



नई दिल्ली
NEW DELHI

याचिका संख्या /Petition No.: 17/MP/2018

कोरम/Coram:

श्री पी. के. पुजारी, अध्यक्ष/Shri P. K. Pujari, Chairperson

डॉ. एम. के. अय्यर, सदस्य/ Dr. M.K. Iyer, Member

श्री. आई. एस. झा, सदस्य/ Sh. I.S. Jha, Member

आदेश दिनांक /Date of Order: 8th of November, 2019

IN THE MATTER OF:

Petition under Section 79 (1) (f) read with Section 79 (1) (a) and other applicable Provisions of The Electricity Act, 2003 for adjudication of disputes between the Petitioner and the Respondents 1 to 3.

AND IN THE MATTER OF:

NTPC Vidyut Vyapar Nigam Limited

Core-7, SCOPE Complex,

Institutional Area,

Lodhi Road, New Delhi – 110 003

...Petitioners

Versus

1. M/s Ajmer Vidyut Vitaran Nigam Limited

Through its Managing Director,

Hathi Bhata, Jaipur Road,

Ajmer – 305 001

2. M/s Jaipur Vidyut Vitaran Nigam Limited

Through its Managing Director,
Vidyut Bhawan, Janpath,
Jaipur – 302 005

3. M/s Jodhpur Vidyut Vitaran Nigam Limited

Through its Managing Director,
New Power House, Industrial Area,
Jodhpur – 342 003

4. Ministry of New and Renewable Energy

Through its Secretary,
Block No. 14, CGO Complex,
Lodhi Road, New Delhi – 110 003

5. Rajasthan Rajya Vidyut Prasaran Nigam Limited

Through its Managing Director
Vidyut Bhawan, Janpath,
Jaipur- 302005

...**Respondents**

Parties Present: Shri M.G. Ramachandran, Senior Advocate, NVVNL

Ms. Ritu Apurva, Advocate, NVVNL

Ms. Anushree Bardhan, Advocate, NVVNL

Ms. Tanya Sareen, Advocate, NVVNL

Shri Nishant Gupta, NVVNL

Shri Sujoy Das Verma, NVVNL

Shri Anant Raman, NVVNL

Ms. Swapna Seshadhari, Advocate, Rajasthan Discom

आदेश/ ORDER

The Petitioner, M/s NTPC Vidyut Vyapar Nigam Limited (hereinafter referred to as 'NVVN') is an Inter-State Trading Licensee and an electricity trader in terms of the provisions of Section 2(26) read with Section 14 of the Electricity Act, 2003 (hereinafter referred to as the "Act"). The Petitioner has filed the Petition under Section 79(1)(f) read with Section 79(1)(a) and other applicable provisions of the Act for adjudication of disputes between the Petitioner and the Respondents 1 to 3.

2. The Respondent No. 1, M/s Ajmer Vidyut Vitaran Nigam Limited; the Respondent No. 2, M/s Jaipur Vidyut Vitaran Nigam Limited and the Respondent No. 3, M/s Jodhpur Vidyut

Vitaran Nigam Limited (hereinafter collectively referred to as 'Respondent Discoms') are the Distribution Licensees in the State of Rajasthan which procure power for distribution and retail supply of electricity to the consumers in the State.

3. The Respondent No. 4, the Ministry of New and Renewable Energy (hereinafter referred to as 'MNRE') is the administrative Ministry of the Government of India dealing with the promotion of new and non-conventional energy in India. NVVN has impleaded MNRE as a proforma party and no relief is being claimed against MNRE.
4. The Respondent No. 5, M/s Rajasthan Rajya Vidyut Prasaran Nigam Limited is the State Transmission Utility (hereinafter referred to as 'STU') of the State of Rajasthan and has been joined as a proper party.
5. The Petitioner has made the following prayers:
 - a) *declare that the Respondents 1 to 3 are liable to pay to the Petitioner the Trading Margin at the rate of 7 Paise/kWh for the bundled power (both electricity from the Solar Power Project and the electricity generated by NTPC Limited) for the period from October 2011 till date and shall continue to pay such Trading Margin for the entire period of the PSA dated 10.1.2011;*
 - b) *hold that as on 30.11.2017, the Petitioner is entitled to recover a sum of Rs. 69.11 Crores from the Rajasthan Discoms towards the principal amount of outstanding Trading Margin and further the Delayed Payment Surcharge at the rate of 1.25% per month aggregating to Rs. 25.96 Crore from the Rajasthan Discoms;*
 - c) *hold that as on 30.11.2017, the Respondents 1 to 3 are liable to pay to the Petitioner a sum of Rs. 81.22 Crores unilaterally adjusted by the Rajasthan Discoms from the bills of the Petitioner towards shortfall in the generated electricity by the Solar Power Developers together with the Delayed Payment Surcharge at the rate of 1.25% per month;*
 - d) *hold that as on 30.11.2017, the Respondents 1 to 3 are liable to pay to the Petitioner a sum of Rs. 43.57 Crores deducted from the bills for the Month of July 2013 and August 2013 towards supply of the coal power together with the Delayed Payment Surcharge at the rate of 1.25% per month;*
 - e) *hold that as on 30.11.2017, the Respondents 1 to 3 are liable to pay to the Petitioner a sum of Rs. 55.35 Crores deducted from the bills for the Month of July 2013 and August 2013 towards supply of the solar power (Batch II) together with the Delayed Payment Surcharge at the rate of 1.25% per month;*
 - f) *hold that as on 30.11.2017, the Respondents 1 to 3 are liable to pay to the Petitioner an amount of Rs. 53.57 Crores from the bills of the Petitioner for the Months December*

2012 to April 2013 (Batch II Power) and June 2013 to September 2013 (Batch I Solar Thermal With Respect To Godavari Green Limited) towards supply of unbundled solar power to Rajasthan Discoms together with the Delayed Payment Surcharge at the rate of 1.25% per month;

- g) award cost of the petition; and*
- h) pass such further order or orders as this Commission may deem just and proper in the circumstances of the case.*

SUBMISSIONS OF THE PETITIONER IN THE PLEADINGS AND DURING HEARINGS

6. The Petitioner has submitted that MNRE formulated the Jawaharlal Nehru National Solar Mission (hereinafter referred to as 'JNNSM') Scheme for promotion of solar power and for sale of such solar power to the Distribution Licensees in the State including the Respondent Discoms to enable them to fulfil their Renewable Purchase Obligation (hereinafter referred to as 'RPO') in terms of Section 86(1)(e) of the Act. To facilitate the Implementation of JNNSM, MNRE has designated NVVN as the Nodal Agency for procuring solar power by entering into PPAs with Solar Power Developers (SPDs) and sell the power of SPDs bundled with equivalent unallocated megawatt capacity from NTPC coal stations to the Distribution Licensees in the country. To enable a head start to the JNNSM, MNRE had announced:
 - a) Migration Projects: To enable projects which have made progress under the earlier schemes of MNRE/ States to migrate to JNNSM. On 10.01.2011, NVVN signed PPAs with 16 SPDs selected under the scheme for 84 MW capacity in three States viz. Maharashtra (11 MW); Punjab (7 MW) and Rajasthan (66 MW).
 - b) Batch-I and Batch-II Projects: NVVN invited applications for 'Request for Selection' for new solar projects for a capacity of 620 MW (comprising of 150 MW of solar PV Projects and 470 MW of solar thermal projects).
7. The Petitioner has submitted that on 26.04.2010, the Commission determined generic tariff of INR 15.31/kWh for renewable power projects (including solar thermal power projects) in tariff order in Petition No. 53/SM/2010. Accordingly, MNRE issued guidelines for selection of New Grid Connected Solar Power Projects and NVVN agreed to purchase power from the SPDs as an intermediary and sell power to the Distribution Licensees after bundling it with the unallocated quota of coal-based power projects of NTPC. On 18.08.2010, NVVN floated 'Request for Selection' (hereinafter referred to as 'RfS') and the bidders were required to

submit the 'Request for Proposal' (hereinafter referred to as 'RfP') indicating discount on the Commission's approved tariff of Rs.15.31/kWh under Regulation 8 of the CERC (Terms and Conditions for Tariff determination from Renewable sources) Regulations, 2009 and the CERC (Terms and Conditions for Tariff determination from Renewable sources) (First Amendment) Regulations, 2010. NVVN entered into PPAs with the selected SPDs for procurement of power and executed Power Sale Agreements (hereinafter referred to as the 'PSAs') with Respondent Discoms for resale of the bundled power.

8. The Petitioner has submitted that the points of contention are as under:

a) Re: Trading Margin pertaining to the period from October 2011

9. The Petitioner has submitted that as per Clause 5 of the PSA dated 10.01.2011, the Respondent Discoms are required to pay to NVVN the applicable tariff for the bundled power as per the provisions of Schedule 3 of the PSA. Schedule 3 of the PSA provides for the formula for determination of rate for solar power and NTPC power (bundled power). Clause 6.2 of the PSA provides for 'Delivery and Content' of the monthly bill and Schedule 4 referred to in Clause 6.2.2 of the PSA provides for computing the monthly tariff payment for the bundled power with one of the components expressly provided as the Trading Margin. Trading Margin [T(m)] is the amount which is to be appropriated by NVVN as the agreed consideration in the transactions. The formula as contained in Schedule 4 provides for computation of the amount due and payable by Respondents, including as an additional element, the Trading Margin.

10. The Petitioner has submitted that the EoI issued on 26.11.2010 provides specifically that in addition to the tariff that may be payable, there will be a NVVN margin charged at the CERC capped Trading Margin as applicable from time to time. Annexure 1 attached to the said Expression of Interest provided for the component of Bundled Pooled Rate specifically stipulating, inter-alia, as under:

*"Note: The above calculations of per unit pooled cost of bundled Power of Rs. 4.27 (for 2011-12); Rs. 4.36 (for 2012-13) & Rs.4.34 (as levelised tariff) has been worked out considering the indicative tariff for thermal power @ Rs. 2.50/kWh . Thereafter, the effective pooled cost of bundled power (i.e., the levelised tariff as shown in the last column) is worked out with taking into account the per unit cost of thermal power as Rs. 2.55, 2.60, 2.65..... Rs. 3.00/kWh . **The above worked out cost is exclusive of the NVVN margin and shall be charged at the CERC capped trading margin as applicable from time to time.**"*

11. The Petitioner has submitted that the Trading Margin applicable at the relevant time as per the decision of the Commission was 7 Paise/kWh in cases where the sale price was exceeding Rs. 3/kWh. In this regard, the Regulation 4 of the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, inter alia, provides as under:

“4. Trading Margin: The licensee shall not charge trading margin exceeding seven (7.0) paise/kWh in case the sale price is exceeding Rupees three (3.0)/kWh and four (4.0) paise/kWh where the sale price is less than or equal to Rupees three (3.0)/kWh . This margin shall include all charges, except the charges for scheduled energy, open access and transmission losses. The trading margin shall be charged on the scheduled quantity of electricity.”

12. The Petitioner has submitted that the Respondent Discoms were also fully aware that under the JNNSM Scheme Batch I, NVVN will proceed to sign the PPAs with the SPDs for procurement of solar power. The bundled power can be made available to the Respondent Discoms only when the Government of India allocates the conventional power from NTPC’s generating stations. The Respondent Discoms did not raise any objection or reservation or condition either to the payment of Trading margin or to the quantum of such Trading Margin. It is a well settled principle of construction of contract that the intentions of the parties have to be gathered from the surrounding circumstances and in an objective manner. The Petitioner has placed its reliance on *Bank of India and Anr. Vs. K. Mohandas and Ors. (2009) 5 SCC 313; Ottoman Bank of Nicosia v. Ohanes Chakarian : AIR 1938 PC 26; Ganga Saran v. Firm Ram Charan Ram Gopal: AIR 1952 SC 9; Edridge v. R.D. Sethna, 1933 SCC OnLine PC 47 : ILR (1934) 58 Bom 101 : (1932-33) 60 IA 368 : (1934) 36 Bom LR 127 : (1933) 38 LW 972 : 1934 All LJ 50 : AIR 1933 PC 233 : (1933) 65 Mad LJ 813.*

13. The Petitioner has submitted that aspect of Trading Margin has been further clarified by the MNRE vide O.M. dated 07.06.2013 as under: -

“Subject: Sale of Solar Power to State Utilities/Discoms under Phase-I of JNNSM – trading margin of NVVN – reg.

- 1. With reference to the solar power projects set up in different States under Phase-I of the Jawaharlal Nehru National Solar Mission (JNNSM) through NTPC Vidyut Vyapar Nigam Ltd. (NVVN), the NVVN has been purchasing the solar power from Solar Power Developers as per respective PPA tariffs and selling the bundled solar power to State Utilities/Discoms at reduced tariffs of around Rs.4-5/kWh . With a view to encourage inter-state trading of this solar power for fulfillment of RPO’s are also bring about a uniformity in the trading margin being charged by NVVN, a trading margin of Paise Seven (7) per kWh on the power sold by*

NVVN to State Utilities/ Discoms from JNNSM Phase-I projects is hereby fixed. This amount may be billed by NVVN along with the Energy Charges.

2. *This issues with the approval of the Competent Authority.”*

14. The Petitioner has submitted that except the Respondent Discoms, the Distribution Licensees in other States who are procuring bundled solar and coal-based power in similar manner have not raised any dispute on the payment of 7 paise/kWh. Respondent Discoms have paid Trading Margin arbitrarily at the reduced rate of 1.5 paise/kWh instead of 7 paise/kWh for the entire period. There is also no basis for restricting the Trading Margin to solar component purchased from SPDs. It is pertinent to note that NVVN is a separate legal entity which had procured the quantum of power from NTPC and resold the same to Respondent Discoms, thus performing the trading activity. The need for payment of trading margin on this quantum has also been duly recognized by MNRE in its communication dated 07.06.2013.

