

**CENTRAL ELECTRICITY REGULATORY COMMISSION
NEW DELHI**

Petition No. 145/MP/2021

Coram:

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

Date of Order: 4th January, 2024

In the matter of:

Petition under Section 79(1)(b), 79(1)(f) and other applicable provisions of the Electricity Act, 2003 for adjudication of disputes with the Respondent with regard to the tariff payable under the Power Purchase Agreement dated 27/11/2013 and addendums dated 11/01/2018 and 28/06/2018.

And

In the matter of:

KSK Mahanadi Power Company Limited,
8-2-293/82/A, Road No. 22, Jubilee Hills,
Hyderabad – 500033

...Petitioner

Vs

Tamil Nadu Generation and Distribution Corporation Limited,
NPKRR Maligai, 6th Floor, Eastern Wing, 144, Anna Salai,
Chennai – 600 002

...Respondent

Parties Present:

Shri Anand K. Ganesan, Advocate, KSKMPL
Ms. Swapna Seshadri, Advocate, KSKMPL
Ms Kriti Soni, Advocate, KSKMPL
Ms. Aishwarya Subramani, Advocate, KSKMPL
Ms Anusha Nagarajan, Advocate, TANGEDCO
Shri. Rahul Ranjan, Advocate, TANGEDCO

ORDER

The Petitioner, KSK Mahanadi Power Company Limited ('KSKMPCL') has filed this petition seeking the following relief(s):



(a) Hold and direct TANGEDCO is liable to pay the amounts wrongly withheld/deducted in terms of the PPA dated 27/11/2013 and addendum agreements dated 11/01/2018 and 28/06/2018 on account of transmission charges and SLDC/RLDC charges;

(b) Hold and direct TANGEDCO to pay an amount of Rs. 64,62,80,697/- towards reimbursement of Transmission Charges (POC and Non POC, including rebate and STOA credit), RLDC/SLDC Charges wrongly deducted and recovered from the Petitioner;

(c) Hold and direct that TANGEDCO is liable to pay late payment surcharge computed in terms of Article 8.3.5 of the PPA on the amounts deducted and withheld by TANGEDCO from the date when the amounts were due and payable till the date of actual payment of the principal amounts by the Respondent;

(d) Restrain TANGEDCO from making unilateral deductions in the monthly invoices raised by the Petitioner and direct TANGEDCO to strictly comply with the terms and conditions of the PPA for payment of the tariff to the Petitioner;

(e) Award costs of the present proceedings in favor of the Petitioner and against TANGEDCO; and

(f) Pass such other further order(s) as the Hon'ble Commission may deem just in the facts of the present case;

2. The Petitioner, is a company incorporated under the Companies Act, 1956 and presently existing under the provisions of the Companies Act, 2013. The Petitioner is a generating company within the meaning of section 2(28) of the Electricity Act, 2003 and is in the process of establishing a 3600 MW (6x600 MW) coal-based generating station at Village Nariyara, Tehsil Akaltara and District Janjgir-Champa in the State of Chhattisgarh (in short, "the generating station"). The Petitioner is currently undergoing Corporate Insolvency Resolution Procedure (CIRP) under the Insolvency and Bankruptcy Code, 2016 (IBC), as the Hon'ble NCLT, Hyderabad Bench vide its order dated 3.10.2019 in IB NO. 492/07/HDB/2019, has admitted the matter under Section 7 of the IBC and initiated the CIRP, by appointing an Interim Professional Shri. Mahendra Kumar Khandelwal. Thereafter vide order dated 16.6.2020, the NCLT has appointed Shri Sumit Binani as the Resolution Professional.

3. The Respondent TANGEDCO, on 21.12.2012, had issued RFP documents for procurement of power under Case-1 Bidding guidelines issued by the MOP, GOI vide



Tender Ref: 03/PPLT/2012 and subsequently entered into Power Purchase Agreement (PPA) with various generators. The Petitioner KSKMPCL, after being selected as a successful bidder in the competitive bidding process initiated by the Respondent for procurement of electricity under Section 63 of the Electricity Act, 2003 ('the Act'), entered into PPA dated 27.11.2012 and addendum agreements dated 11.1.2018 and 28/6/2018 with the Respondent, for supply of a total contracted capacity of 500 MW from the generating station of the Petitioner, located in Chhattisgarh to the Respondent. The tariff under the PPA has been adopted by the TNERC (State Commission) vide its order dated 29.7.2016 and the supply of power from the Petitioner to the Respondent commenced in August, 2015. Apart from the above PPA, the Petitioner has entered into PPAs for sale of power from its generating station, as under:

- a) PPA dated 31.7.2012 (as amended on 19.12.2014 and 23.1.2018), between the Petitioner and Distribution Licensees in the State of Andhra Pradesh;
- b) PPA dated 18.10.2013 between the Petitioner and Chhattisgarh State Power Trading Company Limited for supply of 5%/7.5% of the net generated power under host state obligation;
- c) PPA dated 26.2.2014 between the Petitioner and UP Distribution licensees (UP Discoms).

Submissions of the Petitioner, KSKMPCL

4. The Petitioner, in support of the above prayers, has submitted the following:

(a) The present Petition has been filed on account of wrongful unilateral deduction of amounts from the monthly transmission charges reimbursement raised by the Petitioner to TANGEDCO in terms of the PPA. The deductions and short payments by TANGEDCO have been from the non-reimbursement of transmission charges to the Petitioner, as per terms of the PPA. The details of the amounts withheld by the Respondents are as under:

Description	Amount (Rs.)	Period
Towards reimbursement of transmission (POC, Non POC, Rebate, STOA credit) charges	64,23,01,337/-	August, 2015 to July 2020



Towards reimbursement of RLDC/SLDC charges	39,79,360/-	
Total	64,62,80,697/-	

(b) The present Petition is restricted to the claim for reimbursement of transmission charges for the above period and the Petitioner, however, reserves its right to make other claims for the above period.

(c) In terms of Article 5.1.1 under the PPA, the Petitioner is obligated to make available for sale an aggregate contracted capacity of 500 MW, on an annual basis to TANGEDCO. With regard to the tariff payable to the Petitioner by TANGEDCO for the supply of power, Schedule 4 under the PPA provides that the Petitioner is entitled to the full capacity charges on making available 85% contracted capacity on an annual basis. Schedule 4 also provides for payment of capacity charges on a proportionate basis for availability below 85%.

(d) In terms of Schedule 4 under the PPA, the consequence for any reduction in capacity supplied to the Procurer under the PPA as penalty is also provided wherein, penalty shall be imposed upon the Petitioner in the event the Petitioner's cumulative availability for the year falls less than 80% of the contracted capacity. Thereafter, TANGEDCO can deduct or recover only those amounts from the Petitioner as per the provisions under the PPA. However, TANGEDCO not only made deductions in capacity charges paid to the Petitioner under the monthly bills, but also at the same time, resorted to short admission of POC charges in proportion to the declared capacity.

