are limited to confirming, modifying, setting aside or reviewing the Orders under challenge. Sections 111 and 120(1)(f) do not vest with APTEL, the power to adjudicate claims arising from non-implementation of the Order impugned in appellate/ review proceedings.
- j) Viewed in this light, the scope of the appellate/ review proceedings cannot be expanded by the Petitioner seeking effective implementation of the Revised Tariff Order or seek recovery claims arising from non-implementation thereof. Therefore, the reliefs sought by the Petitioner including recovery of the arrear amount on account of alleged erroneous computation of PLF, are not maintainable in appellate or review proceedings against the Revised Tariff Order.
- k) In any event, the Petitioner has not placed on record the pleadings in respect of Appeal No. 168 of 2011. In absence of the same, it cannot be presumed that the averments seeking recovery claims were pleaded in the Appeal. Assuming without admitting that the said averments were pleaded, they cannot be read as part of the liberty granted by APTEL. Any interpretation of the Review Order dated 30.04.2013 inconsistent with the aforesaid position, is contrary to law.

- l) It is *ex-facie* clear that the reliefs in the present petition arise from a fresh cause of action and a new *lis* between the parties beyond the scope of the Review Order dated 30.04.2013, which cannot be adjudicated in the captioned petition.

Re. Petition raises subsequent causes of action that are beyond the scope of tariff determination under Sections 62, 64 and 86(1)(a) of the Act

- m) The proceedings which led to institution of the present petition, arose from the Original Tariff Order. The said order came to be passed by APERC in exercise of its *suo motu* powers under Sections 62 & 64 read with Section 86(1)(a) of the Act.
- n) Original Tariff Order stipulates *inter alia* the tariff/ cost at which power is procured by the Respondents from non-conventional bagasse based co-generation plants including the Petitioner. The effect of the Original Tariff Order is therefore limited to such tariff determination. The Original Tariff Order was subsequently set aside, and resulted in passing of the Revised Tariff Order dated 12.09.2011. By this petition, the Petitioner principally assails the breach of the Original Tariff Order/ Revised Tariff Order, by the Respondents, particularly in respect of alleged error in computation of PLF. Any breach, non-implementation or other dispute arising out of the Original Tariff Order or the Revised Tariff Order as determined by APERC under Sections 62, 64 and 86(1)(a) of the Act is a new and distinct cause of action. The remedy for any such breach, non-implementation or other dispute lies before the Appropriate Commission under Section 79(1)(f) or Section 86(1)(f) of the Act as applicable. If the reliefs sought by the Petitioner are accepted, it would result in usurpation of the jurisdiction of the Appropriate Commission to adjudicate upon such disputes arising from the Original Tariff Order. This position is entirely contrary to the statutory framework under the Act.
- o) In any event, the Revised Tariff Order and tariff determination by judgment dated 20.12.2012 is for the period 2004-2009. Therefore, the claims of the petition for the period 2009-2010 are *ex-facie* beyond the scope of the proceedings before the Commission and therefore beyond the scope of the liberty granted by the APTEL.
- p) Even otherwise, as per the pleadings filed by the Petitioner in the Review petition dated 20.12.2012, it is the admitted position that claims in respect of the year 2009-2010 have been trued up by the Respondents to the satisfaction of the Petitioner. Clearly, by the present petition, the Petitioner has sought to mislead this Commission and seek double recovery of dues in respect of 2009-10. This amounts to unjust enrichment and is not permitted in law.

Re. Without prejudice, recovery of the Arrear Amount is barred by limitation

- q) It is the admitted position of the parties that the method of computation of PLF was decided by APERC by the Review Order dated 11.08.2004. The said Order has attained finality and remains in force. The cause of action for seeking the Arrear Amount arose on 12.08.2004. Consequently, as per Article 137 of the Limitation Act, 1963, the period of limitation for seeking recovery of the Arrear Amount for the period 2004-2009 lapsed after 3 years from the date of cause of action *i.e.* during the period 2007-2012. Therefore, the present petition and the O.P. No. 15 of 2014 filed before the APERC, are barred by limitation and ought to be dismissed by this Commission on this ground without more.
- r) The reliance placed on the Review Order dated 30.04.2013 granting liberty to the petitioner to file this petition and circumvent the bar of limitation, is misplaced. As stated hereinabove, the reliefs sought in the present petition are beyond the scope of the liberty granted, and hence not maintainable before this Commission. In any event, the Hon'ble Supreme Court in *Suman Devi v. Manish Devi & Ors.* (2018) 9 SCC 808, has clearly held that grant of liberty cannot obviate the bar of limitation. Therefore, even on this ground, the recovery of the arrear amount is barred by limitation.

