

**CENTRAL ELECTRICITY REGULATORY COMMISSION  
NEW DELHI**

**Coram:**

**Shri I. S.Jha, Member  
Shri Arun Goyal, Member  
Shri Pravas Kumar Singh, Member**

**Date of Order: 23<sup>rd</sup> September, 2023**

**Petition No. 239/MP/2019**

**In the matter of:**

Petition for recovery of money due and outstanding from BSES Yamuna Power Limited as per tariff determined by the Commission and in terms of the agreement between THDC India Limited and BSES Yamuna Power Limited.

**And**

**In the matter of**

THDC India Limited,  
Pragatipuram, Bypass Road,  
Rishikesh – 249201 (Uttarakhand).

**....Petitioner**

**Vs**

BSES Yamuna Power Limited  
Shakti Kiran Building,  
Karkardooma, New Delhi - 110 032.

**.... Respondent**

**And**

**In the matter of:**

**Petition No. 54/MP/2021**

Petition under Section 79(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes with THDC India Ltd.

**And**

**In the matter of**

BSES Rajdhani Power Limited  
BSES Bhawan, Nehru Place, New Delhi - 11 0019.

**....Petitioner**

**Vs**

THDC India Limited,  
Pragatipuram, Bypass Road,  
Rishikesh – 249201 (Uttarakhand).

**....Respondent**



**Petition No. 135/MP/2022**

Petition under Section 79(1)(f) of the Electricity Act, 2003 seeking adjudication of disputes with THDC India Ltd.

**And**

**In the matter of:**

BSES Yamuna Power Limited  
Shakti Kiran Building, Karkardooma,  
New Delhi - 110 032.

....Petitioner

Vs

THDC India Limited,  
Pragatipuram, Bypass Road,  
Rishikesh – 249201 (Uttarakhand).

....Respondent

**Parties present:**

Shri Amit Kapur, Advocate, BYPL & BRPL  
Shri Buddy Ranganadhan, Advocate, BYPL & BRPL  
Shri Anupam Varma, Advocate, BYPL & BRPL  
Shri Rahul Kinra, Advocate, BYPL & BRPL  
Shri Aditya Ajay, Advocate, BYPL & BRPL  
Shri Girdhar Gopal Khattar, Advocate, BYPL & BRPL  
Ms. Megha Bajpeyi, BRPL  
Ms. Anushree Bardhan, Advocate, THDC (in 239/MP/2019)  
Shri Tabrez Malawat, Advocate, THDC (in 54/MP/2021 & 135/MP/2022)  
Ms. Ankita Bafna, Advocate, THDC  
Shri Syed Hamza, Advocate, THDC  
Shri Sourajit Sarkar, Advocate, THDC

**ORDER**

As the issues raised by the parties in the aforesaid petitions are common, these petitions have been clubbed and disposed of by a common order, as stated in the subsequent paragraphs.

**Petition No.239/MP/2019**

2. Petition No.239/MP/2019 has been filed by the Petitioner, THDC seeking the following relief(s):

*“(a) direct the Respondent - BYPL Yamuna Power Limited to pay the outstanding amount due to the Petitioner, THDC India Limited forthwith or under a scheme within the shortest possible time so as to ensure that the Petitioner*



*recovers the entire amount outstanding along with the Delayed Payment Surcharge as provided in the Power Purchase Agreements; and*

*(b) pass such further order or orders as this Hon'ble Commission may deem just and proper in the circumstances of the case."*

### **Submissions of the Petitioner, THDC**

3. In support of the above prayer, the Petitioner, THDC has made the following submissions:

(a) THDC has established the Tehri Hydroelectric Power project, Stage-I (4x 250 MW) and Koteshwar Hydroelectric Power project (4 x100 MW). The Ministry of Power, GOI allocated the power from these two projects to various States, including the State of Delhi vide communications dated 18.5.2005 and 8.8.2007 respectively. Pursuant to this, Delhi Transco Limited (DTL) entered into PPA with THDC on 27.4.2004 and 19.4.2006 in respect of the allocated power of 103 MW from Tehri HEP and on 27.10.2006 for 39.4 MW from Koteshwar HEP.

(b) Subsequently, the above quantum of power from the two generating stations, was reassigned by the Delhi Electricity Regulatory Commission (DERC) to the three distribution companies of Delhi viz., BSES-Yamuna Power Ltd (BYPL), BSES-Rajdhani Power Ltd (BRPL) and North Delhi Power Ltd (NDPL). On **12.10.2015**, 40 MW of power of Tehri HEP, which was allocated to BYPL and other Delhi Distribution companies, was transferred to the Union Territory of Chandigarh. The above allocation of power from the two projects continued till **14.3.2016**, when DTL transferred the allocated power capacity of BYPL to BRPL, after in-principle approval by DERC vide order dated 2.3.2016.

(c) THDC has duly performed its obligation under the PPA and became entitled to recover tariff from the Respondent BYPL on the terms and conditions contained in the said PPA. The PPA also provides for payment of Delayed Payment Surcharge (DPS) for the delay in payment of the monthly bills and supplementary bills raised by THDC at the rate and terms and conditions contained in the Power Purchase Agreement.

(d) As on **31.3.2018**, a sum of Rs 286.96 crores was due and outstanding from BYPL to THDC, which comprises of the principal amount of Rs. 167.59 crore and Late Payment Surcharge (LPS) of Rs. 119.37 crore. By communication dated **7.5.2018**, BYPL had duly acknowledged that an amount of Rs. 280.38 crore was outstanding.

(e) During the year 2018-19, BYPL paid to THDC only a sum of Rs 57 crore, as on 31.3.2019. After adjusting the above payment of Rs 57 crore and after factoring DPS, on the outstanding amount till 31.3.2019, an aggregate amount of Rs. **272.43 crore** has been due and outstanding. Further, the DPS for the



period from 1.4.2019 onwards and the arrear and supplementary billing for the period 2011-14 raised during 2019-20, are also due and payable by BYPL to THDC.

(f) Despite several requests and reminders by THDC, the amount has not been paid. THDC is suffering financially on account of the non-payment of the amount by BYPL. BYPL has consistently taken the stand that on account of its financial position it has not been able to pay the amount to THDC. The Petitioner has placed on record the communication exchanged between the parties, the meetings held till 31.3.2019 and minutes of meetings of NRPC & TCC/Commercial Sub-Committee.

(g) In the facts and circumstances mentioned above, THDC has sought directions of this Commission to BYPL to duly and faithfully pay and discharge the outstanding amounts along with DPS at the earliest. The non-payment of the amount by BYPL will affect the operation of THDC and its ability to service other Procurers of electricity from the above two projects. BYPL cannot be allowed to proceed to raise the issue of its financial position as a ground for not clearing the outstanding amount due to THDC. BYPL is required to give a credible and workable scheme for liquidation of the amount due to the Petitioner.

(h) Though there is no dispute that substantial amount is outstanding from BYPL to THDC which has been duly acknowledged and admitted by BYPL in various correspondences, there is a difference between THDC and BYPL in regard to the timely payment and discharge of the amounts outstanding. BYPL should be directed to pay the amounts outstanding under a scheme, whereby the interest of THDC is protected and THDC receives the amount due and payable to it. This is particularly at the instance of BYPL that the DERC / DTL transferred the contracted capacity of BYPL in the two generating stations to BRPL and thereby, limiting the financial exposure of BYPL for the period beyond 14.3.2016. Even after the above facility was granted to BYPL and despite the lapse of more than 3 years, BYPL has still not fully paid the amounts to THDC. The Petitioner has contended that BYPL is no longer entitled to defer the payment of the above amounts.

#### **Hearing dated 5.11.2019**

4. The Petition was listed for 'admission' on 5.11.2019 and the Commission, after hearing the learned counsel for THDC, 'admitted' the Petition and issued notice to the Respondent BYPL, with directions to complete pleadings.

#### **Hearing dated 5.3.2020**



5. During the hearing of the Petition on 5.3.2020, the learned counsel for the Respondent BYPL sought adjournment, on the ground that it was taking steps to mutually settle the matter with regard to the payment of dues to the Petitioner. This was not objected to by the learned counsel for the Petitioner, THDC. Accordingly, the hearing of the Petition was adjourned, with directions to parties, to report settlement, if any.

### **Petition No.54/MP/2021**

6. During the pendency of Petition No. 239/MP/2019, BRPL, on 17.2.2021, filed Petition No.54/MP/2021, seeking adjudication of disputes with THDC, with the following prayers:

- (a) Admit the present Petition;
- (b) Quash and/or set aside the Communication dated 09.08.2019 issued by THDC and communications dated 19.09.2019 and 01.01.2021 in which THDC has claimed outstanding dues; and
- (c) Direct THDC to adjust the payments made by the Petitioner in the following manner as has been done from **September, 2011 till August, 2019:**
  - (i) Firstly, against Current Energy and Energy overdues (Principal dues); and thereafter
  - (ii) Against the LPSC accrued.
- (d) Pass any other order which this Hon'ble Commission may deem fit.”

### **Submissions of the Petitioner, BRPL**

7. In justification of the aforesaid prayers, the Petitioner, BRPL has mainly submitted the following:

(a) The Petitioner is aggrieved by the communication dated 9.8.2019 issued by THDC, whereby, THDC even after admitting that payment adjustment mechanism has not been specified in the Tariff Regulations by this Commission for payments received from beneficiaries (including Petitioner herein) towards dues /bills raised by generating companies, has unilaterally sought to adopt an unlawful payment adjustment mechanism by providing the surreptitious reasoning of avoidance of any complication and dispute in future, as under.

- (i) The payment received from the beneficiary shall be adjusted against the outstanding bills including LPS on date-wise First in First Out (FIFO) basis;
- (ii) If the date of bill of principal amount and LPS amount is same then, LPS amount shall be adjusted first.



(b) BRPL by communication dated 17.9.2019, had categorically objected to THDC's methodology and stated that it is not in agreement with the payment adjustment mechanism unilaterally sought to be adopted and applied by THDC as above.

(c) THDCs methodology is arbitrary and erroneous since:

(i) THDC's methodology is against the agreement reached between BRPL and THDC and the past practice adopted by the parties.

(ii) Admittedly, the PPAs signed between THDC and DTL on 27.4.2004, 19.4.2006 and 27.10.2006 and the Tariff Regulations of this Commission are silent on the payment appropriation methodology and do not provide for any such methodology;

(iii) The PPA entered between BRPL and THDC on 30.2.2012 does not provide for the appropriation of any payment towards LPSC as contended by THDC;

(iv) THDC is acting against the express instructions by BRPL to adjust the amounts paid by BRPL firstly towards the Principal amounts, which is against the prescription of Sections 59 and 60 of the Indian Contract Act, 1872. In terms of this, the payment adjustment mechanism between the parties has to be specified by the Debtor (Petitioner herein) while making payment and cannot be done in a unilateral manner by THDC.

(v) As per past practice and agreement between the parties, BRPL has and is making all payments and also apportioning all its payments first towards principal dues from September, 2011 till June, 2019. This methodology was agreed to by THDC and reconciliation statements were signed on this understanding, excluding the payment of Rs 10.87 crore between April, 2013 to December, 2013.

(vi) The issue of payments and alleged non-payment owing to the regulator having depleted the ability of the BRPL to pay and any issue incidental to the same is pending adjudication before the Hon'ble Supreme Court of India in Writ Petition No. 104/2014 filed by BRPL. Even though THDC was not a party in the petition, it was represented by Counsel(s) and had also tendered its submissions. Despite being aware of the said fact that the Hon'ble Supreme Court is seized of the matter, there was no occasion for THDC to seek adjustment of payments made by BRPL towards outstanding LPS first, before adjusting any principal amount. THDC is showing an outstanding principal overdue of **Rs.139 crore**, which is erroneous and unwarranted.

***A. Specific agreement between the parties being the Reconciliation statements and the Doctrine of past practice***

(vii) Since September 2011, BRPL and THDC have been following the methodology of adjusting payments made by BRPL firstly, against Principal dues and thereafter, against the LPSC accrued. As such, both parties agreed to the methodology being followed which is evident from the



reconciliation statements for the period from September, 2011 till June, 2019.

(viii) Till letter dated 9.8.2019, the payments made by BRPL were being adjusted firstly towards the Principal amounts and there was no dispute regarding the same. Thus, appropriation of dues has to be done as per the terms on which the payments were made and the terms and conditions mutually agreed between the parties. If the PPA is silent, it has to be done in accordance to the terms on which the payments are to be made as also the past practices followed between the parties (*reliance placed on judgments of the Hon'ble Supreme Court in [(a) McDermott International Inc. Vs. Burn Standard Co. Ltd. (2006) 11 SCC 181(b) Pure Helium India (Pvt.) Ltd. Vs. ONGC (2003) 8SCC 593 (c) Suresh Nathan & anr. Vs. UOI & ors. 1992 Supp (1) SCC 584]*)

***B. Admittedly the Tariff Regulations and the PPA are silent as regards the adjustment methodology***

(ix) THDC on its own volition by communication dated 9.8.2019 unilaterally devised and adopted the new mechanism for appropriating payments by BRPL, wherein payments were first adjusted towards LPSC and thereafter towards principal amounts, undermining the agreed terms between the parties.

(x) THDC by its own admission has categorically admitted that the tariff Regulations of the Commission do not provide for any payment adjustment mechanism for payments received from the beneficiaries against their dues/bills raised by generating companies.

***C. Unilateral change in methodology of adjustment cannot be done.***

(xi) THDC cannot unilaterally change the conditions or mode of appropriation of payments which was mutually agreed and decided by the parties and which was in place since 2011, as evident from the reconciliation statements.

(xii) Even assuming, without admitting that there was a need to change the methodology for mode of appropriation of payments, then the same had to be done mutually by agreement and cannot be done by either of the parties unilaterally, as done by THDC in the present case. In case THDC was aggrieved by such appropriation it should have refused to accept the payments made by BRPL previously.

***D. Change in methodology of appropriation of payments only serves the commercial interest of THDC.***

(xiii) THDC in its own commercial interest has unilaterally changed the methodology and decided to interpret the clauses of PPA to suit its own interest for appropriation of payment made by BRPL since 1.9.2019 onwards, undermining the fact that there was already an established practice being followed since the assignment of PPA from DTL to BRPL, pursuant to which PPA dated 30.3.2012 was signed between the parties.



(xiv) As laid down in a catena of judgments by the Hon'ble Supreme Court that in cases where payment has been made without expressly stating whether it was towards interest or principal, the payment is to be applied towards interest first and then balance to the principal amount. But in cases where payments have been made in a particular mode and the same has been accepted, the above rule of appropriation of payments does not apply. In the present case, BRPL in all its communication/e-mails had specifically stated that after 2019, the payments are been made towards principal energy dues.

(xv) At this belated stage, in order to suit its own commercial and business interest, THDC cannot be allowed to propose a new payment/ adjustment methodology which conflicts with the established practice followed by the parties.

(xvi) APTEL in Appeal No. 82 of 2012 (BRPL v. CERC & ors.) has held that commercial terms viz. Letter of Credit, dues etc. have to be mutually decided between the parties and it is not open to the parties to question the same after entering into the PPA and acting as per the same.

#### ***E. Section 59 and 60 of the Indian Contract Act 1872***

(xvii) The aforesaid provisions of the Indian Contract Act have been interpreted by the Hon'ble Supreme Court and the Hon'ble High Court of Delhi with regard to the manner of appropriation of payments (even assuming for the purpose of argument that the principal and interest are different debts). [*Reliance placed on the judgment of the Hon'ble Supreme Court in Industrial Credit & Development Syndicate bank vs. Smithaben H. Patel & ors. (1999 3 SCC 80) and the judgment of Hon'ble High Court of Delhi in Ircon International Ltd. vs. M. Moolji (Bombay) 2012 188 DLT 52 (DB).*]

#### ***Reply of the Respondent THDC***

8. THDC vide its reply affidavit dated 9.8.2021 has submitted the following:

(i) THDC had sought to adjust the payment against bills on date-wise, First in First out (FIFO) basis, in terms of the agreed understanding stipulated in Article 10.3 of the PPA dated 30.3.2012 in relation to Tehri HPP and Koteshwar HEP.

#### ***A. Apportionment of LPS is valid and in terms of Article 10.3 of the PPA***

(ii) THDC has been supplying power to BRPL and accordingly raising monthly invoices for energy charges in terms of Clause 9 and Clause 10.2.1 of the PPA. However, BRPL failed to make payment of such monthly invoices within the stipulated time period of 60 days as per Clause 10.2.1 of the PPA. Due to failure of BRPL to make timely payments, THDC has been levying LPS as per the CERC Regulation on the outstanding principal amount in terms of clause 9.3 of the PPAs.