(e) The PPA also provides that the obligation for payment of Transmission charges, and RLDC/SLDC charges is solely on the procurer i.e. TANGEDCO. Therefore, no question arises that the transmission charges including POC, Non POC charges, and also RLDC and SLDC charges, are the responsibility of TANGEDCO. Also, TANGEDCO is mandated to reimburse any of these charges if paid by the Petitioner. The Petitioner is only paying the charges on behalf of TANGEDCO and is entitled to recover the entire charges on reimbursement basis, and is not subject to any adjudication or adjustment. The entire charges paid to the transmission licensee in relation to the contracted capacity is to be recovered from TANGEDCO.



(f) In terms of the provisions of the PPA, transmission charges are to be paid by the Procurer “from the injection point onwards”, and there is no restriction or qualification for the payment of charges/fees levied by RLDC/SLDC. Therefore, RLDC/SLDC charges, irrespective of the levy being after or before the injection point, is to be reimbursed by the Procurer. The question of levy of charges up to the Injection Point in any event, does not arise, as the Petitioner has transmission line up to the injection point. With effect to this, TANGEDCO had taken a view that the payment of ‘System Operation Charges’, and ‘Market Operation Charges’ that are charges levied by RLDC, were not payable in terms of the PPA, as such charges technically are levied before the injection takes place.

(g) In terms of Article 4.3.1(b) of the PPA, the Procurer is liable for payment of transmission charges for the ‘contracted capacity’, and does not restrict the payment to the ‘declared capacity’. TANGEDCO has misinterpreted this provision while restricting the POC charges to the proportion of the ‘declared capacity’ as the only requirement under the said clause is that the transmission charges should have been paid by the Seller.

(h) The PPA nowhere provides for payment of transmission charges based on the capacity made available. The liability of payment of Transmission charges is a separate and distinct liability of the Procurer which cannot be linked to the capacity made available. The same needs to be paid on the contracted capacity as stated in the PPA and not as interpreted by the TANGEDCO that the transmission charges (POC) are to be paid only in proportion to the declared capacity. Even though, the Petitioner has made several representation requesting TANGEDCO to release the amounts pertaining to POC charges, TANGEDCO has neither replied to the said representations nor has taken any action for refunding of the amounts.

(i) Furthermore, the Petitioner has been unable to clear the full dues of PGCIL for the transmission facilities due to the non-payment of the transmission charges by TANGEDCO to the Petitioner in terms of the PPA. Consequently, PGCIL had been invoking the letter of credits available with them being replenished by the Petitioner, which were submitted and to be maintained in terms of Transmission Service



Agreement, thus causing severe financial hardship in continuing the limits with the banks for reinstating the said letter of credit.

(j) In terms of Article 8.3.5 of the PPA, TANGEDCO is liable to pay the Late Payment Surcharge, at the rate equal to SBI PLR per annum, on the amount of outstanding payment, calculated on a day-to-day basis and compounded with monthly interest, for each day of the delay, on the amounts due and payable, which is not paid.

(k) The Commission has an exclusive jurisdiction under Section 79(1)(b) read with Section 79(1)(f) of the Act in regard to the issues relating to the Petitioner, as the Petitioner has PPAs for supply of electricity to more than one State. The Hon'ble Supreme Court, has, in the case of Energy Watchdog vs. Central Electricity Regulatory Commission & ors., (2017) 14 SCC 80 settled the position of jurisdiction of this Commission, where inter-state supply is concerned and is squarely applicable to the present case.

(l) From March 2019 onwards, TANGEDCO has been directly making payments to Power Grid irrespective of the declared capacity by the Petitioner. Therefore, the same amounts to an admission and acknowledgment of default, and same would extend the period of limitation in terms of Section 18(1) of the Limitation Act. Therefore, the present Petition is not barred by limitation.

Hearing dated 22.2.2022

4. The Petition was 'admitted' on 22.2.2022 and the Commission, also directed the Petitioner to furnish certain additional information and for the parties to complete their pleadings in the matter. In compliance to the above directions, the Petitioner has filed the additional information vide affidavit dated 25.6.2022.

Reply of the Respondent, TANGEDCO

5. The Respondent TANGEDCO vide reply affidavit dated 4.12.2022, has submitted the following:

(a) As per CERC Notification dated 18.5.2015 the expenses incurred by NLDC/RLDCs towards monitoring of grid operations, supervision and control over the interstate



transmission systems, real time operations for grid control and dispatch are to be borne by the interstate transmission licensees, generating stations, sellers and distribution licensees and buyers in the form of System Operation Charges and Market Operation Charges. In accordance with the said notifications, the Respondent TANGEDCO being a distribution licensee, pays the SOCs and MOCs towards the said expenses.

- (b) As per Article 4.3 of the PPA, the procurer shall be responsible for the payment of transmission charges (from injection points onwards only) and applicable RLDC/SLDCs charges, limited to charges applicable to the contracted capacity of the power. The Procurer shall reimburse any of the above charges if paid by the seller from the injection point onwards.
- (c) The supply of power from the Petitioner to the TANGEDCO commenced from August,2015. From 1st to 22nd October,2017, in spite of availability in the original source, the Petitioner had declared '0' MW to TANGEDCO from 1st, stating the reasons as Ash conveying line choking and Ash hopper level high in both the units. Further, the Petitioner had supplied 361.25 MW power out of the approved quantum of 425 MW through alternate source from 23rd to 31st October, 2022. It was seen from the WRLDC injection schedule report of the Petitioner that the Petitioner has scheduled full generated power of 840 MW during the month of October, 2017 under LTA to Uttar Pradesh only. This was a clear breach of contractual obligation on behalf of the Petitioner.
- (d) As per schedule 4 of the PPA, full capacity charges shall be payable to the Petitioner on making available 85% of the contracted capacity. However, in case of availability below 85%, the capacity charges shall be payable on proportionate basis in addition to the penalty to be paid by the seller as provided in Schedule 4, if capacity made available is less than 80% of the contracted capacity. Since the Petitioner has declared 0 MW to TANGEDCO and schedule full generated power to Uttar Pradesh instead of declaring the available quantum to their long-term customers TANGEDCO has restricted the transmission charges for the month of October, 2017.



(e) In spite of according approval to the Petitioner's request to supply part of the contracted quantum from alternate source and the balance quantum from the original source from the period from November, 2017 to April, 2018 vide letters dated 30.10.2017, 8.1.2018 and 28.2.2018, the Petitioner had not supplied power to the aggregated contracted capacity to TANGEDCO and not declared the quantum to TANGEDCO proportionately from the Petitioner's power plant available capacity. Therefore, POC charges have been deducted by the TANGEDCO.

SOCs and MOCs do not form part of transmission charges and are charges applicable to the Petitioner for their own existence as an interstate trading licensee and cannot be passed on to TANGEDCO

(f) In response to the debit note raised by the Petitioner for MOC and SOC, TANGEDCO vide its letters dated 13.10.2015 and 13.1.2016 has informed the Petitioner that (i) Technically SOC and MOCs become applicable on the Petitioner just before injection taken place at the injection point and hence are not part of transmission charges and (ii) TANGEDCO and the Petitioner (being an interstate trading licensee) pay the SOC and MOC as per notification dated 18.5.2015 and (iii) The payment of SOC and MOC by the Petitioner is by virtue of its own status as an interstate licensee for availing grid access. Hence these charges are applicable to the Petitioner alone and cannot be passed on to TANGEDCO.

