

**BEFORE THE CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 270/MP/2022

**Coram:
Shri Jishnu Barua, Chairperson
Shri I.S. Jha, Member
Shri Arun Goyal, Member
Shri P.K. Singh, Member**

Date of order: 7th November, 2023

In the matter of

Petition under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 read with Purchase Order No. 38 dated 4.2.2016 and Purchase Order No. 22 dated 20.07.2018 issued by distribution companies of State of Telangana for recovery of Late Payment Surcharge payable to Sembcorp Energy India Limited for delayed payment.

**And
In the matter of**

Sembcorp Energy India Limited,
5th Floor, Tower C, Building No 8,
DLF Cybercity, Gurgaon,
Haryana – 122002

...**Petitioner**

Versus

1. Telangana State Power Coordination Committee,
Vidyut Soudha, Khairatabad,
Hyderabad – 500082

2. Southern Power Distribution Company of Telangana Limited,
Corporate Office: #6-1-50, Mint Compound,
Hyderabad – 500063

3. Northern Power Distribution Company of Telangana Limited,
H. No: 2-5-31/2, Corporate Office, Vidyut
Bhavan, Nakkalgutta,
Hanamkonda, Warangal –506001

...**Respondents**

Parties present:

Shri Vishrov Mukerjee, Advocate, SEIL
Shri Yashavi Kant, Advocate, SEIL

Ms. Anamika Rana, Advocate, SEIL
Shri D. Abhinav Rao, Advocate, Telangana Discoms
Shri Rahul Jajoo, Advocate, Telangana Discoms

ORDER

The present Petition has been filed by Sembcorp Energy India Limited (now known as SEIL Energy India Limited) (SEIL) under Section 79(1)(b) read with Section 79(1)(f) of the Electricity Act, 2003 (in short 'the Act') seeking payment of the outstanding Late Payment Surcharge claimed under the Purchase Order No. 38 dated 4.2.2016 (the Purchase Order 38) and the Purchase Order No. 22 dated 20.7.2018 (the Purchase Order 22) issued by the Telangana State Power Coordination Committee (TSPCC), Southern Power Distribution Company of Telangana Limited (TSSPDCL), and Northern Power Distribution Company of Telangana Limited (TSNPDCL) (hereinafter collectively referred to as 'the TS Discoms'). The Petitioner is seeking recovery of the outstanding Late Payment Surcharge (LPS) on delayed payment of energy bills raised under Purchase Order 22 for the power supply for the period from May 2016 to May 2017 and compensation for deviation in offtake of power against the approved quantum under Purchase Order 38 for the power supplied during the period from August 2018 to September 2018. The Petitioner has made the following prayers:

“(a) Direct Telangana Discoms (Respondent Nos. 1 to 3) to pay Rs. 22,02,55,023/- to SEIL towards Late Payment Surcharge under Purchase Order No. 38 dated 04.02.2016 along with interest till actual date of payment;

(b) Direct Telangana Discoms (Respondent Nos. 1 to 3) to pay Rs. 2,24,93,671/-to SEIL towards Late Payment Surcharge under Purchase Order No. 22 dated 20.07.2018 along with interest till actual date of payment;

(c) As an interim measure, direct Telangana Discoms (Respondent Nos. 1 to 3) to release 75% of the aforesaid outstanding amount of LPS payable to SEIL;

- (d) Direct Telangana Discoms (Respondent Nos. 1 to 3) to pay interest pendente lite till actual payment of Late Payment Surcharge amounts; and
- (e) Pass any other order or direction as this Hon'ble Commission may deem fit in light of facts and circumstances of the present Petition."

Background

2. The Petitioner is a generating company within the meaning of Section 2(28) of the Act as it is engaged in the business of generation, operation, and maintenance of generating plants, including owning and operating Sembcorp Energy India Limited (P1 Project) and Sembcorp Energy India Limited (P2 Project) comprising 1320 MW (2x660 MW), respectively located in the State of Andhra Pradesh.

3. The Petitioner supplied power to the Respondents in terms of the following arrangements (which are the subject matter of the present Petition):

- (a) Purchase Order No. 38 dated 4.2.2016 for the supply of 300 MW Round-the-Clock (RTC) power from 27.5.2016 to 25.5.2017.
- (b) Purchase Order No. 22 dated 20.7.2018 for supply of 50 MW RTC Power for period 1.8.2018 to 30.9.2018.

4. The Purchase Order 38 and the Purchase Order 22 were issued in favour of Sembcorp Gayatri Power Limited (SGPL) (formerly known as 'NCC Power Projects Limited'). Subsequently, vide Order dated 31.10.2018 issued by the Regional Director, South East Region, the Ministry of Corporate Affairs, SGPL amalgamated into SEIL, i.e. the Petitioner. In the present case, the Petitioner supplied power to TS Discoms from the P2 Project.

5. It has been submitted by the Petitioner that, in terms of Purchase Order 38, compensation is to be levied for deviations of more than 30% in the offtake of contracted energy for which open access has been allocated on a monthly basis. Further, on all dues which remain unpaid beyond 30 days, a surcharge is leviable at

the rate of 1.25% per month on the pending amounts till the actual date of payment.

The relevant provisions of Purchase Order 38 are reproduced hereunder:

“Compensation Clause:

[...]

Short supply/intake of Power:

a) Both the parties would ensure that actual scheduling does not deviate by more than **30% of the contracted Energy** as per the approved Open Access on monthly basis.

b) In case deviation from Procurer side is more than **30% of contracted energy** for which Open Access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per Kwh for the quantum of shortfall in excess of permitted deviation of 30% while continuing to pay Open Access charges as per the contract.

[...]

Surcharge of Late Payment

A delayed payment surcharge of 1.25% (one and quarter percent) per month shall be leviable on all dues remaining unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in Telangana State, the immediate next working day will be treated as due date of payment. Surcharge will be liable for payment for the period beyond 30 days till date of payment.”

6. Under Purchase Order 22, bills are to be raised on a weekly basis. Further, on all dues that remain unpaid beyond 30 days, a surcharge is leviable at the rate of 1.00% per month on the pending amounts till the actual date of the payment. The relevant provisions of the Purchase Order 22 are reproduced hereunder:

“2. Billing cycle:

*Weekly bills may be raised provisionally by sellers for the energy delivered at Telangana State (TS) Periphery based on RLDC schedules, duly considering PoC Withdrawal Losses. **For the purpose of raising of weekly bills, the month shall be divided into four parts i.e., from 00:00 hrs of 1st of the month to 24:00 hrs of 8th, from 00:00 hrs of 9th to 24:00 hrs of 15th , from 00:00 hrs of 16th to 24:00 hrs of 23rd, from 00:00 hrs of 24th to 24:00 hrs of last day of the month.***

***The 4th weekly bill is final** and may be raised for the energy delivered at Telangana State (TS) Periphery based on Regional Energy Account (REA) issued by} SRPC, duly considering PoC Withdrawal losses during, the month, after adjustment of the energy billed provisionally for the month. Bill should be raised along with corridor approvals issued by SRLDC.*

[...]

4. Payment Terms:

The due date for payment would be 9th day after the date of receipt of fax / email bill subject to receipt of original invoice within due date. In case the due date is a Bank holiday in Telangana State, the next working day would be treated as due date. The bill received before 2.00 PM on a working day at TSPCC will only be considered as date of receipt, otherwise the next day will be considered as date of receipt. If the bill is not in full shape and needs to be corrected, the date of receipt of corrected bill will be treated as date of receipt. [...]