15. The Petitioner has submitted that the claim is not time barred as is being raised by the Respondent Discoms. The Respondent Discoms had arbitrarily ignored that during the entire period, there were discussions and deliberations between the parties for amicable resolution and such discussions and deliberations were undertaken by the parties with MNRE and the Secretary, Government of Rajasthan. The issue of the applicable Trading Margin at 7 Paise/kWh on the quantum of power traded by NVVN to the State Utilities (including Rajasthan) was already decided by MNRE on 07.06.2013. Further, there was a meeting on 14.11.2013 between the Respondent Discoms and NVVN. The Minutes (duly signed) were forwarded by the Respondent Discoms vide communication dated 20.11.2013. The Minutes, inter alia, recorded as under:

“5. Trading Margin related issue will be further discussed and dealt separately later on.

16. The Petitioner has submitted that in the circumstances mentioned above, there can be no denial by the Respondent Discoms with regard to the claim of Trading Margin of NVVN which can be said to have set the time period running for computation of the limitation of 3 years. It is well settled that unless the claim is denied, there cannot be a dispute which could be taken up either for arbitration or adjudication under section 79(1)(f) of the Act. Therefore, cause of action had not arisen as on 14.11.2013 or 20.11.2013 when the above Minutes of the Meeting were drawn, duly signed and forwarded by the Rajasthan Utilities, namely when the parties agreed to deliberate and hold discussion further. The PSA dated 10.01.2011, in

Article 12.2 provides for the process of amicable settlement. In the discussions held on 14.11.2013 and thereafter, it was agreed that the matter would be further discussed and deliberated at a later date. This confirms the process of attempt being made to amicably resolve the issue of Trading margin in terms of the said Article 12.2 of the PSA. Thereafter, by letter dated 29.12.2014, the Rajasthan Utilities while referring to the minutes of the meeting dated 14.11.2013 dealt with the Trading Margin as under:

“1. Regarding trading margin, letter No. RDPPC/Sr.AO/JPR/F.D-2778 Dt 29.12.11 and letter No. RDPPC/Sr.AO/JPR/F.D-121 Dt 13.04.12 already send to you and the invoices are being verified as per above letters.”

17. The Petitioner has submitted that on 19.05.2016, a meeting was held at the Office of the Principal Secretary, Government of Rajasthan (Energy) which was attended by the Rajasthan Utilities, the Joint Secretary of MNRE and representative of NVVN. With regard to the Trading Margin, it was recorded as under:

“3.Short payment of trading margin (Rs 45 Cr till January 2016)

The issues of short payment of trading margin of 7 p/kWh was discussed. NVVN stated that other Discoms are paying trading margin of 7 p/kWh and NVVN has made payment of tax to Authorities on this margin.

Pr. Secretary (Energy) Rajasthan directed that further deliberations between RUVNL and NVVN officials be held to arrive at an amicable at the earliest.”

18. The Petitioner has submitted that there was another meeting held on 16.03.2017 in MNRE. The meeting was chaired by the Secretary, MNRE and was admittedly attended by the representatives of the Rajasthan Utilities viz. the CEO of RUVNL representing the Respondent Discoms and the Chief Engineer alongwith other officials of MNRE. Officials of the Rajasthan Utilities have also been shown to have attended the meeting and this fact is not disputed in the pleadings filed by the Respondent Discoms. The Minutes of the Meeting were drawn by the officials of MNRE, as the meeting was chaired by the Secretary, MNRE. The Minutes were forwarded to all the concerned persons including the representatives of the Respondent Discoms vide communication dated 03.04.2017. The Office Memorandum communicating the above is signed by the Central Government officials. At no point of time, the Respondent Discoms disputed the receipt of the Minutes of the Meeting or otherwise disputed the contents of the meeting. In the Minutes of the Meeting dated 16.03.2017 the matter of Trading Margin has been dealt, inter alia, as under:

“4. Short payment of Trading Margin (Rs. 57.0 Cr. Till Dec. 2016)

- a) *The trading margin for sale of Bundled Power is being charged by NRVN at 7 paisa/kWh as per EoI of JNNSM Scheme. However, Rajasthan-Discoms have unilaterally continued to pay trading margin @ 1.5 paisa/kWh. Outstanding dues on this account of trading margin till December 2016 is Rs. 57.0 Crore. NRVN further informed that all other beneficiaries states i.e. Punjab, Uttar Pradesh, Maharashtra, Assam, DVC, West Bengal, Odisha, Chhattisgarh, Karnataka, Tamil Nadu, Andhra Pradesh, Telangana are paying a trading margin of 7 paisa per unit of power supplied under JNNSM phase-I.*
- b) *MNRE asked Rajasthan-Discoms to review the trading margin issue and settle the same amicably, as NRVN has to perform lot of activities in scheduling and bundling of Solar power for supply to Discoms scattered all over India.”*

19. The Petitioner has submitted that in view of the above, there cannot be any issue of limitation when NRVN has filed the petition on 29.12.2017. The cause of action for filing the petition arose when despite the Minutes of the Meeting dated 16.03.2017 wherein Trading Margin issue had been dealt specifically, the Respondent Discoms did not settle the issue.
20. The Petitioner has submitted that it is admitted that even as on 19.05.2016 the Principal Secretary (Energy), Rajasthan, was attempting to amicably resolve the matter between the Rajasthan Utilities and the Petitioner. Therefore, there was no question of denial of the claim on account of limitation. The petition filed on 29.12.2017 is well within time even if the signed Minutes of the Meeting on 19.05.2016 is taken as the commencement of the computation of the limitation period.
21. The Petitioner has placed its reliance on the following decisions:
- a) Limitation period does not commence when the parties are still in dialogue or negotiation for amicable settlement: *Shree Ram Mills Ltd. - v- Utility Premises (P) Ltd., (2007) 4 SCC 599; Hari Shankar Singhania (2) -v- Gaur Hari Singhania, (2006) 4 SCC 658; Oriental Building and Furnishing co. Ltd. -v- Union of India, 1981 SCC OnLine Del 140 : AIR 1981 Del 293.*
- b) Requirement of signing the document for acknowledgement Under Section 18 of the Limitation Act: *P.R.M.P. Vellayappa Chettyar v. P.M.P. Somasundaram Chettyar, 1935 SCC OnLine Rang 18 : AIR 1935 Rang 160 : ILR (1935) 13 Rang 322; Langoju Tavudu and another v. Veerini Venkataratnam 1935 SCC OnLine Mad 87 : (1935) 41 LW 744 :*

AIR 1935 Mad 555; Ramjan Ali v. Khawja Meer Ahmed Sethi, 1939 SCC OnLine Pat 239 : AIR 1940 Pat 6.

c) Section 18 (19 of the old Limitation Act) of the Limitation Act, 1963 should be liberally construed: *Teumal Bishamal Sindhi -v- Amar Mohandas Sindhi, 1972 SCC OnLine Bom 45 : (1972) 74 Bom LR 644 : AIR 1973 Bom 84 at page 646; Bindeshwari Prasad v. District Board of Saran, 1960 SCC OnLine Pat 107 : AIR 1961 Pat 134 at page 135.*

22. The Petitioner has submitted that during the period from October 2011 till November 2017, it has supplied 12566 MU of bundled power to Respondent Discoms and an amount of Rs. 87.96 Crore (Principal), as on 30.11.2017, has become due and payable by the Respondent Discoms towards Trading Margin computed at the rate of 7 Paise/kWh. As against the above, the Respondents have unilaterally paid/ agreed to pay the Trading Margin only at the rate of 1.5 Paise/kWh aggregating to Rs. 18.85 Crore. The Respondent Discoms have not settled the issue of the payment of Trading Margin to the Petitioner. It is pertinent to mention here that Clause 6.3.3 of the PSA dated 10.1.2011 provides for the 'Late Payment Surcharge' at the rate of 1.25% per annum. The interest on the outstanding amount calculated at the said rate as on 30.11.2017 works out to Rs. 25.96 Crore.

b) Re: Wrongful adjustment made by the Respondent Discoms towards alleged claim for the shortfall in generation from January 2016 and June 2017

23. The Petitioner has submitted that as per Article 6.8.3 of the PSA, if there is a shortfall in generation by the SPDs, then the compensation shall be payable to the Respondent Discoms as per relevant provisions of the PSA. Similar provisions are contained in the Article 4.4.1 of the PPA. The arrangement entered into between NVVN and the Respondent Discoms is on a back to back basis to the arrangement between the SPDs and NVVN. Further, the compensation payable by the SPDs to NVVN for shortfall in generation was also the subject matter of Petition No. 304/MP/2013 and connected matters filed by the SPDs.

24. The Petitioner has submitted that in the decision dated 11.10.2017 passed in Petition No. 304/MP/2013 relating to M/s Godavari Green Energy Limited, the Commission has held that "*One of the Petitioners, M/s Rajasthan Sun Technique has approached the Hon'ble High Court of Delhi against the NVVNL decision imposing liquidated damages. The Hon'ble High Court of Delhi vide its interim order dated 30.3.2017 in Case No. O.M.P. (1) (Comm.)*

124/2017 has restrained NVVNL from deducting payment from the petitioner's invoices and is listed for arguments. Therefore, the liability of the petition will be decided in the light of judgment of the Hon'ble High Court of Delhi.” By Order dated 30.03.2017 passed in O.M.P (I) (Comm.) No. 124 of 2017 in the matter of *Rajasthan Sun Technique Energy Private Limited Vs. NVVNL*, the Hon'ble High Court of Delhi had decided “*Till the next date the Respondent is restrained from deducting payments from the Petitioner's invoices.*” Therefore, in the circumstances mentioned above, the Petitioner has not been able to recover the full amount of Liquidated Damages claimed towards the shortfall in generation from the SPD.

25. The Petitioner has submitted that the Respondent Discoms were a party to the proceedings in Petition No. 304/MP/2013. The Order dated 11.10.2017 passed by the Commission equally binds the Respondent Discoms. During the pendency of the proceedings and up to the date of the passing of the Order dated 11.10.2017, there was a stay granted by the Commission against the encashment of the Bank Guarantee and recovery of the amount by NVVN from the SPDs. Accordingly, there has been no liability for NVVN during the pendency of the above proceedings, namely, from the date of filing the Petition No. 304/MP/2013 till 11.10.2017 and thereafter in view of decision of this Commission. The same position continues thereafter till the decision of the Appellate Tribunal in Appeal No. 4 of 2018. If the appeals are decided in favour of NVVN, the recovery of the amount from the SPDs will be permissible.
26. The Petitioner has submitted that the obligation of NVVN under the PSA to the Respondent Discoms is on a back to back basis to the enforcement of the corresponding obligation of the SPDs to NVVN in the PPA which is as also decided in Petition No. 304/MP/2013. In the circumstances mentioned above, there is no default or failure on the part of NVVN in compensating the Respondent Discoms for any shortfall in the generation on the part of the SPDs. In any case, instead of claiming the alleged compensation of shortfall in generation in the proceedings before the Commission in Petition no. 304/MP/2013 and the connected matters which were subjudice involving Respondent Discoms also, the Respondent Discoms proceeded to deduct the amount from other undisputed claims due to NVVN. Accordingly, the Respondent Discoms were neither entitled to recover money from NVVN by adjustment of other legitimate claims of NVVN for the alleged shortfall in the generation nor entitled to make unilateral adjustment for the amount towards alleged claim for the shortfall in

generation by recovery from the other admitted amounts due from the Respondent Discoms to NVVN. In this regard the minutes of the discussions between the parties have been as under: -

a) Minutes of the meeting dated 19.05.2016

“2. Amount claimed by Rajasthan Discoms from January 2016 bundled power bills on account of alleged low CUF of Solar Projects Rs. 27.12 Cr.

NVVN stated that the amount claimed by Rajasthan Discoms is not justified as solar energy supplied by NVVN during each contract from 2011-12 to 2014-15 has been more than the minimum committed quantum.

Further JS MNRE clarified that compensation on account of low CUF would be applicable only in case penalty is imposed on Discoms by the State Regulatory Commission. A clarification will be issued by MNRE in this regard so that necessary action may be taken to resolve the issue and release of payment.”

b) Minutes of the meeting dated 16.03.2017

“2. Rs. 27.21 Crore claimed by RDPPC from the January 2016 Bundled Power bill on account of min CUF of Solar Power Development in the PPA.

a) NVVN apprised that solar bundled power is supplied from the pool of Solar Power Projects commissioned under the JNNSM Phase-I scheme in Rajasthan-Discoms. The solar energy supplied to Rajasthan-Discoms by NVVN in each of the contract years from 2011-12 to 2014-15 has been more than minimum committed quantum, on pooled basis as per allocated quantum.

b) Rajasthan-Discoms informed that the payments have been deducted as per Article 4.4.1 of the PPA.

c) MNRE opined that Rajasthan-Discoms can raise the compensation claim for the amount which is payable by them in case of penalty imposed by the State Regulatory Commission which is within the purview of PSA. Rajasthan-Discoms cannot take an action on the PPA terms which is signed between SPD and NVVN.

d) MNRE advised Rajasthan-Discoms that the deductions are not justified and may be refunded to NVVN.”