(g) TANGEDCO is paying the transmission charges directly to PGCIL from March, 2019 onwards and does not amount to any admission or default on behalf of TANGEDCO. TANGEDCO started to pay POC charges directly to PGCIL to avoid restriction of power supply by PGCIL.

POC charges deducted by TANGEDCO due to disproportionate supply and breach of contractual obligation by the Petitioner.

(h) As per Schedule, 4.41 of the PPA, POC charges are to be paid by the Petitioner and reimbursed by the TANGEDCO. However, since the Petitioner has not paid the POC charges, PGCIL had imposed Regulation of Power Supply (RPS) on 27.3.2018 for 83 MW and 27.4.2018 for 200 MW. Due to non-payment of POC charges within due date, surcharge was levied by PGCIL. TANGEDCO is not liable to pay surcharge being levied by PGCIL due to delay and negligence on behalf of the Petitioner. Hence, TANGEDCO has deducted the amount pertaining to the



surcharge from the reimbursement charges raised by the Petitioner. PGCIL also adjusted STOA credits towards LPS which is again due to the default on the part of the Petitioner. Hence, TANGEDCO availed STOA credits without LPS adjustment.

Petition is not maintainable as it has bypassed the provisions of PPA and is barred by Limitation.

- (i) The Petitioner has bypassed the provisions for amicable settlement of disputes under Article 14.2 of the PPA. While the Petitioner had raised notice of dispute as per Article 14.2.1.1 it has without any explanation bypassed the provisions of the PPA under Article 14.2.1.3 for amicable settlement of disputes after TANGEDCO furnished its defense and rejected the claims of the Petitioner. The petitioner has resorted to filing this petition without exploring the option of meeting and trying to amicably settle the dispute as per Article 14.2.1.3 which was mandatory under the PPA.
- (j) The non-payment of transmission charges which TANGEDCO was not liable to pay does not form a continuing cause of action as TANGEDCO through various letters, during the period from 2015 to 2020 had clearly rejected the claims of the Petitioner each time for that specific period. The Hon'ble Supreme Court of India in CLP India Pvt. Ltd. vs GUVNL and ors (2020 5 SCC 585) has clarified that repeated letters or exchange of communication do not extend the period of limitation provided by law. There can be no continued cause of action against TANGEDCO as it had unequivocally refused the payment of transmission charges for the reasons above.
- (k) In terms of the judgement of Hon'ble Supreme Court in A.P. Power Coordination Committee vs Lanco Kondappalli Power Ltd and ors (2016 3 SCC 468), a claim cannot be allowed before Electricity Regulatory Commission if it would be otherwise barred by limitation for filing an ordinary suit before a civil court. Thus, the nonpayment of the transmission charges claimed by the Petitioner after a period of 3 years from when TANGEDCO rejected them, are barred by limitation.

Rejoinder of the Petitioner

6. The Petitioner vide its rejoinder affidavit dated 14.12.2022 has submitted the following.



- (a) The matter in issue in the present case is in a very narrow compass namely, the liability of TANGEDCO to reimburse the transmission charges and the SLDC/ RLDC charges and not depending upon actual power flow, availability, etc. TANGEDCO is in effect rewriting the terms of PPA to the effect that transmission charges shall be payable only in a proportionate manner and not for the actual transmission charges levied by transmission licensee/PGCIL, where no such provision is available in PPA.
- (b) The tariff quoted by the Petitioner is at the interconnection point. For the CTU connected generator, both the interconnection point and the injection point are the same. The Petitioner is connected to the CTU network by way of the dedicated transmission line and the tariff payable by TANGEDCO is also at the interconnection point. For this reason, the PPA provides that the Procurer shall be responsible for payment of transmission charges from the contracted capacity from injection point onwards. Such a charge is to be reimbursed by the Procurer in case, the same is paid by the Seller (generator). This clearly states that it is the obligation of the Procurer to pay the transmission charges for the contracted capacity. The Petitioner Seller acts as a conduit/intermediary between the CTU and the Procurer.
- (c) In fact, considering these provisions of the PPA, as per the Standard Bidding Documents and the obligation of the Procurer, this Commission has amended the Sharing Regulations, whereby, the transmission bills are to be issued by CTU to Procurers directly and the respective payments security mechanism are also required to be established and maintained by such Procurer. Accordingly, TANGEDCO has been paying the invoices for all the transmission capacity contracted by all generators directly to CTU irrespective of the actual supplied capacity. This being the intent, there cannot be anything different principle prior to this amendment.
- (d) The rights and obligations of the parties, in relation to the availability declared and supply of electricity are exhaustively provided for in the PPA. This includes the payment of capacity charges on a proportionate basis, for availability below 85% and levy of penalty, as provided in Schedule 4 of the PPA. Article 15.6 of the PPA



provides that the terms and conditions thereof are the complete and exclusively stated terms of the agreement between the parties.

- (e) Penalty, if any, shall be applicable as per the provisions of the PPA. PPA has clearly provided that penalties are applicable at different stages in execution of Project i.e. prior to the scheduled delivery date for non-commencement, during the operation period for non-supply or reduced supply, during the period of termination in case of any default. There is no such provision for deduction of transmission charges for reduced availability. In terms of Article 4.3.1(b) of the PPA, the payment of transmission charges (from injection point onwards) and the applicable RLDC/SLDC charges on the contracted capacity is the responsibility of TANGEDCO. In case of any payment made by the Petitioner for the above, the same is required to be reimbursed by TANGEDCO.
- (f) It is therefore clear that the charges are in relation to the contracted capacity and not in relation to the declaration of availability, actual power flow, etc., Further, the responsibility for payment of such charges is on TANGEDCO and only in case the payment is made by the Petitioner, the same is required to be reimbursed on actual basis, by TANGEDCO.
- (g) The very concept of reimbursement is that the Petitioner ought not to benefit or lose on account of the transmission and SLDC/RLDC charges paid. The only obligation for the claim of reimbursement by the Petitioner is that it is required to show the levy of such charges on actual basis. There cannot be any further conditions for such payment of transmission and RLDC/SLDC charges. Whatever is paid to the transmission licensee and SLDC/RLDC, the Petitioner is required to be reimbursed for the same.
- (h) As regards limitation, TANGEDCO had started deducting the POC transmission charges from October, 2017 for which the Petitioner had time to file the claims/ suit/ petition till October, 2020. Due to Covid lockdown, the limitation period was extended by the Hon'ble Supreme Court and therefore, the present petition is not barred by limitation. In any case, the Petitioner filed the Petition in May, 2021, which is well within the limitation period stipulated by the Hon'ble Supreme Court.



