TELANGANA STATE ELECTRICITY REGULATORY COMMISSION

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

O. P. No. 68 of 2022

Dated 15.12.2023

Present

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

Between:

M/s. Essel Mining & Industries Limited,
Industry Home, 18th Floor,
10, Camac Street, Kolkata 700 017. ... Petitioner

AND

1. Southern Power Distribution Company of Telangana Limited,
Corporate Office, H.No.6-1-50, Mint Compound,
Hyderabad 500 063.

2. Telangana State Power Coordination Committee (TSPCC),
TSTRANSCO, 5th Floor, Vidyut Soudha,
Khairatabad, Hyderabad 500 082. ... Respondents

(Respondent No.2 deleted from the array of the petition by the Commission)

The petition came up for hearing on 25.08.2022, 05.09.2022, 30.09.2022, 31.10.2022, 21.11.2022, 12.01.2023 and 24.04.2023. Sri. Aditya K.Singh, counsel for petitioner is present on 25.08.2022, 05.09.2022, 21.11.2022 and 12.01.2023, Sri. Aditya K.Singh counsel for petitioner along with Mrs. Anukriti Jain, Advocate are present on 30.09.2022, 31.10.2022 and Sri. Aditya K.Singh, counsel for petitioner along with Ms. Ayushi Saxena, Advocate are present on 24.04.2023. Sri. Mohammad Bande Ali, Law Attaché for respondent is present on 25.08.2022, 05.09.2022, 30.09.2022, 31.10.2022, 21.11.2022, 12.01.2023 and 24.04.2023. The matter having

been heard and having stood over for consideration to this day, the Commission passed the following:

ORDER

M/s Essel Mining & Industries Limited (petitioner) has filed a petition under Section 86(1)(b), (e) & (f) of the Electricity Act, 2003 (Act, 2003) read with the terms of the power purchase agreement (PPA) dated 18.01.2014 and its amendment thereof, seeking directions to the respondents for payments of dues along with late payment surcharge to the petitioner duly complying with the provisions of PPA for its 10 MW solar power plant installed at Kalwakurthy (V) in Mahbubnagar District. The averments of the petition are extracted below:

a. It is stated that the petitioner is a generating company within the meaning of Section 2(28) of the Act, 2003 and has established and operates 10 MW of solar energy generating station, installed at 132/33 kV Kalwakurthy Village, Mahabubnagar District, Telangana (Project).

b. It is stated that the erstwhile Government of Andhra Pradesh (which later bifurcated into Telangana and Andhra Pradesh by way of the Andhra Pradesh Reorganisation Act, 2014, commonly known as the Telangana Act in March, 2014) vide G.O.Ms.No.39, dated 26.09.2012 had pronounced the Andhra Pradesh Solar Power Policy 2012 (Policy) where in it provided incentives for development of solar power plant in the state. This G.O. was amended vide G.O.Ms.No.46, dated 27.11.2012. As per this amended policy the DISCOMS had to ensure the following:

   (i) the DISCOMs had to ensure the promotion of solar power plants with aggregate quantum of 1000 MW before June, 2013.

   (ii) the DISCOMs should select the solar power developers through the process of competitive bidding.

   (iii) the Chairman and Managing Director of Transmission Corporation of Andhra Pradesh Limited (APTRANSCO) would conduct the bidding process duly notifying the substations near which the solar power developers setup the solar power plants to facilitate the easy evacuation and the Chairman and Managing Director, APTRANSCO would develop a bidding document for selection of developers with the process of competitive bidding duly providing pre-bid conference to hear and address difficulties of the potential bidders before the final bid received

and also authorized the CMD, APTRANSCO to take the necessary action accordingly.

c. It is stated that accordingly, APTRANSCO floated e-procurement bid dated 31.08.2013, to which the petitioner applied for setting up of 10 MW solar power project. Consequently, a Letter of Intent dated (LoI) 07.06.2013 was issued to the petitioner for setting up of the solar power plant at Rs.6.49 per unit.

d. It is stated that in terms of the LOI issued to the petitioner, Central Power Distribution Company of Andhra Pradesh Limited (APCPDCL) (which was subsequently changed to Southern Power Distribution Company of Telangana Limited consequent to the bifurcation of Andhra Pradesh state after the operation of the AP Re-organisation Act, 2014) executed PPA dated 05.08.2013 with the petitioner for purchase of energy generated from the 10 MW project for a period of 20 years. However, this PPA was modified pursuant to the drafting changes suggested by the Andhra Pradesh Electricity Regulatory Commission's (APERC) tariff in-principle tariff approval letter dated 28.11.2013. Accordingly, the PPA was modified and executed on 18.01.2014. Therefore, the PPA to be considered effective for the purposes of this project is PPA dated 18.01.2014. The PPA dated 18.01.2014 was submitted before the APERC and APERC vide letter No.E-1018(A)/Dir-Engg/JD(PPP)/D.No.679/2014-02 dated 26.06.2014 informed that the Commission has examined the modified PPA dated 18.01.2014 and directed to amend it further by a separate agreement, if necessary. Thereafter, the PPA dated 18.01.2014 was further amended to incorporate the changes directed by the APERC. This amendment to the PPA executed with the TSSPDCL (former Central Power Distribution Company of Andhra Pradesh) vide an amendment dated 08.07.2014 (Second amended PPA) with its changes deemed to have been made from 18.01.2014. The relevant terms of the PPA are reproduced herein below:

"Article-1

Definitions

"Delivered energy" shall mean, with respect to any Billing Month, the kilowatt hours (kWh) of electrical energy generated by the project and delivered to the DISCOM at the Interconnection point, as measured by both energy meters at the Interconnection Point during that Billing Month at the designated substation of APTRANSCO/DISCOM.

Explanation 1: … …

… …

Amended Explanation 3: Energy will be procured at Rs.6.49 per unit upto 25% CUF calculated over a year. Beyond the same, the energy will be purchased at a flat rate of Rs.3.00/(kwh) unit (without escalation) during the entire agreement period. Annual Truing up will be done at the end of each year and excess amount paid if any during the year shall be recovered in lumpsum from the last bill amount of the year/future bill amount payable to developer.

"Due date of Payment" shall mean the date on which the amount payable by the DISCOM to the Solar Power Developer hereunder for Delivered Energy, if any, supplied during a Billing Month becomes due for payment, which date shall be thirty (30) days from the Meter Reading Date provided the bill is received by DISCOM within 5 working days from Meter Reading Date, and in the case of any supplemental or other bill or claim, if any, the Due Date of Payment shall be thirty (30) days from the date of the presentation of such bill or claim to the designated officer of DISCOM. If the last date of payment fails on a holiday, the next working date shall be considered as last date.

"Scheduled COD" shall mean 12 months from the date of signing of this Agreement.

Article-2

Purchase of Delivered Energy and Tariff

2.1 *All the Delivered Energy, as mentioned in Schedule 1, at the interconnection point for sale to DISCOM will be purchased at the Tariff provided for in clause 2.2 from and after the Date of Commercial Operation of the Project and limited to capacity of project only and title to Delivered Energy purchased shall pass from the Solar Power Developer to the DISCOM at the interconnection point.*

2.2 *The DISCOM shall pay a tariff of Rs.6.49 per Unit ("Tariff") upto 25% CUF calculated on annual basis.*

Explanation: The tariff is firm and is Rs.6.49 per unit for a period of 20 years from the date of the COD as per the definition of delivered energy. Any energy delivered in excess of 25% CUF during the year shall be purchased by APDISCOMS at Rs.3.00 per kWh.

Article-3

Interconnection facilities, Synchronization, Commissioning and Commercial Operations

… …

3.10 *Synchronization, Commissioning and Commercial Operation*

… …

3.10.5 *The Solar Power Developer shall commission the project within twelve (12) Months of the date of signing of this Agreement, and delayed commissioning of the same is subject to the penalties and incentives stated in clause 10.5 and clause 3.11 respectively.*

Article-5

Billing and Payment

5.1 *For the Delivered Energy Purchased, Solar Power Developer shall furnish a bill to the DISCOM calculated at the Tariff provided for in Article 2, in such form as may be mutually agreed between the DISCOM*

and the Solar Power Developer, for the billing month on or before the 5th working day following the Meter Reading Date.

5.2 The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, DISCOM shall pay interest at prevailing SBI bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction.

5.3 The DISCOM shall pay the bill on monthly basis as per Clause 5.1 by opening a one month revolving Letter of Credit in favour of the Solar Power Developer.

5.4 Letter of Credit: Not later than 30 days prior to the Scheduled COD of the Generating unit, DISCOM shall cause to be in effect an irrevocable revolving Letter of Credit issued in favor of Solar Power Developer by a Scheduled Bank (the "Letter of Credit").

a. However Letter of Credit shall not be invoked for any disputed bill amount.

b. Further LC can be invoked only when DISCOMs fail to pay bill amount by due date of bill payment.

Article-10

Events of Default and termination

… …

10.2 DISCOM Event of Default

10.2.1 The occurrence and the continuation of any of the following events, unless any such event occurs as a result of a Force Majeure event or a breach by the Solar Power Developer of its obligations under this Agreement, shall constitute the Event of Default on the part of defaulting DISCOM ("DISCOM event of Default"):

(i) DISCOM fails to pay (with respect to payments due to the Solar Power Developer according to Article 5), for a period of ninety (90) days after Due Date of Payment and the Solar Power Developer is unable to recover the amount outstanding to the Solar Power Developer through the Letter of Credit, or

… …

Article-11

Dispute Resolution

11.4 Failing resolution of the dispute in terms of the above provisions or even otherwise, any party may approach the APERC to resolve the dispute in terms of Section 86(1)(f) of the Electricity Act, 2003."

e. A bare perusal of the afore quoted provisions of the PPA makes the following abundantly clear –

i. The Petitioner is obligated to sell the 10 MW of energy generated to TSSPDCL and TSSPDCL is obligated to pay Tariff for the energy supplied at the Delivery Point.

ii. The Tariff rate i.e., Rs.6.49 per unit shall be firm for the entire term of the PPA and will not vary.

iii. The billing has to be carried out on a monthly basis.

iv. *The settlement period of the invoice of the Petitioner for the energy supplied to TSSPDCL shall be 30 days from the meter reading date.*

v. *If TSSPDCL has any dispute in relation to a bill raised by the Petitioner, it shall notify the Petitioner of such dispute.*

vi. *In case payment of bill is delayed beyond the 'Due Date of Payment', TSSPDCL is obligated to pay late payment surcharge as specified in Article 5.2.*

vii. *Not later than 30 days prior to the Scheduled COD of the Generating, TSSPDCL/TSPCC must open an irrevocable revolving Letter of Credit for one month's billing value in favour of the Petitioner.*

vii. *If the TSPDCL fails to make payments for a period of ninety (90) days after the Due Date of Payment for the energy supplied by the Petitioner and the Petitioner is unable to recover the outstanding amount through the Letter of Credit, the event will qualify as a 'DISCOM Event of Default'.*

f. It is stated that pursuant to the execution of the PPA, the petitioner set up and commissioned the project in the State of Telangana. The petitioner invested huge amounts in setting up the 10 MW project on the basis that TSSPDCL will pay the tariff as specified in the PPA. Accordingly, the 10 MW project was commissioned on 30.06.2014.