27. The Petitioner has submitted that despite the above position, the Respondent Discoms have proceeded to adjust an amount of Rs. 70.99 crore towards shortfall in the generation against the payment due to the Petitioner. The above adjustment by the Respondent Discoms for shortfall in the generation by the SPDs is contrary to the agreement reached between the parties. The Respondent Discoms are required to pay the said amount to the petitioner and are entitled to the benefit of the said Liquidated Damages only upon the payment being made by the SPDs. Therefore, the Petitioner is entitled to recover as on date a sum of Rs. 81.22 crore from the Respondents 1 to 3 for adjustment in the shortfall in generation of electricity

along with the Delayed Payment Surcharge. In so far as this claim is concerned, there is no issue of limitation as the claim pertains to January 2016 to June 2017 and the Petition was filed on 29.12.2017.

c) Re: Non-payment of Rs. 43.57 Crores (as on 30.11.2017) by Respondent Discoms in regard to supply of NTPC coal power through NVVN during the period of 01.07.2013 to 15.08.2013

and

d) Re: Non-payment of Rs. 55.35 Crores by Respondent Discoms in regard to supply of solar power through NVVN during the period of 01.07.2013 to 15.08.2013 (Batch II power)

28. The Petitioner has submitted that Respondent Discoms gave their concurrence on allocation of conventional power from NTPC's Generating Stations and bundling of solar power with effect from 01.04.2013 in terms of the letter dated 01.04.2013 issued by the Ministry of Power. The temporary allocation up to 210 MW bundled power was made due to non-availability of the Long term Access (hereinafter referred to as 'LTA') for the inter-State transfer of solar power to other States. The timeline was with reference to the LTA commencement for the inter-State sale of solar power. The LTA for the inter-State transfer of solar power requires availability of Inter-State Transmission System of Powergrid and the Intra-State Transmission System availability of the Rajasthan Vidyut Prasaran Nigam Limited (Intra-State Transmission STU) as the solar power was connected to the STU network and finalisation of solar scheduling procedure with Rajasthan SLDC/ RVPN. The operationalization of the LTA for the inter-State transfer was finalized on 15.08.2013 and solar power started flowing to the inter-State procurers effective 16.08.2013. Pursuant to the above arrangement agreed to by the Respondent Discoms effective 01.04.2013, the solar power as well as the NTPC's conventional power were scheduled and were supplied to the Respondent Discoms. Despite the above, the Respondent Discoms unilaterally sought to terminate the above arrangement by giving one month notice i.e. effective 01.07.2013. Since the LTA was not operational as on 01.07.2013, the arrangement had to continue till 15.08.2013 which is in accordance with the Ministry of Power's allocation dated 01.04.2013.

29. The Petitioner has submitted that the Respondent Discoms having agreed to the above arrangement on 19.03.2013 based on which the Government of India had issued the allocation benefitting the Respondent Discoms effective 01.04.2013 and the Respondent Discoms having taken advantage of the same for the period from 01.04.2013 onwards, was

not entitled to unilaterally terminate it effective 01.07.2013. From 01.04.2013 till 15.08.2013 the Respondent Discoms had benefitted on both conventional power and the corresponding solar power injected into the Rajasthan Intra-State Transmission System and, therefore, they need to pay for the same. During the period mentioned above the scheduling and dispatch continued for the bundled power.

30. The Petitioner has submitted that the Minutes of the Meeting dated 25.07.2013 clearly establish the circumstances as to why the LTA was not operationalized till 15.08.2013. The meeting was attended by the representatives of the Respondent Discoms, RRVPNL and NVVN. In the meeting it was held as under:

1. *SLDC requested NVVN to furnish name of the co-coordinating Agency for implementation of Renewal Regulatory Fund (RRF) for the Solar projects commissioned under JNNSM Phase-I.*
2. *NVVN stated that as per definition of RRF, the agency appointed by Wind/Solar Generators connected on the pooling station commissioned on or after 3.05.2010, which may be one of the generators or any other mutually agreed agency. NVVN mentioned Individual Generating Stations injecting power into the grid and for pooling stations one of the designated developers shall be Co-ordinating Agency (as per enclosed list). NVVN stated that for RRF NVVN shall not be co-ordinating agency and for scheduling purposes NVVN shall act as a Co-ordinating Agency only for one month, NVVN further stated that updated list of coordinating Agency shall be obtained from SPD's and furnished to CE(LD), RVPN by NVVN within short period.*
3. *NVVN further stated that as a Nodal Agency of JNNSM, shall Co-ordinate for bulk scheduling of power for inter-state transfer to State outside Rajasthan and RDPPC so that sale of bundled power is accomplished as per terms & conditions of PSA signed with beneficiaries of bundled power.*
4. *For UI accounting/RRF individual Solar generators shall be responsible for settlement. However, it was stated that there shall be no impact to RRF on individual Solar Generator as per RRF regulation.*
5. *It was agreed that inter-state scheduling of Solar power shall commence with immediate effect and it was also agreed that the above shall be reviewed after a period of one month or as may be mutually agreed to assess the implementation issues of inter-state scheduling vis-à-vis RRF."*

31. The Petitioner has submitted that in view of above there cannot be any dispute in regard to the payment of tariff and trading margin for the bundled power (both solar power and NTPC's coal power) supplied during the period from 01.07.2013 to 15.08.2013. With regard to the claims under these two heads, the relevant extracts from the minutes of the meetings, and letters are as under: -

Minutes of the Meeting held on 14.11.2013

4. Since RDPPC withdrew the consent for temporarily allocated 210 MW bundled power wef 1st July 2013, therefore payment for the energy injected during the period 01.07.2013 to 15.08.2013 will be done on applicable UI rates of corresponding blocks. However NVVN insisted for full payment at the bundled power rate. (as an interim measure)”

Agenda note for the meeting dated 19.05.2016

“1.2.2 **Shortfall in payment related to delay in Scheduling/implementation of LTA**
Rajasthan Discoms have outstanding dues of Rs 61.75 Crore due to delay in implementation of the LTA for interstate transfer of 210 MW NVVN-Solar Power from Rajasthan from 1st July 2013 to 15th August 2013. The supply of Power to other beneficiaries could only commence w.e.f. 16th August 2013 after finalisation of Solar scheduling procedure with Rajasthan SLDC/RVPN. The bundled power was therefore absorbed in the Rajasthan State, however, Rajasthan-Discoms have paid for the energy supplied at average UI rate of Rs. 1.14 kWh only (Details enclosed at Annexure-I).

The matter had been discussed with Rajasthan earlier also with a view to find a mutually beneficial solution to the issue. In line with earlier discussions and communications, NVVN regulated the scheduling of solar component of the bundled power in lesser proportion to allocated quantum with a view to compensate Rajasthan. This has resulted in gain of Rs 94.14 Cr. To RDPPC till Feb 2016 which duly compensates the entire amount (Rs 93.10 Cr) deducted from the bundled power bills. (Details enclosed as Annexure-II).

The above dues have been outstanding for long time and non payment is effecting financial position of the NVVN and have invited strong comments from Auditors/CAG. Rajasthan Discoms are requested to confirm dues and expeditiously release payment.”

Minutes of the Meeting held on 16.03.2017

“2. Shortfall in payment related to delay in Scheduling/ Implementation of LTA

a) There was delay in implementation of the LTA for interstate transfer of 190 MW NVVN-Solar Power from Rajasthan during the period of 1st July 2013 to 15th August 2013. 196.51 MU bundled power was supplied to Rajasthan-Discoms out of which 43.6 MU was solar energy and 152.9 MU was coal energy and were billed for Rs. 39.84 Crore and Rs. 44.3 Crore respectively. The total amount paid by Rajasthan was Rs. 22.38 Crore against the billed amount of Rs. 84.14 Crore. Rajasthan-Discoms have paid for the energy supplied at average UI rate of Rs. 1.14/ kWh only. NVVN informed that Rajasthan has paid even for NTPC Coal Power which was scheduled to Rajasthan-Discoms based upon their requisition given to RLDC, at the UI rate.

b) MNRE emphasised that Rajasthan-Discoms after getting the power scheduled from NTPC plants are liable to pay full amount for the thermal power consumed and thus directed Rajasthan-Discoms to pay the full amount of the coal power drawn during the said period, if not paid earlier.

c) Rajasthan-Discoms accepted that the payment will be released shortly after confirming at their end whether the amount has been paid to NTPC or not for the coal power of 152.9 MU at the billed rate.”

32. The Petitioner has submitted that as per the procedure, based on the capacity declaration of NTPC plants from which, an allocation of power was made for the period w.e.f. 01.04.2013, Respondent Discoms continued to give generation schedules through RLDC on daily basis even during the period of 01.07.2013 to 15.08.2013. The same is clearly reflected in the REA issued by RPC and payable to NVVN. Respondent Discoms have not paid to NTPC and has paid to NVVN only at UI rate for the above period. It is unfair for the Respondent Discoms to now submit that they did not need the power.

33. The Petitioner has submitted that the Respondents Discoms have wrongly deducted payments from the bills for the month of July 2013 and August 2013 and the Petitioner is entitled to recover a sum of Rs. 26.88 Crore from the Respondents Discoms with regard to supply of NTPC coal power through NVVN during the period from 01.07.2013 to 15.08.2013. As on 30.11.2017, a sum of Rs. 43.57 crore is due and outstanding from Respondents Discoms towards the claim of the Petitioner. Further, a sum of Rs. 55.35 Crore as on 30.11.2017 is also due and outstanding from Respondents Discoms for the period from 01.07.2013 to 15.08.2013 towards solar power consumed. The Petitioner has also submitted that the above claims are payable along with interest computed in terms of Clause 6.3.3 of the PSA at the rate of 1.25% per month.

e) Re: Outstanding dues of unbundled solar power supplied, due to delay in coal power allocation, to Respondent Discoms during the period from December 2012 to April 2013 (solar power from solar power developers of batch-II) and from June 2013 to September 2013 (solar thermal power from batch-I SPD M/s. Godavari Green Limited)

34. The Petitioner has submitted that mismatch between the commissioning of solar plants vis-à-vis allocation of coal power occurred due to procedural time taken by the Government of India in the allocation of equivalent coal power matching with the schedule of commissioning of the solar plants and also due to early commissioning of few of the Solar Projects. The factual details and reasons for supply of unbundled solar power for the period between December 2012 to April 2013 and between June 2013 to September 2013 are as under:

a. Some of the SPDs located in Rajasthan commissioned the solar power projects in December 2012. 20 MW solar capacity was commissioned by December 2012 and went up to 285 MW by March 2013. However, as per the Ministry of Power allocation order dated 13/6/2011-OM dated 12th February 2013, 85 MW was allocated to Rajasthan out of 295 MW Solar capacity to be commissioned in the State of Rajasthan.

b. As per NRPC order dated 28th February 2013, 85 MW NTPC Coal power was scheduled to Rajasthan from 01.03.2013 by NRLDC for bundling.

c. 210 MW solar power was to be inter-state scheduled to eight beneficiary States.

d. Additionally, under Phase-I Batch-I, the 50 MW solar thermal project of M/s Godavari Green, located in Rajasthan, was commissioned on 19th June 2013. The entire 50 MW capacity was allocated to Rajasthan. NVVN approached Ministry of Power for allocation of 50 MW NTPC coal power for bundling as per scheme. The NTPC coal power for bundling was scheduled by NRLDC, from 18th September 2013 vide NRPC order dated 16th September 2013.

35. The Petitioner has submitted that the above were the variations in the commencement of the NTPC's coal-based power in comparison to the commencement of the solar generated power to the Respondent Discoms. The Respondent Discoms had the advantage of the solar power supply to meet the RPO compliance as imposed by the RERC despite non-commencement of the coal-based power. The time taken in the supply of coal-based power was on account of the issue of allocation to be made by the Ministry of Power and was not attributable to NVVN in any manner. Until the Government of India allocated thermal power to be bundled with the solar power, there cannot be any supply of bundled power. At the same time, the dominant purpose for which the agreement was entered into was the promotion of solar power and supply of the same to the Respondent Discoms to enable the Respondent Discoms to meet the RPO compliance which was duly serviced. In any event, there has been no adverse consequence to the Respondent Discoms. As per the Minutes of the Meeting dated 19.05.2016 and the Minutes dated 16.03.2017, any adverse consequences were duly adjusted in favour of the Respondent Discoms.

36. The Petitioner has submitted that in view of the above, there is no basis for the Respondent Discoms to dispute the claim. As mentioned herein above, Respondent Discoms have not suffered any adverse consequences. Respondent Discoms have in fact derived advantage of receiving higher quantum of NTPC generated power in comparison to the proportion of the solar power envisaged under the PSA and, therefore, has significantly benefited. Despite the above, Respondent Discoms have not settled the claim.

37. The Petitioner has submitted that it is entitled to recover as on date a sum of Rs. 31.34 crore from the Respondent Discoms with regard to supply of unbundled solar power through NVVN during the period from December 2012 to April 2013 and from June 2013 to September 2013. As on date, a total sum of Rs. 53.57 Crore is due and outstanding from

Respondent Discoms towards the claim of NVVN as mentioned herein above along with interest computed in terms of Clause 6.3.3 of the PSA at the rate of 1.25% per month.

38. **Details of the amounts due to NVVN:** The Petitioner has submitted the updated statement of claim as on 28.2.2019 as under:

	Particulars	Period of Principle amount	Surcharge up to	Principle amount	Surcharge amount	Total	Remarks
				Rs.Cr.	Rs.Cr.	Rs.Cr.	
1.	Trading Margin	Up to Aug 2018	28/Feb/2019	84.12	39.81	123.93	Trading Margin certified @ 1.5 p/kWh in place of claimed @ 7.0 p/kWh.
2.	Compensation Amount for shortfall in generation	Jan 2016 & Jun 2017 (amount deducted by Raj. Discoms)	28/Feb/2019	70.99	21.75	92.74	Amount deducted from Yr 2011-12 to Yr 2016-17
3.	LTA Coal Power Jul-Aug' 2013	01 Jul 2013 to 15 Aug. 2013	28/Feb/2019	26.88	21.72	48.60	Amount paid @ UI rate only in place of claimed bundled rate.
4.	LTA Solar Power Jul-Aug' 2013	01 Jul 2013 to 15 Aug. 2013	28/Feb/2019	34.15	27.58	61.73	
5.	Unbundled Solar Batch-2 & Godavari	Dec-12 to Apr-13 & Jun-13 to Sep-13	28/Feb/2019	31.34	29.01	60.35	Commissioned Solar PV Projects. RDPPC paid at bundled power rate in place of claimed at bundled tariffs.
Total				247.48	139.87	387.35	

39. The Petitioner has submitted that it has to recover a sum of Rs 387.35 Crores as on 28.02.2019 inclusive of the Delayed Payment Surcharge computed at the rate of Rs 1.25% per month as provided in the PSA (Clause 6.3.3.) Future interest from 1.3.2019 is also payable.