- (i) The reliance on Article 5.3.2 of the PPA is also misconceived and is in fact completely irrelevant to the issue at hand. It is also unfair on the part of TANGEDCO to seek reliance on the said provision selectively, whereas on numerous occasions, the Petitioner has been supplied the full quantum of the contracted capacity, while the other Procurers have taken lesser quantum, based on the emergent needs at the relevant time. For the year 2017-18, the cumulative availability for TANGEDCO was 66.5% and for UPPCL it was only 51.62%. In fact, the cumulative availability for TANGEDCO in all the months of 2017-18 (except April, 2017) has always been higher than the cumulative availability for UPPCL. Even at the end of October 2017, the corresponding figures were 72.31% and 70.18% respectively. It is for this reason that TANGEDCO has also not alleged any such breach of the terms of the PPA. In any event the issue is completely irrelevant for the payment of transmission charges and SLDC/RLDC charges.
- (j) The artificial distinction sought to be made by TANGEDCO on the levy of SOC and MOC are wrong as these charges are levied by the SLDC/RLDC and are squarely covered under Article 4.3.1(b) of the PPA. The transmission line up to the injection point is a dedicated line of the Petitioner and the levy of SOC and MOC are only for beyond the injection point. The Petitioner is not an inter-State trading licensee, but is only a generating company.
- (k) The Petitioner was unable to operate the generating station at the full capacity during the month of October, 2017 for reasons beyond its control. In any event, the capacity charges and energy charges are being paid by TANGEDCO in terms of the PPA. The imposition of power regulation by PGCIL for supply to TANGEDCO was itself due to non-payment of transmission charges, which is the responsibility of TANGEDCO. TANGEDCO cannot seek to take advantage of the same or otherwise deny the liability to pay LPSC for such non-payment.
- (l) It is wrong and denied that the non-payment of transmission charges does not form part of a continuous cause of action. The non-payment of tariff under the PPA is a continuous cause of action as has been upheld by the APTEL in the case of PCKL v UPCL in Appeal No.10/2020 dated 2.11.2020.



Hearing dated 15.12.2022 and 17.1.2023

7. Due to paucity of time, the petition could not be taken up for hearing on 15.12.2022 and 17.1.2023.

Hearing dated 7.3.2023

8. During the hearing on 7.3.2023, the learned counsel for the Petitioner and the learned counsel for the Respondent TANGEDCO made detailed oral submissions in the matter. However, the Commission, at the request of the learned counsels, permitted the parties to file their written submissions and reserved its order in the Petition. In compliance thereof, the Petitioner and the Respondent have filed their written submissions on 14.4.2023.

Written Submissions of the Petitioner

9. The Petitioner has mainly reiterated its submission made in the petition/rejoinder above. It has however referred to the various terms and conditions of the PPA viz., Definition of 'injection point' and 'interconnection point', Articles 4.3 (b) and 15.6, Clause 4.4 (4.4.1 and 4.4.2) and has submitted that the provisions of the PPA are clear and do not leave room for ambiguity in the present case. It has pointed out that the transmission charges shall be limited to as applicable to the contracted capacity of the Procurer, which is 500 MW. While pointing out that the long-term transmission charges are never determined or levied based on the actual use of the system, or to the extent of the availability declared by the generator, the Petitioner has stated that the transmission licensee is not concerned as to the actual use of the transmission system, but only on the capacity reserved for open access. The Petitioner has stated that the very concept of reimbursement is that whatever is charged as transmission charges on the Petitioner, is to be paid by the Respondent and there cannot be a reimbursement, if the basis of the payment of transmission charges by the Respondent to the Petitioner is different from the



basis on which the transmission charges are levied by the transmission licensee on the Petitioner. The Petitioner has added that similar to the issue of transmission charges, the obligation to pay RLDC/SLDC charges under Article 4.31(b) and Clause 4.4.2 of Schedule 4 to the PPA, is squarely on the Respondent as a Procurer and there is no qualification, restriction or condition attached to the said obligation. Accordingly, the Petitioner has submitted that it is entitled to the payment of the principal amount of transmission charges and RLDC/SLDC charges of Rs 646280967/- unilaterally deducted by the Respondent TANGEDCO along with late payment surcharge in terms of Article 8.3.5 of the PPA.

Written Submissions of the Respondent TANGEDCO

10. The Respondent TANGEDCO has reiterated its submissions made in its reply. However, it has also pointed out that the point of dispute is whether the Respondent can be saddled with the burden of such transmission charges, in respect of the capacity that has not been declared by the Petitioner, in breach of the PPA. Referring to the definition of 'transmission charges and Article 4.3.1 of the PPA, the Respondent has submitted that obligation of the Respondent to reimburse the Petitioner only arises in respect of transmission charges payable for actual usage of the CTU network for transmission of power from the injection point to the delivery point. Where the Petitioner has failed to declare availability and thus failed to supply power, the transmission networks having not been used for transmission of power to the delivery point, the Respondent cannot be made liable to pay the same. It has contended that in terms of Article 4.3.1, the Petitioner's right to claim transmission charges is therefore subject to the Petitioner complying with the terms of the PPA and not being in breach thereof. The Respondent has further stated that in terms of the said article, it is responsible for payment of transmission charges limited to the charges applicable to the contracted capacity and hence there is no absolute



responsibility on the part of the Respondent to pay the transmission charges for the entire contracted capacity, but only for the capacity made available to the Respondent up to the contracted capacity. It has further stated that technically SOCs and MOCs become applicable on the Petitioner just before injection takes place at the injection point, and hence are not liable to be reimbursed by the Respondent. Accordingly, the Respondent has submitted that the Petition is without merit and deserves to be rejected.

11. Based on the submissions of the parties, the issues which emerge for consideration is as under:

- (i) **Issue A:** *Whether the claim of the Petitioner is barred by limitation?*
- (ii) **Issue B:** *Whether the Petitioner is entitled for reimbursement of the transmission charges and RLDC /SLDC charges by the Respondent?*
- (iii) **Issue C:** *Whether the Petitioner is entitled for the Late Payment Surcharge?*

The issues are examined in the subsequent paragraphs.

Analysis and Decision

Issue A: Whether the claim of the Petitioner is barred by limitation?

12. The Respondent TANGEDCO while pointing out that there is no continuous cause of action in the present case, as it had, through various letters during the period 2015-2020 rejected the claims of the Petitioner, has submitted that in terms of the judgment of the Hon'ble Supreme Court of India in CLP India Pvt. Ltd. vs GUVNL & ors (2020 5 SCC 585) repeated letters or exchange of communication do not extend the period of limitation provided by law. It has also referred to the judgement of Hon'ble Supreme Court in APPCC v Lanco Kondappalli Power Ltd & Ors (2016 3 SCC 468) and submitted that the claims of the Petitioner beyond the period of three years is therefore barred by limitation. *Per contra*, the Petitioner has referred to the APTEL judgment dated 2.11.2020 in Appeal No.10/2020 (PCKL v UPCL) and submitted that non-payment of tariff under the PPA is a continuous



cause of action. It has also argued that in view of the extension of the period of limitation by the Hon'ble Supreme Court, due to covid pandemic, in 2020, the deduction of transmission charges and non-payment of RLDC/SLDC charges by the Respondent, is not barred by limitation.