(iii) BRPL made payment of monthly invoices raised towards energy charges, but it completely failed to make payment towards LPS of Rs.125.75 crore pending as on September, 2019 (since August, 2013 onwards). THDC has been compelled not only to avail borrowings to meet day to day needs of working capital, but also to service already availed long-term debts. On account of the same, THDC has been constrained to bear carrying and opportunity cost. The said burden of cost of capital constrained THDC to enforce the payment adjustment mechanism provided under Article 10.3 of the PPA in order to ensure recovery of admitted outstanding amount due. THDC reserves the right to claim and recover opportunity cost by way of separate legal proceedings.

(iv) Article 10.3 of the PPA provides the following payment adjustment mechanism in the order of priority:

*(a) Payment received from BRPL shall be first adjusted towards **earlier** longest overdue and undisputed invoice, **if any**;*

*(b) Thereafter, adjustment shall be done in date-wise descending order of pending invoices;*

*(c) The adjustment of payment towards current bill shall be given least priority in comparison to the outstanding payment. For appropriation of payment towards current bill, adjustment shall be made;*

*(i) Firstly, towards Capacity charges*

*(ii) Thereafter, towards Energy Charges, Incentive and other charges.*

(d) THDC vide its letter dated **9.8.2019** communicated the payment adjustment mechanism to BRPL as provided in the PPA, with effect from 1.9.2019 onwards. It is evident that the appropriation mechanism suggested by THDC in the said letter is consistent with Article 10.3 of the PPA.

(e) Both, Article 10.3(a) of the PPA and letter dated 9.8.2019, afford due priority to the **longest unpaid invoice over all other invoices due and payable by BRPL to THDC**. It is only on account of the fact that BRPL had been making payment merely towards principal energy bills deferring the payment of LPS, since the past six years from August, 2013, which made the LPS bills being the longest overdue, as eligible for adjustment mechanism.

(f) BRPL vide letter dated 17.9.2019, objected to the said mechanism as being contrary to past reconciliation statements signed between the parties. The reconciliation of statement is only to determine the quantum of due amount and not to reach any conclusion on sequence or appropriation of amount which is pre-agreed as per Article 10.3 of the PPA.



(g) BRPL failed to observe that the payment apportionment mechanism provided under Article 10.3 of the PPA dated 30.3.2012, expressly gave precedence to longest overdue bills, and not to the pending energy bills, as suggested by BRPL, vide its letter dated 17.9.2019.

(h) In response, THDC vide letter dated 19.9.2019 justified the circumstances necessitating enforcement of Article 10.3 of the PPA and implementation of the payment adjustment mechanism with effect from 1.9.2019.

(i) BRPL vide its letter dated 16.10.2019 without disputing its liability, continued to object to the payment appropriation methodology suggested by THDC on the ground that the methodology was unilaterally devised and contrary to the reconciliation statements signed between the parties. In any case, the terms of PPA dated 30.3.2012 signed by the parties shall prevail to serve the commercial interest of parties.

(j) As on 27.5.2021, an amount of Rs. 158.47 crore was due and payable by BRPL towards principal energy charges and Rs. 6.95 crores towards LPS. THDC has a statutory right under the Tariff Regulations to claim its long pending outstanding amount towards LPS which the Petitioner had failed to pay since August 2013, despite reminders from THDC. This conduct of BRPL necessitated THDC to implement the payment adjustment mechanism as per letter dated 9.8.2019 and as per Article 10.3 of the PPA.

***B. Second Amendment to the 2019 Tariff Regulations validates the actions of THDC***

(k) The Commission, on 19.2.2021, has notified the second Amendment to the 2019 Tariff Regulations. The Commission vide the amended Regulation carried out amendment to Regulation 59 (LPS) and has clarified the position in relation to the manner of adjustment of payment firstly towards pending LPS and thereafter towards outstanding monthly electricity charges.

(l) By carrying out amendment in Regulation 59 of the Tariff Regulations, the Commission has reinforced the commercial principle and clarified its intention that the payment received from the customer shall be first adjusted by a Generator towards recovery of pending LPS accrued on the outstanding principal amount.

(m) in view of Article 10.3 of the PPA and the amended Tariff Regulations, the payment adjustment mechanism adopted by THDC vide letter dated 9.8.2019 is not only in compliance with the provisions of the PPA but also



promotes prudent commercial principles established between the creditor and debtor which has been statutorily recognised by the Commission.

***C. Non-applicability of Section 59 to 61 of the Indian Contract Act 1872.***

(n) Payment of LPS along with the payment of energy charges constitute only one debt. Consequently, in the absence of there being several distinct debts owed to THDC Section 59 to 61 of the Contract Act are not applicable to the present dispute. The principal energy charges which are due and payable by BRPL is a debt, however the interest / LPS accrued on the said principal and pending since August 2013 cannot be said to an independent debt. Therefore, the energy charges and LPS form a single debt and not distinct debts for the purpose of applicability of the provisions of the Indian Contract Act [*Reliance placed on the judgment of the Hon'ble Supreme Court in Gurpreet Singh vs. UOI (2006 8 SCC 457)*]

(o) In the present case since Article 10.3 of the PPA expressly provides for a payment adjustment mechanism, Section 59 to 60 of the Contract Act shall not be applicable. Hence, the debtor BRPL cannot make payment at its convenience when there is an agreement regulating the order of payment.

(p) On account of such unreasonable and inordinate delays caused by distribution companies, the generating companies such as THDC have been compelled not only to avail borrowings to meet day to day needs of working capital, but also to service already availed long term debts. It is therefore prayed that the problem of delay and non-payment of LPS being generic and regulatory in nature, this Commission may issue general guidelines and regulatory directions so that the matter can be resolved with other distribution companies, in order to avoid unnecessary litigations.

***D. Tariff Regulations and PPA are not silent as regards the adjustment methodology.***

(q) It is clarified that the payment adjustment mechanism under letter dated 9.8.2019, does not afford precedents to all pending LPS bills, it merely follows the adjustment method on date wise FIFO basis which is consistent with Article 10.3 of the PPA which also gives priority to longest overdue bills.

***E. There are no unilateral changes in methodology of adjustment.***

(r) It is submitted that these payment mechanisms have been devised in terms of Article 10.3 of the PPA which was duly agreed by both parties while executing the agreements.

**Hearing dated 27.8.2021**



9. Though the Petition was listed for hearing on 27.8.2021, the same was adjourned at the request of the learned counsel for the Petitioner, BRPL to file its rejoinder to the reply filed by THDC on 2.7.2021.

### ***Rejoinder of the Petitioner, BRPL***

10. In response to the reply of THDC, the Petitioner BRPL vide rejoinder affidavit dated 15.9.2021 has submitted the following:

(a) It is denied that adjustment of payment by THDC is in terms of Article 10.3 of the PPA. This clause does not provide the methodology for adjustment of LPSC first. THDC is trying to read new terms into the PPA which are absent, and are not mutually agreed by the parties.

(b) In the absence of a specific methodology for adjustment of LPSC first in the PPA as well as the Tariff Regulations, the parties have been following the methodology of adjusting the payments made by BRPL, firstly against current energy and energy dues (principal dues) and thereafter against LPSC accrued.

(c) Till August 2019, THDC had followed the same methodology of adjusting payments made by BRPL towards principal energy dues. However, from September 2019, THDC had adjusted the payments made by BRPL towards LPSC first which was duly objected to by BRPL by various communication as well as in reconciliation statement 2.1.2020.

(d) THDC in its reply virtually admits its violation of the PPA, stating that it has sought to adjust on FIFO basis, whereas Article 10.3 of the PPA provides for adjustment on LIFO basis. THDC cannot take the benefit of the said clause, when its own conduct is not in alignment with the said clause.

(e) It is not the case that there was no LPSC during the period from September 2011 to June 2019. In fact, there was LPSC, principal outstanding dues as well as current outstanding dues. THDC and BRPL were following the methodology for almost 8 years and cannot therefore be unilaterally changed by THDC by relying upon Article 10.3 of the PPA.

(f) As regards, the delay in payment of LPSC by BRPL, the issue of payment and alleged non-payment owing to the Regulator having depleted the ability of BRPL to pay is pending adjudication before the Hon'ble Supreme Court in Writ Petition No. 104 of 2014 (filed by BRPL) and connected matters.

(g) Admittedly, the Tariff Regulations specified by the Commission prior to the amendment, were silent on the methodology for adjustment of payment made by beneficiaries to generating companies as is evident from THDC letter dated 9.8.2019. In fact, the present dispute is limited to adjustment of payment prior



to February 2021. Accordingly, the appropriation of dues prior to the notification of the second amendment to the Tariff Regulation in 2021, has to be done as per terms and condition mutually agreed by the parties as well as past practices between the parties.

(h) The demand for payment of LPSC has been raised by THDC on BRPL through separate invoices which are distinct from the invoices for the principal amounts. It is therefore erroneous on the part of THDC to contend that the liability to pay the LPSC amount is not a distinct debt.

(i) The present dispute pertains to a period which is at a pre-decretal stage. There is no decree of any court of law which has provided the payment appropriation mechanism being followed by the parties prior to THDC letter dated 9.8.2019.

(j) THDC is trying to overreach and circumvent the pending proceedings before the Hon'ble Supreme Court. In fact, the parties by communication dated 18.8.2021 issued by BRPL and letter dated 19.8.2021 issued by THDC, have agreed on a mechanism to liquidate past outstanding dues, barring an amount of Rs. 40 crores which is pending adjudication in this petition, owing to unilateral adjustment adopted by THDC since 2019.

#### **Hearing dated 21.1.2022 and 24.3.2022**

11. Subsequently, the matter was listed on 21.1.2022 and 24.3.2022, wherein, the Commission, at the request of the learned proxy counsel for the Petitioner BRPL, adjourned the hearing.

12. During the pendency of this petition, the Petitioner, BRPL filed I.A. No.22/ 2022 seeking urgent hearing of the matter and for stay of the communication dated 6.4.2022 of THDC, threatening invocation of the Letter of Credit (LC). In the said IA, BRPL has submitted that THDC has threatened the invocation of LC (a) alleging failure of BRPL to make payment of outstanding amount of Rs. 60.18 crore within the due date and (b) Intimating that BRPL must release the alleged outstanding payment within 3 days, failing which THDC shall be resorting to its right under clause 10.2.2 of the PPA, to realise payment of Rs. 13.20 crores through invocation of LC. BRPL has also submitted that there are no outstanding dues pending towards THDC as on the date, and the amounts as alleged, are on account of the unlawful payment



methodology adopted by THDC, which is the subject matter in the main petition, pending adjudication by this Commission.

### **Hearing dated 12.4.2022**

13. During the hearing of I.A No. 22/2022, on 12.4.2022, the learned counsel for BRPL prayed for stay of the THDC communication dated 6.4.2022, till final disposal of the matter. In response, the learned counsel for THDC, on instructions, submitted that it would not take any coercive action against BRPL, pending disposal of the petition. This submission of THDC was taken on record and the IA was disposed of accordingly.

### **Petition No.135/MP/2022**

14. While so, during the pendency of the above said petitions, BYPL (the Petitioner), on 28.4.2022, filed Petition No.135/MP/2022, seeking the following relief(s):

- (a) *Admit the present Petition;*
- (b) *Quash and set aside the Impugned communication dated 06.04.2022 alleging that an amount of Rs. 17.54 crores is outstanding as on 31.03.2022, which is overdue for payment by the Petitioner;*
- (c) *Stay the Impugned Communication dated 06.04.2022 during the pendency of the present matter.*
- (d) *Restrain / injunct THDC from enforcing the claim as contained in the Impugned Communication dated 06.04.2022 against the Petitioner, including taking any steps thereunder, during the pendency of Petition No. 54/MP/2021;*
- (e) *Pass ad-interim ex-parte Orders in terms of Prayers (c) and (d) above; and/or*
- (f) *Pass such further orders as this Hon'ble Commission may deem just and necessary in the facts and circumstances of the case."*

### **Submissions of the Petitioner, BYPL**

15. In support of the above prayers, BYPL has submitted the following:

- (i) BYPL was constrained to file this petition, since THDC vide its communication **dated 6.4.2022** has threatened that BYPL should release an alleged outstanding amount of Rs7.54 crore within three days, failing which THDC shall take other strict actions, including initiation of insolvency



proceedings against BYPL before the National Company Law Tribunal (NCLT).

(ii) THDC's communication dated 6.4.2022 is liable to be quashed since:

(a) THDC vide its communication dated 19.8.2021 and 10.9.2021 had agreed to BYPL's proposed liquidation plan dated 18.8.2021 read with the revised liquidation plan dated 27.8.2021. THDC had relied upon Petition No.54/MP/2021 to state that the final outstanding amount due from BYPL shall be in accordance with the final decision by Court on the above issue.

(b) THDC, while adjusting the amounts paid by BYPL since 1.9.2019 as well as in terms of the liquidation plan dated 27.8.2021, has unilaterally changed the methodology for adjustment of payments made by BYPL to THDC. THDC has unilaterally adjusted payments on date-wise first in First out (FIFO) basis (if the date of the bill of principal amount and LPSC amount is same, then LPSC amount is being adjusted first). This was objected to by BYPL by various communications including communication dated 18.8.2021 proposing the liquidation plan.

(c) Issue of alleged non-payment of dues owing to inactions on the part of the SERC, having depleted the ability of BYPL to pay is pending adjudication before the Hon'ble Supreme Court in W.P. No. 105/2014, filed by BYPL, and DERC in Petition No. 67/2011 regarding suspension of license.

(iii) With effect from February, 2011 as per practice and agreement between the parties, THDC and BYPL have been appropriating all payments first towards the principal dues and then towards LPSC. Owing to substantial increase in fuel costs in 2010-11 and without nay commensurate increase in tariff by DERC, BYPL was not able to pay its dues to generating and transmission companies in a timely manner. In view of this, BYPL filed Writ Petition No.105/2014, before the Hon'ble Supreme Court, due to regulatory interdict, non-determination of cost reflective tariff and delay in liquidation of regulatory asset by DERC.

(iv) On 26.3.2014, the Hon'ble Supreme Court by order directed BYPL to make payment of current dues (w.e.f.1.3.2014, related to the billing period from 1.1.2014). On 6.5.2014, the Court directed BYPL to make payments in accordance with order dated 26.3.2014. On 3.7.2014, the Hon'ble Court had directed BYPL to continue to pay recurring monthly payments to the generation/transmission companies having the same basis as indicated in order dated 6.5.2014.

(v) On 19.2.2016, BYPL requested DERC for transfer of allocation of its share from THDC's projects to BRPL. On 2.3.2016, DERC granted in-principle



approval for the said transfer. Allocation of power from THDC's projects to BYPL continued up to 14.3.2016.

(vi) On 24.4.2018, THDC by communication to BYPL stated that, as on 31.3.2018, a sum of Rs. 289.58 crore was due and outstanding from BYPL. By communication dated 7.5.2018, BYPL had acknowledged that an amount of Rs 280.38 crore is outstanding towards THDC.

(vii) On 31.7.2019, THDC had filed Petition No. 239/MP/2019 before this Commission seeking a direction on BYPL to pay the alleged outstanding amount due to THDC or under a scheme within the shortest possible time. On 9.8.2019, THDC issued communication to BYPL of its own payment adjustment mechanism in respect of payments received from beneficiaries against the dues/bills, since no such mechanism has been specified under the Tariff Regulations.

(viii) On 17.10.2019, BYPL by its communication to THDC objected to the payment adjustment mechanism proposed by THDC. In response, THDC, on 24.10.2019, issued communication to the Petitioner bringing to notice, amongst others, that LPS bills amounting to Rs.53.82 crore have still not been paid since March, 2011 and that with effect from 1.9.2019, all the payments to be received from BYPL shall be adjusted in line with the methodology mentioned in letter dated 9.8.2019.

(ix) On 21.11.2019, BYPL issued letter THDC inter alia stating that (a) it is willing to pay the outstanding dues; and (b) requesting for a meeting to discuss the outstanding dues and payment adjustment mechanism. On 5.3.2020, the Commission vide ROP had inter alia noted the submission of BYPL that it is taking steps to mutually settle the matter with regard to the payment of dues to THDC. On 6.3.2020, THDC issued communication to BYPL requesting it to deposit the alleged outstanding dues of Rs. 263.34 crore (upto 29.2.2020) out of which Rs. 161.01 crore was payable towards LPS. On 21.3.2020, the BYPL issued communication to THDC proposing to resolve the matter amicably.