g. It is stated that the facts stated below demonstrate that the Telangana DISCOM has been acting in an arbitrary, unfair and illegal manner and misusing their dominant position. TSSPDCL, in view of the monopolistic nature of business being undertaken by them and being instrumentalities of the State, are obligated to operate in a fair and transparent manner within the mandate of the Article 14 of the Constitution of India.

h. It is stated that since the commissioning of the 10 MW project, the entire electricity generated by the project is being supplied to TSSPDCL in terms of the PPA. Till the date of filing of the instant petition, entire electricity generated from project has been supplied and billed by the petitioner and further sold to the consumers by TSSPDCL. While the petitioner has been fulfilling its obligations under the PPA, TSSPDCL has repeatedly acted against the mandate of the Act, 2003, the objectives of the and in contravention of the provisions of the PPA read with its amendment.

i. It is stated that the petitioner has been, in terms of the provisions of the PPA, issuing monthly invoices to TSSPDCL/TSPCC for the energy supplied. As per Article 5.5 of the PPA, TSSPDCL/TSPCC is mandated to pay for the energy purchased from the Petitioner within the due date. The due date, in terms of the PPA, is the date on which the amount payable by the TSSPDCL to the petitioner

for energy supplied during a billing month becomes due, which is 30 days from the meter reading date provided the bill is received by the DISCOM within 5 working days from the meter reading date or 30 days from the date of presentation of such bill or claim to the officer of DISCOM. Further, the petitioner is entitled to LPS in terms of Article 5.2 of the PPA which provides that in case of delay in payment for the energy purchased by TSSPDCL beyond the 30 days, TSSPDCL shall pay interest at prevailing SBI bank rate on the outstanding amount. TSSPDCL is, therefore, liable to pay LPS on the outstanding invoices to the petitioner. While the petitioner has time and again requested TSSPDCL/TSPCC to comply with its contractual obligation to clear outstanding invoices including LPS payable thereon, TSSPDCL/TSPCC has, acting in a high-handed manner, completely ignored such requests.

j. It is stated that the details of monthly bills for the period January, 2021 amounting to Rs.14,35,16,046/- that are currently overdue and unpaid, and the LPS applicable are set out below:

Sl. No.	**Invoice No.**	**Invoice month**	**Principle due amount (including TCS amount)**	**Delay in making payment (in days)**	**Late payment surcharge (as on 31.05.2022, calculated on the principal amount due excluding TCS)**
1.	EMIL/Kalwakurthy/2020-21/009	Jan 2021	95,49,988.00	458	14,72,837.94
2.	EMIL/Kalwakurthy/2020-21/010	Feb 2021	1,05,26,751.00	426	15,10,047.51
3.	EMIL/Kalwakurthy/2020-21/011	Mar 2021	99,91,055.00	402	13,52,458.78
4.	EMIL/Kalwakurthy/2021-22/01	Apr 2021	1,04,13,809.00	369	12,93,642.05
5.	EMIL/Kalwakurthy/2021-22/02	May 2021	98,49,913.00	337	11,17,481.84
6.	EMIL/Kalwakurthy/2021-22/03	Jun 2021	88,42,567.00	305	9,07,938.41
7.	EMIL/Kalwakurthy/2021-22/04	Jul 2021	73,33,180.80	257	6,35,093.64
8.	EMIL/Kalwakurthy/2021-22/05	Aug 2021	76,42,104.80	247	6,36,095.30
9.	EMIL/Kalwakurthy/2021-22/06	Sep 2021	73,76,469.10	214	5,31,954.57
10.	5163051015	Oct 2021	82,45,739.70	179	4,97,387.54
11.	5163051037	Nov 2021	72,09,935.70	149	3,62,017.79
12.	5163051052	Dec 2021	81,18,925.10	121	3,31,051.95
13.	5163051070	Jan 2022	89,13,430.90	93	2,79,344.48
14.	5163051084	Feb 2022	51,25,412.60	53	91,541.27
15.	5163051085	Feb 2022	48,39,333.40	53	86,431.82
16.	5163051103	Mar 2022	98,76,222.40	27	89,860.09
17.	5163051121	Apr 2022	96,61,209.00	-	-
			14,35,16,046.00		**1,11,95,185.00**

k. It is stated that pertinently, the TSSPDCL/TSPCC has not even paid the any LPS on the delayed payments for the invoices raised prior to January, 2021 and therefore, is liable to pay Rs.2,69,34,549/- on account of the same. A table showing total LPS payable on the delayed payments is provided below:

Particulars	Period	Amount outstanding (Rs.)
LPS for which the principal amount is received	April 2018 to December 2020	2,69,34,549.00
LPS applicable on the principal amount which is outstanding (calculated as on 31.05.2022)	January 2021 to March 2022	1,11,95,185.00
	Total	**3,81,29,734.00**

l. It is stated that the petitioner has been writing to the respondents, Government of Telangana, Telangana Transco, Ministry of New and Renewable Energy (MNRE) and such concerned authorities regarding its concern of non-payment by the Telangana DISCOM seeking payment of the unpaid energy invoices and the LPS applicable thereon. However, the respondent neither made payments nor responded to the letters issued by the petitioner.

m. It is stated that clause 5.4 of the PPA provides that the TSSPDCL is also required to open a revolving LoC equivalent to one month's generation which can be invoked by the petitioner if the respondents fail to make timely payment of the monthly invoice, which respondents have failed to open.

n. It is stated that it is pertinent to mention here that along with the communications regarding non-payment of the outstanding amounts by the TSSPDCL/TSPCC, the Petitioner also wrote to it on 07.06.2022 seeking payment of the outstanding amounts, and LPS, however, of no avail. TSSPDCL/TSPCC never responded to the letters and communications sent by the petitioner nor has been complying with the terms of the PPA.

o. It is stated that the petitioner attaches great importance and significance to the smooth and continued operation of the power plant. It was only when after its consistent efforts to amicably resolve the payment dispute failed, the petitioner was compelled to approach the Commission to enforce the compliance of the obligations of the respondent under the PPA. The petitioner has approached this Commission for issuance of appropriate directions to the respondents for discharging the liabilities under the PPA and for complying with the obligations of opening of letter of credit LC towards payment security as per the PPA.

GROUNDS

p. It is stated that in view of the factual scenario detailed hereinabove, the petitioner submits as follows:

Sanctity of Contract

i. It is stated that the Courts and Tribunals have an obligation to ensure compliance with the obligations assumed by the parties. The respondents are under a binding obligation to make payment of the tariff invoices raised by the petitioner within 30 days from the date of receipt of the invoice. The same has to be enforced strictly to ensure that the petitioner is able to service all its obligations under the PPA and other project agreements, including the financing agreements for the project.

ii. It is stated that the petitioner invested huge amounts in setting up the project on the basis that TSDISCOM will pay the tariff discovered in the transparent competitive bid process and as specified in the PPA in timely manner. However, the facts stated above demonstrate that the TSDISCOM has been acting in an arbitrary manner and misusing their dominant position.

iii. It is stated that the respondents cannot be allowed to operate at their whims and fancies and must respect the contractual obligations. The non-payment of invoices and LPS is a gross violation of the provisions of the PPA. The PPA, in order to protect the rights of the parties, stipulates a cut-off date by which TSDISCOM must make payments for the energy supplied from the project. Additionally in case payments are not made in a timely manner as per the provisions of the PPA, the TSDISCOM is required to pay LPS on delayed payments in accordance with Clause 5.2 of the PPA. However, in total disregard of the said provisions, and despite repeated requests and communications issued by the Petitioner, the respondents, arbitrarily and illegally, continue to delay/withhold the lawful payments of the petitioner.

iv. It is stated that the respondents have not disputed any invoice raised by the petitioner till date. As such, the invoices have become conclusive and TSDISCOM/TSPCC is bound to make payments for the said invoices. In the present case, TSDISCOM is withholding payments legally admitted and due to the petitioner without any basis whatsoever.

v. It is stated that the petitioner submits that TSDISCOM entered into the PPA, on its own volition, knowing fully well the obligations it entailed, to meet its energy requirement and also to fulfil its mandatory renewable purchase obligation. The parties have acted upon the PPA and have taken respective burden and benefit thereof. The petitioner has been providing uninterrupted supply of power from its solar power project to TSDISCOM and raising invoices against such supply while TSDISCOM has been off-taking the power for supply to its consumers. It is settled law that once a contract has been executed, acted upon and taken benefit of by the parties, the same is binding in law on the parties. In view thereof, TSDISCOM must be pinned to its obligations under the PPA.

Late Payment Surcharge

vi. It is stated that with regard to payment of LPS, it is submitted that the High-Level Empowered Committee (HLEC) headed by the Cabinet Secretary in its report dated 12.11.2018, albeit in the context of thermal plants, has acknowledged an existing trend whereby the State DISCOMs are delaying the payment of monthly bills and are not paying LPS on delayed payment, despite the PPA providing for the same.