SUBMISSION OF RESPONDENTS IN THE PLEADINGS AND DURING HEARINGS

40. The Respondents have submitted that the claims of the Petitioner except for the “*Adjustment of amounts by the Respondents No.1 to 3 towards shortfall in generation for the period from January 2016 (Rs 27.21 crores) & June, 2017 (43.78 crores)*” are barred by limitation since the petition has been filed on 27.12.2018 for claims which have been rejected more than 3

years before the said date. The only other claim which can be said to be continuing is the claim for trading margin which is being claimed at 7 paise per unit. This claim also cannot be made for the period before 28.12.2014.

41. The Respondents have submitted that all the claims of the Petitioner have been rejected by the Respondents by November 2013 i.e. letters dated 12.12.2011, 11.10.2013, 24.10.2013, 27.11.2013, 03.04.2014 & 04.04.2014. Therefore, the claims ought to have been pursued/ filed with the Commission latest by November 2016 or April 2017. As against the same, there is a delay of more than two years and the claims are clearly barred by limitation. The Respondents have submitted that no claims are maintainable for any period prior to three years before filing of the present petition i.e. prior to 29.12.2017. Any claims for this period are barred by limitation in terms of the Judgment of the Hon'ble Supreme Court in *AP Power Coordination Committee & Ors v M/s Lanco Kondapalli Power Ltd & Ors (2016) 3 SCC 468*. The Hon'ble Supreme Court has held that the limitation period of 3 years would apply in adjudication proceeding initiated under Section 86(1)(f) of the Electricity Act, 2003.
42. The Respondents have submitted that despite the issue of limitation having been raised, there is no answer to the same in the rejoinder filed by the Petitioner. The only submission made by the Petitioner in the hearing qua limitation is that the Petitioner has been holding meetings for resolution of the issues with the Respondent Discoms. The Petitioner is seeking to read the minutes of these meetings as being an acknowledgement of debts on the part of Respondent Discoms i.e. minutes of meetings dated 19.05.2016 and 16.03.2017 and thus the period of limitation has been extended in terms of those meetings.
43. The Respondents have submitted that acknowledgment of debt is defined in Section 18 of Limitation Act, 1963. A perusal of section 18 of the Limitation Act indicates following conditions to be fulfilled in order to establish '*acknowledgement of debt*': -
 - That the acknowledgement of liability must be in writing.
 - That the acknowledgement of liability must be made before expiry of limitation period for filing the suit. If limitation has already expired, it would not revive under section 18 of the Limitation Act.
 - That the acknowledgement of liability must be unqualified and must be in unambiguous, clear terms.

- That the acknowledgement must be signed by the person or his authorized agent admitting liability.

44. The Respondents have submitted that the acknowledgement of liability must be made before expiry of limitation period for filing the suit and if limitation has already expired, it would not revive under section 18 of the Limitation Act. In the above background, neither the minutes of meetings dated 19.05.2016 nor the minutes dated 16.03.2017 aid the case of the Petitioner. In the minutes of meeting dated 19.05.2016, it is very much apparent that the Respondent Discoms have not acknowledged anything. Simply a suggestion to the Respondent Discoms endorsing the method does not mean anything. Thus, it is factually incorrect to say that the Respondent Discoms agreed to pay the amounts as claimed by the Petitioner.

45. The Respondents have submitted that the minutes of meeting dated 16.03.2017 have not been signed by the Respondent Discoms because of the incorrect language. The claim made by the Petitioner that the Respondent Discoms had allowed the amount claimed by them is incorrect. Further, the date of the Minutes namely 16.03.2017 is outside the period of limitation for most of the claims and, therefore, the same cannot be an acknowledgement of debt extending the period of limitation. The claim ought to have been filed latest by November 2016 and thus the minutes of meeting dated 16.03.2017, apart from being factually incorrect, is beyond the period of limitation. The dates mentioning the claim are tabulated below: -

Sr. No.	CLAIM	PERIOD OF CLAIM	DATE OF EXPIRY
1.	Trading Margin	From the date of PSA i.e.10.01.2011.	All claims prior to 30.12.2014 are barred by limitation.
2.	Adjustment of amounts by the Respondent Discoms towards shortfall in generation against the payment due to the Petitioner.	From January 2016 (Rs 27.21 crores) & June 2017 (43.78 crores)	It is within limitation but has been answered on the merits.
3.	Non-Payment of Rs 43.57 Crores in regard to supply of NTPC Coal power.	From 01.07.2013 to 15.08.2013	It is 3 years beyond the limitation period.
4.	Non-payment of Rs 55.35Crores by Respondent Discoms in regard to supply of solar power through the Petitioner	From 01.07.2013 to 15.08.2013	It is 3 years beyond the limitation period.
5.	Outstanding dues of unbundled power supplied to Respondent Discoms	From Dec. 2012 to April 2013 and June 2013 to September 2013.	It is 3 years beyond the limitation period.

46. The Respondents have placed their reliance on the following judgments: *K. Krishnamoorthy vs Investment Trust Of India Limited*, cited in 2012-2-L.W. 256; *State Bank Of India vs Kanahiya Lal & Anr*, in RSA NO. 248/ 2015 decided on 2nd May, 2016; *K. Jeyaraman vs M/S. Sundaram Industries Ltd*, cited in 2008-3-L.W. 2594.

47. The Respondents have submitted that the fulcrum of the argument of the Petitioner that having meetings and discussions extends the period of limitation has no basis whatsoever. It is a well settled principle that discussions and meetings do not extend the period of limitation. The Respondents have placed their reliance on the judgment of *Gujarat Urja Vikas Nigam Ltd Vs. Essar Power Limited* (Judgment dated 22 February, 2010 in Appeal No 77 and 86 of 2009).

a) *Re: Trading Margin pertaining to the period from October 2011*

48. The Respondents have submitted that the parties to the agreements are governed by the terms and conditions of the PSA dated 10.01.2011 which exhaustively provides for the rights and obligations of the parties in respect of supply of power by the Petitioner to the Respondent Discoms. Article 5 of the PSA provides for the applicable tariff which is to be paid as per the provisions of the Schedule 3 to the PSA. Further, Schedule 3 to the PSA has no provision with regard to Trading Margin [T(m)]. Article 6 of the PSA provides for the manner of billing by the Petitioner and payment by the Respondent Discoms. Article 6.1.1 requires the Respondent Discoms to pay the monthly tariff payment in accordance with the tariff as specified in Article 5. Article 6.2.2 of the PSA only provides the manner in which the bills are to be raised by the Petitioner on the Respondent Discoms. It is evident from the above that Article 6 read with Schedule 4 of the PSA only provides for the manner in which the bills are to be raised by the Petitioner and does not deal with tariff per se. The tariff is required to be in terms of Article 5 read with Schedule 3 of the PSA. It is incorrect on the part of the Petitioner to rely on Schedule 4 to the PPA de-hors Schedule 3 and Article 5, which are the controlling provisions with regard to the tariff payable by the Respondent Discoms under the PSA.

49. The Respondents have submitted that Schedule 4 of the PSA also does not provide for the trading margin which is payable by the Respondent Discoms to the Petitioner. There is no quantification or consideration with regard to trading margin that is mentioned in Schedule 4 as claimed by the Petitioner. Therefore, reliance of the Petitioner on Schedule 4 to the PSA to claim seven paise per unit as trading margin payable to the Petitioner is wrong and misconceived.
50. The Respondents have submitted that the reliance by the Petitioner on the Expression on Interest dated 26.11.2010, wherein while providing the indicative bundled pooled rate, there is a mention that the NVVN trading margin shall be charged at the CERC capped trading margin, is also misconceived. Firstly, having executed the PSA, it is not open to the Petitioner to refer to any prior document to claim trading margin, which is itself not specified in the tariff payable by the Respondent Discoms to the Petitioner in the PSA.
51. The Respondents have submitted that it is not the case that upon acceptance of the Expression of Interest, there was any binding agreement between the parties, for the terms of the EoI to have any binding force. The Respondent Discoms by the letter dated 21.12.2010 only expressed their consent for the purchase of bundled power under the JNNSM Scheme after obtaining the approval of the State Government. It was also specifically requested to the Petitioner to initiate the process of execution of the PPA. It was not the case that the terms and conditions were agreed between the parties at this stage, much less agreement on the last sentence of the note in the Annexure-1 to the Expression of Interest providing for trading margin. It is pertinent to note that even the Expression of Interest only mentions to be the '*estimated rate for the bundled power*' and not to any terms and conditions that would become binding on the parties or the quantum of trading margin that would be payable to the Petitioner. The Expression of Interest stipulated that the Standard PSA proposed to be entered into with the distribution licensees was as available on the website of the Petitioner, which itself denotes that the commercial terms and conditions between the parties will be covered by the PSA and not any other document. Further, the last sentence of the Expression of Interest states that trading margin shall be charged at the CERC capped trading margin as applicable from time to time.
52. The Respondents have submitted that as on the date when the EoI was issued, namely on 26.11.2010 the applicable Regulations of the Commission was, the Central Electricity

Regulatory Commission (Fixation of Trading Margin) Regulations, 2010 which came into force on 12.01.2010. In terms of the said Regulations, there was trading margin cap only on short-term transactions. There was no capped trading margin provided by the Commission for long term transactions as in the present case. Even as on date, there is no capped trading margin provided for long term transactions. Therefore, even assuming the case of the Petitioner on the applicability of the EoI, there being no capped trading margin specified by the Commission on the date when the said EoI was issued to the Respondent Discoms, the question of payment of trading margin does not arise.

53. The Respondents have submitted that even as per the recent PSA dated 28.07.2016 executed by the Respondent Discoms for procurement of bundled solar power from NTPC, the trading margin agreed to be paid is only seven paise per unit on the solar power component only and not on the bundled power. Even if this is applied to the present case, it would work out to only about 1.33 paise per unit for the bundled power. The Petitioner has been paid higher than the above in the present case. The Respondent Discoms reserve their right to claim and recover back excess trading margin paid to the Petitioner than as applicable. In any event, the Petitioner is not entitled to any higher trading margin as claimed. The Respondents have submitted that in the circumstances mentioned above, the claim for trading margin on behalf of the Petitioner is misconceived and is liable to be rejected.

b) Re: Adjustment made by the Respondent Discoms towards alleged claim for the shortfall in generation from January 2016 and June 2017

54. The Respondents have submitted that Clause 6.8.3 in the PPA provides for compensation in the form of liquidated damages to be payable in case of failure of the project developers to generate minimum quantum of energy during a particular year. In terms of the above clause on account of shortfall in generation, the Respondent Discoms have recovered compensation in the form of liquidated damages of about Rs. 27.21 Crores for the period 2011-12 to 2014-15 and about Rs. 43.78 Crores for the period 2015-16 and 2016-17. The quantum of Rs. 27.21 Crores was recovered in the invoice of January 2016 and the amount of Rs. 43.78 Crores was recovered in the invoice of June 2017.
55. The Respondents have submitted that there is an obligation on the project developer to pay compensation in case of shortfall in generation. There is also an obligation on the part of the

Petitioner to pay the compensation to the Respondent Discoms for such shortfall of supply of solar power. It is pertinent to note that solar power is accounted towards the renewable purchase obligation of the Respondent Discoms and it is for this reason that there is compensation in the form of liquidated damages for a minimum of 25% of the applicable tariff. Anything over and about 25% has to be expressly established and proved as loss on account of non-supply of the solar power. The Respondent Discoms in the State of Rajasthan have not been able to fulfill the RPO targets by procurement of renewable power to the full extent and have been forced to take mitigating steps. The Commission has already by order dated 11.10.2017 in Petitions No. 304/MP/2013 and connected matters, upheld the levy of Rs. 27.21 Crores as damages by the Respondent Discoms, only subject to adjustment on account of backing down instructions and grid unavailability not attributable to the generator. In the circumstances, it is not open to the Petitioner to now claim refund of the very same amounts from the Respondent Discoms. Further, by applying the above principle, the Petitioner has recovered an amount of about Rs. 43.78 Crores for the years 2015-16 and 2016-17 which is in terms of the PSA.

56. The Respondents have submitted that the only claim of the Petitioner is that it has not been able to adjust/ recover the entire amount from the solar developers. The Petitioner has not provided any details and the reasons for non-recovery of the entire amount if any. The Petitioner has only produced an interim order in the case of one solar developer, namely *Rajasthan Sun Technique Energy Private Limited*. There are no details of amounts with respect of each of the project developers. In these circumstances, the claim against the Respondents being made in a vague manner is liable to be rejected. Further, the Petitioner cannot pass on the risk of litigation on the Respondent Discoms. The claim of the Respondent Discoms against the Petitioner is in terms of the PSA, and merely because the Petitioner is not immediately in a position to recover the amount from the project developers on account of an interim orders passed in the inter-se litigation between the parties cannot be ground for claiming any relief against the Respondent Discoms. Hence, the claim made by the Petitioner against the Respondent Discoms in this ground is liable to be rejected.

c) Re: Non-payment of Rs. 43.57 Crores (as on 30.11.2017) by Respondent Discoms in regard to supply of NTPC coal power through NVVN during the period of 01.07.2013 to 15.08.2013

57. The Respondents have submitted that the issue relates to the time period from 01.07.2013 to 15.08.2013, hence is barred by limitation. Further there is no on-going claim on account of this 210 MW capacity which was supplied based on a temporary allocation consented to by the Respondent Discoms for procurement and up to 30.06.2013. However, for the energy which was unilaterally supplied till 15.08.2013, the cause of action for the said claim arose on 30.09.2013 when the amounts raised in the invoices were not paid on the due date. The limitation period applicable is three years and, therefore, the claim ought to have been filed latest by November 2016. Even the minutes of the meeting dated 16.03.2017 wherein it is claimed that the issue was admitted by the Respondent Discoms, apart from being factually incorrect, is beyond the period of limitation and does not extend the limitation period (even assuming the claim of the Petitioner). In the circumstances mentioned above, the claim of the Petitioner on this account is liable to be dismissed on the sole ground of being barred by limitation.
58. The Respondents have submitted that there is no merit in the claim of the Petitioner since there was a quantum of about 210 MW of solar power, which was requested by the Petitioner to be allocated to the Respondent Discoms on temporary basis pending the procurement of Long Term Access Agreement for the export of power. This was over and above the contractual obligation of the Respondent Discoms to procure power from the Petitioner under the PSA. The Respondent Discoms have agreed to procure the power of 210 MW purely on a temporary basis at the same tariff as provided for in the PSA. Corresponding to the solar power of 210 MW, the temporary allocation of 210 MW was made from the unallocated quota of the generating stations of NTPC. This arrangement began from 06.04.2013 and the power was being procured on temporary basis. By communication dated 30.05.2013, the Respondent Discoms intimated to the Petitioner that it did not wish to procure this power on temporary basis and consequently withdrew its consent for procurement of the power on temporary basis with effect from 01.07.2013.
59. The Respondents have submitted that it was the obligation of the Petitioner to stop scheduling this power to the Respondent Discoms with effect from 01.07.2013. However, the said power continued to be scheduled to the Respondent Discoms till 15.08.2013. This was perhaps for the reason that the Petitioner had issues with regard to obtaining LTA for the export of solar power outside the State of Rajasthan and, therefore, the Petitioner unilaterally

decided to continue to supply the power to the Respondent Discoms from 01.07.2013 to 15.08.2013.