(x) With effect from 24.3.2020, a nation-wide lockdown was imposed to curb the spread of the Covid-19 pandemic. Lockdown and curfew orders by the Central and State Governments, and the resultant economic slowdown adversely affected the revenues and cash flow of BYPL as there was a contraction of demand, significantly lower billing, and reduced revenue collections. Despite its precarious financial condition due to the Covid-19 pandemic as well as suo-moto orders of DERC providing disproportionate monetary reliefs to the consumers, BYPL on 10.7.2020, submitted a liquidation plan for payment of outstanding dues of Rs. 257 crores to THDC.





(xi) On 27.7.2020, THDC wrote to BYPL requesting it to resubmit the payment plan to pay complete outstanding dues by 2021. However, BYPL, on 13.10.2020, stated that:

(i) BYPL has an adverse impact on various aspects relating to finances and cash flow since March 2020. The same is likely to continue until the COVID-19 pandemic situation normalizes. The revenues have decreased substantially due to contraction in commercial and industrial activities.

(ii) The revenues for the next six months shall also remain depressed due to lower electricity consumption by consumers during the winter season.

(iii) As per the directions of CERC and various discussions held between THDC and BYPL, it is proposed that BYPL shall pay Rs. 10 (ten) crore per month w.e.f. October 2020 till the liquidation of the entire outstanding dues. BYPL further requests that the amounts paid by shall be adjusted first towards the principal amount, thereafter towards the remaining LPS dues, and THDC shall convey its acceptance for this proposal and inform this Commission that both the parties have amicably resolved the issue and request for withdrawal of Petition No. 239/MP/2019.

(xii) BYPL vide letter dated 26.10.2020 informed THDC, that it had proposed to start the aforesaid monthly payment of Rs.10 crores only after acceptance of proposal by THDC, but as a gesture of goodwill, today (on 26.10.2020) a payment of Rs 10 crore has been made in anticipation of eventual acceptance to BYPL proposal in near future.

(xiii) On 13.11.2020, THDC requested BYPL to place the proposal as submitted in the letter dated 13.10.2020 in Petition No.239/MP/2019 pending before the Commission to deal with the same with liberty to THDC to make appropriate submissions at the time of the hearing. THDC also stated that in the interim, BYPL can start making maximum possible payments till the case is decided, so that the outstanding starts reducing.

(xiv) On 1.1.2021, THDC wrote to BYPL and inter alia requested to deposit alleged outstanding dues of Rs. 241.85 crore, out of which Rs. 144.76 crore was payable towards LPS. In reply, BYPL, on 13.1.2021, wrote to THDC inter alia stating that it has deposited an amount of Rs. 30 crores, which is to be adjusted against the principal dues and outstanding dues as on date is Rs. 232 crores including LPS. Thereafter, THDC by letter dated 11.2.2021, reiterated its earlier demand of placing this before the Commission in pending Petition 239/MP/2019 and in the interim, BYPL can start making maximum possible payments.

(xv) BYPL vide letter dated 1.6.2021 requested THDC for co-operation considering the unprecedented disruptions caused by second wave of Covid-19. In its reply dated 6.8.2021, THDC requested BYPL to immediately submit



a liquidation plan for and alleged overdue amount of Rs. 221.76 crore in 5 monthly instalments.

(xvi) BYPL vide letter dated 8.8.2021 to THDC *inter alia* submitted a liquidation plan for payment of Rs. 208.29 crore (as per BYPL records) in five equal monthly instalments of Rs. 41.66 crore each, starting from August 2021, without prejudice to the pending disputes. THDC vide letter dated 19.8.2021 *inter alia* accepted the liquidation plan dated 18.8.2021 conditionally, as a special case, and also mentioned that the final outstanding amount due from BYPL shall be in accordance with the final decision by Court(s) on the above issue.

(xvii) BYPL vide letter dated 27.8.2021 to THDC *inter alia* submitted a revised liquidation plan for payment of admitted outstanding dues of Rs. 208.29 crore in two equal instalments. In reply, THDC vide its letter dated 10.9.2021 to BYPL *inter alia* accepted the revised liquidation plan dated 27.8.2021 and acknowledged the payment of Rs. 104.15 crore.

(xviii) On 12.11.2021, THDC wrote to BYPL *inter alia* requesting to make payment towards alleged outstanding dues amounting to Rs. 120.44 crore, out of which Rs. 33.35 crore was payable towards LPS. By reply letter dated 3.12.2021, BYPL informed THDC regarding the payment of the second and final instalment, as per the revised liquidation plan dated 27.8.2021.

(xix) THDC issued communication dated 23.12.2021 to BYPL *inter alia* acknowledging the receipt of payment of Rs. 104.49 crore during the month of November, 2021 and it was further stated that as per books of THDC, an amount of Rs. 16.96 crore is still outstanding and payable by BYPL. By reply dated 30.12.2021, BRPL informed THDC disputing any further payments to be made to THDC as it had already cleared all undisputed outstanding dues.

(xx) On 6.1.2022, THDC wrote to BYPL requesting to release the alleged outstanding amount of Rs. 16.96 crore. BYPL vide its reply dated 31.1.2022, informed THDC denying and disputing the payments to be made to THDC since it had already cleared all the undisputed outstanding dues.

(xxi) On 18.2.2022, THDC once again wrote to BYPL regarding payment of the alleged outstanding amount of Rs. 16.96 crore and *inter alia* stated that final outstanding amount due from BYPL shall be in accordance with the final decision in Petition No. 54/MP/2021.

(xxii) BYPL in its reply dated 4.3.2022 stated that THDC by its communications dated 19.8.2021, 10.9.2021, 6.1.2022 and 18.2.2022, had acknowledged that BRPL has filed Petition No.54/MP/2021 before CERC seeking adjudication of disputes regarding adjustment of payment mechanism and the final outstanding amount due from BYPL shall be in accordance with the final decision by the Court(s) on the above issue. Therefore, requiring



payment of the disputed amount is not justifiable and contrary to THDC's own stand in the aforesaid letters.

(xxiii) As on date, no outstanding dues are payable by BYPL to THDC. As mentioned in the ROP for hearing dated 5.3.2020 (uploaded on 6.3.2020) in Petition No. 239/ MP/2019, BYPL had undertaken that it is taking steps to mutually settle the matter with regard to payment of dues to THDC. BYPL has cleared all undisputed outstanding dues towards THDC as on 30.11.2021. However, THDC, by way of the impugned communication continues to allege that there is an amount of Rs. 17.54 crore payable by BYPL, which is incorrect.

(xxiv) BYPL is not responsible for the accumulation of dues and the said issue is pending before the Hon'ble Supreme Court in W.P. (C) No.105 of 2014. BYPL is in the un-enviable position of being told to "swim with its hands tied behind its back". In such circumstances, the Petitioner cannot be considered as an unregulated and uncontrolled entity, which is able and allowed to structure its business, as per economic principles and responsible for its costs, revenues, and deficits.

### **Reply of the Respondent THDC**

16. In response to the above, the Respondent THDC, vide affidavit dated 21.7.2022 has submitted the following:

#### ***A. First apportionment of LPS is valid and in terms of the principles recognised in the second amendment to the 2019 Tariff Regulations***

(a) Pursuant to the re-assigning of the PPAs from DTL to the BYPL, THDC has been supplying power to the BYPL and accordingly raising monthly invoices of energy charges in terms of Article 7.1 of PPA.

(b) THDC has been raising monthly invoices in terms of Article 7.0 of the PPA. However, BYPL has failed to honour its obligations under Article 8.3 of the PPA, to make the payment of such monthly invoices within stipulated time period of 60 days.

(c) BYPL having failed to make the due payments of the principal amount within the stipulated time period of 60 days, necessitated THDC to issue various communications intimating for timely release of the due payments. Particularly, THDC vide letter dated 24.4.2018 informed BYPL about the outstanding amount of Rs. 284.06 crore.

(d) THDC sought this Commission's indulgence in the issue of non-payment by BYPL by preferring Petition No. 239/MP/2019, seeking direction regarding the due payments payable to THDC. This petition was admitted on 5.11.2019 and on next date of hearing i.e. on 5.3.2020, BYPL sought adjournment of hearing



on the ground it intends to settle the matter by undertaking payment of dues to THDC. However, now it is amply clear that rather than settling the issues by making the due payment, BYPL, is attempting to delay the payment of outstanding dues payable to THDC by filing instant petition (Petition No. 135/MP/2022).

(e) After several request of THDC, BYPL submitted a liquidation plan on 10.7.2020, proposing meagre payment in the year 2020-21 and further payment has been extended upto year 2023-24. Further, the said plan of was based on appropriation of payments first towards principal dues and there was no reference of payment of LPS during the repayment period. The said fact was strongly objected by THDC vide its communication dated 27.7.2020 and BYPL was requested to resubmit the plan.

(f) BYPL vide its several communications dated 13.10.2020, 26.10.2020, 13.1.2021 and 1.6.2021 insisted upon the payment of meagre amount, whereas, THDC vide its response dated 13.11.2020, 1.1.2021 and 11.2.2021 objected and rejected the liquidation plan proposed. THDC in all its communications has strongly objected to apportionment methodology proposed by BYPL i.e. appropriating the payment first towards principal dues and thereafter towards LPS.

(g) It has always been the case of THDC that (i) the payment received from BYPL shall be first adjusted towards recovery of pending LPS accrued on the outstanding monthly electricity charges; (ii) after recovery of pending LPS, the payment shall be adjusted towards outstanding monthly electricity charges; and (iii) THDC while recovering LPS shall first adjust the payment received from the BYPL, against the longest overdue bill of LPS and accordingly follow the descending order for adjustment of LPS bills. Subsequently, THDC shall recover the monthly electricity charges firstly against longest overdue bill of such charges.

(h) The Amended Regulations validated the approach adopted by THDC and reinforced the commercial principle which governs the issue. Further, this Commission has also clarified its intention that the payment received from the customer shall be first adjusted by a generator towards recovery of pending LPS accrued on the outstanding principal amount.

(i) The Commission has further strengthened the principle that depriving a creditor of its right/ entitlement in the form of LPS to which he is entitled under his contract and also under the Regulations, would be most commercially unreasonable. The approach adopted by THDC promotes the prudent commercial principles established between the creditor and debtor which has been statutorily also recognized by the Commission. Therefore, the present petition deserves to be set aside.



(j) On 26.7.2021, THDC while highlighting the outstanding amount of Rs. 220.69 crore requested BYPL to make payment of the same in maximum five monthly instalments. Otherwise, THDC shall have no option but to take other strict actions including initiation of insolvency proceedings against BYPL recover its dues. Further, THDC vide its letter dated 6.8.2020 issued reminder to BYPL for the repayment of the amount in terms of the its letter dated 26.7.2021.

(k) In response to aforesaid letters dated 26.7.2021 and 6.8.2021, BYPL vide its letter dated 18.8.2021, agreed to make payment of outstanding dues in five instalments. However, BYPL raised fictitious and baseless issue relating to apportionment methodology. On account of the same, there was difference of Rs. 13.47 crore, as on 18.8.2021.

(l) As a special case, THDC vide letter dated 19.8.2021 accepted the liquidation plan of BYPL. However, THDC denied quantum of total outstanding amount as Rs. 208.29 crore as claimed by BYPL. As per the records of THDC, the total due and payable amount as on 18.8.2021 was Rs. 221.76 crore. THDC reiterated that the outstanding amount has been calculated and adjusted the LPS as per prevailing MOP, GOI Rules, the applicable CERC Regulations and the Amended Regulations and time to time communications sent to BYPL. The stand of THDC was also in conformity with the PPAs executed in relation to the supply of power.

(m) BYPL revised the liquidation plan vide letter dated 27.8.2021 from five monthly instalments to two instalments, in terms of which (a) an amount of Rs. 104.15 crore was paid on 27.8.2021; (b) remaining amount of Rs.104.10 crore as per BYPL was to be paid by end of November, 2021.

(n) On 10.9.2021, THDC while acknowledging the receipt of payment of Rs. 104.15 crore, reiterated that all the payments received from BYPL shall be adjusted in line with prevailing MOP, GOI orders, CERC Regulations and time to time communications sent to BYPL by THDC. from 25.11.2021 to 30.11.2021, THDC received the payment of second instalment of Rs. 104.49 crore. The acknowledgment of the same was conveyed to BYPL by THDC vide its letter dated 23.12.2021. In the said letter, THDC categorically submitted that the payments received shall be first adjusted towards LPS and thereafter, towards monthly charges starting from the longest overdue bill. The said apportionment methodology was in conformity to the Amended Regulations.

(o) It is a matter of record that post payment of dues to the extent of Rs. 208.29 crore by BYPL, the dispute that survives amongst parties relates to payment of outstanding amount of Rs. 17.54 crore. The liability towards payment of the said amount has been disputed by BYPL on account of the adoption of payment apportionment methodology followed by the THDC. It is the case of BYPL that THDC is not entitled to deduct or apportion the payment



of LPS first, and prior to principal amount. However, the said position of BYPL is incorrect and contrary to Amended Regulations, which clearly postulates charges payable by a beneficiary or long-term customer shall be first adjusted towards late payment surcharge on the outstanding charges and thereafter, towards monthly charges billed by the generating company or the transmission licensee, as the case may be, starting from the longest overdue bill. The present petition is contrary to the Amended Regulations and settled position of law. The present petition, therefore, filed by BYPL being meritless and devoid of substance ought to be dismissed.

(p) Aforesaid position of THDC has been further fortified by Rule 4 of the Electricity (Late Payment Surcharge) Rules, 2022 (in short the '**LPS Rules**'). From a plain reading of the LPS Rules, it is amply clear that the above rules intend to provide for adjustment of LPS towards the long overdue payments before the adjustment of the monthly bills

(q) The Commission in Petition No.199/MP/2021 (Jindal Power Limited v. TANGEDCO) held that the payments need to be first adjusted towards LPS and thereafter towards monthly charges, starting from longest overdue bill. Further, in the said order, it has been also held that LPS Rules being procedural in nature would apply to pending dispute.

(r) BYPL's actions are self-contradictory, where, on one hand, it is acknowledging the pending dues payable by it and on the other hand it places reliance on some pending dispute before Hon'ble Supreme Court. Therefore, present petition has been filed with a *malafide* intention to delay and postpone the payment of legitimate dues payable to THDC.

(s) Even after acknowledging the due and payable amounts, BYPL has resorted to arm-twisting and dilly dallying. BYPL has alleged that THDC had agreed that amount of Rs. 17.54 crore is subject to final decision in Petition No. 54/MP/2021, when, in fact said averments of THDC are merely in the context of reconciliation and cannot be interpreted as waiver of liability to make the payment of the long pending overdue.

(t) BYPL has failed to make payment of its dues in a timely manner and the majority of the amount of Rs. 208.29 crore were liquidated only by November, 2021. As on date, there is outstanding of amount Rs. 17.54 crore, which THDC is entitled to receive from BYPL. Payment apportionment methodology of the THDC, first adjustment of LPS and thereafter, towards monthly charges starting from the longest overdue bill, is in conformity with the Amended Regulations. Recently promulgated LPS Rules further cement and fortify the position and approach adopted by the THDC.

(u) The Hon'ble Supreme Court in W.P. (C) No. 105 of 2014 vide its orders dated 6.5.2014 and 3.7.2014, has very categorically directed BYPL to continue



to pay recurring monthly payments to the generating companies, and BYPL has failed to comply with the categorical directions of the Hon'ble Supreme Court.

### **Hearing dated 29.7.2022**

16. The aforesaid Petitions were listed together and heard on 29.7.2022, wherein, the Commission admitted Petition No.135/MP/2022 and permitted BYPL to file its rejoinder. Other matters viz. Petition No. 239/MP/2019 and Petition No. 54/MP/ 2021 were adjourned, at the request of the proxy counsel for BYPL & BRPL.

### **Rejoinder of the Petitioner BYPL (in Petition No.135/MP/2022)**

17. BYPL vide its rejoinder vide affidavit dated 9.8.2022 in Petition No.135/MP/2022 has mainly reiterated its submissions made in the petition. In addition, BYPL has submitted the following:

#### ***Re: Alleged defaults in making payments***

(a) BYPL is not responsible for accumulation of dues and the said issue is pending before the Hon'ble Supreme Court in W.P.(c) No.105/2014., wherein, by order dated 26.3.2014, the Court *inter alia* directed BYPL to make payment of current dues (w.e.f 1.3.2014), related to billing period from 1.1.2014.