Re. Petitioner has failed to satisfy the mandatory pre-requisites for recovering the Arrear Amount

- s) Principally, the Petitioner has sought recovery of the Arrear Amount along with interest alleging erroneous computation of the PLF incentive by the Respondents. It is trite that all recovery claims are founded on the doctrine of compensation and damages. The Petitioner has failed to plead or prove damages or loss caused to it due to delayed payment by the Respondent, in order to substantiate its entitlement to the Arrear Amount.
- t) It is settled law that any party claiming liquidated damages and compensation is required to show mitigation of such damages, in addition to proof of such damages. The Petitioner has not even attempted to mitigate the damages/ loss caused to it, if any, on account of the alleged erroneous computation of the PLF incentive by the Respondents. The petition is silent on this aspect and does not disclose any such action or measure taken by the Petitioner.

- u) The Petitioner by its admitted conduct, has consciously opted to continue supplying power to the Answering Respondents despite the alleged erroneous computation of the PLF incentive and payment thereof by the Answering Respondent. This is distinct from entitlement of the Petitioner to (i) terminate the PPA with the Answering Respondent, and (ii) curtail the power supply and sell the excess power to third parties for recovering the price and the corresponding incentive for such power.
- v) The Petitioner has itself delayed in filing this petition. The Hon'ble Supreme Court by Order dated 04.02.2020 upheld this Commission's jurisdiction to adjudicate upon and decide disputes concerning generating companies and distribution licensing of the State of Andhra Pradesh and Telangana. Consequently, the petition filed before APERC, O.P. No. 15 of 2014, ought to have been promptly filed before this Commission. However, the present petition came to be filed before this Commission on 03.8.2022, after a delay of more than 2.5 years. The delay in filing the petition before this Commission is on account of the Petitioner itself. The Respondents cannot be made liable to bear the interest on the Arrear Amount, if any, for the delay and laches on part of the Petitioner itself.
- w) If this Commission finds the Petitioner to be entitled to any recovery or compensation, the same shall be subject to reconciliation and prudence check by the Respondents as well as this Commission.

Re. Telangana is proper and necessary party, since the reliefs sought pertain to the period prior to bifurcation

- x) In the event that this Commission holds that the petition is maintainable and the Petitioner is entitled to the reliefs sought herein, the liability to bear these costs shall be that of all Respondents, and is not limited to the Respondents. In their reply dated 23.01.2023, Respondent Nos. 6-8 *i.e.* the Telangana Distribution Companies have stated that they are not proper or necessary parties to this petition. This averment is on the basis that as a result of the bifurcation, the Petitioner's plant falls within the jurisdiction of APEPDCL, Andhra Pradesh Eastern Distribution Company of Andhra Pradesh Ltd. (Respondent No.5). Consequently, as per Sections 53 (1) of the Andhra Pradesh Reorganization Act, 2014 (Reorganization Act), the liability is solely on the Answering Respondents.
- y) The petition has been filed and admitted on the basis of the Order dated 04.02.2020 passed by the Supreme Court in Civil Appeal No. 3788-3790 of 2019. By the said order,

the Supreme Court upheld the jurisdiction of this Commission on issues between the generating companies and the distribution licensees of both Andhra Pradesh and Telangana. This is evident from letters dated 10.08.2021 and 02.06.2022 issued by this Commission . Therefore, the contention of Respondent Nos. 6 to 8 *i.e.* the Telangana Distribution Companies is misconceived and liable to be rejected.

- z) Retail Supply Orders for the FY 2006-07, 2007-08, 2008-09, 2009-10 clearly demonstrate that cost in respect of the energy procured from non-conventional sources, including the Petitioner's power plant, was adjusted between all distribution companies of the former State of Andhra Pradesh. This includes the Northern and Central Distribution Companies of Andhra Pradesh, which now belong to the State of Telangana. Clearly therefore, prior to bifurcation, the cost for the energy procured from the Petitioner's power plant, was borne by the Answering Respondents as well as Respondent Nos. 6 to 8, *i.e.* the present day distribution companies of Telangana. This is fortified by the Order dated 30.03.2011 passed in O.P. No. 2 to 5 of 2011 passed by the erstwhile APERC. This Commission, by Order dated 21.10.2022 in 201/MP/2019, has upheld the liability of the Telangana Distribution Companies to make payments during the pre-bifurcation period.

Analysis and Decision

32. We have heard the learned counsels for the Petitioner and the Respondents and have carefully perused the records and considered the submissions of the parties.
33. Before dealing with specific claims of the Petitioner, it is imperative that we first address the preliminary objections raised by APTRANSCO. APTRANSCO has objected to the maintainability of the petition and has submitted that the claim of the Petitioner is barred by limitation. APTRANSCO has submitted that the reliefs sought by the Petitioner in O.P. No. 15 of 2014 concern with the recovery of charges towards PLF computed annually for the period 01.04.2004 to 14.08.2010 along with interest. This is *ex-facie* beyond the scope of liberty granted by APTEL which is limited to the issue of method of computation of PLF. APTRANSCO has computed the PLF on annual basis and accordingly undertaken annual truing up of fixed cost for the period 2004-2010. All dues payable in respect of such PLF have been duly paid to the Petitioner and there is no outstanding amount payable as on date. *Secondly*, the method of computation of PLF was decided by APERC vide Order dated