8. Surcharge for Late Payment:

A delayed payment surcharge of 1.00% (one percent) per month shall be leviable on all remaining due unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in Telangana State, the immediate next working day will be treated as due date of payment. Surcharge will be liable for payment for the period beyond 30 days till date of payment.”

7. According to the Petitioner, it raised weekly bills in accordance with Purchase Order 22 and invoices levying compensation charges for more than 30% deviation in offtake of contracted energy in accordance with Purchase Order 38. However, despite the raising of the weekly Bills/compensation invoices in terms of the Purchase Orders and repeated correspondences seeking payment, there was a delay by the Respondents in payment of the invoices. On account of this delay in payment, the Respondents are liable to pay the Late Payment Surcharge (LPS) for the delay. The Petitioner has submitted that, despite raising such invoices and correspondence, the Respondents have failed to make the payment of the applicable LPS.

Submissions by the Petitioner

8. The Petitioner has *inter alia* submitted as under:

(a) On 4.2.2016, Respondent No. 1, Telangana State Power Coordination Committee (Respondent No. 1 / TSPCC) issued the Purchase Order 38 to the Petitioner for the supply of 300 MW Round the Clock (RTC) power from 27.5.2016 to 25.5.2017. Purchase Order 38 was amended vide Amendment dated 31.5.2016.

(b) On 20.7.2018, Respondent No. 1 issued Purchase Order No. 22 to the Petitioner for the supply of 50 MW RTC Power for the period from 1.8.2018 to 30.9.2018.

(c) The Petitioner raised invoices levying compensation charges for more than a 30% deviation in offtake of contracted energy in terms of Purchase Order 38 and weekly energy bills in terms of Purchase Order 22. However, the Respondents delayed making payments which triggered the applicability of LPS. The Respondents have failed to make payment of the outstanding LPS amounting to Rs. 22,02,55,023/- (payable as on 26.12.2019) in terms of Purchase Order 38 and Rs. 2,24,93,671/- (payable as on 26.11.2019) in terms of the Purchase Order 22.

(d) During the relevant period, the Petitioner wrote several letters to the Respondents seeking immediate payment of the outstanding LPS amounts. However, despite repeated reminders, the Respondents failed to pay the outstanding dues.

(e) On 27.4.2018, TSPCC wrote to SEIL admitting to the amount of Rs. 59,19,42,724/- payable towards compensation to SEIL (after a 5% waiver). However, this amount was paid approximately 20 months later in tranches between 6.12.2019 and 26.12.2019. Since the LPS claim crystallised only post-26.12.2019, the limitation period will begin on 26.12.2019 and expire on 25.12.2022. As the present Petition was filed on 25.8.2022, it has been filed within the period of limitation.

(f) The claim of the Petitioner qua LPS is within the period of limitation and in accordance with the Limitation Act, 1963, read with Order dated 10.01.2022 passed by the Hon'ble Supreme Court in M.A. No. 29 of 2022, wherein the limitation period was extended on account of Covid-19.

(g) The Respondents have neither disputed the compensation invoices (Purchase Order 38) and weekly Bills (Purchase Order 22) nor the LPS invoices raised by the Petitioner. Therefore, the liability to pay LPS stands admitted.

(h) LPS is a provision for interest by way of compensation for delayed payments. It is also meant to act as a disincentive for delayed payments. The

mandatory nature of LPS has been recognized by the Hon'ble Supreme Court in its judgment dated 8.10.2021 in Civil Appeal No. 1843 of 2021, titled Maharashtra State Electricity Distribution Company Limited vs. Maharashtra Electricity Regulatory Commission & Ors. (Para 186, 187, 196, 197, 204). In this regard, the Petitioner has further placed reliance on Order dated 8.1.2020 in Petition No. 22/MP/2019 titled D.B Power Ltd. vs. TANGEDCO Limited (Para 10, 11), judgment dated 8.6.2020 in Appeal No. 56 of 2020 in DB Power Limited vs. CERC and Ors. and judgment dated 27.04.2021 in Appeal No. 77 of 2018 titled Maharashtra State Electricity Distribution Co. Ltd. vs. MERC & Ors.

(i) Furthermore, the High-Level Empowered Committee (HLEC), headed by the Cabinet Secretary, vide its report dated 12.11.2018 (HLEC Report) has acknowledged an existing trend whereby the State Discoms are delaying the payment of Monthly Bills and are not paying LPS on delayed payments, despite the PPA providing for the same. Accordingly, Clause 3.1 of the HLEC report recommends that LPS be mandatorily paid in the event of a delay in payment by the Discoms.

(j) Subsequently, a Group of Ministers (GoM) headed by the Finance Minister, Road Transport Minister, Minister of Commerce, Minister of Petroleum and Natural Gas Minister of Railways and Minister of Power (MoP) constituted by the Central Government to examine the specific recommendations of HLEC submitted its recommendation to make payment of LPS mandatory to the Cabinet Committee on Economic Affairs (CCEA) on 7.3.2019, and the same was approved by CCEA on 7.3.2019.

(k) The Respondents are liable to compensate the Petitioner for the delay in making payment of the LPS Invoices till the actual date of payment on account of the inherent nature of interest being the time value of money to which the Petitioner is entitled.

Hearing dated 13.4.2023

9. The Petition was admitted on 13.4.2023, and notices were issued to the Respondents and the Petitioner to file their respective replies and rejoinders, including

on the aspect of limitation. Pertinently, no dispute was raised regarding the jurisdiction of this Commission to adjudicate the present Petition.

Submissions by the Respondents

10. The Respondents, in their joint reply dated 3.5.2023, have submitted as under:

(a) The Petitioner's claim relates to the financial year 2016-17, and the present Petition has been filed only on 23.8.2022. Therefore, the present Petition is barred by limitation.

(b) Orders passed by the Hon'ble Supreme Court on suspension of the limitation period during the Covid-19 pandemic are not applicable to the present Petition as the limitation for filing the present Petition expired much before the suspension of the limitation period by the Hon'ble Supreme Court.

As regards Purchase Order 38

(c) The invoices for compensation for deviations in offtake of power are to be billed cumulatively every month. Accordingly, the bills were required to be raised every month.

(d) For a delay in payment of each monthly compensation bill, there would be a corresponding LPS bill in the subsequent month. Therefore, each monthly accrual on unpaid amounts beyond 30 days is a distinct and separate cause of action.

(e) Supply of power to the Respondents began on 27.6.2016. Accordingly, in July 2016, the Petitioner was required to raise bills against deviations in the offtake of power by the Respondents. Therefore, the cause of action for default of the first compensation bill payment leading to LPS accrual arose on 1.8.2016; hence, LPS claims for the period from August 2016 to February 2017 are *ex-facie* time-barred.

(f) The Purchase Order 38 does not provide for accrual of LPS on consolidated bills. In terms of Purchase Order 38, LPS is accrued on payment of monthly bills delayed beyond 30 days.