13. The matter has been examined. Though no period of limitation has been prescribed in the 2003 Act for filing of Petitions for adjudication of disputes, the Hon'ble Supreme Court in the 'Lanco Kondapalli case' has held that the claims coming for adjudication before the Commission cannot be entertained or allowed, if otherwise, the same is not recoverable, in a regular suit on account of law of limitation. The relevant extract of the said judgment is as under:

"30.....In our considered view a statutory authority like the Commission is also required to determine or decide a claim or dispute either by itself or by referring it to arbitration only in accordance with law and thus Sections 174 and 175 of the Electricity Act assume relevance. Since no separate limitation has been prescribed for exercise of power under Section 86 (1)(f) nor this adjudicatory power of the Commission has been enlarged to entertain even the time-barred claims, there is no conflict between the provisions of the Electricity Act and the Limitation Act to attract the provisions of Section 174 of the Electricity Act. In such a situation, on account of the provisions in Section 175 of the Electricity Act or even otherwise, the power of adjudication and determination or even the power of deciding whether a case requires reference to arbitration must be exercised in a fair manner and in accordance with law. In the absence of any provision in the Electricity Act creating a new right upon a claimant to claim even monies barred by law of limitation, or taking away a right of the other side to take a lawful defence of limitation, we are persuaded to hold that in the light of nature of judicial power conferred on the Commission, claims coming for adjudication before it cannot be entertained or allowed if it is found legally not recoverable in a regular suit or any other regular proceeding such as arbitration, on account of law of limitation. We have taken this view not only because it appears to be more just but also because unlike labour laws and the Industrial Disputes Act, the Electricity Act has no peculiar philosophy or inherent underlying reasons requiring adherence to a contrary view."

14. In the light of the above judgment, the limitation period prescribed for money claims under the Limitation Act, 1963 i.e. 3 years, will be applicable for filing the application before the Commission.

15. The Hon'ble Supreme Court vide its order dated 23.3.2020 in Suo Motu Writ Petition (C) No.3/2020, taking Suo Motu cognizance of the difficulties faced by the litigants in filing



petitions/suits/appeals/all other quasi proceedings within the period of limitation due to outbreak of Covid-19 pandemic, has directed the extension of the period of limitation in all proceedings before all Courts/Tribunals w.e.f. 15.3.2020 till further orders. On 8.3.2021, the above order dated 23.3.2020 was brought to an end permitting the relaxation of the period of limitation between 15.3.2020 and 14.3.2021. Thereafter, vide order dated 23.9.2021, in M. A. No. 665/2021 (in Suo Motu Writ Petition (C) No.3/2020), the limitation period in all proceedings before the Courts/Tribunals was extended till 2.10.2021. Subsequently, vide order dated 10.1.2022 in M.A. No. 21/2022, the Hon'ble Supreme Court directed that the period from 15.3.2020 till 28.2.2022, shall stand excluded for the purpose of limitation, as may be prescribed under general or special laws in respect of all judicial or quasi-judicial proceedings.

16. As stated, the Petitioner has relied upon the decision of APTEL in Udupi case, and contended that the non-payment of tariff for the period from August, 2015 till July, 2020, in terms of the PPA is a 'continuous cause of action' and hence not barred by limitation. Per contra, the Respondent has submitted that since the same were rejected vide its various letters, the claim is barred by limitation. In Udupi case, APTEL, while examining the issue of non-payment of LPSC, on account of the delay in payment of monthly bills by the discoms, had observed as under:

"192. The details submitted by the appellants demonstrate that the ESCOMs have treated their respective arrangement for procurement of electrical supply from the respondent Udupi Power as running accounts wherein the demands raised by the seller through bills/invoices issued on monthly basis could be satisfied by payments made, on account, for reconciliation/adjustment in due course, such part payments/instalments/tranches being piecemeal and in sums unilaterally decided as per convenience or sweet will of the procurer(s), the drawal of electricity having continued unabated despite such defaults consistently indulged in.

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194. The pattern shown by the above-mentioned details of billing and payments is clearly indicative of the procurers having understood the arrangement with seller to be such as obliged running accounts to be maintained. This being the sequitur, the argument of the respondent



Udupi Power that it is a case of "continuing cause of action" gets validated and strengthened rendering the plea of limitation bar superfluous.

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203. We do not find substance in any of the submissions of the appellants in context of factual matrix at hand. It is a settled position of law that a "continuing wrong" constitutes two elements. It is an act which creates (i) a continuing source of injury and (ii) renders the doer of the act responsible and liable for the continuance of the said injury. Every time a breach is committed, the aggrieved party gets a fresh cause of action to invoke appropriate judicial proceedings.

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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.

209. We conclude that the plea of bar of limitation raised by the appellants is without substance and must be rejected.

17. It is noticed that in the present case, the Petitioner vide letter dated 8.10.2015 had raised invoice for payment of transmission charges including RLDC/SLDC charges for the month of August, 2015 and in response, the Respondent vide its letter dated 13.10.2015 disputed the claim regarding RLDC/SLDC charges, and had deducted the same from the transmission charges paid to the Petitioner. Further, on a debit note, being raised by the Petitioner vide letter dated 22.10.2015 for these charges, the Respondent had reiterated that the said charges were not payable. There has also been deduction of these charges including the short payment of the transmission charges by the Respondent during the



disputed period i.e. till July, 2020. As observed by APTEL in the aforesaid judgment, undisputedly, there have been breaches of the contract by the Respondent, on account of the non-payment of the transmission charges and the RLDC/ SLDC charges, in terms of the PPA as well as the Regulations. As there has been continuous and recurring disobedience and non-compliance of the provisions of law, the said default partakes the character of 'continuing breach' as contemplated under Section 22 of the Limitation Act, and accordingly fresh period of limitation continues to run at every moment of time, during which the breach continues. In State of M.P & ors v Yogendra Srivastava (2010) 12 SCC 538, it was held by the Hon'ble Supreme Court that if the denial of a benefit occurs every month, then such denial gives rise to a fresh cause of action, every month, based on a continuing wrong. The relevant portion of the order is extracted below:

“18. ... Where the issue relates to payment or fixation of salary or any allowance, the challenge is not barred by limitation or the doctrine of laches, as the denial of benefit occurs every month when the salary is paid, thereby giving rise to a fresh cause of action, based on continuing wrong....”

18. It is a settled position of law that a party cannot take the benefit of its own wrong. We therefore agree with the submissions of the Petitioner that the cause of action in the present case is continuous. Accordingly, we conclude that the plea of bar of limitation raised by the Respondent is misconceived and is not tenable.

19. Even assuming that the contention of the Respondent that the claim of the Petitioner is barred by limitation is acceptable, we notice that the claims of the Petitioner for the amounts due and payable till March, 2017 would be within the prescribed period of limitation of three years, considering the fact that the Hon'ble Supreme Court has excluded the period from 15.3.2020 till 28.2.2022 being considered for the purpose of limitation, as stated in para 15 above. In terms of this, the dues payable by the Respondent since March, 2017 cannot be said fall within the period of limitation. The Petitioner has pointed out that



apart from minor deductions prior thereto, the Respondent had started effecting unilateral deduction of the POC transmission charges from October, 2017 and thus, it had time till October, 2020 to file its claims before this Commission. We agree with the submissions of the Petitioner. In line with the judgment of the Hon'ble Supreme Court extending the period of limitation, coupled with the fact that the cause of action is continuous, as stated above, we hold that the present petition filed by the Petitioner in May, 2021 with the reliefs sought in para 1 above, cannot be said to be hit by limitation. Issue (A) is decided accordingly.