11.08.2004 and therefore, the cause of action arose on 12.08.2004. Consequently, the period of limitation lapsed during the period 2007-2012. *Thirdly*, APTEL vide its judgment dated 30.04.2013 in Review Petition Nos. 5 of 2013, has granted liberty to the Petitioner only to raise the limited issue of method of computing the PLF before the Commission and it did not include liberty to institute recovery proceedings against APTRANSCO. However, in O.P. No. 15 of 2014 and in the instant petition, the Petitioner is seeking recovery of charges towards PLF computed annually for the period 01.04.2004 to 14.08.2010 alongwith interest. This is ex-facie beyond the scope of liberty granted by APTEL which is limited to the issue of method of computation of PLF. *Fourthly*, the review proceedings (Review Petition 5 of 2013 in Appeal No. 168 of 2011), pending before APTEL were limited to challenging the determination made under the Tariff Order 12.09.2011. Sections 111 and 120(1)(f) of the Electricity Act, 2003 do not vest with APTEL, the power to adjudicate claims arising from non-implementation of the order impugned in appellate/ review proceedings. *Fifthly*, The Petitioner has failed to plead or prove damages or loss caused to it due to delayed payment by the Respondent, in order to substantiate its entitlement to the 'Arrear Amount'. *Finally*, inspite of the Hon'ble Supreme Court order dated 04.02.2020, the Petitioner filed the petition before this Commission on 03.8.2022, after a delay of more than 2.5 years.

34. From the pleadings, very briefly, we note that the factual position is as under:

- a) On 20.06.2001, APERC passed an Order in O.P. 1075 of 2000.
- b) On 20.03.2004, APERC passed suo-motto Order in Petition R.P. No. 84 of 2003 in O.P. 1075 of 2000 (Tariff Order dated 20.03.2004) to be effective from 01.04.2004. Aggrieved by the decision, the Petitioner and APTRANSCO preferred legal remedies before different fora.
- c) On 11.08.2004, APERC dismissed R.P. No. 84 of 2004 which was filed by APTRANSCO whereas the W.P. No. 6207 of 2004 filed by the Petitioner, after a series of legal proceedings before different fora, was ultimately allowed by APTEL (in A.No. 20 of 2005) on 02.06.2006.
- d) However, APTRANSCO preferred Civil Appeal No. 2926 of 2006 and Civil Appeal No. 3910 of 2006 before the Hon'ble Supreme Court which was decided vide judgment dated 08.07.2010 and it was inter-alia held that APERC Order dated 20.06.2001 in O.P. 1075 of 2000 has attained finality and that Tariff Order dated 20.03.2004 was remanded back to APERC for re-determination of Tariff.

- e) APERC re-determined the tariff vide Order dated 12.09.2011. Aggrieved by the decision, the Petitioner again filed Appeal No. 168 of 2011 which was allowed by APTEL on 20.12.2012, with the direction to APERC to re-compute the tariff. The Petitioner again filed Review Petition (R.P. No. 5 of 2013) on the limited grounds concerning computation of PLF, control period etc. which were not dealt with, in the said judgment dated 20.12.2012. On 30.04.2013, APTEL granted liberty to the Petitioner to raise the issue of method of computation of PLF before APERC. The Petitioner filed O.P. No. 15 of 2014 before APERC.
- f) During the pendency of O.P. No. 15 of 2014, the State of Andhra Pradesh was bifurcated into Telangana and Andhra Pradesh. Hon'ble Supreme Court by Order dated 04.02.2020 in Civil Appeal No. 3788-3790 of 2019 upheld this Commission's jurisdiction to adjudicate upon disputes concerning generating companies and distribution licensing of the State of Andhra Pradesh and Telangana.

35. From the above, we note that APERC Order dated 20.06.2001 in O.P. 1075 of 2000 has attained finality and that the Tariff Order 20.03.2004 was remanded back (by the Hon'ble Supreme Court) to APERC for re-determination of Tariff. APERC re-determined the tariff vide Order dated 12.09.2011 (Tariff Order 12.09.2011). It is observed that the Petitioner vide letter dated 08.08.2012 informed APTRANSCO that "*while, we have received part of the Amount claimed for the power exported, the balance though the truing up of the fixed cost has been done by you for the years 2009-2010 and 2010-2011, the same has not been made for the other years.*" Further, vide letters dated 08.08.2012, 14.10.2012, 27.11.2012 and 07.05.2013, the Petitioner has also informed APTRANSCO that it is entitled to Rs.4,28,23,048/- (Arrear amount) on account of truing up of the fixed cost for the years 2004-05, 2005-06, 2006-07 and 2009-10, along with interest of Rs.2,95,94,157 for the period between 01.04.2004 to 14.08.2010 as well as *pendente lite* and future interest.