(g) The Petitioner did not provide the consolidated bill dated 21.11.2018 to the Respondents, as is evident from the fact that the consolidated bill does not

bear the 'Office Inward Stamp' of the Respondents. Furthermore, the Petitioner has not carried forward the previous LPS in the subsequent bills raised by it, therefore, it is deemed that no such claim was submitted by the Petitioner.

(h) The Petitioner has not filed any proof of acknowledgement for LPS bills except the 2nd LPS bill dated 10.12.2018 and 3rd LPS bill dated 18.01.2019 as they bear Office Inward Stamp of the Respondents. Therefore, it is evident that the rest of the bills were not submitted by the Petitioner to the Respondents.

(i) There is discrepancy in the LPS amounts claimed by the Petitioner as the Petitioner has claimed Rs. 24,66,428/- for period from 21.11.2018 to 09.12.2018 (18 days) vide 2nd LPS bill dated 10.12.2018, whereas, the Petitioner has claimed Rs. 76,45,927/- for period from 10.12.2018 to 17.01.2019 (39 days) vide 3rd LPS bill dated 18.01.2019.

As regards the Purchase Order 22

(j) With regard to Purchase Order 22, the Petitioner has provided acknowledgement/proof of submission i.e. 'Office Inward Stamp' of the Respondents only for two LPS bills dated 14.11.2018 and 18.1.2019, acknowledging the receipt of the bills. Accordingly, the rest of the LPS bills cannot be considered.

Submissions by the Petitioner in Rejoinder

11. The Petitioner, vide its rejoinder dated 7.7.2023, has mainly submitted as under:

(a) The contention of the Respondents that orders of the Hon'ble Supreme Court on suspension of limitation period during the Covid-19 pandemic are not applicable to the present Petition as the limitation for filing the present Petition expired much before the suspension of limitation period by the Hon'ble Supreme Court is incorrect as:

(i) The limitation period would commence from the date of receipt of the complete payment of the outstanding compensation for deviation in offtake by the Respondents. This is the date on which the Respondent's liability to pay LPS gets crystallised.

(ii) The Respondent's failure to pay LPS constitutes a "continuing breach", giving rise to a fresh cause of action every day, till the breach continues. Thus, there exists a continuing cause of action. As the Respondents have not paid the outstanding LPS as on the date, the bar of limitation would not apply.

(iii) Without prejudice, the right to sue/cause of action accrued in favour of SEIL to file the present Petition seeking payment of the LPS only after deemed denial by the TS Discoms of its liability to pay the LPS, i.e. by way of their reply to the present Petition.

Purchase Order 38

(b) The Petitioner raised consolidated invoices dated 2.6.2017 and 26.12.2017 on TS Discoms for compensation payable on account of a difference in availability due to a deviation of more than 30% in the offtake of the contracted energy. Subsequently, the Petitioner, vide its letters dated 6.3.2017, 19.6.2017, 19.9.2017, and 25.10.2017 requested Respondent No. 1 to release the amount of Rs 62,30,97,604/- payable in terms of the compensation bills dated 2.6.2017 and 26.12.2017.

(c) On 20.12.2017, the Petitioner extended a 5% waiver of the compensation payable by TSPCC in light of the meeting held on 19.12.2017. On 27.4.2018, Respondent No. 1 wrote to the Petitioner admitting to the amount of Rs. 59,19,42,724/- payable towards compensation to the Petitioner after a 5% waiver.

(d) However, this amount was paid approximately 20 months later in tranches between 6.12.2019 and 26.12.2019. The Respondent No. 1 paid Rs. 2,00,00,000/- to the Petitioner on 30.7.2019. Further, balance payments towards the principal amount were made between 6.12.2019 and 26.12.2019 as recorded in the letter dated 30.11.2021 from the Petitioner to the Respondent No. 1. Accordingly, the entire compensation payable for the deviation in offtake of power was finally paid by Respondents only on 26.12.2019.

(e) As the LPS claim crystallised only post-26.12.2019 (date of complete and final payment), the limitation period will begin on 26.12.2019 and expire on 25.12.2022. Therefore, the present Petition was filed on 25.8.2022 within the period of limitation.

(f) Without prejudice to the foregoing, the present Petition is covered under the Order dated 10.1.2022 passed by the Hon'ble Supreme Court in M.A. No. 21 of 2022 & batch, as under:

(i) With respect to Purchase Order 38, the LPS claim was crystallised only on 26.12.2019 when the complete payment was made. Thus, the limitation would begin on this date. Accordingly, the limitation would have ordinarily expired on 25.12.2022. As per SC Order dated 10.1.2022, the period between 15.3.2020 and 28.2.2022 stands excluded, and the balance period of limitation remaining as on 3.10.2021 shall become available with effect from 1.3.2022. For the present claim of LPS, the balance period of limitation remaining as on 3.10.2021 is 14 months. Thus, 14 months post 1.3.2022 was available to the Petitioner. As the Petition was filed on 25.8.2022, the claims are within the period of limitation.

(ii) Without prejudice, even if the limitation began on 30.7.2019 (i.e. the date when Respondents paid the first payment of Rs. 2 crore (in a tranche of payments), the period of limitation would have ordinarily expired on 30.7.2022. However, in terms of the SC Order dated 10.1.2022, the period from 15.3.2020 till 28.2.2022 stands excluded and the balance period of limitation remaining as on 3.10.2021, shall become available with effect from 1.3.2022. The balance period of limitation as on 3.10.2021 is 9 months. Thus, 9 months post 1.3.2022 were available to the Petitioner. Thus, the limitation would have expired on 1.12.2022. As the Petition was filed on 25.8.2022, the claims are within the period of limitation.

(iii) Similarly, under Purchase Order 22, the LPS claim was crystallised only on 26.11.2019, i.e. when complete payment of the principal amount was made by the Respondents. Accordingly, the

limitation would begin on this date and would have ordinarily expired on 25.11.2022. However, in terms of the SC Order dated 10.1.2022, the period from 15.3.2020 till 28.2.2022 stands excluded and the balance period of limitation remaining as on 3.10.2021, shall become available with effect from 1.3.2022. For the claims under the Purchase Order 22, the balance period of limitation remaining as on 3.10.2021 was 13 months, which shall become available with effect from 1.3.2022. Thus, the Petitioner had 13 months to file the present Petition. As the present petition was filed on 25.8.2022, the claims are within the period of limitation.

(g) Additionally, without prejudice, the Respondent's failure to pay the LPS constitutes a "continuing breach" which gives rise to a fresh cause of action till the breach continues. Thus, the bar of limitation will not apply in the present case since the Respondents have not paid LPS, to date.

(h) The APTEL in the Udipi Judgment, while adjudicating an identical issue (i.e., the limitation period for claiming LPS), has held that a continuing wrong comprises two elements i.e., it creates a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. Default by the Respondents to pay LPS partakes the character of a continuing wrong under Section 22 of the Limitation Act, and for every breach, the Petitioner gets a fresh cause of action.

(i) Without prejudice, the Hon'ble Supreme Court in the case of *Andhra Pradesh Power Coordination Committee & Ors v. Lanco Kondapalli Power Limited & Ors* [(2016) 3 SCC 468] (Lanco Judgment) has restricted the applicability of the Limitation Act only to adjudicatory powers and functions of the State Commission under Section 86(1)(f) of the Act. It may be noted that the Hon'ble Supreme Court held that the principles of the Limitation Act would not apply to the powers and functions of the Regulatory Commission, which are administrative and regulatory in nature. The ratio of Lanco Judgment with respect to the Limitation Act not being applicable to the administrative and regulatory functions of the Regulatory Commission was reiterated by the APTEL in the Udipi Judgment. The APTEL in Udipi Judgment (while adjudicating an identical issue, i.e., the limitation period for claiming LPS), has

categorically held that the LPS has statutory character. Hence, the Limitation Act will not apply in the present case.