(b) THDC in its 'Rebate scheme 2014-19' has itself categorically provided that the payments would be first adjusted towards the current bills. However, in utter disregard, THDC vide impugned communication dated 6.4.2022, seeks to coerce BYPL in paying the purported amount for the period prior to 1.1.2014, which were stayed by the Hon'ble Supreme Court, as well as its own 'Rebate Scheme' by threatening to invoke insolvency proceedings, under IBC, for alleged outstanding dues.

(c) In terms of the ROP of the hearing dated 5.3.2020, BYPL proposed a liquidation plan for payment of Rs 10 crore per month with effect from October, 2020 till the liquidation of the entire admitted outstanding dues. On 26.10.2020, BYPL issued communication regarding the release of first instalment of Rs 10 crore as per the liquidation plan.

(d) Subsequently, based on the request of THDC, BYPL submitted liquidation plan for payment of Rs 208.29 crores (in 5 equal monthly instalments of Rs.66 crore each starting from August, 2021, without prejudice to the pending disputes between the parties. Liquidation plan dated 18.8.2021 was revised by BYPL vide communication dated 27.8.2021 for payment in two instalments of Rs.104 crore (approx). The liquidation plan dated 18.8.2021 and the revised liquidation plan dated 27.8.2021, were agreed to by THDC vide communication dated 19.8.2021 and 10.9.2021 respectively.



(e) In terms of the revised liquidation plan dated 27.8.2021, BYPL had made payment of the admitted outstanding dues to THDC in two instalments viz., First instalment of Rs 104.15 crore on 27.8.2021 and Second instalment of Rs 104.50 crore from 24.11.2021 to 30.11.2021 and the same was communicated to THDC on 3.12.2021. THDC by communication dated 10.9.2021 and 23.12.2021 had acknowledged the payment of the amounts by instalments. However, it has erroneously claimed an amount of Rs.16.96 crore as outstanding. Therefore, as on 3.12.2021, Petition No. 239/MP/2019 had become infructuous, since the Petitioner had cleared all outstanding dues to THDC.

***Re: THDC's case that payments received from BYPL shall be first adjusted towards LPSC and thereafter, towards outstanding monthly electricity charges***

(f) Perusal of the PPA makes it clear that no methodology for adjustment of LPSC first has been provided therein. THDC is trying to read new terms into PPA which are absent and are not mutually agreed by the parties. Till August, 2019 THDC has followed the same methodology of adjusting the payments made by BYPL towards principal energy dues. However, from the month of September, 2019, for the first time, without any agreement between the parties, THDC has adjusted the payments towards LPSC first, which was duly objected to by the Petitioner by various communications as well as in the reconciliation statements.

(g) THDC having followed the payment adjustment methodology between the parties from March, 2011 onwards is estopped by the principle of acquiescence by conduct [*Reliance placed on Kanchan Udyog Ltd v United Spirits Ltd (2017) 8 SCC 237*].

(h) It is settled law that in the absence of a specific term in the contract providing for appropriation of payments towards different debts, the appropriation by the debtor has necessarily to be in accordance with the instructions of the creditor accompanying such payment. It is only if such payments were to be made without any specific instruction would the debtor be free to appropriate such payment to the dues of his choice.

(i) In the present case, payments have always been specified to be towards energy dues by BYPL. Even assuming without admitting that BYPL had not given any specific instructions for appropriation of payments, admittedly, THDC had adjusted all payments first against principal energy dues and then against LPSC from the year 2011 till 2019, as evident from the reconciliation statements signed between the parties from September, 2011 till June 2019.

***Re: Applicability of the Second Amendment Regulations***

(j) Admittedly the Tariff Regulations specified by the Commission prior to the notification of the Second amendment Regulations were silent vis-a vis methodology for adjustment made by beneficiaries to generating companies, which is also evident from THDC communication dated 9.8.2019. Further, the PPA executed by the parties also does not provide for the methodology of adjustment of LPSC.





(k) THDC cannot apply the Second amendment Regulations for payment adjustment on the dues arising prior to the applicability of these regulations. Second amendment Regulations came into force from 19.2.2021 and are applicable for the five-year tariff period from 1.4.2019 to 31.3.2024, except amendment in Regulation 6 and Regulation 59 of the Principal Regulations, which shall be applicable from the date of notification of the regulations in the official gazette.

(l) Even in the amended Regulation 59, weightage has been accorded to the mutually agreed method of payment adjustment. Prior to the unilateral change in appropriation methodology by THDC in September, 2019 adjustment of all payments was being made against principal first and the same was mutually agreed method of payment adjustment between the parties.

(m) THDC in its letter dated 9.8.2019 had itself admitted that 'Payment adjustment mechanism for payment received from the beneficiaries against their dues/bills raised by the generating companies has not been specified in the CERC Tariff Regulations'.

### ***Re: Applicability of LPSC Rules, 2022***

(n) Contrary to the contentions raised by THDC, the LPSC Rules, 2022 are not applicable to the present case, as there are no outstanding dues payable by BYPL to THDC. The LPSC Rules, 2022 do not and cannot apply retrospectively to amounts, which even allegedly, fell due prior to 3.6.2022. Even assuming for the purpose of argument that the LPSC Rules, 2022 apply, the word used in the said Rules is 'due', which means and has to mean, legally payable. If the amount is not legally payable, it cannot be said to be 'due' Hence, the amount of Rs 17.64 crore, as claimed by THDC, would not fall under the expression 'due', since the same is not legally payable. It is reiterated that BYPL has cleared all undisputed outstanding amounts towards THDC as on 30.11.2021. THDC's allegation that there is an amount of Rs 18.54 crore (as on 25.8.2022) payable by BYPL is due to the incorrect methodology for appropriation of payments adopted by THDC, which is admittedly pending adjudication on Petition No.54/MP/2021 filed by BRPL, prior to the issuance of LPSC Rules, 2022.

(o) The Commission's order in Jindal power case is not applicable to the present case, since in the facts of the said case, the liability to pay LPSC amount claimed in petition was admitted by the Respondent therein and there was no dispute to be adjudicated under Section 79(1)(f) of the Electricity Act, 2003. In the present case, unilateral payment adjustment mechanism sought to be imposed by THDC is subject matter in petition No.54/MP/2021 filed by BRPL, much prior to the issuance of the LPSC Rules, 2022 as well as the date of final payment (30.11.2021) as per liquidation plan between the parties.

(p) THDC by its communication dated 19.8.2021 and 10.9.2021 had itself relied upon Petition No.54/MP/2021 to state that the final outstanding amount due from BYPL shall be in accordance with the final decision by Court on the above issue. The order is not applicable in the present case, since as per BYPL, all undisputed outstanding dues towards THDC have been cleared as on 30.11.2021.

### ***Re: Contradictory stand taken by THDC***



(q) THDC has been taking varying stands to justify its unlawful and arbitrary conduct of unilaterally imposing the payment adjustment methodology since September, 2019. By letter dated 9.8.2019, THDC has unilaterally adopted a payment adjustment mechanism to purportedly achieve a common understanding, without having to discuss the same with the Petitioner.

(r) THDC vide its communication dated 24.10.2019 has communicated that payment adjustment methodology effective from 1.9.2019, is as per standard business practice. However, THDC acted contrary to the doctrine of past practice as pointed out by BYPL on 17.10.2019.

(s) By communication dated 9.5.2022, THDC has sought to rely on the Second Amendment Regulations to justify the arbitrary payment adjustment methodology, when in fact, the said amendment came into force from 13.9.2021, except Regulation 6 and Regulation 59 of the Principal Regulations.

(t) By communication dated 9.6.2022 and 17.6.2022, THDC once again changed its stand and sought to rely on the LPSC Rules, 2022 by requesting for a liquidation plan under Rule 5(2). BYPL by letter dated 11.7.2022, requested THDC not to precipitate the matter till the matter is disposed of by the Commission.

### **Hearing dated 10.8.2022**

18. These Petitions were listed for hearing on 10.8.2022, through virtual hearing. During the hearing, the learned counsels for THDC and BSES Discoms made detailed submissions in support of their contentions. At the request of the learned counsels, the Commission, permitted the parties to file their written submissions and accordingly, reserved its order, in these petitions.

### **Written Submissions**

19. THDC on 31.8.2022 has filed its written submissions mainly on the lines of their submissions made in the replies filed thereunder. It has however reiterated that the payments made by BYPL since August, 2021 to November, 2021 were adjusted firstly in LPSC and thereafter in energy bill, starting from the longest overdue bill. The said adjustments were made as per the prevailing law i.e. the Second amendment Regulations, 2021 to the Tariff Regulations, and the LPS Rules. THDC has also pointed out that the appropriation of Rs 2.28 crore, done by THDC, during



the period from April, 2013 till December, 2013 cannot be challenged and is barred by limitation. BRPL and BYPL (in short 'the BSES Discoms') on 1.9.2022, have filed consolidated written submissions, mainly reiterating the submissions made in their petitions and the rejoinders filed thereunder. However, BYPL has pointed out that Petition No. 239/MP/ 20219 had become infructuous, when the last instalment under the liquidation plan dated 27.8.2021, was paid by BYPL, on 30.11.2021.

### **Petition No.239/MP/2019**

20. Before proceeding to decide the issues involved, we notice that in Petition No. 239/MP/2019, THDC has sought direction on BYPL, to pay and discharge the outstanding amounts forthwith or under a scheme within the shortest possible time so as to ensure that THDC recovers the entire amount outstanding along with LPSC. However, based on the submission of BYPL (during the hearing on 5.3.2020), that it was taking steps to mutually settle the matter with regard to the payment of dues, the Commission had adjourned the hearing of the petition, and granted time to the parties, to report settlement, if any. Pursuant to this, series of communications were exchanged between THDC and BYPL, from 6.3.2020. Thereafter, based on THDC letter dated 6.8.2021, requesting BYPL to submit a liquidation plan for an overdue amount of Rs. 221.76 crore in 5 monthly instalments, BYPL vide letter dated 18.8.2021, submitted a liquidation plan for payment of Rs 208.29 crore, in five equal monthly instalments of Rs 41.66 crore, starting from August, 2021, without prejudice to the pending issues. THDC vide its letter dated 19.8.2021, had accepted the said liquidation plan, as a special case. However, THDC while maintaining that the total outstanding amount, as per its record, was Rs.221.76 crore, stated that the dues payable by BYPL, shall be subject to the final decision of the Commission, in Petition No.54/MP/2021 (filed by BRPL). Thereafter, BYPL vide letter dated 27.8.2021,



submitted a revised liquidation plan for payment of the outstanding dues of Rs 208.29 crore in two instalments i.e. (Rs 104.15 crore on 27.8.2021 and Rs.104.14 crore, by end of November, 2021). THDC accepted the revised liquidation plan and accepted the payment of Rs.104.15 crore, subject to the final decision of the Commission in Petition No.54/MP/2021. Subsequently, BYPL, on 30.11.2021, made payment of the second instalment of Rs 104.49 crore to THDC and by letter dated 3.12.2021, informed THDC for reconciliation and to waive the balance disputed amount, as the same had accrued due to unilateral change in payment adjustment methodology adopted by THDC. However, THDC while acknowledging the said payment, vide letter dated 23.12.2021, stated that an amount of Rs 16.96 crore was still outstanding and payable by BYPL. Pursuant to this, there has been series of communications between the parties, from 6.1.2022 to 4.3.2022, reiterating their respective stand. Thereafter, THDC vide letter dated 6.4.2022, requested BYPL to make the payment of Rs 17.54 crore (within three days) failing which THDC would initiate insolvency proceedings against the Petitioner before NCLT, to recover the dues. Similar letter was also issued to BRPL, threatening invocation of LC due to alleged non-payment of dues. Against this communication, BYPL has filed Petition No. 135/MP/2022, seeking various reliefs as stated in paragraph 14 above.

### **Petition No.54/MP/2021 and Petition No.135/MP/2022**

21. BRPL, in Petition No. 54/MP/2021, has challenged the payment adjustment mechanism adopted by THDC, vide letter dated 9.8.2019, in respect of the payments made by BRPL towards dues/bills, as unlawful. BYPL in Petition No.135/MP/2022 has submitted that THDC through its letter dated 9.8.2019 provided its own payment mechanism to be effective from 1.9.2019 stating that outstanding bills including LPS on date-wise first in and first out basis, whereas BYPL was appropriating all its payments first towards the principal dues since 2011 as per the past practice and



agreed arrangement. Though BYPL made payments to THDC as per its liquidation plan dated 27.8.2021, THDC vide its letter dated 6.1.2022 has claimed from BYPL, an amount of Rs.16.96 crore as on 31.12.2021 based on its (THDC) methodology of appropriation intimated vide its letter dated 9.8.2019. THDC vide its letter dated 6.4.2022 has requested BYPL to make payment of an outstanding amount of Rs. 17.54 crore within 3 days failing which THDC would initiate insolvency proceedings against BYPL. This letter has been challenged by BYPL seeking a direction to quash and set aside the said letter and restrain THDC from taking any steps to enforce the claim contained in the said letter. .

22. From the submissions of the parties and the documents on record, in these petitions, the following issues emerge for consideration of the Commission:

***(A) What payment adjustment mechanisms have been provided in the respective PPAs signed by THDC with BYPL and BRPL?***

***(B) What payment adjustment mechanism was adopted by THDC with respect to the payments made by BYPL and BRPL from time to time?***

***(C) Whether the payment adjustment mechanism was unilaterally altered by THDC vide its letter dated 9.8.2019? If yes, whether the same is justifiable; and***

***(D) Whether THDC is entitled for relief, in terms of, the Second Amendment to the 2019 Tariff Regulations, the LPSC Rules, 2021 and the LPSC Rules, 2022?***

*We examine the issues as under:*

***Issue No. (A) What payment adjustment mechanism has been provided in the respective PPAs signed by THDC with BYPL and BRPL?***

23. BYPL and BRPL have submitted that the PPAs executed between THDC and Delhi Transco Limited (DTL) on 27.4.2004, 19.4.2006 and 27.10.2006, and the Tariff Regulations framed by the Commission are silent on the payment appropriation methodology. BYPL and BRPL have further submitted that all payments received by THDC for supply of power from Discoms have been adjusted and appropriated



towards the principal dues first which is evident from the Reconciliation Statements for Energy Bills dated 7.1.2011 for bills raised and payments received upto 31.12.2010. BYPL and BRPL have further submitted that the said methodology was continued to be followed by THDC except for adjustment of amount of Rs.10.87 crores and Rs.2.28 crores towards late payment surcharge first in respect of BRPL and BYPL respectively which was disputed by them. BYPL and BRPL have also submitted that the PPA dated 30.3.2012 executed by BRPL, does not provide either for apportionment of payment towards LPSC first, or for that matter, any payment appropriation methodology at all, and therefore LPSC cannot be adjusted first by THDC. Further, THDC Rebate Scheme 2014-19 also provided that payments would be first adjusted towards the current bills. Accordingly, BYPL and BRPL have stated that in view of the past practice and agreed arrangements between the parties, all payments made from September, 2011 till August, 2019 were being apportioned first towards the principal dues. However, this agreed arrangement was unilaterally changed by THDC vide its letter dated 9.8.2019 by proposing a new methodology to be adopted from 1.9.2019 onwards which provided for appropriation of the payments made by BYPL and BRPL towards LPSC first and thereafter, towards the principal dues.

24. *Per contra*, THDC in its written submission in Petition No.135/MP/2022 has submitted that the facts relating to PPA between BYPL and THDC are different from the PPA between BRPL and THDC. The PPAs dated 27.4.2004 and 27.10.2006 between THDC and DTL continued to govern the contractual relationship between THDC and BYPL even after the assignment of PPAs by DERC among the three Delhi Discoms whereas THDC and BRPL entered into two PPAs dated 30.3.2012 which contained provisions different from the provisions of the PPAs dated 27.4.2004 and 27.10.2006 between THDC and DTL. THDC has submitted that as



per Clause 7.2.1 of PPAs dated 27.4.2004 and 27.10.2006, surcharge shall be levied by THDC in case of delayed payments and shall be governed as per the notification/directives/guidelines issued or to be issued by CERC/GOI from time to time. THDC has also submitted that the said PPAs dated 27.4.2004 and 27.10.2006 are silent on the terms and conditions of payment appropriation methodology. THDC has also submitted that the Electricity (Late Payment Surcharge) Rules 2021 (LPS Rules) became effective from 22.2.2021 and the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2021 (Second Amendment) became effective on 13.9.2021 and both these notifications provided for adjustment of LPSC first and appropriation of energy bills thereafter, starting from the longest overdue. THDC has submitted that BYPL stopped procurement of power from THDC with effect from 15.3.2016 after transfer of its share to BRPL. Since the payments of outstanding dues consisting late payment surcharge and energy bills were made by BYPL after issuance of the Second Amendment and LPS Rules, THDC has adjusted the payments received in terms of the same, particularly in view of the fact that PPAs with respect to BYPL are silent on mechanism of payment appropriation.