Accordingly, HLEC recommended that LPS be mandatorily paid in the event of delay in payment by the DISCOMs. Recommendation 3.1 of the HLEC report provides as under:

"3.1 Mandatory payment of Late Payment Surcharge (LPS) It has been observed that due to delay in payment by the DISCOMs, the viability of the generators get hurt severely. As one of the roles of the regulator is to ensure sustainable operation of the power sector, the Committee recommends that Ministry of Power may advise the Regulators to monitor payments by DISCOMs and frame appropriate regulations. It has also been pointed out that frequently the DISCOMs insist that generators should forgo the LPS on the delayed payments, despite its mention in the signed PPA. This again adversely affects the viability of generators and their ability to meet its obligation to service the debt and other operating expenses. Therefore, the Committee recommends that Ministry of Power may engage with the Regulators to ensure that LPS is mandatorily paid in the event of delay in payment by the DISCOMs."

vii. It is stated that the Central Government recommended the constitution of a Group of Ministers (GOM) headed by the Finance Minister, Road Transport Minister, Minister of Commerce, Minster of Oil, Minister of Railways and the Minister of Power to examine the specific recommendations of HLEC which was constituted to address the issue of stressed power projects and forward their comments for consideration by the Cabinet. The GoM thereafter submitted its recommendation to the Cabinet Committee on Economic Affairs (CCEA) on 07.03.2019. The CCEA on 07.03.2019 approved recommendations of the GOM to make payment of LPS as mandatory.

viii. It is stated that on 08.03.2019, Ministry of Power vide its office memorandum has approved the recommendations of GoM qua mandatory payment of LPS, as under:

"3.4 Approval with regards to mandatory payment of Late Payment Surcharge (LPS): Ministry of Power may engage with the Regulators to ensure that LPS is paid in case of delay in payment by DISCOMs as per the provisions of the PPA. Appropriate Regulatory Commission may ensure compliance."

ix. It is stated that the conduct of TSDISCOM in non-payment of LPS on monthly bills is in violation of the express terms of the PPAs and the express directions of the cabinet.

x. It is stated that the intent behind a clause of LPS is essentially to compensate the non-defaulting party as per the time value of money whereby, it becomes an obligation of the defaulting party to put the non-defaulting party in a position where the defaulting party would have made timely payments to the non-defaulting party for the bills raised by the non-defaulting party. The concept of '*Time Value of Money'* states that money that is available at present time is worth more than the same amount in the future, due to its potential earning capacity or the inflation that decreases the value of the money. The actual time value of money gets lost if the payment of LPS is delayed or not paid at all. In order to do justice to the intention of LPS, and the concept of '*Time Value of*

Money', in case of delay in the payments of LPS, the same should be paid along with an interest so as to put the non-defaulting party in a position had the LPS payment was received by it on time. This would act as deterrent to a party who owes the amount and continues to hold back and enjoy the benefit of the money. Hon'ble APTEL in "*Ispat Industries Ltd. vs. MERC*" Appeal nos. 70 & 110 of 2008 dated 05.08.2010 has held that:

> *"A person deprived of the use of money to which he is legitimately entitled has a right to be compensated for such a deprivation through interest. In an action by way of restitution, it is the duty of the court to give full and complete relief to the party by ordering for interest as well".*

xi. It is stated that the Hon'ble Supreme Court in T.N. Generation & Distribution Corpn. Ltd. v. PPN Power Generating Co. (P) Ltd., (2014) 11 SCC 53 held as under:

> 73. With regard to the issue raised about the interest on late payment, APTEL has considered the entire matter and come to the conclusion that interest is payable on compound rate basis in terms of Article 10.6 of the PPA. In coming to the aforesaid conclusion, APTEL has relied on a judgment of this Court in Central Bank of India v. Ravindra [(2002) 1 SCC 367]. In this judgment it has been held as follows: (SCC p. 394, para 37)
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> "37. … … The essence of interest in the opinion of Lord Wright, in Riches v. Westminster Bank Ltd.[1947 AC 390: (1947) 1 All ER 469 (HL)] (AC at p. 400: All ER at p. 472E-F) is that: *'… … it is a payment which becomes due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or, conversely, the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation;*the money due to the creditor was not paid, or, in other words, *'was withheld from him by the debtor after the time when payment should have been made, in breach of his legal rights, and interest was a compensation, whether the compensation was liquidated under an agreement or statute'.*
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> A Division Bench of the High Court of Punjab speaking through Tek Chand, J. in CIT v. Sham Lal Narula [AIR 1963 P&H 411] thus articulated the concept of interest: (AIR p. 414, para 8)
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> *'8. The words "interest" and "compensation" are sometimes used interchangeably and on other occasions they have distinct connotation. "Interest" in general terms is the return or compensation for the use or retention by one person of a sum of money belonging to or owed to another. In its narrow sense, "interest" is understood to mean the amount which one has contracted to pay for use of borrowed money. … …*
>
> *In whatever category "interest" in a particular case may be put, it is a consideration paid either for the use of money or*

for forbearance in demanding it, after it has fallen due, and thus, it is a charge for the use or forbearance of money. In this sense, it is a compensation allowed by law or fixed by parties, or permitted by custom or usage, for use of money, belonging to another, or for the delay in paying money after it has become payable."

74. Similar observations have been made by this Court in Indian Council for Enviro-Legal Action v. Union of India [(2011) 8 SCC 161 : (2011) 4 SCC (Civ) 87] wherein it has been held as follows: (SCC pp. 241-42, paras 178-80)

"178. To do complete justice, prevent wrongs, remove incentive for wrongdoing or delay, and to implement in practical terms the concepts of time value of money, restitution and unjust enrichment noted above—or to simply levelise—a convenient approach is calculating interest. But here interest has to be calculated on compound basis—and not simple—for the latter leaves much uncalled for benefits in the hands of the wrongdoer.

179. Further, a related concept of inflation is also to be kept in mind and the concept of compound interest takes into account, by reason of prevailing rates, both these factors i.e., use of the money and the inflationary trends, as the market forces and predictions work out.

180. Some of our statute law provide only for simple interest and not compound interest. In those situations, the courts are helpless and it is a matter of law reform which the Law Commission must take note and more so, because the serious effect it has on the administration of justice. However, the power of the Court to order compound interest by way of restitution is not fettered in any way. We request the Law Commission to consider and recommend necessary amendments in relevant laws."

75. The late payment clause only captures the principle that a person denied the benefit of money, that ought to have been paid on due dates should get compensated on the same basis as his bank would charge him for funds lent together with a deterrent of 0.5% in order to prevent delays."

q. It is stated that in terms of the above it is a settled law that a party withholding money which are due to the other party must compensate the party who has been deprived the use of the money for deprivation of the use thereof. It is stated that clause 5.2 of the PPA provides that in case of delay in payment for the energy purchased by TSDISCOM beyond the time period specified in the PPA, TSDISCOM shall pay interest at prevailing base prime lending rate of State Bank of India on the outstanding amount. However, despite the petitioner's repeated requests, TSDISCOM has failed to comply with its contractual obligation of paying LPS on delayed payments.

r. It is stated that due to respondent's inaction, the project is staring at financial distress. The non-payment/delayed payment of dues by the respondents has a cascading effect which not only adversely impacts the project of the petitioner, thereby causing tremendous loss to the petitioner, but also to the banks and financial institutions which have financed the project, including through public money. It is pertinent to note that financing documents have strict payment schedules which the petitioner is bound to abide by and are honoured through the payments made by TSDISCOM. Due to the non-payment of the outstanding amount by TSDISCOM, even the operational expenditure of the petitioner is not realized sufficiently, and the petitioner faces challenges in keeping the project afloat.

s. It is stated that the liability to pay interest is not just a contractual provision but also an equitable right of the person deprived of the use of the money legitimately due to such party. This must also be given effect to act as a deterrent for future delayed payment and ensuring discipline in enforcement of the PPA.

Rebate & Letter of Credit

t. It is stated that it is a matter of record that the PPA entitles TSDISCOM to a rebate of 1% in the event tariff invoices are paid within 30 days from presentation of the invoice. The same undoubtedly is a win-win situation for both petitioner and TSDISCOM as Petitioner would be paid its dues prior to the due date and at the same time TSDISCOM would save 1% of the invoiced amount and further there would be no question of LPS which itself has become a significant amount.

u. It is further stated that the TSDISCOM has not even opened the LoC or established any payment security as is required under clause 5.4 of the PPA, thereby acting in contravention of the terms of the PPA.

Unjust Enrichment

v. It is stated that while the respondents have not been making any payments to the petitioner against the invoices raised for the power supplied since January, 2021, they are recovering the tariff for the energy procured from the project from the ultimate consumers. Pertinently, the cost of procurement of power from the petitioner has been accounted for in the tariff being charged by TSDISCOM from its consumers. Despite recovering these amounts, payments to the

petitioner are being withheld. This action not only amounts to unjust enrichment of TSDISCOM but is also contrary to TSDISCOM's legal obligation to remit such monies to the petitioner.

w. It is stated that it is a settled law that the Courts and Tribunals must prevent unjust enrichment. The SC in Sahakari Khand Udyog Mandal Ltd. vs. Commissioner of Central Excise and Customs (2005) 3 SCC 738 discussed the principle in detail. The Court held that

> *30. Stated simply, 'Unjust enrichment' means retention of a benefit by a person that is unjust or inequitable. 'Unjust enrichment' occurs when a person retains money or benefits which in justice, equity and good conscience, belong to someone else.*
>
> *31. The doctrine of 'unjust enrichment', therefore, is that no person can be allowed to enrich inequitably at the expense of another. A right of recovery under the doctrine of 'unjust enrichment' arises where retention of a benefit is considered contrary to justice or against equity.*
>
> *32. The juristic basis of the obligation is not founded upon any contract or tort but upon a third category of law, namely, quasi-contract or the doctrine of restitution.*
>
> *33. In the leading case of Fibrosa v. Fairbairn, (1942) 2 All ER 122, Lord Wright stated the principle thus:*
>
> > *"... … Any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from another which it is against conscience that he should keep. Such remedies in English law are genetically different from remedies in contract or in tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."*
>
> *Lord Denning also stated in Nelson v. Larholt, (1947) 2 All ER 751;*
>
> > *"It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution if the justice of the case so requires."*
>
> *34. The above principle has been accepted in India. This Court in several cases has applied the doctrine of unjust enrichment."*

<u>Public Authority must act Fairly</u>

x. It is stated that it is settled principle of law that a public authority must act in a fair manner not just in public law but also under private law. The TSDISCOM is state within the meaning of Article 12 of the Constitution of India and thus must act in a fair and reasonable manner even when it is acting merely as a counter

party to a contract. In LIC v. Consumer Education & Research Centre, (1995) 5 SCC 482 the Supreme Court held that:

23. *Every action of the public authority or the person acting in public interest or any act that gives rise to public element, should be guided by public interest. It is the exercise of the public power or action hedged with public element (sic that) becomes open to challenge. If it is shown that the exercise of the power is arbitrary, unjust and unfair, it should be no answer for the State, its instrumentality, public authority or person whose acts have the insignia of public element to say that their actions are in the field of private law and they are free to prescribe any conditions or limitations in their actions as private citizens, simpliciter do in the field of private law. Its actions must be based on some rational and relevant principles. It must not be guided by irrational or irrelevant considerations. Every administrative decision must be hedged by reasons. The Administrative Law by Wade, 5th Edn. at p. 513 in Chapter 16, Part IV dealing with remedies and liabilities, stated thus:*

> *"Until a short time ago anomalies used to be caused by the fact that the remedies employed in administrative law belong to two different families. There is the family of ordinary private law remedies such as damages, injunction and declaration; and there is a special family of public law remedies particularly certiorari, prohibition and mandamus, collectively known as the prerogative remedies. Within each family the various remedies can be sought separately or together or in the alternative. But each family had its own distinct procedure."*

At p. 514 it was elaborated that "this difficulty was removed in 1977 by the provision of a comprehensive, 'application for judicial review', under which remedies in both facilities became interchangeable". At p. 573 with the heading "Application for Judicial Review" in Chapter 17, it is stated thus:

> *"All the remedies mentioned are then made interchangeable by being made available 'as an alternative or in addition' to any of them. In addition, the court may award damages if they are claimed at the outset and if they could have been awarded in an ordinary action."*

The distinction between private law and public law remedy is now settled by this Court in LIC v. Escorts Ltd. [(1986) 1 SCC 264: 1985 Supp (3) SCR 909] by a Constitution Bench thus: (SCC p. 344, para 102)

> *"If the action of the State is related to contractual obligations or obligations arising out of the tort, the court may not ordinarily examine it unless the action has some public law character attached to it. Broadly speaking, the court will examine actions of State if they pertain to the public law domain and refrain from examining them if they pertain to the private law field. The difficulty will lie in demarcating the frontier between the public law domain and the private law field. It is impossible to draw the line with precision and we do not want to attempt it. The question must be decided in each case with reference to the particular action, the activity in which the State or the instrumentality of the State is*

engaged when performing the action, the public law or private law character of the action and a host of other relevant circumstances."