60. The Respondents have submitted that since the power was being temporarily allocated to the Respondent Discoms, there was no vested right in the Petitioner to continue to supply the power to the Respondent Discoms. It is relevant to mention that the power supply from the generating stations of NTPC from un-allocated quota was from the same generating stations from which the Respondent Discoms had firm allocated quota. Therefore, the power from such generating stations was being scheduled in routine course irrespective of any temporary allocation.
61. The Respondents have submitted that having created a *fait accompli* position of supplying the power despite the specific communication from the Respondent Discoms withdrawing the temporary allocation, it is not open to the Petitioner to claim any relief in the form of payment of charges for the electricity so supplied. The Respondent Discoms have already compensated the Petitioner by paying at UI rates for the electricity supplied, though the electricity was not required by the Respondent Discoms. In fact, there was no obligation on the part of the Respondent Discoms to pay any amount for the said electricity. The Respondents reserve their right to claim and recover back the amount paid at UI rate for the electricity so supplied, as there was no obligation on the part of the Respondent Discoms to pay any amount for the said electricity as per PSA.
62. The Respondents have submitted that by the letter dated 20.12.2013, the Petitioner had sought for the payment on the UI rates as notified by the Commission. The same was complied with by the Respondent Discoms and the supplied electricity was paid at UI rates as available on the NRPC website were paid by the Respondent Discom to the Petitioner. The claim of the Petitioner that the Respondent Discoms agreed to pay the amounts as claimed by the Petitioner in the meeting held on 16.03.2017 is also incorrect. There is no such agreement with the Respondent Discom, the minutes of the meeting circulated were unilateral and have not been signed by the Respondent Discoms. In the circumstances, it is not open to the Petitioner to proceed on the basis of the minutes of the meeting dated 16.03.2017 and claim payment of amounts for the electricity supplied despite the specific objection of the Respondent Discom.

63. The Respondents have submitted that it is also not the case that the Respondent Discoms have without any notice to the Petitioner, decided to stop the temporary allocation of power. The Respondent Discoms had given more than one month's notice for withdrawal of the temporary allocation and there is no justification whatsoever for the Petitioner to act on the said basis. It is wrong that merely because the Petitioner has paid money to generators, the same is to be necessarily recovered from the Respondent Discoms. The liability of the Respondent Discom is to pay for electricity strictly in terms of the PSA and there is no vested right for the Petitioner to claim any amounts over and above what is provided for in the PSA, or for electricity supplied but not covered by the PSA and which was not required by the Respondent Discoms. In the facts and circumstances mentioned above, the Respondents have submitted that the claim by the Petitioner on this account is misconceived and is liable to be dismissed.

d) Re: Non-payment of Rs. 55.35 Crores by Respondent Discoms in regard to supply of solar power through NVVN during the period of 01.07.2013 to 15.08.2013 (Batch II power)

64. The Respondents have submitted that the claim of the Petitioner relating to the period from 01.07.2013 to 15.08.2013 is barred by limitation and is liable to be dismissed as discussed in the previous issue.

65. The Respondents have submitted that the consent for temporary allocation of 210 MW was withdrawn with effect from 01.07.2013 by the Respondent Discoms by communication dated 30.05.2013. Thereafter, there was no right for the Petitioner to claim that the power is being procured by the Respondent Discoms and claim payment of the same on the tariff as provided in the PSA. The power was being procured purely on temporary basis, which was till 30.06.2013 and which has been paid for by the Petitioner.

66. The Respondents have submitted that solar power was neither scheduled, nor asked for, but unilaterally injected into the grid. There is no liability of payment to the Petitioner for such electricity was supplied on unilateral basis, without requisition by the Respondent Discoms. In fact, the Respondent Discoms specifically stated that the power would not be required from 01.07.2013. It is also not a case that the power could not be exported outside the State on account of any default on the part of the transmission licensee. Firstly, in case of any issue

with the transmission licensee, the said issue ought to have been raised with the transmission licensee.

67. The Respondents have submitted that in any case, the LTA for the solar developers was granted by PGCIL only on 28.06.2013. Thereafter, commercial LTA Agreement was to be executed, the payment security mechanism to be created and other formalities to be completed for operationalization of the LTA. The petition is vague in this regard and there is no question of the Petitioner seeking to allege default of the Respondent Discoms in this regard. It is relevant to mention that the NOC was issued by RVPN as early as on 22.02.2013. This was issued with the specific condition that the Agreement would be entered into with RVPN prior to the commencement of the LTA. However, the Petitioner did not come forward with the execution of the agreement with RVPN. In fact, considering the urgency of the matter, the scheduling of power was agreed to and acted upon by the RVPN without any commercial agreement and without even the applicable security deposit being furnished by the Petitioner for the open access. This was only on the bona fide basis that the operationalization of the LTA should not be delayed.

68. The Respondents have submitted that in the meeting held on 25.07.2013, the issues relating to the scheduling of inter-State transfer of power were discussed and scheduling was agreed to be commenced. The Ministry of Power on 12.08.2018 issued the communication for allocation of 210 MW solar power to outside the State of Respondent Discoms and corresponding allocation of 210 MW coal power to various States. This is confirmed by the communication dated 14.08.2018 of the NRPC, which states the revision in allocation from 16.08.2018.

69. The Respondents have submitted that in the above background, it is unfair on the part of the Petitioner to blame the Respondent Discoms for delay in the operationalization of LTA. The claims made are also vague and unsubstantiated. In any event, under the PSA between the parties, there is no such obligation on the part of the Respondent Discoms and the claim of the Petitioner in this regard is misconceived and liable to be rejected.

e) Re: Outstanding dues of unbundled solar power supplied, due to delay in coal power allocation, to Respondent Discoms during the period December 2012 to April 2013 (solar power from solar power developers of batch-II) and June 2013 to September 2013 (solar thermal power from batch-I SPD M/s. Godavari Green Limited)

70. The Respondents have submitted that the said claims of the Petitioner are also barred by limitation and are liable to be dismissed as such. The period of issue is from December 2012 to April 2013 and from June 2013 to September 2013. Since, the petition is filed only on 27.12.2017, it is well beyond three years from when the cause of action arose and hence it is barred by limitation.

71. The Respondents have submitted that even on merits, the claim is misconceived and is liable to be rejected. The entire basis of the Agreement between the parties is for the procurement of bundled power by the Rajasthan Discom, from the Petitioner. In this regard, the very recital of the PSA reads as under:

“C. NVVN shall sign Power Purchase Agreements (PPAs) with thirty seven solar power developers (hereinafter referred to as “SPDs”) for procurement of 620 MW Solar Power on a long term basis, as indicated at Schedule-1.

D. NVVN shall also sign a Power Purchase Agreement (PPA) with NTPC Limited (hereinafter referred to as “NTPC”) for procurement of 620 MW power on a long term basis from the coal based Stations subject to allocation of power by Ministry of Power indicated at Schedule 2.

E. NVVN has agreed to sell Bundled Power to the Discom and the Discom has agreed to purchase such Bundled Power from NVVN as per the terms and conditions of this Agreement.”

72. The PSA also defines the Contracted Capacity as being the Bundled Power, as under:

“Contracted Capacity” shall mean Bundled Power contracted with Discom for sale of such power by NVVNL to Discom as per recital G of this Agreement;

73. The Respondents have submitted that the entire purpose of the Agreement was to procure the bundled power of solar and thermal power to reduce the cost. Despite the above, the solar power was unilaterally injected into the grid without any supply of coal power corresponding to the solar power, and consequently there being no bundled power. The entire basis for procurement of power under the JNNSM Scheme was that coal power would be allocated corresponding to the capacity of the solar power. When the coal power was not allocated, there can be no basis for requiring the Respondent Discoms to procure solar power alone at full tariff.

74. The Respondents have submitted that the alleged procedural time taken for the allocation of coal power in favour of the Respondent Discoms and delay in such allocation cannot result in the Petitioner being required to pay high tariff for only solar power without the benefit of the bundled energy. In the above circumstances, the Respondent Discoms rejected the claim of the Petitioner for payment of high tariff for only solar component. The very basis of the PSA was for supply of bundled power and it was the obligation of the Petitioner to ensure allocation of coal power corresponding to the solar capacity. The Petitioner cannot seek to wriggle out of its obligation of supplying bundled power claiming procedural delays on the part of the Government of India and require the Respondent Discoms to take unbundled power at high cost. It is wrong that the Petitioner, after discussions with the Respondent Discoms, started regulating the scheduling of solar power component of the bundled power from August 2013 or that benefit of Rs. 94.14 Crores has accrued to the Respondent Discoms.

75. The Respondents have submitted that the views expressed in the meetings are unilateral and do not have the effect of either requiring the Respondent Discoms to pay the claim of the Petitioner or otherwise reviving the time barred claims of the Petitioner. In the facts and circumstances mentioned above, it is submitted that there is no merit in the claims of the Petitioner and the present petition is liable to be dismissed with costs.

ANALYSIS AND DECISION:

76. The Petition was admitted on 14.03.2018 and was heard on 30.08.2018, 12.12.2018, 19.03.2019 and 16.05.2019. After carefully perusing the records, the brief facts of the case are as under:

77. MNRE formulated the JNNSM Scheme for promotion of solar power and for sale of such solar power to the Distribution Licensees in States including the Respondent Discoms to enable them to fulfil their 'RPO'. MNRE had also allowed Migration of Projects and thereafter Batch-I and Batch II new projects.

78. MNRE issued guidelines for selection of New Grid Connected Solar Power Projects (SPDs) and NVVN as a nodal agency agreed to procure power from the SPDs at the Commission notified tariff after discount offered by SPDs and to sell the same to the Distribution

Licensees after bundling it with the Central unallocated quota of coal-based power projects of NTPC. NVVN entered into PPAs with SPDs and PSAs with Discoms including the Respondent Discoms. The points of contentions are as under:

- a) Trading Margin pertaining to the period from October 2011;
- b) Wrongful adjustment made by the Respondent Discoms towards alleged claim for the shortfall in generation from January 2016 and June 2017;
- c) Non-payment of Rs. 43.57 Crores (as on 30.11.2017) by Respondent Discoms with regard to supply of NTPC coal power through NVVN during the period 01.07.2013 to 15.08.2013;
- d) Non-payment of Rs. 55.35 Crores by Respondents Discoms with regard to supply of solar power through NVVN during the period 01.07.2013 to 15.08.2013 (Batch II power); and
- e) Outstanding dues of unbundled solar power supplied, due to delay in coal power allocation to Respondent Discoms during the period from December 2012 to April 2013 (solar power from solar power developers of batch-II) and June 2013 to September 2013 (solar thermal power from batch-I SPD M/s. Godavari Green Limited)

79. From the submissions of the parties, the following issues arise before this Commission:

Issue No.1: *Whether the Respondent Discoms are liable to pay to the Petitioner the Trading Margin at the rate of 7 Paise/kWh for the bundled power (both electricity from the Solar Power Project and the electricity generated by NTPC Limited) for the period from October 2011 till date and shall continue to pay such Trading Margin for the entire period of the PSA dated 10.01.2011?*

Issue No.2: *Whether the Petitioner is entitled to recover a sum of Rs. 69.11 Crores as on 30.11.2017 towards the principal amount of outstanding Trading Margin and further the delayed Payment Surcharge at the rate of 1.25% per month aggregating to Rs. 25.96 Crores from the Respondent Discoms?*

Issue No.3: *Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 81.22 Crores as on 30.11.2017, for unilaterally adjusting from the bills of the Petitioner towards shortfall in the generated electricity by the Solar Power Developers together with the delayed Payment Surcharge at the rate of 1.25% per month?*

Issue No.4: *Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 43.57 Crores as on 30.11.2017, for deducting from the bills for the Month of July 2013 and*

August 2013 towards supply of the coal power together with the delayed Payment Surcharge at the rate of 1.25% per month?