Issue B: Whether the Petitioner is entitled for the reimbursement of transmission charges and RLDC /SLDC charges by the Respondent?

20. The Petitioner has submitted that on a plain reading of the definition of the contracted capacity and Article 4.3.1(b) of the PPA, the obligation of the Respondent to pay the transmission charges from the injection point is on the contracted capacity and not be limited to either the declaration of availability or the schedule given by the Petitioner. It has also stated that similar to the issue of transmission charges, the obligation to pay the RLDC/SLDC charges under Article 4.3.1(b) and Clause 4.4.2 of Schedule 4 of the PPA is squarely on the Respondent as a procurer and there is no qualification, restriction or condition attached to the said obligation. Per contra, the Respondent has submitted that the obligation of the Respondent to reimburse the Petitioner only arises in respect of the transmission charges payable for actual usage of the CTU network for transmission of power from the injection point to the delivery point and where the Petitioner has failed to declare availability and thus failed to supply power, the transmission networks having not been used for the transmission of power to the delivery point, the Respondent cannot be held liable to pay the same. It has also contended that the Respondent being a distribution licensee pays the SOC and MOC charges incurred by NLDC /RLDC, and similarly, the Petitioner being a generating company is bound to pay the SOC and MOC in terms of the



regulations for availing grid access in terms of the Commission's notification dated 18.5.2015.

21. We have examined the submissions. Some of the provisions of the PPA executed by the parties are extracted below for consideration.

Definitions:

Contracted capacity: shall mean the Aggregated Contacted Capacity; 500 MW

Delivery Point: shall mean the STU interface(s) as specified in Schedule 1 of this agreement;

Injection Point: shall mean the PGCIL 765/400 KV CHAMPA POOLING STATION IN CHHATTISGARH as specified by the successful bidder in Format 4.10 of the Selected bid;

Interconnection Point: shall mean the point where the power from the Power Station switchyard bus of the Seller is injected into the interstate/intrastate transmission system (including the dedicated transmission line connecting the power station with the interstate/intrastate transmission system);

Transmission charges: shall mean the charges to be paid by the Seller and reimbursed by the Procurer as transmission tariff for usage of intervening CTU networks for the transmission of power from the injection point up to the Delivery point, as approved by the Appropriate Commission.

Articles

4.3 Procurers Obligation

*4.3.1 Subject to the terms and conditions of this Agreement, **the Procurer shall:***

a) ensure the availability of Interconnection Facilities and evacuation of power from the Delivery Point before the Scheduled Delivery Date or the Revised Scheduled Delivery Date, as the case may be;

b) be responsible for payment of the Transmission Charges from the Injection Point onwards) and applicable RLDC/ SLDC charges limited to the charges applicable to the Contracted Capacity of Procurer. The Procurer shall reimburse any of the above charges, if paid by the Seller;

c) Deleted

d) Deleted

e) make all reasonable arrangements for the evacuation of the Infirm Power from the Power Station; subject to the availability of transmission capacity and

f) fulfil all obligations undertaken by the Procurer under this Agreement.

xxxxx.

15.6 Entirety

15.6.1 This Agreement and the Schedules are intended by the Parties as the final expression of their agreement and are intended also as a complete and exclusive statement of the terms of their agreement.



15.0.2 Except as provided in this Agreement, all prior written or oral understandings, offers or other communications of every kind pertaining to this Agreement or supply of power up to the Contracted Capacity under this Agreement to the Procurer by the seller shall stand superseded and abrogated.

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Schedule 4 (Tariff)

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4.4 Transmission/Wheeling Charges and RLDC/SLDC Charges

4.4.1 *The payment of POC and Non POC Charges to the CTU, from the Injection Point to the Delivery Point shall be paid by the Seller and would be reimbursed by the Procurer.*

4.4.2 *The payment of the RLDC/SLDC charges shall be the responsibility of the Procurer.”*

22. In terms of Article 4.3.1(b) of the PPA, the obligation for payment of transmission charges from the injection point onwards and the applicable RLDC/SLDC charges up to the contracted capacity of 500 MW, is on the Procurer i.e. the Respondent TANGEDCO. It further provides that in case the Seller (Petitioner herein) pays the transmission charges, then the same is to be reimbursed by the Procurer. Similar provision exists in Clause 4.4.1 and 4.4.2 of Schedule 4 of the PPA. The contracted capacity as defined in the PPA, in the present case is 500 MW. The only restriction provided for in Article 4.3.1(b) is that the transmission charges shall be limited to the contracted capacity of the Respondent (Procurer). Thus, on a plain reading of Article 4.3.1(b) along with the definition of the contracted capacity, it is evident that the obligation to pay the transmission charges from the injection point onwards for a contracted capacity of 500 MW is squarely upon the Respondent TANGEDCO and not the Petitioner. However, in case the transmission charges and the RLDC/SLDC charges are paid by the Petitioner, then the Respondent TANGEDCO is liable to reimburse the same to the Petitioner. The contention of the Respondent that the term 'limited to' in Article 4.3.1(b) read with the term 'for usage of intervening CTU networks...' in the definition of 'transmission charges' indicates that there is no absolute responsibility on the Respondent to pay the transmission charges for the



entire capacity, but only for the capacity made available to the Respondent up to the contracted capacity, is clearly misconceived and contrary to the reading of the provisions of the PPA. In case, the parties intended that the responsibility for payment of the transmission charges by the Respondent are to be based on actual availability, then the same would have been reflected in the said clause. The parties having not intended as such, the interpretation placed by the Respondent TANGEDCO on the said provision, is contrary to the settled principles of law, that a contract between parties is to be read and understood in their plain language to know the intention of the parties. In this regard, it is pertinent to extract herewith the judgment of three Judge bench of Hon'ble Supreme Court in Bharat Aluminum Company Vs. Kaiser Aluminum Technical Services Inc. [(2016) 4 SCC L26I in which it was held as under:

“10. In the matter of interpretation, the court has to make different approaches depending upon the instrument falling for interpretation. Legislative drafting is made by experts and is subjected to scrutiny at different stages before it takes final shape of an Act, Rule or Regulation. There is another category of drafting by lawmen or document writers who are professionally qualified and experienced in the field like drafting deeds, treaties, settlements in court, etc. And then there is the third category of documents made by laymen who have no knowledge of law or expertise in the field. The legal quality or perfection of the document is comparatively low in the third category, high in second and higher in first. No doubt, in the process of interpretation in the first category, the courts do make an attempt to gather the purpose of the legislation, its context and text. In the second category also, the text as well as the purpose is certainly important, and in the third category of documents like wills, it is simply intention alone of the executor that is relevant. In the case before us, being a contract executed between the two parties, the court cannot adopt an approach for interpreting a statute. The terms of the contract will have to be understood in the way the parties wanted and intended them to be. In that context, particularly in agreements of arbitration, where party autonomy is the grund norm, how the parties worked out the agreement, is one of the indicators to decipher the intention, apart from the plain or grammatical meaning of the expressions and the use of the expressions at the proper places in the agreement.”