26. *This Court has rejected the contention of an instrumentality or the State that its action is in the private law field and would be immuned from satisfying the tests laid under Article 14. The dichotomy between public law and private law rights and remedies, though may not be obliterated by any strait-jacket formula, it would depend upon the factual matrix. The adjudication of the dispute arising out of a contract would, therefore, depend upon facts and circumstances in a given case. The distinction between public law remedy and private law field cannot be demarcated with precision. Each case will be examined on its facts and circumstances to find out the nature of the activity, scope and nature of the controversy. The distinction between public law and private law remedy has now become too thin and practicably obliterated.*

27. *In the sphere of contractual relations the State, its instrumentality, public authorities or those whose acts bear insignia of public element, action to public duty or obligation are enjoined to act in a manner i.e. fair, just and equitable, after taking objectively all the relevant options into consideration and in a manner that is reasonable, relevant and germane to effectuate the purpose for public good and in general public interest and it must not take any irrelevant or irrational factors into consideration or appear arbitrary in its decision. Duty to act fairly is part of fair procedure envisaged under Articles 14 and 21. Every activity of the public authority or those under public duty or obligation must be informed by reason and guided by the public interest."*

Encourage Renewable

y. It is stated that one of the main features of the Act, 2003 is promotion of renewable energy sources. Section 61 (4) and section 86(1)(e) of the Act, 2003 enjoin the regulatory Commissions to promote co-generation and generation of electricity from renewable sources of energy. Section 86(4) provides that the State Commissions in discharge of their functions shall be guided by the National Electricity Policy (NEP) and tariff policy. The NEP provides for promotion of non-conventional energy sources. The tariff policy also provides for specification of a percentage of total energy consumption in the area of distribution licensee from purchase of energy from renewable energy sources. The Union Government has also announced the National Action Plan for climate change which envisages several measures to address global warming. One of the important measures identified involves increase in the share of renewable energy in total energy consumption in the country. The increase in utilisation of renewable sources of energy is important for energy security of the country and meeting the challenge of climate changes. The development of

renewable energy sources is greatly dependent on the regulatory framework under the Act, 2003. Thus, strict enforcement of PPA is material to encourage generation of Power from renewable sources.

z. It is stated that, under the Act, 2003 as well as the NEP, there is an express mandate on the state Government to promote renewable energy and to gradually progress to satisfying the energy demands by way of renewable energy sources. However, to the contrary, TSDISCOM is denying payments to petitioner despite being mandated and obligated to act in a manner to ensure promotion of and generation from renewable sources.

aa. It is stated that such actions of TSDISCOM/TSPCC are in contravention of the Act, 2003, NEP and National Tariff Policy, 2016 (NTP) issued by the Central Government under Section 3 of the Act (NTP). The Act, 2003, NEP and NTP, which are statutory policies, mandate the promotion of generation of electricity from renewable sources. However, the actions of respondents have a contrary impact. By delaying payment of undisputed invoices, withholding payments for undisputed invoices, refusing and to make complete payments, and failure to open the LC, the only payment security mechanism available to the petitioner under the PPA, the respondents are in effect pushing the petitioner towards bankruptcy and the project towards a complete shut-down.

ab. It is stated that while on one hand the GoTS has invited private investments into the state for development of the renewable energy sector by offering incentives under the state solar policy, on the other hand, the TSDISCOM, by the afore-stated actions, has clearly and consistently been acting in complete disregard of the aim and objective of the GoTS as well as its own responsibilities in the capacity of being a ‘State Instrumentality’ and a distribution licensee under the Act, 2003. The target to meet significant quantity of power from renewable sources can only be achieved if the developer is assured of timely payments of the tariff. Infinite delays in payment of tariff invoices not just affects the viability of existing projects but also discourages future participants for setting up renewable stations.

ac. It is stated that the respondents in choosing to ignore the payment of tariff invoices in a timely manner is acting in most unfair and unreasonable manner and the Commission has both the powers and obligation to ensure compliance in terms of the PPA and the Act, 2003.

2. The petitioner has sought the following prayer in the petition.

"(i) to direct the respondents to strictly comply and abide with the provisions on timely payment of tariff invoices of the PPAs entered into between the petitioner and the respondents(s).

(ii) to direct the respondents to make the payment of principal amount of Rs.14,35,16,046/- alongwith late payment surcharge applicable thereon within a period of 4 weeks from date of order of this Commission.

(iii) to direct the respondents to make the payment of late payment interest of Rs.2,69,34,549/- for the delayed payments for the invoices from April, 2018 till December, 2020 within a period of 2 weeks from the date of order of this Commission.

(iv) to direct the respondents to make all future payments of invoices in a timely manner as per the provisions of the PPA and failing such payment to be released along with the late payment surcharge.

(v) to direct the TSDISCOM to open an irrevocable revolving letter of credit in favour of the petitioner as per Article 5.4 of the PPA.

3. The respondents have not filed its counter affidavit to the petition despite giving ample opportunity, but the respondent No.1 has filed an affidavit on 25.10.2022 stated as below:

a. It is stated that on 30.09.2022 during the course of hearing on submission made on behalf of respondents stating that respondent No.1 has made arrangement for payment of amount due, in 12 to 48 instalments through Power Finance Corporation Limited (PFC) and Rural Electrification Corporation Limited (REC) and that the respondent has passed on required information of all the petitioners including the petitioner herein who filed similar petitions that outstanding dues along with bank details to PFC and REC for arranging payment of agreed amount as per PPA directly to the petitioners.

b. It is stated that respondent No.1/TSDISCOMs have entered into loan agreement with REC Limited and PFC limited facilitating financial assistance for clearance of dues.

c. It is stated that the Commission directed this respondent to file specific affidavit indicating the amount that is to be paid by the said corporations on behalf of respondents as per the agreement.

d. It is stated that payments are being arranged to the petitioners in 12 equal instalments and out of which 3 instalments have already been paid. Balance 9 instalments will be paid on 5th of every month.

e. It is stated that the late payment surcharge is under reconciliation and the same is in process. The details of monthly bills covered in the financial assistance scheme extended by PFC and REC is submitted below:

Name of the petitioner (s)	**Amount covered under REC/PFC payments to be made in 12 instalments (Rs)**	**Installments already paid (Amount in Rs./Date of Payment) 22.09.2022/23.09.2022/06.10.2022**		
M/s Essel Mining & Industries Limited	12,28,36,517	10236376	10236376	10236376

4. The respondent No.1 has filed a common additional submission in support of its case as extracted below:

a. It is stated that the petitioner, in the subject Petition (Petition filed under the Section 86(1)(f) of the Electricity Act 2003) has prayed the Commission to issue directions to the Respondents for payment of outstanding sums to it under the bills raised by it along with Late Payment Surcharge (LPS) for the period April 2016 to March 2022 in terms of the provisions of the PPA subsisting with it.

b. It is stated that as per the law settled by the Hon'ble Supreme Court in several Electricity matters, the rights and obligations of the Parties shall have to be read together with the statutory provisions and the claims of the petitioner have to be examined in accordance with statutory provisions/law settled also.

c. It is stated that the Case law, (2016) 3 SCC 468 (APPCC Vs LANCO Kondapalli Power Ltd., Hon'ble Supreme Court's judgment dated 16th October 2015 in Civil Appeal No.6036 of 2012 & batch), wherein it was held, as extracted below:

"… …

30. … … We hold that a claim coming before the Commission cannot be entertained or allowed if it is barred by limitation prescribed for an ordinary suit before the Civil Court.

… … We must hasten to add here that such limitation upon the Commission on account of this decision would be only in respect its judicial power under clause (f) of subsection (1) of Section 86 of the Electricity Act, 2003 and not in respect of its other powers or functions, which may be administrative or regulatory.

… … "

d. It is stated that in terms of the aforesaid case law, the principles of Limitation Act, 1963 shall apply to the claims sought to be adjudicated by this Hon'ble Commission under Section 86(1)(f) of the Electricity Act,2003.

e. It is further stated that the Article 55 of the first Schedule of the Limitation Act 1963 has stipulated that in case of breach of Contract, the limitation period for filing a Suit is 3 years from the date of cause of action.

f. It is stated that since the petitioner's claims are pertaining to the period from (September 2017) to (March 2022) and the petition was filed before the Commission on as per list enclosed, therefore the outstanding claims beyond 3 years prior to the date of filing of the Petition ought to be rejected since these were barred by time in terms of the law settled by the Hon'ble Apex Court.

g. It is also stated that the Hon'ble Apex Court also held in a catena of the judgments that "*exchange of Communications do not extend the period of limitation provided by law*".

h. It is further stated that the Commission is requested to examine clauses on delayed payment surcharge in different PPA's which is conflicting with the present method of interest rates. The attention of Hon'ble Commission is drawn to the fact that from 2016 all the banks have switched over to MCLR i.e., Marginal Cost of Fund Based Lending Rate.