36. We are of the view that the Petitioner disputed the alleged calculation of PLF in O.P. No. 1 of 2005 which was adjourned sine die by APERC on 26.04.2005. Subsequently, after Tariff Order 20.03.2004 was remanded for re-determination of tariff, APERC re-determined the tariff vide Tariff Order 12.09.2011. Hence, the real cause of action occurred when APTRANSCO undertook the exercise of truing up the Petitioner's project in accordance with Tariff Order 12.09.2011 and made payment. It is pertinent to mention here that the 'Arrear Amount' is not

a claim arising out of any damage or loss but it is a claim arising out of truing up exercise because of change of methodology/calculation of fixed charges (with PLF threshold 55%) which is to be done on annual basis and on the basis of the net exported quantum. We further note that the Petitioner has placed on record, the copy of the 'reply affidavit' (Annexure M of the Complaint) filed in Review Petition 5 of 2013 in Appeal No. 168 of 2011. We observe that in the 'reply affidavit', the Petitioner has constantly raised the issue of disbursement of 'Arrear Amount' towards the annual truing up of the fixed cost before various fora. The Petitioner vide letters dated 08.08.2012, 14.10.2012, 27.11.2012 and 07.05.2013 had already informed APTRANSCO that it is entitled to the 'Arrear Amount' on account of truing up of fixed cost which is within three years of Tariff Order dated 12.09.2011, hence, the petition is not barred by limitation.

37. APTEL vide its judgement dated 30.04.2013 in Review Petition Nos. 5 of 2013, has, inter alia, held as under:

“Regarding the issue of method of computation of PLF raised in R.P. no. 5 of 2013. we have to state that this issue was not dealt with in the orders of Chairman. Member-Finance and Member-Technical and is specific to the Appellants in Appeal no. 168 of 2011. According to the Review Petitioner, the State Commission decided not to deal with the issue as the Appeals were pending before the Tribunal and only wants liberty to be granted to the Petitioner to raise this issue before the State Commission. Accordingly. we grant liberty to the Review Petitioner to raise this issue before the State Commission.”

38. We observe that the Hon'ble Supreme Court by Order dated 04.02.2020 in Civil Appeal No. 3788-3790 of 2019, in the matter of *Eastern Power Distribution Company of Andhra Pradesh Ltd. and Anr. v. GMR Vemagiri Power Generation Ltd. and Ors.*, has inter-alia held as under:

4. As the controversy involves State of Andhra Pradesh as well as the State of Telangana and ultimate effect is going to be on more than one State, considering the provisions contained in Section 105 of the Andhra Pradesh (Reorganization) Act, 2014, CERC is appropriate authority to hear and decide the dispute. In the facts and circumstances of the case, we find no ground to interfere with the decision of the High Court.

5. Let the dispute be decided by CERC, in accordance with, after hearing the parties, as expeditiously as possible.

39. From the above we observe that during the pendency of O.P. No. 15 of 2014, the State of Andhra Pradesh was bifurcated into Telangana and Andhra Pradesh. Vide Order dated 04.02.2020, the Hon'ble Supreme Court upheld the jurisdiction of the Commission to

adjudicate upon and decide disputes concerning generating companies and distribution licensing of the State of Andhra Pradesh and Telangana. During the pendency of the petition, this Commission directed the Petitioner to take steps to refile the petition in the e-portal of the Commission. We are of the view that it is not a case of fresh filing but it is a case of transfer of the petition from APERC to this Commission.

40. In view of above discussion, we hold that the reliefs sought by the Petitioner in O.P. No. 15 of 2014 are maintainable before the Commission and are not barred by limitation.

41. Now coming to the main issues. The issues that arise for our consideration are as follows:

Issue No. 1: *Whether the calculation of Plant Load Factor (PLF) should be done on monthly basis or annual basis and whether computation of fixed charges is to be done on the basis of net exportable capacity rather than on installed capacity? And Whether the Respondents should be directed to pay Rs. 4,28,23,048/- towards fixed cost as claimed by the Petitioner in the monthly tariff bills furnished by it to the 1st Respondent for the period 01.04.2004 to 14.08.2010 by truing up annualized threshold PLF of 55% along with interest?*

Issue No. 2: *Whether Telangana DISCOMs are proper and necessary party, since the reliefs sought pertain to the period prior to bifurcation and Whether Telangana DISCOMs should be directed to pay the Arrear amount along with the interest?*

Issue No. 1

42. The Petitioner has submitted that APTRANSCO has been computing PLF on monthly basis rather than on annual basis for the years 2004-05, 2005-06, 2006-07 and 2009-10. No documents were produced by the Respondents showing payment of fixed cost subject to overall annualized threshold PLF of 55%. The Respondent has been erroneously computing the fixed charges on net exportable capacity rather than on installed capacity. In view of above, the only issue for consideration is whether the calculation of Plant Load Factor (PLF) should be done on monthly basis or annual basis and whether computation of fixed charges is to be done on the basis of net exportable capacity rather than on installed capacity.