23. Also, if the contention of the Respondent TANGEDCO that the payment of transmission charges under the PPA [Article 4.3.1(b)] is to be limited to either the declaration of availability or the schedule given by the Respondent, is accepted, the same will result in to making the provision pertaining to payment /reimbursement of the transmission charges and RLDC/SLDC charges under Clauses 4.4.1 and 4.4.2 of



Schedule 4) meaningless, redundant and otiose. It is pertinent to mention that the Petitioner's (Seller's) obligation under Article 4.2.1 (d) of the PPA is for obtaining open access for transmission of Aggregated Contracted Capacity of power from the injection point to the Delivery point. The long-term transmission charges are determined by the Commission and are applicable based on the capacity reserved in the transmission system and are not levied based on the actual use of the system or to the extent of availability declared by the generators. As rightly pointed out by the Petitioner, the transmission licensee is not concerned as to the actual use of the transmission system, but only the capacity reserved for open access. In the light of the above, we find no merit in the contention of the Respondent and the same is rejected.

24. Another contention of the Respondent TANGEDCO is that since the obligation on the Respondent to reimburse the transmission charges has been specifically made 'subject to the terms and conditions of the PPA', the Petitioner's right to claim transmission charges is therefore subject to the Petitioner complying with the same and not being in breach thereof. We have in the paragraph above held that the transmission charges reimbursable by the Respondent is limited to the contracted capacity (500 MW) and not based on the actual availability, as contended by the Respondent. In our view, the actual availability of the generating station, the quantum of energy scheduled may have an implication on the capacity charges and the energy charges payable by the Respondent to the Petitioner, wherein, under Schedule 4 of the PPA, full capacity charges shall be payable to the Petitioner on making available 85% of the contracted capacity and in case of availability below 85%, the capacity charges shall be payable on proportionate basis in addition to the penalty to be paid by the Seller as provided in Schedule 4, if capacity made available is less than 80% of the contracted capacity. However, these are not relevant factors for



consideration in respect of the payment/reimbursement of the transmission charges by the Respondent, in terms of the PPA. It is pertinent to note that the Petitioner is connected to the CTU network by way of a dedicated transmission line and the tariff quoted by the Petitioner and payable by the Respondent is also at the interconnection point. Thus, for a CTU connected generator, both the interconnection point and the injection point are the same. It is in this background that the Respondent, is, under the PPA, responsible for the payment of transmission charges for the contracted capacity from the injection point onwards. It is observed that the Respondent, in terms of the CERC (Sharing of Transmission charges and losses) Regulations 2020, which provide for billing and recovery of transmission charges directly from the Discoms (and not the generator) has been duly admitting and paying the transmission charges for the contacted capacity of 500 MW, irrespective of the availability declared by the Petitioner or the actual supply of electricity. Thus, the principle that the Respondent is responsible for the payment of transmission charges remained the same even after the Sharing Regulations 2020 came into force, except for the fact that under the PPA, the billing for transmission charges was on the generator, to be reimbursed by the Respondent. As submitted by the Petitioner, the concept of reimbursement will have no meaning if the reimbursement of the transmission charges by the Respondent is different from the transmission charges levied and paid by the Petitioner. The contentions of the Respondent are therefore baseless and merit no consideration. We, therefore hold, that the unilateral deduction of the transmission charges reimbursable by the Respondent TANGEDCO is arbitrary and the Respondent is liable to reimburse the transmission charges in full, as paid by the Petitioner to PGCIL in terms of the PPA, for the disputed period. We direct accordingly.



25. As regards RLDC/SLDC charges, the Respondent has submitted that being a distribution licensee, it pays the System Operation Charges and Market Operation Charges incurred by NLDC/RLDC towards monitoring of grid operations etc., and similarly, the Petitioner, being a generating company is bound to pay the SOC and MOC in terms of the RLDC Fees and Charges, notified on 18.5.2015, for availing grid access. It has also submitted that technically SOC and MOC become applicable to the Petitioner just before the injection takes place at the injection point and hence are not liable to be reimbursed by the Respondent. It is noticed that similar to the issue of transmission charges, Article 4.3.1(b) read with Clause 4.4.2 of Schedule 4 of the PPA (as quoted above) is squarely applicable to the Respondent, who is responsible for the payment of RLDC/SLC charges. These provisions contain no restriction or qualification with regard to the obligation of the Respondent to pay/reimburse these charges, when paid by the Petitioner. It is noticed from Annexure-E annexed to the Petition, that the Respondent, apart from deduction of the transmission charges payable to the Petitioner, has not reimbursed the RLDC/SLDC charges to the Petitioner, during the disputed period. When the language of the contract is plain and unambiguous and the intention of the parties are clear, with regard to the obligation of the Respondent (Procurer) to pay/ reimburse the RLDC/SLDC charges, the same cannot be denied on the plea that SOC/MOCs technically become applicable on the Petitioner just before injection takes place at the injection point. The submissions of the Respondent on this count are also not acceptable. In our view, the payment of the applicable RLDC/SLDC charges on the contacted capacity is the responsibility of Respondent TANGEDCO and in case of payments made by the Petitioner for the above, the same is required to be reimbursed by the Respondent.



26. Based on the discussions in foregoing paragraphs, we hold that the Petitioner is entitled for the reimbursement of the Transmission charges and RLDC /SLDC charges amounting to Rs 64,62,80,697/- withheld by the Respondent TANGEDCO, contrary to the provisions of the PPA. Issue (B) is disposed of accordingly.

Issue C: Whether the Petitioner is entitled for the Late Payment Surcharge?

27. The Petitioner has submitted that in terms of Article 8.3.5 of the PPA, the Respondent TANGEDCO is liable to pay Late Payment Surcharge (LPSC) at the rate equal to SBI PLR per annum, on the amount of outstanding payment, calculated on a day-to-day basis and compounded with monthly interest, for each day of the delay, on the amounts due and payable, but not paid. Accordingly, the LPS amount calculated by the Petitioner from March, 2014 till December, 2020 is Rs 17,09,71,929/- as per statement enclosed in Annexure-G to the petition.

28. Article 8.3.5 of the PPA provides as under:

“8.3.5 In the event of delay in payment of a monthly bill by the Procurer beyond its due date, a Late Payment Surcharge shall be payable by such Procurer to the Seller at the rate equal to SBI PLR per annum, on the amount of outstanding payment, calculated on a day-to-day basis (and compounded with monthly rest) for each day of the delay. The Late Payment Surcharge shall be claimed by the Seller through the Supplementary Bill”

29. We have in this order held that the Petitioner is entitled to the reimbursement of the transmission charges and RLDC/SLDC charges, amounting to Rs 64,62,80,697/- by the Respondent TANGEDCO. The PPA defines the ‘Monthly Bill’ or ‘Monthly Invoice’ and Supplementary Bill as under:

“Monthly Bill” or “Monthly Invoice” shall mean a monthly invoice comprising of Capacity Charges (applicable after Delivery Date) and Energy Charges (as applicable), including incentive and penalty, as per Schedule 4 hereof;

“Supplementary Bill” shall mean a bill other than a Monthly Bill raised by any of the Parties in accordance with Article 8 of this Agreement.