> *In certain PPA's clause 5.2 Clause - "The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of Payment, DISCOM shall pay interest at prevailing SBI bank rate and in case this rate is reduced, such reduced rate is applicable from the date of reduction".*
>
> *In certain PPA's 5.2 Clause – "The DISCOM shall be entitled to get a rebate of 1% of the total amount billed in any billing month for payments made before the Due Date of Payment. Any payment made beyond the Due Date of payment, the DISCOM shall pay simple interest at prevailing base prime lending rate of State Bank of India and in case this rate is increased/reduced, such an increased/reduced rate is applicable from the date of such notification."*
>
> *And in certain PPA's 5.3 Clause - "For default in payment beyond 30 days from the date of billing, a surcharge at the rate of nationalized bank rate (Prime Lending Rate) per month or part thereof shall be levied on the billed amount."*

i. It is stated that the application of the different rates to different generators is totally ambiguous and contrary to the present system of applying interest rates by the lenders (MCLR).

j. It is stated that the “change in law” means any change or amendment to the provisions of electricity law in force, regulations, directions, notifications issued by the competent authorities and Government of India (GoI), Government of Telangana State (GoTS) including the erstwhile Government of Andhra Pradesh (GoAP) from time to time.

k. It is stated that the change in method of lending is subservient to the change in law article, therefore the Hon’ble Commission is requested to examine and give standard rate of interest i.e., MCLR to be applied to all the generators. Therefore, there will be uniformity and aligned to the present method of lending.

l. It is stated that in light of the above, the Commission is prayed to examine the claims of the Petitioner duly taking into account the law settled by the Hon’ble Supreme Court in the interest of justice in respect of time barred debts.

m. It is requested to examine the application of uniform Delayed Payment Surcharge i.e., MCLR to all the solar generators aligning with the present method of interest application envisaged by RBI w.e.f. 01.04.2016.

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

5. The petitioner has filed reply written submissions to the additional submissions filed by the respondent No.1, pleading that this Commission may allow the present petition in terms of the prayer made in the petition, the averments in the reply are extracted below:

a. It is stated that the captioned matter was heard and reserved for orders on 12.01.2023. Thereafter, on 29.03.2023, the Commission served us with a copy of notice along with additional submission filed by respondent, wherein the Commission vide said notice intimated that the captioned matter is being reopened for further hearing as respondent have filed additional submission setting out several new facts and contentions.

b. It is stated that the present reply is being filed on behalf of M/s Essel Mining & Industries Limited (petitioner) in response to the additional submission filed by respondents. It is stated that any omission on the part of the petitioner to deal with any specific contention or averment of the respondents should not be construed as an admission of the same by petitioner. The petitioner reiterated the contents of the petition and the same may be read as part and parcel of this

reply to additional submission, which are not being reproduced herein for the sake of brevity. Further, all the submissions made herein are without prejudice to one another and are to be treated in alternate to one another in case of conflict or contradiction.

c. It is stated that at the outset, the submissions/averments made by the respondents in its additional submission are denied for being unsustainable, unjustifiable and devoid of merits. It is also humbly submitted that the same are founded on a misconstrued reading and understanding of the extant provisions of the applicable law, PPAs and the judicial pronouncements.

d. It is stated that by virtue of its additional affidavit, respondents have stated that:

i. The outstanding claims beyond 3 years prior to the date of filing of the Petition ought to be rejected since these were barred by time in terms of the law settled by the Hon'ble Apex Court.

ii. Further requested the Commission to examine clauses on delayed payment surcharge in different PPA's which is conflicting with the present method of interest rates.

iii. The change in method of lending is subservient to the change in law article, therefore the Commission is requested to examine and give standard rate of interest that is MCLR to be applied to all the generators.

e. It is stated that through the present reply, the petitioner is making its additional submissions on the abovesaid issues in detail and the petitioner herein craves leave of the Commission to make para-wise submissions as may be required during the course of the present proceedings including such other submissions as the Commission may deem fit in this regard.

f. It is stated that the petitioner is relying on following submissions to pray that the petitioner's claim should be allowed and the respondent's averments should not be considered:

<u>Limitation</u>

g. It is stated that there is a continuing breach of contract and a fresh period of limitation begins to run at every moment of the time during which the breach continues.

i. It is stated that Article 22 of the Limitation Act, 1963 (Limitation Act) states that in cases of a continuing breach of contract, a fresh period of limitation begins to run at every moment of the time during which the breach continues. Article 22 reads as follows:

"22. Continuing breaches and torts.- In the case of a continuing breach of contract or in the case of a continuing tort, a fresh period of limitation begins to run at every moment of the time during which the breach or the tort, as the case may be, continues."

ii. It is stated that the petitioner's contractual arrangement with the respondent is for 25 years with a running account. The respondent has been continuously breaching the terms of the PPA by making default in payment of the monthly principal and interest amount till date. Action of the Respondent constitute continuing breach and will be covered by Section 22 of the Limitation Act.

iii. It is stated that Section 3 of the Limitation Act, 1963 which relates to "Bar of Limitation" is subject to Section 22 of the Limitation Act, 1963 (quoted earlier) which specifically provides breach of a continuing nature as an exception to the rule of limitation.

iv. It is stated that the petitioner has been continuously raising invoices and has been writing request letters requesting them to make payment.

v. It is stated that the Hon'ble APTEL in "Power Company of Karnataka Limited and anr. Vs. Udupi Power Corporation Limited-Appeal No.10 of 2020 dated 02.11.2020 while reviewing relationship of generating company and distribution company observed that there is a continuing nature of the relationship between generating company and distribution company). The Hon'ble APTEL further held that arrangement between distribution company and generating company is for 25 years. APTEL specifically held that if any generating company will not be paid regularly then it will be burdened with additional capital costs till it gets paid by distribution companies, therefore these breaches will be considered as "Continuing breach". APTEL further held that if distribution companies have consistently defaulted in paying monthly bills and late payment surcharge then these cases will be covered by Article 22 of the Limitation Act and cause of action to sue will arise on each default. Relevant part of the Judgment is being reproduced hereinafter:

"189. It is noteworthy that there is a continuing nature of the relationship, it being a commercial arrangement for twenty-five years under the PPA coupled with a clear case of running account which itself leads us to consider it a case of continuing cause of action. Pertinently, Article 6.4(b) of the PPA stipulates, albeit in the context of interest liability, that amount payable "shall accrue from day to day and shall be calculated on a 365-day year basis.

… …

191. Be that as it may, even from the details submitted by PCKL/ESCOMs, it is clear that there have been numerous and continuous defaults by ESCOMs in making payment of monthly and infirm power charges of Udupi Power on time or in full. The range of such delays, as shown by data submitted by the appellants themselves, extends from a period of one month to even a year in some instances. In fact, defaults seem to be the rule, timely payments an exception.

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.

… …

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.

204. The respondent refers to the case of State of M.P. & Ors. vs. Yogendra Srivastava (2010) 12 SCC 538, wherein it was held 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:

> *"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."*

205. To similar effect are judgments reported as Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan, AIR 1959 SC 798 (Para 31); State of Bihar v. Deokaran Nenshi, (1972) 2 SCC 890 (Para 5); Bengal Waterproof Limited vs. Bombay Waterproof Manufacturing Co. Ltd. & Anr. (1997) 1 SCC 99 (Para 10); and Basic Shiksha Parishad and Ors. vs. Sugna Devi and Ors. (2004) 9 SCC 68 (Paras 5 and 6).

206. Reliance is also placed on Udai Shankar Awasthi vs. State of U.P., (2013) 2 SCC 435, wherein the Supreme Court explained the expression "continuing breach" as under:

> *"24. In Balakrishna Savalram Pujari Waghmare v. Shree Dhyaneshwar Maharaj Sansthan [AIR 1959 SC 798] AIR p. 807, para 31 this Court dealt with the aforementioned issue, and observed that a continuing offence is an act which creates a continuing source of injury, and renders the doer of the act responsible and liable for the continuation of the said injury… If the wrongful act is of such character that the injury caused by it itself continues, then the said act constitutes a continuing wrong. …*
>
> *26. While deciding the case in Gokak Patel Volkart Ltd. … this Court placed reliance upon its earlier judgment in State of Bihar v. Deokaran Nenshi…wherein the Court while*

dealing with the case of continuance of an offence has held as under:

"5. A continuing offence is one which is susceptible of continuance and is distinguishable from the one which is committed once and for all. It is one of those offences which arises out of a failure to obey or comply with a rule or its requirement and which involves a penalty, the liability for which continues until the rule or its requirement is obeyed or complied with. On every occasion that such disobedience or non-compliance occurs and reoccurs, there is the offence committed. The distinction between the two kinds of offences is between an act or omission which constitutes an offence once and for all and an act or omission which continues, and therefore, constitutes a fresh offence every time or occasion on which it continues. In the case of a continuing offence, there is thus the ingredient of continuance of the offence which is absent in the case of an offence which takes place when an act or omission is committed once and for all.

29. Thus, in view of the above, the law on the issue can be summarised to the effect that, in the case of a continuing offence, the ingredients of the offence continue i.e., endure even after the period of consummation…."

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."

Article 19 of the Limitation Act

h. It is stated that even if we assume but not concede that there is no continuing breach then also this Petition has been filed within 3 years from the cause of action arose. It is submitted that limitation should be computed from the date of the payment. It is further submitted that Hon'ble Supreme Court in "*In Re Cognizance for Extension of Limitation [Miscellaneous Application No.21 of 2022 in Miscellaneous Application No.665 of 2021 in Suo Motu Writ Petition (C) No.3 of 2020*" (SC Limitation Extension Judgment) has recognised difficulties faced by litigant during Covid-19 and have excluded period starting from 15.03.2020 till 28.02.2022 from the calculation of the limitation period.

i. It is stated that Article 19 of the Limitation Act stipulates that where payment on account of a debt or of interest on a legacy is made before the expiration of the prescribed period, a fresh period of limitation shall be computed from the time when the payment was made.

j. It is stated that this petition has been filed seeking claim for following time period:

   i) Principal Amount: For the billing month January, 2021 to billing month April, 2022;
   ii) Late Payment Surcharge: For the billing month April, 2018 to March, 2022.

k. It is stated that the petition was filed before this Commission on 04.07.2022. Therefore, it is noteworthy that the principal claim has been filed within 3 years from the cause of action and hence within the period of limitation.

l. It is stated that for the billing month of April, 2018, invoice was submitted on 26.04.2018. Due date for the payment was 26.05.2018. The respondent has paid the principal amount on 28.09.2018. Therefore, the petitioner is aggrieved by breach of the PPA by the respondent on 28.09.2018.

m. It is further stated that it is pertinent to mention that the Hon'ble Supreme Court in SC Limitation Extension Judgment excluded period starting from 15.03.2020 till 28.02.2022, for the purposes of limitation prescribed under any general or special laws in respect of all judicial or quasi-judicial proceedings, in view of the spread of the new variant of the COVID-19 and the drastic surge in the number of COVID cases across the country. Relevant paras of the said judgment are being produced herein below:

1. In March 2020, this Court took Suo Moto cognizance of the difficulties that might be faced by the litigants in filing petitions/applications/suits/appeals/all other quasi proceedings within the period of limitation prescribed under the general law of limitation or under any special laws (both central and/or state) due to the outbreak COVID-19 pandemic.