43. We observe that the Hon'ble Supreme Court vide judgment dated 08.07.2010 in Civil Appeal No. 2926 of 2006 and Civil Appeal No. 3910 of 2006, inter alia, held as under:

- “52 (a) **The order of the Tribunal dated 02.06.2006 is hereby set aside.***
- (b) We hold that the Andhra Pradesh Electricity Regulatory Commission has the jurisdiction to determine tariff which takes within its ambit the purchase price for procurement of the electricity generated by the Non-conventional energy developers / generators, in the facts and circumstances of these cases.*
- (c) We hereby remand the matters to the Andhra Pradesh Electricity Regulatory Commission with a direction that it shall hear the Non-conventional energy generators afresh and fix/determine the tariff for purchase of electricity in accordance with law, expeditiously.*
- (d) It shall also re-examine that in addition to the above or in the alternative, whether it would be in the large interest of the public and the State, to permit sale of generated electricity to third parties, if otherwise feasible.*
- (e) The Andhra Pradesh Electricity Regulatory Commission shall consider and pronounce upon all the objection that may be raised by the parties appearing before it, except objections in relation to its jurisdiction, plea of estoppel and legitimate expectancy against the State and /or APTRANSCO and the plea in regard to PPAs being result of duress as these issues stand concluded by this judgment.*
- (f) **We make it clear that the order dated 20.06.2001 passed by the Andhra Pradesh Electricity Regulatory Commission has attained finality** and was not challenged in any proceedings so far. This judgment shall not, therefore, be in detriment to that order which will operate independently and in accordance with law.*
- (g) We also hereby direct that State of Andhra Pradesh shall be added as party respondent in the proceedings and the Andhra Pradesh Electricity Regulatory Commission shall grant hearing to the State during pendency of proceeding before it.”*

44. We observe that the contracting parties have not annexed APERC Order dated 20.06.2001 in O.P.No.1075 of 2000 with the petition. The relevant extract of Order dated 20.06.2001 in O.P.No.1075 of 2000 has been taken from APERC’s Order dated 20.03.2004 in R.P No 84 of 2003 in O.P. No 1075 of 2000. APERC vide Order dated 20.06.2001 in O.P.No.1075 of 2000, inter alia, has held as under:

- (a) The existing incentives under G.O.Ms .No. 93, dated 18-11-1997, which are continued under the orders of the Commission from time to time till 24-06-2001 under Commission’s letter No.2473, Dated: 24.04.2001 are extended for the time being till 24-07-2001. (The temporary extension has been given to enable the developers to finalise agreements/arrangements relating to supply of power to APTRANSCO prior to 24-07-2001).*
- (b) With effect from the billing month of August 2001, all generators of non-conventional energy shall supply power to APTRANSCO only as per the following terms:*
- i) Power generated by non-conventional energy developers is not permitted for sale to third parties;*
 - ii) Developers of non-conventional energy shall supply power generated to APTRANSCO/DISCOMs of A.P. only.*
 - iii) Price applicable for the purchase by the supply licensee should be Rs.2.25 per*

unit with 5% escalation per annum with 1994-95 as the base year.

(c) APTRANSCO shall arrange payment for the supply of power purchased from developers of non-conventional energy by opening a Letter of Credit in favour of the suppliers of power.

(d) A suo motu review of the incentives to take effect from 1st April, 2004, will be undertaken by the Commission after discussions with all the concerned parties.

(e) There will also be a review of the purchase price with specific reference to each developer on completion of 10 years from the date of the commissioning of the project (by which time the loans from financial institutions would have been repaid) when the purchase price will be reworked on the basis of return on equity, O&M expenses and the variable cost.

(f) It was further stated that wheeling and banking charges would continue to be regulated by GO.Ms.No. 93 of 18-11-1997 till further orders of the Commission.

45. APERC vide Order dated 20.03.2004 held as under:

As observed earlier, fixation of uniform tariff across all Bagasse based co-generation plants with varying capacities, technologies and operating conditions would lead to uneven tariffs and undue enrichment of some developers. The Commission therefore proposes a two tier tariff for the Bagasse based co-generation plants distinguishing those operating up to 55% PLF and others operating above 55% PLF. Where, Plant Load Factor during a settlement period exceeds 55% (the level at which the fixed cost is expected to be recovered), only variable cost indicated above and incentive of 21.5 paise / unit as explained in Para (47) below shall be paid for every unit delivered in excess of the above PLF.

46. APERC vide Order dated 11.08.2004 has held that:

11. Issue: Incentive to be on annual basis:

APTRANSCO as well as other developers requested that the PLF should be worked on annual basis and incentive be allowed accordingly, construing that the Commission had indicated in its Order dt. 20-03-2004 that PLF shall be computed on the basis of billing month.

