TELANGANA STATE ELECTRICITY REGULATORY COMMISSION

5th Floor, Singareni Bhavan, Red Hills, Lakdi-ka-pul, Hyderabad 500 004

O. P. No. 47 of 2018

Dated 11.04.2023

Present

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

Between:

M/s Dubbak Solar Projects Private Limited,
Regd. Office at Crown Plaza, 1st Floor, Today Hotels,
NH 8, Gurgaon 122 001. ... Petitioner

AND

1. Transmission Corporation of Telangana Limited,
   Vidyut Soudha, Somajiguda,
   Hyderabad 500 082.

2. Southern Power Distribution Company of Telangana Limited,
   Corporate Office, # 6-1-50, Mint Compound,
   Hyderabad 500 063. ... Respondents

This petition, having been remanded by the Hon'ble APTEL came up for hearing on 11.08.2022 and 01.09.2022. Sri. M. Sridhar, Advocate representing Sri. Challa Gunaranjan, Advocate for the petitioner appeared on 11.08.2022 and Sri. Challa Gunaranjan counsel for the petitioner appeared on 01.09.2022. Sri. Mohammad Bande Ali, Law Attaché for respondents appeared on 11.08.2022 and 01.09.2022. The petition having stood over for consideration to this day, the Commission passed the following:

ORDER

The original petition is taken up on being remanded back to the Commission by hon'ble APTEL Judgment dated 26.05.2022.

2. This petition is filed under Section 86(1)(e) & (f) of the Electricity Act, 2003 (Act, 2003) seeking directions that the units fed into grid by the petitioner's 8 MW solar plant from the date of synchronization that is 08.06.2016 to the date of long-term open access (LTOA) agreement that is 18.11.2016 as deemed to have been banked or in alternative to pay at the rate of Rs. 6.78/unit.

3. The petitioner has sought the following prayers in the petition:

> *"to declare that the units fed into grid by the petitioner's 8 MW solar plant from the date of synchronization that is 08.06.2016 to the date of LTOA agreement that is 18.11.2016 are deemed to have been banked in terms of Telangana Solar Power Policy, 2015 and Regulation No.1 of 2017 and consequently direct the respondents to wheel the said banked energy to the petitioner's consumer under LTOA dated 18.11.2016 or in alternative direct the 2nd respondent to pay for the 56,12,300 units at the rate of Rs.6.78 per unit amounting to Rs.3,80,51,394/- with 12% interest."*

4. The Commission had, by its order dated 02.01.2019, disposed of the original petition by observing as below:

> *"… …*
>
> *43. In the result, the original petition is allowed to the extent indicated below subject to the observations made in the course of discussion above.*
>
> *a) The petitioner is entitled to banking of energy injected from 30.07.2016 to 18.11.2016 and the energy injected prior to the said period is treated as inadvertent energy which the licensees are not required to pay for it.*
>
> *b) The petitioner is allowed to wheel the quantum of energy banked for the above said period within one year from the date of this order or 31.01.2020 whichever is earlier.*
>
> *c) The SLDC shall provide the necessary data to enable the petitioner and the respondent to arrive at the figures in respect of energy banked.*
>
> *d) The petitioner is not entitled to any charges or tariff for the energy that is allowed to be banked.*
>
> *e) The parties are directed to bear their own costs in the circumstances of the case."*

5. The said order came to be challenged before the Hon'ble APTEL by the respondent No. 2 vide Appeal No. 265 of 2021 and batch and the appeal was disposed of on 26.05.2022 with the following observations.

> *"… …*
>
> *8. Though appeals at hand were resisted on merits at the beginning, midway the hearing the learned counsel for the second respondent (SPPDs) having taken instructions fairly submitted that some aspects of the impugned original orders dated 02.01.2019 do call for a revisit by the State Commission so as to bring clarity. We also find that the State*

Commission has not examined the question as to who was responsible for the delay in grant of LTOA within the prescribed period and if such delay is attributable to Transco (third respondent) as to whether the burden can be shifted on to the appellant (Discom) for it to suffer the relief in the nature which have been granted. In addition to that, we are not satisfied with the way the issue of retrospective application of the third amendment of 2017 to the relevant regulations has been glossed over, the observation that it was the responsibility of the licensee to enlighten the generator in that regard being unfounded.