(j) The Petitioner has filed the present Petition seeking payment of LPS, which is statutory in nature. Therefore, the present Petition falls under the regulatory regime of this Commission, and the principles of the Limitation Act, 1963, would not apply. Accordingly, the Petitioner's claims are not barred by the limitation.

(k) The Respondents' denial of the consolidated bills for the compensation raised by the Petitioner on the ground that monthly invoices ought to have been raised is misplaced and is a mere afterthought. Any objection to the compensation invoices dated 2.6.2017 and 26.12.2017 raised by the Petitioner ought to have been raised earlier, including the time when Respondents convened a meeting to discuss the same and also accepted liability after a 5% waiver. Furthermore, the Respondents, in terms of their conduct, by accepting the waiver and payment of the compensation, accepted the compensation invoices dated 2.6.2017 and 26.12.2017 raised by the Petitioner in terms of Purchase Order 38.

(l) All invoices were duly sent to the Respondents through official channels and were duly acknowledged. Furthermore, the Petitioner, in terms of the various correspondences (which have been duly acknowledged by the Respondents), has given a tabulated statement of the amounts which are payable and outstanding, and neither such correspondence nor the tabulated statement has been disputed by the Respondents.

(m) The Respondents' contention that the Petitioner could not have raised a consolidated LPS bill dated 21.11.2018 and claimed payment within 30 days is misplaced as the due date of the bill dated 21.11.2018 was immediate, and secondly, the Petitioner is not claiming the LPS on the LPS Bill dated 21.11.2018. Further, the provision for the payment of LPS provided in Purchase Order 38 does not create a distinction between the nature of the outstanding dues and states that all payments which are due beyond 30 days will attract LPS. Accordingly, for the delay till 21.11.2018, the Petitioner claimed the LPS payable.

(n) The Respondents' contention that in terms of the 2nd Bill, SEIL has claimed the LPS of Rs. 24,66,428 for 18 days (i.e. from 21.11.2018 to 9.12.2018) and claimed Rs. 76,45,927 for 39 days (from 10.12.2018 to 17.1.2019) is incorrect as the same is explicitly contrary to the information provided in the invoices as:

(i) 1st LPS bill dated 21.11.2018 raised by the Petitioner was a consolidated bill claiming LPS of Rs. 12,48,01,258/- payable up to 20.11.2018. However, the 2nd LPS bill dated 10.12.2018 for Rs. 24,66,428 computed LPS payable up to 30.11.2018 i.e. from 21.11.2018 to 30.11.2018. Therefore, 2nd LPS bill computed LPS payable for 10 days from 21.11.2018 to 30.11.2018.

(ii) 3rd LPS bill dated 18.1.2019 for Rs. 76,45,927/- computed LPS payable from 1.12.2018 to 31.12.2018 i.e. for 30 days.

(o) With regard to Purchase Order 22, the contention of the Respondent that since only two LPS bills dated 14.11.2018 and 18.1.2019, which bear the Respondent's office stamp, should be the only valid ones, and all other LPS bills/invoices should be disallowed due to a lack of acknowledgement, is incorrect, as the Petitioner has placed on record the invoices bearing the acknowledgement of Respondents. Further, in terms of the Udipi Judgment, it has already been established that the party claiming LPS is not obligated to issue invoices/bills against the party who is liable to pay the LPS, as the accrual of LPS is automatic.

Hearing Dated 12.7.2023

12. The Petition was heard on 12.7.2023, and the order was reserved in the matter. Based on the request of the learned counsels for the parties, the Petitioner and the Respondents were permitted to file their respective written submissions, if any. However, only the Respondents have filed their written submissions.

Written submissions by the Respondents

13. The Respondents, in their written submissions, have reiterated the submissions made in the reply and have mainly submitted as under:

(a) The limitation period for claims related to recovery of the LPS is 3 years as per Section 25 of the Limitation Act, 1961 (i.e., suits for recovery of interest upon money).

(b) It is a settled position of law that if a case is based on multiple causes of action, the period of limitation will begin to run from the date when the right to sue first accrues. (See: *Khatri Hotels Pvt. Ltd vs. Union of India Anr (2011) 9 SCC 126*).

(c) Since the claims raised in the present Petition expired much before the Covid -19 pandemic, the *suo moto* orders passed by the Hon'ble Supreme Court extending the limitation during the Covid-- Pandemic do not apply to the present case.

(d) Upon perusal of Purchase Order No. 38, it is clear that as per the provisions relating to the compensation for bills, the compensation would be paid by the Procurer (Respondents) to Seller (Petitioner) for deviating from the permitted off-take limit of 30% of contracted energy, which would be computed cumulatively every month. Therefore, compensation bills are required to be raised by the seller (Petitioner) every month. Further, in the event of a delay in payment of compensation bills beyond 30 days from the date of receipt of the bill, the Seller is entitled to claim the Late Payment Surcharge @ 1.25% per month on the dues remaining unpaid for more than 30 days. Accordingly, in light of the aforesaid position, the cause of action for default in payment of the first compensation bill payment leading to LPS accrual arose on 1.8.2016 and

the period of limitation of 3 years expired on 1.8.2019; hence, the LPS claim for the months of August 2016 to February 2017 is *ex-facie* time-barred and ought to be rejected.

(e) In the present case, the Petitioner admittedly raised its invoices for LPS even prior to 26.12.2019. Therefore, the Petitioner cannot be permitted to approbate and reprobate in order to bring its claims within the limitation period.

(f) The Petitioner has furnished the LPS Invoices which are claimed to have been raised on the Respondent-Discoms under the Purchase Order 38 from 21.11.2018 (before this date, the Petitioner had not raised any month-wise LPS bill) onwards up to 8.2.2020. As per the the Purchase Order, a period of 30 days was prescribed for the payment of bills within which no LPS would be payable but not for such a consolidated bill payment within 30 days, which has been misinterpreted by the Petitioner. Further, no such consolidated LPS bill was ever raised by the Petitioner against the Respondent- Discoms. A *malafide* attempt is being made to bring the LPS claims within the limitation period and take undue benefit of the Hon'ble Supreme Court's *suo-moto* order for an extension of the limitation period.

(g) The payment of any bill stipulates the submission of the original bill. Each of the monthly LPS Invoices raised from 10.12.2018 did not carry forward the earlier previous bill sums; hence, these are to be treated as independent bills.

(h) As the Petitioner has not been able to submit the proof of acknowledgement of submitting / raising the consolidated LPS bill (1st Bill dated 21.11.2018) on the Respondent-Discoms and since the Petitioner has not carried forward the previous consolidated LPS bill sum in the subsequent

monthly bills, it is deemed that there is no such claim submitted by the Petitioner. Similar is the case with other LPS bills which were not acknowledged by Respondents. As such, the Commission may disallow all such claims, that have not been acknowledged by Respondents.