Commission's Analysis: *It was not the intention of the Commission that PLF and incentives should be worked on a monthly basis. The Commission, therefore, while issuing orders on the review petitions filed by the NCE developers clarified that the PLF shall be computed on annual basis, and re-iterated that clarification herein too.*

47. APERC, in compliance to Order dated 12.09.2011 in R.P.No.84/2003 in O.P. No.1075/2000 upon remand from the Hon'ble Supreme Court in Civil Appeal No. 2962 of 2006 & batch dated 08.07.2010, re-determined the tariff vide Tariff Order 12.09.2011 as under:

(62) PLANT LOAD FACTOR:

In 2004 order, Commission fixed a threshold level of PLF at 55% on the basis of fuel availability.

In 2010, SISMA-AP had stated that, while the norm adopted by the Commission in 2004 is in concurrence with the PLF sought by them, they wanted carry forward mechanism

to be introduced on account of reduced PLF's due to non/less availability of Bagasse, which is beyond their control. They further submitted that, APTRANSCO is computing, PLF on monthly basis and truing up at the year and, thereby huge amounts are retained by APTRANSCO. In response APDISCOMs have stated that the Commission in orders passed in the review-petition clarified that the settlement period of calculation of PLF as one year and as such APDISCOMs Are calculating the PLF on annual basis and carrying truing up of the fixed Cost.

I have examined the issue. I see no reason to introduce carry-forward mechanism in as much as the threshold PLF of 55% was originally agreed to by the developers and further more such a possible situation at best can be an exception rather than routine affair. That being the case and as such, the threshold PLF for fixed cost recovery can be fixed at 55%.

48. APTEL vide Order dated 20.12.2012 in A.No.168 of 2011, inter alia, has held as under:

32.3 Carry forward of un-recovered fixed cost:

i. The appellant Developers companies have not raised any issue regarding threshold PLF but have pleaded that they should be permitted to carry forward the un-recovered fixed cost on account of non-achievement of threshold PLF of 55% in a year to the following year for recovering the previous year's un-recovered fixed cost.

ii. Learned Sr. counsel for the licensees vehemently opposed the prayer of the Developers and stated that there was no justification for carry forward of un-recovered fixed cost to the next year. Moreover, the Developers have not pressed the issue in the written submissions and therefore, should be treated as given up.

iii. The threshold PLF of 55% has not been challenged in the appeals and no case has been made out for allowing carry forward of the un-recovered fixed cost on account of non-achievement of threshold PLF in a year. We feel that the PLF will depend on the availability of the plant and fuel and these factors cannot be treated as uncontrollable. Thus, we do not accept the contention of the Developers for carry forward of the un-recovered fixed cost.

49. APTEL vide Order dated 30.04.2013 has held as under:

Regarding the issue of method of computation of PLF raised in R.P. no. 5 of 2013, we have to state that this issue was not dealt with in the orders of Chirman, Member-Finance and Member-Technical and is specific to the Appellants in Appeal no. 168 of 2011. According to the Review Petitioner, the State Commission decided not to deal with the issue as the Appeals were pending before the Tribunal and only wants liberty to be granted to the Petitioner to raise this issue before the State Commission. Accordingly, we grant liberty to the Review Petitioner to raise this issue before the State Commission.

50. From the above, we note that APERC vide its Order dated 12.09.2011 has held that the threshold PLF of 55% was originally agreed to by the developers hence the threshold PLF for fixed cost recovery can be fixed at 55%. Further, there is no reason to introduce carry-forward mechanism. APTEL vide Order dated 20.12.2012 has observed that the threshold PLF of 55% has not been challenged

in the appeals and no case has been made out for allowing carry forward of the un-recovered fixed cost on account of non-achievement of threshold PLF in a year. APTEL vide its Order dated 30.04.2013 in R.P. No. 5 of 2013 has, inter-alia, held that regarding the issue of method of computation of PLF raised in R.P. no. 5 of 2013, liberty is granted to the Petitioner to raise this issue before the Commission.

51. From the pleadings, we note that in the reply dated 18.02.2013 in R.P. No. 5 of 2013 before APTEL, APTRANSCO has categorically submitted that *the PLF is calculated annually considering the exportable capacity during season and off-season*. In the instant petition, APTRANSCO in its reply dated 03.05.2023 has admitted that there was no dispute between the parties on the quantum of the threshold PLF viz. 55%. APTRANSCO has further admitted on records that it has computed the PLF on annual basis and accordingly undertaken annual truing up of the fixed cost for the period 2004-2010. All dues payable in respect of such PLF have been duly paid to the Petitioner and there is no outstanding amount payable as on date. From the above we are of the view that APTRANSCO has constantly maintained the stand that the PLF is calculated annually considering the exportable capacity during season and off-season. Further, it is the admitted position that the claims in respect of the year 2009-2010 have been trued up by the Respondents to the satisfaction of the Petitioner. In view of the above, we hold that calculation of fixed charges (with PLF threshold 55%) is to be done on annual basis.