9. *In the above facts and circumstances, with the consent of all the parties before us, we set aside the impugned orders and remit the original petitions of each SPPD to the State Commission with a direction for proper inquiry to be made into the question as to which entity was responsible for the delay in grant of LTOA, and as to whether the responsibility, if fixed on the Transco, can be shifted on to the appellant Discom for bearing the burden of relief as was granted by the order dated 02.01.2019. We may add that in the event of the claims being pressed by the SPPDs on the strength of third amendment to the relevant regulations as published in the official gazette on 25.03.2017, the State Commission will also examine if such regulations can be given effect to retrospectively.*

10. *We clarify that the remit as above shall be limited to the examination of the claims through lens of above questions only. No further contentions shall be allowed to be urged by either side.*

11. *The issues cannot be allowed to fester for long. Therefore, we would request the State Commission to proceed expeditiously and render its fresh decision in accordance with law at an early date, preferably within two months from the date of this judgment.*

12. *Needless to add, the Commission will examine the issues hereby remitted with an open mind, without being influenced by the conclusions reached by its earlier order or by any observation made by this tribunal in this judgment*."

6. The matter was taken up for hearing by the Commission and notice was issued to the parties in terms of the directions of the Hon'ble APTEL. Pursuant to such notice, the matter was heard on the dates mentioned supra. Further, the respondent No.2 has filed written submissions in the matter. The contents of the said written submissions are reproduced below:

a. It is stated that the counsel for the petitioners in the above cases by placing reliance on a decision in '*PTC India Limited Vs. Central Electricity Regulatory Commission'* 2010 (4) Supreme Court Cases 603 rendered by a constitution bench stated that the Commission is empowered to grant relief in regard to claim in respect of the units of energy injected by the petitioners from the date of synchronization at the rate of Rs.6.78 per unit even though there is no specific provision of the Act 2003, regulation or rule made there under.

b. It is stated that a perusal of the cited decision indicates that considering the importance of the question, the matter was referred by a three-judge bench of the Hon'ble Supreme Court to the Constitution Bench formulating the following question:-

> "*Whether the Appellate Tribunal has jurisdiction to decide the question as to the validity of the Regulations framed by the Central Commission*."

c. It is stated that the crucial points that arose for determination are as follows: -

"(i) Whether the Appellate Tribunal constituted under the Electricity Act, 2003 ("2003 Act") has jurisdiction under Section 111 to examine the validity of Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2006 framed in exercise of power conferred under Section 178 of the 2003 Act?

(ii) Whether Parliament has conferred power of judicial review on the Appellate Tribunal for Electricity under Section 121 of the 2003 Act?

(iii) Whether capping of trading margins could be done by the CERC (Central Commission) by making a Regulation in that regard under Section 178 of the 2003 Act?"

d. It is stated that the Hon'ble Constitution Bench having referred to various decisions cited by the parties the conclusion that the APTEL has no jurisdiction to decide the validity of the regulations framed by the Central Electricity Regulatory Commission (CERC) under Section 178 of the Act and that the validity of the regulations may however be challenged by seeking judicial review under Article 226 of the Constitution of India.

e. It is stated that the counsel for the petitioners drew the attention of the Commission to para 56 of the cited decision, which reads as follows:

> *"Similarly, while exercising the power to frame the terms and conditions for determination of tariff under Section 178, the Commission has to be guided by the factors specified in Section 61. It is open to the Central Commission to specify terms and conditions for determination of tariff even in the absence of the regulations under Section 178. However, if a regulation is made under Section 178, then, in that event, framing of terms and conditions for determination of tariff under Section 61 has to be in consonance with the regulation under Section 178."*

f. It is stated that it is very much clear from the perusal of the aforementioned extract of the decision relied on by the counsel for petitioner that the Hon'ble Court referred to the powers of the Commission while exercising the power to frame the terms and conditions for determination of tariff under Section 178 with reference to the factors specified in Section 61. The Hon'ble Court further observed that it is open to the CERC to specify terms and conditions for determination of tariff in the absence of regulations under