30. The term “Monthly Bill” or “Monthly Invoice” has been defined to mean a monthly invoice comprising Capacity Charges and Energy Charges, including incentives and penalties as per Schedule 4. Thus, Article 8.3.5 covers the payment of LPS for the delay in payment of Capacity charges and Energy Charges beyond its due date as per the terms provided therein, to be claimed through a Supplementary bill. In other words, this Article does not cover the payment of LPS for the delay in payment/ reimbursement of the transmission charges to the Petitioner. We however note, that the term “Supplementary Bill” has been defined to mean a bill other than a ‘Monthly Bill’ raised by any of the parties in accordance with Article 8 of the Agreement. Clearly, the scope of the term “Supplementary Bill” is much wider than the “Monthly Bill” and is expected to include all such bills, except Monthly Bill, which any party can raise in accordance with Article 8. The Article 8.8 of the Procurer(s) PPA further provides as under:

“8.8 Payment of Supplementary Bill

8.8.1 Either Party may raise a bill on the other Party (“Supplementary Bill”) for payment on account of:

- i) Adjustment required by the Regional Energy Account (if applicable);*
 - ii) Tariff Payment for change in parameters, pursuant to provisions in Schedule 4; or*
 - iii) Change in Law as provided in Article 10,*
- and such Supplementary Bill shall be paid by other Party.”*

31. According to the above provision, either party may raise a bill on the other party for payment of (i) adjustment required by the Regional Energy Account, (ii) Tariff Payment for Change in parameters, pursuant to the provisions in Schedule 4, (iii) Change in Law as provided in Article 10. In this regard, what begs our consideration is the Sl. (ii) above i.e. Tariff Payment for change in parameters pursuant to the provision in Schedule 4 and whether the claim for reimbursement of the transmission charges/PoC upon the Procurer TANGEDCO would fall within the scope of the Supplementary Bill or not.



32. As per provisions under Schedule 4 (Tariff) read with Article 4.3.1(b) of the PPA, quoted above, the responsibility and obligation for payment of POC/transmission charges and the SLDC/RLDC charges is on the Respondent TANGEDCO (Procurer). In case of payment by the Petitioner of the said charges, the same are to be reimbursed, on actual basis, by the Respondent TANGEDCO. However, the pertinent question, is whether the claim for reimbursement of the transmission charges/ and SLDC/RLDC charges, by Respondent TANGEDCO, would fall within the scope of the Supplementary Bill, in particular, Article 8.8.1(ii) above. In our view, the said clause has to be construed in the widest amplitude to cover all the residual claims under Schedule 4, including the claim for transmission charges and SLDC/RLDC charges on a reimbursement basis. It is pertinent to note under the scheme of the PPAs, only two kinds of Bill/Invoices have been envisaged, as can be seen from the definition of the “Invoice” or “Bill”, as reproduced below:

“Invoice” or “Bill” shall mean either a Monthly Invoice, or a Supplementary Invoice by any of the Parties;

33. The provisions of the PPAs do not envisage any other categories than the above two for raising any claim on the other party/side. In our view, the right to claim the payment of the transmission charges and RLDC/SLDC charges, under the provisions of the PPAs, albeit on a reimbursement basis, has to be by way of a Supplementary Bill, covered under Article 8.8.1(ii). Even if these claims are not categorically made by the Petitioner under the said head, all such claims have to be treated at par with and in the nature of Supplementary Bills only. Any other interpretation to the contrary, would lead to an absurd situation where the parties are allowed to keep the valid claims of the transmission charges etc., of the other side to remain outstanding for the entire term of the PPA without any consequences thereof.



34. Having held that a claim of reimbursement of transmission charges and SLDC/ RDLC charges under the provisions of the PPAs has to be considered a Supplementary Bill, there cannot be any dispute with regard to the entitlement of LPS on the delayed payment against such claims as Article 8.8.3 of the PPA clearly provides as under:

“8.8.3 In the event delay in payment of a Supplementary Bill by either Party beyond its Due Date, a Late Payment Surcharge shall be payable at the same terms applicable to the Monthly Bill in Article 8.3.5.”

35. Hence, in the present case, we hold that the Petitioner is entitled to LPS on the outstanding POC/Transmission charges and the SLDC/RLDC charges reimbursable by the Respondent, TANGEDCO, in terms of the provisions of the PPA.

36. As per Article 8.3.5 of the PPA, the LPS on delayed payment beyond the due date i.e. 30 days from the date of the bill, is at the rate equal to SBI PLR per annum, on the amount of outstanding payment, calculated on a day to day basis (and compounded with monthly interest) for each day of the delay on the amounts due and payable, but not paid. Such LPS shall be claimed through Supplementary Bill. In terms of this, the Petitioner has worked out the LPS for the period from March, 2018 to December, 2020 for Rs 17.08 crores. It is observed that the Petitioner had raised the claims for reimbursement of transmission charges and SLDC/RLDC charges upon the Respondent TANGEDCO, after having paid such charges to PGCIL (out of which an amount of Rs 64,62,80,697/- was withheld by the Respondent as stated above). However, having held that the Petitioner will be entitled to LPS on the outstanding POC/transmission charges and SLDC/RLDC charges reimbursable by the Respondent, TANGEDCO, as per the provisions of the PPA, the Due Date also needs to be worked out as per the provisions of the PPA. The LPS amounts shall be worked out as per rates and methodology prescribed under Article 8.3.5



of the PPA on the amounts payable by the Respondent TANGEDCO. Issue (C) is disposed of as above.

Summary

37. Accordingly, in view of our findings in the foregoing paragraphs, the summary of our decisions is as under:

- (i) The claim of the Petitioner for reimbursement of full transmission charges and RLDC/SLDC charges are not barred by limitation;
- (ii) The Petitioner is entitled for the reimbursement of the transmission charges and SLDC/RLDC charges amounting to Rs 64,62,80,697/- withheld by the Respondent TANGEDCO, contrary to the provisions of the PPA;
- (iii) The Petitioner is also entitled to LPS (on the aforesaid amount of Rs. 64,62,80,697/-), which has to be worked out as per rates and methodology prescribed under Article 8.3.5 of the PPA;

38. The Petitioner will revise its claims in accordance with the above within a period of one month from the date of this order, and the Respondent TANGEDCO, shall thereafter be liable to pay such amount within a month thereafter.

39. Petition No. 145/MP/2021 is disposed of in terms of the above discussions and findings.

Sd/-
(Pravas Kumar Singh)
Member

Sd/-
(Arun Goyal)
Member

Sd/-
(I. S. Jha)
Member