(i) There is a discrepancy in the amounts claimed in the 2nd LPS bill & 3rd LPS bill. For example, the Petitioner claimed Rs. 24,66,428/- for 18 days from 21.11.2018 to 9.12.2018, while it has claimed Rs. 76,45,927/- from 10.12.2018 to 17.1.2019 (for 39 days), which also requires due verification by the Commission.

(j) Insofar as the claims arising out of Purchase Order No. 22 are concerned, the terms of payment of the said Purchase Order are similar to Purchase Order No. 38. Further, the Petitioner has furnished the acknowledgement (Office Inward Stamp) in respect of only two LPS bills, i.e., bill dated 14.11.2018 and 18.01.2019 but the other bills do not bear the office inward stamp of the Respondent's office, acknowledging the receipt of the bills.

Analysis and Decision

14. After considering the submissions of the parties and perusal of documents placed on record, the following issues arise for our consideration:

Issue No. 1: Whether the claims raised by the Petitioner in the present Petition are barred by the limitation?

Issue No. 2; Whether the Petitioner is entitled to LPS on delayed payment of Compensation invoices and Energy Bills for supply of power in terms of Purchase Order 38 and Purchase Order 22, respectively?

Issue No. 3: Whether the Petitioner is entitled to interest on the outstanding LPS amounts till the actual date of payment.

The above issues have been dealt with in the subsequent paragraphs.

Issue No. 1: Whether the claims raised by the Petitioner in the present Petition are barred by the limitation?

15. The Petitioner has placed on record the tabulated statement of invoices with respect to Purchase Order 38 and Purchase Order 22, for which there has been delayed payment. The Petitioner has submitted that its claims are not barred by the limitation, as the limitation period would commence from the date of receipt of complete payment of the outstanding compensation for the deviation offtake by the Respondents (Purchase Order 38), i.e. the date on which the Respondent's liability to pay LPS gets crystallised. The Petitioner has submitted that its consolidated invoice dated 2.6.2017 for the deviation in off-take of power for the period from May 2016 to May 2017 was finally paid by the Respondents only on 26.12.2019 and since the LPS claims crystallised only post 26.12.2019, the limitation period will begin on 26.12.2019 and expire on 25.12.2022. Thus, the present petition filed on 25.8.2022 is within the limitation period. Additionally, the Petitioner has also contended that the failure to pay the LPS by Respondents constitutes a continuing breach, giving rise to a fresh cause of action till the breach continues, and thus, the bar of limitation will not apply. In this regard, the Petitioner has also placed reliance on the various judgments, including the APTEL's Udupi Power Judgment. Alternatively, the Petitioner has also set up a plea that the determination of liability to pay the LPS is regulatory in nature and not a judicial consideration of an adjudicatory issue and therefore, the principle of the Limitation Act, as held to be applicable in respect of the judicial functions under Section 79(1)(f) of the Act, does not apply in the present case.

16. The Respondents, in their submissions, have contended that the LPS claim raised by the Petitioner is time-barred as:

(a) Supply of power to Respondents began on 27.6.2016. Accordingly, in July 2016, the Petitioner was required to raise bills against deviations in the offtake of power by the Respondents. Therefore, the cause of action for the default of the first compensation bill payment leading to LPS accrual arose on 1.8.2016; hence, the LPS claim for the period from August 2016 to February 2017 is *ex-facie* time-barred.

(b) The limitation period for filing the present Petition expired much before the suspension of the limitation period by the Hon'ble Supreme Court in light of the Covid-19 pandemic. The Suo motu orders passed by the Hon'ble Supreme Court do not apply to the present case.

(c) Since the LPS claims raised by the Petitioner relate to financial year 2016-17, the present Petition is barred by the limitation as it was filed only on 23.8.2022.

17. *Per contra*, the Petitioner has submitted that the period of limitation for its LPS claims is to be considered from the date on which the liability to pay the LPS crystallises, i.e., when complete payment of the compensation invoices/ energy bills was received. In this regard, the Petitioner has placed reliance on the judgment of the APTEL dated 2.11.2020 in Appeal No. 10 of 2020 and batch titled *Power Company of Karnataka Ltd. v. Udupi Power Corporation Ltd.* (Udupi Judgment).

18. We have considered the submissions of the Petitioner and Respondents on the aspect of limitation. It is noted that a similar issue of limitation has been considered by the Commission in its recent Order dated 9.8.2023 in Petition No. 173/MP/2022 in the matter of Sembcorp Energy India Ltd. v. APPCC and Ors. The relevant findings of the Commission in its Order dated 9.8.2023 are reproduced hereunder:

“27. Insofar as the claim of LPS by the Petitioner pertaining to Batch 1 Invoices and the specific limitation period for such claim is concerned, it is noticed that the APTEL in the Udupi Judgment while dealing with LPS claims therein, has held that the period of limitation for LPS claims will be governed by Article 113 of the Limitation Act, which relates to suits for which there is no prescribed period. Accordingly, APTEL held that the limitation period shall be calculated as three years from the date on which the “right to sue accrues” or the “cause of action” arises. Relevant extracts of the Udupi Judgment are as under:

“175. The argument that Article 25 occurring in Part-I of the Schedule to Limitation Act, 1963 applies to the present dispute involving specific issue of LPSC itself is wrong. There is no specific limitation period specified for claiming LPSC in Schedule to the Limitation Act, 1963. Accordingly, even in cases where there is no running account, the period of limitation for LPSC claims will have to be governed by Article 113 of Limitation Act, 1963 (Part X- Suits for which there is no prescribed period), which provides the limitation period as three years computed from the date on which the “right to sue accrues” which is same as the date on which the “cause of action” arises.”

28. Although the findings in the Udupi Judgment were challenged before the Hon’ble Supreme Court in Civil Appeal No. 838 of 2021 titled Power Company of Karnataka Ltd. v. Udupi Power Corporation Ltd. However, vide Order dated 8.2.2022, the Civil Appeal was dismissed on the ground that there was no substantial question of law that merited consideration.

29. In the present case, the Respondents have neither disputed the amount under the weekly invoices raised by the Petitioner towards the supply of power nor denied that there had been a delay on their part in making payments thereof. The record also indicates that even the LPS invoices raised by the Petitioner do not appear to have been disputed by the Respondents in any of their communications at the relevant time until their stand taken in the reply filed to the present Petition. In the present circumstances, the “right to sue accrues” for the Petitioner in respect of its LPS claims can begin to run only when there is a default on the part of the Respondents in making the payment of LPS as per the terms of POs, which can only be subsequent to the crystallization of the LPS liability of the Respondents, i.e. date on which the payment towards weekly invoices was made by the Respondents. It is observed that the Petitioner has calculated the period of limitation from the date on which the liability to pay LPS was crystalized itself, i.e., the date on which the complete payment towards weekly invoices was made by the Respondents [...].”