52. We further observe that the relevant Articles of the PPA dated 14.08.2001 are as under:

Article 1.4

Delivered Energy means, with respect to any Billing Month, the kilo watt hours (kWh) of electrical energy generated by the Project and delivered to the APTRANSCO at the Interconnection Point as defined in Article 1.8 as measured by the energy meters at the Interconnection Point during that Billing Month.

Explanation: For the purpose of clarification, Delivered Energy, excludes all energy consumed in the Project by the main plant and equipment lighting and other loads of the Project from the energy generated and as recorded by energy meter at interconnection point.

Article 1.6

Installed Capacity means the total rated capacity in mega watt of all the generators installed.

Article 1.8

Interconnection Point: means the point or points where the Project and the APTRANSCO's grid system are interconnected at designated APTRANSCO substation,

The metering for the Project will be provided at the interconnection point as per Article 4.1.

Explanation: In case of Biomass based Power Projects, Power Projects based on Waste to Energy and independent Mini Hydel/Wind Power Projects the-Interconnection Point will be at designated'APTRANSCO Substation.

Article 2.1

All the Delivered Energy at the interconnection point for sale to APTRANSCO will be purchased at the tariff provided for in Article 2.2 from and after the date of Commercial Operation of the project. Title of Delivered Energy purchased shall pass from the Company to the APTRANSCO to the interconnection Point.

Article 2.2

*The Company shall be paid the tariff for the energy delivered at the interconnection point for sale to APTRANSCO at **Rs. 2.25 paise per unit with escalation at 5% per annum with 1994-95 as base year and to be revised on 1st April of every year upto the year 2003-2004.** Beyond the year 2003-2004, the purchase price by APTRANSCO will be decided by Andhra Pradesh Electricity Regulatory Commission. There will be further review of purchase price on completion of ten years from the date of commission of the project, when the purchase price will be reworked on the basis of Return on Equity, O&M expenses and the Variable Cost.*

Article 5.1

For Delivered Energy purchased, the Company shall furnish a bill to the APTRANSCO calculated at the rate provided for in Article 2.2, in such form as may be mutually agreed between the APTRANSCO and the Company, for the billing month on or before the 5th working day following the metering date.

Article 5.2

*Any payment made beyond the due date of payment, **APTRANSCO shall pay interest at the rate of 10% per annum** as per existing nationalized bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction.*

Article 5.6

Billing disputes: The APTRANSCO shall pay the bills of the Company promptly subject to the clauses 5.1 and 5.2 above.

*The APTRANSCO shall notify the Company in respect of any disallowed amount on account of any dispute as to all or any portion of the bill. The Company shall immediately take up issue with all relevant information with APTRANSCO which shall be rectified by the APTRANSCO, if found satisfactory. Otherwise notify its (APTRANSCO's) rejection of the disputed claim within reasonable time with reasons therefor. The dispute may also be decided by mutual agreement. If the resolution of any dispute requires the APTRANSCO to reimburse the Company, **the amount to be reimbursed shall bear interest at 10% per annum from the date of disallowance to the date of reimbursement.***

53. From the above, we observe that as per definition contained in the PPA, 'Delivered Energy' means *net energy* at the Interconnection Point and excludes all energy consumed in the Project

by the main plant and equipment lighting and other loads of the Project from the energy generated and as recorded by the energy meter at interconnection point. The power generated by the Petitioner was to be supplied to APTRANSCO at Rs.2.25 per unit with 5% escalation per annum with 1994-95 as the base year. In case of delayed payment, interest at the rate of 10% per annum was to be levied. As per Article 5.6 of the PPA *the amount to be reimbursed shall bear interest at 10% per annum from the date of disallowance to the date of reimbursement*. The Petitioner is accordingly directed to provide the audited calculations duly supported by the energy accounting statements verified from the relevant authorities to the Respondents for further necessary action.

Issue No. 2:

54. APTRANSCO has submitted that Telangana DISCOMs are proper and necessary parties, since the reliefs sought pertain to the period prior to bifurcation. Retail Supply Orders for the FY 2006-07, 2007-08, 2008-09, 2009-10 demonstrate that cost in respect of energy procured from non-conventional sources, including the Petitioner's power plant, was adjusted between all distribution companies of the erstwhile State of Andhra Pradesh. This includes the Northern and Central Distribution Companies of Andhra Pradesh, which now belongs to the State of Telangana. Prior to bifurcation, the cost for the energy procured from the Petitioner's power plant, was borne by APTRANSCO as well as distribution companies of Telangana. APTRANSCO has submitted that the above argument is fortified by the order dated 30.03.2011 passed in O.P. No. 2 to 5 of 2011 passed by the erstwhile APERC. *Percontra*, Telangana Discoms during the hearing held on 17.01.2023 submitted that they are not a necessary party to the case.