Section 178. But the said observations/findings of the Hon'ble Court are not at all in respect of general powers of the Commission to grant a particular relief, as that of the relief sought in the present cases.

g. It is stated that the respondents, therefore, submit that the decision cited by the learned counsel for the petitioner is not at all applicable to the facts and circumstances of the present cases.

h. It is stated that the alternate submission made by the learned counsel for the petitioners is with reference to Section 70 of the Contract Act, 1872 (Contract Act).

i. It is stated that the counsel for the petitioners by placing reliance on the decisions in (1) '*State of West Bengal Vs. B. K. Mondal & Sons'*, 1962 Supp (1) SCR 876: AIR 1962 SC779; (2) '*Mulamchand Vs. State of Madhya Pradesh'*, AIR 1968 SC1218; and (3) '*Mahanagar Telephone Nigam Limited Vs. Tata Communications Limited'*, 2019 (5) Supreme Court Cases 341, stated that the petitioners are entitled for compensation under Section 70 of the Contract Act. Section 70 of the Contract Act reads as follows:

> *"Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered."*

j. It is stated that the counsel for the petitioners placed reliance on Para 18 of the decision in '*State of West Bengal Vs. B. K. Mondal & Sons'*, 1962 Supp (1) SCR 876: AIR 1962 SC779 and the same reads as follows:

> *"There is no doubt that the thing delivered or done must not be delivered or done fraudulently or dishonestly nor must it be delivered or done gratuitously. Section 70 is not intended to entertain claims for compensation made by persons who officiously interfere with the affairs of another or who impose on others services not desired by them. Section 70 deals with cases where a person does a thing for another not intending to act gratuitously and the other enjoys it. It is thus clear that when a thing is delivered or done by one person it must be open to the other person to reject it. Therefore, the acceptance and enjoyment of the thing delivered or done which is the basis for the claim for compensation under Section 70 must be voluntary. It would thus be noticed that this requirement affords sufficient and effective safeguard against spurious claims based on unauthorised acts. If the act done by the respondent was unauthorised and spurious the appellant could have easily refused to accept the said act and then the respondent would not have been able to make a claim for compensation. It is unnecessary to repeat that in cases falling under Section 70 there is no scope for claims for specific*

performance or for damages for breach of contract. In the very nature of things claims for compensation are based on the footing that there has been no contract and that the conduct of the parties in relation to what is delivered or done creates a relationship resembling that arising out of contract."

k. It is stated that the Counsel for the petitioners placed reliance on the following in para 6 of the decision in '*Mulamchand Vs. State of Madhya Pradesh'*, AIR 1968 SC 1218 and para 8 of '*Mahanagar Telephone Nigam Limited Vs. Tata Communications Limited'* and the same read as follows:

"In other words, if the conditions imposed by Section 70 of the Indian-Contract Act are satisfied then the provisions of that Section can be invoked by the aggrieved party, to the void contract. The first condition is that a person should lawfully do something for another person or deliver something to him; the second condition is that doing the said thing or delivering the said thing Ike must, not intend to act gratuitously; and the third condition is that the other person for whom something is done or to whom something is delivered must enjoy the benefit thereof. If these conditions are satisfied, Section 70 imposes upon the latter person the liability to make con sensation to the former in respect of, or to restore, the thing done or delivered. The important point to notice is that in a case falling under Section 70 the person doing something for another delivering something to another cannot sue for the specific performance of the contract, nor ask for damages for the breach the contract, for the simple reason that there is no contract between him and the other person for whom he does something to whom he delivers something. So, where a claim for compensation is made by one person against another under Section 70, it is not on the basis of any subsisting contract between the parties but a different kind of obligation. The juristic basis of the obligation in such a case is not founded upon any contract or tort but upon a third category of law, namely, quasi contract or restitution."

l. It is stated that it is very much clear from the perusal of the cited decisions that, to attract the ingredients of Section 70 of the Contract Act, that when a thing is delivered or done by one person, it must be open to the other person to reject it and that there must be acceptance and enjoyment of the thing delivered.