… …

5. Taking into consideration the arguments advanced by learned counsel and the impact of the surge of the virus on public health and adversities faced by litigants in the prevailing conditions, we deem it appropriate to dispose of the M.A.No.21 of 2022 with the following directions:

i. The order dated 23.03.2020 is restored and in continuation of the subsequent orders dated 08.03.2021, 27.04.2021 and 23.09.2021, it is directed that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation as may be prescribed under any general or special laws in respect of all judicial or quasi- judicial proceedings;

ii. Consequently, the balance period of limitation remaining as on 03.10.2021, if any, shall become available with effect from 01.03.2022.

iii. In cases where the limitation would have expired during the period between 15.03.2020 till 28.02.2022, notwithstanding the actual balance period of limitation remaining, all persons shall have a limitation period of 90 days from 01.03.2022. In the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

n. It is stated that the above order passed by the Hon'ble Court states that the period from 15.03.2020 till 28.02.2022 shall stand excluded for the purposes of limitation. Further, at Para 5 (iii) - the Hon'ble Court also states that in cases where the limitation would have expired during the period between 15.03.2020 to 28.02.2022, all persons shall have a limitation period of 90 days starting from 01.03.2022. Further, in the event the actual balance period of limitation remaining, with effect from 01.03.2022 is greater than 90 days, that longer period shall apply.

o. It is stated that for billing month April, 2018, if we consider submission of the Respondent, but not concede, then the petitioner will have to file an appropriate petition for claiming late payment surcharge, within 3 years from the date of the receipt of the principal amount. It is pertinent to note that the respondent paid principal amount on 28.09.2018 and in terms of the SC Limitation Extension Judgment, limitation to file appropriate petition would have expired in the month of November, 2023. The petitioner has filed this petition on 04.07.2022.

p. It is stated that even if we consider respondent's submission on the limitation, but not conceding, the petitioner has filed this petition much before the expiry of the limitation period in terms of the respondent's submission.

q. It is stated that this Commission, during the course of hearing dated v0.09.2022, directed the respondent to file specific affidavit indicating the amount that is to be paid by the respondent including LPS and to be facilitated by the said corporations under the agreement before the Commission.

r. It is stated that in furtherance of the above said directions of this Commission, the respondent filed its affidavit dated 21.10.2022 before this Commission wherein it accepted the outstanding due as claimed by the petitioner and submitted that they have initiated the arrangement for payment of principal amount due, in 12 to 48 instillments through Power Finance Corporation Limited (PFC) and Rural Electrification Corporation Limited (REC). Further, with regard to LPS payment the respondent stated that the same was under consideration.

s. It is stated that further, the respondent vide its letter dated 06.12.2022 to the petitioner, again accepted the outstanding due, and also informed that aforesaid amount has been arrived in terms of the LPS Rules and is being released as monthly EMIs. However, it is pertinent to mention that after comparison of the dues communicated by respondent with petitioner's books and records, it was observed by the petitioner that there was a difference of Rs.6,02,791/- in the total outstanding principal sum.

t. It is stated that it is pertinent to mention that the above-mentioned affidavit and letter is clearly an admission of outstanding amount and LPS amount due. It is stated that respondent in it its above-mentioned affidavit unequivocally and in clear terms mentioned that they LPS is under reconciliation and same is under process. It is, therefore, clear that in this case, there has never been any dispute whatsoever with regard to the principal liability of the respondent towards energy charges, and no dispute was raised regarding LPS.

<u>Change in Law</u>

u. It is stated that the respondent is further praying to amend delayed payment clause of the PPA due to change in law.

v. It is stated that the respondent cannot seek change in law relief in absence of change in law clause in the PPA.

w. It is stated that the Commission in M/s ACME Dayakara Solar Power Private Limited v. Southern Power Distribution Company of Telangana Limited. O.P.No.22 of 2020 refused to provide any change in law relief in absence of the change in law clause in the agreement.

x. It is further stated that even if we assume, but not concede, that the respondent can file petition for seeking change in law relief then also change in method of interest rates will not be considered as a change in law.

y. It is stated that the respondent is seeking retrospective amendment in the terms of the PPA by praying MCLR to be adopted for the calculation of the late payment surcharges. Prayer of the Respondent is wholly misconceived and against the law settled by Hon'ble Supreme Court in Maharashtra State Electricity Distribution Company Ltd. v. MERC & Ors. (2022) 4 SCC 657.

z. It is stated that the contention of the respondent is liable to be rejected outright, since LPS provision in the PPA is not linked to the rate at which the respondent is able to get loans from Banks or Financial Institutions. The respondent under the PPA agreed to pay LPS as per the base prime lending rate of SBI and now cannot seek any other rate such as MCLR.

aa. It is stated that Hon'ble Supreme Court in the judgment of Union of India v. Association of Unified Telecom Service Providers of India and Others 2020 (3) SCC 525, have held the following:

"192. The ratio of the case, it is not attracted for the reason that in the instant matter, it is the contractual rate of interest and penalty agreed to which cannot be said to be arduous in any manner. The rate of interest has been agreed and particularly since it is a revenue sharing regime, and the licensees have acted in conscious disregards of their obligation. Thus, on the anvil of the decision above also, they are liable to pay the dues with interest and penalty. … …

… … There is no such discretion available when the parties have agreed in default what amount is to be paid. It automatically follows that it is not to be determined by the licensor once over again. Parties (licensor and licensees) are bound by the terms and conditions of the contract. There is no enabling clause to vary either the rate of interest or the penalty provided therein and even if permissible, it is not called for to vary interest or penalty fixed under the agreement in the facts and circumstances of the case.

… …

197. It is not levy of penal interest which is involved in the instant case. Thus, based on the decision mentioned above, we find that when there is contractual stipulation, the interest can be levied and compounded".

ab. It is stated that the present PPA between the petitioner and respondent are mutually and knowingly executed, therefore the express terms of the PPA must be given effect. It is pertinent to mention that it is settled law that courts will neither rewrite nor substitute the terms of a Contract. In in this regard reliance is placed on Nabha Power Limited v. Punjab State Power Corporation Limited and another (2018) 11 SCC 508 (paras 45 & 72) and Shree Ambica Medical Stores and Others. v. Surat People's Cooperative Bank Limited and Others (2020) 13 SCC 564 (para 20).

ac. It is stated that further, the contention raised by the respondent has already been settled by Hon'ble Supreme Court in Maharashtra State Electricity Distribution Company Ltd. v. MERC & Ors. (Supra), Hon'ble Court while dealing with identical issue held the following:

"175. The object of LPS is to enforce and/or encourage timely payment of charges by the procurer, i.e. the Appellant. In other words, LPS dissuades the procurer from delaying payment of charges. The rate of LPS has no bearing or impact on tariff. Changes in the basis of the rates of LPS do not affect the rate at which power was agreed to be sold and purchased under the Power Purchase Agreements. The principle of restitution under the Change in Law provisions of the Power Purchase Agreements are attracted in respect of tariff.

176. LPS cannot be equated with carrying cost or actual cost incurred for the supply of power. The Appellant has a contractual obligation to make timely payment of the invoices raised by the Power Generating Companies, subject, of course, to scrutiny and verification of the same. Mr. Mukul Rohatgi has a point that if the funding cost was so much lesser than the rate of LPS, as contended by the Appellant, the Appellant could have raised funds at a lower rate of interest, made timely payment of the invoices raised by the Power Generating Companies, and avoided LPS.

177. The proposition that Courts cannot rewrite a contract mutually executed between the parties, is well settled. The Court cannot, through its interpretative process, rewrite or create a new contract between the parties. The Court has to simply apply the terms and conditions of the agreement as agreed between the parties, as observed by this Court in Shree Ambica Medical Stores and Ors. v. Surat People's Co-operative Bank (supra), cited by Ms. Divya Anand.

… …

It is well settled that Courts cannot substitute their own view of the presumed understanding of commercial terms by the parties, if the terms are explicitly expressed. The explicit terms of a contract are always the final word with regard to the intention of the parties as held by this Court in Nabha Power Ltd. (NPL) vs. Punjab State Power Corporation Ltd. (supra).

178. There is substance in Ms. Anand's argument that the Appellant is obliged to seek amendment of the provisions of the Power Purchase Agreement

only in accordance with the agreed procedure for amendment of the terms thereof. The agreed rate of Late Payment Surcharge can only be amended in the absence of SBI PLR and that too with the mutual consent of the parties to the Power Purchase Agreement.

179. The argument that the Power Generating Companies are availing loans at a lesser rate of interest but charging LPS on the basis of a higher rate of interest, leading to unjust enrichment, is untenable in law. LPS under the Power Purchase Agreements do not correspond to the actual interest paid by the Power Generating Companies for funds raised by them. The payment of Late Payment Surcharge LPS penalty suffered by the Procurer, that is, the Appellant, on account of default in timely payment.

180. As observed above, the Parties to the Power Purchase Agreements have mutually and consciously agreed to the incorporation of the PLR as notified by SBI from time to time, as the rate for levy of LPS. Therefore, by virtue of the doctrine of incorporation, the PLR as notified by SBI each year gets incorporated in the Power Purchasing Agreements, as binding between the parties. Thus, any other system notified by the Reserve Bank of India by its circulars has no bearing on the terms of the Power Purchase Agreement and cannot be deemed to be incorporated in the Power Purchase Agreement, except in case of mutual agreement between the parties. … …"

ad. It is stated that therefore, in view of the above, the contention raised by the respondent that contractual rate, as incorporated in the PPA which is the base prime lending rate of State Bank of India (SBI), will stand altered by introduction by the Reserve Bank of India (RBI) of the MCLR with effect from 2016 is liable to be rejected.

6. The Commission has heard the parties to the present petition from time to time and it was ultimately reserved for orders on 12.01.2023. Subsequent to reserving the matter for orders by the Commission, the respondent has filed common additional submissions in this matter as well as in other similar matters on 28.01.2023 raising several contentions, which required an examination by the Commission and also the submission of the petitioner on the same for ascertainment and for a detailed hearing. Even though the respondent did not seek reopening the matter, but due to various averments made in the common additional submissions by the respondent, the Commission opined that the matter required for reopening for fresh consideration and accordingly the Commission de-reserved the matter and posted it for hearing on 24.04.2023. The Commission has heard the parties and also considered the material available to it. Record of proceedings on various dates including that of 24.04.2023 are extracted for ready reference.

Record of proceedings dated 25.08.2022:

"… … The counsel for petitioner stated that the petition is filed for recovering the amounts due towards power generation supplied to the respondent. The representative of the respondent stated that the matter is coming up for the first time and he needs further time for filing counter affidavit. The Commission upon insistence for the disposal of the petition on the same lines as has been decided by the Commission in similar cases, had observed that the Commission is inclined to pass orders, however, an opportunity is being given to the respondent for filing counter affidavit. The Commission having noticed that the matter is coming up today for the first time for filing counter affidavit, while making it clear that the licensee shall file the counter affidavit expeditiously and the petitioner is at liberty to file rejoinder, if any upon filing counter affidavit by the respondent, adjourned the matter."