25. As regards BRPL, THDC has submitted that Clause 10.3 of the PPAs dated 30.3.2012 relating to BRPL provides for payment appropriation methodology according to which the first priority is towards earlier unpaid undisputed outstanding, if any which includes LPSC and thereafter the current bills consisting of capacity charges, energy charges, incentive and other charges. Therefore, the payment appropriation mechanism adopted by THDC was completely in terms of the agreed understanding stipulated in Article 10.3 of the PPAs dated 30.3.2012. .



26. The matter has been examined. As stated, THDC has executed PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 with DTL for supply of power from its two projects, namely, Tehri HEP and Koteswar HEP based on the tariff notifications/orders issued by this Commission from time to time. Delhi Electricity Regulatory Commission (DERC) re-assigned the PPAs entered into by DTL with different generating companies vide its order dated 31.3.2007. Consequent to such reassignment of PPAs and re-allocation of capacities, BRPL signed two PPAs with THDC on 30.3.2012 in respect of its share in Tehri HEP and Koteswar HEP of THDC. However, BYPL continued with the PPAs entered into by Delhi Transco Limited. Therefore, the contractual relationship between THDC and BRPL was governed by the PPAs dated 30.3.2012 from the effective date. Recital J of the PPAs dated 30.3.2007 defines effective date as under:

“ The said date , i.e. 01.04.2007, effective from which DERC has allocated the capacities from generating stations to the Distribution Companies of Delhi is hereinafter referred to as the “Effective Date”.

27. Clause 2.0 of the PPA provides that the Parties to this Agreement acknowledge, accept and confirm the transfer and vesting of the rights and obligations of DTL to BRPL for procurement of power from THDC from the Effective Date. Thus, while the contractual relationship between THDC and BRPL was governed as per the PPAs dated 30.3.2012 from the Effective Date (i.e.1.4.2007), the contractual relationship between THDC and BYPL was being governed in accordance with PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 entered into by DTL with THDC till BYPL's share was finally transferred to BRPL with effect from 15.3.2016.

28. Relevant clauses of the PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 applicable in case BYPL provide as under:





*“6.1 The tariff to be charged and its associated Terms and Conditions for the energy to be supplied by THDC from the project shall be as per the Tariff Notifications/orders/directions issued or to be issued by CERC from time to time under the Electricity Act, 2003 and/or any other Act/Regulations as may be enacted/substituted by the Government of India in place of these provisions. Recovery of Income Tax and Foreign Exchange Rate Variation shall be governed as per orders/directions issued by CERC from time to time.*

*7.1 THDC shall prepare monthly bills for the energy supplied to DTL on the basis of REAs issued by NREB and STL shall accept these bills for payment. The bill shall be the aggregate of charges as approved/notified by CERC/GOI and also subject to all other related provisions wherever appearing in this agreement. Notwithstanding the above, THDC shall have the right to rectify any discrepancy in any bill, suo-moto if considered necessary, and as a result of such rectification by THDC, if any amount becomes due and payable to THDC, the same shall be paid by DTL.*

*7.2.1 The surcharge shall be levied by THDC in case of delayed payments. The provisions for levy of surcharge in the monthly bills shall be governed as per the notification/directives/guidelines issued/to be issued by CERC/GOI from time to time as per the prevailing statutes and the same shall form an integral part of this agreement.”*

29. Thus, the late payment surcharge specified by the Commission in the Tariff Regulations notified from time to time or by the GOI shall be applicable for delayed payment on the part of BYPL. It is pertinent to mention that there is no provision in the PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 with regard to the relative priority in apportionment between monthly bills and late payment surcharge when the payments are made by BYPL.

30. In case of BRPL, the PPAs dated 30.3.2012 contain the following provisions regarding tariff, billing, payments, late payment surcharge and apportionment:

*“8.2 The tariff to be charged and its associated Terms and Conditions for the energy to be supplied by THDC from the project shall be as per the Tariff Notifications/orders/directions issued or to be issued by CERC from time to time under the Electricity Act, 2003 and/or any other Act/Regulations as may be enacted/substituted by the Government of India in place of these provisions.*

*8.3 Tax on Income: Billing and recovery of income tax shall be as per regulations of CERC as applicable from time to time.*

*8.4 Recovery of Foreign Exchange Rate Variation shall be governed as per orders/directions issued by CERC from time to time.*

*9.1.1 THDC shall prepare monthly bills for the energy supplied to BRPL on the basis of REAs issued by NRPC/ NRLDC or any other Competent Authority in*



*accordance with the tariff orders issued by CERC. The bill shall be the aggregate of charges as approved/notified by CERC/GOI and also subject to all other related provisions wherever appearing in this agreement.*

*9.1.3 Notwithstanding the above, THDC shall have the right to rectify any discrepancy in any bill, suo-moto if considered necessary, and as a result of such rectification by THDC, if any amount becomes due and payable to THDC, the same shall be paid by DTL.*

*9.2.1 In case BRPL has any objection as to the accuracy of any bill(s), it shall lodge a written objection (the Bill Dispute Notice) with THDC within 60 days on presentation of such bill(s). However, the payment of such bill(s) shall be made in full by BRPL. On such objection being upheld by THDC, the same shall be rectified within a period of 45 days from the date of receipt of the written objection (the Bill Dispute Notice) and necessary effect of the same shall be given in the subsequent bill(s).*

*9.2.3 If the bills raised by THDC are not disputed within 60 days from receipt, such bills shall be taken as conclusive.*

*9.3 The Late Payment Surcharge shall be levied by THDC in case of delayed payments. The provision for levy of surcharge in the monthly bills shall be governed as per the notification/directives/guidelines issued/to be issued by CERC/GOI from time to time as per the prevailing statutes and the same shall form an integral part of this Agreement.*

*10.2.1 THDC would raise bills for monthly power supplies normally by the 7th day of the following month as per REA issued by NRPC or any other competent authority in accordance with the tariff orders issued by CERC. BRPL shall accept these bills and shall make payments against the bills so raised by 60th day (hereinafter referred to as the "Due Date") from the date of billing.*

*10.3 All payments made by BRPL shall be appropriated by THDC for amounts due in the following order of priority:*

- i) towards earlier unpaid, undisputed outstanding, if any.*
- ii) towards the Capacity Charges, Energy Charges, Incentive and other charges in Current Bill on LIFO system."*

31. Thus, in case of BRPL, payments are required to be made by the due date i.e. by the 60<sup>th</sup> day from the date of billing of the monthly bills for the energy supplied and aggregate of other charges such as tax income, FERV, other taxes, amounts approved under change in law etc. If BRPL does not raise any objection on the bills within 60 days from receipt, such bills are taken as conclusive and undisputed. If BRPL has any objection to the accuracy of the bill, it shall lodge a written objection (the Bill Dispute Notice) within 60 days of receipt of such bills. In case of delayed



payment on the part of BRPL i.e. beyond the due date, the the late payment surcharge specified by the Commission in the Tariff Regulations issued from time to time or by the GOI shall be applicable. Article 10.3 of the PPAs dated 30.3.2012, provides for the appropriation of the payments made by BRPL to THDC. On a plain reading of Article 10.3 (i), it is clear that payments made by BRPL are required to be appropriated firstly, towards 'earlier unpaid and undisputed outstanding' which would comprise of monthly tariff, taxes, FERV, other taxes, amount approved by Commission, on account of change in law which remain outstanding beyond 60 days from the date of billing and the LPSC accrued thereon till the date of payment. Thereafter, as a second priority, the amounts towards current bills/dues comprising the capacity charges, energy charges, incentive and other charges are to adjusted. In our view, the term "earlier unpaid, undisputed outstanding" would include the undisputed unpaid principal amount and the late payment surcharge thereon.

32. From the above discussion of the contractual provisions, it emerges that that there is no clear provision in the Agreement between THDC and BYPL with regard to priority of appropriation of payment received among current dues, outstanding dues and LPSC. However, in case of BRPL, there is provision regarding appropriation of "unpaid, undisputed outstanding" amounts first and thereafter the "current bill".

**Issue No. (B): What payment adjustment mechanisms were adopted by THDC in respect of payments received from BYPL and BRPL?**

33. BYPL and BRPL have submitted that since the signing of the PPAs by THDC with DTL, all payments received by THDC from BRPL and BYPL, for supply of power from its projects, have been adjusted and appropriated by THDC towards principal dues first (referred to as "Original Methodology"), as evidenced from the quarterly/annual reconciliation statements (as per PPA) for energy bills dated



7.1.2011, for the bills raised upto and payments received till 31.12.2010. and also the reconciliation statements from 31.3.2012 to 31.12.2013. BRPL and BYPL have further submitted that THDC continued to follow the methodology of adjusting principal dues first, between the period from 2014 till August, 2019, consistent with the order dated 26.3.2014 of the Hon'ble Supreme Court in W.P. Nos 104 & 105/2014, the THDC Rebate Scheme 2014-19 except for a brief period from April 2013 to December 2013 when LPSC was adjusted first. BRPL and BYPL have also submitted that THDC has acted against their express instructions to adjust the amounts paid by BRPL and BYPL towards the principal amounts first which is against Sections 59 and 60 of the Contract Act. BYPL and BRPL have submitted that, contrary to its own conduct and mutually agreed arrangement between the parties, THDC has attempted to unilaterally change the methodology for adjustment of payments made by the BRPL and BYPL towards outstanding LPSC first, before adjusting the principal amount vide its letter dated 9.8.2019. Accordingly, the BYPL and BRPL have submitted that THDC having followed the original methodology from March 2004 and having waived its rights, if any, accruing under the PPAs, is estopped by the principles of acquiescence by conduct.

34. Per contra, THDC, while pointing out that there was no past practice, has submitted that it has exercised its right of appropriation earlier as well to adjust the LPSC in terms of Article 10.3 of the PPA. THDC has further submitted that the reconciliation statements in terms of Article 11 of the PPA only determine the 'quantum of total outstanding' and not the sequence of apportionment of the payments and therefore, it cannot be concluded that through reconciliation statements, the parties can act contrary to Article 10.3 of the PPA. THDC has further submitted that the present petition and the issue relating to payment appropriation



mechanism has no co-relation with the writ petition filed by BSES Discoms. It has stated that the order of the Hon'ble Supreme Court dated 26.3.2014 pertains to payment of current bills and does not mention anything regarding the payment appropriation mechanism. THDC has further stated that the current long pending LPSC pertains to the period post Supreme Court's order dated 26.3.2014, which in effect directs the BRPL and BYPL to make payment of current bills which includes LPSC. However, BRPL and BYPL did not make payment of LPSC dues which were due for the period from 26.3.2014 to 31.8. 2019. THDC has further submitted that Sections 59 and 60 of the Indian Contract Act are not applicable in this case as principal dues and LPSC constitute single debt and not separate debts as contended by BRPL and BYPL.

35. We have considered the submissions of the parties. Even after re-assignment of PPAs pursuant to DERC order dated 30.7.2007, the PPAs dated 27.4.2004 and 15.4.2006 (signed between THDC and DTL) continued to be applicable to BYPL till 14.3.2016, when its share was transferred to BRPL. However, BRPL entered into two PPAs dated 30.03.2012 with THDC for supply of power from two projects of THDC. In addition to the provisions for monthly bills, the PPAs contained the provisions with regard to Late Payment Surcharge (LPS) as under;

**PPAs dated 27.4.2004 and 15.4.2006 between DTL and THDC (applicable for BYPL)**

*“7.2.1 The surcharge shall be levied by THDC in case of delayed payments. The provisions for levy of surcharge in the monthly bills shall be governed as per the notification/directives/guidelines issued/to be issued by CERC/GOI from time to time as per the prevailing statutes and the same shall form an integral part of this Agreement.”*

**PPAs dated 30.3.2012 between BRPL and THDC**



*“9.3\_The Late Payment surcharge shall be levied by THDC in case of delayed payments. The provisions for levy of surcharge in the monthly bills shall be governed as per the notification/directives/guidelines issued/to be issued by CERC/GOI from time to time as per the prevailing statutes and the same shall form an integral part of this Agreement.”*

36. It is noted that the PPAs between DTL and THDC (applicable in case of BYPL) did not contain any appropriation mechanism for the payment received from BYPL. On the other hand, the PPAs dated 30.03.2012 between BRPL and THDC which was effective from 1.4.2007 contained provisions for apportionment in Article 10.3 which provided that payment made by BRPL shall be appropriated first towards “earlier unpaid, undisputed outstanding” and then towards current bill on LIFO system. However, in actual practice, THDC except for a brief period from April 2013 to December 2013 continued to follow the original methodology/mechanism i.e. by adjusting the payments made by the BRPL and BYPL, firstly, towards Principal dues and thereafter towards LPSC. The said arrangement was acceptable to BRPL and BYPL and thus partook the character of a mutually agreed arrangement. During the period from April 2013 till December 2013, THDC adjusted an amount of Rs.10.87 crore and Rs.2.28 crore paid by BRPL and BYPL respectively towards LPSC first. The mutually agreed arrangement except for the above mentioned brief period continued till 31.8.2019 as THDC sought to change the appropriation mechanism with effect from 1.9.2019 vide its letter dated 9.8.2019. It can be inferred that the outstanding LPSC amounts till 31.8.2019 are on account of the mutually agreed arrangement followed between the parties to adjust the principal dues first and thereafter the LPSC. The parties have accepted and implemented this arrangement through their conduct by not raising any objection thereto and never approached this Commission seeking directions for an appropriation mechanism different from the such mutually agreed arrangement. Thus the parties have been following the methodology of adjusting the payments made by BYPL and BRPL firstly (i) against



Principal dues (current energy and energy overdues) and thereafter (ii) against the LPSC accrued except for the period from April 2013 till December 2013 [during this period payments made by the BRPL and BYPL were adjusted by THDC against LPSC first and later towards principal dues, amounting to Rs 10.87 crore and Rs.2.28 crore respectively]. BRPL and BYPL have disputed such adjustment against LPSC first for the period April 2013 to December 2013 in the present petition which has been dealt with in later part of the order.

### **Supreme Court Order dated 26.3.2014 in W.P. Nos 104 & 105/2014**

37. Both BRPL and BYPL have submitted that as per the order dated 26.3.2014 and subsequent orders dated 6.5.2014 and 3.7.2014, Hon'ble Supreme Court had directed the distribution companies to continue to pay the current bills and therefore, the current bills gets precedence over LPSC in the matter of adjustment against the payments received by THDC in terms of the orders of the Hon'ble Supreme Court. THDC has submitted that the order dated 26.3.2014 passed by the Hon'ble Supreme Court pertains to payment of current bills and it does not talk or observe anything about payment appropriation mechanism. THDC has argued that BRPL and BYPL have erroneously interpreted the order of the Hon'ble Supreme Court.

38. We have perused the orders of the Hon'ble Supreme Court. It is noticed that in the proceedings relating to non-payment of dues by the discoms (including BRPL and BYPL) in W.P. Nos 104 & 105/2014, the Hon'ble Supreme Court vide order dated 26.3.2014 had inter-alia directed the the Distribution Companies including BRPL and BYPL to pay the current payments, with effect from March 2014, relating to the billing period from 1.1.2014, as under:

*"In our opinion, the suggestion made by Mr. Rohatgi is reasonable. This would avoid unnecessary delay on the ground that necessary information has not been given. Let the necessary questionnaire/proforma be given to the distribution companies within 10 days from today. The information would be*



*furnished/supplied by the distribution companies within 10 days thereafter to the DERC and within two weeks thereafter, the road map will be prepared by the DERC. In the meantime, the distribution companies will continue to pay the current payments to the generating and transmission companies with effect from 1st March, 2014 which will relate to the billing period from 1st January, 2014.*

*The interim order dated 7th February, 2014 with regard to no disconnection in the supply of electricity shall continue.”*

39. The aforesaid order dated 26.3.2014 was continued by orders dated 6.5.2014 and 3.7.2014 and is still subsisting. Hon'ble Supreme Court has directed that the distribution companies will continue to pay the "current payments" with effect from 1.3.2014 which will relate to the billing period from 1.1.2014. The term 'current payments' would therefore mean the payment of the bills raised during the current month for the corresponding billing period. The said order does not put any embargo on the distribution companies to make payment of the arrears in addition to the current payments due. Further, the said Hon'ble Supreme Court order is silent about the payment appropriation mechanism i.e. methodology of appropriating the amount received. Though the contention of THDC that the issue of priority of appropriation of payments between Principal and LPSC was not a subject matter in the proceedings before the Hon'ble Supreme Court is acceptable, the fact remains that THDC has been adjusting the payments made by BRPL and BYPL, against the principal dues first and thereafter against LPSC accrued, except for the period of about 9 months (April 2013 to December, 2013) which indicates the practice and understanding between the parties on the issue.