m. It is stated that in the present cases, the energy injected was neither accepted nor enjoyed by the respondents. Therefore, the petitioners are not entitled to claim compensation for the energy thrusted upon the respondents without their consent.

n. It is stated that the respondents rely upon the order in O. P. No. 32 of 2014 passed by the Karnataka Electricity Regulatory Commission (KERC) on 26.11.2015 in '*Lalpur Wind Energy Private Limited Vs. Karnataka Power Transmission Corporation Limited and Others'* wherein, similar question fell for

consideration. The KERC extracted the commentary under Section 70 of the Contract Act by the Learned Authors, Pollack & Mulla, 14th edition, volume II and the same reads as follows:

> *"… … A claim on the basis of something done against the express provisions of statute cannot be claimed under this Section. …"*
> *"… … Where the Defendant informed the Plaintiff that he did not want the work done, the work was not done lawfully. …"*
> *"… … The voluntary acceptance of the benefit of the work done or under delivery is the foundation of the claim under Section 70. The person on whom the benefit is conferred, enjoys the benefit voluntarily. It means that the benefit must not have been thrust upon him without his having the option of refusing it. Nobody has a right to forcing the benefit upon another. …"*

o. It is stated that the KERC having extracted the said commentary of Section 70 observed as follows in para 9 (e) at page 21(6 line from downwards) and the same reads as follows:

> *"Further, it can be noted that the electrical energy injected into the Grid cannot be stored and it would be consumed instantly and there would be no option for the Respondents, either to accept or reject the said energy. Therefore, it is not a case of enjoying the benefit voluntarily by the Utilities, but it amounts to thrusting it upon them, without having the option of refusing it"*

p. It is stated that it thus become very much clear from the aforementioned decision of KERC and also from the decisions cited by the learned counsel for petitioners that the petitioners cannot take aid of Section 70 of the contract Act to claim compensation in respect of the energy thrusted upon by them to the grid of the respondents without their consent and knowledge.

q. It is stated that the aforementioned order of KERC in O. P. No. 32 of 2014 was challenged before the Hon'ble APTEL. The Hon'ble APTEL by order dated 8th February, 2019 in Appeal No.37 of 2016, upheld the order of KERC in O. P. No. 32 of 2014.

r. It is stated that as per applicable regulations in force, the energy generated by renewable power developers, which was under drawn by the scheduled consumers and fed into the grid was earlier considered to be inadvertent energy and the same was free of cost as per clause 10.3 of the Regulation No.2 of 2006.

s. It is stated that banking facility was later extended to solar developers vide Regulation 1 of 2013. The concept of deemed banked energy was not introduced as a promotional measure of renewable source.

t. It is stated that the terms and conditions for drawl of banked energy were amended by way of Regulation No. 2 of 2014 which precisely formulated that the developers need to communicate the block wise drawl from banked energy and the same shall be wheeled to their consumer accordingly as per Regulations in force. As per Regulation No. 2 of 2014 banking facility was provided to the solar power developers who have open access agreement. Regulation No.2 of 2014 further provides that the unutilized banked energy is deemed to have been purchased by DISCOM at 50% APPC.

u. It is stated that if for the sake of arguments even if the energy injected by the petitioners for the period referred in the respective petitions, construed to be deemed banked energy, then the settlement of such energy has to be carried out as per Regulation No. 2 of 2014, which was applicable for that particular period.

v. It is stated that the Telangana Solar Power Policy 2015 (which came into effect from 01.06.2015) cannot be applied to the present cases without there being any direction or guideline of the Commission as per Section 108 of the Act, 2003.

w. It is stated that therefore, TSSPDCL has acted as per Regulation No. 2 of 2014 which does not speak about deemed banked energy for the period from the date of synchronization to the date of open access approval.

x. It is stated that in the circumstances mentioned above, these respondents submit that the Commission may be pleased to appreciate the fact that the petitioners are not entitled to the facility of deemed banked energy without any regulation at that particular point of period.

y. It is stated that the Commission while issuing Regulation 1 of 2017 clearly stated that the said regulation was mainly intended to facilitate the accounting of energy for banking by a generating company (having captive consumption), who has no open access agreement with the licensees and having connection agreement only, by entering a separate agreement.

z. It is stated that the respondents alternatively submit as follows:-

Clause 2(d) & (f) of Appendix 3 of Regulation 2 of 2014 reads thus:-

"(d) The energy banked between the period from 1st April to end of 31st January of each financial year which remains unutilized as on 31st January, shall be purchased by the DISCOMs, as per the wheeling schedule.