Record of proceedings dated 05.09.2022:

"… … The counsel for petitioner stated that no counter affidavit is filed so far despite granting time for the said purpose. Again time is being sought inspite of the fact that the Commission had already considered similar matters and disposed them. The representative of the respondent stated that the Commission may consider granting further time for filing counter affidavit while conceding the fact that sufficient time has already been given. The Commission expressed its distress that the licensee is placing the Commission in a peculiar situation of not disposing of the matter despite it being the similar to earlier batch of cases. However, in view of the request of the representative of the respondent, the matter is adjourned."

Record of proceedings dated 30.09.2022:

"… … The counsel for petitioner stated that the petition is filed for recovering the amounts due towards power generation supplied to the respondent. Even till today, no counter affidavit is filed nor any commitment is given as regards payment to be made or not before this Commission. The representative of the respondent stated that the respondent has made arrangements for payment of amount due in 12 to 48 instalments through Power Finance Corporation Limited and Rural Electrification Corporation Limited. The respondent has passed on the information required to them and they will directly arrange payment of the amount as agreed between the respondent and the said corporations. In support of his submissions, he has sought to file the agreement entered by them for payment of the amount due to the petitioner. Therefore, he sought further time to report in the matter. The counsel for petitioner stated that the petitioner is in dark about the same. Unless the respondent comes up with an affidavit to that effect, the petitioner will not be in a secured position. He has required the Commission to direct the respondent to file an affidavit detailing the amounts indicated to the said corporations in respect of each of the cases by filing separate affidavits as the petitioner is entitled to the original amount as also the late payment surcharge.

The Commission, considering the submissions made by the parties, has directed the respondent to file specific affidavit in respect of the each of the petitions indicating the amount that is to be paid by the respondent including LPS and to be facilitated by the said corporations under the agreement before

the Commission. Such an affidavit shall be filed on or before 22.10.2022 with a copy to the petitioner's counsel. The Commission will consider the matter on the next date of hearing depending the developments in the matter. Accordingly, the matter is adjourned."

Record of proceedings dated 31.10.2022:

"… … The counsel for petitioner stated that the petition is coming up for counter and hearing. The Commission had earlier required the respondent to file an affidavit indicating the amounts that are being paid through the financial agencies as also the quantum of instalment for the benefit of the petitioner. Though the Commission directed that such an affidavit be filed by 22.10.2022, the respondent has filed the same only the other day when it has been served on the petitioner. Even now, the respondent did not mention the LPS amount that is being considered for reimbursement alongwith the principal amount and no details are mentioned in the affidavit despite the fact that in the earlier round of cases, the Commission had specifically pointed out that LPS amount is liable to be paid to the petitioner and directed accordingly while passing orders in the said batch of cases. According to the PPA, the respondent has to clearly identify and pay the LPS amount the moment the payment of principal amount has been delayed upon submission of invoice for the purpose by the petitioner beyond the stipulated time. While explaining the provisions in the PPA with regard to billing and payment, it is stated that the DISCOM is entitled to rebate only when it has made payment of the original amount within the stipulated time, but, is liable to pay the LPS amount on delaying the payment of original amount beyond the period stipulated in the PPA. Contrary to the said provision, it is noticed that in some cases, the respondent has indicated a lessor amount of the total payment due inspite of the figures mentioned by the petitioner in its petition. This amounted to reduction of the net payment and claiming rebate at a higher percentage than that is accepted in favour of DISCOM for early payment.

The representative of the respondent stated that they have filed the affidavit clearly indicating the amount that is proposed to be disbursed through the arrangement made with the financial institutions. The payment is particularly with reference to the principal amount. He has no instructions on the aspect of LPS amount, which is the bone of contention of the petitioner apart from the principal amount. He needs time to seek instructions as also clarification from the management on the aspect of LPS payment to the generators apart from the principal amount committed in the affidavit.

The Commission expressed its dismay that the respondent filed affidavit without giving the complete picture of the payments sought to be made and which are not sought to be made. It is also noticed by the Commission that there is no clarity on the aspect of payment of LPS from the respondent. Therefore, it desired that the licensee shall place before the Commission the relevant particulars with regard to the principal amount as also LPS in respect of each of the generators. The Commission also enquired about undertaking any conciliation process before initiating the proceedings. The counsel for petitioner replied emphatically that no steps as provided in the PPA were initiated nor any communication was received from the respondent. Since the statement made by the licensee is insufficient and inadequate, the Commission desired the licensee to place proper information with regard to all the payments due

including the subsequent period and the petitioner to corroborate by way of reply as to the details if any are missing in the statement of the licensee. In the circumstances, the matter is adjourned for further hearing including required corroboration of the figures by either side."

Record of proceedings dated 21.11.2022:

"… … The counsel for petitioner stated that the Commission had specifically recorded in the proceedings on the earlier date of hearing that the action required to be taken by the respondent in the matter on payment of amounts duly identifying the same. However, no action including the filing of any information has come forth from the respondent, even after lapse of 21 days. In fact, the Commission had already considered the issues and disposed of several similar cases and what remains to be examined, is with reference to the amounts due on different heads. The representative of the respondent stated that though Commission required furnishing of details of the payments as contemplated in the matter, however, the issue is not merely of the petitioner alone, but there are about 200 generators in whose cases, the exercise has to be undertaken. As such, the matter has been entrusted to a group of auditors, who have been tasked to calculate the amounts in respect of all the generators and it will take a period of one month. This work is entrusted to the auditors as the company staff are not able to concentrate on the matter and they are also busy with several topics including the litigation before the Hon'ble Supreme Court on their service issues. He needs atleast one month to complete the exercise and report the same to the Commission. He also emphasized that the payment of amounts relates to not only one or two months, but the period to be considered is about 5 years in many cases.

The counsel for petitioner vehemently opposed the proposal made by the representative of the respondent and stated that the Commission may consider reserving the matter and give liberty to the respondent to file the required information before it within a period of one week or ten days as may be appropriately considered. The Commission is concerned about the inaction on the part of the licensee and observed that what all the petitioner required them to do is to identify and intimate the amount that will be paid towards principal and late payment surcharge, which has not been done by the licensee. As such, there is no case for granting further time, however, keeping in view the magnanimity of the issue, the Commission is inclined to grant time for filing the required information. At this juncture, the counsel for petitioner stated that the required information may be filed at the earliest within a period of fifteen days and thereafter give time for corroborating the same.

The Commission considering the submissions has fixed the time period for filing the information as sought by it to be filed on or before 15.12.2022 with a copy to the counsel for petitioner and thereafter, the Commission will hear the parties on the next date of hearing. It is made clear that if no information is filed, the Commission will proceed to hear the matter on merits. The time is being granted solely to enable effective resolution of the issue. It is emphasized that the licensee shall atleast furnish information in the case without fail as stipulated above. Keeping in view the above situation, the matter is adjourned."

Record of proceedings dated 12.01.2023:

"… … The counsel for petitioner stated that the Commission had specifically recorded in the proceedings on the earlier date of hearing that the action

required to be taken by the respondent in the matter on payment of amounts duly identifying the same. However, no action including the filing of any information has come forth from the respondent, even after lapse of the period till the date of hearing. In fact, the Commission had already considered the issues and disposed of several similar cases and what remains to be examined, is with reference to the amounts due on different heads. The issue of LPS is not adverted to anywhere nor any information is coming forth from the respondent. It is appropriate that the respondent places the information both in respect of LPS as well as principal amount, though the principal amount is being reimbursed in terms of the mechanism stated earlier. The petitioner is also in receipt of current payments, but the issue of LPS as also opening of letter of credit has not taken place.

The representative of the respondent stated that in terms of the directions of the Commission, arrangements have been made for payment of the amount due. The arrangements have already been made for payment of the arrears, but there is no issue of LPS in these cases and no quantification is required to be made. The petitioner is at liberty to approach the respondent for payment of LPS in terms of the PPA. The respondent having considered and made arrangement for payment of arrears as well as current liability is not required to make any other payment. The licensee is ready to comply with the provisions of the PPA, however, the Commission may consider the unreasonable argument with reference to payment of LPS despite the fact that the payment is being effected in a timely manner.

The Commission noticed that the provisions in the PPA as explained by the petitioner would call for payment of LPS as also incentive. However, as the licensee has failed to comply with the directions as also did not place any information on the amounts due, no further time can be considered in the matter. Accordingly, the matter is reserved for orders."

<u>Record of proceedings dated 24.04.2023:</u>

"… … The counsel for petitioner stated that the main issue in this petition is with regard to payment of arrears due alongwith interest and late payment surcharge. The details were earlier not forthcoming from the respondent. Moreover, the petitioner has claimed the bills towards power supply and the same have not been honoured as such interest is liable to be paid for the same and further as the amount is paid belatedly, as per the provisions of the PPA the respondent is liable to pay late payment surcharge also. One contention that has been raised by the respondent is that the claims are beyond the period of limitation, which cannot be accepted as it is a continuous process as and when the payment gets delayed, it will attract such consequence as are provided in the PPA. Therefore, the respondent cannot contend that the limitation has expired.

The counsel for petitioner stated that even if the contention is to be accepted insofar as limitation is concerned the claims would survive for the reason that the Hon'ble Supreme Court in suo motu proceedings in W.P.No.3 of 2020 had extended the limitation period for the issues where the limitation had expired between 15.03.2020 to 28.02.2022 by its orders from time to time. It is also made clear there that the limitation would start running from 01.03.2022 and would be expiring after 90 days. It is also submitted that the Hon'ble Supreme Court had occasion to consider the issue of limitation in the matters of A.P.

Power Coordination Committee Vs. Lanco Kondapalli Limited reported in 2016 (3) SCC 468, which is not applicable to the facts of the case. Reliance is also placed by the respondent in the matter of Power Company of Karnataka Limited Vs. Udupi Power Corporation Limited reported in 2020 SCC On Line APTEL 94, which is of no help to the respondent. In fact, the said appeal would support the contents of the petitioner that the respondent is bound to pay the LPS. The Commission has extensive power on regulation in respect of PPAs executed and it can pass such necessary orders.

The counsel for petitioner stated that the respondent has committed itself to release the payments in 9 or 12 instalments upto 36 instalments of the amounts due through an affidavit filed by the respondent. They now cannot contend different aspects contrary to their own submissions that arrangements have been made for liquidating the arrears of amounts due. The Commission may consider the approbating and reprobating of submissions made by the respondent. The Commission may not consider the arguments raised now in the additional submissions in view of the specific affidavit submitted by the respondent earlier.