19. In the aforesaid order, the Commission has held that the ‘right to sue’ would commence only subsequent to the crystallisation of the LPS liability of the Respondents. In the present case, the consolidated invoices for the deviation in the off-take of power were raised against Respondents on 2.6.2017 and 26.12.2017, and the payments towards the same were made by the Respondents in tranches starting from 30.7.2019 (payment of Rs. 2 crore) and the balance payments towards the principal amount were made between 6.12.2019 and 26.12.2019. Thus, the entire liability of LPS of the Respondents stood crystallised only upon the payment of the

principal amount by the Respondents on 26.12.2019 and even if we were to consider the period of limitation commencing from such date itself, the claims of the Petitioner towards LPS on the delayed payment of such deviation charges fall within the period of limitation as the period of limitation would expire on 26.12.2022 whereas the present petition came to be filed on 25.8.2022. Even if we were to consider that part of the LPS liability stood crystallised upon the part payment of the principal amount by the Respondents on 30.7.2019, claims of the Petitioner would fall within the period of limitation in view of the Hon'ble Supreme Court's order dated 10.1.2022 whereby period from 15.3.2020 till 28.2.2022 has been excluded for the purpose of computing the period of limitation.

20. The Respondents have, however, raised an objection to the delays in raising the compensation invoices on the part of the Petitioner. The Respondents have submitted that, as per the terms of the Purchase Order, the Petitioner was required to raise an invoice towards compensation for the deviations caused by the procurers beyond 30% of the contracted energy during a month on a monthly basis. Further, in the event of a delay in the payment of such compensation invoices for a period beyond 30 days, a corresponding LPS invoice was to be raised in the subsequent month. We have considered the above submissions of the Respondents and notice that at no point in time, prior to their replies in the present case, the Respondents appear to have raised any objection towards the delay on the part of the Petitioner in raising the invoices for compensation and/or LPS thereof. Even while acknowledging their liability and consequently making the payment towards the principal amount against such compensation invoices, the Respondents did not raise any objection to the delay in raising such invoices in terms of the Purchase Order. Thus, by making the payment towards such compensation invoices without any demur, Respondents are now

estopped from raising any such objection towards delay on the part of the Petitioner in raising such invoices. The Respondents have also pointed out that if the averment of the Petitioner that the liability of Respondents stood crystallized only on 26.12.2019, then the Petitioner could not have raised any invoice qua LPS prior to that date, and admittedly, the Petitioner has raised the invoices for LPS even prior to 26.12.2019. Indisputably, the Petitioner has raised the LPS invoices on the outstanding compensation invoices on a running basis after raising the first consolidated invoice for the LPS on 21.11.2018. However, this does not take away the fact that the entitlement of the Petitioner towards the LPS claim towards outstanding compensation invoices stood crystallised only upon the payment of the principal amount by Respondents against such compensation invoices. If the averment of Respondents to the above is accepted, it will lead to a situation wherein the significant part of the Petitioner's entitlement towards the LPS would expire even prior to its total LPS entitlement getting crystallised upon payment of the principal amount, and that too without Respondents having denied or disputed their liability towards the principal or LPS at any stage prior to the present proceedings.

21. Insofar as the LPS claims of the Petitioner under Purchase Order 22 are concerned, the Petitioner raised the LPS invoices starting from 9.8.2018 to 4.10.2018 for the delayed payment of weekly energy bills for the supply of energy for the period 1.8.2018 to 30.9.2018. The Respondents, as such, do not appear to have raised any objection to the limitation on these claims, except that two invoices that do not bear their acknowledgement of receipt stamp. It appears to us that even as per the averment of Respondents with respect to the starting of limitation period, as advanced in respect of invoices under the Purchase Order 38, these invoices under the Purchase Order 22 would not be barred by the limitation. In other words, even if the period of

limitation is considered to commence after the expiry of 30 days from the weekly energy invoices remaining unpaid, the period of limitation for the first LPS invoice would commence from September 2019 and the period of limitation would expire only in September 2022. Thus, viewed from any angle, these invoices cannot be held to be time-barred.

22. Notwithstanding the above findings, we also find force in the alternate averment of the Petitioner that the liability of the LPS for the delay in payment is a continuing cause of action, and each day of non-payment gives rise to a fresh cause of action, and the reliance placed on the Udupi Judgment in this regard.

23. We observe that the APTEL in the Udupi Judgment as regards the claim for the LPS being a 'continuing wrong' has held that a "continuing wrong" includes a continuing source of injury and renders the doer of the act responsible and liable for the continuance of the said injury. Further, the APTEL has held that every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings and that the default of the distribution licensee to pay LPS partakes the character of a continuing breach as contemplated under Section 22 of the Limitation Act. Relevant extracts of the Udupi Judgment are as under:

*"207. We uphold the submission that, in the facts and circumstances presented before us, the elements of "continuing breach" are satisfied. Indisputably, there have been breaches of the contract on account of the non-payment of regular monthly bills and invoices towards infirm power and LPSC by the ESCOMs in terms of the PPA as well as Regulations. Each 'breach' by the ESCOMs resultantly burdened Udupi Power with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of 'continuing breach'. Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. **The 'breach' being recurring, the second element of 'continuing breach' is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic.***

208. For the foregoing reasons, we uphold the submission of the second respondent that the default of ESCOMs in paying against **monthly tariff bills as well as LPSC partakes the character of a “continuing breach” as contemplated under Section 22 of the Limitation Act, 1963. Thus, “a fresh period of limitation begins to run at every moment of the time during which the breach ... continues”.** Since the breach continues on account of continued refusal to discharge liability towards LPSC, a fresh cause of action is constituted so long as the breach is recurrent and continues.”

24. Hence, even as per the ratio laid down by the APTEL in Udipi Judgment, the failure of Respondents to discharge their liability towards the LPS partakes the character of a continuing breach, which gives a fresh cause of action so long as the breach is recurrent and continues, and thereby, such claims of the Petitioner cannot be held time-barred under the limitation period.

25. In view of the foregoing observations, we hold that the Petitioner’s LPS claims in respect of Purchase Order 38 and Purchase Order 22 are not barred by the limitation. This issue is answered accordingly.

Issue No. 2: Whether the Petitioner is entitled to LPS on delayed payment of Compensation invoices and Energy Bills for the supply of power in terms of Purchase Order 38 and Purchase Order 22, respectively?

26. The Respondents, with respect to the compensation invoices raised by the Petitioner for deviation in offtake of power under Purchase Order 38, have contended that there is no provision for accrual of LPS on the consolidated bill and that various LPS invoices, as placed on record by the Petitioner, do not bear the ‘Office Inward Stamp’ of Respondents; therefore, it is evident that such bills were not submitted by the Petitioner to the Respondents.

27. *Per contra*, the Petitioner has submitted that the Respondents’ contention that the Petitioner ought to have raised monthly invoices is misplaced and an afterthought since the said objection was never raised when the consolidated bill was raised by the

Petitioner. Further, the provision for payment of the LPS provided in Purchase Order 38 does not create a distinction between the nature of the outstanding dues and states that all payments which are due beyond 30 days will attract LPS.

28. Further, the Petitioner has submitted that the Respondents' contention that various LPS invoices do not bear the 'Office Inward Stamp' and therefore, such bills were not submitted to the Respondents is incorrect. Furthermore, it has been submitted that all the invoices were duly raised on Respondents through official channels and were duly acknowledged by Respondents. Also, the Petitioner had provided the Respondents with a tabulated statement of outstanding amounts annexed to various correspondences. The said correspondences, dated 8.3.2019, 9.4.2019, 9.5.2019, and 8.3.2021, were never disputed by the Respondents. Accordingly, the Respondents, Telangana Discoms, are adopting dilatory tactics in order to avoid the payment of legitimate dues.