#### **THDC Rebate Scheme 2014-19**

40. BRPL and BYPL have submitted that THDC by its communication dated 29.3.2014 offered the THDC Rebate Scheme 2014-19 which was proposed to be implemented with effect from 1.4.2014 to 31.3.2019. BRPL and BYPL have





submitted that THDC's Rebate Scheme is consistent with the original methodology of adjusting the current bills first. However, it is only after 1.9.2019 that THDC has sought to unilaterally change the mutually agreed methodology and adjust the payment first towards LPSC which is also against THDC's Scheme 2014-19. We have considered the submission of the parties. THDC's Rebate scheme 2014-19, provides as under:

*"1.2 Current Bills:*

*The current bill(s)/ billing would mean and include the bill(s) raised by THDCIL during the month in respect of power supplied to beneficiary during the previous months as per Regional Energy Accounts (REAs) issued by Regional Power Committees (RPCs) or the concerned successor entity and shall include Capacity Charges, Energy Charges, incentive, supplementary bill for the past period on account of CERC/Appellate Tribunal for Electricity/ Statutory Body Order, Income Tax bill, FERV bill, bill for reimbursement of NRLDC & ULDC charges, other taxes, duties, cess etc., in accordance with the tariff orders issued by Central Electricity Regulatory Commission (CERC), or against tariffs pending issuance of orders by CERC*

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*4. 0 Rebates under the 'THDC Rebate Scheme 2014-19'*

*The Rebate for the beneficiary who fulfil the eligibility criteria under this Scheme are as follows:*

- a) The rebate shall be allowed on the payments made by the beneficiary towards monthly bill(s) excluding the amount of non rebatable portion as per this Rebate Scheme. **The payment received by THDCIL during the month shall be first adjusted towards undisputed outstanding and the balance towards payment of Current Bill for the purpose of this Rebate Scheme on First in First Out (FIFO) basis.**" [Emphasis Supplied]*

41. BRPL and BYPL by referring to above provisions of the Scheme have submitted that the same is consistent with the mutually agreed arrangement (of adjusting principal dues first and later LPSC) and the Hon'ble Supreme Court order dated 26.3.2014 (making current payments) and therefore, THDC by issuing the letter dated 9.8.2019 has acted contrary to its own rebate scheme, which categorically provides for payments to be adjusted towards current bills. Per contra, THDC has submitted that BRPL and BYPL have incorrectly interpreted the provisions of the Scheme which categorically pertains to current bills and does not



dictate the appropriation of pending dues. We have considered the submission of the parties. The scheme provides for adjustment of the payments received during the month first towards undisputed outstanding and balance towards the payment of current bills. Thus, the current bills gets the second priority as per the scheme, the first being the “undisputed outstanding”. The Scheme does not provide for adjustment of the current bills first as contended by BRPL and BYPL. We have however noticed that notwithstanding the Rebate Scheme requiring to adjust the undisputed outstanding first, THDC has been making adjustment of the payments made by BYPL and BRPL, towards the Principal dues(energy bills) first till August 2019, when it sought to change the methodology of appropriation through its letter dated 9.8.2019.

42. The Reconciliation statements signed by THDC and BRPL for the period from July, 2011 till June, 2019 have been submitted by BRPL indicating the appropriation methodology followed by THDC, as under:

S No.	Reconciliation Period	FY	Signed on	Payment Appropriation
1.	July-11 to Sep-11	2011-12	14.10.2011	Towards Energy
2.	Oct-11 to Dec-11	2011-12	06.01.2012	Towards Energy
3.	Jan-12 to Mar-12	2011-12	12.04.2012	Towards Energy
4.	Apr-12 to June-12	2012-13	30.07.2012	Towards Energy
5.	July-12 to Sep-12	2012-13	15.10.2012	Towards Energy
6.	Oct-12 to Dec-12	2012-13	15.01.2013	Towards Energy
7.	Jan-13 to Mar-13	2012-13	10.04.2013	Towards Energy
8.	Apr-13 to Jun-13	2013-14	17.08.2013	Towards Energy/LPSC
9.	July-13 to Sep-13	2013-14	28.10.2013	Towards Energy/LPSC
10.	Oct-13 to Dec-13	2013-14	15.01.2014	Towards Energy/LPSC
11.	Jan-14 to Mar-14	2013-14	15.04.2014	Towards Energy
12.	Apr-14 to Jun-14	2014-15	06.08.2014	Towards Energy
13.	July-14 to Sept-14	2014-15	15.10.2014	Towards Energy
14.	Oct-14- to Dec-14	2014-15	14.01.2015	Towards Energy
15.	Jan-15 to Mar-15	2014-15	30.04.2015	Towards Energy
16.	Apr-15 to Jun-15	2015-16	30.07.2015	Towards Energy
17.	July-15 to Sept-15	2015-16	30.10.2015	Towards Energy
18.	Oct-15 to Dec-15	2015-16	15.01.2016	Towards Energy



19.	Jan-16 to Mar-16	2015-16	12.04.2016	Towards Energy
20.	Apr-16 to Jun-16	2016-17	28.07.2016	Towards Energy
21.	Jul-16 to Sept-16	2016-17	25.10.2016	Towards Energy
22.	Oct-16 to Dec-16	2016-17	30.01.2016	Towards Energy
23.	Jan-17 to Mar-17	2016-17	26.04.2017	Towards Energy
24.	Apr-17 to Jun-17	2017-18	31.07.2017	Towards Energy
25.	Jul-17 to Sept-17	2017-18	31.10.2017	Towards Energy
26.	Oct-17 to Dec-17	2017-18	30.01.2018	Towards Energy
27.	Jan-18 to Mar-18	2017-18		Towards Energy
28.	Apr-18 to Jun-18	2018-19	05.07.2018	Towards Energy
29.	Jul-18 to Sept-18	2018-19	15.10.2018	Towards Energy
30.	Oct-18 to Dec-18	2018-19	17.01.2019	Towards Energy
31.	Jan-19 to Mar-19	2018-19	29.04.2019	Towards Energy
32.	Apr-19 to Jun-19	2019-20	30.07.2019	Towards Energy

43. Similarly, BYPL has submitted the Reconciliation Statement signed between BYPL and THDC indicating the appropriation methodology followed by THDC as under:

S No.	Reconciliation Period	FY	Signed on	Payment Appropriation
1.	July-11 to Sep-11	2011-12	14.10.2011	Towards Energy
2.	Oct-11 to Dec-11	2011-12	06.01.2012	Towards Energy
3.	Jan-12 to Mar-12	2011-12	12.04.2012	Towards Energy
4.	Apr-12 to June-12	2012-13	27.07.2012	Towards Energy
5.	July-12 to Sep-12	2012-13	29.10.2012	Towards Energy
6.	Oct-12 to Dec-12	2012-13	15.01.2013	Towards Energy
7.	Jan-13 to Mar-13	2012-13	26.04.2013	Towards Energy
8.	Apr-13 to Jun-13	2013-14	30.07.2013	Towards Energy/LPSC
9.	July-13 to Sep-13	2013-14	12.10.2013	Towards Energy/LPSC
10.	Oct-13 to Dec-13	2013-14	23.01.2014	Towards Energy/LPSC
11.	Jan-14 to Mar-14	2013-14	15.04.2014	Towards Energy
12.	Apr-14 to Jun-14	2014-15	15.07.2014	Towards Energy
13.	July-14 to Sept-14	2014-15	15.10.2014	Towards Energy
14.	Oct-14- to Dec-14	2014-15	14.01.2015	Towards Energy
15.	Jan-15 to Mar-15	2014-15	15.04.2015	Towards Energy
16.	Apr-15 to Jun-15	2015-16	15.07.2015	Towards Energy
17.	July-15 to Sept-15	2015-16	28.10.2015	Towards Energy
18.	Oct-15 to Dec-15	2015-16	15.01.2016	Towards Energy
19.	Jan-16 to Mar-16	2015-16	12.04.2016	Towards Energy
20.	Apr-16 to Jun-16	2016-17	14.07.2016	Towards Energy
21.	Jul-16 to Sept-16	2016-17	20.10.2016	Towards Energy
22.	Oct-16 to Dec-16	2016-17	13.01.2017	Towards Energy
23.	Jan-17 to Mar-17	2016-17	17.04.2017	Towards Energy
24.	Apr-17 to Jun-17	2017-18	14.07.2017	Towards Energy
25.	Jul-17 to Sept-17	2017-18	13.10.2017	Towards Energy
26.	Oct-17 to Dec-17	2017-18	23.01.2018	Towards Energy
27.	Jan-18 to Mar-18	2017-18	12.04.2018	Towards Energy



28.	Apr-18 to Jun-18	2018-19	05.07.2018	Towards Energy
29.	Jul-18 to Sept-18	2018-19	15.10.2018	Towards Energy
30.	Oct-18 to Dec-18	2018-19	07.01.2019	Towards Energy
31.	Jan-19 to Mar-19	2018-19	39.04.2019	Towards Energy
32.	Apr-19 to Jun-19	2019-20	08.07.2019	Towards Energy

44. THDC has not objected to the said tabulation indicating the appropriation first towards energy, except stating that the reconciliation statements are only to determine the 'quantum of total outstanding' and not the sequence of apportionment of the payments. Even if this submission of THDC is presumed to be correct, the fact that the payments made by BYPL and BRPL during the relevant periods were being adjusted by THDC against Principal dues first (excepting the period from April, 2013 till December, 2013), cannot be overlooked, as the same points to the mutual understanding that the parties had with regard to appropriation of the payments made. Thus, we find that by mutually agreed arrangement, THDC followed the methodology of adjusting principal dues first, as evident from the reconciliation statements, (except for the period from April, 2013 till December, 2013),

**Adjustments during the period from April 2013 till December, 2013**

45. THDC has adjusted Rs 10.87 crore and Rs.2.28 crores paid by BRPL and BYPL respectively, during the period from April 2013 to December, 2013 towards LPSC first and has accordingly contended that there has been no agreed methodology with regard to the payment adjustment mechanism, as contended by the BSES Discoms. BRPL has submitted that the said adjustment of Rs.10.87 crore made by THDC during April 2013 to December 2013 was not agreed by BRPL in the reconciliation statements and had accordingly intimated to THDC in May, 2019 after the payment of energy dues to THDC. BYPL has submitted that THDC has erroneously adjusted Rs.2.27 crores which was not agreed by BYPL in the reconciliation statement. THDC has submitted that the claims of BRPL and BYPL



with respect to the appropriated amounts of Rs.10.87 crore and Rs.2.28 crore during April to December 2013 is barred by limitation. We have considered the rival contentions of the parties. In the case of A.P. Power Coordination Committee Vs. Lanco Kondapalli Power Ltd. [(2016) 3 SCC 468], Hon'ble Supreme Court held as under:

*“31.....Evidently, in the absence of any reason or justification the legislature did not contemplate to enable a creditor who has allowed the period of limitation to set in, to recover such delayed claims through the Commission. Hence 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.....”*

46. The limitation period for money claim is three years from the date when the cause of action accrues. If BRPL and BYPL were aggrieved about the appropriation of LPSC first between April 2013 to December 2013 erroneously, they should have approached the Commission within the limitation period of three years i.e. between April 2016 to December 2016. Raising the claims now in Petition Nos. 54/MP/2021 and 135/ MP/ 2022 which were filed in the years 2021 and 2022 respectively, are clearly barred by limitation in the light of the Lanco Londapalli judgement quoted above. Accordingly we reject the claims of BRPL and BYPL to adjust the payment made between Aril 2013 to Decenber 2013 towards principal dues first in accordance with the agreed mutual arrangement.

**Issue No.(C): Whether the payment adjustment mechanism adopted earlier was unilaterally altered vide THDC letter dated 9.8.2019? It yes, whether the same is maintainable?**

**Petition No.54/MP/2021**



47. BRPL has submitted that since September, 2011, BRPL and THDC have been following the methodology of adjusting the payments made by BRPL firstly towards principal dues and thereafter, against the LPSC accrued. However, THDC on its own volition, by letter dated 9.8.2019 unilaterally devised and adopted the new mechanism for (i) adjusting the payment received from the beneficiary, against outstanding bills including LPSC on date-wise First-in-First-Out (FIFO) basis and (ii) if the date of the bill of principal amount and LPS amount is the same, then the LPS amount shall be adjusted first, consequently undermining the mutual agreement between the parties. BRPL has submitted that the said methodology was categorically objected to by letter dated 17.9.2019 and stated that the BRPL was not in agreement with the payment adjustment mechanism unilaterally sought to be adopted and applied by THDC.

48. BRPL has submitted that the subsequent methodology of THDC is arbitrary and erroneous since (i) the said methodology is against the agreement reached between BRPL and THDC and the past practice adopted by the parties (ii) the PPAs (27.4.2006, 19.4.2006 and 27.10.2006) and the tariff regulations framed by the Commission are silent on the payment appropriation methodology and do not provide for any payment appropriation methodology (iii) the PPA dated 30.3.2012 does not also provide for appropriation of any payment towards LPSC first, as contended by THDC (iv) THDC is acting against the express instructions of BRPL to adjust the amounts firstly towards the principal amounts, which is against the prescriptions of the Indian Contract Act, 1872 (vi) As per past practice and agreement between the parties, BRPL has and is making all payments and also apportioning all its payments first towards the principal dues from September, 2011 till date (vii) the methodology was agreed to by THDC and Reconciliation statements



were signed on this understanding, excluding payment of Rs 10.87 crore. Despite being aware that the Hon'ble Supreme Court is seized of the matter, there was no occasion for THDC to seek adjustment of payments made by the BRPL towards the outstanding LPSC first, before adjusting the principal amount and (viii) THDC cannot unilaterally change the agreement arrived between the parties and in the absence of a contrary provision in the PPA, it is the prerogative and right of the BRPL to make payments of the bills and provide instructions for appropriation towards principal amounts as per practice. BRPL has further submitted that despite the above, since September 2019, THDC has been unilaterally adjusting payments made by BRPL towards LPSC first and showing outstanding principal dues. BRPL has also submitted that during the pendency of this petition, it has, without prejudice to its rights and contentions, by letter dated 18.8.2021 submitted a liquidation plan for liquidation of LPSC overdues amounting to Rs 97 crores (remaining amount from total LPSC overdues of Rs 122 crore) in five instalments viz., four equal monthly instalments aggregating Rs 20 crore and fifth instalment of Rs 17 crores. THDC while agreeing to the said liquidation plan, by letter dated 19.8.2021, stated that the final outstanding amount due from BRPL shall be in accordance with the final decision by the Court on this issue. BRPL has further stated that in terms of the agreed liquidation plan dated 18.8.2021, it had made the payment of all five instalments and THDC, on 3.2.2022 while acknowledging the payments, stated that the payments have been adjusted towards LPSC first and thereafter towards monthly charges, starting from the longest overdue bill and that the final outstanding dues shall be in accordance with the decision of this Commission, in the present petition. BRPL has pointed out that it has cleared all admitted outstanding dues towards THDC in terms of the liquidation plan and there is no default on the part of BRPL. It has also pointed out that there are no outstanding dues pending towards



THDC as per BRPL and the amounts as alleged by THDC are on account of the unlawful payment methodology adopted by THDC and the same is subject matter pending adjudication before this Commission. BRPL has added that contrary to the above, THDC vide letter dated 6.4.2022 has sought to coerce BRPL in paying the purported outstanding amount of Rs 60.18 crore, when in fact, there are no outstanding dues pending on the part of BRPL towards THDC. Accordingly, BRPL vide IA had sought interim protection against THDC not to invoke the LC established by BRPL or take any coercive steps against BRPL vis-a vis the alleged outstanding payments during the pendency of this petition.