The representative of the respondent stated that the aspect of LPS cannot be agitated as there was no issue on the same. Therefore, the respondent has specifically adverted to in the additional submissions pointing out the provisions in the PPA alongwith the relevant law. In the contentions raised by the petitioner, the amounts have been quantified only for a specific period and nothing is made out for a period prior to the period mentioned in the PPA or the petition. In any case as the respondent has made arrangement for payment of the principal amount, payment of interest or late payment surcharge would not arise. One specific issue that requires consideration is that of change of applicability of interest rate which was mentioned as prime lending rate, which has been changed by the banking regulator for consideration of interest as marginal cost lending rate (MCLR), which needs to be examined, as it stands contrary to the provisions of PPA. Therefore, the Commission may consider refusing the said prayer.

The counsel for petitioner stated that the amounts due is a continuous exercise and every month when the amount is becoming due it will attract not only interest but also late payment surcharge unless the respondent has disputed the bill and communicated the same before the due date. Inasmuch as, the Government of India had notified the late payment surcharge rules. Such rules have been held to be part of the agreement on and from the date of their notification. Therefore, the respondent could not have raised the contention with regard to applicability of the late payment surcharge and as also question of limitation attracting it. The counsel for petitioner referred to several provisions and judgements rendered by the Hon'ble ATE as also the Hon'ble Supreme Court on the question of limitation, continuity of liability and treatment of modifications made by the government policies as change in law. The contention that the calculation of interest based on prime lending rate has been changed to MCLR do constitute a change in law and the licensee should have taken steps to amend the agreement.

The counsel for petitioner stated that the Commission may not consider any of the submissions made by the licensee as the law is settled against them. Also, the Commission had already disposed of a batch of cases on the similar

subject. Therefore, there is nothing further to be considered for deviation from the earlier decision of the Commission.
The Commission felt it appropriate that the parties to the petition may consider undertaking conciliation of the matter towards LPS amount amicably. In view of the submissions made by the parties, the matter is reserved for orders."

7. The Commission is of the view that the Telangana State Power Coordination Committee (TSPCC/2nd respondent) is neither a statutory body nor is a recognized under the Act, 2003 or the regulations made thereof by the Commission. The said Committee has been created by the Government vide G.O.Ms.No.21 dated 12.05.2014, as referred by the petitioner, is only to coordinate the power procurement and allied activities to have a single window to favour generators. It is also relevant that just because correspondence is being done by the TSPCC, it has no statutory authority to contest or defend for the lapses or omissions committed by 1st respondent. As such it need not be a party to the proceedings before the Commission. Hence, the Commission dropped 2nd respondent viz., TSPCC from the array of the respondents, accordingly, the 1st respondent is sole respondent in this case.

8. Though the Commission was considerate and magnanimous in granting time for filing the counter affidavit, the respondent has failed to respond to the petition through a proper counter affidavit. However, it had filed an affidavit setting out certain details as to the action taken by it towards arranging payment for the amounts due in the petition. Further, the Commission has specifically posted the matter for hearing and after hearing the parties on the basis of additional submissions made by the respondent, required the parties to undertake conciliation of the LPS amount. However, the respondent did not initiate any action in the matter and no information has been placed by the parties in this regard. The Commission has no other option but to decide the matter on the prayer of the petitioner in this context.

9. From the pleadings it is noticed that the petitioner is having a long-term Power Purchase Agreement with the respondent vide NCE Solar PPA No.132/2013 dated 18.01.2014 for setting up of the Solar Power Project of 10 MW capacity at Kalwakurthy Village, Mahabubnagar District connected to at 33 kV side of 132/33 kV Kalwakurthy substation, for sale of Solar Power to the respondent from the Date of Commercial Operation. The terms & conditions of the PPA stipulates that –

5.1 *For the Delivered Energy, the Solar Power Developer (petitioner) shall furnish a bill to the DISCOM (respondent) for the billing month on or before the 5th working day following the Meter Reading Date;*

5.2 *Any payment made beyond the Due Date of Payment, the respondent shall pay interest at prevailing SBI bank rate; [Late Payment Surcharge (LPS)]*

5.3 *The respondent shall pay the bill on monthly basis by opening a one month revolving Letter of Credit in favour of petitioner.;*

5.4 *The respondent shall cause to be in effect an irrevocable revolving Letter of Credit issued in favour of the petitioner by a Scheduled Bank;*

5.5 *The respondent shall make payment for the eligible bill amount by the due date of payment;*

5.6 *The respondent shall pay the bills of petitioner promptly;*

… …

11.4 *… … any party may approach TSERC to resolve the dispute under Section 86(1)(f) of the Electricity Act, 2003;*

10. Prima facie, the prayer in this petition is with regard to action of the respondent in not making the payment in accordance with the provisions of the PPA. The petitioner has identified the outstanding amount due against monthly delivered energy bills for the period upto 31.05.2022, which includes LPS amount, the details which are shown in the averments of the petition as Rs.3,81,29.734/-. The petitioner further contended that the respondent is yet to open the Letter of Credit as provided in clause 5.4 of Article 5 of the PPA, as such, it is unable to recover the outstanding due or any part thereof. Therefore, in the prayer it is sought not only for release of payments due along with interest thereon for late payment (late payment surcharge, LPS) but also for directions to the respondent for opening of irrevocable revolving Letter of Credit in favour of petitioner and for making all future payments in a timely manner, though there is no mention of the amount for subsequent period.

11. The Commission is of the view that in the absence of any contest made by the respondent as to the veracity of the claims made by the petitioner, there is no dispute on the amounts payable by the respondent to the petitioners. However, as per the provisions of the PPA, when the petitioner has complied with its part to the PPA by delivering the electricity energy to the respondent, the respondent is bound to make payment without any demur. Further, in terms of the PPA such occurrence and continuation of event of non-payment of dues by the respondent to the petitioner and when the petitioner is unable to recover the outstanding amount, shall constitute "*DISCOM (respondent) Event of Default*". Further, as the PPA provides for payment of interest, it is bounden duty of respondent to pay the interest in terms of the PPA.

Since the respondent did not pay the amounts towards delivered energy bills raised by the petitioner, it is liable to pay interest as claimed by the petitioner to that extent as also further LPS for the amounts which are not paid till date.

12. The petitioner sought to rely on the minutes of GoM as also the directions thereof by the GoI with regard to payments of due as well as LPS. Inasmuch as the PPA as also the subsequent rules notified in the year 2022 on the subject matter are binding on the respondent and as such, it cannot escape from the liability.

13. The petitioner sought to rely on Judgments of the Hon'ble Supreme Court and APTEL referred in the pleadings of the petitioner with regard to payment of amounts due by the respondent. Without reiterating the relevant observations of those Judgements, which are already extracted in the pleadings, the Commission is in complete agreement with the submission of the petitioner. Moreover, the decisions referred thereof are binding on this Commission. Therefore, it cannot extricate itself from the findings thereof and is accordingly, inclined to accept the submissions of the petitioner.

14. The petitioner also relied on the Judgments of the Hon'ble Supreme Court in the matter of unjust enrichment and public authority must act fairly. Even in the case of these judgments as referred by the petitioner, since the respondent did not comply with the provisions of the PPA and did not make timely payment of the invoices, the natural understanding would be that the respondent has unjustly enriched itself by withholding the amounts due to the petitioner and its actions are not in consonance with the principles of public authority must act in fair manner. From the pleadings, there appears to be a certain extent force in the contention of the petitioner insofar as the above two aspects are concerned, but the Commission views that such application is subject to reasonable benefit of regulatory oversight in favour of the petitioner.

15. The respondent relied on the Judgment of the Hon'ble Supreme Court in respect of the observations made in the matter of M/s A.P.Power Coordination Committee on the aspect of limitation. Contra argument is also placed by the petitioner on the same aspect by placing reliance on the judgment of the Hon'ble APTEL in the matter of Power Company of Karnataka Vs. Udupi Power Corporation Limited. While it is not denied that the observations of the Hon'ble Supreme Court qua limitation are binding on the Commission as the petition is filed under Section 86(1)(f) of the Act,

2003, at the same time, the decision of the Hon'ble APTEL places importance on the aspect of 'continuous breach'. This case squarely falls within the aspect of continuous breach. Therefore, the contention of the respondent regarding limitation aspect or delayed filing of the petition cannot be accepted.

16. The respondent contended that since the method of calculation of interest is proposed to be changed, it amounts to 'Change in Law'. The contention of the respondent appears to be based on misunderstanding. The method of calculation of interest cannot be deviated upon as provided in the PPA. At the same time, if the competent authority under the financial laws had changed the method of calculation of interest, nothing precluded respondent to initiate appropriate proceedings before the Commission for amendment of the provisions in the PPAs in line with such modifications in financial laws. Having not done so, it cannot now take defence that the same is change in law. For this reason, the contention of the respondent fails and is rejected.

17. The Commission had occasion to consider a judgment rendered by the Hon'ble APTEL in the matter of Bangalore Electricity Supply Company Ltd. Vs. Devangere Sugar Company Limited in Appeal No.176 of 2009. The observations made by the Hon'ble APTEL are extracted below:

> *"23. Besides this, there is one more breach. Under Clause 6.6, the Corporation (Appellant) shall establish and maintain transferable, sustainable and irrevocable revolving Letter of Credit (LOC) in favour of the company (Respondent)*
>
> *25. In the instant case, admittedly, neither the amount due were paid in time, nor the penal interest was paid as per clause 6.3 of the contract, nor the LOC was established within the stipulated time as per Clause 6.6 of the Contract.*
>
> *26. In every Power Purchase Agreement (PPA), the opening of a LOC is a vital part of the contract. It is fundamental financial obligation cast upon the Appellant by the contract to honour the same. In other words, to open an LOC forms an integral part of the contract. It is, therefore, clear that there is a failure on the part of the Appellant to honour its obligation under the contract. … … "*

18. Thus, it is seen that the present case also provides for Letter of Credit and the same is not complied with according to the pleadings. In the absence of any statement from the respondent as to the reasons or compliance of providing Letter of Credit in terms of the PPA, the Commission has no other option to infer that the respondent did

not provide Letter of Credit to the petitioner, which it is required to comply with. The Commission opines that the respondent complying with the said provision in order to safeguard the interest of the petitioner, is appropriate in the interest of justice.

19. The Commission also considers it appropriate to observe that the respondent shall comply with the terms of the PPA without any demur and also honour all the payments in future towards the invoices to be raised by the petitioner, though it had made arrangement for payment of the earlier invoices and LPS as the case may be.

20. In view of the above, the petition is allowed and the respondent shall comply with this order within a period of four (4) weeks from the date of receipt of the order. While complying with the order, the respondent would ensure that the amounts are settled completely and shall endeavour to make payment of the eligible amount of the bills raised by the petitioner promptly in accordance with the provisions of the PPA.

21. The original petition is disposed in terms of the observations made supra, without any costs.

This Order is corrected and signed on this the 15th day of December, 2023.

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

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