55. We observe that the relevant provisions of the *A.P. Reorganization Act, 2014* stipulates as under:

"2. —In this Act, unless the context otherwise requires,—
(a) "appointed day" means the day which the Central Government may, by notification in the Official Gazette, appoint*
**2nd June, 2014, vide notification No. S.O. 655(E), dated 4th March, 2014, see Gazette of India, Extraordinary, Part II sec. 3(ii).*

.....

53. Assets and liabilities of State undertakings.—(1) The assets and liabilities relating to any commercial or industrial undertaking of the existing State of Andhra Pradesh, where such undertaking or part thereof is exclusively located in, or its operations are

confined to, a local area, shall pass to the State in which that area is included on the appointed day, irrespective of the location of its headquarters:

Provided that where the operation of such undertaking becomes inter-State by virtue of the provisions of Part II, the assets and liabilities of—

(a) the operational units of the undertaking shall be apportioned between the two successor States on location basis; and

(b) the headquarters of such undertaking shall be apportioned between the two successor States on the basis of population ratio.

(2) Upon apportionment of the assets and liabilities, such assets and liabilities shall be transferred in physical form on mutual agreement or by making payment or adjustment through any other mode as may be agreed to by the successor States.

56. The Twelfth Schedule of the *Andhra Pradesh Reorganization Act, 2014* stipulates as under:

C. Power

1. Units of APGENCO shall be divided based on geographical location of power plants.

2. Existing Power Purchase Agreements (PPAs) with respective DISCOMS shall continue for both on-going projects and projects under construction.

3. The existing Andhra Pradesh Electricity Regulatory Commission (APERC) shall function as a joint regulatory body for a period not exceeding six months within which time separate SERCs will be formed in the successor States.

4. The existing State Load Despatch Centre (SLDC) shall function for both successor States for a period not exceeding two years within which time separate SLDC shall be set up for each successor State. During this period, the existing SLDC shall function under the direct administration and control of the Southern RLDC at Bengaluru.

5. Transmission lines of APTRANSCO of 132 KV and higher voltage cutting across the successor States shall be deemed as Inter-State Transmission System (ISTS) lines. The transmission lines falling within the territory of each successor State shall be transferred to the respective State Transmission Utilities. The maintenance of ISTS lines shall also be done by successor States in their respective jurisdictions.

6. The power of the Central Generating Stations will be allotted in such ratio to the State of Telangana and the State of Andhra Pradesh based on the actual energy consumption of the last 5 years of the relevant DISCOMS in the respective successor State.

7. For a period of ten years, the successor State that has a deficit of electricity shall have the first right of refusal for the purchase of surplus power from the other successor State.

8. The districts of Anantapur and Kurnool which fall within the jurisdiction of the AP Central Power Distribution Company Ltd. will now be reassigned to the AP South Power Distribution Company Ltd.

57. From the above, we observe that the bifurcation of liabilities and assets between the two States viz. Andhra Pradesh and Telangana had taken effect on 02.06.2014 (the appointed day), and that the legislation does not have a retrospective effect. Section 53 (2) of the Act stipulates that the assets and liabilities shall be transferred in physical form on mutual agreement or by making payment or adjustment through any other mode as may be agreed to by the successor States. We note that as per the Twelfth Schedule of the *Andhra Pradesh Reorganization Act, 2014*,

the power of only Central Generating Stations were allotted to the State of Telangana and the State of Andhra Pradesh based on the actual energy consumption of the last 5 years of the relevant DISCOMS viz. TSSPDCL.

58. In the instant case, we note that the Petitioner and the Resopndents No. 6 to 8 have categorically mentioned that under the PPAs under the third transfer scheme in the year 2005, the Project was allocated exclusively to Andhra Pradesh Eastern Power Distribution Company Limited (APEPDCL) by virtue of its geographical location. The Power generated by the Petitioner was supplied only to APEPDCL and therefore the payment liability, if any, solely rests on APEPDCL.
59. In view of the above, we are of the view that that since the plant located in Andhra Pradesh is under the jurisdiction of APEPDCL, the withheld amounts if any shall be recovered from APEPDCL alone. Therefore, liability if any is identifiable with APEPDCL belonging to the residual State of Andhra Pradesh. In view of the above, we hold that the payment liability of the Arrear Amount lies solely with APTRANSCO. As such APTRANSCO is directed to pay the arrear amount (after verifying the same from the relevant authorities) on account of truing up of fixed cost for the said years 2004-05, 2005-06, 2006-07 and 2009-10, along with interest @10% p.a. from the date of disallowance to the date of reimbursement.
60. The Petition no. 230/MP/2022 is disposed of in terms of the above.

Sd/-

पी. के. सिंह
(सदस्य)

Sd/-

अरुण गोयल
(सदस्य)

Sd/-

आई. एस. झा
(सदस्य)