(f) The purchase price payable by the DISCOMs for unutilized banked energy will be equivalent to 50% of the Pooled Cost of Power Purchase, applicable for that financial year, as determined by the Commission under RPPO/REC Regulation (1 of 2012)."

aa. It is stated that the Commission may be pleased to appreciate the fact that the energy banked during the respective period mentioned in the respective petitions corresponds to the FY 2016-17, during which period the petitioners had no agreement relating to banking of energy with TSSPDCL. More so, there was no regulatory framework for applying the Government policy in respect of deemed bank energy for that particular period.

ab. Hence it is prayed that the Commission may be pleased to pass appropriate orders.

7. The Commission has heard the parties to the petition and also considered the material available to it. The submissions on two dates are extracted for ready reference.

Record of proceedings dated 11.08.2022:

"… … The advocate representing the counsel for the petitioner stated that the original petition was earlier disposed of by the Commission, which was challenged by the DISCOM before the Hon'ble ATE. The Hon'ble ATE had disposed of the appeal duly remanding the matter back to the Commission for a fresh disposal in terms of the points culled out by the Hon'ble ATE. He needs time to make submissions on the points mentioned in the order of the Hon'ble ATE. The representative of the respondents confirmed the submissions of the advocate representing the counsel for petitioner. Further, the counsel for petitioner filed a letter seeking adjournment in the matter. Accordingly, the matter is adjourned."

Record of proceedings dated 01.09.2022:

"… … The counsel for petitioner stated that the matter is being taken up by the Commission pursuant to directions of the Hon'ble ATE duly remanding the matter back to the Commission upon appeal filed by the respondent distribution licensee. Originally the Commission had considered the prayer of the petitioner and allowed the case of the petitioner. By virtue of the directions of the Hon'ble ATE, the Commission is required to look into two issues that have been identified. The Hon'ble ATE limited the proceedings to two issues, namely, whether the delay in according LTOA and damages thereof can be shifted to the transmission licensee / nodal agency and whether the Regulation No.1 of 2017 can be made applicable in the case of the petitioner by treating it as retrospectively applicable.

The counsel for petitioner while elaborating on the orders of the Hon'ble ATE has brought out the various dates of importance applicable to the case of the petitioner. It is his case that the transmission licensee being the nodal agency has not followed the regulation on open access in case of granting LTOA. While under the regulation, the petitioner is entitled to be communicated as to whether it would be allowed to avail LTOA within 30 days of the closure of the window,

which is taken as end of calendar month. The petitioner was allowed LTOA after 93 days after the period of allowing LTOA expired. In support of this statement, he has explained various dates applicable to the case to demonstrate that there is a violation of the regulation.

The counsel for petitioner stated that the petitioner's project was established pursuant to and in terms of the solar policy notified by the government and it is entitled to the benefits set out therein. The petitioner had established the project and synchronized it with the grid and thereafter applied for LTOA. There was no intimation from the respondents as to the running or stoppage of the petitioner's project till LTOA is granted. In the absence of the same, the petitioner went on to generate power and fed the same into the grid. The distribution licensee had used the power fed into the grid and benefited by selling of the same to its consumers. The petitioner in this matter is now seeking payment for the supply of power at the rate appropriately decided by the Commission or allowing it to use the same for consumption by its consumers. Neither of these aspects have been considered by the distribution licensee.

The counsel for petitioner stated that the solar policy provided for banking energy, but the respondents have denied the same to the petitioner. The licensees have not given effect to the orders of the government as also the policy of the Government of India. Thereby, they have caused the loss to the petitioner by denying the benefit of the units fed into the grid prior to allowing to open access for either banking and utilization later or for effecting sale to its consumers. The petitioner had been contracting with the consumers but in the absence of LTOA the consumers were leaving from its fold. The Commission had given effect to the solar policy of the Government of Telangana and notified Regulation No.1 of 2017. Considering the analogy set out therein, the Commission had given effect to the request of the petitioner on similar lines, though the regulation would not apply to the facts and circumstances mentioned in this case.