49. *Per contra*, THDC has submitted that the payment adjustment mechanism provided under letter dated 9.8.2019 is consistent with Article 10.3 of the PPA dated 30.3.2012 executed by the parties. It has also stated that both, Article 10.3 of the PPA and the letter dated 9.8.2019, afford due priority to the longest unpaid invoice, over all other invoices, due and payable by BRPL to THDC. It has stated that since BRPL had been making payments merely towards principal energy bills deferring the payment of LPS, since the past six years, from August, 2013, the LPS being longest overdue, is eligible for adjustment mechanism. THDC has contended that while applying the appropriation mechanism (on date wise FIFO basis) and adjusting the payment towards longest pending bills (LPSC bills), it has not only followed the terms of the PPA dated 30.3.2012, but also conformed to the settled principles of law that when both principal and interest accrued thereon under single debt, are due and payable, in that case, the payment should be adjusted first towards interest and subsequently towards pending principal amount. THDC has further stated that it has the statutory right under the Tariff Regulations to claim its long pending outstanding amount towards LPSC which BRPL had categorically failed to pay since August,





2013 despite several reminders of THDC and this conduct of BRPL necessitated THDC to implement the payment adjustment mechanism provided under letter dated 9.8.2019, in terms of the settled principles of law and as per Article 10.3 of the PPA. THDC has also referred to Regulation 59 of the Central Electricity Regulatory Commission (Terms and Conditions of Tariff) (Second Amendment) Regulations, 2021 dated 19.2.2021 and submitted that the sequence of adjustment of payment to be followed by the parties shall be (i) the payment received from the customer shall be first adjusted by THDC towards recovery of pending LPS accrued on the outstanding monthly electricity charges (ii) After recovery of pending LPS, the payment received from customer shall be adjusted towards outstanding monthly electricity charges and (iii) THDC while recovering LPS shall first adjust the payment received from the customer, against the longest overdue bill of LPS and accordingly follow the descending order for adjustment of LPS bills. Subsequently, THDC shall recover the monthly electricity charges firstly against longest overdue bill of such charges. THDC has stated that by carrying out the necessary amendment in Regulation 59 of the Tariff Regulations, the Commission has reinforced the commercial principle and has clarified that the payment received from customer shall be first adjusted by a generator towards recovery of pending LPS accrued on the outstanding amount. Accordingly, THDC has submitted that in view of Article 10.3 of the PPA dated 30.3.2012 and the subsequent amendment brought out by the Commission, the payment adjustment methodology adopted vide letter dated 9.8.2019 is not only in compliance with the provisions of the PPA, but also promotes the prudent commercial principle established between creditor and debtor, which has been statutorily recognised by the Commission.



50. In response to the above, BRPL has stated that the issue of payments and alleged non-payments owing to the Regulator having depleted the ability of BRPL to pay, is pending adjudication before the Hon'ble Supreme Court in the said writ petitions, filed by BRPL & BYPL. It has also submitted that despite being aware of the fact that the Hon'ble Supreme Court is seized of the matter, there was no occasion for THDC to seek adjustment of payments made by BRPL towards LPSC first, before adjusting the principal amount. BRPL has also submitted that though the PPA as well as the Tariff Regulations (prior to the notification of the amended regulations), were silent on the appropriation of LPSC first, THDC on its own volition unilaterally devised and adopted a new mechanism of appropriating LPSC first. Pointing out that the present dispute is limited to adjustment of payments prior to February 2021, BRPL has submitted that the appropriation of dues prior to the notification of the amended regulations has to be done as per the terms and conditions mutually agreed between the parties as well as past practice followed between the parties. BRPL has further submitted that even if the Second Amendment Regulations, 2021 were to apply, these regulations clearly contemplate an adjustment of LPSC first, unless otherwise agreed between the parties. BRPL has stated that in the present case, both THDC and BRPL had, from 2007 till August, 2019 adjusted all payments first towards the principal amount except for the period from April 2013 to December 2013, when an amount of Rs.10.87 crore was adjusted by THDC towards LPS first.

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51. BYPL has submitted that in response to THDC letter dated 24.4.2018, informing that a sum of Rs 289.58 crore was due and outstanding as on 31.3.2018, BYPL vide letter dated 7.5.2018, acknowledged that an amount of Rs. 280.38 crore



was only outstanding for payment to THDC. BYPL has also stated that THDC, pursuant to filing of Petition No.239/MP/2019, issued letter dated 9.8.2019 (same as issued to BRPL) unilaterally adopting a new payment adjustment mechanism with effect from 1.9.2019, which was objected to by BYPL vide letter dated 17.10.2019. Pursuant to the ROP of the hearing dated 5.3.2020 in Petition No. 239/MP/2019, BYPL had proposed a liquidation plan for payment of Rs 10 crore per month, with effect from October, 2020 till the liquidation of the entire outstanding dues. Accordingly, BYPL has stated that on 26.10.2020, an amount of Rs 10 crores was released to THDC. Subsequently, based on the request by THDC, BYPL submitted a liquidation plan dated 18.8.2021 for payment of Rs 208.29 crore (as per BYPL records), in five equal monthly instalments of Rs 41.66 crore each starting from August, 2021, without prejudice to the pending disputes between the parties. BYPL has stated that the said liquidation plan was revised by it on 27.8.2021 for payment of the said amount in two instalments. BYPL has pointed out that both the liquidation plans (18.8.2021 and 27.8.2021) were agreed to by THDC on 19.8.2021 and 10.9.2021 respectively, stating that the final outstanding amount due from BYPL shall be in accordance with the final decision in Petition No.54/MP/2021. BYPL has further stated that in terms of the liquidation plan dated 27.8.2021, it has made payment of the admitted outstanding dues to THDC viz., First Instalment of Rs 104.15 crore, on 27.8.2021 and Second instalment of Rs 104.50 crore in five tranches between 25.11.2021 to 30.11.2021. BYPL has also submitted that THDC vide letters dated 10.9.2021 and 23.12.2021 acknowledged the payment of the aforesaid amounts by BYPL in instalments, subject to the final decision of this Commission in Petition No.54/MP/2021. BYPL has stated that while adjusting the amounts paid by it since 1.9.2019, as well in terms of the liquidation plan dated 27.8.2021, THDC, in an arbitrary manner has been unilaterally adjusting payments



made by the BYPL to THDC on date-wise FIFO basis. BYPL has added that it has cleared all undisputed outstanding dues towards THDC as on 30.11.2021, however, THDC by its communication dated 6.4.2022 has threatened BYPL to release an alleged (admittedly disputed) outstanding amount of Rs.17.54 crore, failing which THDC shall take strict actions, including initiation of insolvency proceedings against BYPL, before NCLT, to recover its dues. BYPL has pointed out that THDC is seeking to pre-empt and circumvent the adjudication of the dispute raised in Petition No.54/MP/2021.

52. Per contra, THDC has submitted that BYPL stopped procurement of power from THDC since 15.3.2016 after its share was transferred to BRPL, and there is no supply of power to BYPL currently. It has also submitted that an amount of Rs 270 crore was outstanding against BYPL since 15.3.2016 and it has not paid the amount till 30.11.2021. THDC has submitted that the payments of Rs 208 crore (during August, 2021 to November, 2021) were made after issuance of the Second Amendment Regulations dated 19.2.2021 and the Electricity (Late Payment Surcharge) Rules, 2021 dated 22.2.2021 ('LPS Rules, 2021'), which provide for adjustment of LPS first and appropriation of energy bills thereafter, starting from the longest overdue. THDC has pointed out that since payment of outstanding amounts were made by BYPL after issuance of the Second Amendment Regulations, 2021, all outstanding amounts is to be adjusted towards LPSC first and thereafter towards adjustment of energy bills. THDC has further submitted that the Ministry of Power, GOI vide notification dated 22.2.2021, has issued the Late Payment Surcharge Rules, 2021, which was later superseded by the Electricity (Late Payment Surcharge) Rules, 2022 issued vide notification dated 3.6.2022. Since, during the intervening period (27.8.2021 to 30.11.2021), when payments were made by BYPL,



the LPS Rules, 2021, which provides for adjustment of payments towards LPSC first and thereafter towards monthly charges, starting from the longest overdue bill, were in force, the same shall be applicable. Pointing out that the LPSC Rules, 2022 has *pari materia* provision, in relation to the payment appropriation, THDC has submitted that the payments made by BYPL on 27.8.2021 and in tranches during the period from 25.11.2021 to 30.11.2021 shall be appropriated as per sub-rule 5 of the LPSC Rules, 2021 read with the relevant provisions of the Second Amendment Tariff Regulations, 2021. Relying upon the Commission's order dated 8.7.2022 in Petition No. 199/MP/2021 (JPL v TANGEDCO), THDC has pointed out that LPSC Rules being procedural in nature, would apply to the pending dispute and all payments need to be first adjusted towards LPSC and thereafter towards monthly charges, starting from longest overdue bill. Accordingly, THDC has stated that it had adjusted the payments made by BYPL firstly in LPSC and thereafter in energy bill, as per the prevailing law. THDC has pointed out that there is no past practice, particularly in view of the fact that power itself was not sold to BYPL since 15.3.2016.

53. In response to the above, BYPL has submitted that in the absence of a specific methodology for adjustment of LPSC first in the PPA as well as the Tariff Regulations, the parties were following the methodology of adjusting payments made by BYPL (i) firstly against principal dues and thereafter (ii) against LPSC accrued from March, 2011 till August, 2019. It has also submitted that unilateral adoption of the payment adjustment mechanism (of adjusting LPSC first) from September 2019, vide letter dated 9.8.2019, is contradictory to the established practice being followed between the parties. BYPL, while reiterating the submissions made by BRPL above, with regard to the Second Amendment Regulations, 2021 has submitted that even in the amended regulations, weightage has been accorded to the mutually agreed



method of payment adjustment. BYPL has submitted that reliance placed upon the LPSC Rules, 2021/ 2022 by THDC is erroneous since, the word used in the said Rules, is 'due', which means 'legally payable'. Accordingly, BYPL has submitted that the amount of Rs 17.54 crore, claimed by THDC vide its communication dated 6.4.2022, would not fall under the expression 'due' since the same is not legally payable. It has argued that even if LPSC Rules, 2022 are assumed to be applicable to inter alia outstanding dues, payable by a Discom to a generator, BYPL has cleared all undisputed outstanding amounts towards THDC on 30.11.2021 and cannot therefore have retrospective effect. BYPL has added that LPSC Rules, 2022 are not applicable to the present case, in the light of the order dated 26.3.2014 of the Hon'ble Supreme Court in W.P. Nos. 104 & 105/2014 directing the BSES Discoms to pay the current dues (with effect from 1.3.2014), relating to the billing period from 1.1.2014, which is still in force. They have also submitted that the Commission's order in JPL case is not applicable in the present case, as in the said case, the liability to pay the LPSC amount claimed was admitted by the Respondent therein, and there was no dispute which was required to be adjudicated under Section 79(1)(f) of the Act.

54. We have examined the submissions of the parties. The main grievance of the BRPL and BYPL is that THDC vide its letter dated 9.8.2019 has unilaterally and arbitrarily adopted the payment adjustment mechanism (of adjusting LPSC first) which is contrary to past practice and mutual understanding between the parties till August, 2019 except for the period April 2013 to December 2013 when the LPS was adjusted first. In this regard, we refer to the THDC's letter dated 9.8.2019, separately addressed to BRPL and BYPL which reads as under:

*"Kindly refer to the above subject. Payment adjustment mechanism for payment received from the beneficiaries against their dues/bills raised by the generating companies has not been specified in CERC Tariff Regulations. Therefore, in order to*



*have common understanding during reconciliation and to avoid any complication and dispute in future, the following payment adjustment mechanism shall be adopted by THDCIL.*

*The adjustment against the payment received from the beneficiary shall be done against outstanding bills including LPS on date-wise First in First Out (FIFO) basis. Further, if the date of bill of principal amount and LPS amount is same then LPS amount shall be adjusted first.*

*The above payment adjustment mechanism shall be implemented w.e.f 01.09.2019 onwards"*

55. It is evident from the above that THDC, in order to have a common understanding during reconciliation and to avoid disputes in future, has introduced a payment adjustment mechanism, with effect from 1.9.2019 in terms of which the payments from beneficiaries (BRPL and BYPL in this case) are to be adjusted against outstanding bills including LPSC (on FIFO basis) and in case the date of bill of the principal amount and LPSC amount are the same, then LPSC is to be adjusted first. In other words, in terms of the new mechanism, the payments made by BRPL and BYPL are sought to be appropriated by THDC towards LPSC first and thereafter, towards the Principal dues, with effect from 1.9.2019. THDC has submitted that the earlier mechanism was by way of leverage granted by THDC to ameliorate the discoms from a financial exigencies as a temporary measures. It is argued that in view of clear terms of the PPA, THDC cannot be compelled to continue with the mutual agreed arrangement against its own interest for perpetuity.

56. Per contra, BRPL and BYPL have submitted that though the said letter dated 9.8.2019 states that the methodology of adjusting LPSC first is to have a common understanding during reconciliation and to avoid disputes in future, there have been no common understanding between the parties on this issue, as the same was opposed by both discoms, resulting in challenge to the same in Petition No.54/MP/2021. According to BRPL and BYPL, THDC letter dated 9.8.2019, seeking to unilaterally impose new terms into the existing mutually agreed terms is



contrary to past practice and understanding between the parties. BRPL and BYPL have challenged the said letter dated 9.8.2019 on the following grounds:

- (a) The letter dated 9.8.2019 is contrary to past practice of 12 years reflected in Reconciliation Statements signed between the parties, the PPAs, the Supreme Court order dated 26.3.2014 and THDC's own Rebate Scheme.
- (b) THDC is acting contrary to the express instructions of BSES Discoms against the provisions of Section 59 and 60 of the Contract Act.

57. As regards the first ground, it is pertinent to note that initially contractual relationship between THDC and both BRPL and BYPL was guided by the PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 signed with DTL. Subsequently, BRPL signed PPAs dated 30.3.2012 with THDC (with effective date as 1.4.2007) while BYPL continued to be governed by the PPAs between THDC and DTL. The PPAs between THDC and DTL did not contain any appropriation mechanism while the PPAs dated 30.3.2012 did contain an appropriation mechanism in the form of Clause 10.3. Both BRPL and BYPL have submitted in their consolidated written submissions that Article 10.3 does not provide for any appropriation methodology for LPSC. We have also observed in this order that the Hon'ble Supreme Court order dated 26.3.2014 only provided that the distribution companies would continue to pay the current bills and did not provide for any appropriation mechanism. Further, THDC Rebate Scheme provided for payment adjustment towards undisputed outstanding as first priority and current bills as the second priority for the purpose of the Rebate Scheme. Notwithstanding the above factual position, THDC, BRPL and BYPL adopted a mutually agreed arrangement based on their implied consent and conduct under which current bills were adjusted first which is evident from the reconciliation statements. THDC has submitted that said mechanism was adopted by THDC by way of leverage granted to BYPL and BRPL to ameliorate them from financial exigencies as a temporary measures. In our considered view, the mutually agreed





arrangement for payment adjustment adopted by the parties (by adjusting principal dues first and later on LPSC accrued), was a temporary measure to ameliorate the DISCOMS as a leverage granted by the THDC, even outside the express terms of the PPAs. We are of the view that THDC was well within its rights to withdraw such a leverage in order to protect its financial interests, in exercise of its commercial wisdom. With the issue of the said letter, the past practice and implied mutual understanding between THDC and both BRPL and BYPL came to an end on 31.8.2019.

58. The next ground of challenge is that in terms of Section 59 and 60 of the Indian Contract Act, BRPL and BYPL have the prerogative to indicate the payment adjustment mechanism and THDC has acted contrary to their instructions by not providing for adjustment against current bills first in its letter dated 9.8.2019.