Issue No.5: *Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 55.35 Crores as on 30.11.2017 for deducting from the bills for the Month of July 2013 and August 2013 towards supply of the solar power (Batch II) together with the delayed Payment Surcharge at the rate of 1.25% per month? and*

Issue No.6: *Whether the Respondent Discoms are liable to pay to the Petitioner an amount of Rs. 53.57 Crores as on 30.11.2017, from the bills of the Petitioner for the Months December 2012 to April 2013 (Batch II Power) and June 2013 to September 2013 (Batch I Solar Thermal With Respect To Godavari Green Limited) towards supply of unbundled solar power with the delayed Payment Surcharge at the rate of 1.25% per month?*

80. No other issue was pressed or claimed.

81. Before proceeding to the issues on merit, we feel that it is imperative to first address the legal issue related to limitation raised by the Respondents. The Respondents have submitted that the claims of the Petitioner are barred by limitation since the petition has been filed on 27.12.2017 for claims which have been rejected more than 3 years before the said date. The contentions of the Respondents have been tabulated as under:

S. No.	CLAIM	PERIOD OF CLAIM	Objections
1.	Trading Margin	From the date of PSA i.e. 10.01.2011.	Claims prior to 30.12.2014 are barred by limitation.
2.	Adjustment of amounts by the Respondent Discom towards shortfall in generation against the payment due to the Petitioner.		Within limitation. No objection
3.	Non-Payment of Rs 43.57 Crores in regard to supply of NTPC Coal power.	From 01.07.2013 to 15.08.2013	Claim beyond 3 years hence barred by limitation
4.	Non-payment of Rs 55.35Crores by Respondent Discom in regard to supply of solar power through the Petitioner	From 01.07.2013 to 15.08.2013	Claim beyond 3 years hence barred by limitation
5.	Outstanding dues of unbundled power supplied to Respondent Discom	From Dec. 2012 to April 2013 and June 2013 to September 2013.	Claim beyond 3 years hence barred by limitation

82. The Commission observes that Article 12.2 and Article 12.3 of the PSA stipulates as under:

*“12.2 Amicable Settlement and Dispute Resolution
12.2.1 Amicable Settlement*

*i. Either Party is entitled to raise any claim, dispute or difference of whatever nature arising under, out of or in connection with this Agreement (“Dispute”) by giving a written notice (Dispute Notice) to the other Party, which shall contain:
(i) a description of the Dispute;*

- (ii) the grounds for such Dispute; and*
- (iii) all written material in support of its claim.*

ii. The other Party shall, within thirty (30) days of issue of Dispute Notice issued under Article 6.6.2, furnish:

- (i) counter-claim and defences, if any, regarding the Dispute; and*
- (ii) all written material in support of its defences and counter-claim.*

iii. Within thirty (30) days of issue of Dispute Notice by any Party pursuant to Article 6.6.2 if the other Party does not furnish any counter claim or defence under Article 6.6.4 or thirty (30) days from the date of furnishing counter claims or defence by the other Party, both the Parties to the Dispute shall meet to settle such Dispute amicably. If the Parties fail to resolve the Dispute amicably within thirty (30) days from the later of the dates mentioned in this Article 6.6.4, the Dispute shall be referred for dispute resolution in accordance with Article 12.3.

12.3 Dispute Resolution

12.3.1 Dispute Resolution by the Appropriate Commission

i. Where any Dispute (i) arises from a claim made by any Party for any change in or determination of the Tariff or any matter related to Tariff or claims made by any Party which partly or wholly relate to any change in the Tariff or determination of any of such claims could result in change in the Tariff, or (ii) relates to any matter agreed to be referred to the Appropriate Commission, such Dispute shall be submitted to adjudication by the Appropriate Commission. Appeal against the decisions of the Appropriate Commission shall be made only as per the provisions of the Electricity Act, 2003, as amended from time to time.

ii. The obligations of the Discom under this Agreement towards NVVN shall not be affected in any manner by reason of inter-se disputes amongst the Discom.”

83. The Commission observes that Section 18 of the Limitation Act, 1963 stipulates as under:

“18. Effect of acknowledgment in writing.—

- (1) Where, before the expiration of the prescribed period for a suit of application in respect of any property or right, an acknowledgment of liability in respect of such property or right has been made in writing signed by the party against whom such property or right is claimed, or by any person through whom he derives his title or liability, a fresh period of limitation shall be computed from the time when the acknowledgment was so signed.*
- (2) Where the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed; but subject to the provisions of the Indian Evidence Act, 1872 (1 of 1872), oral evidence of its contents shall not be received.*

Explanation.—For the purposes of this section,—

- (a) an acknowledgment may be sufficient though it omits to specify the exact nature of the property or right, or avers that the time for payment, delivery, performance or enjoyment has not yet come or is accompanied by a refusal to pay, deliver, perform or permit to enjoy, or is coupled with a claim to set-off, or is addressed to a person other than a person entitled to the property or right;*
 - (b) the word “signed” means signed either personally or by an agent duly authorised*
-

in this behalf; and
(c) *an application for the execution of a decree or order shall not be deemed to be an application in respect of any property or right.*

84. In view of the above, the Commission observes that Article 12.2.1 stipulates that the Petitioner/ Respondent is entitled to raise any claim or dispute of whatever nature arising in connection with this Agreement and the parties have to settle such Dispute amicably. If the Parties fail to resolve the dispute amicably then the dispute has to be referred for resolution in accordance with Article 12.3 to the Commission. The Commission further observes that Trading Margin is a part of the Applicable Tariff. Further, the cause of action of other issues mentioned at Sr. No. 3 to 5 at para 81 above which relate to tariff arose on 30.09.2013 i.e. when the amounts raised in the invoices were not paid on the due date. The Commission notes that a meeting was convened on 19.05.2016 in which Principal Secretary (Energy), Government of Rajasthan and Joint Secretary, MNRE endorsed the methodology proposed by NVVN and directed the Officers of RUVNL & NVVN to discuss and resolve the issue on above methodology with feasible solution. Subsequently, the Respondent Discoms accepted to release the payments in the meeting dated 16.03.2017 taken by Secretary (MNRE). In the Minutes of the meeting dated 16.03.2017, it is specifically mentioned that representatives of RUVNL were present in the meeting. However, the representatives of RUVNL have not signed the minutes of the said meeting. Since the dispute still remains unresolved and payments have not been released despite the decision in the meeting of 16.03.2017, the Commission is of the view that the period of limitation shall be counted from 16.03.2017 and the claims are not barred under Limitation Act, 1963.
85. Having decided that the present petition is not barred by limitation, we now proceed to discuss the issues on merit one by one.

Issue No.1: *Whether the Respondent Discoms are liable to pay to the Petitioner the Trading Margin at the rate of 7 Paise/kWh for the bundled power (both electricity from the Solar Power Project and the electricity generated by NTPC Limited) for the period from October 2011 till date and shall continue to pay such Trading Margin for the entire period of the PSA dated 10.01.2011?*

And

Issue No.2: *Whether the Petitioner is entitled to recover a sum of Rs. 69.11 Crores as on 30.11.2017 towards the principal amount of outstanding Trading Margin and further the delayed Payment Surcharge at the rate of 1.25% per month aggregating to Rs. 25.96 Crores from the Respondent Discoms?*

86. Since Issue No. 1 and 2 are interconnected, the same are taken together for discussions. The Petitioner has submitted that during the period from October 2011 to November 2017, it has supplied 12,566 MU of bundled power to the Respondents. Trading Margin [T(m)] was to be paid by the Respondent Discoms as per various provisions of the PSAs. Schedule 4 provides for the computation of the amount due and payable including Trading Margin. The EoI issued on 26.11.2010 provided that in addition to the tariff, Trading Margin is payable. The Trading Margin applicable at the relevant time as per the decision of the Commission was 7 Paise/kWh (in cases where the sale price was exceeding Rs. 3/kWh). As per the Petitioner, the aspect of Trading Margin has been further clarified by the MNRE vide O.M. dated 07.06.2013 vide which it was held that “*With a view to encourage inter-state trading of this solar power for fulfilment of RPO’s are also bring about a uniformity in the Trading Margin being charged by NRVN, a Trading Margin of Paise Seven (7) per kWh on the power sold by NRVN to State Utilities/ Discoms from JNNSM Phase-I projects is hereby fixed. This amount may be billed by NRVN along with the Energy Charges.*” The Petitioner has submitted that except the Respondent Discoms, the Distribution Licensees in other States who are procuring bundled solar and coal-based power in similar manner have not raised any dispute on the payment of Trading Margin of 7 paise/kWh. The Respondent Discoms have paid Trading Margin at the reduced rate of 1.5 paise/ kWh instead of 7 paise/kWh. Article 12.2 of the PSA also provides for the process of amicable settlement. Accordingly, the issue was deliberated in various meetings but could not be amicably settled. The petition was filed on 29.12.2017 and is well within time even if the signed Minutes of the Meeting on 19.05.2016 is taken as the commencement of the computation of the limitation period. The Respondent Discoms are liable to pay Rs. 87.96 Crore (Principal) alongwith Rs. 25.96 Crore (Late Payment Surcharge) as on 30.11.2017.

87. **Per Contra**, the Respondent Discoms have submitted that Article 5 of the PSAs stipulates that the applicable tariff is to be paid as per the provisions of the Schedule 3 to the PSAs. However, there is no provision regarding Trading Margin in Schedule 3. Further, there is no quantification with regard to Trading Margin in Schedule 4 and hence the reliance on Schedule 4 and Expression of Interest dated 26.11.2010 by the Petitioner is misconceived. The Expression of Interest only mentions the ‘*estimated rate for the bundled power*’ and is not binding on the parties. The last sentence of the Expression of Interest states that Trading Margin shall be charged at the CERC capped Trading Margin as applicable from time to time. The Central Electricity Regulatory Commission (Fixation of Trading Margin)

Regulations, 2010 came into force on 12.01.2010. In terms of the said Regulations, there was Trading Margin cap only on short-term transactions. There was no cap on Trading Margin for long-term transactions. Even as on date, there is no capped Trading Margin provided for long term transactions. As per the latest PSAs, the Trading Margin agreed to be paid is seven paise per unit only on the solar power component and not the bundled power. If this is applied to the present case, it would work out to only about 1.33 paise per unit for the bundled power whereas the Respondent Discoms are paying 1.5 paise.

88. The Commission observes that the relevant Articles of the Power Sale Agreement dated 10.01.2011 stipulate as under:

“5. ARTICLE 5: APPLICABLE TARIFF

5.1.1 The Applicable Tariff for Bundled Power shall be derived as per the provisions of Schedule 3 of this Agreement and the Discom shall make the Tariff Payments to NVVN as per the provisions of this Agreement.”

SCHEDULE 3: RATE DERIVATION FOR SOLAR POWER AND NTPC POWER

- 1) *The billing to the Distribution Utilities (Discoms) shall be done by NVVN for realisation of amount for solar power component and NTPC power component.*
- 2) *The solar power component amount is product of the energy metered and tariff notified by CERC and shall be calculated as under:*

$$A(sp) = E(sp) * T(sp)$$

Where

- *A(sp) = Amount realization (in Rs.) for Solar Power for the applicable Month;*
- *E(sp) = No. of units (kWh) metered at SPD Delivery Point and verified by the Energy Accounts for the applicable Month;*
- *T(sp) = Tariff (in Rs./kWh) which shall be as notified by CERC for respective solar power project and discount offered by Solar Power Developer, if any;*

SCHEDULE 4: AMOUNT RELALISATION FOR BUNDLED POWER

- i. *The payments to be made by the Discom to NVVN for the Bundled Power in a Monthly Power in a Monthly Invoice shall comprise of amounts to be realized for Solar Power component and NTPC power component.*
- ii. *The Bills shall be raised by NVVN on the Distribution Utilities as mentioned under:*
 1. *Provisional Billing for Bundled Power for the previous month-*
 - (a) *Provisional tariff for bundled power for the previous month*

$$T_p(bp) = \frac{\sum E_p(sp)*T(sp) + \sum E_p(np)*T(np) + \sum A_u}{\sum E_p(sp) + \sum E_p(np)} + T_m$$

Where,

- $T_p(bp)$ = Tariff (in Rs./kWh) as computed for Bundled Power for the applicable Month;
- $E_p(sp)$ = No. of units (kWh) for the applicable Month based on normative CUF as per CERC Regulations for respective solar power object;
- $T(sp)$ = Tariff (in Rs./kWh) which shall be as notified by CERC for respective solar power project and discount offered by Solar Power Developer, if any;

Where, weighted average component of solar power is worked out for all Solar Power Developers who have signed their respective power purchase agreements with NVVN under the Guidelines for New Grid Connected Solar Power Project;

- $E_p(np)$ = No. of units (kWh) at NTPC Delivery Point at normative PLF for the applicable Month;
- $T_p(np)$ = Tariff (in Rs./kWh) for the applicable Month as computed in Schedule 1;
- A_u = Monthly Transmission Charges (Rs.) as applicable for the link between the respective STU pooling Station to STU grid station/CTU grid station for the Solar Power Stations, as the case may be;
- $T(m)$ = Trading Margin of NVVN.

Where weighted average for NTPC stations is worked out for the identified Stations allocated to Distribution Utilities as allocation of equivalent MW power for bundling with solar power, for which power purchase agreement has been signed with NVVN.”

89. The Commission observes that Expression of Interest issued on 26.11.2010 by NVVN provided as under:

“Note: The above calculations of per unit pooled cost of bundled Power of Rs. 4.27 (for 2011-12); Rs. 4.36 (for 2012-13) & Rs.4.34 (as levelised tariff) has been worked out considering the indicative tariff for thermal power @ Rs. 2.50/kWh . Thereafter, the effective pooled cost of bundled power (i.e., the levelised tariff as shown in the last column) is worked out with taking into account the per unit cost of thermal power as Rs. 2.55, 2.60, 2.6....., Rs. 3.00/kWh . The above worked out cost is exclusive of the NVVN margin and shall be charged at the CERC capped trading margin as applicable from time to time.”

90. The Commission observes that the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, inter alia, provides as under:

“1.Short title and commencement:

(1) These regulations may be called the Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010.

(2) These regulations shall come into force on expiry of thirty days from the date of publication in the Official Gazette.

2. Applicability:

These regulations shall apply to the short term buy-short term sell contracts for the inter-State trading in electricity undertaken by a licensee.

Provided that these regulations shall not apply to the intra-State trading in electricity undertaken by the licensee by virtue of the provisions of Rule 9 of the Electricity Rules, 2005, on the basis of the inter-State trading licence granted by the Commission.

4. Trading Margin: The licensee shall not charge trading margin exceeding seven (7.0) paise/kWh in case the sale price is exceeding Rupees three (3.0)/kWh and four (4.0) paise/kWh where the sale price is less than or equal to Rupees three (3.0)/kWh. This margin shall include all charges, except the charges for scheduled energy, open access and transmission losses. The trading margin shall be charged on the scheduled quantity of electricity.”

91. The Commission notes that the Ministry of New and Renewable Energy, Government of India vide O.M. dated 07.06.2013 issued a clarification regarding Trading Margin as under:

“Subject: Sale of Solar Power to State Utilities/Discoms under Phase-I of JNNSM – trading margin of NVVN – reg.