29. The Petitioner has submitted that all the invoices placed on record bear the Respondents' acknowledgement and secondly, as per the Udipi Judgement, the party claiming LPS is not obligated to raise the LPS bills/invoices as the accrual of LPS is automatic. Therefore, the defaulting party is liable to pay the LPS whether or not LPS invoices are raised on them.

30. The Respondents have contended that there is discrepancy in the LPS amounts claimed by the Petitioner as the Petitioner has claimed Rs. 24,66,428/- for the period from 21.11.2018 to 9.12.2018 (18 days) vide 2nd LPS bill dated 10.12.2018, whereas, the Petitioner has claimed Rs. 76,45,927/- for the period from 10.12.2018 to 17.1.2019 (39 days) vide 3rd LPS bill dated 18.1.2019.

31. In response, the Petitioner has submitted that the contention raised by Respondents is misplaced as evident from the invoices. The 1st LPS bill dated 21.11.2018 raised by the Petitioner was a consolidated bill claiming LPS of Rs. 12,48,01,258/- payable up to 20.11.2018. However, the 2nd LPS bill dated 10.12.2018 for Rs. 24,66,428 computed LPS payable up to 30.11.2018 i.e. from 21.11.2018 to 30.11.2018. Thus, 2nd LPS bill computed LPS payable for 10 days from 21.11.2018 to 30.11.2018. Accordingly, 3rd LPS bill dated 18.1.2019 for Rs. 76,45,927/- computed LPS payable from 1.12.2018 to 31.12.2018 i.e. for 30 days.

32. We have considered the submissions made by the Petitioner and the Respondents. This Commission is of the view that the APTEL, in terms of the Udupi Judgment, held that a party claiming the LPS is not obligated to issue invoices/bills against the party who is liable to pay the LPS as the accrual of LPS is automatic as under:

*“207. We uphold the submission that, in the facts and circumstances presented before us, the elements of “continuing breach” are satisfied. Indisputably, there have been breaches of the contract on account of the non-payment of regular monthly bills and invoices towards infirm power and LPSC by the ESCOMs in terms of the PPA as well as Regulations. Each ‘breach’ by the ESCOMs resultantly burdened Udupi Power with additional working capital cost till it gets paid by the ESCOMs. As such, the breach creates a continuing source of injury, thereby satisfying the first element of ‘continuing breach’. Since ESCOMs have consistently defaulted in paying charges and LPSC, there has been a continuous and recurring disobedience and non-compliance of applicable law. **The ‘breach’ being recurring, the second element of ‘continuing breach’ is satisfied. There is no obligation on the part of Seller to specifically claim LPSC by raising invoices since neither Regulations nor PPA envisage anything but its accrual which has to be automatic.**”*

The findings of the Udupi Judgment have attained finality given that Civil Appeal No. 838 of 2021 was dismissed vide Order dated 8.2.2022. Accordingly, the contentions raised above by Respondents deserve to be rejected.

33. We have perused the relevant provisions of the Purchase Orders which are extracted as under:

Purchase Order 38

2. Short supply/intake of Power:

a) Both the parties would ensure that actual scheduling does not deviate by more than 30% of the contracted Energy as per the approved Open Access on monthly basis.

b) In case deviation from Procurer side is more than 30% of contracted energy for which Open Access has been allocated on monthly basis, Procurer shall pay compensation at 20% of Tariff per Kwh for the quantum of shortfall in excess of permitted deviation of 30% while continuing to pay Open Access charges as per the contract.

[...]

Payment Terms:

The due date for payment would be 9th day after the date of receipt of fax / email bill subject to receipt of original invoice within due date. In case the due date is a Bank holiday in Telangana State, the next working day would be treated as due date. Please note that the bill received before 02.00 P.M. on a working day at TSPCC will only be considered as date of receipt, otherwise the next day will be considered as date of receipt. If the bill is not in full shape and needs to be corrected, the date of receipt of corrected bill will be treated as date of receipt.

The due date for reimbursement of Open Access charges paid by the Trader/Generator on behalf of TSDISCOMs would be 7th day after the date of receipt of fax / email bill subject to receipt of original invoice within due date duly enclosing proof of payment.

[...]

Surcharge of Late Payment

A delayed payment surcharge of 1.25% (one and quarter percent) per month shall be leviable on all dues remaining unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in Telangana State, the immediate next working day will be treated as due date of payment. Surcharge will be liable for payment for the period beyond 30 days till date of payment.”

Purchase Order 22

“2. Billing cycle:

Weekly bills may be raised provisionally by sellers for the energy delivered at Telangana State (TS) Periphery based on RLDC schedules, duly considering PoC Withdrawal Losses. **For the purpose of raising of weekly bills, the month shall be divided into four parts i.e., from 00:00 hrs of 1st of the month to 24:00 hrs of 8th, from 00:00 hrs of 9th to 24:00 hrs of 15th , from**

00:00 hrs of 16th to 24:00 hrs of 23rd, from 00:00 hrs of 24th to 24:00 hrs of last day of the month.

The 4th weekly bill is final and may be raised for the energy delivered at Telangana State (TS) Periphery based on Regional Energy Account (REA) issued by} SRPC, duly considering PoC Withdrawal losses during, the month, after adjustment of the energy billed provisionally for the month. Bill should be raised along with corridor approvals issued by SRLDC.

[...]

4. Payment Terms:

The due date for payment would be 9th day after the date of receipt of fax / email bill subject to receipt of original invoice within due date. In case the due date is a Bank holiday in Telangana State, the next working day would be treated as due date. The bill received before 2.00 PM on a working day at TSPCC will only be considered as date of receipt, otherwise the next day will be considered as date of receipt. If the bill is not in full shape and needs to be corrected, the date of receipt of corrected bill will be treated as date of receipt.

[...]

8. Surcharge for Late Payment:

A delayed payment surcharge of 1.00% (one percent) per month shall be leviable on all remaining due unpaid for more than 30 days from the date of receipt of the bill. If the due date for payment is a Bank holiday in Telangana State, the immediate next working day will be treated as due date of payment. Surcharge will be liable for payment for the period beyond 30 days till date of payment.”

34. From the above provisions, we observe that in relevant clauses of Purchase Orders 38 and 22, it has been provided that all dues that remain unpaid for more than 30 days, the Petitioner shall be entitled to LPS at the rate of 1.25% (Purchase Order 38) and 1.00 % (Purchase Order 22) per month till the date of actual payment.

35. We note that the Petitioner has supplied power to the Respondents as under:

(a) During the period from May 2016 to May 2017 in accordance with Purchase Order 38.

(b) During the period from August 2018 to September 2018 in accordance with Purchase Order 22.

36. We note that there is no dispute that there was a delay by Respondents in making payment of the principal amount and that LPS invoices are now sought to be denied during the proceedings before this Commission. The record also indicates that even the LPS invoices raised by the Petitioner do not appear to have been disputed by Respondents in any of their communications at the relevant time until their stand taken in the reply filed to the present Petition. In the present circumstances, the 'right to sue accrues' for the Petitioner in respect of its LPS claims can begin to run only when there is a default on the part of the Respondents in making the payment of LPS as per the terms of the Purchase Orders, which was only subsequent to the crystallisation of the LPS liability of Respondents.