Sections 59 and 60 are extracted as under:

*“59. Application of payment where debt to be discharged is indicated.—Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying, that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.*

*60. Application of payment where debt to be discharged is not indicated.—Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.”*

59. As per Section 59, if a debtor owing several distinct debts to one person makes a payment to him with the intimation that the payment is to be applied to the discharge of some particular debt, the payment must be applied accordingly. Both BRPL and BYPL have argued that they have been clearly indicating to THDC that the amount paid by them was to be adjusted towards principal amount first since THDC has been issuing separate invoices and signing separate reconciliation statements



for Energy Dues and LPSC Dues, thus constituting separate and distinct debt. In *Industrial Credit & Development Syndicate v. Smithaben H. Patel*, [(1999) 3 SCC 80], Hon'ble Supreme Court has held as under:

*“14. .... The provisions of Sections 59 to 61 of the Contract Act are applicable in cases where a debtor owes several distinct debts to one person and do not deal with cases in which the principal and interest are due on a single debt.”*

60. Since in the cases under consideration, the LPSC has accrued on account of non-payment of current bills by due date, the principal and LPSC would be considered as a single debt and not separate and distinct debts as made out by BRPL and BYPL. Consequently, Section 59 of the Indian Contract Act is not applicable and THDC is not bound to abide by the instructions of BRPL and BYPL in the matter of appropriation of the payment towards current dues first.

61. From the above discussion, it clearly emerges that the PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006 between DTL and THDC governed the contractual relation between THDC and BYPL till 14.3.2016 (BYPL's share was transferred to BRPL with effect from 15.3.2016) and the contractual relationship between THDC and BRPL upto 31.3.2007. The PPA dated 30.3.2012 governed the contractual relationship between THDC and BRPL with effect from 1.4.2007. While there was absence of any payment apportionment mechanism in PPAs dated 27.4.2004, 19.4.2006 and 27.10.2006, the PPA dated 30.3.2012 did contain Clause 10.3 with regard to appropriation mechanism. However, there is divergence of views between the parties with regard to interpretation of Clause 10.3 of the PPAs dated 30.3.2012. While both BRPL and BYPL have admitted in their consolidated written submissions that Article 10.3 of the PPA does not provide for any appropriation methodology for LPSC, THDC has argued that Clause 10.3 of the PPAs dated 30.3.2012 relating to BRPL provides for the payment appropriation methodology. Without going into the



merit of contention of the parties with regard to interpretation of Clause 10.3 of the PPAs dated 30.3.2012, the fact remains that the parties have been acting on an implied mutual understanding by apportioning the payment towards current bills first and then towards LPSC except for a brief period from April 2013 to December 2013 where LPSC was adjusted first. The Commission has already given a finding (Para 46 of this order) that the said appropriation (April 2013 to December 2013 cannot be reopened being barred by limitation. Further, the Commission is of the view that the appropriation methodology adopted and duly reconciled by the parties upto 31.8.2019 does not require any interference now.

62. THDC issued letter dated 9.8.2019 seeking to change the then prevailing appropriation mechanism with effect from 1.9.2019. This change of mechanism has been opposed by BRPL and BYPL. We have already noted in para 55 of this order, that the payment adjustment methodology adopted by the parties prior to 1.9.2019 was an arrangement as a temporary measure to ameliorate the Discoms as a leverage granted by THDC, even outside the express terms of the PPAs dated 30.3.2012 and THDC was well within its rights to withdraw such a leverage in order to protect its financial interests.

63. THDC has also argued that the appropriation methodology proposed by it through its letter dated 9.8.2019, effective from 1.9.2019, was in line with the general rule of appropriation settled by Hon'ble Supreme Court in a number of judgements. Few of the judgements of Hon'ble Supreme Court including those relied upon by THDC are discussed as under:

(a) ***Meghraj v. Bayabai, [(1969) 2 SCC 274]***

*"5. In Venkatadri Appa Row v. Parthasarathi Appa Row [LR 47 IA 150] , the Judicial Committee of the Privy Council observed that upon taking an account of principal and interest due, the ordinary rule with regard to payments by the debtor unappropriated*



either to principal or interest is that they are first to be applied to the discharge of interest. Lord Buchmaster delivering the judgment of the Board observed:

*“There is a debt due that carries interest. There are moneys that are received without a definite appropriation on the one side or on the other, and the rule which is well established in ordinary cases is that in those circumstances the money is first applied in payment of interest and then when that is satisfied in payment of the capital. That rule is referred to by Rigby L.J. in the case of Parr Banking Co. v. Yates [(1898) 2 QB 460] in these words: “The defendant’s counsel relied on the old rule that does, no doubt, apply to many cases, namely, that, where both principal and interest are due, the sums paid on account must be applied first to interest. That rule, where it is applicable, is only common justice. To apply the sums paid to principal where interest has accrued upon the debt, and is not paid, would be depriving the creditor of the benefit to which he is entitled under his contract.”*

6. Counsel for the appellant contended that in Venkatadri Appa Row case there was no specific appropriation by the debtor, whereas in the present case there is specific direction by the debtor. But the normal rule is that in the case of a debt due with interest any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal. It was by the mortgagors to plead and prove an agreement — that the amounts which were deposited in Court by the mortgagors were accepted by the mortgagees subject to a condition imposed by the mortgagors. In the present case there is no evidence which supports the contention raised by Counsel for the appellant”.

**(b) Industrial Credit & Development Syndicate v. Smithaben H. Patel, [(1999) 3 SCC 80]**

*“14. In view of what has been noticed hereinabove, we hold that the general rule of appropriation of payments towards a decretal amount is that such an amount is to be adjusted firstly, strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments be made firstly in payment of interest and costs and thereafter in payment of the principal amount. Such a principle is, however, subject to one exception, i.e., that the parties may agree to the adjustment of the payment in any other manner despite the decree. As and when such an agreement is pleaded, the onus of proving is always upon the person pleading the agreement contrary to the general rule or the terms of the decree schedule. The provisions of Sections 59 to 61 of the Contract Act are applicable in cases where a debtor owes several distinct debts to one person and do not deal with cases in which the principal and interest are due on a single debt.”*

**(c) Gurpreet Singh v. Union of India, [(2006) 8 SCC 457]:**

*“20. In Industrial Credit & Development Syndicate v. Smithaben H. Patel [(1999) 3 SCC 80 : (1999) 1 SCR 555] this Court considered the question whether Sections 59 to 61 of the Contract Act would apply to a debt that has merged in a decree. This Court held that Sections 59 and 60 of the Contract Act would be applicable only at pre-decretal stage and not thereafter, since post-decretal payments are to be made either in terms of the decree or in terms of the agreement arrived at between the parties, though on the general principle as mentioned in Sections 59 and 60 of the Contract Act. It was also held that the general rule of appropriation towards a decretal amount was that such an amount was to be adjusted strictly in accordance with the directions contained in the decree and in the absence of such direction, adjustments be made firstly in payment of interest and costs and thereafter in payment of the principal amount, subject of course, to any agreement between the parties.”*



64. From the above judgements, the following principles of appropriation of payment towards outstanding dues emerge:

- (a) The normal rule is that in the case of a debt due with interest, any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter to the principal.
- (b) In case of decretal amount, the general principle of appropriation is that it should be in terms of the decree and in the absence of such direction, adjustments shall be made firstly in payment of interest and costs and thereafter in payment of the principal amount.
- (c) The above principles are subject to one exception i.e. the parties may agree to the adjustment of the payment in any other manner. As and when such an agreement is pleaded, the onus of proving is always upon the person pleading the agreement contrary to the general rule or the terms of the decree.

65. It emerges from the above that as per the general principle of appropriation, in a case of debt with interest, any payment made by the debtor is in the first instance to be applied towards satisfaction of interest and thereafter, towards the principal. The Commission is the view that the methodology proposed by THDC vide its letter dated 9.8.2019 is in line with the (i) provision in BRPL PPA for appropriation of “unpaid, undisputed outstanding” amounts first and thereafter the “current bill” and (ii) the general rule of appropriation between principal dues and interest as laid down by the Hon’ble Supreme Court in a number of judgements as quoted in para 63 above. Accordingly, based on the reconciled amount of outstanding dues and LPSC as on 1.9.2019 arrived based on the original method (current dues first and thereafter LPSC with the exception for the period from April 2013 to December 2013), THDC shall adjust the payments received from BRPL and BYPL on or after 1.9.2019 first towards LPSC, next towards outstanding principal and finally towards current bills.



**Issue No (D): Whether THDC is entitled for relief, in terms of the LPSC Rules, 2021, Second Amendment to the 2019 Tariff Regulations, and the LPSC Rules, 2022?**

66. THDC has submitted that BYPL had cleared the pending dues with a substantial delay of five years and eight months, on 27.8.2021 and during the period from 25.11.2021 to 30.11.2021. MOP, GOI issued LPS Rules 2021 notification dated 22.2.2021. THDC has submitted that payments made by the BYPL shall be appropriated as per sub-rule 5 of the LPS Rules, 2021. THDC has stated that the payment appropriation mechanism has been correctly adopted by THDC in compliance to the LPSC Rules.

67. THDC has further submitted that Regulation 59 of the 2019 Tariff Regulations, as amended vide the Second Amendment Regulations, 2021 notified on 13.9.2021 has validated the appropriation mechanism adopted by THDC. THDC has submitted that the BYPL and BRPL ought to be directed to make the payment of Rs 18.54 crore and Rs. 61.56 crore, respectively, as on 25.8.2022 in terms of the LPS Rules and Second Amendment to the Tariff Regulations, 2019.

68. Per contra, BYPL has submitted that the word used in the LPS Rules, is 'due', which means 'legally payable'. Accordingly, the amount of Rs 17.54 crore, claimed by THDC would not fall under the expression 'due' since the same is not legally payable. BYPL has further contended that even if LPSC Rules, 2022, which was notified on 3.6.2022, is assumed to be applicable, it has cleared all undisputed outstanding amounts towards THDC on 30.11.2021 and cannot therefore have retrospective effect. BRPL has submitted that the Second Amendment Regulations contemplates an adjustment towards LPSC first, unless otherwise agreed by the parties. It has been further contended that THDC cannot apply the Second Amendment Regulations, 2021 for payment adjustment, on the dues arising prior to



the applicability of these regulations and therefore, THDC is required to follow the agreed terms between the parties for adjustment of payments first towards principal outstanding dues.

69. We have considered the submission of the parties. Ministry of Power, Government of India notified the Electricity (Late Payment Surcharge and related matters) Rules, 2021 (LPS Rules 2021) on 22.2.2021 and Electricity (Late Payment Surcharge and related matters) Rules, 2022 (LPS Rules 2022) on 3.6.2022. Regulations 4 and 5 of the LPS Rules, 2022 are pari materia with Rules 4 and 5 of LPS Rules 2021. Rules 4 and 5 of LPS Rules 2021 are extracted as under:

*“4. Late Payment Surcharge.- (1) Late Payment Surcharge shall be payable on the payment outstanding after the due date at the base rate of Late Payment Surcharge applicable for the period for the first month of default.*

*(2) The rate of Late Payment Surcharge for the successive months of default shall increase by 0.5 percent for every month of delay provided that the Late Payment Surcharge shall not be more than 3 percent higher than the base rate at any time:*

*Provided that the rate at which Late Payment Surcharge shall be payable shall not be higher than the rate specified in the agreement for purchase or transmission of power, if any:*

*xxxxx.*

*5. Adjustment towards Late Payment Surcharge. - All payments by a distribution licensee to a generating company or a trading licensee for power procured from it or by a user of a transmission system to a transmission licensee shall be first adjusted towards Late Payment Surcharge and thereafter, towards monthly charges, starting from the longest overdue bill.”*

70. Regulation 59 of the 2019 Tariff Regulations introduced through the Second Amendment Regulations, 2021 provides as under:

*“59. Late payment surcharge: In case the payment of any bill for charges payable under these regulations is delayed by a beneficiary or long-term customer as the case may be, beyond a period of 45 days from the date of presentation of bills, a late payment surcharge at the rate of 1.50% per month shall be levied by the generating company or the transmission licensee, as the case may be*

*(2) Unless otherwise agreed by the parties, the charges payable by a beneficiary or long-term customer shall be first adjusted towards late payment surcharge on the outstanding charges and thereafter, towards monthly charges billed by the generating company or the transmission licensee, as the case may be, starting from the longest overdue bill.”*



71. It is observed that The Second Amendment Regulations, 2021 are in line with the provisions of the LPS Rules. The only difference is that the Second Amendment Regulations, 2021 carves out an exception in the form of “unless otherwise agreed by the parties”. In the cases in hand, as on the date of coming into force of the Second Amendment Regulations, 2021, there was no agreement between THDC and BYPL on the manner of appropriation against the payment made. In the case of BRPL, Article 10.3 of the PPAs dated 30.3.2012 between THDC and BRPL contain the provisions of appropriation of payment towards “earlier unpaid Outstanding” first. Therefore, the expression “unless otherwise agreed by the parties” in Clause (2) of Regulation 59 of Clause (2) of Regulation 59 of Second Amendment Regulations, 2021 is of no avail. In PTC India Limited Vs. Central Electricity Regulatory Commission and Others [(2004) 4 SCC 603], Hon’ble Supreme Court has held that regulations made under Section 178 of the Electricity Act, 2003 will make inroad into and have overriding effect on existing contract. Relevant portion of the judgement is extracted as under:

*“58. A regulation under Section 58 is in the nature of a subordinate legislation. Such subordinate legislation can even override the existing contracts including power purchase agreement which have got to be aligned with regulations under Section 178.”*

In accordance with the above, the payments made by BRPL and BYPL shall be made in accordance with the provisions of LPS Rules, 2021 with effect from 22.2.2021 and in accordance with Second Amendment Regulations, 2021 which is line with the LPS Rules, 2021.

72. Accordingly, the parties are directed to reconcile the outstanding dues/payments, and adjust the same. in terms of the findings in this order, within one month from the date of this order. Any excess recovery or under recovery shall be settled, by the parties within two months thereafter.





73. We notice that in the present case, certain interim orders, directing THDC not to take any coercive action, in terms of their letter dated 6.4.2022, was granted to the BSES Discoms. In view of the findings above, the interim orders passed by this Commission shall stand disposed.

### **Summary of the Findings**

74. Summary of our findings in this order are as under:

*(a) The PPAs between THDC and BYPL are silent about the priority of appropriation of the payments received between the current dues, outstanding principal and LPSC. Article 10.3 of the PPAs dated 30.3.2012 between THDC and BRPL contain the provisions of appropriation of payment towards “earlier unpaid Outstanding” first. However, THDC and BRPL/BYPL, as per mutually agreed arrangement/ past practice, had been adopting the methodology of adjusting payments against principal dues first and thereafter against LPSC accrued (except from April 2013 to December 2013).*

*(b) THDC by its letter dated 9.8.2019, has withdrawn the leverage granted in the payment adjustment mechanism with effect from 1.9.2019 and therefore, the earlier mutually agreed arrangement/ past practice between the parties regarding priority of appropriation ceased to bind the parties with effect from that date.*

*(c) All payments made by BYPL and BRPL prior to 1.9.2019 shall be reconciled and adjusted as per the implied understanding/ mutually agreed arrangement between the parties. Adjustment of Rs 10.87 crore and Rs.2.28 crore paid by BRPL and BYPL respectively during the period from April 2013 to December, 2013 towards LPSC first by THDC cannot be disturbed being beyond the period of limitation.*

*(d) The methodology proposed by THDC vide its letter dated 9.8.2019 is in line with the provisions of appropriation of payment towards “earlier unpaid Outstanding” first as contained in BRPL PPA and general rule of appropriation laid down by Hon’ble Supreme Court in a catena of judgements., Accordingly, with effect from 1.9.2019, adjustment of payments made by BRPL and BYPL shall be made first towards LPSC, next towards outstanding principal and finally towards current bills. This mechanism will be followed till 21.2.2021 when LPS Rules, 2021 came into effect.*

*(e) LPS Rules, 2021, Second Amendment Regulations, 2021 and LPS Rules 2022 shall be applicable from the respective dates of their coming into effect. Since the priority of appropriation is the same in all the three statutory instruments i.e. first towards LPSC and then towards monthly charges starting with the longest overdue bill, the said methodology shall be adopted for appropriation of the payments made against the outstanding dues as on 22.2.2021 and thereafter.*



*(f) THDC, BRPL and BYPL are directed to reconcile and adjust the payments made accordingly within a period of one month and any excess or under recovery by THDC shall be settled by the parties within two months thereafter.*

66. The above directions are subject to the final decision of the Hon'ble Supreme Court, on this issue, if any, in the pending writ petitions.

67. Petition Nos, 239/MP/2019, 54/MP/2021 and 135/MP/2022 are disposed of in terms of the above.

**Sd/-**  
**(Pravas Kumar Singh)**  
**Member**

**Sd/-**  
**(Arun Goyal)**  
**Member**

**Sd/-**  
**(I.S. Jha)**  
**Member**