1. With reference to the solar power projects set up in different States under Phase-I of the Jawaharlal Nehru National Solar Mission (JNNSM) through NTPC Vidyut Vyapar Nigam Ltd. (NVVN), the NVVN has been purchasing the solar power from Solar Power Developers as per respective PPA tariffs and selling the bundled solar power to State Utilities/Discoms at reduced tariffs of around Rs.4-5/kWh. With a view to encourage inter-state trading of this solar power for fulfillment of RPO's are also bring about a uniformity in the trading margin being charged by NVVN, a trading margin of Paise Seven (7) per kWh on the power sold by NVVN to State Utilities/ Discoms from JNNSM Phase-I projects is hereby fixed. This amount may be billed by NVVN along with the Energy Charges.

2. This issues with the approval of the Competent Authority.”

92. The Commission observes that Article 5 of the PSAs stipulates that the applicable tariff is to be paid as per the provisions of the Schedule 3 to the PSAs. However, there is no provision regarding Trading Margin in Schedule 3. Further, as per Schedule 4, Trading Margin is a part of Tariff (in Rs./kWh) as computed for Bundled Power for the applicable Month. The Expression of Interest (EoI) provides for Trading Margin which was to be charged as capped by the Commission and made applicable from time to time. However, CERC (Fixation of Trading Margin) Regulations, 2010 are applicable only for short term buy-short term sell contracts for the inter-State trading in electricity undertaken by a licensee. The Regulations are not applicable on the long-term transactions as in the instant case. Thus, the provision in the EoI that the Trading Margin would be as charged as capped by the Commission has no relevance. In such cases of long-term Contracts (PPAs-PSAs), therefore, the issue as to whether and at what rate the Trading Margin is to be paid/ received is left to the contracting parties to be mutually agreed upon. The parties had sufficient chances to amicably settle the

issue in meetings dated 14.11.2013, 19.05.2016 and 16.03.2017 held at various quarters in the Government of India. However, the issue remained unresolved. The Commission also observes that MNRE vide notification dated 07.06.2013 indicated the Trading Margin to be @ Paise Seven (7) per kWh on the power sold by NVVN to State Utilities/ Discoms from JNNSM Phase-I projects. However, the Commission is of the view that in the instant petition, the notification of MNRE dated 07.06.2013 is not applicable since the PSAs were executed on 10.01.2011 and the notification cannot be made applicable retrospectively. It is pertinent to mention here that Section 79 (1) (j) of the Electricity Act, 2003 requires the Commission “to fix the trading margin in the inter-State trading of electricity, if considered, necessary”. Accordingly, the Commission, being of the opinion that it is necessary to fix trading margin for inter-State trading in electricity, exercised the powers conferred under Section 178 of the Electricity Act, 2003 and conceived Central Electricity Regulatory Commission (Fixation of Trading Margin) Regulations, 2010, applicable to the short-term-buy-short-term sell contracts for the inter-State trading in electricity undertaken by a licensee. The Regulations provide for the ceiling of the Trading Margin in short-term-buy-short-term-sell contracts for the inter-State trading. The Regulations do not provide any Trading Margin for Long Term transactions and leave it to the contracting parties to mutually agree on Trading Margin, if any. The Commission observes that the Petitioner has filed the Petition under Section 79 (1) (f) read with Section 79 (1) (a) and other applicable Provisions of the Electricity Act, 2003 for adjudication of disputes between the parties and not for the Fixation of Trading Margin for long-term-buy-long-term-sell contracts for the inter-State trading which may be applicable to them. In any case the Commission does not fix Trading Margin on case to case basis. The spirit of the Electricity Act, 2003 read with the CERC (Fixation of Trading Margin) Regulations, 2010 gives freedom and choice to the contracting parties to mutually agree on Trading Margin for any kind of the trading transaction. In view of the above the Commission cannot fix any Trading Margin in the instant case by way of adjudication U/s Section 79 (1) (f) of the Electricity Act, 2003. The issues are decided accordingly.

Issue No.3: Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 81.22 Crores as on 30.11.2017, for unilaterally adjusting from the bills of the Petitioner towards shortfall in the generated electricity by the Solar Power Developers together with the delayed Payment Surcharge at the rate of 1.25% per month?

93. The Petitioner has submitted that as per Article 6.8.3 of the PSA, if there is a shortfall in generation by the SPDs, the compensation shall be payable to the Respondent Discoms as per relevant provisions of the PSA. Similar provisions are contained in Article 4.4.1 of the PPA. The arrangement entered into between NVVN and the Respondent Discoms is on a back to back basis with the arrangement between the SPDs and the NVVN. The Order dated 11.10.2017 passed by the Commission in Petition No. 304/MP/2013 equally binds the Respondent Discoms as they were party to the proceedings. During the pendency of the proceedings and up to the date of the passing of the Order dated 11.10.2017, there was a stay granted by the Commission against the encashment of the Bank Guarantee and recovery of the amount by NVVN from the SPDs. The same position continues thereafter since the Appeal No. 4 of 2018 and batch is pending before APTEL. Accordingly, the Respondent Discoms were not entitled to recover money by adjustment of other legitimate claims of NVVN unilaterally. Thereafter, the matter was also discussed in the meeting dated 19.05.2016 and 16.03.2017 and it was decided that *“compensation on account of low CUF would be applicable only in case of penalty is imposed on Discoms by the State Regulatory Commission.” and the deductions are not justified and may be refunded to NVVN.* However, the Respondent Discoms proceeded to adjust an amount of Rs. 70.99 Crores towards shortfall in the generation. Therefore, the Petitioner is entitled to recover as on date, a sum of Rs. 81.22 Crores from the Respondents Discoms for adjustment in the shortfall in generation of electricity along with the Delayed Payment Surcharge.

94. **Per contra**, the Respondent Discoms have submitted that as per Article 6.8.3, there is an obligation on the project developer to pay compensation in case of shortfall in generation. Accordingly, the Respondent Discoms have recovered compensation in the form of liquidated damages of Rs. 27.21 Crores for the period 2011-12 to 2014-15 from the invoice of January 2016 and Rs. 43.78 Crores for the period 2015-16 and 2016-17 from the invoice of June 2017. The Respondent Discoms have not been able to fulfil the RPO targets by procurement of renewable power to the full extent and have been forced to take mitigating steps. The Commission has, by order dated 11.10.2017 in Petition No. 304/MP/2013 and connected matters, upheld the levy of Rs. 27.21 Crores as damages by the Respondent Discoms, subject to adjustment on account of backing down instructions and grid unavailability not attributable to the generator. In these circumstances, it is not open to the Petitioner to now claim refund of the very same amounts from the Respondent Discoms. The Respondents have submitted that they have applied the same principle for the years 2015-16

and 2016-17 and have recovered an amount of Rs. 43.78 Crores. The Respondents have submitted that the only claim of the Petitioner is that it has not been able to adjust/ recover the entire amount from the solar power developers. The Petitioner has not provided any details and the reasons for non-recovery of the entire amount, if any. The Petitioner has only produced an interim order in the case of one solar developer, namely *Rajasthan Sun Technique Energy Private Limited*. In the circumstances, the claim against the Respondents being made in a vague manner is liable to be rejected.

95. The Commission observes that the Petitioner has submitted that Rajasthan Discoms have made wrongful adjustments towards alleged claim for the shortfall in generation for the period from January 2011 to June 2017. The Respondent Discoms have recovered compensation in the form of liquidated damages of Rs. 27.21 Crores for the period 2011-12 to 2014-15 from the invoice of January 2016 and Rs. 43.78 Crores for the period 2015-16 and 2016-17 from the invoice of June 2017.
96. The Commission notes that the relevant Articles of the executed PPAs/ PSAs are as under:

Article 4.4.1 of the Power Purchase Agreement dated 10.01.2011 stipulates that:

“4.4.1: NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyond Million kWh (MU). If for any contract year, it is found that the SPD has not been able to generate minimum energy of Million kWh(MU), on account of reasons, solely attributable to the SPD, the non-compliance by SPD shall make SPD liable to pay compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVNL to enable NVVNL to remit the amount to Discoms. This compensation shall be applied to the amount of shortfall in generation during the Contract Year. The amount of compensation shall be computed at the rate equal to the compensation payable by the Discoms towards non-meeting of RPOs, subject to a minimum of 25% of the applicable tariff.”

Article 6.8.3 of the Power Sale Agreement dated 10.01.2011 stipulates that:

“Article 6.8 Renewable Purchase Obligation

6.8.3: NVVN, at any time during a Contract Year, shall not be obliged to purchase any additional energy from the SPD beyondMillion kWh(MU).If for any Contract Year, it is found that the SPD has not been able to generate minimum energy of Million kWh (MU), on account of reasons solely attributable to the SPD, the noncompliance by SPD shall make SPD liable to pay the compensation provided in the PSA as payable to Discoms and shall duly pay such compensation to NVVN to enable NVVN to remit the amount to Discoms. This compensation shall be proportional to the amount of shortfall in solar energy during the Contract Year.”

97. The Commission observes that solar power is accounted towards the renewable purchase obligation of the Respondent Discoms and it is for this reason that there is a provision (Article 4.4.1 of the PPA) for compensation in the form of liquidated damages for a minimum of 25% of the applicable tariff. The Commission has vide order dated 11.10.2017 in Petition No. 304/MP/2013 and connected matters, already upheld the levy of Rs. 27.21 Crores as damages by the Respondent Discoms, subject to adjustment on account of backing down instructions and grid unavailability not attributable to the generator. As such, having already decided the issue in Petition No. 304/MP/2013 and connected matters, the Petitioner cannot raise the same issue again before the Commission in the instant petition. Regarding the claim of Rs. 43.78 Crores for the years 2015-16 and 2016-17, the Respondent Discoms have pleaded that applying same principles as decided in Petition No. 304/MP/2013 and connected matters, they have recovered the said amount from the Petitioner. The Commission observes that the Respondent Discoms have failed to bring on records any documentation to prove that due to shortfall of energy they have not been able to fulfil the RPO targets. As such the Commission directs the Respondent Discoms to submit proper documentation to the Petitioner to prove that they have suffered loss by way of penalty from the SERC on account of non-compliance of RPO due to shortfall of generation within sixty days of the date of this Order failing which the Petitioner is entitled to recover the amount of Rs. 43.78 Crores from the Respondent Discoms which was deducted from the invoice of June 2017 alongwith delayed payment surcharge @1.25% per month on the outstanding amount calculated on a day to day basis as per provisions of Article 6.3.3 of the PSA. The issue is decided accordingly.

Issue No.4: *Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 43.57 Crores as on 30.11.2017, for deducting from the bills for the Month of July 2013 and August 2013 towards supply of the coal power together with the delayed Payment Surcharge at the rate of 1.25% per month?*

AND

Issue No.5: *Whether the Respondent Discoms are liable to pay to the Petitioner a sum of Rs. 55.35 Crores as on 30.11.2017 for deducting from the bills for the Month of July 2013 and August 2013 towards supply of the solar power (Batch II) together with the delayed Payment Surcharge at the rate of 1.25% per month?*

98. Since issue No. 4 and 5 are interconnected, the same are taken together for discussions. The Petitioner has submitted that due to non-availability of LTA for the Inter-State Transfer of Solar Power to other States in accordance with the Ministry of Power's allocation dated

01.04.2013, the Respondent Discoms gave their concurrence on 19.03.2013 for temporary allocation of Solar power up to 210 MW, along with the corresponding coal power from generating stations of NTPC, within the State of Rajasthan. Since the LTA was to become operational on 16.08.2013, the temporary arrangement had to continue till 15.08.2013. Despite the above arrangement, Rajasthan Discoms Power Procurement Centre (RDPPC) unilaterally sought to terminate the above arrangement by giving one month notice i.e. effective 01.07.2013. From 01.04.2013 till 15.08.2013, the Respondent Discoms had benefitted on both conventional power and the corresponding solar power injected into the Rajasthan intra-State System and, therefore, they need to pay for the same. During the period mentioned above, the scheduling & dispatch continued for the bundled power. In view of the above, there cannot be any dispute with regard to the payment of tariff and trading margin for the bundled power (both solar power and coal power from generating stations of NTPC) supplied during the period from 01.07.2013 to 15.08.2013. In the Meeting held on 14.11.2013, it was decided that as an interim measure, the Respondent Discoms will make the payment for the energy injected during the period from 01.07.2013 to 15.08.2013 on applicable UI rates of corresponding blocks. However, NVVN insisted on full payment at the bundled power rate. Further, in the Meeting dated 19.05.2016, it was observed that the Respondent Discoms have outstanding dues of Rs 61.75 Crore against the bundled power absorbed in the State of Rajasthan. However, Respondent Discoms have paid for the energy supplied at average UI rate of Rs. 1.14 per kWh only. The matter was discussed with Respondent Discoms with a view to find a mutually beneficial solution to the issue. The non-payment was affecting the financial position of the Petitioner and had also invited strong comments from Auditors/ CAG. Respondent Discoms were requested to confirm dues and expeditiously release payment. Further, in the Meeting dated 16.03.2017, the Respondent Discoms accepted that the payment will be released shortly after confirming at their end whether the NTPC was paid for the coal power of 152.9 MU at the billed rate. The Petitioner has submitted that the Respondent Discoms continued to give generation schedules through RLDC on daily basis during the period of 01.07.2013 to 15.08.2013 even though the Respondent Discoms had withdrawn consent to supply electricity on temporary basis w.e.f. 01.07.2013. The same is clearly reflected in the REA issued by RPC and payable to NVVN. The Respondent Discoms have paid NVVN only at UI rate for the period from 01.07.2013 to 15.08.2013. It is unfair for the Respondent Discoms to now submit that they did not need the power. The Respondent Discoms have wrongly deducted payments from the bills for the Month of July 2013 and August 2013 and the Petitioner is entitled to recover the sum with

regard to supply of coal power from generating stations of NTPC and solar power consumed through NVVN during the period from 01.07.2013 to 15.08.2013 along with interest computed in terms of Clause 6.3.3 of the PSA at the rate of 1.25% per month.