The counsel for petitioner would urge upon the Commission to consider giving effect to the provisions of the Act, 2003, solar policy of the Government of Telangana and the National Tariff Policy, which require and mandate encouraging renewable sources of energy. In the earlier round of this matter, the Commission pragmatically considered applying the above principles and as such, allowed the petition. Now the Hon'ble ATE has limited the scope of the petition to the two issues mentioned above and required the Commission to decide as to which of the licensee has to compensate the petitioner in respect of the energy generated and fed into the grid before it is allowed to avail open access on long term basis. It is needless to say that the principles of Section 70 of the Contract Act would squarely apply to the present situation where the distribution licensee has drawn the power and sold to its consumers and such power was not fed into the grid by the petitioner in a gratuitous manner. There are lapses on the part of both the licensees and as such, the Commission was considerate earlier and required the licensees to allow the petitioner to bank the quantum of energy injected into the grid prior to LTOA and use it in favour of its consumers within a period of one year that is a calendar year of 2019. In support of his contention, he has relied on the judgment of the Hon'ble Supreme Court reported in AIR 1962 SC 779 as followed in AIR 1968 SC 1218 and further followed in 2019 (5) SCC 341. Further, he relied on the judgment rendered by the Hon'ble Supreme Court in the matter of M/s PTC India Limited Vs. CERC

reported in 2010 (4) SCC 603 with regard to the applicability of the regulation. The said judgment explained the concept of regulation as also the status of the regulation made by the Commission.

As such, the counsel for petitioner would endeavour to submit that the petitioner is entitled to compensation or damages for the energy injected into the grid for which, as directed by the Hon'ble ATE the Commission may consider as to which of the licensees is liable to compensate the petitioner. Though, the Hon'ble ATE required the consideration of the regulation made by the Commission as to its applicability and whether its application is prospective or retrospective, he is not pressing for the same. Thus, he sought a decision in the matter in terms of the directions of the Hon'ble ATE.

The representative of the respondents stated that the respondent / TSSPDCL had approached the Hon'ble ATE questioning the order of the Commission and the Hon'ble ATE considered the issues raised by the respondent, thus, remanded the matter back to the Commission for fresh adjudication on a limited scope as set out by them. Prima facie, the petitioner is not entitled to any relief as the petitioner's project is prior to the regulation of 2017 and the said principle cannot be applied to this case. The principle set out in the amendment Regulation of 2014 would apply to the facts and circumstances of the case. The earlier regulations did not provide for banking of energy prior to the grant of open access and treated it as infirm power. As such, the petitioner was given the same treatment in case of the power injected by it into the grid. As directed by the Hon'ble ATE, the Commission may consider as to whether the distribution licensee is liable to pay for the energy which was injected contrary to the regulation applicable at that time.

Further, the relevant regulation provided for payment of pooled cost at 50% of the rate applicable for the units banked by the generators and not consumed by them. Even applying the said principle, the petitioner could not have been given the relief of payment of 100% pooled cost or for utilization of the same against the demand of its consumers. The licensee submits that the Commission may consider that the licensee has been put to grave loss due to inadvertent injection of power, which resulted in other penalties. It is his case that the Commission may consider whether delay in according permission for LTOA constitutes or invites any loss to the petitioner and if so, which of the licensees has to bear the same. The Commission may consider the submissions in the original proceedings qua the present directions of the Hon'ble ATE and decide the matter.

The counsel for petitioner would emphasize that even if Regulation of 2017 or the solar policy cannot be applied, the Commission had ample power under Section 86 of the Act, 2003 to safeguard the interests of the generators more particularly renewable sources as mandated therein. Alternatively, the Commission is required to consider Section 70 of the Contract Act with regard to non-gratuitous act, which has to be compensation for which the judgments have already been referred. The Commission may consider and decide the matter in terms of the directions of the Hon'ble ATE.