37. Further, in our view, LPS is a contractual right that arises upon default in payment of invoices within the due date. The intent behind incorporating the LPS clause in an agreement is to enforce/encourage timely payment of bills within the stipulated time. Since then, we have already held that the Petitioner's LPS claims are within the period of Limitation, and the Petitioner is entitled to the outstanding LPS for the delay on the part of the Respondents in making payment for the invoices raised under Purchase Orders 38 and 22.

38. The Petitioner has indicated the outstanding LPS amount as under:

S. No	Claim	Amount (Rs.)
1.	LPS payable (as on 26.12.2019) for delayed payment of compensation for deviation in offtake of power (under PO 38) against the quantum approved under open access.	22,02,55,023/-
2.	LPS payable (as on 26.11.2019) for delayed payment of Energy Bills raised for power supplied for the period 01.08.2018 to 30.09.2018 (under PO 22).	2,24,93,671/-

Total Claim Amount	24,27,48,694/-
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39. Although the Respondents have not disputed the above computation in their replies, they have alleged that there is a discrepancy in the amounts claimed in the 2nd and 3rd LPS bills raised under Purchase Order 38. They have submitted that the Petitioner has claimed the LPS of Rs. 24,66,428/- for the period from 21.11.2018 to 09.12.2018 (18 days) vide 2nd LPS bill dated 10.12.2018, whereas, it has claimed the LPS of Rs. 76,45,927/- for the period from 10.12.2018 to 17.01.2019 (39 days) vide the 3rd LPS bill dated 18.01.2019 and this requires verification by the Commission.

40. In view of the above, the Petitioner is entitled to LPS on delayed payment of compensation invoices and Energy Bills for the supply of power in terms of Purchase Orders 38 and 22, respectively. Even though the Respondents have *per se* not disputed the computation Rs. 24,27,48,694/- in their reply, the Petitioner and Respondents shall reconcile the amount within 15 days of this Order and thereafter make the payment of the aforesaid outstanding LPS amount within a month thereafter.

Issue No. 3: Whether the Petitioner is entitled to interest on the outstanding LPS amounts till the actual date of payment.

41. The Petitioner has contended that the Purchase Orders entitle the Petitioner to claim the LPS on all dues that remain unpaid beyond a period of 30 days. As the LPS invoices have also remained unpaid for a period beyond 30 days, interest will apply for the period of delay till the date of actual payment.

42. We note that this contention has been adjudicated by the Commission in its Order dated 9.8.2023 in Petition No. 173/MP/2022 wherein the Commission held as under:

“46. We have considered the submissions made by the parties. Admittedly, the LPS claims of the Petitioner pertaining to the period from 21.1.2019 till 10.1.2020 under POs 1 & 2 are yet to be paid by the Respondents, and in the foregoing paragraphs, we have issued directions to the Respondents to make the payments within a month from the date of this order. Accordingly, the question arises as to whether there can be any direction for awarding interest on the LPS till the date of its actual payment. We notice that a similar issue had come up for consideration before the APTEL in Appeal No. 386 of 2019, titled Maharashtra State Electricity Distribution Company Limited v. Maharashtra Electricity Regulatory Commission and Anr. The said appeal was filed by the appellant, Maharashtra State Electricity Distribution Company Limited (MSEDCL), on being aggrieved by the direction of MERC to pay the penal interest on the outstanding Delayed Payment Surcharge to the wind power generator. The said direction was contested by MSEDCL on various grounds, including that it amounts to interest on interest (double penalty), that the penal levy is against the provisions of the agreement, etc. However, by rejecting such ground, the APTEL, vide judgment dated 20.9.2021, upheld the direction of MERC to levy interest on the Delayed Payment Surcharge. The aforesaid judgment of APTEL was challenged before the Hon’ble Supreme Court by Civil Appeal No.6440 of 2021, wherein the Hon’ble Supreme Court, while vacating the directions given by APTEL (by Para 45) for the financial affairs of MSEDCL to be examined and for appropriate measures to be taken in such regard by the State Commission, disposed of the appeal, declining to interfere with the abovementioned decision on its merits, by order dated 2.3.2022.

47. In view of the aforesaid judgment of the APTEL, which has been upheld by the Hon’ble Supreme Court, the contention of AP Discoms that there cannot be any interest on the outstanding LPS cannot survive. Moreover, as observed by the APTEL in the said judgment, if such contention of AP Discoms is accepted, it would lead to a patently unfair and absurd situation wherein defaulting parties, i.e. AP Discoms in the present case, could simply avoid meeting their undisputed payment commitment towards LPS for the delayed payment of energy charges under the POs and thereafter, not paying the interest thereon despite such dues having remained outstanding for a considerable period (as noted, LPS liability pertains to the period from 21.1.2019 to 10.1.2020), which ultimately compelled the Petitioner to initiate the present legal proceedings for recovery of its legitimate dues. Accordingly, in the facts and circumstances of the present case and balancing the interests of the consumers and the generators, we find it proper to award the interest on the outstanding LPS dues under POs 1 & 2 at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by Auditor’s Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest. Thus, the Respondents shall also be liable for interest (at the rate specified above) on the outstanding LPS from the 30th day from the date of the respective LPS invoices till the date

of the Order. The Petitioner and the Respondents shall reconcile the amount of interest on LPS within 15 days of this Order and thereafter make the payment of the interest within 30 days.

48. In view of our findings, the Respondents, AP Discoms, shall make the payment towards the outstanding LPS along with interest thereon calculated in terms of the above, Further, in case the payments are not made within the timeline specified (15 days for reconciliation and 30 days thereafter) the provision of Late Payment Surcharge in the PPA would kick in.”

43. Accordingly, the Commission has already held that if the interest on delayed payment is not levied, the same would lead to a patently unfair and absurd situation wherein defaulting parties could simply avoid meeting their undisputed payment commitment towards the LPS for the delayed payment of energy charges under the Purchase Orders and thereafter not paying the interest thereon despite such dues having remained outstanding for a considerable period. Thus, in accordance with the view taken by the Commission in its Order dated 9.8.2023 in Petition No. 173/MP/2022, we find it proper to award the interest on the outstanding LPS dues under Purchase Orders 38 and 22 at the actual rate of interest paid by the Petitioner for arranging working capital funds (supported by the Auditor’s Certificate) or the rate of interest on working capital as per the 2019 tariff Regulations or the late payment surcharge rate as per the PPA, whichever is the lowest.

44. Thus, Respondents shall be liable for the interest (at the rate specified above) on the outstanding LPS from the 30th day from the date of the respective LPS invoices until the date of the Order. The Petitioner and Respondents shall reconcile the amount of interest on the LPS within 15 days of this Order and thereafter make the payment of the interest within 30 days thereafter.

45. This issue is addressed accordingly.

46. In view of our findings, the Respondent Discoms (Telangana Discoms) shall make the payment towards the outstanding LPS along with interest thereon calculated in terms of the above. Further, in case the payments are not made within the timeline specified (15 days for reconciliation and 30 days thereafter), the provision of Late Payment Surcharge as per the Purchase Orders would kick in.

47. Petition No. 270/MP/2022 is disposed of in terms of the above discussions and findings.

Sd/-
(P.K. Singh)
Member

sd/-
(Arun Goyal)
Member

sd/-
(I.S. Jha)
Member

sd/-
(Jishnu Barua)
Chairperson