99. **Per Contra**, the Respondent Discoms have submitted that the consent for procurement of the power on temporary basis was withdrawn by the Respondent Discoms on 30.05.2013 with one month notice. It was the obligation of the Petitioner to stop scheduling this power to the Respondent Discoms with effect from 01.07.2013. However, the said power continued to be scheduled to the Respondent Discoms till 15.08.2013. It is relevant to mention that the power supply from the generating stations of NTPC from un-allocated quota was from the same generating stations from which the Respondent Discoms had firm allocated quota. Therefore, the power from such generating stations was being scheduled in routine course irrespective of any temporary allocation. The Respondent Discoms have already compensated the Petitioner in the form of UI rates for the electricity, though the electricity was not required by the Respondent Discoms. The claim of the Petitioner that the Respondent Discoms agreed to pay the amounts as claimed by the Petitioner in the meeting held on 16.03.2017 is incorrect. It is also not a case that the power could not be exported outside the State on account of any default on the part of the transmission licensee. Firstly, in case of any issue with the transmission licensee, the said issue ought to have been raised with the transmission licensee. The Respondent Discoms have submitted that in the meeting held on 25.07.2013, the issues with relation to the scheduling of inter-State transfer of power were discussed and the scheduling was agreed to be commenced. The Ministry of Power had, on 12.08.2018, issued the communication regarding allocation of 210 MW solar power outside the State of Rajasthan and corresponding allocation of 210 MW coal power to various States. This is confirmed by the communication dated 14.08.2018 of the NRPC, which states the revision in allocation from 16.08.2018. In the above background, it is unfair on the part of the Petitioner to blame the Respondent Discoms, for delay in the operationalization of LTA and the claims of the Petitioner is liable to be rejected.

100. The Commission notes that due to non-availability of the Long Term Access (LTA) for the Inter-State Transfer of Solar Power to other States, RDPPC gave its consent on 19.03.2013 for allocation of 210 MW solar power to the Respondent Discoms. Out of 210 MW capacity, 200 MW was commissioned in the State of Rajasthan. On 04.04.2013, the Ministry of Power allocated 200 MW of thermal power to the Respondent Discoms and the same was scheduled

from 06.04.2013. On 30.05.2013, RDPPC terminated the above arrangement effective from 01.07.2013. Meanwhile, the Long-Term Access was granted by PGCIL on 28.06.2013 and the LTAA was signed on 08.07.2013. The LTAA became operational on 16.08.2013. However, the coal-based power from NTPC plants bundled with the solar power was continued to be scheduled by NRLDC on a day to day basis to the Respondent Discoms even beyond 01.07.2013 and up to 15.08.2013. Thus, from 01.04.2013 till 15.08.2013, the Respondent Discoms had availed both conventional power and the corresponding solar power which was injected into the Rajasthan intra-State system. Admittedly, in the Meeting held on 14.11.2013, it was decided that as an interim measure, the Respondent Discoms will make payment for the energy injected during the period 01.07.2013 to 15.08.2013 on applicable UI rates of corresponding blocks. The same was duly acknowledged by the Respondent Discoms and they paid for the energy supplied at average UI rate of Rs. 1.14 per kWh only. However, NVVN insisted for full payment at the bundled power rate. In the Meeting dated 19.05.2016, the matter regarding full payment was again discussed with Respondent Discoms with a view to find a mutually agreeable solution. Respondent Discoms were requested to confirm dues and expeditiously release payment. Further, in the Meeting dated 16.03.2017, the Respondent Discoms accepted that the payment will be released shortly after confirming at their end whether the NTPC was paid for the coal power of 152.9 MU at the billed rate.

101. The Commission observes that RDPPC withdrew the temporary consent for allocation of 210 MW of the bundled power in the State of Rajasthan w.e.f. 01.07.2013 by giving a notice on 30.05.2013. The Commission observes that as per the Regional Energy Accounts prepared by NRPC, the Respondent Discoms have continued to give generation schedules through RLDC on daily basis even during the period from 01.07.2013 to 15.08.2013. We, thus, notice that though the consent for temporary injection of power was withdrawn w.e.f. 01.07.2013, the power was continued to schedule even beyond that period. We do not agree with the contention of the Respondent Discoms that the power was injected without their consent since the power was scheduled by RLDC based on schedule given by the Respondent Discoms as is clear from the Regional Energy Accounts prepared by NRPC. Having scheduled the power, the Respondent Discoms cannot now say that the injection of power was without their consent. The Respondent Discoms have also argued that power supply from the generating stations of NTPC from un-allocated quota was from the same generating stations from which the Respondent Discoms had firm allocated quota and that the power

from such generating stations was being scheduled in routine course irrespective of any temporary allocation. We do not find any force in this argument of the Respondent Discoms for them paying only at UI rates. They have scheduled power from 01.07.2013 to 16.08.2013 that was supplied through NVVN and there is no reason for them to pay at any other rate than what was paid for the period prior to 01.07.2013. Therefore, the Commission is of the view that the Respondent Discoms shall pay the applicable tariff to the Petitioner within sixty days of the date of this Order failing which the Respondent Discoms will be liable for delayed payment surcharge @1.25% per month on the outstanding amount calculated on a day to day basis as per provisions of Article 6.3.3 of the PSA.

***Issue No.6:** Whether the Respondent Discoms are liable to pay the Petitioner an amount of Rs. 53.57 Crores as on 30.11.2017, from the bills of the Petitioner for the Months December 2012 to April 2013 (Batch II Power) and June 2013 to September 2013 (Batch I Solar Thermal With Respect To Godavari Green Limited) towards supply of unbundled solar power with the delayed Payment Surcharge at the rate of 1.25% per month?*

102. The Petitioner has submitted that mismatch between the commissioning of solar plants vis-à-vis allocation of coal power occurred due to procedural time taken by the Government of India in the allocation of equivalent coal power matching with the schedule of commissioning of the solar plants and also due to early commissioning of few of the Solar Projects. Due to the variations in the commencement of the NTPC's coal-based power in comparison to the commencement of the solar power, the Respondent Discoms had the advantage of the solar power supply to meet the RPO compliance as directed by RERC. In any event, there has been no adverse consequence to the Respondent Discoms. As per the Minutes of the Meeting dated 19.05.2016 and the Minutes of Meeting dated 16.03.2017, any adverse consequences were duly adjusted in favour of the Respondent Discoms. Therefore, there is no basis for the Respondent Discoms to dispute the claim. The Petitioner has submitted that it is entitled to recover as on date a sum of Rs. 31.34 Crores from the Respondent Discoms with regard to supply of unbundled solar power through NVVN during the period from December 2012 to April 2013 and from June 2013 to September 2013. A total of Rs. 53.57 Crores is due and outstanding from Respondent Discoms towards the claim of NVVN along with interest computed in terms of Clause 6.3.3 of the PSA at the rate of 1.25% per month.
103. **Per contra**, the Respondent Discoms have submitted that the entire basis for procurement of power under the JNNSM Scheme was that coal power would be allocated corresponding to

the capacity of the solar power. When the coal power was not allocated, there can be no basis for requiring the Respondent Discoms to procure solar power alone at full tariff. The Petitioner cannot seek to wriggle out of its obligation of supplying bundled power claiming procedural delays on the part of the Government of India and require the Respondent Discoms to take unbundled power at high cost. It is wrong that the Petitioner, after discussions with the Respondent Discoms, started regulating the scheduling of solar power component of the bundled power from August 2013 or that benefit of Rs. 94.14 Crores has accrued to the Respondent Discoms.

104. The Commission notes that under the JNNSM Phase-I, Batch II Scheme (New Project Scheme) it was envisaged that the solar power is to be supplied in 1:1 ratio in MW terms with equivalent coal power capacity to Distribution Licensees of States. There was a procedural delay in allocation of coal power by the Government of India. The reasons for supply of unbundled solar power for the period in between December 2012 to April 2013 and between June 2013 to September 2013 as submitted by the Petitioner is as under:

- a. *Some of the Solar Power Developers located in Rajasthan commissioned the solar power projects in December 2012. 20 MW solar capacity was commissioned by December 2012 and went up to 285 MW by March 2013. However, as per the Ministry of Power allocation order dated 13/6/2011-OM dated 12th February 2013, 85 MW was allocated to Rajasthan out of 295 MW Solar capacity to be commissioned in the State of Rajasthan.*
- b. *After receiving the commissioning certificates issued by the State Nodal Agency i.e. Rajasthan Renewable Energy Corporation (RREC) of solar Projects located in the State of Rajasthan, NVVN requested NRPC to allocate coal power vide letter dated 18th February 2013) enclosing the certificates received. As per NRPC order dated 28th February 2013, 85 MW NTPC Coal power was scheduled to Rajasthan from 01.03.2013 by NRLDC for bundling.*
- c. *210 MW solar power was to be inter-state scheduled to eight beneficiary States. Further, due to non availability of the LTA for inter-state scheduling of the solar power from Rajasthan, 210 MW solar power commissioned in the State of Rajasthan was also temporary allocated to the Rajasthan State after obtaining their consent vide letter Ref No CE-RDPPC/F.D/696 dated 19th March 2013. However, out of 210 MW capacity, 200 MW was commissioned in the State of Rajasthan. The equivalent coal power was also allocated vide MoP Order No. 13/6/2013 dated 1st April 2013. Accordingly, 200 MW Coal power for bundling was scheduled to Rajasthan w.e.f. 6th April 2013 as per NRPC order dated 4th April 2013.*
- d. *Additionally, under Phase-I Batch-I, the 50 MW solar thermal project of M/s Godavari Green, located in Rajasthan, was commissioned on 19th June 2013. The entire 50 MW capacity was allocated to Rajasthan. NVVN approached Ministry of Power for allocation of 50 MW NTPC coal power for bundling as per scheme. The MoP issued the coal power allocation order Ref. No. 13/08/2011 OM/2308 dated 12th September 2013. The NTPC coal power for bundling was scheduled by NRLDC from 18th September 2013 vide NRPC order dated 16th September 2013.*

105. From the above, it is observed that 295 MW solar PV plants were to be commissioned in State of Rajasthan and as per the scheme, the same was to be bundled with coal power in 1:1 ratio. About 20 MW solar capacity was commissioned by December 2012 which gradually increased to 295 MW by March 2013. Out of this, 85 MW was allocated to the State of Rajasthan vide Ministry of Power Order dated 12.02.2013 and balance 210 MW was to be scheduled through LTA for the Inter-State Transfer to other States. However, as per NRPC order dated 28.02.2013, 85 MW coal power for bundling could be scheduled from 01.03.2013. Further, as per NRPC communication dated 04.04.2013, 200 MW coal power was scheduled from 06.04.2013. Meanwhile, M/s Godavari Green solar thermal Power Plant was commissioned on 19.06.2013 and 50 MW of solar PV was made available. As per NRPC communication dated 12.09.2013, 50 MW coal power was scheduled from 18.09.2013.
106. The Commission observes that the matter was discussed in the meeting convened on 19.05.2016 in which Private Secretary (Energy) and Joint Secretary, MNRE endorsed the methodology proposed by NVVN and directed the Officers of RUVNL & NVVN to discuss and resolve the issue on above methodology with feasible solution. It was also directed in the said meeting that *“in the methodology for compensating Discoms, more thermal power than that envisaged to be scheduled should be given rather than less solar power than that required to be scheduled under the provisions of the Scheme so that Discoms get solar & thermal power for the initial period at same rates as envisaged under the Scheme.”* In the meeting dated 16.03.2017, MNRE directed the Respondent Discoms to review and pay NVVN, the deducted amount of Rs. 31.34 Crores at the earliest. Further, as per minutes of the meeting dated 16.03.2017 it was observed that:

“Unbundled Solar power from the Solar Projects at the time of Commissioning:

..
b) Payment of 60.12 MU unbundled solar power supplied was released by Rajasthan Discoms at the average Bundled Power rate of Rs. 3.83 per unit only and resulted into shortfall of Rs. 31.34 Crore. Solar Projects have been paid by NVVN at full tariff as per PPA terms. NVVN after discussing the Issue with Rajasthan started regulating the scheduling of solar component of the bundled power w.e.f. August 2013 in lesser proportion vis-a-vis allocated quantum with a view to compensate Rajasthan. The details of the solar power component regulated was regularly submitted to Rajasthan Discoms and till February 2016 Rs. 94.14 Crore was compensated to Discoms.

107. The Commission observes that as per Power Sale Agreement dated 10.01.2011, the Petitioner was to sell Bundled Power to the Respondent Discoms. However, the Petitioner had supplied

60.12 MU of solar power (52.35 MU of solar power from 24.12.2012 to 05.04.2013 and 7.77 MU of solar power from 19.06.2013 to 17.09.2013) without corresponding quantum of coal power. The Petitioner raised the bill amounting to Rs. 54.58 Crores at the rate of unbundled solar power. However, the Respondent Discoms made the payment of Rs. 23.24 Crores only at the bundled rate of power as per the PSA while bill was raised only for solar power. Therefore, there was a shortfall of Rs. 31.34 Crores. The Commission observes that as per Annexure-I and II appended with Agenda for the meeting held on 19.05.2016, the solar power component supplied was regulated from August 2013 till February 2016 and the Respondent Discoms were compensated accordingly. The Fact was also reiterated in the minutes of the meeting held on 16.03.2017 and the Respondent Discoms were directed to pay to the Petitioner Rs. 31.34 Crores at the earliest. In view of the above, the Commission holds that the Respondent Discoms should pay the amount due to the Petitioner alongwith late Payment Surcharge @ 1.25% per month on the outstanding amount calculated on a day to day basis as per provisions of Article 6.3.3 of the PSA.

108. With the above directions, Petition No. 17/MP/2018 stands disposed of.

Sd/-
आई. एस. झा
सदस्य

Sd/-
डॉ एम. के. अय्यर
सदस्य

Sd/-
पी. के. पुजारी
अध्यक्ष