Having heard the submissions of the parties, the matter is reserved."

8. In the remand proceedings, the Honourable APTEL at Para 9 of the Judgement directed this Commission to make a proper enquiry in to the question as to which entity

was responsible for delay in grant of LTOA, and as to whether the responsibility if fixed on the Transco, can be shifted on the appellant DISCOM for bearing the burden of the relief as was granted by the order dated 02.01.2019 and in the event of claims being pressed by the SPPDs on the strength of third amendment to the relevant regulations as published in the Official gazette on 25.03.2017, the State Commission will also examine if such regulations can be given effect retrospectively. At Para 10 of the Judgement the Honourable APTEL has clarified that the examination of the claims through lens of above questions only and no further contentions shall be allowed to be urged by either side. In terms of the directions of the Hon'ble APTEL, **firstly** the Commission is required to examine whether the delay has occurred and if so, which entity i.e. which of the respondent was responsible for the delay and if the responsibility is to be fixed on 1st respondent (TSTRANSCO) can it be shifted to 2nd respondent (TSDISCOM) for bearing the burden and **secondly it** is required to be examined the applicability of Regulation No.1 of 2017 prospectively or retrospectively in the matter.

9. The undisputed facts of the case are that the petitioner had established an 8 MW solar power plant at Dharmajipet (v) , Dubbak Mandal, Siddhipet District. . It had been synchronized into the grid on 08.06.2016. It applied for long term open access on 21.06.2016 i.e. in the calendar month June, 2016 and the window closed on 30.06.2016. Permission was supposed to be accorded within a period of 30 days as per Clause 10.6 of the Regulation No. 2 of 2005, which expired on 31.07.2016. The actual permission was accorded on 01.11.2018 by 1st Respondent. As per Clause 5.1 of Regulation No. 2 of 2005 the nodal agency for receiving and processing the LTOA applications is State Transmission Utility (STU) i.e. TSTRANSCO first respondent). The Clause 10.6 of Regulation No. 2 of 2005 mandates that based on system studies conducted with the other agencies involved including other licensees, it is determined that LTOA sought can be allowed without further system strengthening, the nodal agency **shall with in thirty days of closure of a window, intimate the applicant of the same.** In the present case the first respondent being the nodal agency did not communicate within the time period stipulated in the regulation as to the grant or otherwise of the open access. The first respondent in the counter at one place has reasoned for the delay by stating that there was such delay in processing the LTOA application of the petitioner was on account hectic system studies activities were going on in TRANSCO for giving 24 hours power supply to the agricultural sector and the

TSTRANSCO concentrated on those studies during that period. From the counter of the second respondent (TSDISCOM) it is clear that such LTOA application was forwarded to second respondent along with a letter dated 20.09.2016 with a request to issue necessary feasibility for intrastate LTOA for transmission of power from the plant of the petitioner to its third party purchaser. The first respondent without any delay after receipt of the application of LTOA in order to process it within time frame ought to have undertaken correspondence with the 2nd respondent to ascertain the feasibility aspect. The first and second respondents ought to have acted in a cohesive manner and ensure compliance of the regulation applicable and where as it appears such coordination among them found missing in the case on hand. The pleadings would disclose that the second respondent had allowed synchronization of the project and has also drawn power from the petitioner without any demur. The 2nd respondent should have taken precautions to desist from drawing power and ought to have altered or intimated the 1st respondent expeditiously within the window closure time as to feasibility or otherwise of allowing LTOA of petitioner. Needless to say the ultimate beneficiary with lapses is 2nd respondent and not the 1st respondent. It is appropriate to state that the 1st and 2nd respondents should act in a cohesive manner and ensure the compliance of the regulation applicable. The 1st respondent being a facilitator is not supposed to trade in the electricity as such; no burden can be cast upon it. The 1st respondent is only expected to provide requisite facility of deciding the grant or otherwise of LTOA to the petitioner. For want of timely action on the part of 2nd respondent it appears the delay occurred in processing the LTOA of the petitioner at the end of the 1st respondent. The inactions on the part of the 2nd respondent would lead to a conclusion that the 2nd respondent was responsible for the delay in processing the LTOA of the petitioner.

That the first respondent accorded approval on 01.11.2016 upon receipt of the feasibility report from the 2nd respondent and after such approval, LTOA agreement in between petitioner and 2nd respondent was entered on 18.11.2016 i.e. with a delay of 17 days despite showing promptness by the petitioner in submitting the demand drafts as required towards security deposit on account of wheeling charges imbalance in supply and consumption of electricity besides State Load Dispatch Centre charges. This delay caused on the end of 2nd respondent cannot also be overlooked. Neither the petitioner nor the 1st respondent can be found fault for the lapse of 2nd respondent

and they cannot be made responsible.

10. That it is common knowledge that any Act or any rules and regulations made there under will be applicable only **prospectively.** In a strict sense, the Clause 7 of Appendix –III of the Regulation No. 1 of 2017 over which the petitioner relied upon cannot be applied to the facts and circumstances of the case. The Commission while exercising its power under Section 86(1)(e) of the Act, 2003 has authority to encourage renewable source of energy. It is also bound to follow the policy notified by the appropriate Government with regard to encouraging renewable sources of energy. The petitioner's project came to be established in the year 2016 and intended to undertake open access third party sale much prior to the regulation notified by the Commission. The Regulation no. 1 of 2017 is a Third Amendment to (Interim Balancing and Settlement Code for Open Access Transactions) Regulation No. 2 of 2006. It is the contention of the petitioner that the Clause 15 of the Regulation No. 2 of 2006 (which is a principal regulation) provides that in case of any difficulty in giving effect to any of the provisions of the regulation, the Commission may by general or special order issue appropriate directions to open access generators, schedule consumers, open access consumers, transmission, distribution licences(s) etc. to take suitable action not being inconsistent with the provisions of the Act, 2003, which appear to the Commission to be necessary or expedient for the purpose of removing difficulty and by invoking this Clause the difficulty can be removed and the Regulation 1 of 2017 can be made applicable prospectively. No force is found behind this contention of the petitioner as such by treating the case of the petitioner a special one no such order causing benefit to the petitioner can be issued and any such order is issued it will be repugnant to the Regulation 1 of 2017 where in it is clearly stated that the said regulation shall come in to force from the date of its publication in the official Gazette i.e. from 25/03/2017. ***Hence, the Commission is of the considered view that, the Regulation No.1 of 2017 shall be having the prospective effect and not retrospective effect.***

11. The second respondent made written submissions in the matter and sought to rebut the contentions raised by the petitioner. The reference made to the judgment of the Hon'ble Supreme Court in the matter of ***'M/s PTC India Limited Vs. CERC'*** was in the context of regulation made by the Commission would read into a contract

subsisting if there are contrary and repugnant provisions in the agreement. It has nothing to do with the prayer raised by the petitioner for payment of amount for the banked energy or allowing the energy to be utilized now by the petitioner. However, the 2nd respondent sought to confuse itself on both the contexts. Therefore, the opposition to the said contention is neither appropriate nor in accordance with the findings of the Hon'ble Supreme Court.

12. That, the petitioner at length raised contentions by drawing attention of the Commission over Section 70 of Indian Contract Act and its applicability to the facts and circumstances of the case and the 2nd respondent sought to rebut the contention with regard to Section 70 of the Contract Act by explaining the provision by relying on the very same judgments, which are cited by the petitioner. While extracting Section 70 of the Contract Act, the 2nd respondent referred to judgments of the ***State of West Bengal Vs. B. K. Mondal and Sons'***, ***Mulamchand Vs. State of Madhya Pradesh'*** as also ***'Mahanagar Telephone Nigam Vs. Tata Communications Limited.***

13. The Commission refrained to make any comment or observation over above stated rival contentions for the reason the Honourable APTEL in the Judgement at Para 10 has clarified that the examination of the claims through lens of questions placed at Para 9 of the Judgement only.

14. Accordingly, in compliance of the directions of the Honourable APTEL, the petition is disposed of by duly deciding the points raised by the Honourable APTEL at Para 9 of the Judgement.

This order is corrected and signed on this the 11th day of April, 2023.

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

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